



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu DCJ & VP, Ibrahim, Njoki, Lenaola & Ouko SCJJ)

APPLICATION NO. E001 OF 2023

-BETWEEN-

KENYA AGRICULTURAL RESEARCH INSTITUTEAPPLICANT

-AND-

PETER WAMBUGU KARIUKI & 16 OTHERS..... RESPONDENTS

(Being an application for extension of time within which to file and serve a Notice of Appeal)

Representation

Mr. Ngethe holding brief for Mr. Millimo for the Applicant
(Millimo, Muthomi & Co. Advocates)

Mr. Konosi for the 1st to 17th Respondents
(Konosi & Co. Advocates)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion by the Applicant dated 20th January, 2023 and filed on 26th January, 2023, anchored on Rule 15(2) of the Supreme Court Rules, 2020 seeking for extension of time within which to file and serve a Notice of Appeal and costs of the Application; and

[2] UPON considering the grounds on the face of the application and the two supporting affidavits both sworn on 20th January, 2023 by Albert Wafula Munyakho, the Applicant's Learned Counsel and the Learned Counsel's court clerk Onesmus Kisinga together with written submissions dated 20th January, 2023 and filed on 26th January, 2023, we note that the Applicant was aggrieved by two related decisions of the Court of Appeal in **Civil Appeal No. 271 of 2015 Peter Wambugu Kariuki & 16 Others Vs. Kenya Agricultural Research Institute** and **Civil Appeal No. 315 of 2015 Kenya Agricultural Research Institute Vs. Peter Wambugu Kariuki & 16 Others** delivered on 18th October, 2018 and 21st December, 2018 respectively and preferred an application for review. The Applicant being dissatisfied with the decision of the Court of Appeal delivered on 28th April 2022 in dismissing its review application, filed a Notice of Appeal dated 11th May, 2022, on 17th May 2022, five (5) days late and served the same on the Respondent on 20th May, 2022. Applicant's Counsel contends that it was upon receiving instructions in January, 2023 to proceed with seeking certification in order to pursue an appeal that they noticed the error. Counsel relies on the cases of **Seventh Day Adventist Church East Africa Ltd & 2 Others Vs. Masosa Construction Company (2006) eKLR** and **Commissioner of Police & 2 Others Vs. Joseph Mburu Gitau & 641 Others (2019) eKLR** by the Court of Appeal to urge that the delay was inadvertent as it was due to the complexity of the issues as well as seeking approval following the Applicant's internal protocols being a state corporation. Further, that the failure to file and serve the Notice of Appeal within time was also not intentional but due to Counsel's failure to advise the court clerk of the urgency of the matter and the deadline of 12th May, 2022.

[3] The Applicant contends that the intended appeal raises grounds of general importance as the impact of the two conflicting decisions of the Court of Appeal arising from the same subject matter create huge public interest in the certainty, consistency and overall resolution of the disputes within the Judiciary. Further, relying on the decision in **John Ochanda v Telkom Kenya Limited; SC**

Motion no. 24 od 2014 (2014) eKLR, it is contended that the Respondents, having been served with the Notice of Appeal on 20th May, 2022, have been aware of the Applicant's intention to appeal to the Supreme Court and will not suffer any prejudice which cannot be adequately compensated by an order of costs.

[4] UPON perusing the Respondents' Replying Affidavit sworn by Peter Wambugu Kariuki, the 1st Respondent, on 3rd February, 2023 and filed on 7th February, 2023 together with submissions dated 6th February, 2023 and filed on 7th February, 2023, we note that the Respondents contend *inter alia* that if the Applicant found the two decisions of the Court not to be legally sound, it should have appealed rather than sought to review the same; that contrary to its allegation, by the time the Applicant elected to seek review, it had understood the import and purport of the two judgments; that the issues raised in the two Judgments are straightforward and not complex. Further, that the period between delivery of the judgments in the two related appeals in late 2018, filing and serving the Notice of Appeal on 20th May, 2022 to January 2023 is too inordinate and has not been adequately explained; that no official of the Applicant has sworn an affidavit to explain the delay and the allegation of the Applicant's internal approval protocols; and that it is mischievous for the Applicant in the draft application for certification to seek to appeal both against the Ruling delivered on 28th April, 2022 and against the Judgment delivered on 21st December, 2018 as an alternative prayer.

