

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Corum: Ibrahim, Ojwang, Wanjala, Njoki, Lenaola, SCJJ)

AT NAIROBI

APPLICATION NO. 29 OF 2018

BETWEEN

MOMBASA COUNTY GOVERNMENT..... APPELLANT

AND

KENYA FERRY SERVICES.....1ST RESPONDENT

**THE ATTORNEY GENERAL for and on behalf of THE INTER-
GOVERNMENTAL RELATIONS TECHNICAL**

COMMITTEE.....2ND RESPONDENT

MYSPLACE PROPERTIES LIMITED.....3RD RESPONDENT

(Being an application for extension of time to file an appeal out of time against the decision of Court of Appeal (Visram, Karanja, Koome JJA) sitting in Mombasa, in Civil Appeal No. 15 of 2017, delivered on 19th of April, 2018)

RULING

A. INTRODUCTION

[1] This is an application by way of Notice of Motion dated 5th September, 2018 brought under Articles 159 and 163(4)(a) of the Constitution, Sections 21(2) and 24(1) of the Supreme Court Act, Rules 23 and 26(1) of the Supreme Court Rules, 2012 and the inherent powers of this Court. The application seeks the following substantive orders:

- a.;
- b. ***THAT the Honourable Court grants the Applicant an extension of time within which to file the instant petition of appeal;***
- c. ***THAT the Applicant be granted leave to file the instant petition of appeal out of time;***
- d. ***THAT the petition of appeal annexed herewith be admitted and deemed to be properly on record and to have been so filed within the stipulated time; and***
- e. ***Costs of this application be provided for.***

[2] The application is premised upon fourteen (14) grounds in the body of the application and the Supporting Affidavit of Jimmy Waliaula, the Director Legal Services of the Applicant, sworn on 5th September, 2018.

B. BACKGROUND

i. Proceedings at the High Court

[3] The genesis of this cause is a disagreement between the County Government of Mombasa and the National Government as to who should control the revenue generated from the collections paid by the users of the ferry services. On 18th February, 2016 the Applicant through their agents, allegedly invaded the 1st Respondent's facilities, forcefully took over the same, and started collecting revenue from the users. This prompted the 1st Respondent to file *Constitutional Petition No. 9 of 2016* in the High Court at Mombasa, raising the following two issues for determination, namely:

- i. *The division of the functions of the National and County Governments under the Fourth Schedule to the Constitution of Kenya, 2010 and in particular Part II which confers upon the county Governments the function of **county transport**, including under paragraph 5(e), the function of operating ferries and harbours, **excluding**, the regulation of international and national shipping and matters related thereto; and*

ii. *The question of division of assets between the National and County Governments; and*

[4] The High Court (*Emukule, J*) in his judgment delivered on 8th November, 2016 made a decision allowing the petition in favour of the 1st Respondent. The Learned Judge declared that: the 1st Respondent's right to the protection of its property was breached by the Applicant, the Applicant's actions to take over the ancillary activities, powers, duties, and obligations of the 1st Respondent were unlawful, and that the Applicant's proposed law, called Mombasa Port Authority Bill and Mombasa Ports and Harbours Bill 2014, were inconsistent with the provisions of Articles 201 and 209(5) of the Constitution of Kenya, 2010.

[5] Consequently, the Learned Judge issued orders directing the Applicant and its agents grant the personnel of the 1st Respondent, take over the operations of facilities ancillary to functions of the 1st Respondent, as the Likoni Ferry Operator; prohibited the Applicant from interfering, taking over, collecting rent, or any other levies within the confines of the facilities erected and situated on Plot No. MS/1/1762 and MS/1/1763; prohibiting the Applicant from taking parking areas, waiting bays, termini, rental space and buildings and advertising space currently or hereafter contracted by the 1st Respondent to third parties. The Court also directed the Applicant to account and refund to the 1st Respondent all the sums of money collected as rents, gate fees and rental space fees and advertising space, and also issued an order for compensation by way of damages in respect of lost revenue from motor vehicles, tuk tuks, motor cycles, bicycles and handcarts using the 1st respondent's landing facilities, and termini.

ii. *Proceedings at the Court of Appeal*

[6] Aggrieved by the decision of the High Court, the Applicant filed an appeal at the Court of Appeal, *Civil Appeal no. 15 of 2017*. The Court of Appeal identified two issues for determination as follows:

- a. *Whether the operation of the Likoni Ferry is a National Government function; or*
- b. *Whether the function devolved to the county government upon the enactment of the Constitution of Kenya 2010 and subsequent subsidiary legislation.*

[7] In a judgement delivered on 19th day of April, 2018, the Court of Appeal upheld the decision of the High Court and dismissed the appeal with costs to the 1st Respondent. As a result the Applicant herein approached this Court seeking extension of time within which to file an appeal before this Court.

iii. *Proceedings at the Supreme Court.*

PARTIES' SUBMISSIONS

a. Applicant

[8] The Applicant filed written submissions dated 2nd October, 2018 and submits that the instant application was filed timeously. The Applicant urges that its advocates requested for typed proceedings on 26th April, 2018, filed its Notice of Appeal on 30th April, 2018, obtained typed proceedings and the certified Order/decreed of the Court of Appeal on 28th June 2018 and 5th July, 2018 respectively. The Applicant attributes the delay in filing the Appeal to the delay in obtaining typed proceedings and the decree, and change of advocates on record.

