REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim & Ojwang, SC.JJ)

CIVIL APPLICATION NO. 35 OF 2014

—BETWEEN—

FAHIM YASIN TWAHA ..... APPLICANT

—AND—

1. TIMAMY ISSA ABDALLA .....

2. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... **RESPONDNETS**

3. SILVANO BUKO BONAYA .....

(An application for extension of time to file an appeal from the Judgment and Order of the Court of Appeal at Malindi (Okwengu, Makhandia & Sichale, JJA) dated 13th January, 2014 and 21st November, 2013 respectively in Civil Appeal No. 36 of 2013)

RULING

I. INTRODUCTION

[1] The applicant filed his application to this Court on 8th September, 2014 under certificate of urgency, seeking Orders as follows:

> *(a) that the Court be pleased to extend time to file an appeal to this Court, pursuant to Rule 33 of the Supreme Court Rules, against the Order and Judgment dated 21st November, 2013 and 13th January, 2014 respectively, of the Court of Appeal sitting at Malindi, in* Civil Appeal No. 36 of 2013, ***Timamy Issa Abdall v. Swaleh Salim Swaleh Imu and 3 Others****; and*

(b) that, as an alternative to prayer (a) above, this Court be pleased to grant the applicant leave to file the proposed appeal against the Order and Judgment dated 21st November, 2013 and 13th January, 2014 respectively, pursuant to Article 163(4)(b) of the Constitution and Section 16 of the Supreme Court Act, 2011.

[2] Due to inadvertent omission at the Court's registry, the application was not placed before the Court, until 17th December, 2014 when *Tunoi, SCJ* certified the motion urgent, but directed that it be heard after the Court's vacation.

[3] The application was canvassed before us on the 11th of March, 2015.

II. SUBMISSIONS FOR THE PARTIES

(a) Applicant

[4] Learned counsel Mr. Mungai, who appeared for the applicant, submitted that as regards the main prayer for extension of time, an appeal to this Court has to be filed within 30 days of filing a notice of appeal, by Rule 33(1) of the Supreme Court Rules. He submitted that the Court of Appeal, while giving its decision on 21st November, 2013 (allowing 1st respondent's appeal), did not state the reasons. He filed a notice of appeal on 2nd December, 2013, expecting that "the Judgment of the Court of Appeal" would be delivered within reasonable time thereafter; but this came only on 13th January, 2014. He urged that the effect of the delayed "delivery of Judgment" was that the applicant's right to file an appeal directly to this Court had been compromised.

[5] Consequently, the applicant resolved to invoke Article 163(4)(b) of the Constitution, seeking leave by filing an application before the Appellate Court on 16th February, 2014. Learned counsel urged that while, ordinarily, applications for leave in election matters are heard within one month, his application has been

pending before the Court of Appeal for almost a year, and had been pending for 6 months before that Court, at the time of lodging the instant application.

[6] Learned counsel submitted that, as early as April, 2014, written submissions had been filed, and dates given for highlighting of the same. However, it was submitted, on 18th July, 2014, three Appellate Judges disqualified themselves from proceedings, ordering that the matter be heard in Nairobi on 24th July 2014.

[7] Learned counsel submitted that Section 16 of the Supreme Court Act, 2011 gives this Court jurisdiction to allow a party to file an appeal directly. He urged that the Court of Appeal had made a decision in December, 2013, but has not given the applicant a hearing of his application; this, he submitted, stood in departure from the substantive law, in the terms of Articles 50 and 159 of the Constitution, as well as the relevant procedural law.

[8] The applicant asked this Court to exercise its discretion and grant him leave for direct access. He rested his case on the principles of expeditious dispute resolution, and apex-Court discretion to cure procedural defects in litigation. For the latter point, counsel sought reliance on ***Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others*** [2014] eKLR**,** urging that if this Court finds that there was failure of procedural and substantive justice, it should exercise its special jurisdiction to provide a suitable remedy, so as to uphold justice.