[5] The Respondents further contend that the mere existence of conflicting judgments does not qualify a matter to be of general public importance; filing of documents in the Court of Appeal are done online and nothing stopped the Applicant from filing its Notice of Appeal on the e-filing portal within the prescribed time. Further, the Respondents point out that the decretal sum of Ksh.6,942,616.70 deposited in a joint interest-earning account pending determination of the Applicant's application for review, by a letter dated 2nd August, 2022, the parties agreed to have it released to the Respondents, which

means the Judgment of the Court of Appeal has been fully executed rendering the intended appeal a mere academic exercise. Further, that whether or not an appeal is arguable is not one of the principles which a court must consider when dealing with an application for extension of time; and that the judgment of the Court of Appeal having been executed the Applicant will not suffer any loss as it has paid the decretal sum save for costs.

WE NOW PRONOUNCE as follows, bearing in mind all these submissions:

[6] APPRECIATING that the court, under Rule 15(2) of the Supreme Court Rules, 2020 has unfettered discretionary powers to extend the 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;

[7] RESTATING the guiding principles in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Application No. 16 of 2014; [2014] eKLR enunciated as follows:

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.*

[8] FURTHER RESTATING the principles in the case of ***County Executive of Kisumu v County Government of Kisumu & 8 others***, SC. Civil Application No. 3 of 2016; [2017] eKLR where we emphasized the need for the Applicant, in an application for extension of time, to satisfactorily declare and explain the whole period of delay to the Court; as well as the case ***Base Titanium Limited v County Government of Mombasa & another*** SC Petition (App) No 22 of 2018 [2019] eKLR, was echoed in ***GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR*** where we held that the principles for grant of an order of extension of time are that an applicant must give sufficient reasons for any delay and that the period of delay is nonetheless an important consideration in the court's exercise of discretion to grant or deny the extension.

[9] NOTING that in spite of the Respondents' contentions, the initial delay of five days in filing the Notice of Appeal is not inordinate and has been sufficiently explained by Counsel. Be that as it may, the delay that concerns us is from service of the Notice of Appeal on 20th May, 2022 to 18th January, 2023 when the Applicant elected to pursue an appeal before the Supreme Court, and in noting the error filed the instant application; a period of over seven (7) months. Though the Supreme Court Rules, 2020 do not prescribe a timeline within which a party must seek certification, a period of over seven(7) months without explanation cannot be termed as reasonable. Rule 38 of the Supreme Court Rules, 2020 requires the institution of an appeal within thirty (30) days from either the date of filing the notice of appeal or after the grant of certification, demonstrating the need to move with speed in pursuing an appeal before this Court.

[10] FURTHER NOTING that the Applicant asks the Court to apply the decision in ***Seventh Day Adventist Church East Africa Ltd & 2 Others Vs. Masosa Construction Company (2006) eKLR*** to find that the

Applicant, being a state corporation, had to follow its internal protocols before arriving at the decision to pursue an appeal and delays in making such decisions would be inevitable; that this was coupled with the time taken to understand and appreciate the effect of the two Judgments of the Court of Appeal;

[11] BEARING in mind that the Respondents were served on 20th May, 2022, they have been aware all along of the Applicant's intention to appeal. We however, also take note that by a letter dated 2nd August, 2022, the parties agreed to have the sum of Ksh.6,942,616.70 deposited in a joint interest-earning account pending determination of the Applicant's application for review, released to the Respondents in fulfilment of the Judgment of the Court of Appeal.

[12] CONSIDERING that extension of time is an equitable remedy, the grant of which involves the exercise of judicial discretion and that equity aids the vigilant and not the indolent, we have great difficulty reconciling a party that lodges its Notice of Appeal on 17th May, 2022, on 2nd August 2022 releases funds to its opponents in fulfilment of the Judgment of the Court of Appeal yet waits another five (5) months before arriving at a decision to pursue an appeal to this Court by way of certification. Reiterating our finding in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*; SC Application 15 of 2014(2014) eKLR the concept of timelines and timeliness is a vital ingredient in the quest for efficient and effective governance under the Constitution which must be adhered to.

[13] FOR THE AFORESTATED REASONS we find that the Applicant's explanation in the circumstances is neither reasonable nor satisfactory and great prejudice will be occasioned to the Respondents if the application was to be allowed.

[14] ACCORDINGLY, we are persuaded that in the circumstances, the instant application lacks merit and hereby make the following orders:

