

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Ibrahim & Ojwang, SCJJ)

APPLICATION NO. 15 OF 2014

-BETWEEN-

HASSAN NYANJE CHARO.....APPLICANT

-AND-

1. KHATIB MWASHETANI	}	RESPONDENTS
2. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION		
4. JUMA MUSA		
5. GIDEON MWANGANGI WAMBUA		

(An application from the Judgment and Order of the Court of Appeal sitting at Malindi (Okwengu, M’Inoti & Sichale JJA) dated 27th November, 2013 in Civil Appeal No. 39 of 2013)

RULING

A. INTRODUCTION

[1] The applicant filed a Notice of Motion dated 15th April, 2014 seeking *extension of time to file an appeal* to this Court, pursuant to Rule 33 of the Supreme Court Rules, 2012. The proposed appeal is against the Judgment and Orders of the Court of Appeal at Malindi, in *Civil Appeal No. 39 of 2013* dated 27th November, 2013.

B. BACKGROUND

[2] The applicant and the 4th respondent (both voters in Lunga Lunga Constituency), being dissatisfied with the election results for Member of the National Assembly for that Constituency, filed two election petitions at the

Election Court in Mombasa, contesting the same. The two petitions were consolidated and heard together. In its Judgment dated 26th September, 2013 the Election Court nullified the election of the 1st respondent as Member of National Assembly, and ordered fresh elections.

[3] The 1st respondent, aggrieved by the decision of the Election Court, appealed to the Court of Appeal in Malindi *Civil Appeal No. 39 of 2013*, seeking to have the Judgment of the Election Court set aside.

[4] On 27th November 2013, the Court of Appeal allowed the appeal, and set aside the decision of the trial Judge. The Court reserved the reasons for their decision to 27th December, 2013 in accordance with Rule 32 of the Court of Appeal Rules. The reasons were eventually delivered nearly a month later, on the 23rd January, 2014.

[5] Being aggrieved with the appellate Court's decision, the applicant filed an application under a certificate of urgency, in the Court of Appeal dated 2nd December, 2013 seeking certification of the matter as one which involved *issues of general public importance*.

[6] On 20th December, 2013 the Court of Appeal certified the application as urgent, and fixed it for hearing on 30th January, 2014. However, on the said date the application was adjourned, and the Court ordered that it be disposed of by way of written submissions.

[7] The Court then fixed a date for Ruling on the application on 4th March, 2014, but thereafter, an adjournment was ordered. The applicant has informed the Court that the Ruling has now been delivered. He has approached this Court

seeking leave for *extension of time to lodge the record of appeal*, under Article 163(4) (a) of the Constitution.

[8] The applicant relies on the grounds listed in the Notice of Motion, and supporting affidavit annexed to his application (dated 16th April, 2014). The grounds, *inter alia*, are as follows:

(i) that the applicant being aggrieved by the Judgment and Order of the Court of Appeal in *Civil Appeal No. 39 of 2013*, filed Notices of Appeal dated *28th November, 2013* and *29th January, 2014*;

(ii) that the Court of Appeal's *delay in delivering the Ruling on certification* has hindered the applicant's access to the final Court and, in the circumstances, this Court should intervene, in the exercise of its inherent jurisdiction, and allow the application for extension of time to file the Petition of Appeal, pursuant to Article 163(4) (a) of the Constitution.

(iii) that the intended appeal raises *questions of constitutional interpretation and application*, specifically Article 81 (e)(ii) of the Constitution; and thus it is just and expedient that time to file the appeal be enlarged, so the applicant may urge the question of interpretation and application of that Article;

(iv) that the lodging of *one* Petition of Appeal, urging both issues of constitutional interpretation and application, and matter of general public importance, would achieve the objectives of just, expeditious, proportionate and affordable resolution of the appeal before the Court;

(v) that the applicant has on numerous occasions applied to the Court of Appeal seeking certified proceedings to facilitate the preparation of the Record of Appeal, which proceedings have not been availed; and

(vi) that the delay in lodging the appeal grounded on Article 81(e) (ii) of the Constitution is, in the circumstances, excusable, and the Court has jurisdiction to extend time to achieve the ends of justice, in discharge of its mandate as stipulated in Section 3 of the Supreme Court Act.

[9] There was no appearance by the 1st respondent and the 4th respondent. The applicant was represented by learned counsel, Mr. Asige and Mr. Njenga, while the 2nd and 3rd respondents were represented by Mr. Nyamodi.

C. THE PARTIES' RESPECTIVE SUBMISSIONS

(i) The Applicant's Case

[10] Mr. Asige, urged the Court to adopt the Notice of Motion and the supporting affidavit filed on 17th April, 2014 which sought extension of time to appeal from the Court of Appeal's decision in *Civil Appeal No.39 of 2011*.

