



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

APPLICATION NO. E003 OF 2024

— BETWEEN —

**JOMO KENYATTA UNIVERSITY OF
AGRICULTURE & TECHNOLOGY.....APPLICANT**

-AND-

KWANZA ESTATES LIMITED..... RESPONDENT

(Being an application for extension of time to apply for review of the Ruling of the Court of Appeal at Nakuru (Nyamweya, Ochieng & Korir, JJ. A) dated 15th December 2023 in Civil Application No. E053 of 2023 granting leave to appeal to the Supreme Court; and for a stay of proceedings in Supreme Court Petition No. E001 of 2014)

Representation:

Ms. Kitur for the Applicant
(Ashitiva Advocates LLP)

Mr. Konosi for the Respondent
(Konosi & Company Advocates)

RULING OF THE COURT

[1] UPON READING THE NOTICE OF MOTION by the Applicant dated 1st February 2024 and filed on 5th February 2024 pursuant to Articles 25(c), 50(1) and

163(5) of the Constitution, Sections 3(e), 3A, 15A, 23A and 23(2A)(b) of the Supreme Court Act and Rule 15(2) of the Supreme Court Rules 2020 for orders that this Court be pleased to; *grant leave for the extension of time to the applicant to apply for review of the Ruling by the Court of Appeal in Civil Application No.E053 of 2023; grant the applicant leave to file and serve the draft Originating Motion; and grant a stay of proceedings in SC Petition No. E001 of 2024 (the appeal herein) pending the hearing and determination of the instant application and the Originating Motion; and*

[2] UPON READING THE APPLICANT’S SUPPORTING AFFIDAVIT sworn on 1st February 2024 by Maryanne Mwihaki Wanyoike, the Ag. Chief Legal Officer of the applicant; and the applicant’s submissions dated 16th February 2024 to the effect that: the respondent filed an Originating Motion dated 30th June 2023 at the Court of Appeal seeking that its appeal be certified as raising matters of general public importance and for grant of leave to appeal to the Supreme Court; the applicant was never served with any hearing notice; on 9th October 2023, the hearing of the Motion proceeded *ex parte*; subsequently, on 15th December 2023, the Court of Appeal delivered its ruling allowing the Motion thereby granting the respondent leave to appeal to the Supreme Court; the applicant only became aware of the ruling when it came across it on the court e-filing portal; consequently, the applicant filed an application dated 21st December 2023 in the Court of Appeal seeking a review of the impugned ruling on grounds that the requisite hearing notice informing the applicant of the hearing had been sent to the wrong email address by the Court of Appeal registry at Nakuru, an admitted inadvertent error by the court; while the applicant was waiting for the Court of Appeal to review its decision, on 15th January 2024, the respondent filed SC Petition No. E001 of 2024 before this Court; and

[3] FURTHER, the applicant advances as the reason for the delay the fact that it opted to exhaust all the available remedies before the Court of Appeal by filing the application for review, so as not to abuse the court process; that the applicant has

brought this application without undue delay after it realized that the respondent had filed its appeal before this Court; that as a result, the appeal before this Court automatically renders the application for review before the Court of Appeal idle as it has been overtaken by events; that there will be no prejudice suffered by the respondent if an extension of time is granted and if the applicant is allowed to apply for a review of the impugned ruling as the respondent's appeal is already on record; that conversely, the applicant will suffer prejudice as it would be condemned unheard since it was precluded from presenting and addressing pivotal issues in the Motion for certification; that further, if the proceedings in **SC Petition No. E001 of 2024** before this Court are not stayed, this application will be rendered nugatory; finally, that the applicant has satisfied the principles for the grant of an order for extension of time as enunciated in the case of **Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others**, SC Application No. 16 of 2014; [2014] eKLR; and

[4] UPON CONSIDERING the respondent's replying affidavit sworn by Geoffrey Makana Asanyo, the respondent's Managing Director, on 27th February 2024 and its submissions dated 4th March 2024 to the effect that: upon the respondent filing its Motion before the Court of Appeal for certification, the court issued directions, receipt of which the applicant acknowledged and pursuant thereto filed its replying affidavit which it served upon the respondent on 18th July 2023; thereafter the applicant failed to file its written submissions in respect of the Motion; subsequently on 23rd August 2023, the court served a hearing notice for the Motion on 9th October 2023; on the said hearing date, after being satisfied that the applicant was properly served with the hearing notice, the court proceeded to hear the Motion in the absence of the applicant; being cognizant of the applicant's replying affidavit on record, the court rendered its ruling on 15th December 2023 allowing the Motion having duly considered the response; and

