Salat v Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling)

Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR

Neutral citation: [2014] KESC 12 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL

APPLICATION 16 OF 2014

MK IBRAHIM & SC WANJALA, SCJJ

JULY 4, 2014

BETWEEN

NICHOLAS KIPTOO ARAP KORIR SALAT ..... APPLICANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1ST RESPONDENT

WILFRED ROTICH LESAN ..... 2ND RESPONDENT

ROBERT SIOLEI COUNTY RETURNING OFFICER BOMET COUNTY ..... 3RD RESPONDENT

KENNEDY OCHAYO ..... 4TH RESPONDENT

WILFRED WAINAINA ..... 5TH RESPONDENT

PATRICK WANYAMA ..... 6TH RESPONDENT

MARK MANZO ..... 7TH RESPONDENT

ABDIKADIR SHEIKH ..... 8TH RESPONDENT

Supreme Court sets out principles to be considered in exercise of discretion to extend time for filing appeals

The Supreme Court's discretion to extend time for filing an appeal was guided by key principles. Extension was not a right but an equitable remedy granted to deserving parties. The applicant must lay a satisfactory basis for the request. The decision was case-specific, requiring a reasonable explanation for the delay, absence of undue delay, and consideration of potential prejudice to the respondent. In some cases, such as election petitions, public interest

may be a factor. Ultimately, the court balanced fairness, diligence, and the interests of justice in determining whether to grant an extension.

Reported by Phoebe Ida Ayaya and Maryconcepter Nzakuva

Election Law *- election appeals - extension of time for filing election appeal - whether the Supreme Court had jurisdiction to extent time to file an election petition appeal out of time - whether the applicant had laid satisfactory basis to warrant the court to extent time to file the appeal -Supreme Court Rules, 2012, rule 53.*

Constitutional Law *- Supreme Court - appeals from Court of Appeal to Supreme Court - certification of an appeal as one that raised matters of general public importance - whether the intended appeal raised any constitutional matters to warrant it being an appeal filed as of right without certification - Constitution of Kenya, 2010, article 164(4).*

Civil Practice and Procedure *- leave to withdraw - application for leave to withdraw - whether a letter to the Registrar was sufficient to withdraw an application for certification before the Court of Appeal - Court of Appeal Rules (cap 9 Sub Leg), 2010, rule 52.*

Brief facts

The applicant, one of the contestants in the 2013 General Elections for Bomet County Senatorial seat, brought the application seeking orders for extension of time limited for filing of Petition of Appeal and that the Petition of Appeal filed at the Supreme Court out of time to be deemed to duly filed.

The applicant, aggrieved by the decision of the Court of Appeal on his election petition appeal, decided to seek further redress to the Supreme Court by filing an application in the Court of Appeal seeking certification that his case involved matters of general public importance and that he be granted leave to appeal to the Supreme Court.

Issues

i. Whether the intended appeal raised any constitutional matters to warrant it being an appeal filed as of right without certification.
ii. Whether the Supreme Court had jurisdiction to extend time to file an election petition appeal out of time.
iii. Whether the applicant had laid satisfactory basis to warrant the court to extent time to file the appeal.
iv. Whether a letter addressed to the Registrar was a sufficient way of withdrawing an application before the Court of Appeal.

Held

1. Pursuant to rule 33(1) of the Supreme Court Rules, 2012, it was mandatory that an appeal be filed within 30 days of filing the notice of appeal. Under rule 53 of the same Rules, the Supreme Court could indeed extend time. However, it could not to be gainsaid that where the law provided for the time within which something ought to be done, if that time lapsed, one needed to first seek extension of that time before he could proceed to do that which the law required.
2. The applicant, by filing an appeal out of time before seeking extension of time, and subsequently asking the court to extend time and recognize such 'an appeal', was tantamount to moving the court to remedy an illegality which the court could not do and such a document was unknown in law.
3. Where one intended to file an appeal out of time and sought an extension of time, the much he could do was to annex the draft intended petition of appeal for the court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it.
4. Under the Supreme Court Rules, 2012, one did not need to seek and get certification before filing a notice of appeal. A notice of appeal was a primary document to be filed outright whether or not the subject matter under appeal was that which required leave or not.

5. From the notice of appeal, it was clear that the applicant expressed a general intention to appeal the Court of Appeal's decision. He did not state that he intended to appeal as of right or on the basis that the matter involved matters of general public importance. Further, the same was to be filed pursuant to article 163(4) (a) of the Constitution.
6. The applicant intended to move the court as of right where no leave was required. Whether, the intended appeal properly fell under the realm of the court's jurisdiction was a substantive matter to be decided in the main appeal, if and when filed. Thus, where a party moved the court as of right, a respondent could not move to strike out such an appeal during the hearing of an application for extension of time. Such a respondent ought to wait until the intended appeal was properly filed.
7. The notice of appeal having been filed within the 14 days of the decision of the Court of Appeal that was intended to be appealed against, and given that the applicant sought to come to the court as of right, there was no legal mandatory requirement for certification first and the same was proper.
8. Whether or not the constitutional questions framed by the applicant were indeed canvassed and determined by the Court of Appeal was a substantive question that rightly fell for determination during the hearing of the appeal if and when filed.
9. The application for determination was for extension of time to file an appeal. Determining that the appeal did not involve constitutional issues would amount to a court deciding on a matter that was not before it. All that the court needed to determine was whether the applicant had a *prima facie* case that raised issues of constitutional interpretation and/or application.
10. The intended appeal revolved around the application and interpretation of articles 81 and 86 of the Constitution of Kenya, 2010 on general principles for the electoral system and voting. The applicant had also expressed an intention to invoke the court's jurisdiction under article 163(4) (a) of the Constitution of Kenya, 2010. Hence, the applicant had established a *prima facie* case to approach the court as of right.
11. Time was of the essence in election matters where the people's sovereign power to elect their legal representatives was involved. It was with that recognition that the Constitution provided for the time frame within which election matters had to heard and determined.
12. A party could however, encounter some delay and the time within which he/she was to perform an act lapsed. At common law, equity developed in the courts of Chancery Division to check the excess of common law. If one showed that he had a *bona fide* cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if established that he was not at fault.
13. It was on that equitable underpinning that courts in common law jurisdictions in exercise of their discretion granted orders extending time. Extension of time had been given statutory backing with various pieces of legislation providing courts with the power to extend time.
14. Extension of time being a creature of equity, one could only enjoy it if he acted equitably: *he who seeks equity must do equity.* Hence, one had to lay a basis that he was not at fault so as to let time to lapse. Extension of time was not a right of a litigant against a court, but a discretionary power of the courts for which litigants had to lay a basis where they sought courts to grant it.
15. The Supreme Court by virtue of rule 53 of the Supreme Court Rules, 2012 had discretionary powers to extend time within which certain acts could be undertaken. That could be perceived by the use of the word "may" in crafting of the rule. The discretion was a very powerful tool which ought to be exercised with abundant caution, care and fairness; it ought to be used judiciously and not whimsically to ensure that the principles enshrined in the Constitution were realized.
16. Discretion to extend time was indeed unfettered. It was incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there were any extenuating circumstances that could enable the court to exercise its discretion in favour of the applicant.