[9] Counsel also cited ***Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*** [2014], in which this Court had extended time, and submitted that once the Court formed the opinion that the applicant was making diligent efforts in quest of justice, in spite of obstacles in the judicial process, then it should be found proper to extend time, as requested. Counsel urged that the Appellate Court Judges had no reason to delay "their Judgment" until 13th January, 2014. Such delay on the part of the Court, counsel submitted, had impeded the

applicant's right: and the Supreme Court had good cause to exercise its jurisdiction to rectify the said shortfall, by granting leave to move this Court.

(b) 1st Respondent

[10] The 1st respondent filed a replying affidavit of 27th October, 2014 contesting the application. He also filed written submissions, and a list of authorities on 10th March, 2015 through learned Senior Counsel, Mr. Nowrojee.

[11] Learned counsel submitted that an application for leave had already been made by the applicant under Article 163(4) (b) of the Constitution, before the Court of Appeal and was pending, and that, to file two matters with similar effect, or matters seeking the same remedy in two different Courts, was an abuse of the process of the Court; and he prayed that the application be dismissed. Mr. Nowrojee submitted that it had been held in ***Bundotich v. Managing Director Kenya Airports Authority and Another*** [2007] 2 EA 90**,** that to have two applications running side by side, amounted to an abuse of process.

[12] Learned counsel submitted that the application for certification was misconceived, as this Court has already held that such an application should first be made before the Court of Appeal; and the Supreme Court only reviews the Court of Appeal's decision afterwards. In this regard, counsel cited ***Sum Model Industries Ltd. v. Industrial and Commercial Development Corporation,*** Civil Application No. 1 of 2011 , urging that the procedure has not been followed, and so the prayer should be dismissed.

[13] As regards the prayer for extension of time to file an appeal, Mr. Nowrojee submitted that as the Court of Appeal delivered its Judgment on 21st November, 2013; followed by a notice of appeal on 2nd December, 2013; followed by reasons

for the Judgment on 13th January 2014; and followed by an application for certification of 21st April, 2014, the applicant was remiss in not seeking extension of time soon after the reasons were delivered, or immediately after the application at the Appellate Court seeking certification was field. Learned Senior Counsel submitted that it was blameworthy not to file the notice of appeal until 8th September, 2014 — seven months after the decision was delivered.

[14] Learned counsel submitted that the applicant, having moved the Appellate Court under Article 163(4)(b) of the Constitution, now expresses dissatisfaction with that Court's procedure rather than its decision, and seeks to take a different route under Article 163(4)(a) of the Constitution. This route, Mr. Nowrojee submitted, was not tenable.

[15] Citing the case, ***Evans Odhiambo Kidero & 4 Others v. Ferdinard Waititu & 4 Others*** [2014] eKLR, learned counsel submitted that the 30 days within which an appeal has to be lodged upon filing of a notice of appeal, are to be viewed in the context of the constitutional principles set for timelines, and for expedition in the completion of electoral processes. He urged that such timelines were in nature, and as signalled in the ***Kidero*** case, mandatory.

[16] Mr. Nowrojee submitted that under the Supreme Court Rules, where a notice of appeal is filed, and no appeal follows within 30 days, the notice of is deemed withdrawn. Counsel contended that such withdrawal had happened in this case; hence there was no notice of appeal on record. It followed, as counsel urged, that while a party may seek extension of time where such period had lapsed, such was not the case here, as there was no application before the Court for extension of time to file a notice of appeal.

[17] Learned counsel urged it to be a principle in extension-of-time applications, that the applicant is to proffer reasons for the delay, as a basis for

the prayer. This requirement, he submitted, remained unfulfilled. The applicant had not given reasons for the delay in filing his appeal to this Court.

[18] On the question whether any prejudice will be occasioned to the respondent, learned counsel submitted that, indeed, there will be prejudice, since the electoral law seeks to ensure that an electoral cause lodged outside the timelines, terminates in the public interest, and in fulfilment of the voters' legitimate expectations.

