

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(Coram: Maraga, CJ & P; Ibrahim, Ojwang, Wanjala & Lenaola SCJJ)

MISCELLANEOUS APPLICATION NO. 27 OF 2018

– BETWEEN –

JOHN LOKITARE LODINYO.....APPLICANT

– AND –

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....

2. BONVENTURE OKOCHI OBONGOYA

3. MARK LOMUNOKOL

RESPONDENTS

(Being an application for extension of time to file a notice of appeal from the Judgment and Decree of the Court of Appeal at Kisumu (Githinji; Okwengu; Mohammed, JJ.A) in Election Petition No. 24 of 2018 dated 26 July 2018)

RULING OF THE COURT

[1] THE APPLICANT has come before this Court on the basis of a certificate of urgency dated 13th August, 2018, seeking the following orders:

a) That the Court be pleased to extend time to file a notice of appeal against the Order and Judgment of the Court of Appeal dated 26th July, 2018.

b) That upon the grant of prayer (a) above, the Court be pleased to grant the applicant leave to file the notice of appeal out of time.

c) That upon the grant of leave, the Court be pleased to deem the Notice of Appeal dated 9th August, 2018 and filed on 10th August, 2018, as filed within time and properly on record.

d) That the cost of this application be provided for.

e) Any such orders or further relief as the Court may deem fit.

- [2]** THE APPLICANT states that the Judgment in question had been delivered on 26th July 2018, and a notice of appeal was required by law to be filed within 14 days; but he filed it on 10th August 2018, one day after the expiry of the time limit.
- [3]** THE APPLICANT states in his Notice of Motion of 13 August 2018 that he had run out of time for lodging his notice of appeal, and that in his perception, the “delay was not inordinate”. He prays for an exercise of discretion by the Court, by extending the time allowed for filing the notice.
- [4]** THE APPLICANT states that he “[stands] to suffer immense prejudice if the notice of appeal is not admitted”; and that he stands to “be locked out of the [relevant elective] seat ... on account of the procedural technicalities”
- [5]** The applicant’s advocate, Mr. Akenga Collins of M/s. Akenga Kimutai & Associates Advocates, has sworn a supporting affidavit averring that: “The appellant/applicant is desirous of having the matter heard and determined on merit”
- [6]** The 1st and 2nd respondents oppose the application on grounds that it is without merit and that the applicant has not demonstrated sufficient reasons why the Orders sought should be granted.
- [7]** The 3rd respondent also opposes the application and urges that the applicant has not shown the public interest that would justify the grant of the Orders sought.

[8] Rule 31 of the Supreme Court Rules, 2012 prescribes a 14- day period, after the delivery of the Judgment, within which to file a Notice of Appeal. In the case of ***Patricia Cherotich Sawe v. Independent Electoral & Boundaries Commission & 4 Others*** SC Pet. No. 8 of 2014; [2015] eKLR (***Patricia Sawe*** case) we accentuated the importance of a Notice of Appeal and in that regard, we pronounced as follows [para 28]:

“What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: “litigation must come to an end.”

[9] In this case, the petitioner had filed a Notice of Appeal out of time. We upheld the preliminary objection that sought to strike out the appeal that was premised on that Notice of Appeal and held as follows:

“It is requisite, in the circumstances, to apply a broad-based principle regarding electoral matters, which this Court has pronounced in other cases: on account of the large public interest in electoral matters, all petitions in that regards, ought to take into account the prescribed timelines.”

[10] In ***Richard Nyagaka Tong’I v. Chris Munga Bichage & 2 Others*** SC Pet. No. 17 of 2014; [2015] eKLR we held that even where a Court reserves reasons for Judgment to a later date, time for filing the Notice of Appeal runs

as from the time of the decision, rather than that of the detailed reasons for the decision. In this case, the Court of Appeal had delivered its Orders without reasons and the appellant only filed a Notice of Appeal 14 days after the delivery of the reasons. In excusing the appellant's mistake, we pronounced thus [para 62]:

“The appellant has sufficiently explained, that the delay in giving reasons by the Court of Appeal made it impossible to formulate a competent appeal, to be filed with this Court under Rule 33(2)(a). It is evident that the appellant was at all times conscious of his obligation to file a competent petition, that meets the terms of Article 163(4)(a); and once the Court of Appeal rationalized the pertinent issues in written format on 4th April, 2014, he embarked on the pursuit of his right of appeal; in accordance with Rule 31(1) he filed a notice of appeal, and later, a petition of appeal under Rule 33(2)(a).”

- [11] In both of the above quoted cases, we recognized the importance of a Notice of Appeal particularly, in electoral matters. In ***Mary Wambui Munene v. Peter Gichuki Kingara & 2 others*** SC Appl. No. 12 of 2014; [2014] eKLR and ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others*** SC Appl. No. 16 of 2014; [2014] eKLR (***Nick Salat*** case) the petitioners had filed the Notice of Appeal within time but failed to file the appeal within the requisite time. In both cases, the petitioners had first sought certification from the Court of Appeal before they abandoned the Appellate Court proceedings in favour of approaching the Supreme Court directly under Article 163(4)(a) of the Constitution. We extended time for filing the appeal. These two cases are distinguishable from the present case, where the applicant is seeking extension of time to file a Notice of Appeal.

[12] We have held in the *Nick Salat* case that a Notice of Appeal is a jurisdictional pre-requisite. No appeal can be preferred without first filing a Notice of Appeal. Where else the final pronouncement by a Court signifies the end of litigation in a matter, a Notice of Appeal signifies the intention to keep the matter alive. Hence, we cannot belittle the role played by a Notice of Appeal, and especially in an electoral matter such as this where electoral justice is closely tied to the issue of timely resolution of disputes. We are therefore inclined to follow the precedent set in the *Patricia Sawe* case.

[13] Hence, upon considering the applicant's request, while taking into account all the relevant circumstances, and in particular the fact that the case-filing rules are so crucial to the proper discharge of the Court's mandate; that the Registry has always remained accessible to parties during vacations; and that no time is now available for entertaining belated causes – we hereby disallow the applicant's Notice of Motion dated 13th August, 2018. We hereby issue Orders accordingly.

DATED and DELIVERED at Nairobi this **22nd** day of **October, 2018**.

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

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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J. B. OJWANG
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

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I. LENAOLA
JUSTICE OF THE SUPREME COURT

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

**REGISTRAR,
SUPREME COURT OF KENYA**