[9] The Applicant urges that the Court of Appeal has created serious constitutional uncertainty, had an apparent conflict between the County and National levels of government which needed to be settled by this Court. The Applicant maintains that the intended appeal, is a matter of general public interest, which if unresolved, will occasion prejudice to the people of Mombasa County as their right to access to justice and fair trial will be impeded. The Applicant contends that the appeal will enable this Court discharge its mandate under the Supreme Court Act, and that Rule 53 of the Supreme Court Rules give the court power to extend time. In support of its submissions, the Applicant has cited this Court's decision in the case

of *Nicolas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others SC. App. No. 16 of 2014; [2015] eKLR (the Nick Salat Case)* where this Court set the principles for extension of time; *Hassan Nyanje Charo v Khatib Mwashetani & 3 others Civil Application No. 14 of 2014; [2014] eKLR*, where it was held that the delay by the Courts ought not be revisited upon an appellant; and *Aviation & Allied Workers Union Kenya v Kenya airways Limited & 3 Others, Appl. No. 50 of 2014 (Aviation and Allied Workers Union Case)*, where it was held that a delay of four months was not unreasonable.

[10] Additionally, the Applicant filed supplementary submissions dated 12th November, 2018 urging that they intend further to file the petition upon determination of the instant application, as their Notice of Appeal is still valid, and that the reason for delay was beyond its control.

b. 1st Respondent

[11] The 1st Respondent strenuously opposes the application. They filed a replying Affidavit sworn on 6th November, 2018 together with their submissions filed on 8th November, 2108. The 1st Respondent urges that the Applicant's Notice of Appeal lapsed on 19th May, 2018 when they failed to file a petition and a record of appeal. In disputing the Applicant's argument that they did not contribute to the delay, they submit that the Applicant started pursuing typed proceedings after the time fixed for filing an appeal had lapsed.

[12] It's the 1st Respondent's submission that the Applicant has not complied with the orders of the Court of Appeal and is therefore underserving of the orders sought in the instant application. While citing this Court's decisions in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, SC. Appl. No. 5 of 2014; [2014] eKLR*, the 1st Respondent urges that this appeal falls under Article 163(4)(a) of the Constitution whereby the Applicant had a direct right of appeal without seeking certification. The 1st Respondent also cites *the Nick Salat Case*

and concludes that the Applicant does not deserve the exercise of this Court's discretion. They urge that an extension of time could prejudice their legitimate expectation, that justice shall not be delayed, and on clarity and finality of legal proceedings. The 1st Respondent prays for the dismissal of the application with costs.

c. 2nd Respondent

[13] In opposing the Application, the 2nd Respondent had their submissions filed on 9th November 2018. They submitted that this Application is incompetent in view of Rules 37(1) and 33(1) of the Supreme Court Rules, 2012 which require an appeal to be filed at least 30 days from the date of filing of the Notice of Appeal. In the 2nd Respondent's view, the Applicant's Notice of Appeal stood withdrawn in the absence of a fresh application to file a fresh one.

[14] On whether this Court should extend time for the Applicant to file its appeal, the 2nd Respondent submits that the Applicant does not deserve the exercise of this Court's discretion for two reasons. First, it is guilty of material non-disclosure as to the date of receipt of typed proceedings, and second, it has not explained the inordinate delay between the filing of the Notice of Appeal and the present application. On this, the 2nd Respondent cited this Court's decision in ***Aviation and Allied Workers Union Case and Fahim Yasin Twaha v Timamy Issa Abdalla and others, Application No. 35 of 2014; [2015] eKLR.***

[15] It is also the 2nd Respondent's submissions that they stand to suffer prejudice if the orders sought are granted and sought for the dismissal of the Application with costs.

d. The 3rd Respondent

[16] The 3rd Respondent challenged the application by filing written submissions on 9th November, 2018. The 3rd Respondent contends that the application is incompetent for six reasons, to wit, the intended appeal has not been certified as

one involving a matter of general public importance, there is nothing involving constitutional interpretation and application to qualify the intended appeal under Article 163(4)(b) of the Constitution, no leave was sought under Section 15(1) of the Supreme Court Act, there is no application for leave within the meaning of Section 16 of the Supreme Court Act, there is no certification by the Court of Appeal as per Rule 40 of the Court of Appeal Rules and Section 24 of the Supreme Court Act, and there is no certification that the appeal is of exceptional circumstances pursuant to Section 17 of the Supreme Court Act.

[17] On whether there is a sufficient reason for the delay, the 3rd Respondent submits that the Applicant's reason is not one envisaged under Section 31 (1) of the Supreme Court Act. The 3rd Respondent urged that there is no rule requiring the Applicant to file the petition of appeal simultaneously with the record or the proceedings. In that regard, the 3rd Respondent added that the Applicant ought to have attached the alleged typed proceedings or a certificate of delay in the present application to enable this Court quantify whether the delay was inordinate.

