



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Mwilu; (DCJ & VP), Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)

APPLICATION NO. E016 OF 2024

-BETWEEN-

GITSON ENERGY LIMITED APPLICANT

-AND-

**ENERGY & PETROLEUM
REGULATORY AUTHORITY..... 1ST RESPONDENT
CABINET SECRETARY, NATIONAL TREASURY 2ND RESPONDENT
MINISTRY OF ENERGY 3RD RESPONDENT
KENYA POWER & LIGHTING
COMPANY LIMITED 4TH RESPONDENT
KENYA ELECTRICITY TRANSMISSION
COMPANY LIMITED 5TH RESPONDENT
ATTORNEY GENERAL 6TH RESPONDENT**

(Being an application for extension of time to file an appeal and record out of time)

Representation:

Ms. Ruth Kiunga for the applicant
(*Theuri Wesonga & Company Advocates*)

Mr. Maina for the 1st respondent
(*Mwaura & Wachira Advocates*)

Ms. Rael Muyoka for the 5th respondent
(*Dr. Mutubwa Law*)

No representation for the 2nd, 3rd, 4th and 6th respondents

RULING OF THE COURT

[1] **UPON PERUSING** the Notice of Motion dated 25th March 2024 and filed on 30th April 2024, pursuant to Article 163(4)(b) of the Constitution, Rule 15(2) of the Supreme Court Rules and other enabling provisions of law; *seeking extension of time to file an appeal and record out of time against the ruling by the Court of Appeal (Tuiyot, Lesiit & Gatembu, JJ.A) in Civil Application No. EO43 of 2022, and costs;* and

[2] **UPON CONSIDERING** the applicant's grounds on the face of the application and affidavit sworn by **James Gitau** on 3rd April 2024, wherein it is contended that, even though the Notice of Appeal was filed within the prescribed time, the time to file an appeal and record has lapsed; the delay is excusable and not inordinate; the same was occasioned by the Court of Appeal's failure to avail complete typed proceedings to the applicant; the request for typed proceedings was made on 12th February 2024 but the appellate court only furnished part of the relevant proceedings; despite several reminders and follow up, the Court of Appeal has failed to furnish the said proceedings; the appeal raises matters of general public importance warranting this Court's determination; the application is brought without delay; and if granted would not be prejudicial to the respondents; and

[3] UPON FURTHER CONSIDERING the applicant's submissions dated 25th March 2024 and filed on 30th April 2024, wherein the applicant reiterates its grounds in support of the application and further submits that: the Court is clothed with the powers to extend time pursuant to Rule 15(2) of Supreme Court Rules, 2020; the application meets the principles for enlargement of time established in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others*, SC Application No. 16 of 2014; [2014] eKLR (*Nicholas Kiptoo Case*); and the applicant has exercised all due diligence including numerous follow ups at the Court of Appeal, but to no avail. It relies on this Court's decision in *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others*, SC Application No. 15 of 2014; [2014] eKLR, to urge that it would not be in the interest of justice to turn away a party who, despite exercise of due diligence in pursuit of his cause, is impeded by the slow turning wheels of the court's administrative machinery; and

[4] HAVING READ and CONSIDERED the 1st respondent's Grounds of Opposition dated 15th May 2024 and 5th respondents Preliminary Objection dated 21st May 2024, wherein it is urged that the application is bad in law, inadmissible and incurably defective for want of certification as the application and intended appeal is premised on Article 163 (4) (b) of the Constitution, and for want of jurisdiction as the Court cannot entertain an appeal against an interlocutory ruling where the substantive issues are still pending before the superior courts; the notice of appeal having lapsed, the same stands withdrawn by dint of Rule 46(1) of the Court's Rules; no appeal has been filed despite the mechanism under Rule 40 (1) (2) and (3) allowing an intending appellant to file its record with the exclusion of some documents; and without jurisdiction, the court cannot exercise its discretion under Rule 15 (2); and

