

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

APPLICATION NO. 11 (E020) OF 2021

- BETWEEN -

MUTHEU AGATHA APPLICANT

-AND-

RAHEEM MEHDI AZIZ AZAD.....1ST RESPONDENT

**THE CABINET SECRETARY MINISTRY OF FOREIGN AFFAIRS AND
INTERNATIONAL TRADE.....2ND RESPONDENT**

**THE CABINET SECRETARY MINISTRY OF INTERIOR AND
COORDINATION OF THE NATIONAL GOVERNMENT.....3RD RESPONDENT**

**THE INSPECTOR GENERAL,
NATIONAL POLICE SERVICE.....4TH RESPONDENT**

(Being an Application for leave to extend time to file an Appeal against the orders and Judgment of the Court of Appeal in Civil Appeal No. E445 of 2020 (Kiage, Sichale & Mohammed, JJ.A.) delivered at Nairobi on 4th June, 2020.)

RULING OF THE COURT

- [1]** UPON careful perusal of the Notice of Motion dated 24th September, 2021 brought pursuant to the Supreme Court Rules, 2020 (although the Applicant did not specify the rules relied on); the Applicant seeks leave of the Court to file the Appeal out of time, or to deem the Appeal, Supreme Court Petition 014 of 2021, already lodged to have been so lodged with the Court’s leave; and
- [2]** UPON reading the affidavit sworn by the Applicant, Mutheu Agatha in support of the Motion where she has averred that it is in the best interest of

justice to allow the application so as to accord her an opportunity to be heard on merit of her Appeal; that the delay in filing the Appeal was occasioned by facts beyond her control as we have set out below in Paragraph 3; that the orders sought will not occasion any prejudice to the Respondents; and that the applicant is ready and willing to abide by any terms the court may impose; and;

[3] **UPON** considering the written submissions by the applicant that both Articles 25 and 50(1) of the Constitution guarantee the right to a fair and public hearing which are absolute; and further, that the Application meets the threshold set in *Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & Others*, Supreme Court Application No. 16 of 2014, [2014] eKLR for extension of time; that the delay was occasioned when the superior court below failed to avail the typed proceedings in time; and

[4] **UPON** bearing in mind the decision in *Anthony Raymond Cordeiro & 2 others v Adrian Noel Carvalho & 5 others* [2014] eKLR, and the provisions of Article 159 of the Constitution, to which the applicant has referred us; and

[5] **FROM** the Replying Affidavit sworn by David Chege Mboche on behalf of the 1st respondent in opposition to the Application and the written submissions, where the 1st respondent has urged us to be guided by our own Ruling in *County Executive of Kisumu v County Government of Kisumu & 8 Others*, Supreme Court Application No. 3 of 2016 [2017] eKLR, to find that the whole period of delay has not been declared or explained satisfactorily; and that the applicant has not provided a certificate of delay from the Deputy Registrar of the Court of Appeal, as proof that the delay was occasioned elsewhere, nor has she explained the steps, if any, taken to follow up the

proceedings; also the 1st respondent contends that even if time is enlarged, the intended Appeal is not arguable as it does not raise matters of general public importance or of novel constitutional nature.

WE THEREFORE PRONOUNCE as follows:

- [6] **NOTING** that the Court, under Rule 15(2) of the Supreme Court Rules, 2020 has unfettered discretionary powers to extend time limited by the Rules or by any of its decisions; that any person intending to appeal to the Court is required by Rule 36 (1) of the Supreme Court Rules, 2020, to file a Notice of Appeal within fourteen days from the date of the decision intended to be challenged; and that, subsequently, within thirty days of the date of lodging the Notice of Appeal, an appeal must be filed; and
- [7] **WHILE** it is evident from the record that after the judgment of the Court of Appeal was rendered on 4th of June 2021, the applicant timeously, within three (3) days lodged the Notice of Appeal on 7th of June, 2021, and on the same day requested for typed proceedings and even paid the court charges. The proceedings were, however, not availed until 20th September, 2021. Nine (9) days later, the present application was made on 29th of September, 2021. Time began to run from 7th June, 2021, being the date the Notice of Appeal was lodged. Within 30 days of that date, namely on 19th July, 2021, in terms of section 57 of the Interpretation and General Provisions Act, the Appeal ought to have been filed. The delay was attributed to the court's failure to furnish the Applicant with a copy of the proceedings. They were subsequently availed on 20th September, 2021.
- [8] **RESTATING** our sentiments in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014] eKLR and *County Executive of Kisumu* (supra), that the issue of delay of typed proceedings “**is well known in our legal system**”; that delays caused by courts to the detriment

of the party cannot be visited upon the party because “***such a delay is not on part of the party but the court and that this issue consists of facts beyond a party’s reach***”; and that it would not be in the interests of justice to turn away an applicant “***who has, prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court’s administrative machinery***”.

See also ***Ferdinand Ndungu Waititu Babayao v Republic***, SC Petition (Application) No. 2 of 2020, [2020] eKLR.

We nonetheless wish to throw this caution; the fact that a court has contributed to the delay will not automatically lead to a favourable outcome to an applicant as each case will be determined on its peculiar circumstances.

[9] CONSIDERING that the argument by the 1st respondent that the delay was not justified on account of failure by the applicant to exhibit a certificate of delay issued by the Registrar, was without basis, because there is no provision in the Rules of this Court, as those in the Civil Procedure Rules or the Court of Appeal Rules for such a requirement.

[10] BEARING all the foregoing in mind, we note that the proceedings were availed on 20th September, 2021. Before that period the applicant could not take any step towards lodging the Appeal. So that time could only start running from 20th September, 2021. Therefore, the period in contention is between 20th September, 2021 and 29th of September 2021, the date this application was made, in total a delay of 9 days.

[11] The Court has, in the case of ***Nicholas Salat*** (supra) enunciated the following principles to guide it, the parties and counsel in an application for the enlargement of time:

“...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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

5. whether there will be any prejudice suffered by the respondents, if 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”

[12] SATISFIED that this application meets the above threshold, the delay not being inordinate and the applicant having sufficiently explained her predicament, we find that this explanation is consistent with the Court’s position that an appeal filed out of time without leave of this Court is irregular, we reject the invitation that we deem the Appeal herein as duly filed. See *Hassan Nyanje Charo* (supra).

[13] IN THE CIRCUMSTANCES, we now make the following ORDERS;

- i. The Notice of Motion Application dated 24th September, 2021 and filed on 29th September, 2021 is hereby allowed;**
- ii. The parties to appear before the Deputy Registrar for further directions as to the filing of the record of appeal and all related matters;**
- iii. Each party shall bear own costs.**

Orders accordingly.

DATED and DELIVERED at NAIROBI this 10th day of February, 2022.

.....
M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

.....
M.K. IBRAHIM
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