[19] Counsel cited Supreme Court Petition No. 17 of 2014, ***Richard Nyagaka Ton'gi v. Chris Munga N. Bichage and Others***, in support of the proposition that "Judgment" means the decision of the Court, and it matters not whether the edict given in November 2013 was an "Order" or a "Judgment"; for all parties knew of the said decision on 21st November, 2013, and the notice of appeal filed was on the strength of that decision. He submitted that the record of appeal could have been filed on a provisional basis, and the applicant could later obtain consent to file a supplementary record of appeal. Counsel submitted that this application should be dismissed.

(c) 2nd and 3rd Respondents

[20] The 2nd and 3rd respondents contested the application, and agreed with the submissions of the 1st respondent. They filed their grounds of opposition, written submissions, and a list of authorities on 10th March 2015.

[21] The two respondents, through learned counsel Mr. Gumbo, submitted that under Rule 37(1) of the Supreme Court Rules, a party who files a notice of appeal has to lodge the appeal within 30 days, failing which the notice is deemed to have lapsed; and so, once the Court finds the notice to have lapsed, then there is no basis upon which to extend time as prayed in this application, especially as the governing Rule 37(1) is couched in mandatory terms.

[22] It was further submitted that extension of time is not a right, and the burden lies on the applicant to comply with attendant principles, as indicated in the ***Nick Salat*** case. Counsel urged that in extending time, a Court exercises an equitable jurisdiction, being guided by relevant principles. Such principles, counsel urged, have been adopted in Article 87(1) of the Constitution which requires timely and expeditiously disposal of electoral matters. Learned counsel submitted that a delay of 8 months is inconsistent with the spirit of the Constitution; and he asked that the application be dismissed with costs.

(d) Applicant in Reply

[23] Learned counsel Mr. Mungai, submitted that his client's prayer had not sought certification that the matter was one of general public importance, but was premised on Section 16 of Supreme Court Act, regarding *miscarriage of justice,* as had occurred, by way of the application receiving delayed hearing and determination at the Court of Appeal. It is after sensing the miscarriage of justice, counsel urged, that he filed this application before the Court within 15 days.

[24] Counsel submitted that under the Rules of the Supreme Court, an appeal comprises the record of appeal, which the applicant could not file without the "reasons of the Court of Appeal decision"; and it was thus necessary to wait for the Appellate Court to set out reasons for its earlier Orders.

[25] Of the imperative character of timelines in electoral disputes, learned counsel called for an interpretation which would show his client to have been the victim of failure of timeliness, and so, to merit a discretionary extension of time.

[26] Counsel sought to distinguish the ***Chris Bichage*** case, urging that unlike in that case, his client's notice of appeal was filed quite properly, save that under Rule 33(3), the appeal could not be filed promptly, as all documents required were not ready. In the alternative, learned counsel would rely on the ***Chris***

Bichage case, for the principle that where a Court is at fault, the applicant should not be prejudiced.

[27] Learned counsel submitted that election matters are, on the face of it, "public interest matters", and therefore in principle, and on grounds of public interest, this case deserved extension of time or, in the alternative, a certification to come to the Supreme Court.

III. ANALYSIS

(a) Preliminary Issues

[28] The main Order sought by the applicant, is one granting extension of time to file his appeal to this Court, out of time. In the alternative, he wants the Court to grant him leave to come to this Court on appeal.

[29] As regards extension of time, this Court has already laid down certain guiding principles. In the ***Nick Salat*** case, it was thus held:

> *"... 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.*
>
> *"... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*
>
> 1. ***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;***

2. ***a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;***
3. ***whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;***
4. ***where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;***
5. ***whether there will be any prejudice suffered by the respondents, if extension is granted;***
6. ***whether the application has been brought without undue delay***; and
7. ***whether in certain cases, like election petitions, public interest should be a consideration for extending time"*** [emphasis supplied]**.**

[30] The scenario in the applicant's case is a peculiar one. Upon the Court of Appeal delivering its edict on 21st November, 2013, he filed a timely *notice of appeal* on 2nd December, 2013. However, he avers that he could not file his appeal within time, because *he was awaiting the "Judgment of the Court of Appeal,"* for to him, what that Court had delivered on 21st November, 2013 was only "*an Order*," *and not a "Judgment."* During the period of awaiting that "Judgment", the time for filing an appeal lapsed. He subsequently chose *to file in the Court of Appeal an application, seeking certification that his intended appeal involves "matters of general public importance."* He complains of delay in the Court of Appeal, in the determination of his said application for certification. It is precisely this, that brings him to the Supreme Court, with an application seeking extension of time, since time had lapsed before he could file an appeal "as of right".