17. The court ought to consider the following principles in exercising the discretion to extend time for filing an appeal:

a. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;

b. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;

c. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;

d. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;

e. Whether there would be any prejudice suffered by the respondents if the extension was granted;

f. Whether the application had been brought without undue delay; and;

g. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

18. The Appellate Jurisdiction Act and the Court of Appeal Rules, 2010 provided for the mode and instances when a party could withdraw applications, civil appeals, criminal appeals and review. Rule 52 of the Court of Appeal Rules, 2010 dealt with withdrawals of applications, which allowed an applicant to at any time; informally apply to the court for leave to withdraw the application.

19. A party's right to withdraw a matter before a court could not be taken way. A court could not bar a party from withdrawing his/her matter. All that the court could do was to make an order as to costs where it was deemed appropriate.

20. The applicant informally expressed his desire to withdraw the application vide a letter addressed to the Registrar and as such no parallel application was pending before the Court of Appeal. Indeed, the application at the Court of Appeal was withdrawn. Hence there was no abuse of the court process as there was only the present application before the court for determination.

The purported appeal was struck out and expunged from the court's record; the time limited for filing of a Petition of Appeal by the applicant was extended; the applicant was granted leave to file an appeal within 14 days from the date of the ruling; the applicant was to bear the respondents' costs of the application.

Citations

3.Mr Paul Lilan for the 2nd Respondent

2.Mr Yego for the 1st, 3rd -8th Respondents

1.Mr Mwenesi for the Applicant

5.Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 3(4); 9; 23; 30(2); 31; 32; 33(1); 53 –(Interpreted)

4.Supreme Court Act, 2011 (Act No 7 of 2011) sections 3,15(1)(2); 16(1)(2); 17; 18 –(Interpreted)

3.Elections Act, 2011 (Act No 24 of 2011) section 85A –(Interpreted)

2.Court of Appeal Rules, 2010 (cap 9 Sub Leg) rules 52, 77(1) –(Interpreted)

1.Constitution of Kenya, 2010 articles 25(c); 27(1); 38; 48, 50; 81, 86; 87(1); 163(4)(a),(7); 259 –(Interpreted)

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RULING

Introduction

1. This is an application by way of Notice of Motion dated 24th April, 2014 brought under Rule 23, 33(1) and 53 of the Supreme Court Rules 2012 seeking orders:

2. The application is premised upon twelve (12) grounds in the body of the application and the Supporting Affidavit of the Applicant, Nicholas Kiptoo Arap Korir Salat, dated 24th April, 2014.

Background

3. A brief background to this matter suffices. Both the applicant and 2nd respondent, Wilfred Rotich Lesan, were among the contestants in the General Elections held on the 4th March, 2013, for Bomet County Senatorial seat. On the 6th March, 2013, the 2nd respondent was declared the duly elected Senator for Bomet County by the Independent Electoral and Boundaries Commission, the 1st respondent through their agent Robert Siolei, County Returning Officer Bomet County, the 3rd respondent herein.

4. Being dissatisfied with the conduct of elections and declaration of the 2nd respondent as the winner, the applicant filed an Election Petition No. 1 of 2013 in the High Court at Kericho. He sought, among other prayers, a declaration that the 2nd respondent had not been validly elected. He blamed the respondents, in the petition, for electoral malpractices, irregularities, fraud, intimidation, bribery and coercion which had denied him the seat which otherwise the electorate had voted him to.

5. The High Court, Muchelule, J in a decision delivered on 19th August 2013, dismissed the petition on grounds inter alia that the petitioner did not prove that any errors committed were such as would materially influence the results in his favour.

6. Aggrieved by that decision, the applicant appealed to the Court of Appeal in Nairobi Civil Appeal No. 228 of 2013. In a majority decision (M'Inoti & Gatembu, JJA with Kiage, JA dissenting) delivered on 28th February 2014, the Court of Appeal upheld the High Court decision and dismissed the appeal with costs to the respondents.

7. This decision by the Court of Appeal further aggrieved the applicant herein. He decided to seek further redress to this Court by filing an application: Civil Application Sup No. 5 of 2014(UR 2014) in the Court of Appeal seeking certification that his case constitutes matters of general public importance and that he be granted leave to appeal to the Supreme Court.

8. On 9th April, 2014, the day set for hearing of this application, one member of the Court of Appeal Bench, Karanja, J, recused herself and the following order was made by the Court of Appeal (Waki, Karanja & Musinga, JJA):

> "As one of the members of this bench has recused herself, and Mr. Koceyo may wish to consider the possibility of making this application directly to the Supreme Court, we take out the matter from today's cause list. If the applicant still wishes to proceed before this Court, the matter shall be relisted on priority basis but the next bench shall exclude the Honourable Justice W. Karanja J.A. Costs in the motion."

