



REPUBLIC OF KENYA



KENYA LAW
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**Karubiu v Karaba & 3 others (Petition 30 of 2018)
[2018] KESC 73 (KLR) (21 December 2018) (Ruling)**

James Karimi Karubiu v Dickson Daniel Karaba & 3 others [2018] eKLR

Neutral citation: [2018] KESC 73 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 30 OF 2018
DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ
DECEMBER 21, 2018**

BETWEEN

JAMES KARIMI KARUBIU APPLICANT

AND

HON DICKSON DANIEL KARABA 1ST RESPONDENT

HON CHARLES KIBIRU REUBENSON 2ND RESPONDENT

SAMUEL SEKI LEMPATI 3RD RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 4TH
RESPONDENT**

(Being an Application for enlargement of time for appeal against the Appellate Court's decision delivered at Nyeri (Kiage, Sichale & Kantai JJ.A) on 11 July 2018)

RULING

I. Introduction

1. Coming up before the court is the applicant's Notice of Motion dated 2 October 2018, attended with the applicant's supporting affidavit of even date.
2. The applicant seeks Orders as follows:
 - (a) the Court do authorize enlargement of time, enabling the applicant to file an appeal from a Court of Appeal decision delivered on 11 July 2018;
 - (b) to that intent, the applicant's notice of appeal lodged at the Nyeri station of the Court of Appeal on 25 September 2018, be deemed as being properly on record;



- (c) the applicant be allowed to file a petition of appeal, the same to be duly heard and determined;
- (d) the costs of this application be incorporated in the main cause.

II Background To The Application

3. The senate seat for the County of Kirinyaga, in the General Elections of 8 August 2017, had drawn four candidates. The 3rd respondent herein, who had borne responsibility as the Returning Officer, declared the 2nd respondent, who mustered a total of 147,921 votes, as the winner; the 1st respondent coming second, with a total of 130,925 votes; and the applicant herein coming third, with a total of 11,987 votes.
4. The 1st respondent contested such a declaration of results in High Court Election Petition No. 4 of 2017 – a cause fully heard, amidst numbers of interlocutory applications demanding recount of votes, scrutiny of voting, review, and recusal. The hearing ended with Court directions for the formulation and filing of counsel’s written submissions. However, just before the formal canvassing of the said submissions in Court, the petitioner (1st respondent) lodged an application seeking to withdraw his cause.
5. The applicant herein, then, stepped in with a new application seeking to be substituted as litigant, in place of 1st respondent. The High Court (Mshila, J.), in a Ruling of 31 January 2018, was satisfied with 1st respondent’s reason for seeking withdrawal, and duly granted the application – the petition being withdrawn, with costs to the 2nd, 3rd and 4th respondents.
6. The learned judge, however, was not inclined to allow substitution of the applicant herein as petitioner, perceiving the proposition as an abuse of Court process.
7. The learned judge’s Ruling was followed by two appeals: Election Petition Appeals No. 3 and No. 4 of 2018 – and these were consolidated and determined by the Appellate Court.
8. The appellate court appraised the matter as falling under three separate heads: (i) effect of the withdrawal by the original petitioner; (ii) merits of the denial of party-substitution by the trial Court; and (iii) the issue of costs.
9. The court of appeal delivered its Judgment on 11 July 2018, holding that the effect of withdrawal by the original petitioner, did amount to a withdrawal of all applications falling under the umbrella of the petition. The Appellate Court upheld the trial Judge’s decision, taking note of the fact that the appellant before it had, in several notable instances, shown that he lacked the intent to take over and to prosecute the withdrawal matter.

III. Moving The Surpeme Court

10. The instant application relates to the said appellant before the Court of Appeal. Before the Supreme Court, he lodged a notice of appeal on 25 September 2018, as a step towards the filing of an appeal. Both, however, are out of time: hence the instant application seeking approval for the filing of appeal-papers, by virtue of Rule 53 of the Supreme Court Rules, 2012 which permits enlargement of time.
11. It is the applicant’s case that his delay merits accommodation by this Court, because: (i) his rights under the electoral process were unfairly compromised, and he was denied fair hearing; (ii) he has the principled intent of assuring that the people of Kirinyaga County have a leader whom they have freely elected; (iii) nobody is likely to suffer prejudice if he is substituted as petitioner in Election Petition No. 4 of 2017.