[11] He submitted that the order of the Court of Appeal contested by the applicant was delivered on the 27th November, 2013; the reasons were deferred, and delivered on 23rd January, 2014. It was his submission that the Judgment had, in effect, been delivered on 23rd January, 2014 *after a lapse of the mandatory time (30 days)* required for lodging an appeal at the Supreme Court.

[12] Mr. Asige submitted that, in the said matter, there were two other applications to be supplied with the Order, Judgment and proceedings. He submitted that on 6th March, 2014 the Court of Appeal responded to the applications, but only in respect of the *Judgment and Order*. He submitted that the Court's response had not been timely; and that there has not been any response with regard to the application for the *proceedings*.

[13] Consequently, counsel stated, the applicant has been *unable to lodge his appeal on time*. Counsel urged the Court to allow the application, firstly, because the delay was not occasioned by the applicant's default; and secondly, in view of the fact that the intended appeal seeks *a proper interpretation of Article 81(e) (ii) of the Constitution, and Section 63 of the Elections Act*.

[14] Counsel asked for a grant of a *45-day extension period*, as there was a related application pursuant to Article 163(4) (b) of the Constitution, pending before this Court. This other application was challenging the Court of Appeal's decision refusing to grant leave.

[15] Mr Asige submitted that his client's application falls under Article 163 (4) (a) of the Constitution: it involves the *interpretation of Article 81 (e) (ii)* of the Constitution; and that even though he has formulated the text of an appeal, this was only a draft, and no more.

(ii) The 2nd and 3rd Respondents' Case

[16] Mr. Nyamodi, counsel for the 2nd and 3rd respondents, wholly relied on the grounds of opposition filed on the 5th of May, 2014. He submitted that a perusal of the intended "draft Petition of Appeal" revealed that the intended appeal is premised on Article 163 (4) (a) and (b) of the Constitution. In this regard, counsel argued that the intended appeal entailed a duplicity: an appeal as of right from the Court of Appeal, and an appeal subject to certification from the Court of Appeal that the question is one involving a matter of general public importance.

[17] He submitted that where an appeal is coached in the foregoing manner, it follows that the application contemplated falls under both Articles 163(4) (a) and 163(4) (b) of the Constitution; and that in this context, it is

mandatory for the applicant to seek certification with regard to the aspect falling under Article 163(4) (b).

[18] Mr. Nyamodi submitted that the application as formulated, primarily falls within the ambit of Article 163 (4) (b) of the Constitution and, in this regard, is incompetent for lack of certification by either the Court of Appeal or the Supreme Court. He urged that, in the absence of certification, the Court lacks jurisdiction to grant the prayer for extension of time.

D. ISSUES FOR DETERMINATION

[19] Upon a perusal of the documents before us, and the submissions of counsel, the following issues emerge for determination by this Court:

- (i) whether this Court has jurisdiction to hear the intended appeal; and
- (ii) whether an extension of time to file an appeal should be granted.

(i) The Question of Jurisdiction

[20] This is the fulcrum of the objection by the 2nd and 3rd respondents. Counsel argues that the applicant's intended appeal, as embodied in the draft petition, is brought upon a dual foundation: Article 163 (4) (a) (appeals as of right, in cases dealing with the interpretation and application of the Constitution); and Article 163 (4) (b) (appeals involving matters of general public importance, which require leave to appeal). As leave has not been granted by the Court of Appeal, and the applicant's application for review (in Application No. 14 of 2014) is still pending before this Court, Mr. Nyamodi insists that this Court is not yet clothed with jurisdiction to hear the intended appeal, and as such, cannot grant the application for extension of time to file an appeal.

[21] Learned counsel's essential argument is that the two appeals are inextricably linked and thus, the requirements of leave constraining the aspect of the matter founded upon issues of general public importance, do affect the entire appeal.

[22] We are not of such a view, however. Appeals to this Court need not lie on the entirety of the issues arising in the lower Courts. What come to this Court on appeal, are disputes over *constitutional interpretation or application*, or over matters *of general public importance*. Thus, if such issues can be isolated from the general case heard by the lower Courts, then it is implausible to argue that one cannot further distinguish the "issues of constitutional relevance" that clothe this Court with direct jurisdiction, from those requiring certification as "matters of general public importance".

[23] We agree with the applicant that the draft Petition is only an indication of the issues that the applicant seeks to place before this Court, for determination. It is subject to change, depending on this Court's direction on the applicable span of its jurisdiction, in the matter. In the event this Court is convinced regarding its jurisdiction under Article 163(4)(a), but not Article 163(4)(b) (and Supreme Court Application No. 23 of 2014), the applicant will be obliged to file a Petition that excludes those matters which had been proposed to be "of general public importance". There is, therefore, no bar to this Court's exercise of jurisdiction over those questions which truly involve matters of constitutional interpretation or application, arising from the now-proposed matters of general public importance.

