REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga CJ & P; Mwilu DCJ & V.P; Ibrahim, Wanjala & Njoki, SCJJ)

APPLICATION NO 28 OF 2019

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION .... APPLICANT

AND

CHRYSANTHUS BARNABUS OKEMO .... 1ST RESPONDENT

SAMUEL KIMUNCHU GICHURU .... 2ND RESPONDENT

THE ATTORNEY GENERAL .... 3RD RESPONDENT

CHIEF MAGISTRATE COURT .... 4TH RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION .... 5TH RESPONDENT

(Being and application for extension of time to file a Record of Appeal out of time to appeal the Judgment of the Court of Appeal (E.M. Githinji, H.M. Okwengu and J Mohammed, JJA) dated 2nd March 2018 in Civil Appeal No. 5 of 2016 consolidated with No. 23 of 2016)

RULING

I. INTRODUCTION

[1] Via a Notice of Motion application dated 16th September 2019 and filed on *17th September 2019*, the Director of Public Prosecutions (DPP) sought the following orders from this Court:

(i) *THAT the appellant/applicant be granted leave to file the record of appeal out of time;*

(ii) *THAT the honourable Court be pleased to admit the applicant's intended record of appeal out time; and*

(iii) *THAT the Court grants such other orders as it may deem fit and just to grant.*

[2] The application was premised on summarized grounds: *that the delay was not deliberate nor intended; that the Applicant was unable to lodge the record of appeal within time mainly because it was unable to obtain the record of proceedings and judgment from the Court of Appeal and the High Court within the prescribed time; that this matter raises salient constitutional issues that would definitely define the relations between the office of the DPP and that of the Attorney General in dealing with matters of Extradition and Mutual Legal Assistance; that it is in the public interest that the application be allowed as matter may potentially impact the country's relationship with the Jersey authorities and international partners; that the Applicant has demonstrated utmost desire to have the matter concluded expeditiously having immediately lodged the notice of appeal after the judgment was delivered; and that it is in the interest of justice that the application be granted as the matter is of great public importance and interest, and Court should consider and settle the jurisprudential questions raised.*

[3] The application was supported by the affidavit of Catherine Mwaniki, a Senior Assistant Director of Public Prosecutions with the Applicant. Her averments reiterated the grounds in support of the application. She annexed two letters of the Applicant addressed to the Registrar Court of Appeal, requesting for photocopies of all the applications, responses, proceedings and judgment to enable it prepare it appeal to this Court.

II. PARTIES' SUBMISSIONS

[4] The ***DPP/Applicant*** reiterated the grounds in support of the application in its written submissions filed on 23rd September 2019. It submitted that the Court of Appeal judgment was delivered on 2nd March 2018 and it promptly filed a *Notice of Appeal on 12th March 2018*.

[5] That in the intervening period the Applicant filed an application for stay of the Court of Appeal decision in this Court, being *Supreme Court Application No.8 of 2018,* whereupon an order of *'stay of the Court of Appeal decision pending the hearing determination of the appeal'* was granted by a single Judge on 8th May 2018. That that application is pending determination before the Court, parties having filed their respective submissions. That meanwhile, the Applicant received the Court of Appeal proceedings in the cause of the pendency of that *Supreme Court Application No.8 of 2018* and was waiting for directions in that matter. That having obtained the necessary documents, it is now ready and willing to file the same at the earliest as may be directed by this Honourable Court.

[6] The DPP urged that the intended appeal is not frivolous as it raises salient constitutional issues and engenders issues of great public interest. That if the Court of Appeal's decision is allowed to stand the Applicant's discharge of his mandate will seriously be affected. It set out the mandate of the DPP under Article 157(6) of the Constitution and the Office of the Director of public Prosecution Act, 2013 No. 2 of 2013 in contra distinction to that of the Attorney General under Article 156(4) of the Constitution in urging that the Applicant's mandate ought not to be affected, as it has happened on the basis of the Court of Appeal decision. It thus urges the Court to exercise its discretion and extend time.

[7] The ***1st and 2nd Respondents*** filed their written submissions on 11th December 2019 and 27th September 2019 respectively. Though filed separately, their submissions raise similar issues. First, they argued that under Rule 33(1) of this Court Rules, 2012 the Applicant ought to have filed its appeal within 30 days of the filing the Notice of Appeal, that is, by 13th April 2018. That no appeal had been filed by 16th September 2019, the date of filing of this application for extension of time (constituting a delay of 1 year, 5 months, 3 days, equivalent to 521 days). That the failure to file that appeal automatically renders the Notice of Appeal withdrawn by virtue of Rule 37 (1) and the Applicant has not sought leave to resuscitate the said Notice of Appeal. They cited the Court of Appeal

decision in ***Mae Properties Limited -vs- Joseph Kibe & AnothEr*** [2017] eKLR in urging that upon the lapse of the prescribed time within which to file an appeal, the Notice of Appeal dies a natural death.

