

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
*(Mwilu, DCJ & V-P; Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)*  
**APPLICATION NO. 4 (E006) OF 2021**

**BETWEEN**

**BOOKPOINT LIMITED ..... APPLICANT**

**AND**

**GUARDIAN BANK LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GUILDERS INTERNATIONAL BANK LIMITED..... 2<sup>ND</sup> RESPONDENT**

*(An application for extension of time to file an appeal against the Judgement and order of the Court of Appeal (Asike-Makhandia, Kiage & Sichale JJ.A) delivered at Nairobi on 18<sup>th</sup> December 2020 in Civil Appeal No. 90 of 2017)*

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**RULING**

**A. INTRODUCTION**

- [1] By way of a Notice of Motion dated and filed on 25<sup>th</sup> February 2021, the applicant sought an order of extension of time to file a Petition and Record of Appeal. Notably, there is no indication under which provision of the law the application is made.
- [2] The application is anchored on the grounds that: the Judges of Appeal notes were not obtained in good time, and that there was a misunderstanding regarding timelines, the petition having been lodged on the 24<sup>th</sup> of day of February 2021 when it ought to have been lodged on or about the 19<sup>th</sup> of February 2021.

**B. APPLICANT'S CASE**

- [3] The application is supported by the affidavit and a supplementary affidavit sworn and filed on 25<sup>th</sup> February 2021 and 5<sup>th</sup> March 2021, respectively by **Virinder Goswami**, counsel for the applicant,

- [4] It is deposed that the delay in filing the petition and record of appeal was occasioned by failure to obtain the Judges of Appeal notes in good time. That they wrote to the Registrar of the Court of Appeal on 11<sup>th</sup> January 2021 requesting for the Judges' notes. A Notice of Appeal was filed on **19<sup>th</sup> January 2021**. With no response forthcoming from the Registrar, they made several visits to the registry and wrote a reminder on the 29<sup>th</sup> of January 2021.
- [5] That it was not until the **16<sup>th</sup> of February 2021** that they were informed that the notes were ready, but as the Record ought to have been filed by the 19<sup>th</sup> of February 2021, they only had two days to prepare and bind over 4 volumes amounting to 44 books which despite their best efforts they were unable to do.
- [6] In its submissions dated and filed on the 25<sup>th</sup> of February 2021, it is submitted that there was only a two-day delay in the filing of the Record, and that the delay is not detrimental to the respondents as their advocates were served with the Notice of Appeal by the 26<sup>th</sup> January, 2021. Further, that the appeal raises important constitutional issues and other weighty issues which need the input of the apex Court.

### ***C. 1<sup>ST</sup> RESPONDENT'S CASE***

- [7] In response to the application, the 1<sup>st</sup> respondent filed grounds of opposition and written submission on 22<sup>nd</sup> March 2021. It urges that the purported appeal has been filed irregularly and is predicated on a Notice of Appeal that was filed 15 days out of time. That the applicant filed its Notice of Appeal on the 19<sup>th</sup> January 2021 yet the decision being challenged was delivered on the 18<sup>th</sup> of December 2020. That under Rule 36(1) of the Supreme Court Rules, 2020 and Section 57 of the Interpretation and General Provisions Act, Cap. 2 Laws of Kenya, the applicant ought to have filed its Notice of Appeal within 14 days from 18<sup>th</sup> December 2020, the last day being 4<sup>th</sup> January 2021.
- [8] The 1<sup>st</sup> respondent submits that a Notice of Appeal is a jurisdictional prerequisite signifying the intention to appeal, and purported late filing without leave cannot be sanctified by this Honourable Court. In support thereof, they

cite the following decisions of this Court: **University of Eldoret & another v Hosea Sitienei & 3 Others** [2020] eKLR and **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others**, SC Application No 16 of 2014; [2014] eKLR (**Nicholas Salat Case**).

- [9] It is further urged that extension of time is not a right of a party, but an equitable remedy only available to a deserving party at the discretion of the Court, and that the applicant bears the burden of demonstrating to the satisfaction of the Court the cause of the delay, which, it is argued, the applicant herein has failed to do. On this submission, they rely on the case of **County Executive of Kisumu vs County Government of Kisumu & 8 others**, SC Civil Appl. No 3 of 2016; [2017] eKLR. (**The County Executive of Kisumu Case**)
- [10] It is further submitted that Rule 40 (1) of the Supreme Court Rules, 2020, provides a complete and exhaustive list of documents that need to be contained in the Record of Appeal and judges' notes are not included. Further, that Sub-Rule (4) provides for introduction of such notes by way of a supplementary record of appeal without the need for leave of Court, within fifteen days.
- [11] Lastly, it is submitted that the applicant failed to annex a draft intended petition to either of its affidavits, instead, filing a Petition of Appeal, which it deems presumptuous, as filing of a Petition before this Court, out of time, without leave is inappropriate and renders such a Petition a nullity. They cite the case of **Nicholas Salat Case** in support thereof and urge that the Court rejects the application in its entirety with costs.

#### **D. 2<sup>ND</sup> RESPONDENT'S CASE**

- [12] The 2<sup>nd</sup> Respondent filed Grounds of Opposition and written submissions dated 8<sup>th</sup> March 2021. It submits that the applicant has failed to lay any satisfactory basis upon which the Court should exercise its discretion in its favour. That the law does not require or contemplate that the record of appeal to be filed should

contain the judges' notes thus their unavailability is not reasonable cause for failure to file a Petition of Appeal in time.