9. Subsequent to this order, the applicant moved to the Supreme Court on 24th April 2014 and filed this application by way of a Notice of Motion seeking an extension of time to file the appeal outside the 30 days period. Notably enough, on the same day, the applicant also filed an appeal to this Court: Petition No. 10 of 2014. On 30th April, 2014, the applicant filed another Notice of Motion Application under certificate of urgency seeking that this Application, be certified urgent. The certificate of urgency was heard before Ojwang, SCJ and he declined to certify the matter as urgent. The application was finally set down for hearing on 4th June, 2014 when it was canvassed.

SUBMISSIONS

Applicant's Submissions

10. Through his legal representative, Learned Counsel Mr. Mwenesi, the applicant urged this Court to extend time within which to lodge his appeal as the time within which to lodge an appeal had since lapsed. Counsel submitted that under Rule 33 of the Supreme Court Rules, the Petition of Appeal ought to be filed within 30 days from the date of filing the Notice of Appeal but that period had since lapsed.

11. He submitted that the applicant had filed Petition No. 10 of 2014 under Article 163(4)(a) of *the Constitution*, as one which raises issues of interpretation and application of *the Constitution* but time had lapsed. Counsel urged that time be extended and the Petition be deemed to have been duly filed. The plea for extension of time was supported by the grounds embodied in the Application and the Supporting Affidavit of the applicant, Nicholas Kiptoo Arap Koror Salat, dated 24th April, 2014.

12. Counsel submitted that the delay in filing the appeal was occasioned by facts beyond the applicant's control thus; the Court should exercise its discretion under Rule 53 of the Supreme Court Rules and extend time in-order for them to argue whether *the Constitution* was properly applied and interpreted in the High Court and Court of Appeal.

13. Mr. Mwenesi argued that upon being dissatisfied with the Court of Appeal's decision, they sought certification from the Court of Appeal in Civil Application Sup No. 5 of 2014(UR 2014) for leave to appeal to the Supreme Court. However, on the day of the hearing the appellate judges advised them to apply directly to the Supreme Court. This prompted them to file Petition No. 10 of 2014 on 24th April, 2014.

14. It was submitted that it was reasonable to allow the applicant, Mr. Salat, to appear before this Court by extending time since he was misguided on the law and went to the wrong forum, but once he realised this, he came immediately to the right forum: to this Court. Counsel attributed this as a mistake of counsel who instead of filing the appeal as of right went ahead to seek certification by the Court of Appeal. Further, since the determination at the High Court, the applicant has been seeking justice and is not playing around with the courts' time as he filed the Notice of Appeal on time. Hence, the mistakes of counsel should not be visited on a litigant, unless both are out to mislead the Court, which was not the case here.

15. Counsel submitted that the delay in filing was occasioned by facts not within the Applicant's control. First, they had not obtained a decree from the Court of Appeal as the terms of the decree had not been settled and the Court of Appeal had fixed the 29th May, 2014 as the date for settling of the terms of the decree, which date was way beyond the 30 day period within which to file an appeal. However, counsel further observed that it is now settled in the Zacharia Okoth Obado v Edward Akong'o Oyugi & Others Supreme Court Application No. 7 of 2012 that the decree can be brought by way of a Supplementary Record of Appeal.

16. Counsel further submitted that by the time he obtained the typed proceedings from the Court of Appeal the 30 day period had since lapsed. He urged the Court to find that he has always been steadfast in pursuing this matter since the filing of this petition in the High Court.

17. It was Mr. Mwenesi's submission that the principles for grant of stay in the *Gatirau Peter Munya vs Dickson Mwenda Kithinji, Application No. 2 of 2014* were relevant and applicable to an application like this one, for extension of time. He also submitted that no prejudice will be occasioned to the respondents as they had been served with the Notice of Appeal on time and the Application for Certification and had therefore been anticipating the appeal. Counsel explained his desire to have the constitutional issues raised in this matter heard and determined by this Court for the benefit of the people of Bomet County.

18. Counsel also urged the Court to consider the efforts made by the appellant to obtain certification to be substantial compliance and allow for extension of time in order for the appeal to be heard on its merits. He stated that the delay in filing this appeal was not deliberate, inordinate and it was in the interest of justice and in the spirit of Article 259 of *the Constitution*, Rule 3(4) of the Court's Rules and the *Supreme Court Act* for this appeal to be allowed.

19. In support, Counsel cited the case of *Shabbir Ali Jusab v Annar Osman & another Supreme Court Civil Application No. 1 of 2013* in arguing that the Court disregarded procedural technicalities in favour of substantive justice and dismissed the preliminary objection raised where a Notice of Appeal was filed and served late.

20. Also cited was Joseph Kiangoi v Wachira Waruru & 2 othersCivil Appeal (Application) No. 30 of 2008. It was submitted that the Court of Appeal in this case declined to strike out an appeal where a Notice of Appeal was not served within the stipulated time under rule 77(1) of the Court of Appeal rules. Similarly, that in Ayub Murumba Kaikai v The Town Clerk of Webuye County Council the Court of Appeal declined to strike out an appeal for failure to serve the Memorandum of Appeal within 7 days.

1st, 3rd - 8th Respondents' submissions

21. The 1st, 3rd, 4th, 5th, 6th, 7th and 8th respondents vehemently opposed the application. They filed a Replying Affidavit dated 10th May, 2014, together with Written Submissions dated 31st May, 2014. Their learned Counsel, Mr. Yego, submitted that the application lacked merit, is an afterthought, made

in bad faith and an abuse of the Court's process. He stated that the applicant had abused the Court's process by filling an appeal out of time and without certification as contemplated under Article 163(4)(b) of *the Constitution* and Rule 40(b) of the Court of Appeal Rules, 2010. Further, he averred that this application is an afterthought aimed at circumventing the mandatory requirement for certification as the matter does not raise any issue relating to the interpretation and/or application of *the Constitution* so as to warrant approaching this Court as of right. It was submitted that the judges both at the High Court and Court of Appeal, applied facts that were raised and never engaged in constitutional interpretation.