[8] Accordingly, it was contended that this Court has no jurisdiction to grant the orders sought as the application collapses as there is no valid Notice of Appeal on record, a Notice of Appeal being a jurisdictional pre-requisite as per the case of ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others*** [2014] eKLR.

[9] Secondly, as regards the delay, while the Applicant explained that it was occasioned by the delay in getting proceedings from the superior courts, the 1st Respondent argued that the Court notes that the Applicant waited for 316 days to request for a record of the proceedings via letter dated 22nd January 2019, and made a follow-up after 191 days via letter dated 1st August 2019. That this is abundant testament of the Applicant's indefensible indolence. It was thus, submitted that the delay is inordinate and inexcusable. The 2nd Respondent particularly submitted that there is no certificate of delay or other document from the Superior courts lending any credibility to the allegation of delay on the part of the courts.

[10] Further, that because of the Applicant's delay in instituting the appeal, the noose of judicial uncertainty continues to precariously hang over the respondents, 2 years after delivery of the Court of Appeal decision, which is not only unfair, but also violates their non-derogable right and legitimate expectation that "justice shall not be delayed" guaranteed by Articles 50(2)(e) as read with 159(2)(b) of the Constitution.

[11] It was further urged that justice must be done to both parties and the Court should not be apathetic so as to tamper with legal rights acquired. That while Rule 53 grants the Court jurisdiction to extend time, the Court should decline to exercise discretion in favour of the Applicant considering that even its counsel has not stated that the Applicant exercised due diligence to get the proceedings from the Court of Appeal to no avail. The 2nd Respondent

reiterated that condonation of delay in filing a record of appeal is not a matter of right for an applicant, but a plausible and satisfactory explanation for the delay is the key that unlocks the court's flow of discretionary favour. They thus urged that the application be declined.

III. ANALYSIS

[12] This is an application for extension of time within which to file a record of appeal out of time. Outrightly, we would like to state that the Applicant has never filed any appeal in this matter. As such, there is no petition of appeal filed in this matter. This clarification is important since in seeking extension of time to file a record of appeal, the presumption is that there is already on record a petition of appeal, which is not. As per Rule 38(2) of the Supreme Court Rules, 2020, a record of appeal is just but one component of an appeal to this Court, which appeal include: a petition of appeal, a record of appeal, and the prescribed fee. We therefore invoke Article 159(2)(d) and deem this application as being one for filing an appeal out of time.

[13] The law on such applications for extension of time was settled in the case of ***Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others*** [2014] eKLR. The principles therein have been re-stated by the Court numerous times in subsequent matters. At the core of these principles is the fact that an application like this one calls for the Court's exercise of its discretion. As per the ***Nicholas Salat*** case, in exercising that discretion the Court is guided as follows, that:

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.*

[14] Applying these principles to the current matter, the following issues calls for determination:

> *(a) Whether the application for extension of time should be entertained given that the Notice of Appeal is 'dead' and no prayer for its resuscitation has been made;*
>
> *(b) Whether there has been inordinate delay and if yes, whether there is a satisfactory explanation;*
>
> *(c) Whether the Court should exercise its discretion to extend time.*

(a) Whether the application for extension of time should be entertained given that the Notice of Appeal is 'dead' and no prayer for its resuscitation has been made;

[15] Before determining this issue, we would like to observe that when this application was filed, it was under the Supreme Court Rules, 2012. However, the same have now been repealed by the Supreme Court Rules, 2020. While the numbering of some of the rules has changed, the content remains the same. Consequently, while in making their case the Respondents cited Rule 37(1) of the 2012 Rules, the same rule has now been re-produced as Rule 46(1) in the 2020 Rules, which provides:

"Where a party has lodged a notice of appeal, but fails to institute the appeal within the prescribed time, the notice of Appeal shall be deemed to have been withdrawn and the Court may on its own motion, or on application by any party, make such orders as may be necessary."

[16] It is on this basis that it was urged that given the period of delay in this matter, the Notice of appeal lapsed and/or died. That as such, this application for extension of time does not lie before this Court as even if it is granted, there will be no basis upon which a valid appeal may be filed, as a notice of appeal is a jurisdictional pre-requisite.

[17] It is unfortunate that the DPP did not file any response or further submissions on this issue as raised by the Respondents. This is the first incident on which we do not hesitate to fault the DPP's conduct on how he has generally pursued this matter. When such a fundamental jurisdictional question was raised, it behoved the DPP as the applicant whose application risked being struck out for want of jurisdiction, to have exercised some diligence and filed a reply to the same. Be that as it may, this Court is not handicapped for lack of a reply from the Applicant on the issue. It is also trite law that a jurisdictional challenge is a legal question which even the Court itself can raise *suo motto*, hence the Court may not need prompting and/or urging by parties.

