# REPUBLIC OF KENYA
## IN THE SUPREME COURT OF KENYA
### CIVIL APPLICATION NO. 3 OF 2016

*(Coram: Ibrahim & Wanjala, SCJJ)*

**COUNTY EXECUTIVE OF KISUMU ..... APPLICANT**

**–VERSUS–**

**COUNTY GOVERNMENT OF KISUMU ..... 1ST RESPONDENT**

**HON. GABRIEL OCHIENG .....2ND RESPONDENT**

**KISUMU COUNTY ASSEMBLY SERVICE BOARD ..... 3RD RESPONDENT**

**ANN ATIENO ADUL ..... 4TH RESPONDENT**

**NICHOLAS STEPHEN OKALA ..... 5TH RESPONDENT**

**THE ATTORNEY GENERAL ..... 6TH RESPONDENT**

**NELCO MUSANYA SAGWE ..... 7TH RESPONDENT**

**PETER ODERO ANDITI ..... 8TH RESPONDENT**

**ELUID OWEN OJUOK ..... 9TH RESPONDENT**

*(Being an application for extension of time to file an appeal out of time against the decision of Court of Appeal, Kisumu (D.K. Maraga, D. K. Musinga & A.K. Murgor JJA) in Civil Appeal No. 17 of 2014, as consolidated with Kisumu Civil Appeal No. 18 of 2014, delivered on 6th October 2015)*

# RULING

## *I. INTRODUCTION*

**[1]** The applicant filed this application on 12 February, 2016 seeking the following orders:

*(1) That the application be certified as urgent and service thereof be dispensed with in the first instance.*

*(2) That this Honourable Court be pleased to grant leave to extend the time limited for filing of the petition of appeal herein.*

*(3) That there be a stay of execution of the whole Judgment/Orders of the Court of Appeal sitting at Kisumu in Civil Appeals No. 17 and 18 of 2015 (consolidated) pending the hearing and determination of the appeal to this Court.*

*(4) That corollary to the foregoing, the petition of appeal filed by the appellant be deemed as properly and duly filed thus part of the record.*

*(5) That the costs of and incidental to this application do abide the result of the said appeal.*

**[2]** While the notice of motion application includes certification of urgency as the first prayer, there was neither an application seeking that the matter be certified urgent nor was there any affidavit deposed to in support to the urgency prayer. It suffices it to say that the urgency prayer was abandoned.

**[3]** In the grounds supporting the application, it was urged that when the Court of Appeal delivered the Judgement, subject of this appeal, on 6 October, 2015 dismissing the applicant's appeal with costs to the 2nd, 6th and 7th respondents, the applicant was aggrieved by that decision and filed a notice of appeal on 19th October 2015 at the Court of Appeal. The notice of appeal was accompanied by a letter addressed to the Registrar requesting for typed copies of the proceedings and the Judges' notes, which documents form part of the record of appeal as a mandatory requirement. The typed copies of the proceedings were however, only furnished to the applicant on 4th December 2015, outside the time limitation

period provided by the Rules of the Court for filing an appeal. A certificate of delay by the Deputy Registrar was supplied on 16th December 2015. Hence, it was submitted that the delay was due to reasons beyond the applicant's control.

**[4]** It was also submitted that the petition raises weighty and arguable constitutional issues with a high probability of success. The applicant delineated eleven (11) grounds it submits demonstrates the arguable constitutional issues. These grounds include:

(i) that the Court of Appeal erred and misapplied and misinterpreted the law, Article 165(6) of the Constitution, in finding that the High Court has supervisory jurisdiction over County Assemblies and National Assembly in exercise of their quasi-judicial functions, ignoring that impeachment of a Speaker is a constitutional procedure. Hence contravened Articles 1(3) and 117 of the Constitution and specifically the doctrine of separation of powers;

(ii) that the Court of Appeal erred in law by purporting to oust the clear constitutional and statutory powers of the 1st appellant (County Assembly of Kisumu) as donated by Article 178(2)(b) of the Constitution and section 9(4) of the County Governments Act, which gives the 1st appellant power to appoint a speaker in the absence of one.