[5] UPON NOTING the 1st respondent's submissions dated 15th May 2024 and filed on 12th July 2024, re-emphasizing its grounds in support of the grounds of opposition, and in addition, urging that the application fails to meet the principles

for extension of time laid down in the **Nicholas Kiptoo Case**. Moreover, the 1st respondent contends that this Court lacks jurisdiction on grounds that the intended appeal challenges a ruling by the Court of Appeal granted under Rule 5(2) (b) of the Court of Appeals Rules; the said ruling does not involve any matters of constitutional interpretation or application and the applicant has not sought nor has the appeal been certified as one involving matters of general public importance; and, as such the Court lacks jurisdiction both under Article 163(4)(a) and 163(4)(b) of the Constitution; and

[6] UPON FURTHER CONSIDERING the 5th respondent's submissions dated 21st May 2024 and filed on 22nd May 2024 restating its grounds in support of the preliminary objection, and further reiterating the arguments proffered by the 1st respondent; moreover, noting the 5th respondent's case that the applicant is inviting the Court to sit on appeal against a Court of Appeal ruling under Rule 5(2) (b) of the Court of Appeal Rules, contrary to the principle established *inter alia* in **Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others** [2015] eKLR. It is further argued that in any event, typed proceedings are not among the mandatory documents that must accompany an appeal; under Rule 40 of the Court's Rules, the applicant ought to have filed the record with the exclusion of unavailable typed proceedings; having failed to institute its appeal within the prescribed time, the notice of appeal was deemed withdrawn by dint of Rule 46(1); and the notice of appeal is a jurisdictional prerequisite; and

[7] UPON CONSIDERING the applicant's replying affidavit sworn on 31st May 2024 and further submissions in a rejoinder of even date, reiterating its arguments in support of the application, more so that it meets the criteria for extension of time under Rule 15 (2). Further, the applicant shifts its argument that the intended appeal only raises issues of general public importance under Article 163 (4) (b). Instead, it contends that the intended appeal also raises issues of constitutional interpretation and application, particularly of Articles 27, 43 and 47 under Article 163(4)(a). Furthermore, it urges that the notice of appeal cannot be deemed

withdrawn, for reasons that it has proffered justifiable reasons for the applicant's failure to file the appeal and record within the prescribed timelines; and in response to the argument that the application is lacking in form, it asserts that under Article 159(2)(d) procedural technicalities should not override substantive justice; and

[8] COGNISANT OF THE FACT that a preliminary objection has been raised by the 1st and 5th respondents, it is our considered view that the challenge of our jurisdiction goes to the competency of the instant application as well as the intended appeal. It is consequently apposite to determine the jurisdictional question in the first instance; and

[9] BEARING IN MIND that this Court has delineated with finality its jurisdiction to hear appeals emanating from interlocutory orders of the Court of Appeal made in exercise of its discretion under rule 5(2)(b) of the Court of Appeal Rules; specifically in *Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others*, SC Application No. 16 of 2015; [2015] eKLR wherein we stated;

“The application before us contests the exercise of discretion by the appellate court, when there is neither an appeal, nor an intended appeal pending before this Court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of article 163 (4) (a) of the Constitution. Any square involvement of this Court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, ... Such an early involvement of this Court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.

In these circumstances, we find that this court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5 (2) (b) of that Court’s Rules, there being neither an appeal, nor an intended appeal pending before the Supreme Court.”

[10] APPRECIATING THAT this principle is echoed in; ***Basil Criticos vs. Independent Electoral and Boundaries Commission & 2 Others*** SC Petition No. 22 of 2015; [2015] eKLR; ***Clement Kungu Waibara vs. Annie Wanjiku Kibeh & Another***, SC Application No. 31 of 2020; [2020] eKLR; ***Bia Tosha Distributors Limited vs. Kenya Breweries Limited & 6 Others***, SC Application No. 10 of 2017 [2018] eKLR; and most recently in ***Sonko vs. Clerk County Assembly of Nairobi City & 11 Others*** (Application 14 (E022) of 2021) [2021] KESC 14 (KLR).