[18] Fortunately, the law as regards the lapse of a notice of Appeal is not novel. Both the Court of Appeal and this Court have already dealt with the issue. The Respondents correctly cited the Court of Appeal decision in ***Mae Properties Limited -vs- Joseph Kibe & Another*** [2017] eKLR in urging that a notice of appeal dies a natural death upon expiry of 60 days (in regard to appeal to the Court of Appeal). Unfortunately, the respondents did not cite the entire gist of that Court of Appeal decision. As evident in the case of ***Geoffrey Matoke v Moraa Masare & 4 others*** [2019] eKLR, the Court of Appeal proceeded in the ***Mae Properties*** case to state what the implication of extending time is thus:

"16. In Mae Properties Limited - v - Joseph Kibe & another [2017] eKLR, this Court expressed as follows in relation to application of Rules 82 and 83 of the Rules of this Court:

> *It is safe to say, therefore, that a notice of appeal dies a natural death after the expiry of 60 days unless its life should be sooner extended by lodgment of the appeal within 60 literal days, or such longer time as may still amount to 60 days by operation of the proviso to Rule 82(1) on exclusion**. It may also be resuscitated or vivified by an order extending time for the lodging of the appeal properly made by a single Judge on a Rule 4 application.** Absent those supervening circumstances, the notice of appeal dies in the eyes of the law. Its interment may then take the form of an order of the court suo motu, on its own motion and at its sole discretion, presumably with neither notice nor reference to the parties. The Court has this inherent power to make the formal order of the notice having been deemed as withdrawn. It is a power meant to unclog our system and rid it of trifling notices of appeal lodged with no intention to lodge appeals. And it is a power that the Court ought to use vigilantly and more robustly as a regular house-cleaning measure."*

[19] The position becomes clearer as stated by this Supreme Court. Faced with a similar case in ***Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others*** [2015] eKLR it stated as follows***:***

> ***"[59] It was urged by counsel for all the respondents that under Rule 37(1) of the Supreme Court Rules, if an appeal is not filed within 30 days of filing the notice of appeal, the notice of appeal is deemed to have been withdrawn; so in this case, the 30 days having lapsed, the notice of appeal was to be deemed withdrawn, leaving no basis upon which an***

> ***application for extension of time to file an appeal could be sustained.***
>
> ***...***
>
> ***[61] So it is argued that there is no longer any notice of appeal, as the current one is deemed withdrawn. It is clear to us that Rule 37(1) is not to be read in isolation. It has to be read in conjunction with other rules, particularly Rule 53 which provides that "The Court may extend the time limited by these Rules, or by any decision of the Court". It means that, where the time contemplated under Rule 33(1) for filing the appeal lapses, and there is no action on the part of the litigant, then Rule 37(1) sets in. However, where time thus lapses, but there is a satisfactory explanation of the inaction, then the Court, guided by Rule 53 (and as a Court of equity), has the discretion to extend time.***
>
> ***[62] In extending time to allow the filing of an appeal out of time, the Court essentially breathes life into the notice of appeal which had lapsed, and it is deemed to be still in force. This is what the law contemplates, in providing for application(s) for extension of time to file an appeal out of time. With such extension of time, the competence of the notice of appeal is reinstated.***

[20] It therefore follows that while it is true that failure to file an appeal within the prescribed time upon filing the notice of appeal renders the notice of appeal 'dead' the law does not contemplate that an application has to be first made to 'resuscitate' such a notice before another application for extension of time to file the appeal out of time is made. The Court in exercising its discretion to extend time under Rule 15(2) of the Supreme Court rules, 2020 breathes life into that notice of appeal. Consequently, the Respondents' contention that the application is incompetent on the basis of a lapsed notice of appeal is dismissed.

(b) Whether there has been inordinate delay and if yes, whether there is a satisfactory explanation;

[21] The delay in this matter cannot be overemphasized. The 1st Respondent was apt when he computed it as being 521 days by the time of filing this application. What needs to be established is whether the Applicant has given a satisfactory explanation for that delay. It is trite that the entire period of delay has to be stated and satisfactorily explained. The Applicant states that the same was occasioned by the delay in getting copies of the superior court's proceedings. It also alluded to the fact that it was awaiting this Court's directions in an application for stay that it had filed, *Supreme Court Application No. 8 of 2018*. Is this explanation plausible?