[31] This account of events raises the following questions for determination:

(i) having filed a notice of appeal within time, could the applicant have filed an appeal without the "reasoned text of the decision" of the Court of Appeal?

(ii) can an appeal that lies "as of right", be converted to one that requires certification, where the prescribed time for lodging it has lapsed?

(iii) where an appeal lies only upon certification that it involves "matters of general public importance", and where such an application for certification is delayed at the Court of Appeal, does such delay convert the matter to one "as of right", so that the applicant may now come directly before the Supreme Court?

(b) Reasoned Text of Appellate Court Decision: Is this required for a further Appeal?

[32] The applicant urged that under the Supreme Court Rules, he could not file an appeal without "the Judgment of the Court of Appeal". To him, what the Appellate Court rendered on 21st November, 2013 was only "an Order", rather than the "Judgment". Rule 33(1) of the Supreme Court Rules thus provides:

> ***"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—***
>
> ***(a) a petition of appeal;***
> ***(b) a record of appeal; and***
> ***(c) the prescribed fee".***

Rule 33(3) goes on to give the content of a record of appeal. Counsel contended that he could not have filed a record of appeal, because there was no "Judgment of the Court of Appeal."

[33] It is clear to us, however, that the Judgment of the Court of Appeal was delivered on *21st November 2013,* and what was issued on 13th January, 2014 were the *reasons running through that Judgment*, as these had been reserved. This issue has now been settled by this Court in the ***Chris Bichage*** case [paragraph 45], thus:

> ***"... we would hold that a 'Judgment' is a determination or decision of a Court, that finally determines the rights and obligations of the parties to a case, and includes any decree, order, sentence, or essential direction for the execution of the intent of the Court."***

[34] The issue then is whether a record of appeal would have been prepared without the "reasons of the Court of Appeal decision"? Rule 33(4) of the Supreme Court Rules thus provides:

> *"For purposes of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under subrule (3) and shall further contain the following documents relating to the appeal in the first appellate court—*
>
> *(a) the certificate, if any, certifying that the matter is of general public importance;*
> *(b) the memorandum of appeal;*
> *(c) the record of proceedings; and*
> *(d) the* ***certified decree or order****"* [emphasis supplied].

[35] Clearly, it is not a mandatory requirement for a record of appeal from the Appellate Court to the Supreme Court to include the complete Judgment of the Court of Appeal. A *certified Decree or Order* of the Appellate Court suffices. In the ***Chris Bichage*** case, this Court held [paragraph 34] as follows:

> *"It is not mandatory that the Judgment of the Appellate Court be part of the record, though under Rule 33(2) the Petition of Appeal is to specify objections to the decision, and indicate the points of law alleged to have been wrongly decided. A Record of Appeal is also to be filed with the Court, as prescribed in Rule 33(1). The Record of Appeal is a bundle of documents forming part of the proceedings in all the lower Courts, and which are relevant in the adjudication of the matter on appeal before the Supreme Court. One such mandatory item, for purposes of an appeal from a Court of appellate jurisdiction,* ***is the certified Order or Decree of the first appellate Court from which an appeal is to be preferred to the Supreme Court (Rule 33(4))"*** [emphasis supplied].

[36] In that context, we would note the content of Rule 33(6) of the Supreme Court Rules, which provides:

> ***"Where a document referred to in sub-rule (3) and (4) is omitted from the record of appeal, the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal."***

[37] It follows that, with the Court of Appeal Order of 21st November, 2013, the applicant *was, indeed, in a position to file a record of appeal*. Such a record would have been complete, with a certified Order of the Court of Appeal. Having filed a notice of appeal on 2nd December, 2013, the last day of filing an appeal with 'an incomplete' record of appeal was *1st January 2014*. The reasons having been delivered on 13th January, 2014 the applicant could still have filed 'without

leave' these reasons, as a "missing document", by *16th January, 2014*. There is no basis, therefore, for the applicant's contention that he could not have filed his appeal out of time "without the reasons of Appellate Court's decision."

