



REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

*(Coram: Koome CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki, Lenaola, Ouko &
Warsame SCJJ)*

PETITION(APPLICATION) NO. E003 OF 2026

— BETWEEN —

WANJIRU GIKONYO.....1ST APPELLANT

CORNELIUS ODUOR OPUOT.....2ND APPELLANT

-AND-

THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE NATIONAL GOVERNMENT CONSTITUENCY

DEVELOPMENT FUND BOARD..... 2ND RESPONDENT

**THE SENATE OF THE REPUBLIC OF KENYA.....3RD RESPONDENT/
APPLICANT**

THE HON ATTORNEY GENERAL.....4TH RESPONDENT

THE CABINET SECRETARY, TREASURY.....5TH RESPONDENT

COUNCIL OF GOVERNORS.....6TH RESPONDENT

CHARLES AGAR OWINO.....7TH RESPONDENT

PETER RUNKIN OUMA ONYANGO.....8TH RESPONDENT

ISABEL NYAMBURA WAIYAKI.....9TH RESPONDENT

(Being an application for extension of time to file Pleadings)

Representation:

Malidzo Nyawa for the 1st Petitioner

(Katiba Institute)

Mr. Wambola H/b for Mr. Elisha Ongoya, SC for the 2nd Petitioner

(Ongoya & Wambola Advocates)

Mr. Mbarak Awadh for the 1st Respondent

(The National Assembly)

Ms Chesire H/b for Mr. Kipkirui for the 2nd Respondent

(Naikuni, Ngaah & Miencha Company Advocates)

Mr. Eugene Mukele H/b for Mr. Job Wambwala for the 3rd Respondent

(The Senate)

No appearance for the 4th, 5th, 6th, 7th, 8th and 9th Respondents

RULING OF THE COURT

[1] UPON PERUSING the 3rd Respondent's Notice of Motion dated 2nd July 2026 and filed on 2nd July 2026, pursuant to Section 3, 3A and 31 of the Supreme Court Act and Rules 15 of the Supreme Court Rules, 2020, seeking orders inter alia that:

1. *Spent*
2. *This Honourable Court grants the applicant extension of time within which to file response and submissions to the Petition of Appeal*
3. *Costs of and incidental to this application abide the result of the said appeal.*

[2] UPON CONSIDERING the affidavit sworn by Jeremiah Nyegenye, CBS, on 2nd July 2026 and filed on the same date, together with written submissions of even date, the 3rd respondent avers that the Petition of Appeal was served upon it on 6th March 2026; that the petition was thereafter placed before the Speaker of the Senate for directions; that the Speaker instructed that the matter be referred to the Senate Justice, Legal Affairs and Human Rights Committee for consideration and advice to the House; that the Committee, upon receipt of the referral, directed the legal counsel to prepare draft pleadings for its review, which pleadings were duly prepared and submitted for scheduling before the Committee for approval; that owing to the government financial cycle running between March and June, during which priority is accorded to bills relating to vertical and horizontal revenue allocation to ensure both national and county governments are adequately resourced, the Committee was only able to deliberate upon and approve the pleadings on 18th June 2026; that thereafter the matter was referred back to the Speaker through the Senate's administrative channels for concurrence with the Committee's resolution, which concurrence was granted on 22nd June 2026; and upon receipt of the requisite approvals, the 3rd respondent proceeded to file its documents on 24th June 2026; and

[3] UPON FURTHER CONSIDERING the 3rd respondent's further averments that the delay was neither inordinate nor deliberate; that the pleadings were filed immediately upon receipt of instructions; that during the mention of the matter on 26th June 2026, the 1st respondent opposed its documents, whereas the appellants did not raise objection; that no prejudice will be suffered by the respondents should the extension be granted; that the application has been brought without undue delay; and that public interest is best served by granting the extension, the matter being one that squarely implicates constitutional interpretation, the framework of devolution, and the equitable sharing of national resources, functions in which the 3rd respondent/ applicant bears a direct constitutional mandate, and

[4] IN SUPPORT OF THE APPLICATION, the 3rd respondent/ applicant relies on this Court's decisions in *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 others*, [2014] KESC 12 (KLR); *Parliamentary Service Commission & 4 Others Vs Salaries and Remuneration Commission & 7 others* [2026] KESC 33 (KLR); *County Government of Kajiado Vs Tata Chemicals Magadi Ltd* [2026] KESC 41 (KLR), and in the Court of Appeal decision in *Ibrahim & another Vs Zumzum Investment Limited & another* [2024] KECA 864 (KLR) to highlight the principles for granting leave to extend time to file pleadings out of time; and