22. Counsel contended that the applicant was misleading the Court by alleging that the Court of Appeal judges advised him to file his appeal directly to this Court. On the contrary, it was Counsel's contestation that the Court of Appeal merely advised him to relist his Application for certification before a different bench that excludes Karanja, J.A who had recused herself. There was no leave granted or 'green-light' given by the Court of Appeal to come to the Supreme Court. The Court of Appeal was clear that the applicant had two options: either to prosecute the application at the Court of Appeal or to file similar application directly to the Supreme Court.

23. Mr. Yego pointed out that the applicant had filed an Application seeking certification in the Court of Appeal, which Application was still pending at the time this current application was filed in this Court. He however noted that they have been forthwith been served with a copy of a letter to the Registrar of the Court of Appeal 'purporting' to withdraw the application. This, Counsel questioned whether it was the right procedure for withdrawal of an application.

24. Counsel submitted that the delay in filing the appeal is inordinate, inexcusable and has not been satisfactory explained. He faulted the applicant's claim that they did not receive the typed proceedings on time. He contended that those proceedings were less than 20 pages and would not take more than 30 days to procure them and file a Record of Appeal. He referred this Court to the provision of Article 87(1) of *the Constitution* on the timely settlement of electoral disputes. He urged the Court to find that the applicant has not demonstrated any solid ground for extension of time. It was submitted that there was no certificate of delay issued by the Court of Appeal that had been produced to show that the Registry acknowledged the delay. Further, it was also submitted that there was no letter produced to show that the applicant had requested for proceedings.

25. Counsel urged the Court that the applicant had jumped the gun by filing an appeal to this Court before exhausting the preliminary steps requiring certification as he does not enjoy any automatic right to appeal. Counsel stated that if indeed the applicant enjoyed an automatic right to appeal to this Court then they would have filed the appeal within thirty days from the date of judgement. However, by going to seek leave first, the applicant had acknowledged that he had no direct right of appeal.

26. Counsel Mr. Yego was emphatic that this Court's jurisdiction in election matters was limited to constitutional issues and the Presidential Petitions. Hence, the Court should guard this least it opens a flood-gate which was not the intention of the drafters. The Court should only hear very few cases of constitutional magnitude. Counsel submitted that the current matter raises no constitutional questions. The appeal does not raise any issues relating to the interpretation or application of *the Constitution*; and neither does it involve matters of general public importance.

27. He cited the case of Hermanus Phillipus Steyn v Giovanni Gnecchi- RusconeSupreme Court application No. 4 of 2012 and referred to the principles laid down therein for certifying a matter as one of general public importance. He urged that we guard these principles least we lose out on them. He argued that the current case was a matter of two competing candidates and did not meet the threshold

of these principles. Counsel also cited the case of *Malcolm Bell v Daniel Toroitich Arap Moi Supreme Court application No. 1 of 2013* in which this Court restated these principles.

28. Counsel also relied upon the case of Sum Model Industries Limited v Industrial and Commercial development CorporationSupreme Court Civil application No.1 of 2011 in urging that an application for certification should first be made in the Court of Appeal before any party moves to this Court.

29. In conclusion, Counsel urged this Court to dismiss the application with costs for lack of merit and to further strike out Petition No. 10 of 2014.

2nd Respondent's Submissions

30. The 2nd respondent through learned Counsel Mr. Paul Lilan, also opposed the application. He supported the submissions of learned Counsel, Mr. Yego for the other respondents. He filed a Replying Affidavit dated 9 May, 2014 together with written submissions dated 30th May, 2012 in which he frames four issues for consideration:

Whether or not the appellant has a right to appeal directly to the Supreme Court without obtaining leave.Whether or not the appellant has been granted leave to appeal to the Supreme Court.Whether or not the appellant has satisfied the basic minimum criteria for appeals to the Supreme Court.Whether or not the appellant petition of appeal in the Supreme Court petition No. 10 of 2014 is properly before this honourable Court.

31. Counsel answered all the framed issues in the negative. He submitted that the matter herein did not involve determination of any constitutional question at the Court of Appeal; hence there is no automatic right of appeal to this Court and leave ought to have been first sought. He averred that this application is misconceived, incompetent and bad in law as the applicant had not been granted leave to appeal to the Supreme Court contrary to Section 16(1) and (2) of the *Supreme Court Act*.

32. Counsel submitted that the applicant's Supporting Affidavit contains falsehoods and deliberate distortion of facts and was a clear attempt to mislead the Court. He submitted that appeals to the Supreme Court are governed by the provisions of Section 15(1) and (2) of the *Supreme Court Act*, thus the applicant has no automatic right of appeal in this matter. Section 15 provides:

15. (1) Appeals to the Supreme Court shall be heard only with the leave of the Court.

(2) Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of *the Constitution*.

(3) References in any written law, other than this Act, to the leave of the Supreme Court shall be construed subject to the provisions of sections 17 and 18 of this Act.

33. In response to whether the appellant was granted advice to 'appeal directly to the Supreme Court', Counsel stated that the applicant was misleading the Court as he was not advised to appeal directly to the Supreme Court as alleged, but rather advised to consider making the same application for leave to appeal in the Supreme Court or argue the application before a different bench after the Honourable Justice Karanja, JA recused herself.

34. As to Whether or not the applicant has satisfied the basic minimum criteria for appeals to the Supreme Court, Counsel submitted that Section 16 of the *Supreme Court Act* sets out the minimum basic criteria for leave to be granted. Counsel submitted that Section 16 (1) is framed in mandatory negative terms to show that the burden is on the applicant to prove conditions set out under Section 16(2) and it is not enough for the appellant to allege that the matter involves a matter of general public importance.

35. Counsel cited the cases of *Malcolm Bell v Daniel Toroitich Arap Moi Supreme Court application No. 1 of 2013* in which this Court restated the principles on what constitutes a matter of general public importance enunciated in Hermanus Phillipus Steyn v Giovanni Gnecchi- RusconeSupreme Court application No. 4 of 2012. He contended that the applicant had not met that criterion as the issues in controversy involved the parties and all issues of fact and law had been dealt with by the Court of Appeal.

