

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

***[Coram: Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ]***

**PETITION NO.10 OF 2019**

**GILBERT MWANGI NJUGUNA..... APPELLANT**

**VERSUS**

**JUDICIAL SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

*(Being an application for extension of time to file a supplementary record of appeal from an appeal from the judgment and Decree of the Court of Appeal of Kenya at Nairobi by the Hon. Waki, Gatembu and Otieno Odek (JJA) dated 25<sup>th</sup> January, 2019 in Civil Appeal No. 34 of 2016)*

**RULING**

**[1]** The Petitioner’s Notice of Motion is dated 10<sup>th</sup> June 2019 seeking extension of time to file a Supplementary Record of Appeal. It is brought under Article 163 of the Constitution and Rules 21 and 53 of the Supreme Court Rules.

It is supported by an affidavit of Gilbert Mwangi Njuguna, the Applicant. He has attached a copy of the unfiled supplementary record of appeal.

**A. BACKGROUND**

**[2]** The Applicant, Gilbert Mwangi Njuguna, was employed on 1<sup>st</sup> September 1986 by the Judicial Service Commission (JSC) as a District Magistrate II. He was later accused of involving himself in several cases of gross misconduct during his tenure with the Judiciary. He was subsequently interdicted from service on 27<sup>th</sup> October 2006 and then retired in public interest on 23<sup>rd</sup> June 2008. He had attained the position of Acting Senior Principal Magistrate and at the time of interdiction, was serving at Chuka Law Courts.

**[3]** Aggrieved by the decision of the JSC to retire him in public interest, the Applicant filed a petition dated 4<sup>th</sup> May 2009 as amended on 15<sup>th</sup> July 2010 in the High Court for declaratory orders inter alia that his interdiction by the JSC on 27<sup>th</sup> October 2006 was illegal, null and void.

**[4]** Upon hearing the parties, the trial judge in a judgment dated 28<sup>th</sup> January 2014, allowed the petition and made orders, inter alia, that the purported interdiction of the Applicant from Judicial Service on 27<sup>th</sup> October 2006 was illegal, null and void and that the 1<sup>st</sup> Respondent (JSC) ought to re-engage the Applicant at a level not lower than Senior Principal Magistrate (SPM) with effect from the date of the Judgment without loss of his accrued pension with respect to past service.

**[5]** Aggrieved by the High Court Judgment, the 1<sup>st</sup> Respondent (JSC) filed an appeal to the Court of Appeal seeking an order that the Judgment of the Industrial Court (Honourable Justice Nduma Nderi) dated 28<sup>th</sup> January 2014 be set aside and be substituted with an order dismissing the Applicant's Further Amended Petition with costs. The Applicant on his part cross appealed, contending, inter alia, that the trial Judge erred in not allowing the Amended Petition dated 15<sup>th</sup> July, 2010 as prayed, and also give an order for vindicatory and exemplary damages.

**[6]** The Court of Appeal delivered a judgment on 25<sup>th</sup> January 2019 allowing the appeal by the 1<sup>st</sup> Respondent (JSC). The judgment of the Employment and Labour Relation Court dated 28<sup>th</sup> January 2014 was set aside and the Cross Appeal by the petitioner dismissed for lack of merit. The Applicant thereafter filed Petition No. 10 of 2019 in this Court dated 15<sup>th</sup> March 2019 challenging the Judgment of the Court of Appeal.

**[7]** The parties appeared before the Deputy Registrar of this Court on several occasions for direction and on 21<sup>st</sup> June, 2019, the 1<sup>st</sup> Respondent was granted 7 days to file submissions in opposition to the application by the petitioner. The file

was thereafter to be placed before the Court for the empaneling of a Bench to determine the said application.

## **B. PARTIES' SUBMISSIONS**

### ***Applicant's Submissions on the application:***

[8] The Applicant's submissions in support of the application is dated 10<sup>th</sup> June 2019 and filed on 11<sup>th</sup> June 2019. The Applicant submits that under Rule 53 of this Court's Rules, the Court has power to extend time. Citing the decisions of this Court in *Nicholas Kiptoo Korir Arap Salat v. Independent Electoral & Boundaries Commission & 7 Others*, [2014] eKLR, *Harun Osoro Nyamboki v. Peter Mujunga Gathuru* [2019], eKLR; and *Director of Public Prosecutions v. Michael Sistu Mwaura Kamau & 4 Others* [2019] eKLR, it is submitted that the principles that guide the Court in the exercise of its discretion to extend time are well established.

[9] It is further submitted that the Applicant filed his Petition of Appeal on 19<sup>th</sup> March, 2019 but by then he had not been supplied with typed proceedings of the Court of Appeal. That upon being supplied with typed proceedings on 29<sup>th</sup> March, 2019, he alleged that he attempted to file the same but was rejected for having been filed out of time. He states that he has filed this application to correct the situation and that the Respondents will not be prejudiced if the application is allowed. The Applicant also submits that his Petition of Appeal merits serious judicial consideration and that it will be rendered nugatory if this application is denied.