(iii) that the Court of Appeal erred in failing to understand that the relationship between Speaker of a County Assembly and a County is a quasi-political and procedural one and not an employment relationship *strict sensu*, hence that the Court of Appeal erred in finding that the Employment and Labour Relations Court had jurisdiction, thereby misinterpreted Article 162(2)(a) of the Constitution and section 12 of the Industrial Court Act, Cap. 234 of the Laws of Kenya.

(iv) that the Court of Appeal erred in holding that Articles 28, 41, 47, 50 and 178(3) of the Constitution had been infringed as against the 2nd respondent (Hon. Gabriel Ochieng) and hence a reason to depart from the doctrine of separation of powers as elucidated under sections 12 and 29 of the National Assemblies (Powers and Privileges) Act, Cap. 6 Laws of Kenya.

(v) that the Court of Appeal erred in holding that the 3rd respondent (Kisumu County Assembly Service Board), as a State organ, had the *locus* to enforce its constitutional rights as against individuals and most importantly another State organ pursuant to Articles 22 and 23 of the Constitution.

(vi) that the Court of Appeal erred in law and in fact by finding that the Assembly was aware of and disregarded a court order barring the impeachment of the 4th respondent (Ann Atieno Adul), devoid of any proof of service. Hence the appellants rights to a fair trial in Articles 25(c) and 50(1) of the Constitution was evidently curtailed.

**[5]** The application is also based on the ground that it is in the best public interest that the appeal herein be heard for the enrichment of jurisprudence. That the appeal has been brought by a State organ as against another and as such, it is in the best public interest that the appeal is heard and determined on merit. Lastly, it is stated that the appeal has been lodged without inordinate delay and the respondents stand to suffer no prejudice whatsoever if the application is allowed.

**[6]** The application is supported by an affidavit deposed by Kilinda Kilei, the legal counsel of the applicant, in which he buttresses the grounds in support of the application.

## *II. PROCEDURAL POSTURE*

**[7]** This matter was mentioned before the Deputy Registrar on 30th May, 2016 when the applicant sought to amend the application, particularly to amend the 1st

respondent from *'County Government of Kisumu'* to *'County Assembly of Kisumu'*. There was no objection to the amendment motion, hence it was allowed by consent. Counsel for the applicant, Mr. Ojuro, also indicated that the applicant was not pursuing the prayer on stay of the Court of Appeal judgement but only pursuing the prayer for extension of time. Directions were then issued on service and filing of submissions.

**[8]** The matter underwent several mentions. During the mention of 15th September, 2016 the issue of entering into a consent on the extension application was mooted with a resolution that parties were to explore that possibility. On 17th November, 2016 the parties agreed that the matter, application and submissions, be placed before the Court and a date for the ruling on the matter be given to the parties. Hence they agreed to dispense with an oral hearing of the application. Consequently, on 25th November, 2016 the Hon. Deputy Chief Justice and Vice-President of the Court constituted a Bench of two judges, *Ibrahim and Wanjala SCJJ*, to hear and determine this matter, that determination based purely on the consideration of the written submissions vide rule 23 of the Supreme Court Rules, 2012.

## *III. SUBMISSIONS*

### *(a) The applicant's*

**[9]** In its written submissions filed on 5th July, 2016, the applicant submits that it is only pursuing the following orders:

> *(2) That this Honourable Court be pleased to grant leave to extend the time limited for filing of the petition of appeal herein;*

*(4) That corollary to the foregoing, the petition of appeal filed by the appellant be deemed as properly and duly filed thus part of the record;*

*(5) That costs of and incidental to this application do abide the result of the said appeal.*

**[10]** It invokes rules 32 and 53 of this Court's Rules as regards this Court's discretionary powers to extend time. It submits that the petition it has already filed in this Court was filed outside the thirty (30) days period, legally provided for filing an appeal after filing of a notice of appeal. It urges the Court to exercise it discretion under rule 53 and extend time.

**[11]** The applicant invokes this Court's jurisprudence in the case of ***Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others,*** [2014] eKLR (***Nicholas Salat****)* and submits that it has *'a bona fide cause of action and time has lapsed, but was constrained to pursue within time that cause, because of some compelling reasons'*. It reiterates the principles for extension of time as delimited in the ***Nicholas Salat*** case and buttresses submissions captured in the grounds in the notice of motion application as having met these principles.