36. In the written submission, the 2nd respondent refuted the applicant's plea that Supreme Court Petition No. 10 of 2014 was properly before Court and should be deemed duly filed. Counsel submitted that the Notice of Appeal filed by applicant contravened the mandatory provisions of Rules 30, 31 and 32 of the Supreme Court Rules, 2011.Rule 30 provides:

> 30 (1) A person who intends to appeal to the Court shall file a notice of appeal, in Form b set out in the first Schedule, with the Registrar of the Court or tribunal against whose decision it is desired to appeal.
>
> (2) Where an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall be necessary to obtain such leave or certificate before lodging the notice of appeal.
>
> (3) A notice under sub-rule (1) shall be lodged within fourteen days of the decision appealed from under sub-rule (2), as the court may direct.

37. Hence, Counsel submitted that it was irregular for the applicant to seek to cure Supreme Court, Petition No. 10 of 2014 having been filed irregularly. It was submitted that Rule 30(2) was in mandatory terms that one has to first obtain certification before lodging the Notice of Appeal, hence the Notice of Appeal on which the Petition No. 4 of 2014 is premised, having been filed without first obtaining leave was illegal.

38. Further, it was submitted that the applicant was using Petition No. 10 of 2014 to pre-empt this application by arguing that the application be allowed because he has filed the Petition, while he ought to have complied with all the requirements of Sections 15 and 16 of the *Supreme Court Act* and Rule 30 of the Supreme Court rules, 2011 before filing his Petition of Appeal. The Petition is improper and should be struck out: Counsel urged.

39. It was urged that the application seeking certification in the Court of Appeal had not been withdrawn as all they had been served with was a letter dated 12th May, 2014 addressed to the Registrar of the Court of Appeal seeking to withdraw the application. Counsel urged the Court to find that in the absence of a Court order withdrawing the application, the matter was still pending in the Court of Appeal thus, there existed two parallel applications which amounts to abuse of court process.

40. In conclusion, Counsel urged the Court to find that this application was an abuse of the Court's process as the matter does not raise any constitutional issue; this application is an afterthought aimed at circumventing the court's process; the Petition of Appeal is improper and it be struck out with costs.

Applicant's response

41. In reply to the respondents' submissions that two parallel applications existed, Counsel Mr. Mwenesi reiterated that the application in the Court of Appeal had since been withdrawn via a letter addressed to the Registrar, Court of Appeal. He was emphatic that the practice has been that a letter addressed to the registrar seeking to withdraw any matter was sufficient to withdraw the mater.

42. Mr. Mwenesi, in reference to Mr. Yego's submissions that the Court of Appeal dealt with facts only and that there was no constitutional issues, said that that gave them a right to come to Supreme Court as that was in contravention of section 85A of the *Elections Act*, 2011 that the Court of Appeal should only deal with matters of law. Further, he submitted that the facts were considered to determine if they satisfy Article 81 of *the Constitution*, hence the Court of Appeal was undertaking interpretation and application of *the Constitution*.

43. Counsel urged the Court to exercise its discretion judiciously, in–order to meet the end of justice in accordance with Article 48 of *the Constitution* and allow this application with costs in the cause.

Issues for determination

44. This application raises the following issues for determination by this Court;

Analysis

45. Before delving into the issues we have framed, we would like to dispose of some preliminary aspects of this matter. Firstly, the judgement of the Court of Appeal subject of the intended appeal was delivered on 28th February, 2014. The applicant being aggrieved filed a Notice of Appeal on 7th March, 2014 expressing his intention to appeal against that decision thus:

> " Take Notice ThatNicholas Kiptoo Arap Korir Salat the appellant being dissatisfied with the decision of the Court of Appeal given at Nairobi on 28th February, 2014 intends to appeal to the Supreme Court against the whole of the said decision as was decided that the appeal be dismissed with costs."

46. Pursuant to rule 31 (1) of the Supreme Court Rules, 2012, this Notice of Appeal was filed within time.

31(1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgement or ruling ...

47. Having filed the Notice of Appeal, a party is supposed to file an appeal within thirty (30) days pursuant to rule 33(1) of the Court's Rules:

33(1) An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal- ...

48. The applicant herein, having timely filed his Notice of Appeal, did not file an appeal within the thirty days. He filed an Application in the Court of Appeal seeking certification that his intended appeal is one that involves matters of general public importance. On the day set for hearing of that application, a Honourable judge on the bench recused herself and the court opined that the applicant may consider filing his application directly to the Supreme Court or re-listing the same before a bench not composed of the recused Justice.

49. We will discuss this 'order' of the Court of Appeal in this ruling later. However, we would like to state from the onset that the Court of Appeal misdirected itself in giving such directions. In Sum Models Industries Ltd vs Industrial And Commercial Development Corporation, Civil Application No. 1 of 2011, this Court stated:

> " This being an application for leave to appeal against a decision of the Court of Appeal, it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved. It is the Court of Appeal which has all along been seized of the matter on appeal before it.

> That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. If the applicant should be dissatisfied with the Court of Appeal's decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for by Article 163 (5) of *the Constitution*. To allow the applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave, would lead to Abuse of the Process of Court."

50. The Court of Appeal is bound by the decisions of this Court pursuant to Article 163(7) of *the Constitution*: All courts, other that the Supreme Court, are bound by the decisions of the Supreme Court. Consequently, the learned judges of the Court of Appeal in purporting to 'advise' the applicant to file his application directly to this Court misdirected themselves.

51. Secondly, upon issuance of the above 'order' by the Court of Appeal, the applicant moved to this Supreme Court on 24th April, 2014 and filed this Application seeking extension of time to file his appeal out of time, together with a Petition of Appeal No. 10 of 2014. In his submissions, counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

52. What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires.

53. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

54. To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filling renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record.

55. This Court recognizes that election matters have to be heard and determined expeditiously. Having struck out Petition No. 10 of 2014 as filed, the document which formed the Petition is hereby admitted as a draft intended Petition of appeal annexed to this application which is only presented to this Court for perusal. The same may be filed as the intended appeal when and if extension of time is granted. Henceforth, in this ruling a reference to the draft Petition of appeal will be a reference to the document that formed the body of 'Petition No. 10 of 2014.'

