



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
(Coram: Mwilu; DCJ & VP, Ibrahim, Wanjala, Lenaola & Ouko SCJJ)

PETITION (APPLICATION) NO. 27 (E031) OF 2022

BETWEEN

MARIAM SAIDI MWAMBORA 1ST APPLICANT
BENSON KITETO.....2ND APPLICANT
ROSEBUD STELLA MUBIRU.....3RD APPLICANT
KOON CHOO & CHRISTINE LYN JOGSCHAT.....4TH APPLICANT
ANTONY BWIRE AKUKHA.....5TH APPLICANT
JOSEPH ONG'UTI.....6TH APPLICANT
STEPHEN K. NDEGWA.....7TH APPLICANT
SAMUEL G. MOMANYI.....8TH APPLICANT
DANIEL O. OМУYA.....9TH APPLICANT
BADIAH G. MBUGUA.....10TH APPLICANT

AND

SPIRE PROPERTIES (K) LIMITED & 50 OTHERS.....RESPONDENTS

(Being an application for extension of time to file a Notice of Appeal and Record of Appeal from the Judgment of the Court of Appeal at Mombasa (Kairu, Msagha & Nyamweya JJA) delivered on 29th July 2022 in Civil Appeal No. 135 of 2018)

Representation:

Mr. Kongere for the applicants
(Musa Boaz & Thomas Advocates)

Mr. Kashindi for the 1st respondent
(Munyao, Muthama & Kashindi Advocates)

Mr. Gakuo for the 2nd respondent
(Muturi Gakuo & Kibara Advocates)

Ms. Murage for the 5th - 51 respondents
(Gikandi & Co Advocates)

RULING OF THE COURT

[1] UPON reading the Notice of Motion by the Applicants dated 17th October 2022 and filed on 19th October 2022, brought pursuant to Rules 15 and 31 of the Supreme Court Rules, 2020 seeking orders that;

1. *The time for lodging an appeal against the judgment and orders of the Court of Appeal delivered on 29th July 2022 in Mombasa Court of Appeal Civil Appeal No. 135 of 2018 as consolidated with Civil Appeal No. 139 of 2018 be extended.*
2. *Consequent to 1 (above), the Notice of Appeal dated 15th August 2022 and filed on the same date be deemed as having been filed within such extended time.*
3. *The Petition of Appeal and Record of Appeal, both dated 13th September 2022, filed as Supreme Court Petition No. EO31 of 2022, subsequent to the Notice of Appeal dated 15th August 2022 be deemed to have been filed in time; and*

[2] UPON considering the grounds in support of the application and the averments contained in the supporting affidavits of **Mariam Saidi Mwambora** and Counsel **Kongere Billy** both sworn on 18th October 2022 wherein they aver that the Notice of Appeal filed on 15th August 2022 was filed out of time as the judgment of the Court of Appeal intended to be challenged was delivered on 29th July 2022, therefore, it ought to have been filed on or before 12th August 2022; that the delay was occasioned by the applicants' counsel's involvement in offering legal services with regard to election preparedness, election management, and election results transmission; that the counsel's mistaken computation of time arose from the erroneous view that July had thirty (30) days as opposed to thirty-one (31) days; and that the apparent mistake only occurred to counsel once it was pointed

out to him in the Replying Affidavit of Spire Properties Limited (K), the 1st respondent; and

[3] UPON considering the applicants' submissions dated 17th October 2022 and filed on 19th October 2022, where they submit that the Supreme Court has the power to extend time pursuant to Rule 15 (2) of the Supreme Court Rules, 2020 and that the delay in filing the Notice of Appeal was due to the applicants' counsel's mistaken belief that the deadline for filing the Notice of Appeal was 15th August 2022 instead of 12th August 2022 which was the due date; and

[4] UPON FURTHER considering the applicants' submissions in opposing the 1st and 2nd respondents' Preliminary Objections where they argue that an application for extension of time can and should be heard before the Preliminary Objections; that the courts below interpreted and applied Article 162 (2) of the Constitution in resolving the dispute before them and reached divergent views that form the substratum of the appeal before this Court; that Section 12 of the Employment and Labour Relations Court Act, 2011 which was referred to by the High Court and the Court of Appeal is a normative derivative of Article 162 (2) of the Constitution, therefore, it could not be interpreted by either court without appreciating the limit of Article 162 (2) of the Constitution; and

[5] ALSO NOTING the 1st respondent's Preliminary Objection on jurisdiction and submissions wherein it contends that this Court lacks jurisdiction to hear and determine the Petition and that the Preliminary Objection dated 6th October 2022 in regard to the substantive appeal raises pure points of law and should be dealt with at the first instance before this Court can consider the application for extension of time dated 17th October 2022; and

[6] FURTHER NOTING Transnational Bank Limited's, the 2nd respondent's replying affidavit sworn *by Isaac Onyango* on 25th October 2022 wherein he avers that the application is fatally defective, ill-conceived, lacks merit, and should be struck out for the reasons that;