**[12]** It also submits that this application was filed in this Court on 8th February 2016; 2 months after the proceedings were availed to the applicant on 4th December, 2015, the reason being that there was a festive Christmas season and the advocates for the applicant were unable to get instructions until the month of February, 2016 when this application was filed. It also urges that under Order 50 Civil Procedure Rules, 2010, the period between 19th December and 21st January, time does not run. Consequently, it was submitted that the applicant was hence delayed for 28 days only.

**[13]** It is submitted that the applicant has annexed the draft petition to demonstrate the arguability of the intended appeal, and believe that the respondents will suffer no prejudice or injustice if the extension is granted. Further, it is submitted that the intended appeal raises constitutional issues that will enable this Court to meet its objectives under section 3 of the Supreme Court Act, 2012, particularly: *"to provide authoritative and impartial interpretation of the Constitution; and develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth."* In this regard, it is submitted that the appeal revolves around the issue of removal of a speaker of a county assembly and therefore touches on interpretation of the Constitution, therefore it is in the public interest and in the interest of justice to grant leave to file the appeal out of time to enable this Court to decide the issue as the Court of final appeal and authority.

**[14]** In reply to the 3rd, 7th and 8th respondents' submissions that this Court should rely on the jurisprudence in the ***Nicholas Salat*** case and strike out the petition of appeal already filed in this Court for having been filed out of time, without leave, the applicant urged that the petition and record of appeal is a draft for the guidance of his Honourable Court to show the urgency of this matter when determining this present application.

### *(b) The respondents'*

**[15]** Apart from the 3rd, 7th and 8th respondents, all the others did not oppose the application for extension of time. The 3rd, 7th and 8th respondents filed their submissions on 16th June, 2016. They oppose the application for extension of time on the ground that the applicant has not laid a basis for grant of the extension of time.

**[16]** They submit that infact the applicant proceeded on 12 February 2016 to file a petition of appeal to this Court in the absence of an order granting an extension

of time. That, they submit, was irregular. Further, having so already filed the petition of appeal, the respondents submit that the grounds advanced by the applicant are not in support of its application for extension of time, but in fact support of the petition of appeal already filed without leave. Hence the motion for extension is misconceived.

**[17]** It is their submission that it defeats logic why the applicant would be asking for leave to extend time to file an appeal which in its own pleadings, in its own words and in the affidavit evidence in support, it says without contradiction, that it has already lodged. That the applicant cannot simply be asking for permission to do that which it has already done contrary to the Rules of the Court. It is also submitted that the prayer sought is confusing. That the discretionary powers to this Court are to extend time, but the applicant seeks the Court to grant leave to extend time.

**[18]** They cite the principles in the ***Nicholas Salat*** case and submit that the applicant has not made a case to warrant this Court to exercise its discretion in the applicant's favour. That extension of time is not a right of a party, but is only available to a deserving party, and at the discretion of the Court. That in this case, the applicant has failed to lay a basis to the satisfaction of the Court.

**[19]** On the arguability and merit of the appeal, it is submitted that both the superior Court and the first Appellate Court correctly applied the law and interpreted all the constitutional provisions as fell to be decided in the circumstances of the case as was before them. There was no single error and the applicant's grounds advanced as supporting the grant of the conflicting orders which they seek do not support their case at all.

**[20]** They urge that while the motion is defective, the delay is also unreasonable and no attempt has been made at all, to explain it. That the applicant also had the option of filing a timely petition of appeal and to later put in those documents

which ordinarily should form part of the record of appeal, but were not there through a supplementary record of appeal. This it did not do.

**[21]** The respondents submit that they stand to suffer extreme prejudice if the extension is granted, in this otherwise concluded litigation, since their rights which the courts below have recognized and protected are likely to be infringed upon again. Lastly, it is their case that the public interest consideration in this matter, taken against its peculiar circumstances militates against prolonging this otherwise unfortunate, uncalled for, senseless litigation being advanced at the expense of public resources and funds which are financing each and every aspect of it at the instance of the County Executive of Kisumu. Hence, they urged that the application be dismissed.