56. Thirdly, another issue raised by the 2nd respondent was the contestation that the Notice of Appeal in this matter was filed without first seeking leave certifying that the intended appeal is one involving

a matter of general public importance. It was his submission that leave is a mandatory requirement before one file a Notice of Appeal. Counsel cited rule 30(2) of the Supreme Court rules, 2011.

57. This Court has a clear mandate under Section 3 of the *Supreme Court Act*, 2011 to inter alia:

...

(b) Provide authoritative and impartial interpretation of *the Constitution*

(c) Develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.

58. In developing this rich jurisprudence, the Court will not shun from correcting glaring errors of law when presented by litigants and/or counsel. It is unfortunate that the learned Counsel for the 2nd respondent has sought to strike out the draft Petition on the basis that the Notice of Appeal was filed before grant of leave and cited Rule 30(2) of the Supreme Court Rules, 2011 in support of his claim.

59. This error is puzzling. An advocate is an officer of the Court and has a duty to aid the Court reach a legitimate determination founded on sound law. Hence, an advocate has to be abreast with the law and keep pace with the various developments. It is surprising that the learned Counsel referred to the Supreme Court, Rules 2011 which were repealed on 26th October, 2012 via Legal Notice No. 123 by the enactment of Supreme Court Rules, 2012. Under the Supreme Court Rules, 2012 the relevant rule is Rule 31. It states:

> " 31(1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgement or ruling, in Form B set out in the First schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.
>
> (2) Where an appeal lies only on a certificate that a matter of general public importance is involved, it "SHALL NOT" be necessary to obtain such certification before lodging the notice of appeal.
>
> (3) Upon receipt of the notice of appeal of the court or tribunal against whose decision it is intended to appeal, the court or tribunal shall transmit a copy of the notice to the Registrar." (Emphasis provided)

60. Suffice it to say that under the current Court Rules, one need not seek and get certification before filing a Notice of Appeal. A Notice of Appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant's notice of appeal as having been filed out of time in Silverbrand v County of Los Angeles [2009] 46 Cal. 4th 106, 113 stated inter alia:

> " As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. "Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal." (Sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all."

61. We have also perused the Notice of Appeal in the annexed draft petition. The same has been reproduced earlier in this ruling. From its body, it is clear that the applicant expressed a general intention to appeal

the Court of Appeal decision. He did not state that he intended to appeal as of right or on the basis that the matter involved matters of general public importance. Further, a perusal of the draft Petition, shows that the same is to be filed pursuant to Article 163(4)(a) of *the Constitution*. Clearly, the applicant intends to move this Court as of right where, no leave is required. Whether, the intended appeal properly falls under this realm of the Court's jurisdiction is a substantive matter to be decided in the main appeal, if and when filed. Thus, where a party moves this Court as of right, a respondent cannot move to strike out such an appeal during the hearing of an application, like this one, for extension of time. Such a respondent should wait until the intended appeal is properly filed.

62. Consequently, the Notice of Appeal having been filed within the 14 days of the decision of the Court of Appeal that is intended to be appealed against, and given that the applicant seeks to come to this Court as of right, there is no legal mandatory requirement for certification first and the same is proper.

Whether the intended appeal raises any constitutional matters to warrant appeal as of right

63. It was the respondents' case that the intended appeal raises no constitutional questions to warrant appeal as of right. Counsel for the appellant however, submitted that the appeal raises constitutional issues involving interpretation and application of *the Constitution* and that it is premised upon Article 163(4) (a) of *the Constitution*. In his draft petition annexed to this application, he enumerates upto 34 intended grounds of appeal which he asserts raise constitutional issues. Some of these grounds include inter alia that;

The learned judges erred in law in misapplying and misinterpreting the provisions of Articles 38, 81 and 86 of *the Constitution* by holding that the grave serious irregularities, fraud, intimidation and coercion of voters committed during the tallying, collation and announcement of the results were as a result of human fatigue.The learned judges erred in law in misapplying and misinterpreting the provisions of Articles 25(c) 27(1) and 50 of *the Constitution* when they infringed upon the appellant constitutional right to a fair hearing.The learned judges erred in law in misapplying and misinterpreting the provisions of Articles 38, 81 and 86 of *the Constitution* as regard the conduct of a free and fair election in Bomet County in determining the appeal.The learned judges erred in law in misapplying and misinterpreting the provisions of Articles 38, 81 and 86 of *the Constitution* as it relates to the law of scrutiny and recount.

64. All the respondents contended that the appeal does not raise any issues relating to the interpretation or application of *the Constitution*, and neither does it involve any matter of general public importance. It was their submission that this application is an abuse of the Court's process: an afterthought aimed at usurping this Court's jurisdiction without seeking certification as contemplated by the provisions of Article 163(4) (b) of *the Constitution*. They urged this Court to find that the intended appeal does not raise any issue relating to the application and interpretation of *the Constitution*.

65. This Court has had occasion to give direction on when an appeal is one that involves questions of constitutional interpretation and/or application. In Peter Gatirau Munya V Dickson Mwenda Kithinji & OthersSupreme Court Application No. 5 of 2014, (Peter Munya Case 1) the Court pronounced at paragraph *69* thus:

> "...Where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an applicant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application."

66. Similarly in Peter Gatirau Munya v Dickson Mwenda Kithinji & OthersSupreme Court Petition No 2B of 2014 (Peter Munya Case 2) at paragraph 243 (Concurring opinion of the Chief Justice), it was held:

> "...the *Elections Act* and Regulations thereunder are normative directives of the principles embodied in Article 81(e) and 86 of *the Constitution*, and that in interpreting them, a Court of law cannot disengage from *the Constitution*.
>
> Thus the question whether an election was free and fair under Article 81(e) and accurate, verifiable, secure, accountable and transparent under Article 86 of *the Constitution*, will engage this Court's jurisdiction to hear an appeal, under Article 163(4) (a) of *the Constitution*."

