



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

APPLICATION NO. E025 OF 2024

-BETWEEN-

SICPA SA.....APPLICANT

-AND-

**THE PUBLIC PROCUREMENT AND
ADMINISTRATIVE REVIEW BOARD.....1ST RESPONDENT**

**THE ACCOUNTING OFFICER
KENYA BUREAU OF STANDARDS.....2ND RESPONDENT**

KENYA BUREAU OF STANDARDS.....3RD RESPONDENT

(Being an application for extension of time to file and serve an appeal against the Judgment of the Court of Appeal (Musinga (P), Kantai & Mativo JJ.A) delivered on 2nd August, 2024 in COACA E474 of 2024)

Representation:

Mr. Kithinji Marete for the applicant
(Kithinji Marete & Company Advocates)

Mr. Munene Wanjohi for the 1st respondent
(Office of the Attorney General)

Ms. Beatrice Maina for the 2nd and 3rd respondents
(Kenya Bureau of Standards)

RULING OF THE COURT

[1] UPON PERUSING the applicant’s Motion dated 23rd September, 2024 filed under Articles 50, 159(d) and 163(4)(a) of the Constitution, Sections 3A,

15B and 21A of the Supreme Court Act, Rules 15(2), 33 and 36 of the Supreme Court Rules where it seeks an order of extension of time to file an appeal from the decision of the Court of Appeal in COACA E474 of 2024 delivered on 2nd August, 2024; and

[2] UPON CONSIDERING the grounds in support of the application and the supporting affidavits sworn on 23rd September, 2024 by Lilian Atogo, the applicant's General Manager, and Kithinji Marete, the applicant's counsel, as well as submissions of even date to the effect that: the applicant being aggrieved by the decision of the Court of Appeal made on 2nd August, 2024 filed a Notice of Appeal on 15th August, 2024 at the Court of Appeal and transmitted a copy thereof to the Supreme Court Registry on 21st August, 2024; the applicant was therefore supposed to file its appeal at the Supreme Court by 16th September, 2024; the applicant's counsel erroneously and mistakenly miscalculated the date of filing the appeal by basing his calculation on the date of transmission of the Notice of Appeal to the Supreme Court thereby arriving at the erroneous filing date of 20th September, 2024;

[3] ADDITIONALLY, it is deposed that in the intervening period, extenuating circumstances necessitating the applicant's advocate to take time off arose; the circumstances concerned his wife's medical issues from between 13th and 19th September, 2024 which required them to unexpectedly and urgently travel out of the country between 17th and 19th September, 2024 to seek medical attention; hence the miscalculation only came to light on the afternoon of 20th September, 2024 when the applicant's advocate, upon his return, was finalizing the petition and record of appeal; the advocate candidly informed the applicant of the mistake and immediately moved with speed to draft and file the present application on the next available working day being Monday, 23rd September, 2024, by which time for filing the appeal had lapsed by 7 days; the delay of 7 days is not inordinate and counsel urges the court not to visit the error on his client; that the appeal is arguable with good chances of success as it raises weighty and consequential constitutional issues on the constitutional right to the equal and full benefit of the law and to participate in the public procurement

of goods and services in Kenya with such equal rights as envisaged at Articles 10, 27, 50, 201 and 227 of the Constitution; the respondents will not suffer any prejudice as they were all aware of the intended appeal having been served with the notice of appeal on 15th August, 2024; and

[4] TAKING INTO ACCOUNT the 1st respondent's grounds of objection dated 2nd October, 2024 and written submissions dated 4th October, 2024 contending that the Court's jurisdiction has not been well invoked as the application and intended appeal do not in any way touch on interpretation of the Constitution and further have not been certified as raising matters of general public importance; the matter is a procurement matter which does not fall within the purview of this Court's jurisdiction; the Court is devoid of jurisdiction by dint of Section 175(4) of the Public Procurement and Asset Disposal (PPAD) Act which stipulates that decisions of the Court of Appeal in matters under that Act shall be final and this has been upheld by the Court of Appeal in several matters including ***ADK Technologies Ltd in Consortium with Computer Technologies Ltd v Public Procurement Administrative Review Board & 4 Others*** (Civil Appeal E598 of 2021) [2022] KECA 407 (KLR) and ***Al Ghurair Printing and Publishing LLC v Coalition for Reforms and Democracy & 2 Others*** [2017] e KLR; further Section 175(4) of the PPAD Act places a strict statutory timeline that is incapable of extension of the Court of Appeal's rendering of a final decision within 45 days; the Court is urged to down its tools in this appeal and decline to take any further steps towards its hearing and determination; and

[5] FURTHER CONSIDERING the 2nd and 3rd respondents' grounds of opposition dated 3rd October, 2024 and written submissions dated 8th October, 2024 wherein they join issue with the 1st respondent, and additionally urge that the intention of the law makers was to ensure that public procurement disputes were handled expeditiously and under the PPAD Act as well as the PPAD Regulations, 2020; the application is devoid of merit and should not be entertained by this court as it does not meet any of the two limbs of Article 163(4)(a) and (b); to buttress their point they rely on past decisions of this Court

on that issue including **Stanley Mombo Amuti v Kenya Anti-Corruption Commission**; SC Petition No 21 of 2019 [2020] eKLR and **Modern Holdings (E. A) Ltd v Kenya Ports Authority (Petition 20 of 2017)** [2018] KESC 23 (KLR) wherein this court has held that where a case to be appealed has nothing little to do with the interpretation or application of the Constitution, no further appeal to the Supreme Court under Article 163(4)(a) of the Constitution should be entertained; and