[5] TAKING INTO ACCOUNT the 1st respondent's Replying Affidavit sworn by Samuel Njoroge ,CBS, Clerk of the National Assembly, on 9th July 2026 and filed on 10th July 2026, together with written submissions of even date, the 1st respondent avers that upon filing of the petition of appeal, the Deputy Registrar of this Court on 17th March 2026 issued directions and timelines for filing responses; that the deadline for filing was 31st March 2026; that the appellants were required to file any rejoinder by 7th April 2026; that the 1st respondent complied with the said timelines by filing its Replying Affidavit and Grounds of Affirmation on 19th March 2026; that the matter was thereafter mentioned on 10th April 2026 and 22nd May 2026; that despite admitting knowledge of the appeal, the 3rd respondent/ applicant delayed filing its pleadings and submissions pending internal approvals and failed to appear on the two mention dates; that when the matter was mentioned on 26th June 2026, all parties had complied within the prescribed timelines save for the 3rd respondent, which purported to have complied by filing its response and submissions more than two months out of time without first seeking leave of the Court; that the present application is an afterthought, seeking to validate documents that were incompetent *ab initio*; that the 3rd respondent's/applicant's conduct throughout the proceedings demonstrates indolence, having failed to participate in case management and only appearing after the appeal had substantially progressed;

that the application was only filed after the 1st respondent opposed its documents, further underscoring its afterthought nature; that the 3rd respondent's conduct is inconsistent with that of a diligent litigant deserving equitable relief of extension of time; that the reasons advanced, being internal administrative processes and institutional approval mechanisms, were entirely within its control and cannot justify non-compliance with the Supreme Court Rules; that the explanation shows the delay was not occasioned by circumstances beyond its control but by institutional choices regarding prioritization of internal business; that no evidence has been adduced to support the alleged resolutions of the Senate as set out in the supporting affidavit; that granting the orders sought would prejudice the respondents by delaying expeditious determination of the appeal and undermining the certainty and finality intended by the Rules of this Court; and that the 1st respondent would be denied an opportunity to respond to issues raised by the 3rd respondent, which supports the petition, thereby infringing its right to a fair hearing; and

[6] NOTING THAT the 1st respondent in opposing the motion relies on the decisions of this Court in *Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 others (Supra)*, *County executive of Kisumu Vs the County Government of Kisumu & 8 Others* [2017] KESC 16 (KLR) *Konchellah Vs Mbogo & another* [2018] KESC 3 (KLR) and *Okoiti & 3 others Vs the Cabinet Secretary of the National Treasury and Planning & 10 others* [2023] KESC 69 (KLR); and

[7] FURTHER TAKING INTO ACCOUNT the 2nd respondent's grounds of opposition and written submissions both dated and filed on 9th July 2026, wherein it contends that the application is misconceived, incompetent and devoid of merit, the 3rd respondent having filed the present application only after the 2nd respondent had objected to its grounds in support of the petition dated 24th June 2026 and submissions of even date; that the 3rd respondent has failed to establish sufficient

cause to warrant exercise of this Court's discretion under Rule 15(2) of the Supreme Court Rules, 2020; that the 3rd respondent has not satisfactorily explained the delay in filing the impugned pleadings, the delay being solely attributable to internal administrative processes and inaction; that pleadings may only be filed with leave of the Court, unlike in this instance where the 3rd respondent filed the impugned pleadings long after the timelines prescribed by this Court had lapsed and without leave; that by the time the impugned pleadings were filed, the parties had substantially complied with case management directions and exchanged their respective submissions; that the impugned pleadings introduce substantive arguments in support of the petition after the close of pleadings, thereby prejudicing the 2nd respondent and conferring upon the 3rd respondent an undue forensic advantage; and that granting the orders sought would occasion substantial prejudice to the 2nd respondent by permitting the 3rd respondent to reconstruct its case after the close of pleadings and after parties had exchanged submissions; and

[8] NOTING that the Appellants, the 4th, 5th, 6th, 7th and the 8th respondents, did not file responses to the application; and

[9] BEARING IN MIND that rule 15(2) of the Supreme Court Rules, 2020 grants this court the power to extend time limited under the Rules, and the guidelines set out in the *Salat case* being that:

- i. ***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.***
- ii. ***A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court.***
- iii. ***Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.***
- iv. ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***

- v. *Whether there will be any prejudice suffered by the respondents if the extension is granted.*
- vi. *Whether the application has been brought without undue delay.*
- vii. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time; and*

[10] Having considered the totality of the application, the response and submissions put forth, **WE NOW OPINE AND DETERMINE** as follows:

- i. According to the Court record, on 17th March 2026 the Deputy Registrar issued directions that the appeal dated 6th March 2026 be served upon the respondents by close of business the same day; that the respondents were granted fourteen (14) days upon service to file and serve their responses; that the appellant was granted a further seven (7) days from the date of service of the responses to file a rejoinder, if any; and that the matter was slated for mention on 10th April 2026. In line with the Court's directions, the 3rd respondent was required to file its response by 31st March 2026; that on 10th April 2026, when the matter was mentioned to confirm compliance, 3rd respondent had filed its response to the petition of appeal;
- ii. The record further reveals that when the matter was mentioned on 26th June 2026 to confirm filing of submissions, Mr. Mbarak, learned counsel for the 1st respondent, informed the Deputy Registrar that the 3rd respondent had on 24th June 2026, filed grounds in support of the petition together with written submissions but was objected to them being deemed properly on record, the same having been filed two months after the close of pleadings and without leave of Court; that he argued it was only proper for the 3rd

respondent to seek leave of Court and that admitting the documents would prejudice the 1st respondent who had already filed its submissions; that in response, Mr. Mukele, learned counsel for the 3rd respondent, stated that it had taken long to obtain instructions from the Senate and urged the Deputy Registrar to deem the documents properly on record given the public interest issues raised by the matter.