(c) *Delayed "Appeal-as-of-Right": Can it transform into "Appeal-with-Certification"?*

[38] The applicant submitted that upon realizing that time within which to file an "appeal as of right" had lapsed, he opted to seek certification from the Court of Appeal. This Court's *appellate jurisdiction* is set out in Article 163(4) of the Constitution, in the following terms*:*

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court—***
>
> ***(a) as of right in any case involving the interpretation or application of this Constitution; and***
>
> ***(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)"***

[39] The two avenues of the appellate jurisdiction of this Court are distinct. Firstly, an appraisal of the nature of an appeal as involving matter of constitutional interpretation and/or application, signals access to the Supreme Court "as of right"; and no form of authorization or leave from the Court of Appeal, or the Supreme Court is required at the beginning. The principles regulating this limb of the Court's appellate jurisdiction were set in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others*** S.C. Civil Application No. 5 of 2014**;** [2014] eKLR ***(Munya 1)***.

[40] If, on the other hand, the appeal does not fall with the ambit of Article 163(4)(a) of the Constitution (ie, appeal "as of right"), then it should be certified as one involving a "matter of general public importance", by being brought within the ***Hermanus*** principles. On this limb, as indicated by this Court in the ***Sum Model*** case, an application for certification has to be originated *in the Court of Appeal*.

[41] Suffice it to say that the path that a litigant takes is determined on the basis of the *subject-matter*, as has been held by the superior Courts. Once the Court of Appeal renders its decision, the litigant is able to elect which course to follow. This decision is taken in advance, as it is the basis of determination on whether to seek certification first, or proceed straight to the Supreme Court. Thus, the decision on how to proceed, rests on the character of the issues involved in the subject matter, *rather than on such procedural shortfalls as may have afflicted a litigant's progress*. It follows that where a party has elected the path to the Supreme Court "as of right", that matter cannot be 'converted' to one where certification is required, just because time for filing "an appeal as of right" has lapsed.

[42] In ***Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others***, Application No.15 of 2014 (2014) eKLR, this Court disallowed counsel's argument that an intended appeal comprised a blend of "appeal-as-of- right" matters on the one hand, and "appeal-by-certification" matters, on the other hand [at paras.21-22]:

> *"Learned counsel's essential argument is that the two appeals are inextricably linked and thus, the requirements of leave constraining the aspect of the matter founded upon issues of general public importance, do affect the entire appeal.*

"We are not of such a view, however. Appeals to this Court need not lie on the entirety of the issues arising in the lower Courts. What come to this Court on appeal, are disputes over ***constitutional interpretation or application, or over matters of general public importance.*** *Thus, if such issues can be isolated from the general case heard by the lower Courts,* then ***it is implausible to argue that one cannot further distinguish the 'issues of constitutional relevance' that clothe this Court with direct jurisdiction, from those requiring certification as 'matters of general public importance'"*** [emphasis supplied].

[43] Thus, a litigant is under forensic obligation to categorize his or her case, indicating the constitutional or legal category under which he or she is moving the Supreme Court. The pathway thus identified, is for pursuit. And where it is perceived that an appeal raises both categories of issues, the course of merit is to comply with the requirements of *both:* file an appeal "as of right" on the constitutional issues; and seek leave as regards "matters of general public importance". As regards the latter, the relevant appeal is to be filed only after grant of leave. It is then left to the Supreme Court in its exercise of discretion, whether the two causes should be consolidated and resolved as one.

(d) When Appellate Court is already moved for Leave: Can the Suitor concurrently move the Supreme Court for Time-enlargement, or for the same Leave?