[6] **NOTING** the applicant's rejoinder in the further affidavit sworn on 15th October, 2024 by Lilian Atogo and further submissions dated 16th October, 2024 contending that; the respondents have not contested the reasons given for the delay in filing the intended appeal; the respondents assail the application before the court by way of challenge to the merits of the intended appeal; the applicant relies on the decision in **Nicholas Kiptoo Arap Korir Salat Salat vs. Independent Electoral and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR)(Nicholas Salat Case)** to argue that it is this Court's position that the question of whether an intended appeal properly falls under this realm of the Court's jurisdiction is a substantive matter to be decided in the main appeal. Without prejudice to the foregoing, the applicant further contends that the questions of constitutional interpretation and application were raised and canvassed in the superior courts and progressed through the normal appeal mechanism with the Court of Appeal making far-reaching pronouncements regarding the interpretation and application of the Constitution; the constitutional matters discernible throughout the proceedings include whether a procuring entity can unilaterally apply an eligibility criteria known as '*organizational deficiency*' in a procurement process not known to the Constitution, the PPAD Act or any laws in Kenya and whether the inclusion of such criteria was unconstitutional and impermissibly discriminatory and contrary to the dictates of Articles 2, 10, 27 and 227 of the Constitution as well as whether such inclusion may propagate the repeated punishment of otherwise eligible bidders amounting to double jeopardy contrary to Article 50 of the Constitution. Further, the finality of

Section 175 of the PPAD Act does not supersede Article 163(4) of the Constitution, and statute cannot undermine or halt the applicant's constitutional right to move the Court on matters of interpretation and application of the Constitution and only this Court can, at the hearing of the substantive appeal determine whether a party has properly invoked its jurisdiction, and all aforestated matters have been set out in its draft petition of appeal annexed to its application demonstrating an arguable appeal which deserves the hallowed adjudication of the Court; and

[7] GUIDED by the provisions of Rule 38(1)(a) of the Supreme Court Rules, 2020 which provides that a person who intends to appeal to this Court shall file their appeal within thirty (30) days from the date of filing the Notice of Appeal, where the appeal is of right as well as computation and extension of time provided under Rule 15(1) of the Supreme Court Rules, 2020; and

[8] APPRECIATING that this court is clothed with unfettered discretion under Rule 15(2) of the Supreme Court Rules to extend the time for filing any document; and that the principles that govern the exercise of such discretion are set out in the *Nicholas Salat case* are 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.”*

[9] HAVING considered the totality of the application, responses and rival arguments by the parties, **WE NOW OPINE** as follows:

- i. It is common ground that the Court of Appeal judgment, the subject of the intended appeal, was delivered on 2nd August, 2024 and the applicant filed a Notice of Appeal on 15th August, 2024 evincing its intention to challenge the impugned judgment;
- ii. From the Motion and the affidavit in support thereof it is clear that the applicant intends to file an appeal to this Court as of right pursuant to Article 163(4) (a) of the Constitution. The petition sought to be filed, a copy of which is annexed to the Motion, indicates as much. What is more, the applicant urged that the intended appeal raises issues of constitutional interpretation;
- iii. The applicant was therefore supposed to have filed its appeal by 16th September, 2024; however, it is contended that the applicant's counsel erroneously and mistakenly miscalculated the date of filing the appeal arriving at the inaccurate filing date of 20th September, 2024; while the instant application was electronically filed on 23rd September, 2024, by which time for filing the appeal had lapsed by 7 days;
- iv. The delay is attributed to extraneous circumstances that required the applicant's advocate to take time off due to his wife's medical condition. Between 13th and 19th September 2024, her condition necessitated urgent and unplanned travel abroad for medical attention from 17th to 19th September 2024. As a result, the miscalculation only became evident on the afternoon of 20th September 2024, when the advocate, upon his return, was finalizing the petition and record of appeal.
- v. We note that the respondents have not contested the reasons proffered for the delay in filing the intended appeal; instead, they assail the application before the court by way of a challenge to the merits of the intended appeal.
- vi. On this ground we reiterate this Court's holding in the ***Nicholas Salat Case*** to the effect that whether the intended appeal properly falls under

this realm of the Court's jurisdiction is a substantive matter to be decided in the main appeal, if and when filed. Thus, where a party moves this Court as of right, a respondent cannot move to strike out such an appeal during the hearing of an application, like this one, for an extension of time. Such a respondent should wait until the intended appeal is properly filed.

vii. In our view, the applicant has adequately established a plausible reason for the delay. Moreover, we do not find the delay unreasonable or inordinate.

viii. Based on the foregoing, we are inclined to exercise our discretion by extending the time within which the applicant is to file its appeal.

[10] Taking into account the foregoing and this court's decision in ***Rai & 3 others v Rai & 4 others*** [2014] KESC 31 (KLR), we deem it just to order that the costs of the Motion shall abide the outcome of the appeal.

[11] Consequently, and for the reasons afore-stated, we make the following orders:

- i. The Notice of Motion dated 23rd September, 2024 and filed on 24th September, 2024 is hereby allowed, and leave is hereby granted to the applicant to file and serve the intended petition/appeal within fourteen (14) days of the date of this ruling.***
- ii. Costs of the Motion shall abide the outcome of the intended appeal.***

It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of March 2025.

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M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
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