[24] The affidavit in support of this application and the draft Petition, reveal a central issue of constitutional interpretation: improper influence under Article 81 (e) (ii) of the Constitution, *vis-à-vis* undue influence under Section 63 of the

Elections Act (Cap. 7, Laws of Kenya). This seems to have been fundamental to the differing positions taken by the Court of Appeal and High Court.

(ii) Should Extension of Time for the Filing of Appeal be granted?

[25] This matter presents two varying *public-interest considerations* that require balancing by this Court. The first is the principle of *timeliness in the resolution of election disputes*, embodied in Article 87 (1) of the Constitution. This places an obligation on all parties involved, and on the Courts, to work expeditiously to resolve the disputes. The principle emerges clearly from the case, ***Gatirau Peter Munya v. Dickson Mwenda Githinji & 2 Others***, SC Petition No. 2B of 2014 (paragraph 62):

“Article 87 (1) grants Parliament the latitude to enact legislation to provide for ‘timely resolution of electoral disputes.’ This provision must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about ‘timelines and timeliness’, was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.”

[26] The second public interest consideration is that of *access to justice*, embodied in Article 48 of the Constitution. The intended appeal is from a decision of the Court of Appeal rendered on *23rd January 2014*. Thus, we perceive a five-month delay in the filing of the appeal. The delay in the prosecution of this case prejudices the certainty of the political representation of the people of Lunga Lunga Constituency. It is clear that the blame lies squarely on the *Court processes of generating proceedings*, prejudicing the applicant's right to access justice.

[27] Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail. We note that the last correspondence in the record before us was on *29th January, 2014* and that could cast doubt on the measure of assertion of diligence; but there is nothing to show that the applicant has not made other efforts to inquire about the proceedings, or to show that the proceedings are now ready but remain uncollected. As no respondent has called into question the assertion that the proceedings are not yet available, we would not impugn the applicant's claim of diligence.

[28] Would it be in the interests of justice then to turn away an applicant who has, *prima facie*, exercised all due diligence in pursuit of his cause, but is impeded by the slow-turning wheels of the Court's administrative machinery? We think not. We find that though prejudice to the representation of the people of Lunga Lunga Constituency will persist, it is due to no fault on the part of the applicant.

[29] We note that there are still other processes pending before the Court of Appeal, that delay the prosecution of this case. We would urge that Court, and the Registrar thereof, do expedite these processes, so as to facilitate the timely and final resolution of this dispute.

E. CONCLUSION

[30] It becomes quite clear from recent decisions of this Court, that the domain of *elections* – be it in respect of the Presidency, Senate, National Assembly or gubernatorial office – entails special considerations of priority in constitutional governance. On this account, it by no means comes unexpectedly, that a dedicated regime of *electoral law*, built upon the broad principles, and the specific terms of the Constitution, together with the elaborative body of statutory and regulatory law, is well and truly evolving. Relevant decisions of the Supreme Court in this regard, include: ***Odinga v. Independent Electoral and Boundaries Commission & Three Others***, [2013] KLR – SCK (Petition No. 5 of 2013); ***Joho & Another v. Shahbal & Two Others***, Sup. Ct. Petition No. 10 of 2013; ***Munya v. Kithinji & Two Others***, Sup. Ct. Petition No. 2B of 2014, and Application No. 5 of 2014; ***Wanjohi v. Kariuki & Two Others***, Sup. Ct. Petition No. 2A of 2014; ***Munene v. King’ara & Two Others***, Sup. Ct. Petition No. 7 of 2013.

[31] 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.

[32] However, even as we take due 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*.

[33] Here is a case in which an applicant has exercised all due diligence, so as to move a Court of justice, in a situation of grievance on electoral issues. But the mechanisms of the Judiciary itself have shut the door to his knocks thereon. Today he comes before this Court, praying for an open window through which he

can lodge his complaint, in the shape of enlarged time, during which one of the superior Courts will have availed to him the requisite appeal papers.

[34] As the sluggish motion of the judicial machinery enjoys no constitutional privilege, as against the specific guarantees of the Bill of Rights, the inevitable decision in this matter, is one that favours the suitor's claim.

[35] Accordingly, the applicant's Notice of Motion of 15th April, 2014 succeeds. We grant him 14 days extension of time, within which to lodge an appeal in the Supreme Court.

[36] Costs shall be in the appeal.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of July, 2014.

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

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

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

REGISTRAR
SUPREME COURT OF KENYA