



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki & Ouko, SCJJ)

PETITION NO. 19 (E027) OF 2021

— BETWEEN —

THE SENATE 1ST APPELLANT
THE SPEAKER OF SENATE 2ND APPELLANT
SENATE MAJORITY LEADER 3RD APPELLANT
SENATE MINORITY LEADER.....4TH APPELLANT

-AND-

THE SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT
THE NATIONAL ASSEMBLY..... 2ND RESPONDENT
THE COUNCIL OF COUNTY GOVERNORS..... 3RD RESPONDENT
THE ATTORNEY GENERAL.....4TH RESPONDENT
KENYA MEDICAL SUPPLIES AUTHORITY.....5TH RESPONDENT
INSTITUTE FOR SOCIAL ACCOUNTABILITY.....6TH RESPONDENT
MISSION FOR ESSENTIAL
DRUGS AND SUPPLIES.....7TH RESPONDENT
KATIBA INSTITUTE.....8TH RESPONDENT
PHARMACEUTICAL SOCIETY OF KENYA9TH RESPONDENT
ELIAS MURUNDU.....10TH RESPONDENT
THE COMMISSION ON REVENUE ALLOCATION....11TH RESPONDENT

Being an application for enlargement of time to file a Notice of Cross Appeal out of time in Petition 19 (E027) of 2021

Representation:

Mr. Okong'o Omogeni SC, Mr. Letangule and Ms. Mercy Thanji for the appellants (Letangule & Co. Advocates)

Mr. Paul Muite SC and Mr. Issa Mansur for the 1st & 2nd respondents (Issa & Company Advocates)

Mr. Simiyu and Ms. Munyao for the 3rd respondent (Manyonge Wanyama & Associates LLP)

Mr. Emmanuel Bitta for the 4th respondent (Office of the Attorney General)

Mr. Ochiel Dudley, Ms. Nkonge and Mr. Ray Odanga for the 6th & 8th respondents (Katiba Institute)

Ms. Omamo for the 7th respondent (Omamo & Co. Advocates)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion dated 30th January, 2023 and filed on 31st January, 2023 by the 1st and 2nd respondents, pursuant to Articles 50 and 159 of the Constitution as well as Rules 3(2), 3(5), 15(2), 31(6) and 47(2)(b) of the Supreme Court Rules, 2020 seeking leave of the Court to enlarge the time for filing of a notice of cross-appeal; seeking that their notice of cross-appeal annexed to the application be deemed as duly filed, served and properly on record; and that upon grant of the foregoing prayers, the 1st and 2nd respondents be permitted to rely in support of their cross-appeal, on the record of appeal lodged by the Petitioners; and

[2] UPON perusing the affidavit sworn by Samuel Njoroge, the Clerk of the National Assembly on 30th January, 2023 in support of the Motion that gives a detailed account of the circumstances that necessitated the aforesaid motion and;

[3] UPON considering the written submissions by the 1st and 2nd respondents filed on 31st January, 2023, wherein they explain that following the changes in the National Assembly administration after the 9th August, 2022 General Elections, a decision was taken to challenge only a part of the judgment of the Court of Appeal that, which in their view, purports to expand the legislative mandate of Senate to cover a category of Bills not envisaged under Articles 109 to 114 of the Constitution; that as a result of that decision, the operations and legality of the Parliamentary Service Act has been challenged in **H.C. Constitutional Petition No. E469 of 2022, Okiya Omtatah Okoiti v. The National Assembly & 3 Others**, to which the National Assembly has raised an objection on account of the pendency of this appeal; and

[4] UPON NOTING that the appellants in their replying affidavit and written submissions of 1st February, 2023 are opposed to the application on the grounds that the right to appeal is not absolute; that under the Supreme Court Rules, 2020 a party is permitted to file a cross appeal either 30 days after the main appeal has been served on that party or 30 days before the hearing of the appeal; that on the occasions the matter was mentioned before the Deputy Registrar, including 2nd December, 2022, the 1st and 2nd respondents never indicated or expressed their intention to file a cross-appeal; that since the 13th Parliament was inaugurated, the 1st and 2nd respondents have had ample time to lodge both the notice and cross-appeal; that the 1st and 2nd respondents' allegation that they have only realised the need of filing the intended cross appeal is deceitful and an afterthought; that their conduct is aimed at circumventing the Court's directions as evinced by their sneaked-in submissions dated 20th January, 2023 despite the Deputy Registrar's directions of 2nd December, 2022 that no further documents shall be filed after that date; and that the Court should decline to exercise its discretion in favour of the 1st and 2nd respondents; and