- iii. The Deputy Registrar determined that he lacked jurisdiction to admit documents filed out of time and directed learned counsel to approach the Court appropriately for the documents to be deemed properly on record. It is those directions which necessitated the filing of the present application for our consideration.
- iv. It is trite law that an applicant seeking leave to regularize a procedural lapse must declare the entire period of delay and offer a cogent and credible explanation for such delay. We have, on numerous occasions, underscored the importance of compliance with orders, rules and practice directions. See ***Okoiti & 3 others Vs Cabinet Secretary for the National Treasury and Planning & 10 others*** (Application E029 of 2023) [2023] KESC 69 (KLR) and ***Independent Electoral and Boundaries Commission Vs Cheperenger & 2 others*** (Petition 5 of 2016) [2018] KESC 46 (KLR). However, we have equally affirmed that minor procedural lapse, particularly where no prejudice is occasioned or demonstrated, will not derail the Court's overarching constitutional mandate: the fair, just and expeditious determination of meritorious appeals.

- v. In this instance, based on the Court's record, the 3rd respondent filed its grounds in support of the petition and written submissions two months out of time. This delay is attributed to the late receipt of instructions, which counsel for the 3rd respondent links to the need for internal consultations by the 3rd respondent which took long time since the period between March and June is the government financial period, and as such the Senate always gives priority to the bills that concern vertical and horizontal revenue allocation to ensure that both national and county governments have necessary resources to continue running. We are inclined to give counsel the benefit of the doubt and accept this explanation, noting that the delay was neither inordinate nor suggestive of bad faith. Further, we are not satisfied with the claim by 1st and 2nd respondent they will be prejudiced if the 3rd respondent is allowed to file their response and submissions out of time because they can file a rejoinder to the 3rd respondent's response if necessary. In the circumstances, we are satisfied that the explanation given is sufficient and that the delay does not warrant the exclusion of the 3rd respondent's grounds in support of the petition and written submissions.
- vi. Regarding the 3rd respondent's contention that the appeal raises issues of significant public interest, we note that the appeal concerns the constitutionality of the National Government Constituency Development Fund Act. We agree with the 3rd respondent's counsel that the appeal indeed raises issues of a public nature involving questions of constitutional interpretation, devolution, sharing of resources and the 3rd respondent plays a role in all the aforementioned functions and it would be in public interest to hear the 3rd respondent on its grounds in support of the petition and written submissions.

- vii. Even after stating so, we reiterate the caution we gave in the ***Salat case*** that it is highly irregular and presumptive for a party to file documents out of time and thereafter seek the Court's stamp of approval on such an obvious illegality. Following the course adopted in the ***Salat Case and Senate & 3 others Vs Speaker of the National Assembly & 10 others (Petition 19 (EO27) of 2021) [2023] KESC 7 (KLR)***, we hereby expunge the 3rd respondent's grounds in support of the petition and written submissions filed out of time and without leave. The 3rd respondent is, however, hereby granted leave to file and serve afresh their grounds in support of the petition and written submissions in line with our grant of leave to do so.
- viii. Since costs follow the event, and consistent with ***Rai & 3 others Vs Rai & 4 others*** (Petition No. 4 of 2012) [2014] KESC 31 (KLR), we deem it just to order that the costs of the motion shall abide the outcome of the appeal.

[11] CONSEQUENTLY and for the reasons afore-stated, we make the following Orders:

- i. ***The application dated 2nd July 2026 and filed on 2nd July 2026 is allowed to the extent that the time for filing the 3rd respondent's/applicant's grounds in support of the petition and written submissions is hereby extended.***
- ii. ***The grounds in Support of the Petition and written submissions filed on 24th June, 2026 on behalf of the 3rd respondent are hereby expunged from the record.***

- iii. *The 3rd respondent/applicant shall file and serve its grounds in support of the petition and written submissions within seven days of the date of this ruling.*
- iv. *The 1st and 2nd respondents are at liberty to file rejoinders thereof within seven days of service of the said grounds in support of the petition and written submissions, if so minded.*
- v. *The costs of this application shall abide the outcome of the substantive appeal.*

It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of September, 2026.

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M.K. KOOME

**CHIEF JUSTICE & PRESIDENT OF
THE SUPREME COURT OF KENYA**

.....
P.M. MWILU

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT
OF THE SUPREME COURT OF KENYA**

.....
S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....
W. OUKO

.....
M. WARSAME