[44] It is clear to us that a party who moves the Appellate Court for leave and certification, has recognized the relevant cause as one founded on "matter of general public importance". Consequently, this Court's intervention is not in issue until that Court's task is complete. In ***Hassan Nyanje Charo v. Khatib***

Mwashetani & 3 Others, Application No.14 of 2014 (2014) eKLR, this Court was faced with an application for leave, while a similar application was still pending at the Court of Appeal. Just as in this case, the applicant attributed improper delay to the Court of Appeal in determining the matter, indicating this as a justification for moving the Supreme Court. Relying on its earlier decisions, this Court thus held [paras.25-27]:

> *"In essence, when approaching the Supreme Court for grant of certification for leave to appeal to the Supreme Court, the Court exercises, not an appellate jurisdiction, but a Review Jurisdiction. This jurisdiction would be exercisable where a party had initially approached the Court of Appeal for certification. Where one is denied leave, then such a person has a right to approach the Supreme Court for review of that decision. Similarly, where leave is granted, an aggrieved party also has a right to approach the Supreme Court for a review of that decision.*
>
> *"The Applicant in this case has not invoked this Court's Review jurisdiction. His application for certification is still pending in the Court of Appeal. In the* ***Sum Model*** *case and the* ***Hermanus*** *case . . . this Court has set out the criteria for seeking leave to appeal to the Supreme Court. Further, it is an established principle that the law should be certain, consistent and predictable. The Court's Rules of Procedure and Directions should also apply indiscriminately to all persons.*
>
> *"This Court having pronounced itself on the procedure where one seeks certification in the* ***Sum Model*** *case, we are bound by it. As a two-Judge Bench, we are obliged to follow the laid down principles, and are bound by the decisions of this Court. Consequently,* ***until the Court of Appeal has pronounced itself as to whether to grant or deny***

certification for leave, we are reluctant to assume jurisdiction" [emphasis supplied].

[45] Consequently, as the applicant has an application for grant of leave pending at the Court of Appeal, there is no basis in law for entertaining his application in this Court. The pendency of an application in the Court of Appeal mitigates against the scenario of a parallel right that can be pursued in the Supreme Court. We would restate the principle that where an appeal lies on the basis of leave, the same cannot be converted to an appeal "as-of-right", on the basis that the Court charged with granting leave has delayed its determination.

(e) The Applicant's Case for Leave: What is its Nature?

[46] The applicant thus prays: "*as an alternative to prayer 2 above this Honourable Court be pleased to grant the applicant leave to file the proposed appeal against the Order and Judgment dated 21st November, 2013 and 13th January, 2014 respectively of the Court of Appeal*".

[47] Learned Senior Counsel Mr. Nowrojee, for the 1st respondent, submitted that the leave being sought by the applicant has to be granted first by the Court of Appeal, or, secondly, by this Court, upon review of the Appellate Court decision denying the same.

[48] We are in agreement with the respondents that, indeed, if the prayer in question is for certification of the intended appeal, as involving "matters of general public importance", then this Court has to await the decision of the Court of Appeal, and await a review-application in respect of that decision, in a proper case.

[49] However, it was learned counsel Mr. Mungai's submission, for the applicant, that he was not seeking leave in respect of "matter of general public importance", but he was seeking the leave contemplated in Section 16 of the Supreme Court Act, 2011. He submitted that, by virtue of Section 16(2) of the Supreme Court Act, he was seeking leave to appeal to the Supreme Court "because a miscarriage of justice had occurred", which the Supreme Court should remedy, by granting leave to file an appeal at this apex Court.

[50] Section 15(1) of the Supreme Court Act provides that appeals to the Court shall be heard only by leave of the Court. What "leave" is contemplated under Sections 15 and 16 of the Act? Section 16 Act provides:

> ***"(1) The Supreme Court shall not grant leave to appeal to the Court unless it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal.***
>
> ***"(2) It shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—***
>
> > ***(a) the appeal involves a matter of general public importance; or***
> >
> > ***(b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard".***

[51] The essence of the applicant's submission is that, because of his apprehension that there has been a miscarriage of justice, the Supreme Court should grant him leave to be heard on appeal.