**[22]** In their submissions, they have attached Replying Affidavits of Anne Atieno Adul, the 4th respondent, Peter Odero Anditi, the 8th respondent, and Nelco Masanya Sagwe, the 7th respondent. All these affidavits oppose the application for extension of time. It is worth noting that while counsel for the 4th respondent had indicated that she is not opposed to the application and did not file any submissions, it is now evident that she is in support of the position of the 3rd respondent, hence opposing the application.

## *IV. DETERMINATION*

**[23]** It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the ***Nicholas Salat*** case to which all the parties herein have relied upon. The Court delineated the following as:

**"the under-lying principles that a Court should consider in exercise of 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 for 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. ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
5. ***Whether there will be any prejudice suffered by the respondents if the 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."***

**[24]** The applicant's main ground is that it did not get typed proceedings on time. That having applied for the typed proceedings on 16th October, 2015, it was not until 4th December, 2015 that it received the same. In addition, even upon receipt of the said proceedings, the applicant's case is that due to the festive period, its counsel could not receive instructions until February, 2016. The respondents, in opposition to the application, argue that this explanation is not sufficient.

**[25]** The issue of delay of typed proceedings is well known in our legal system and on this basis; this Court has previously extended time and held that such a delay is not on part of the party but the court and that this issue consists of facts beyond a party's reach. In ***Hassan Nyanje Charo v Khatib Mwashetani and 3 Others***, *eKLR [2014]* this Court stated:

> **"[27] Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail...**
> **[28] Would it be in the interests of justice then to turn away an applicant who has, *prima facie,* exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not."**

**[26]** However, we hasten to add that a ground of delay of getting typed proceedings is not a *prima facie* panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the Court.

**[27]** In the present case, while there is indeed a certificate of delay from the Deputy Registrar of the Court of Appeal, this alone does not suffice for the Court to indulge the applicant and grant an extension. The proceedings were availed to the applicant on 4th December, 2015. It filed its application more than two months later. While it submits that it filed the application on 8th February, 2016, the record (from the receipt of payment and the stamp on the face of the application) shows that the application was infact filed on 12th February, 2016. The question that begs for an answer is whether this 'further' delay after receipt of the typed proceedings has been explained?

**[28]** In an attempt to explain this further delay, the applicant, first invokes Order 50 Civil Procedure Rules, 2010 and argues that time does not run between 19th December and 21st January. Secondly, it submits that due to the festive season, its counsel could not get instructions until the month of February.

**[29]** We do not find this explanation sufficient for two reasons. First, we would like to disabuse the applicant's reliance on the Civil Procedure Code and Rules. This Court has held that the regime of law that governs proceedings before it is the Constitution, Supreme Court Act, the Supreme Court Rules, 2012 and any practice directions made by the Court or Chief Justice. The Civil Procedure Rules are not applicable. This point was underscored in the case of ***Daniel Kimani Njihia v Francis Mwangi Kimani & Another,*** *[2015] eKLR*, thus;

> **"[13] We have found still another impropriety. The Notice of Motion has been brought under Sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9, Laws of Kenya), and Rules 39, 42 and 43 of the Court of Appeal Rules, 2010. These are not the right provisions of law under which the applicant should move the Supreme Court, where a review of denial of certification is sought.**
>
> **[14] <u>This Court's jurisdiction is exercisable only on the basis of express provisions of the Constitution and the law</u>. The operational rules for this Court (Supreme Court Rules, 2012) are made pursuant to the Constitution, Article 163(8) of which provides:**
>
> > *"The Supreme Court shall make rules for the exercise of its jurisdiction".*

**[15] Consequently, <u>the only applicable sources of law when moving the Supreme Court are the Constitution, the Supreme Court Act, and the Supreme Court Rules, 2012. The Appellate Jurisdiction Act is not applicable when moving this Court. Neither is the Civil Procedure Code</u>." (Emphasis provided).**

**[30]** Consequently, the applicant cannot rely on the provisions of the Civil Procedure Code to submit that time was not running. Secondly, we find it hard to believe that counsel could not be instructed until the month of February. Which instructions was counsel waiting for? In filing the notice of appeal on time, we believe counsel had already received instructions to appeal. We also believe that in seeking the typed proceedings, counsel was acting under the instructions that he should appeal; hence he had started the process of preparing the record of appeal as early as October, 2015. We are unable to believe that having filed a notice of appeal, having requested and received typed proceedings, and also having requested and been issued with a certificate of delay, it can be probable that counsel was yet to get instructions from the applicant to lodge an appeal.