[5] UPON FURTHER noting that the 3rd respondent in its grounds of opposition and written submissions are equally opposed to the application on the grounds that Rule 47(2)(b) of the Supreme Court Rules, 2020 provides, in mandatory terms for the filing of a cross appeal within 30 days of service of the appeal or within 30 days before the hearing of the appeal; and that the delay to lodge the intended cross-appeal is unreasonable and intended to scuttle the hearing of the main appeal; and

[6] ALSO CONSIDERING the 6th and 8th respondents' written submissions dated 1st February, 2023 in which they too oppose the application on similar grounds as the 3rd respondent;

WE NOW THEREFORE OPINE as follows:

[7] RESTATING the principles governing applications for extension of time as enunciated by the Court in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others*; SC Application No. 16 of 2014; [2014] eKLR; that time is extended at the unfettered discretion of the court based on the unique circumstances of each case; that the burden is upon the applicant to explain to the satisfaction of the court the reasons for delay; and whether there will be any prejudice suffered by the opposing parties if the extension is granted, among other considerations; and

[8] UPON APPLYING these strictures to the rival submissions; on the one hand that the delay was inordinate and without any justifiable reasons, and on the other hand that the changes in the administration of the National Assembly was reason enough in explaining the delay; and

[9] UPON EXAMINING Rule 47(2)(b) of the Supreme Court Rules, 2020, on the lodgement of a memorandum of appeal and record of appeal, and being satisfied, in the given circumstances, that the delay involved does not qualify to be described as inordinate and the reasons given are plausible; and

[10] **FURTHER**, the public interest nature of this dispute militates against shutting out or throwing out of the seat of justice any party in the resolution of this dispute, and being satisfied that no party will be prejudiced if the time is extended;

[11] **IN THE CIRCUMSTANCES**, we are minded to consider granting the application, while reminding the 1st and 2nd respondent that, by Rule 47(2)(b) aforesaid, they are required to lodge eight copies of the memorandum of appeal and record of appeal and not to rely on other parties' pleadings as they have prayed.

We also reiterate the caution we issued in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* (supra), that it is highly irregular and presumptive in this Court to file documents out of time without leave and thereafter seek court's stamp of approval to deem them to be regularly on record.

It is in the same spirit that we reject the submissions filed out of time and without prior leave by 1st and 2nd respondent on 20th January, 2023 as well as those of the 4th respondent filed on 26th January, 2023. They are, in our words in *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* (supra), "a nullity and of no legal consequence". We follow the course we adopted in that case, and expunge those sets of submissions from the record.

[12] **REITERATING** the public interest nature of this dispute, we exercise our inherent powers under section 3A of the Supreme Court Act and Rule 3(5) of the Supreme Court Rules to excuse the foregoing infractions by the 1st 2nd and 4th respondents. They are instead granted leave to exchange and file afresh their written submissions.

[13] **SINCE** the award of costs is discretionary as this Court explained in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, no party, in the instant case, is at fault hence we make no orders as to costs.

[14] In the circumstances, we allow this application and make the following orders;

- a. *The application dated 30th January, 2023 and filed on the 31st January, 2023 is hereby allowed.*
- b. *The 1st and 2nd respondents will file and serve the notice, memorandum and record of appeal in compliance with Rule 47 of the Supreme Court Rules within thirty (30) days from the date hereof.*
- c. *The 1st, 2nd and 4th respondents will file and serve afresh their written submissions within fourteen (14) days from the date of this ruling.*
- d. *There shall be no orders as to costs.*

It is so Ordered.

DATED and DELIVERED at NAIROBI this 17th Day of February, 2023.

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M. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

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

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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA