

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga CJ & P, Mwilu DC.J & V-P, Ibrahim, Wanjala, & Njoki, SCJJ)

APPLICATION NO. 24 OF 2020 [E008]

THE HONOURABLE ATTORNEY GENERAL.....1ST APPLICANT
THE PUBLIC PROCUREMENT OVERSIGHT
AUTHORITY2ND APPLICANT

–VERSUS–

OKIYA OMTATAH OKOITI1ST RESPONDENT
WYCLIFFE GISEBE NYAKINA2ND RESPONDENT
LAW SOCIETY OF KENYA3RD RESPONDENT
KENYA RAILWAYS CORPORATION.....4TH RESPONDENT
CHINA ROAD AND BRIDGE CORPORATION.....5TH RESPONDENT

(Being an application for extension of time to file and serve Notice of Appeal, Petition and Record of Appeal from the judgment and decree of the Court of Appeal at Nairobi (Koome, Gatembu & J. Mohamed JJ.A) dated 19th June 2020 in Civil Appeal No.10 of 2015

RULING

- 1. UPON** perusing the Notice of Motion by the applicants dated 10th August 2020 and filed on 15th September 2020, brought under Rules 15(2), 31, 36(1), 37(1) and 38 of the Supreme Court Rules, 2020 in which the applicants seek extension of time to lodge and serve the Notice and Record of Appeal from the judgment and decree of the Court of Appeal dated 19th June 2015, (Koome, Gatembu & J. Mohammed JJ.A) in Civil Appeal No.10 of 2015, and in the alternative that the Notice of Appeal filed on 24th June 2020 and lodged in the Supreme Court registry on 30th July 2020 be deemed to be properly on record and that the Court be pleased to extend time to file a record of appeal;

2. **UPON** reading the grounds on the face of the application, the supporting affidavit sworn on 10th August 2020 by Peter Thande Kuria, an Advocate and State Counsel with the authority and instruction of the 1st applicant, the annexures to the affidavit and the written submissions on record for the applicants filed on 15th September 2020;
3. **UPON** considering the applicants' submissions that due to the global corona virus pandemic, the Court of Appeal had issued directions as to electronic filings in which the applicants invoked by sending an email on 24th June 2020 containing the Notice of Appeal for filing and seeking proceedings. That the applicants never received a response on the filing of the Notice of Appeal before the Court of Appeal and were therefore not in a position to transmit the same to the Supreme Court within the prescribed timelines. That it was only after the follow up by the 1st applicant's clerk and counsel at the Court of Appeal Registry that the Notice of Appeal was retrieved on 30th July 2020, the same day the applicants transmitted it to the Supreme Court Registry. The applicants also submit that their application is meritorious and in public interest considering that the subject matter of the dispute is procurement issues stemming from Article 227 of the Constitution and concerning the construction of the Standard Gauge Railway and further that the delay was occasioned by factors beyond the applicants' control as the delay arose from the Court of Appeal's failure to acknowledge the filing of the Notice of Appeal as soon as it was lodged and the challenges associated with the electronic filing introduced by the Judiciary during the corona virus pandemic to minimize physical contact between people;
4. **UPON** considering the proceedings before the Honourable Deputy Registrar and directions issued before him on 18th September 2020 that parties do file submissions by end of day on 21st September 2020, and no party having filed submissions in support or in opposition to the application, the 4th and 5th

respondents having indicated through their respective counsel that they are not opposed to the application;

5. **UPON** considering the submissions by the 3rd respondent filed on 22nd September 2020 in opposition to the application on the grounds that the 4th respondent exercised its due diligence and filed its appeal on time and the applicants did not pursue the procedure under Rule 33(6) by filing the documents they had in possession to demonstrate some diligence; that the applicants have not satisfactorily explained the whole period of delay to Court; that the Court has no jurisdiction, the applicants not having sought certification of the intended appeal as a matter of general public importance under Article 163(4)(b) of the Constitution;
6. **UPON** considering the 1st and 2nd respondents' Preliminary Objection filed on 23rd September 2020 on the grounds that the orders sought are not available in law in the absence of certification under Article 163(4)(b) of the Constitution and that the intended appeal raises no Constitutional issue meriting interpretation by this Court under Article 163(4)(a) **AND** having further considered their submissions filed on 23rd September 2020 in which they dispute that the applicants have laid any satisfactory basis to warrant the prayers sought and relying on the mandatory use of the word "shall" in rule 38(1) of this Court's Rules 2020 as rendered in ***Law Society of Kenya v Centre for Human Rights and Democracy & others (Sup.Ct.Pet 14 of 2013)***, Rule 46(1) of the Rules which deem a Notice of Appeal withdrawn by failure to lodge an appeal within the timeframe and Rule 65 which demonstrates the gravity of non-compliance with the Rules;
7. The 1st and 2nd respondents further contend that the application is defective for invoking the Court of Appeal Rules and that the 1st and 2nd respondents stand to suffer great prejudice since their rights protected by the Court of Appeal

judgment are likely to be infringed again. In addition, public interest in this matter will be prejudiced given the fact that public funds and/or resources will be expended as some of the respondents like the 4th respondent will be represented by private counsel to defend a meritless petition;

8. By a unanimous decision, we make the following findings:
 - a) The Court has jurisdiction to extend time under **rule 15(2)** of the Supreme Court Rules 2020 as sought in the present application;
 - b) The intended appeal is founded on provisions of Article 163(4)(a) of the Constitution. As to whether the case meets that threshold or should have been certified under Article 163(4)(b) is a matter to be determined on merit.
 - c) The applicant satisfies the principles set in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral & Boundaries Commission & 7 others SC (App) No. 16 of 2014; [2014] eKLR*** in that their explanation for the delay is reasonable and beyond their making and the delay in filing the petition of appeal is not inordinate;
 - d) The Notice of Appeal was filed within time, the delay only relating to its transmission under Rule 36(3) which is excusable;
 - e) The subject matter is one of public interest consideration, distinguishable from general public importance which requires certification; and
 - f) No prejudice will be occasioned to the respondents as the applicants had copied to the respondents' counsel the correspondence relating to the filing of its Notice of Appeal and seeking proceedings as early as 24th June 2020 and there exists a separate appeal among the parties in this application by the 4th Respondent herein, emanating from the same decision of the Court of Appeal being Petition No.13 of 2020 in which all the parties herein will in any event participate.

9. In the end, we make ORDERS as follows:

a) The Notice of Motion by the Applicant dated 10th August 2020 and filed on 15th September 2020 be and is hereby allowed in the following terms:

- i) The Notice of Appeal filed on 24th June 2020 and transmitted to the Supreme Court on 30th July 2020 be and is hereby deemed to be properly on record;
- ii) The applicants to file and serve their record of appeal within 14 days from the date of this ruling.

b) The Deputy Registrar shall issue any and further directions as may be deemed necessary in the circumstances;

c) Costs shall abide the eventual decision of the Petition.

Orders accordingly

DATED and DELIVERED at NAIROBI this 9th day of October 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
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 certify that this is a true copy
of the original**

REGISTRAR

SUPREME COURT OF KENYA