[10] The Respondents did not file submissions in opposition to the application. However, they had filed a Preliminary Objection to the Petition dated 3<sup>rd</sup> May, 2019 and their written submissions in support of a Preliminary Objection dated 2<sup>nd</sup> August, 2019.

### **C. DETERMINATION AND ANALYSIS**

**[11]** We have considered the parties' pleadings concerning the application and the sole issue for determination at this stage is whether the orders sought in the application can issue.

**[12]** The principles for extension of time have been well settled in this Court as pleaded by the Applicant in the case of *Nick Salat (Supra)*. From the pleadings, the following facts are discernable: The Court of Appeal rendered its Judgment on 25<sup>th</sup> January 2019. Notice of Appeal was filed on 1<sup>st</sup> February 2019. The appeal was filed on 19<sup>th</sup> March 2019 before the typed proceedings were obtained from the Appeal Court. The typed proceedings were obtained on the 29<sup>th</sup> March 2019 and that the Applicant tried to file the Supplementary Record of appeal on the 15<sup>th</sup> of April, 2019 but this was rejected because time within which it should have filed had lapsed. He however avers that he filed his submissions on the Petition on the 16<sup>th</sup> April 2019 and the instant application on the 11<sup>th</sup> June 2019.

**[13]** We have examined the documents in the attached supplementary record of appeal and note that the Court of Appeal Judges signed off their notes on the 14<sup>th</sup> March 2019 which was way past the 30 days allowed for filing of a record of appeal. The Petition of Appeal itself was filed on 19<sup>th</sup> March before the Applicant had obtained the written proceedings.

**[14]** The Applicant has alleged that, subsequently, he attempted to file the typed proceedings through a Supplementary Record of Appeal on 15<sup>th</sup> April, 2019 but this was rejected at the Registry as the prescribed time to file had already lapsed.

**[15]** Under Rule 33 of the Supreme Court Rules, the Applicant was required to file the record of Appeal within 30 days of the date he had filed the Notice of Appeal. The Applicant submitted that he could not do so within the said stipulated time

because there was delay in the release of the typed proceedings by the Court of Appeal. That it was not until 29<sup>th</sup> March 2019 that he obtained the same. The Applicant had by then filed the Petition of Appeal on 19<sup>th</sup> March, 2019 before he obtained the typed proceedings from the Court of Appeal.

[16] Under Rule 33 of the Supreme Court Rules, the Applicant was required to have filed the Appeal within 30 days from 1<sup>st</sup> February, 2019 when the Notice of Appeal was filed. In the circumstances, it is clear that the Appeal should have been filed by 3<sup>rd</sup> March, 2019 but being a Sunday it ought to have been filed by 4<sup>th</sup> March, 2019 which was the next working day. The Applicant filed the Appeal on 19<sup>th</sup> March, 2019. This means that the Applicant filed his Appeal 46 days from the date the Notice of Appeal was filed. The Appeal therefore was filed out of time, a delay of 16 days. We note that despite filing the present application for leave to file the Supplementary Record of Appeal out of time, the Applicant has not applied for leave to extend time for filing the Appeal out of time. There is no prayer for such extension of time within the present application.

[17] In the circumstances, therefore, strictly, there is no valid Petition of Appeal on record. It follows that the present application for leave of extension of time to file a Supplementary Record out of time is not founded on any substantive proceedings. It is hanging in the air without any roots or foundation. As was stated in **Nick Salat** - *“where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires”*

[18] The Court in that case proceeded to observe and found that:

***“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.***

***To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as the document is unknown in-law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.***

On the basis of the aforesaid decision, we hereby find that the filing of the so called “Petition” is a nullity and of no legal consequence. It was filed out of time and without leave (an order extending time) it must be expunged from the Court’s Record.

**[19]** We further note that on record is a proposed Consent letter by Joint Counsel for the parties dated 24<sup>th</sup> June, 2018 and lodged in Court on 7<sup>th</sup> November, 2019 and which was placed before the Deputy Registrar on 14<sup>th</sup> November 2019, for adoption of the same as a Court Order. This letter and proposed Consent to allow extension of time to file the Supplementary Record out of time was placed on the file while the preparation of this Ruling was pending. We declined to have this “Consent” endorsed and adopted as a Court Order, when we realized that the so

called “Petition” had been filed out of time. Endorsement and adoption of the said “Consent” would have no efficacy in law.

**C. DETERMINATION AND ORDERS**

**[20]** Flowing from our findings above, the final orders to be made are that:

**(a) *The Applicant’s Notice of Motion dated 10<sup>th</sup> June, 2019 is hereby struck out.***

**(b) *The “Petition” of appeal dated 15<sup>th</sup> March, 2019 and filed on 19<sup>th</sup> March, 2019 is hereby struck out.***

**(c) *Each party to bear its costs.***

**DATED and DELIVERED at NAIROBI this 7<sup>th</sup> Day of February, 2020**

.....  
**M.K IBRAHIM**  
**JUSTICE OF THE SUPREME**  
**COURT**

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

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

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME**  
**COURT**

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

I certify that this is a true  
copy of the original

REGISTRAR,  
SUPREME COURT OF KENYA