67. Without discerning the merits of the appeal, is clear from the foregoing that the grounds of the appeal are premised upon fundamental constitutional provisions governing the conduct of elections in Kenya. The applicant is challenging the application and interpretation of Articles 38, 81, and 86 of *the Constitution*. He is alleging that the Court of appeal erred in misinterpreting and misapplying the provisions of *the Constitution*.

68. Whether or not the constitutional questions as framed by the applicant were indeed canvassed and determined by the Court of Appeal, is a substantive question that rightly falls for determination during the hearing of the appeal if and when filed. This Court should not lose sight of the shore at this stage and divert from the application before it. The application for determination is for extension of time to file an appeal. Determining at this juncture that the appeal does not involve constitutional issues will amount to a court deciding on a matter not before it! All that the Court needs to determine at this juncture is whether the applicant has a prima facie case that raises issues of constitutional interpretation and/or application.

69. Consequently, from the foregoing we can ably draw inference that the crux of the intended appeal revolves around the application and interpretation of Articles 81 and 86 of *the Constitution*. The applicant also alleges breaches of Articles 25(c), 27(1) and 50(1) on his constitutional right to a fair hearing. As already stated, whether or not indeed these issues were determined at the High Court and Court of Appeal, is not a question that can rightly be determined at this preliminary stage. Suffice it to state that the applicant has established a prima facie case to approach this Court as of right.

70. Further, a perusal of the draft petition reveals that the applicant has expressed an intention to invoke the Court's jurisdiction under Article 163(4)(a) of *the Constitution* of Kenya 2010; Section 15(2) of the *Supreme Court Act* (Cap 9A), Laws of Kenya; Rule 9 and 33 of the Supreme Court Rules, 2012. Thus he cannot be denied audience at this preliminary stage in his pursue for justice at this apex Court.

    Whether this Court has jurisdiction to extend time to file an election petition appeal out of time: Has a basis been satisfactorily laid to warrant this Court to extent time to file the appeal?

71. Time is a crucial component in dispensation of justice, hence the maxim: Justice delayed is justice denied. It is a litigants' legitimate expectation where they seek justice that the same will be dispensed timeously. Hence, the various constitutional and statutory provisions on time frames within which matters have to be heard and determined. Time is of more essence in election matters where the people's sovereign power to elect their legal representatives is involved. It is with this recognition that *the Constitution* provide for the time frames within which election matters have to heard and determined. Article 87 provides:

    87(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral matters.

72. A party may however, encounter some delay and the time within which he was to perform an act lapses. At Common Law, equity developed in the courts of Chancery Division to check the excess of common law. If one showed that he had a bona fide cause of action and time had lapsed, but was constrained to pursue within time that cause, because of some compelling reasons, the courts of the Chancery Division could intervene and indulge such a person if established that he was not at fault.

73. It is on this equitable under-pinning that courts in Common Law jurisdictions in exercise of their discretion now grant orders extending time. Presently, extension of time has now been given statutory backing with various legislations providing courts with the power to extend time.

74. Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

75. The applicant urged this Court to exercise its discretion under Rule 53 of the Supreme Court Rules and extend time within which to file the appeal. He submitted that the delay in filing the appeal was occasioned by facts beyond his control and pointed blame to his advocate for going to the wrong forum first, and delay in obtaining the proceedings from the Court of Appeal and the settling of the terms of the decree by the Court of Appeal.

76. The statutory anchorage of the discretion to extend time is Rule 53 of the Supreme Court Rules. It stipulates that:

The Court may extend the time limited by this rules or by any other decision of the Court.

77. Hence, this Court by virtue of rule 53 of the Supreme Court Rules has discretionary powers to extend time within which certain acts can be undertaken. This can be perceived by the use of the word "may" in crafting of the rule. This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realised.

78. This Court in the Raila Odinga v Independent Elections and Boundaries Commission & others,Petition No. 5 of 2013 while addressing itself on discretion to extend timelines stated:

> " It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to *the Constitution*, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations."(Emphasis provided).

79. The Court of Appeal has pronounced itself on this aspect severally. Recently, in Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR the Court of Appeal while referring to other authorities observed (at paragraph *12*):

> " The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the

respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In Henry Mukora Mwangi v Charles Gichina Mwangi- Civil Application No. Nai. 26 of 2004, this Court held:-

"It has been stated time and again that in an application under rule 4 of the Rules the learned single Judge is called upon to exercise his discretion which discretion is unfettered. It may be appropriate to re-emphasize this principle by referring to the decision in Mwangi v Kenya Airways Ltd. [2003] KLR 486 in which this Court stated:-"Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance in Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi - Civil Application No. Nai. 255 of 1997 (unreported), the Court expressed itself thus:-

"It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted."

80. Comparatively, in United Arab Emirates v Abdelghafar & others 1995 IRLR 243 the Employment Appeal Tribunal laid down four principles to be observed in exercising the discretion to extend time. It stated at paragraph *7* thus:

"In the light of the guidance contained in these authorities it is possible to state, with reasonable precision, the principles which govern the exercise of the Appeal Tribunal's discretion to extend time and to identify those factors regarded as relevant.

The grant or refusal of an extension of time is a matter of judicial discretion to be exercised, not subjectively or at whim or by rigid rule of thumb, but in a principled manner in accordance with reason and justice. The exercise of the discretion is a matter of weighing and balancing all the relevant factors which appear from the material before the Appeal Tribunal. The result of an exercise of a discretion is not dictated by any set factor. Discretions are not packaged, programmed responses.As Sir Thomas Bingham M R pointed in Costellow v Somerset CC (supra) at 959C, time problems arise at the intersection of two principles, both salutary, neither absolute.

"... The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met..."

The second principle is that:

"...a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. ..."