[11] WE NOW OPINE as follows:

- i. Having considered the pleadings and submissions by the parties herein, we find that the substantive appeal before the Court of Appeal is yet to be heard and determined on the merits. The intended appeal emanates from an interlocutory ruling made pursuant to rule 5(2)(b) of the Court of Appeal Rules. The said Ruling entails no interpretation or application of the Constitution, nor can it be founded on any question of great public importance.
- ii. Guided by the principles established in the cited decisions, particularly, ***Teachers Service Commission vs. Kenya National Union of Teachers & 3 Others*** [Supra], we find that without a substantive determination, and in the absence of a judgment of the Court of Appeal in the appeal pending before it, this

application and the intended appeal are premature and do not meet the threshold under Article 163 (4)(a) or (b) of the Constitution;

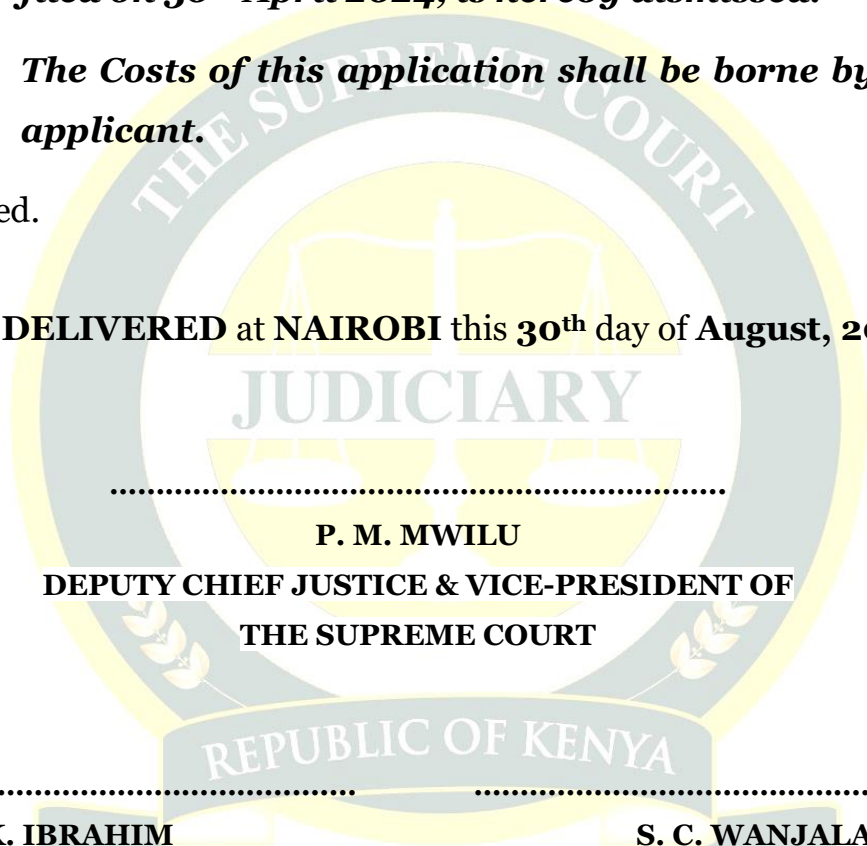
iii. For the foregoing reasons, we hold that this Court lacks jurisdiction to entertain the application or the intended appeal.

[12] CONSEQUENTLY, we make the following Orders:

- (i) *The Notice of Motion dated 25th March 2024 and filed on 30th April 2024, is hereby dismissed.***
- (ii) *The Costs of this application shall be borne by the applicant.***

It is so Ordered.

DATED and DELIVERED at NAIROBI this 30th day of August, 2024.



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

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
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**