**[31]** We take note of the respondents' submissions that the applicant had an option of filing a timely petition of appeal and putting in those documents which ordinarily should form part of the record of appeal but were not there through a supplementary record of appeal. This procedure is provided for by rule 33(6) of the Court Rules which allows for filing of the requisite documents late, but without leave, thus:

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

**[32]** The applicant did not make any submissions in reply to this line of argument by the respondents. However, having filed a notice of appeal on 19th October, 2015, the last day for filing a petition of appeal within time was on 18th November, 2015. Thereafter, the applicant had fifteen days (until 3rd December 2015) to file a supplementary record without leave. We note that the typed proceedings were received on 4th December, 2015, just a day after the lapse of the fifteen days 'without leave' window period. Whether this Court would have refused to accept the filing of such a supplementary record of appeal delayed for a day or two is not an issue here but at the very least, this would have demonstrated some vigilance on the applicant's side. In a nut shell, we agree with the respondents that the applicant has not satisfactorily explained the inordinate delay of two months upon receipt of the typed proceedings.

**[33]** We have also perused the issues framed, which the applicant intends to raise on appeal before this Court. While we find that indeed the issues as highlighted are germane and novel, this alone cannot be a reason for grant of extension. This Court will not admit a matter for hearing on the premise of the novelty of a matter, but upon due exercise of its jurisdiction and within the laid out legal framework. Arguability of a matter is not a ground alone for extension of time.

**[34]** It is on record that the applicant had prayed that as a corollary to the prayer for grant of extension, the petition of appeal already filed in this Court be deemed to have been filed within time. The respondents opposed this prayer and line of submission and relying on this Court's jurisprudence in ***Nicholas Salat*** case, prayed that that petition of appeal be struck out. In its written submissions, however, the applicant sought to correct the record and stated that the petition was annexed as a draft to demonstrate the urgency of the matter.

**[35]** We are in total agreement with the respondent that an appeal filed in this Court out of time without leave of this Court is irregular and this Court will not

invoke such 'novel' principles as urged by applicant so as to validate that petition and deem it as properly filed. We buttress this Court's position in ***Nicholas Salat*** when this Court stated thus:

> **"...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.**
>
> **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.**
>
> **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. 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 filing 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 least (sic) 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."**

Consequently, were we to grant extension of time in this matter, we will not hesitate to accede to the respondents' request, if the same is found to be the position that a petition of appeal had infact been filed in this Court without leave of Court extending time.

**[36]** We have perused the Court Registry records and apparently, there is no evidence of a petition of appeal already filed in this matter. This is surprising though, for indeed, from the application before us, the applicant stated that it had already filed a petition of appeal and went ahead to urge us, if we were inclined to extend time, to deem that petition of appeal as properly filed. It then appeared to change tune in its written submissions when it stated that the 'said appeal' be taken as a draft for purposes of showing urgency of the matter. This mystery may not be unraveled in this ruling, but we call upon the Court Registrar to check against such scenarios. Whatever it is that happened in this matter should be investigated and not allowed to recur. However, as we are unable to trace the said, petition in the Court's records at the registry it is our position that there is no petition of appeal already filed in this matter, hence the issue rests there.

**[37]** The upshot of the above is that we are inclined to disallow the application for extension of time with costs. However as regards costs we note that some of the respondents did not oppose the application. Hence costs will only be to the 3rd, 4th 7th and 8th respondents.

## *V. ORDERS*

**[38]** Consequently we make the following Orders:

***(i) The notice of motion dated 10th February 2016 is disallowed.***

***(ii) The applicant shall bear the costs of the 3rd, 4th, 7th and 8th respondents.***

**Orders accordingly.**

**DATED** and D**ELIVERED** at Nairobi this **12th D**ay of **April** 2017.

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| **.....** | **.....** |
| **M.K. IBRAHIM** | **S. C. WANJALA** |
| **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**