12. The application is contested by the 2nd respondent, who submitted that the applicant did not give any compelling grounds for allowing his belated appeal.
13. Similarly the 3rd and 4th respondents have argued that the applicant's prayer coming some three months since the relevant election was concluded, is but an afterthought, warranting no indulgence on the part of the Court, especially as extension of time is not a right, but an equitable dispensation that is available only to a truly deserving party.
14. The 3rd and 4th respondents averred that the applicant, by failing to annex to his application a draft petition of appeal, as a demonstration that he is truly ready to pursue the course of appeal, should be perceived as being no more than an agent of prejudice towards them. They aver too that the state of uncertainty in Senate representation for Kirinyaga County, occasioned by the applicant's prevarication, has already undermined the proper discharge of the relevant obligations of representation in the legislature.

IV. Analysis And Determination

15. There is one question for determination: should this Court grant extension of time for the applicant to file a petition of appeal?
16. Although this court, by virtue of Rule 53 of the Supreme Court Rules, 2012, has a discretion to grant extension of time for a party to lodge its case, the same is constantly exercised with abundant caution, care, and criteria of fairness: the object being to sustain a judicial process embodying the principles of *the Constitution*, and to uphold the varied manifestations of the rights of litigants and of members of the public. This principle inclines us always to uphold the stand which we had taken in the case, *Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others*, Sup. Ct. Application No. 16 of 2014; [2014] eKLR. Such a discretion is to be dispensed only in favour of an applicant who presents a compelling case, such as would justify the inordinate delay in filing the required papers.
17. Does the application merit the dispensation of the Supreme Court's agreeable discretion? The applicant states that if he is not heard on appeal, his right to fair hearing will have been violated. And he tends to underplay the standing of timelines in the judicial process, averring that these have only a secondary place in relation to the rights of citizens. This would not, however, bring light on the circumstances attending such a delayed filing of his cause.
18. We have in the past underlined the great significance of the notice of appeal, filed ahead of the main cause, and timeously, as a basis of fairness to the other party who will have the responsibility of due preparation for a well-matched encounter at the seat of justice: *Patricia Cherotich Sawe v. Independent Electoral & Boundaries Commission & 4 Others*, Sup. Ct. Pet. No. 8 of 2014; [2015] eKLR; *John Lokitare Lodinyo v. Independent Electoral & Boundaries Commission & 2 Others*, Sup. Ct. Misc. Applic. No. 27 of 2018; [2018] eKLR. Running through such decisions is the beneficent principle that all litigation must come to an end; this will blot out all the unsettling friction from the civilized co-existence of fellow-citizens.
19. It is our perception that the respondents will be unnecessarily prejudiced if we allow the instant application. The applicant, who did not properly give notice of intended appeal, has clearly fallen short on the expression of genuine intent that an intending appellant ought to evince. He stands in breach of Rule 31 (1) of the Supreme Court Rules, 2012: which stipulates that a notice of appeal is to be filed within fourteen days of the occurrence of the subject of contest. Besides, he is in violation of Rule 33 (1) of the said Rules: having filed notice of appeal, a party is required to lodge the appeal itself within



thirty days. Any serious litigant who falls short on these solemn timelines would have endeavoured to ameliorate the situation by filing the intended appeal.

20. It is our finding, in the foregoing circumstances, that the applicant has not laid a sufficient basis in aid of the call for extension of time. We find no reason to exercise a discretion in favour of granting Orders as sought.

21. Accordingly, we decline to grant this application; and we make Orders accordingly.

22. It follows, as we order, that the applicant shall bear the costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2018.

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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S. N. NDUNG’U

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