[52] It is to be noted that in ***Malcom Bell v. Hon. Daniel Torotich Arap Moi & Another,*** Application No. 1 of 2013, (2013) eKLR, this Court held that the provisions in Section 16(1) and (2)(b) of the Supreme Court Act sought to vest a diffuse span of appellate competence in the Supreme Court, and in this form, it was out-of-fit with the mandatory appellate-jurisdiction clause in Article 163(4)(b) of the Constitution. As regards the concept of '*interest of justice',* as applied in Section 16 of the Act, the Court thus remarked [paragraphs 57-59]:

> ***"What 'interests of justice' [Supreme Court Act, 2011, Section 16(1)], and 'interests of justice' as determined by whom – will confer ordinary appellate jurisdiction upon a Supreme Court which already has an appellate remit specifically defined in Article 163(4) of the Constitution? And is the question of rectifying what is referred to as 'substantial miscarriage of justice,' properly a question within the jurisdiction of Supreme Court?***
>
> ***" 'Interests of justice' as a criterion of decision-making by the Supreme Court and other Courts, is already declared by the Constitution in the 'national values and principles of governance' [Article 10]. Such values include [Article 10(2)]: the rule of law; human dignity; equity; social justice; equality; human rights; non-discrimination; and the protection of the marginalised. As the jurisdiction to render justice is, thus, clearly conferred by the Constitution, it is not to be attributed to the provision of s.16(1) of the Supreme Court Act, 2011 (Act No. 7 of 2011).***

"That the statute's elastic conferment of jurisdiction, in respect of 'miscarriage of justice' stood to question, was foreshadowed in the *Hermanus Steyn* ***case in this Court, with the observation that the mischief contemplated has in practice been remediable before superior Courts at any level; but the provision, by its unlimited scope, has now been found to have a compromising effect on the Supreme Court's jurisdiction."***

[53] Earlier on, in the ***Hermanus*** case, this Court had stated, as regards miscarriage of justice, thus [paragraph 63]:

"From the example thus given, it is clear that 'miscarriage of justice' is more consistent with failings in the judicial process of a rather glaring nature, and in threshold trial stages, than with the adjudication of complex questions of law at tertiary-level Courts…"

The Court, in setting out the principles for consideration as a basis for granting leave, thus held:

". . . (v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;"

[54] It is clear to us that learned counsel, had he taken note of these decisions of this Court, would not have continued with his line of submission. It may be observed that the High Court, under Article 165(3)(d) of the Constitution, is the

primary Court with the jurisdiction to determine questions in respect of interpretation of the Constitution, especially the question whether any law is inconsistent with or in contravention of this Constitution. In the exercise of this jurisdiction, the High Court (*Lenaola, J)* has already pronounced itself on the constitutionality of Section 16 of the Supreme Court Act, 2011, in the case of ***Commission on Administrative Justice v. Attorney-General & Another*** [2013] eKLR. One of the issues for determination in that case was:

> "*Whether Section 16(1) and* (2) (b) *of the Supreme Court, 2011 is ultra vires Article 163 of the Constitution to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the Court is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal or where a substantial miscarriage of justice may have occurred or may occur unless the Appeal is heard."*

[55] The High Court, in its decision of 19th September, 2013, considered the constitutionality of Section 16 of Supreme Court Act and (at paragraph 34) thus held:

> ***"I am duly guided and looking at*** *Section 16* ***of the*** *Act****, it is obvious that the addition of the words*** **'a substantial miscarriage of justice'** ***serves to grant the Supreme Court an extra criteria and jurisdiction to hear and determine applications for leave to appeal to that Court. I need not say more than that because the glaring addition is blinding enough."***

[56] The High Court, in that case, concluded thus [paragraph 40]:

> ***"The conclusion I must therefore necessarily reach is that the following orders must be issued in favour of the Petitioner:***

i) That Section 16(2) (b) of the Supreme Court Act 2011 is declared to be *ultra vires* ***the Constitution, 2010 to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the Court is satisfied that a substantial miscarriage of justice may have occurred or may occur unless the Appeal is heard.*****"**

[57] The above High Court decision has not been the subject of appeal. Now as the apex Court, and conscious of our mandate under Section 3 of the Supreme Court Act, *to "assert the supremacy of the Constitution"*, and paying due regard to the competence and defined remits of other Courts (see ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** *[2012] eKLR*), we do recognise the finding of the High Court, that *Section 16(2)(b) of the Supreme Court Act is unconstitutional.*

[58] It follows that there is no *'leave'* contemplated under Sections 15 and 16 of the Supreme Court Act, apart from "leave certifying that a matter is one of general public importance", and therefore appealable to the Supreme Court. Where an appeal is one involving "matters of general public importance", the application for certification has to be originated in the Court of Appeal.

