

REPUBLIC OF KENYA

IN THE SUPREME COURT AT NAIROBI

(Coram: Maraga CJ & P, Ibrahim, Ojwang, Wanjala & Lenaola SCJJ)

CIVIL APPLICATION NO 13 OF 2017

COUNCIL OF GOVERNORS APPLICANT

VERSUS

THE INSPECTOR GENERAL OF NATIONAL

POLICE SERVICE 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

THE NATIONAL ASSEMBLY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

(An Application for leave to file an Appeal out of time against the Judgment of Hon. Justices Musinga, Gatembu & Murgor, JJA delivered at Nairobi Court of Appeal on the 16th day of June in Civil Appeal No. 269 of 2015)

RULING

[1] The Applicant moved the Court on 11th July 2017 via a Notice of Motion Application dated 6th July 2017 seeking the following orders:

- (1) *That the Court be pleased to extend time to file an appeal to this Court against the Order and Judgment dated 16th June 2017 of the Court of Appeal sitting in Nairobi in Civil Appeal No. 269 of 2015; **Council of Governors versus The Inspector General of National Police Services and 2 others;***
- (2) *That the costs be in the cause.*

[2] The Notice of Motion is predicated on the grounds in the body of the application, to wit, that *Civil Appeal No. 269 of 2015* was heard on 22nd February, 2017 and judgment reserved for delivery on 5th May, 2017. That the Applicant was notified that the judgment was not ready for delivery on 5th May, 2017 and that it was re-scheduled for delivery on 12th May, 2017. The judgment was not delivered on 12th May, 2017 and there was no subsequent notification or indication as to when the judgment was to be delivered. Further, that upon inquiry from the Court of Appeal Registry, on 3rd July, 2017, the Applicant was notified that the judgement had been delivered on 16th June, 2017 and a copy availed to them. Hence, that failure and delay in lodging the Intended Appeal was wholly attributable to the failure by the Court of Appeal Registry in issuing the notice of delivery of judgment. Lastly, that the Intended Appeal is arguable and has overwhelming chances of success, and it is in the interest of justice that leave be granted as prayed. It is also urged that the Respondents will suffer no prejudice if the said leave is granted.

[3] The Application is supported by an affidavit sworn on 7th July 2017 by one, Makena Kaburu, an advocate with *M/S Manyonge Wanyama & Associates Advocates*, the firm on record for the Applicant. The averments in the affidavit buttress the grounds in support of the Application and attached to the said affidavit is a copy of a letter written to the Registrar of the Court of Appeal dated 3rd July 2017 inquiring on the judgment date.

[4] The Applicant filed its submissions dated 6th July, 2017 on 11th July, 2017 together with a List and Bundle of Authorities. It submits that under Rule 53 of the Supreme Court Rules, the Court has discretion to extend the time to do any act required by the Rules. It urges that the failure to comply with the Rules was wholly attributable to the Court of Appeal registry, which failed to inform them of the date of delivery of the judgment. It submits that the application meets the threshold set in the case of ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 Others*** (2014) eKLR.

[5] The 3rd Respondent filed its Grounds of Opposition on 8th February, 2018 opposing the application on the ground that the Applicant had not produced or shown any proof to this Honourable Court that the firm of advocates on record for the Applicant was not notified of the date of delivery of judgment. The 3rd Respondent filed its submissions dated 8th February, 2018 on even date. It submits that they were served with a Notice of Delivery of Judgment on 12th June, 2017 to attend Court for the delivery of the judgment on 16th June, 2017 and that through its advocate on record, it attended to the delivery of the judgment on 16th June, 2017 but that there was no appearance by the Applicant.

[6] It is the 3rd Respondent's submission that the Applicant only stated that it made inquiries to the Registrar of the Court of Appeal through a letter dated 3rd July, 2017 upon which they were informed that judgment had been delivered on 16th June, 2017. However, that the Applicant has not shown or indicated whether they received any response to their inquiries and in any event that, it should have followed up for a written response of its inquiry for the benefit of this Court. Hence it urges that the principles in the *Nicholas Salat* case have not been met by the Applicant.