[18] In conclusion, the 3rd Respondent submits that it will suffer prejudice if the extension is granted since the Applicant has not complied with the initial court orders directing it to hand over the operation and management of the Kenya Ferry Services within 14 days from the date of the Court of Appeal's decision. Consequently, they urge the Court to dismiss the application with costs.

C. ISSUES FOR DETERMINATION

[19] The application raises one issue for determination by this Court, namely:

Whether this Court should extend time for the Applicant to file its appeal? Has the Applicant laid a satisfactory basis to warrant this Court to extend time to file the appeal?

D. ANALYSIS

E. **[20]** Rule 53 of the Supreme Court Rules, 2012 grants this Court discretion to extend time. It provides that:

F. ***“The Court may extend the time limited by these Rules, or by any other decision of the Court.”***

[21] It is the Applicant’s submission that upon the Court of Appeal delivering its verdict on *19th April 2018*, it filed a *Notice of Appeal* on *30th April, 2018*. Nevertheless, it claims that it could not file its appeal within time because *it was awaiting the “typed proceedings and decree of the Court of Appeal*. During the period of awaiting *“typed proceedings and decree”*, the time for filing an appeal lapsed. The Respondents urge that the reasons advanced by the Applicant were not sufficient, that the Notice of Appeal stood withdrawn in the absence of a fresh one, the Applicant is not deserving of the orders for material non-disclosure on the date of receipt of typed proceedings and inordinately delaying to file the current application. They also urge that the Applicant has not sought certification that this is a matter of general public interest.

[22] Rule 33(1) of the Supreme Court Rules thus provides:

“An appeal to the Court shall be instituted by lodging in the Registry within thirty days of the date of filing of the notice of appeal-

- a) ***a petition of appeal;***
- b) ***a record of appeal; and***
- c) ***the prescribed fee”.***

[23] Rule 33(4) of the Supreme Court Rules thus provides:

“For purposes of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to

the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and shall further contain the following documents relating to the appeal in the first appellate court—

- a. the certificate, if any, certifying that the matter is of general public importance;*
- b. the memorandum of appeal;*
- c. the record of proceedings; and*
- d. the certified decree or order” [emphasis supplied].*

[24] Further, Rule 33(6) of the Supreme Court Rules, provides as follows:

“Where a document referred to in sub-rule (3) and (4) is omitted from the record of appeal, the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal.”

[25] Concerning extension of time, this Court has already set the guiding principles in *the Nick Salat Case* as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

- 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 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. *where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
5. *whether there will be any prejudice suffered by the respondents, if 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”* [emphasis supplied]

[26] Further, in the case of County *Executive of Kisumu v County Government of Kisumu & 8 others*, SC. Civil Appl. No. 3 of 2016; [2017] *eKLR*, this Court emphasized the need for the Applicant, *in an application for extension of time*, to satisfactorily declare and explain the whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:

“[24] a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.” [emphasis added]

[27] In the present case, we note there is no certificate of delay from the Deputy Registrar of the Court of Appeal. Further, we note that the Applicant has not annexed the typed proceedings and the decree to confirm that the same were obtained on 28th June 2018 and 5th July, 2018 respectively.

[28] Assuming the proceedings and the decree were annexed and indeed obtained on the stated dates, we note that the present application was filed more than two months later. The Applicant has not provided a satisfactory explanation for the two months delay. The Applicant has attempted to explain the delay by attributing it to *change of advocates from the firm of M/S Balala & Abed Advocates to M/S Paul*

Mwangi & Company Advocates. The Applicant has neither annexed the Notice of Change of Advocates nor explained the exact date within which the change occurred. We do not find this explanation satisfactory.

[29] We take further note that the Applicant did not pursue the procedure provided for under Rule 33(6) of the Supreme Court Rules which allow for filing of the requisite documents late, *but without leave of Court*. Having filed the Notice of Appeal on 30th April, 2018, the last day for filing the Appeal was 29th May, 2018. Thereafter, the applicant had a further fifteen days (until 12th June, 2018) to file a supplementary record without leave. This therefore means that the Applicant ought to have filed the Appeal and the record with the documents that were available to demonstrate some diligence, then later seek leave of this Court to file the supplementary record *out of time*. Consequently, it is our finding that the applicant has not satisfactorily explained the inordinate delay of two months upon receipt of the typed proceedings.

[30] We have perused prayers sought in the application and note the applicant had prayed that, as a corollary to the prayer for grant of extension, the petition of appeal annexed to this application be admitted and deemed to have been filed within time. We have interrogated the record and find that there was no petition annexed to the application. In the absence of the petition, we cannot make any further findings on this prayer.

[31] The upshot of the above is that we are inclined to disallow the application for extension of time with costs to the Applicant.

G. ORDERS

[32] Consequently, we make the following Orders

- i. *The Notice of Motion dated 5th of September, 2018 be and is hereby disallowed.***
- ii. *The Applicant shall bear the costs of the Respondents.***

[33] Orders accordingly.

DATED and DELIVERED at NAIROBI this 25th Day of February 2019.

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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