**[13]** The 2<sup>nd</sup> Respondent also submits that the applicants Notice of Appeal was also filed out of time. That the last day for the filing of the Notice of Appeal, the judgment having been delivered on 18<sup>th</sup> December 2020, would have been 4<sup>th</sup> January 2021. Therefore, a Notice of Appeal filed on 19<sup>th</sup> January 2021 was out of time, yet even in this application, no request has been made to regularize this by way of extension of time for filing a proper Notice of Appeal.

**[14]** Ultimately, it is submitted that the Court lacks jurisdiction in this matter, since as can be gleaned from the judgment of the Court of Appeal, the issues before the superior courts did not involve the interpretation and application of the Constitution; and neither has the applicant sought leave to bring its appeal under Article 163(4) (b) of the Constitution.

#### ***E. APPLICANT'S RESPONSE TO THE 1<sup>ST</sup> RESPONDENT***

**[15]** In response to the 1<sup>st</sup> respondent's assertions, the applicant argues that under *Rule 3 (e) of the Court of Appeal Rules*, time for filing a Notice of Appeal in the Court of Appeal is excluded by the Christmas vacation, that is, from 21<sup>st</sup> December to 13<sup>th</sup> January. Further, that while the Judges' notes can be filed at a later stage, there is nothing stopping the applicant from filing the same along with the Record. And that the Supreme Court Registry directed that leave to file the petition be first obtained. The applicant is adamant that having filed and served the record and the Petition in time, it is simply seeking a 2 days' extension to regularize the filing and such procedure is not in any way prejudicial to the respondent.

#### ***F. ANALYSIS***

**[16]** The applicant only seeks one prayer from the Court: that it extends time for it to lodge the Petition of Appeal out of time. Indeed, by dint of Rule 15 (2) of the

Supreme Court Rules, 2020, this Court is clothed with the power to extend time provided therein.

[17] Upon consideration of the parties' submissions and evaluation of the record before us, we note that the 1<sup>st</sup> respondent raised a pertinent issue which this Court cannot ignore. It contended that even the Notice of Appeal on which the applicant wants to anchor its appeal was not lodged in good time. It is common ground that the judgment of the Court of Appeal was delivered on 18<sup>th</sup> December 2020. Under Rule 36 (1) of the Supreme Court Rules, 2020, a person intending to appeal to the Court ought to file a Notice of Appeal within fourteen days from the date of judgment or ruling which is subject of the appeal. Consequently, in this matter, the Notice of Appeal ought to have been filed on the 14<sup>th</sup> day, which was 1<sup>st</sup> January 2021. However, since that date is a public holiday and was a Friday, the immediate next working day is 4<sup>th</sup> of January 2021. This is the day the Notice of Appeal ought to have been filed. Was this done?

[18] The applicant filed its Notice of Appeal on 19<sup>th</sup> January 2021. These were 15 days out of time. Did it get leave or was it justified? In a bid to explain the delay, the applicant sought to rely on Rule 3(e) of the Court of Appeal Rules that excludes time for filing of a Notice of Appeal during the Christmas vacation. On this assertion, the applicant is misguided.

[19] This Court has settled that the only regime of law that govern proceedings before it is, the Constitution, Supreme Court Act, the Supreme Court Rules and any Practice Directions made by the Court or the Chief Justice. In ***Daniel Kimani Njihia v Francis Mwangi Kimani & Another***, Civil Appl No. 3 of 2014; [2015] eKLR, ***(the Daniel Kimani Njihia Case)*** it was stated:

***“[14] This Court’s jurisdiction is exercisable only on the basis of express provisions of the Constitution and the law. 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, 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. In the Hermanus case, this Court had indicated how it should be moved, thus [paragraph 23]:***

*“... It is trite law that a Court of law has to be moved under the correct provisions of the law.”*

***Hence, without thus identifying the proper legal framework for the motion, an application is liable to be struck out.”***

Further, in ***the County Executive of Kisumu***, it was held that an applicant seeking extension of time, cannot rely on the provisions of the Civil Procedure Code to submit that time does not run between 19<sup>th</sup> December to 21<sup>st</sup> January. The Court of Appeal Rule cannot also be imported for matters before the Supreme Court. Reference has to be made to the Supreme Court Rules, 2020 and not any other rules of procedure.

**[20]** Under the Supreme Court Rules, 2020, the computation of time for any action is provided as:

***15. (1) The computation of time for any action under these Rules shall be in accordance with—***

***(a) any timeline provided for under the Constitution;***

***(b) section 57 of the Interpretations and General Provisions Act;***

***(c) any directions of the Court.***

**[21]** It therefore follows that the applicant ought to have lodged its Notice of Appeal on or before the 4<sup>th</sup> of January 2021. It did not, and neither has it sought

extension of time to file its Notice of Appeal out of time. Consequently, there is no valid Notice of Appeal on record and given the jurisdictional importance of a Notice of Appeal as stated in the **Nicholas Salat case**, this motion for extension to file an appeal out of time is an act in futility. For even if the Court were to be persuaded, upon consideration of the motion on its merit, and be inclined to extend time for filing of the appeal, there is no foundation (Notice of Appeal) upon which such an appeal would be premised.

**G. ORDERS**

**[22]** Consequently, we make the following Orders:

- (i) The Notice of Motion dated 25<sup>th</sup> February 2021 is dismissed.**
- (ii) The applicant shall bear the costs of this application.**

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> Day of July, 2021.**

.....  
**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE-PRESIDENT**  
**OF THE SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR,  
SUPREME COURT OF KENYA**