The approach indicated by these two principles is modified according to the stage which the relevant proceedings have reached. If, for example, the procedural default is in relation to an interlocutory step in proceedings, such as a failure to serve a pleading or give discovery within the prescribed time limits, the court will, in the ordinary way and in the absence of

special circumstances, grant an extension of time. Unless the delay has caused irreparable prejudice to the other party, justice will usually favour the action proceeding to a full trial on the merits. The approach is different, however, if the procedural default as to time relates to an appeal against a decision on the merits by the court or tribunal of first instance. The party aggrieved by that decision has had a trial to hear and determine his case. If he is dissatisfied with the result he should act promptly. The grounds for extending his time are not as strong as where he has not yet had a trial. The interests of the parties and the public in certainty and finality of legal proceedings make the court more strict about time limits on appeals. An extension may be refused, even though the default in observing the time limit has not caused prejudice to the party successful in the original proceedings.An extension of time is an indulgence requested from the court by a party in default. He is not entitled to an extension. He has no reasonable or legitimate expectation of receiving one. His only reasonable or legitimate expectation is that the discretion relevant to his application to extend time will be exercised judicially in accordance with established principles of what is fair and reasonable. In those circumstances, it is incumbent on the applicant for an extension of time to provide the court with a full, honest and acceptable explanation of the reasons for the delay. He cannot reasonably expect the discretion to be exercised in his favour, as a defaulter, unless he provides an explanation for the default.

81. Lastly in the Supreme Court of Judicature Court of Appeal, Civil Division, in Sayers v Clarke Walker (a firm) [2002] EWCA Civ 645 at paragraph *22* observed:

> " It follows that when considering whether to grant an extension of time for an appeal against a final decision in a case of any complexity, the courts should consider "all the circumstances of the case" including:
>
> the interests of the administration of justice;whether the application for relief has been made promptly;whether the failure to comply was intentional;whether there is a good explanation for the failure;the extent to which the party in default has complied with other rules, practice directions and court orders;whether the failure to comply was caused by the party or his legal representative;the effect which the failure to comply had on each party; andthe effect which the granting of relief would have on each party. In the case of a procedural appeal the court would also have to consider item (g):
>
> "whether the trial date or the likely trial date can still be met if relief is granted"."

82. The applicant, herein upon being aggrieved by the judgement of the Court of Appeal filed a Notice of Appeal within time. He then proceeded to file a Civil Application Sup. No. 5 of 2014 (UR 2014), seeking certification to appeal to the Supreme Court. The matter was set for hearing and he only changed his mind when the hearing did not take off and he then opted to abandon that application and filed this application.

83. Counsel for the applicant contended that they were advised by the Court of Appeal by an order dated 9th April 2014 to file appeal to this Court. We have already discussed the legality of that 'advise' in this ruling. However a plain reading of the said order indicates that the position taken by the applicant is contrary to what the Court of Appeal said. The words of the said order are very plain and clear. The judges did not advise the applicant to file an appeal in the Supreme Court. Litigants should not be left to draw conclusions from court orders that are contrary to the letter and spirit of what the court says. Where one is not clear what an order of the court says, there is a provision for such a litigant to approach the court that made the order for clarification. The applicant never did that.

84. From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

85. This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the courtWhether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;Whether there will be any prejudice suffered by the respondents if the extension is granted;Whether the application has been brought without undue delay; andWhether in certain cases, like election petitions, public interest should be a consideration for extending time.What is the position of the Court of Appeal application No Civil Application Sup No. 5 of 2014(UR 2014) seeking certification? Is a letter to the Registrar sufficient to withdraw an application before the Court of Appeal?PARAGRAPH 86.

Counsel for the respondents urged the Court to make a finding that in the absence of a Court order withdrawing Application Sup. No. 5 of 2014 (UR 2014), filed in the Court of Appeal, the matter was still pending and thus, their existed two parallel applications. In response, the applicant contended that the application at the Court of Appeal seeking certification had since been withdrawn via a letter addressed to the Registrar of the Court of Appeal, as has been the practice.

87. The *Appellate Jurisdiction Act* and the Court of Appeal Rules, 2010 provide for the mode and instances when a party may withdraw applications; civil appeals; criminal appeals and review. Rule 52 of the Court of Appeal Rules, 2010 deals with withdrawals of applications. It provides:

An applicant may at any time apply to the Court for leave to withdraw the application and such application may be made informally.

88. The applicant herein filed an application being Civil Application Sup No. 5 of 2014(UR 2014) in the Court of Appeal seeking certification to file an appeal in the Supreme Court. Hence the applicable rule in regard to withdrawal of the application is rule 52 of the Court of Appeal's rules, 2010, which allows an applicant to at any time; informally apply to the Court for leave to withdraw the application.

89. It is not in dispute that the applicant wrote a letter to the Registrar of the Court of Appeal seeking to withdraw the application. Likewise the respondents acknowledge being copied and served with a copy of the said letter. Unfortunately none of the parties found it within their purview to avail a copy of the said letter to this Court; hence we are unable to comment further on the said letter.

90. A party's right to withdraw a matter before the court cannot be taken way. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate. Recently, a single judge of this Court in John O. Ochanda vs Telkcom Kenya Limited, Motion No. 25 of 2014, in granting an application for withdrawal of a Notice of Appeal, stated inter alia:

> " I do hold the view that a prospective Appellant is at liberty to withdrawal a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules

or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any."(Emphasis provided)

91. It is not in doubt that the applicant informally expressed his desire to withdraw the application vide a letter addressed to the Registrar and as such no parallel application is pending before the Court of Appeal. We are satisfied that indeed the application at the Court of Appeal was withdrawn. Hence there is no abuse of the court process as there is only this one application before the Court of law for determination.

Determination And Orders

92. As a result of the foregoing considerations and findings, we hereby give the following Orders:

The purported Appeal, to wit, Petition No. 10 of 2014 is hereby struck out and expunged from the Court's record.The time limited for filing of a Petition of appeal by the applicant is hereby extended. The applicant is granted leave to file an appeal within 14 days from today's date.The applicant shall bear the respondents' costs in this application.

Orders accordingly

DATED AND DELIVERED THIS 4TH DAY OF JULY 2014

....

M. K. IBRAHIM S. C. WANJALA

JUSTICE OF THE SUPREME JUSTICE OF THE SUPREME

COURT COURT