[5] NOTING, the respondent's argument that if indeed the applicant was not served with a hearing notice as alleged, its recourse would have been to apply for

the re-hearing of the Motion in terms of Rule 58(3) of the Court of Appeal Rules by satisfying the court that there were sufficient reasons for his absence when the application was called out for hearing; that the applicant ought to have made its application for review within 14 days of the delivery of the ruling as provided for by Rule 33(2) of the Supreme Court Rules; that the applicant has not explained why it took 19 days to file physical copies of the application contrary to Rule 12 of the Supreme Court Rules; and that the reasons for delay are not satisfactory, hence this application has been brought after unreasonable delay; and

[6] UPON FURTHER CONSIDERATION of the respondent's submissions that it will be prejudicial to it if this application is granted, considering that the Court of Appeal set aside the award of Kshs. 71,965, 138.70 being rent from 1st February 2021 to 30th April 2022; that an order of stay is not feasible in the circumstances of the case, since the appeal has already been filed and the applicant filed its response; and that the issues which the applicant intends to raise in its intended Originating Motion have been raised in that response; and that it should follow that the prudent course should be to proceed with the hearing of the appeal where all the issues can conclusively be determined to save on judicial time; and

[7] UPON READING the applicant's further affidavit sworn on 6th March 2024 by Richard Wokabi Kariuki, its Chief Legal Officer, in response to the respondent's replying affidavit where it is deposed that the applicant was not invited and/or informed of the case management conference and since the applicant was subsequently not aware of the hearing, it did not file its written submissions; and

[8] HAVING CONSIDERED the application, affidavits and rival arguments by both parties **WE NOW THEREFORE OPINE** as follows:

- i) This Court by the provisions of Rule 15(5) of the Supreme Court Rules, 2020, has jurisdiction to extend the time limited by the Rules or by an order of this Court.

- ii) The guiding principles for the grant of this relief are enunciated in ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others***, SC Application No. 16 of 2014; [2014] eKLR as follows: that extension of time is an equitable remedy available to a deserving party at the court's discretion on a case to case basis; that a party seeking extension of time has the burden of laying a basis to the satisfaction of the court; that where there is a reason for delay, it must be explained to the satisfaction of the court; that there should be no prejudice suffered by the respondent if the extension is granted; that the application must be brought without undue delay; and that in certain instances, public interest should be a consideration for extending time.
- iii) Before applying these principles to the instant case, we note that the applicant's application for review dated 21st December 2023 is still pending hearing and determination in the Court of Appeal.
- iv) Contemporaneously, the applicant went ahead and filed the instant application before this Court seeking extension of time and leave to file an Originating Motion for the review of the very same impugned ruling. With this in mind, can the applicant's submission that it filed the application for review in the Court of Appeal so as not to abuse the process of the court, be taken seriously? What it has done indeed amounts to an abuse of the judicial process; seeking similar reliefs, namely the review of the ruling on certification, simultaneously before two different levels of court. The applicant is trying to have its cake and eat it too. Although the applicant has deposed in the aforesaid further affidavit that it has filed a Notice of Withdrawal dated 26th January 2024, there is no evidence by way of an Order of the Court of Appeal, that the application for review has formally been withdrawn. The result is that, presently there are two applications for review before this Court and the Court of Appeal.

- v) To avoid embarrassment of this Court and the Court of Appeal, good order demands that the application pending before the Court of Appeal is first dispensed with one way or another.
- vi) The procedural missteps above notwithstanding, on the merit too, we are not persuaded that the applicant deserves the relief of extension of time, as the test for the grant enunciated in ***Nicholas Kiptoo Arap Korir Salat*** (*supra*) has not been met. For example, the applicant has not laid a proper basis for the grant of the application; the reason for the delay is not only absurd but also unpersuasive, in addition to the likely prejudice that the respondent may be exposed to if time is extended, in view of the fact that the appeal has been lodged and responded to.
- vii) The applicant's grievance which it intends to raise in the intended Originating Motion is similar to what it has raised in response to the appeal before this Court, **SC Petition No. E001 of 2024**.
- viii) For these reasons, we need not address ourselves to the rest of the prayers sought and dismiss this application in its entirety.
- ix) As costs are discretionary and follow the event, the applicant shall bear the costs of this application.

[9] ACCORDINGLY, we make the following **ORDERS**:

- i) The Applicant's Notice of Motion dated 1st February 2024, be and is hereby dismissed.***
- ii) The Applicant shall bear the costs of this application.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 31st Day of May 2024.

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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

.....
S.C. WANJALA
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