[22] We find the DPP's explanation on the delay unsatisfactory. First, their application for stay which they had filed had and has no correlation to an application for extension of time to file an appeal out of time. There is no way directions in that matter, if any, would have impacted the filing of an appeal. It cannot be that the filing of an appeal is predicated on directions in an application for stay. That application will be dealt with separately save to say that we find the DPP's attempt to use the delay in determination of that matter as a basis of his delay to file an appeal disingenuous.

[23] As regard the delay to get proceedings from the High Court and Court of Appeal, we again find that explanation unsatisfactory. We agree with the Respondents that if that was the case, a certificate of delay, especially for such a long delay, would have gone a long was in buttressing the DPP's case. We agree with the Respondents that it took the Applicant 316 days for it to request for the record of proceedings from the High Court. This long period only goes to demonstrate how inordinate the delay was and the complacency on the part of the DPP.

[24] This Court expresses great reservations on Applicant's conduct on the issue of delay. We are left wondering if at all the delay was occasioned by the

courts, what was hard in getting a certificate of delay from the superior courts on such an important matter like this one. It is expected that such an important Constitutional body, as the DPP, that is crucial in the criminal justice system would act with diligence in the execution of its mandate. We find that the DPP's approach to this matter has been anything but casual. We find the delay in this matter quite inordinate and lacks any iota of plausible explanation.

(c) Whether the Court should exercise its discretion to extend time.

[25] With such an inordinate delay that lacks in explanation, a court of law should not hesitate to dismiss an application for extension of time. As such, in an appropriate case, this Court will equally not second guess whether to dismiss the application or not. However, one of the principles on exercise of the discretion to extend time is that each case has to be determined on its own merit and facts.

[26] While we take great exception with the Applicant's conduct in this matter, we have considered the public interest nature of this matter, and find that it calls for this Court's invocation of its inherent power to issues appropriate orders for the ends of justice. In invoking this inherent power, we are fortified by Rule 3(5) of the Supreme Court Rules, 2020 which provides, thus:

> ***Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.***

[27] The issues raised in this matter also calls upon this Court to take note of its objects, as provided in section 3 of the Act*, as a court of final judicial authority to, among other things—*

> ***(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;***

(b) provide authoritative and impartial interpretation of the Constitution;

(c) develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth;

(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya;

(e) improve access to justice…"

[28] With that recognition of its objective, we find that the intended appeal calls upon this Court to authoritatively, impartially and with finality settle the question of who, between the Attorney General and Director of Public Prosecution, has the power to deal with matters of Extradition and Mutual Legal Assistance. This question is one of great public interest given its ramification on the various Treaties that Kenya has ratified. Further, with contradicting decisions from the two superior courts, as evident in this matter where the High Court placed such matters within the mandate of the DPP, while the Court of Appeal held that such matters falls under the mandate of the Attorney General, it behoves this Court to settle the issue and guide the courts below. The fact that the issue at hand is one that sits at the transition from the old Constitution and the Constitution 2010 cannot be gainsaid, given that the new Constitution has created the Office of the Director of Public Prosecutions as an independent office with the power over all criminal matters. It is with this consideration that despite the Applicant's conduct we are inclined to extend time and allow the appeal to be filed.

[29] In granting the extension we further take note of Retired Chief Justice, Willy Mutunga sentiments in ***Jasbir Singh Rai & 3 others v Tarlochan***

Singh Rai Estate of & 4 others [2013] eKLR that, *"it should be good practice for the Supreme Court to take every opportunity presented to it to pronounce itself on new nuggets of our jurisprudence, through interpretation of the Constitution."*

[30] The respondent raised the critical aspect that with the delay in instituting the appeal, the noose of judicial uncertainty continues to precariously hang over the them, and is not only unfair, but also violates their non-derogable right and legitimate expectation that "justice shall not be delayed" guaranteed by Articles 50(2)(e) as read with 159(2)(b) of the Constitution. We agree that delay prejudices the respondents. However, given the public interest aspect of this matter that we have alluded to, we find that it outweighs the individual rights of the two respondents. We would have sanctioned the Applicant to pay the respondents costs but we find that that would amount to expending public funds of the tax payer by a public body that slept on the job. Thus, each part shall be its own costs.

[31] The Court notes the loud silence of the 3rd Respondent, the Honourable Attorney General, who is a critical litigant on the subject matter before the court.

[32] Consequently, we make the following orders:

(a) ***The Notice of Motion dated 16th September 2019 is hereby allowed.***

(b) ***The Applicant is extended time to file its appeal out of time.***

(c) ***The Applicant shall file and serve its appeal within fourteen (14) days of this Ruling failure to which the extension shall lapse.***

(d) ***Each party to bear its/his own cost***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **30th day of JULY, 2020.**

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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N. NJOKI

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR
SUPREME COURT OF KENYA