[7] As noted in the Court of Appeal judgment, the case as against the 1st Respondent was withdrawn by the Appellant/Applicant. We also note that before this Court, there are no responses from the 2nd and 4th Respondents.

[8] Having perused the Application and the grounds in support therein, together with the Supporting Affidavit and the rival submissions of the parties, it is the Court's considered opinion that the Application has fallen short of the threshold for extension of time as outlined in the *Nicholas Salat* case. The Applicant's case is that it did not know of the date of delivery of the judgment as it received no Notice of Delivery of the Judgment from the Court Registry. While the 3rd Respondent avers that it was served with the said Notice, the Court finds its

assertion not helpful to the Court. It does not attach the Notice it was served with or indicate how the Notice was conveyed to it for the perusal of the Court.

[9] Be that as it may, the onus is on the Applicant to demonstrate that it has made a case to warrant this Court's exercise of its discretion and grant the extension sought. A number of pertinent questions thus require answers, to wit, how did the Applicant learn about the delivery of the judgment? It is submitted that it was upon inquiry from the Registry on 3rd July 2017. The question that this Court is grappling with is: how was this inquiry done? Was it orally or by the said letter dated 3rd July 2017? If it was orally, why was there need for a letter? It could be argued that the letter was meant to solicit a written explanation from the Registry. If this was the case, the Applicant has not availed the response to its letter by or from the Registry. Given what was at stake, the need to seek extension of time to file an appeal out of time, we believe such a move was essential. With this lacuna, the Applicant's submission is clouded with ambiguity.

[10] Further, while the Applicant submits that the letter, which is dated 3rd July, 2017 was received on the even day by the Court of Appeal Registry, the copy attached bears a stamp dated 4th July 2017. Hence, while the Applicant submits that it made the inquiry on the 3rd July 2017, the letter was received on 4th July, 2017. No explanation is given for this contradiction. The Applicant's assertion on this issue, uncorroborated as it is, also casts aspersions on the veracity of the Applicant's account.

[11] The Court also notes that, while the Applicant submits that he learnt of the delivery of the Judgment on 3rd July 2017 and was issued with a copy of the same, the present Application was filed on 11th July 2017. Even if this Court was inclined to excuse the delay period before 3rd July 2017 on account of the 'purported Registry miscommunication', no explanation is given for the delay from 4th July 2017 to 11th July 2017. It is trite law that in an application for extension of time, the

entire period of the delay must be outrightly stated and the delay also explained to the satisfaction of the Court.

[12] Lastly, while the Applicant seeks extension of time to file an appeal, it does not indicate whether the Intended Appeal is to be filed as of right under Article 163(4)(a) of the Constitution or upon certification that matters of general public importance are involved under Article 163(4)(b) of the Constitution. In the ***Nicholas Salat*** case, the Court advised that it is pragmatic that in an application for extension of time to file an appeal out of time, one needs to attach a draft of the Intended Petition of Appeal for perusal of the Court to buttress the arguability aspect(s) of the Intended Appeal. This was not done in the present case.

[13] Curiously, in his Notice of Motion Application, the Applicant seeks only one substantive prayer: *extension of time to file an appeal to this Court*. We note however that there is no Notice of Appeal filed in this matter and there being no prayer for extension of time to file a Notice of Appeal, we see difficulties in how the matter will progress beyond the mere blanket prayer for “extension of time” to file an appeal. Parties are bound by their pleadings and the Court will not grant reliefs not sought by litigants before it. Hence, with no prayer or an Application, for extension of time to file a Notice of Appeal out of time, it will be in vain for this Court to grant extension of time to file an Appeal where no Notice of Appeal has been filed given the centrality of a Notice of Appeal as a jurisdictional prerequisite (***See Nicholas Salat case***).

[14] The upshot is that for the foregoing reasons, the Court finds that the Application is without merit and ought to be dismissed, which it hereby does with no order as to costs.

Orders accordingly

DATED and DELIVERED at NAIROBI this 8th Day of November, 2018

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D.K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S.C. WANJALA
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 AT NAIROBI