

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Maraga, CJ & P, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)*

**PETITION (APPLICATION) NO. 27 OF 2018**

**—BETWEEN—**

**BERNARD KIBOR KITUR.....PETITIONER**

**—AND—**

**ALFRED KIPTOO KETER.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

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*(Being an application for extension of time to file an appeal against the judgment and orders of the Court of Appeal (E.M Githinji, H. Okwengu & J. Mohammed, JJA) at Eldoret delivered on 11<sup>th</sup> July, 2018 in Eldoret Court of Appeal Election Petition Appeal No. 21 of 2018)*

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**RULING OF THE COURT**

**[1] UPON** perusing the Notice of Motion application by the Petitioner/Applicant dated 18<sup>th</sup> September, 2018 and filed on 19<sup>th</sup> September, 2018 brought under Articles 22, 23, 159 and 163(3)(b) & (4) of the Constitution, the unstated provisions of the Elections Act, 2012, Rules 23 and 53 of the Supreme Court Rules, 2012 and the Supreme Court Practice Directions, 2017, seeking for extension of time to file an appeal out of time against the judgment and orders of the Court of Appeal in ***Election Petition Appeal No. 21 of 2018***; and

**[2] UPON** reading the Applicant's grounds in support of the application, the Supporting affidavit sworn on 18<sup>th</sup> September, 2018 and the Supplementary affidavit sworn on 28<sup>th</sup> September, 2018 and filed on 2<sup>nd</sup> October, 2018; and

**[3] UPON** considering the Applicant's written submissions dated 1<sup>st</sup> October, 2018 and filed on 2<sup>nd</sup> October, 2018 wherein the Applicant submits that the delay in filing the appeal was occasioned by the uncertainty about the computation of time for lodging an appeal to the Supreme Court; whether the same was calculated from the time the Notice of Appeal was lodged at the Court of Appeal on 24<sup>th</sup> July, 2018 or 25<sup>th</sup> July, 2018 when the same was presented to the Supreme Court Registry and whether the computation of time included public holidays and weekends;

**[4] FURTHER**, it was submitted by the Applicant that on 24<sup>th</sup> August, 2018, a friday, when he presented his documents at the Supreme Court's registry during the Supreme Court's August Recess (per Gazette Notice No. 7465 of 6<sup>th</sup> July, 2018), his documents were not received and it was only on 27<sup>th</sup> August, 2018, a monday, that the documents were received and stamped, with the weekend in between the two dates, which date fell outside the 30-day timeline for lodging an appeal to the Supreme Court; and

**[5] UPON** reading the 1<sup>st</sup> Respondent's Replying affidavit sworn and filed on 1<sup>st</sup> October, 2018 in which he opposed the application by the Applicant arguing that the same was brought inordinately and with undue and unexplained delay, and, that the Petition of Appeal and record of appeal were lodged out of time contrary to Rule 33(1) of the Supreme Court Rules, 2012; and

**[6] UPON** considering the 1<sup>st</sup> Respondent's written submissions dated 1<sup>st</sup> October, 2018 and filed on 2<sup>nd</sup> October, 2018 in which, on the issue of timelines, he submitted that the Applicant had filed his petition of appeal and record of appeal out of time, and that the application seeking extension of time had been brought after an inordinate and unexplained delay;

[7] **WE FIND** as follows;

- (a) As provided under Rule 7A(2) as read with Rule 53 of the Supreme Court Rules, 2012, the Chief Justice, and by extension this Court, may give further directions and extend the time limited under the rules upon consideration of prevailing circumstances.
- (b) Pursuant to Rule 33(1) of the Supreme Court Rules, 2012, 24<sup>th</sup> August, 2012 was the last day by which the Applicant should have lodged his appeal to this Court, which day fell this Court's August Recess period as published in Gazette Notice No. 7465 of 6<sup>th</sup> July, 2018. During this period, the registry was open between the hours of 9:00 am – 12:00 noon as provided under Rule 5(2)(b) of the Supreme Court Rules, 2012, but the Applicant sought to lodge his documents at around 4:00pm on the said day.
- (c) In *Charo v Mwashetani & 3 Others* (2014) KLR-SCK it was stated;  

**“In the emerging jurisprudence, the concept of ‘timelines and timeliness’ is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the Court’s eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice.”** (Emphasis added).
- (d) The Supreme Court Act, 2011, the Supreme Court Rules, 2012 and the Elections Act provide for strict timelines for the hearing and determination of matters before the Court. It would therefore be incumbent upon the respective parties to adhere to these strict timelines. The Court may however consider whether there are any extenuating circumstances that would allow it to exercise its unfettered jurisdiction to extend time, more so

on the grounds of public interest. (see *App. No. 16 of 2014 Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*; (2014) KLR-SCK).

- (e) The filing of the appeal on 24<sup>th</sup> August, 2018 during the prevailing August Recess of the Supreme Court, a few hours outside the officially gazetted time could not be regarded as inordinately late. The Applicant has explained his predicament to the satisfaction of this Court, and grounded within the principles enunciated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* (supra). In any event, the Respondent has not established any prejudice he would suffer should the application not be allowed.

**[8] HAVING** therefore considered the application, the affidavit in support and supplementary affidavit filed in support thereto, the Replying affidavit in opposition thereof and the written submissions of the respective parties, by a unanimous decision of this Bench, we make the following orders under Section 23(2)(b) of the Supreme Court Act, 2011 and Rules 21 and 23 of the Supreme Court Rules, 2012;

**ORDERS**

- (a) The application dated 18th September, 2018 and filed on 19th September, 2018 is hereby allowed and the time to file an appeal out of time is hereby extended;
- (b) The Appeal filed on 27th August, 2018 is deemed to have been filed on time;
- (c) Costs shall abide the cause.

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of October, 2018**

.....  
**D. K. MARAGA**  
**CHIEF JUSTICE/PRESIDENT OF THE**  
**THE SUPREME COURT**

.....  
**J. B. OJWANG**  
**JUSTICE OF THE SUPREME COURT**

.....

**S.C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....

**S.N. NJOKI**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true  
copy of the original**

**THE REGISTRAR**  
**SUPREME COURT OF KENYA**