- i. The Notice of Appeal was filed out of time after the lapse of 14 days contrary to Rule 36 (1) of the Supreme Court Rules, 2020, and the applicants' application for extension of time to file a Notice of Appeal out of time is an afterthought aimed at misleading the Court and that counsel only became aware of his failure to file the Notice of Appeal on time upon being served with the 1st respondent's replying affidavit;
- ii. The applicants' counsel's casualness in lodging the appeal cannot be cushioned and sanctified by this Court's inherent powers to extend time and that extension of time is not an automatic right of a party but an equitable remedy that can only be granted to a deserving party; and
- iii. The applicants have not demonstrated sufficient reasons for the delay in filing the Notice of Appeal out of time; and

[7] HAVING CONSIDERED the application, preliminary objections, responses, and submissions before us, **WE NOW OPINE** as follows:

- i. According to Rule 15 (2) of the Supreme Court Rules, 2020 this Court has unfettered discretion to extend time limited by the Rules or by any of its decisions. Furthermore, Rule 36 (1) stipulates that a person who intends to appeal to the Court shall file a Notice of Appeal within fourteen (14) days from the date of judgment or ruling which is the subject of the appeal.
- ii. This Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*,

SC Application No. 16 of 2014; [2014] eKLR established the principles to be considered in determining an application for extension of time as follows:

- a) *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;*
 - b) *a party seeking extension of time has the burden of laying a basis to the satisfaction of the court;*
 - c) *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*
 - d) *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
 - e) *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
 - f) *Whether the application has been brought without undue delay; and*
 - g) *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.*
- iii. It is evident from the record that the judgment of the Court of Appeal was delivered on 29th July 2022. Therefore, the applicants ought to have lodged the Notice of appeal by 12th August 2022. The applicants have admitted that indeed they filed the said Notice three (3) days after the expiry of the stipulated time. It is our considered view that the applicants have not satisfactorily explained the reasons for that delay and as a consequence, we disallow the application for extension of time. The explanation that counsel was busy elsewhere does not meet our favour at all as it is escapist and bare. Indeed, the delay was only discovered after the 1st respondent raised it. The explanation is therefore also a clear afterthought.

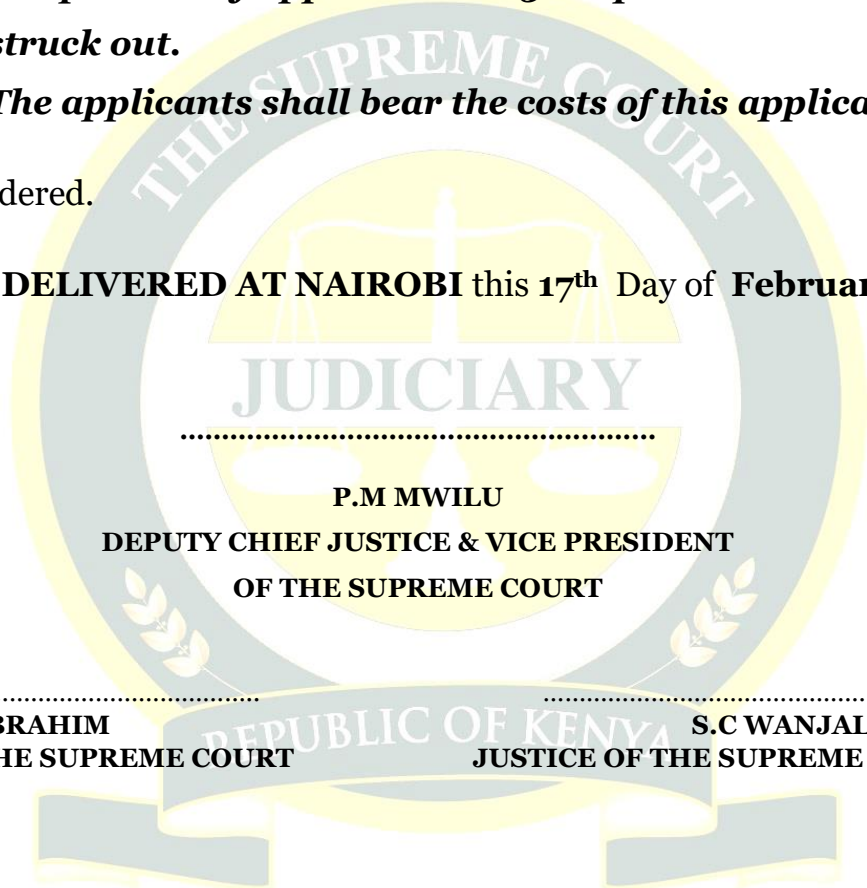
iv. Having disallowed the application for extension of time, it follows that there is no lawful or proper petition before this Court and the preliminary objections cannot also attract our attention.

[8] ACCORDINGLY, we order as follows:

- a. The Notice of Motion dated 17th October 2022 is hereby dismissed.***
- b. The petition of appeal dated 13th September 2022 is hereby struck out.***
- c. The applicants shall bear the costs of this application.***

[9] It is so ordered.

DATED and DELIVERED AT NAIROBI this 17th Day of **February, 2023**



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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

.....
I. LENAOLA
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