(f) The Applicant's Notice of Appeal: Is it to be deemed Lapsed, or Withdrawn?

[59] It was urged by counsel for all the respondents that under Rule 37(1) of the Supreme Court Rules, if an appeal is not filed within 30 days of filing the notice of appeal, the notice of appeal is deemed to have been withdrawn; so in this case, the 30 days having lapsed, the notice of appeal was to be deemed withdrawn, leaving no basis upon which an application for extension of time to file an appeal could be sustained.

[60] Rule 37(1) thus provides:

> ***"Where a party has lodged a notice of appeal but fails to institute the appeal within the prescribed time, the notice of Appeal shall be deemed to have been withdrawn, and the Court may on its own motion or on application by any party make such orders as may be necessary."***

[61] So it is argued that there is no longer any notice of appeal, as the current one is deemed withdrawn. It is clear to us that Rule 37(1) is not to be read in isolation. It has to be read in conjunction with other rules, particularly Rule 53 which provides that "T*he Court may extend the time limited by these Rules, or by any decision of the Court"*. It means that, where the time contemplated under Rule 33(1) for filing the appeal lapses, and there is no action on the part of the litigant, then Rule 37(1) sets in. However, where time thus lapses, but there is a *satisfactory explanation of the inaction*, then the Court, guided by Rule 53 (and as a Court of equity), has the discretion to extend time.

[62] In extending time to allow the filing of an appeal out of time, the Court essentially breathes life into the notice of appeal which had lapsed, and it is deemed to be still in force. This is what the law contemplates, in providing for application(s) for extension of time to file an appeal out of time. With such extension of time, the competence of the notice of appeal is reinstated.

[63] It stands to reason therefore—contrary to the general perception of the respondents— that this Court, by exercise of discretion upon merits, has authority to restore an otherwise-lapsed notice of appeal.

IV. DETERMINATION

[64] Upon consideration of the relevant issues in this matter, we have come to the conclusion that, as at 21st November, 2013 the applicant was indeed in a position to lodge an appeal—as the record would have been complete, with the certified Order of the Appellate Court. It bears restating that the litigant coming before the Supreme Court has the duty of categorizing his or her case, so as to beckon the specific constitutional opening under which the matter falls. Where the litigant's prayer is pending for leave in the Court of Appeal, the motion in that Court is to run its full course; and the matter does not in a parallel course, transmute into an appeal not conditional on grant of leave. This Court has discretion, exercised on the merits of each case, to revive a notice of appeal the prescribed time-frame of which may have lapsed, provided there is a satisfactory explanation of the delay.

[65] The applicant approached this task by attributing delay, in particular, to the Court of Appeal. Subject to the obligation on the part of all Courts to ensure efficiency and dispatch in proceedings before them, as required under the Constitution, it is an important principle guiding the judicial function, that the Courts are independent, and are committed to the judicious and conscientious discharge of their mandate. Upon this premise, this Court will in general, keep faith in the other Courts, in the absence of any plain situation to the contrary, that merits judicial notice. A default on such a scale has not, in this instance, been shown.

[66] Consequently, we will make Orders as follows:

(a) The applicant's Notice of Motion dated 5th September, 2014 is hereby disallowed.

(b) The respondents' costs shall be borne by the applicant.

DATED and **DELIVERED** at **NAIROBI** this 27th day of May 2015.

……	**……**
M.K. IBRAHIM	**J.B. OJWANG**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true
Copy of the original

REGISTRAR
SUPREME COURT OF KENYA