



Kenya Airports Authority v Otiemo, Ragot & Company Advocates (Petition (Application) E011 of 2023) [2023] KESC 104 (KLR) (8 December 2023) (Ruling)

Neutral citation: [2023] KESC 104 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E011 OF 2023
MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA & N NDUNGU, SCJJ
DECEMBER 8, 2023**

BETWEEN

KENYA AIRPORTS AUTHORITY APPELLANT

AND

OTIEMO, RAGOT & COMPANY ADVOCATES RESPONDENT

(Being an application to strike out Submissions, List of Authorities and Digest of Authorities filed by the Petitioner)

Mandatory requirement of leave of the Supreme Court to file pleadings out of time

The Supreme Court disallowed an application to strike out submissions out of time on grounds that at the hearing, the applicant could well argue their appeal orally. The respondent could always be granted leave to file supplementary submissions in reply to the submissions by the appellant which were filed out of time all in the interest of justice and to an expeditious disposal of this litigation. The Supreme Court however underscored the importance of complying with court orders and seeking leave before filing pleadings out of time.

Reported by John Ribia

***Civil Practice and Procedure** – pleadings – submissions – timelines – submissions filed out of time without leave of the Supreme Court - whether the Supreme Court had the discretion to allow for late filing of submissions - whether the Supreme Court could grant an applicant the discretion to file pleadings out of time having not sought leave of the court to file the pleadings out of time and having not complied with the orders of the Registrar of the Court - Constitution of Kenya articles 50(1), 159, and 163(5); Supreme Court Act (cap 9B) section 3; 21; 21(2); Supreme Court Rules, 2020 (cap 9B Sub leg) rules 12(1), 31(6), and 65.*

Brief facts

The respondent sought to strike out and expunge from the record the submissions, list and digest of authorities all dated and filed by the appellant on grounds that the documents were filed out of time, without leave of the Supreme Court, and in violation of the timelines issued by of the Deputy Registrar of the Supreme Court in the matter.



Issues

- i. Whether the Supreme Court had the discretion to allow for late filing of submissions.
- ii. Whether the Supreme Court could grant an applicant the discretion to file pleadings out of time having not sought leave of the court to file the pleadings out of time and having not complied with the orders of the Registrar of the Court.

Held

1. Section 21 of the Supreme Court Act (the Act) granted the Supreme Court general powers to make any ancillary or interlocutory orders. Rule 65 of the Supreme Court Rules empowered the Supreme Court to issue such directions as could be appropriate where a provision of the Rules or Practice Directions was not complied with, having regard to the gravity of the non-compliance and the general circumstances of the case.
2. Article 159 of the Constitution set out the guiding principles of the exercise of judicial authority which included that justice shall not be delayed and shall be administered without undue regard to procedural technicalities.
3. Compliance with the Supreme Court's orders and directions on filing and service of documents was imperative. Compliance went to the root of the rule of law as well as the dignity of the Supreme Court.
4. From the directions issued by the Hon. Deputy Registrar on August 7, 2023, the appellant ought to have filed and served its submissions on or before August 28, 2023. It was not until September 22, 2023, that the appellant filed its submissions online, and filed its hardcopies on September 25, 2023, thus delaying compliance with the court's directions by over 25 days. As noted in rule 12(1) of the Supreme Court Rules, filing was deemed complete when the document was submitted both electronically and physically. The delay in compliance by the appellant was therefore prejudicial to the respondent who was deprived the opportunity to respond to the appellant's submissions.
5. Whereas late filing of submissions was not incurable, and the Supreme Court had discretion to allow such late filing. The appellant had not moved the Supreme Court appropriately by way of an application for extension of time to file the said documents.
6. Section 21 of the Act and rule 65 of the Supreme Court's Rules granted the Supreme Court general powers to make any ancillary or interlocutory orders and any such directions as may be appropriate. The bottom line in all cases was for parties to litigation to reasonably access justice.
7. Prejudice had been suffered by the respondent due to the applicant's failure to timeously file its submissions. The respondent could be facilitated to mitigate such prejudice as may have been suffered.
8. At the hearing, the applicant could well argue their appeal orally. The respondent could always be granted leave to file supplementary submissions in reply to the submissions by the appellant which were filed out of time all in the interest of justice and to an expeditious disposal of this litigation.

Application disallowed.

Orders

- i. *The appellant's submissions, list and digest of authorities all dated September 22, 2023 and filed on September 25, 2023 were admitted as part of the record.*
- ii. *The respondent was granted fourteen (14) days from the date of this ruling to draw, file and serve supplementary submissions.*
- iii. *The appellant was to bear the costs of the application.*

Citations

Cases

Kenya

1. *Attorney General v Torino Enterprises Limited* Civil Appeal 84 of 2012; [2020] KECA 930 (KLR); [2020] eKLR - (Mentioned)
2. *Cooperative Merchant Bank Limited v George Fredrick Wekesa* Civil Appeal 54 of 1999 - (Mentioned)



3. *Dande & 3 others v Director of Public Prosecutions & 2 others* Petition 4 (E005) of 2022; [2022] KESC 23 (KLR) - (Mentioned)
4. *Independent Electoral & Boundaries Commission v Jane Cheperenger United Republican Party & Irine Kimutai Chesang* Petition 5 of 2016; [2018] KESC 46 (KLR); [2018] eKLR - (Followed)
5. *Rai & 3 others v Rai, Estate of & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Followed)
6. *Mati v Returning Officer Mwingi North Constituency & 2 others* Election Appeal 5 of 2018; [2018] KECA 700 (KLR); [2018] eKLR - (Mentioned)
7. *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) ; [2017] eKLR - (Mentioned)
8. *Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others* Application E029 of 2023; [2023] KESC 69 (KLR) - (Mentioned)
9. *Salat, Nicholas v Independent Electoral and Boundaries Commission & 7 others* Application 16 of 2014; [2014] KESC 12 (KLR); [2014] eKLR - (Mentioned)
10. *Senate of the Republic of Kenya & 3 others v Speaker of the National Assembly of the Republic of Kenya & 10 others; Fund Board (Interested Party)* Petition 19(E027) of 2021; [2022] KESC 20 (KLR) - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 50(1); 159; 163(5) - (Interpreted)
2. Supreme Court (General) Practice Directions, 2020 (Gazette Notice No 9586) In general - (Cited)
3. Supreme Court Act (cap 9B) sections 3, 21, 21(2) - (Interpreted)
4. Supreme Court Rules, 2020 (cap 9B Sub leg) rules 12(1); 31(6); 65 - (Interpreted)

Advocates

Mr. Karuti h/b for Mr. Munyu for the appellant

Mr. Otieno David for the respondent

RULING

Representation:

Mr. Karuti h/b for Mr. Munyu for the Appellant

(Iseme, Kamau & Maema Advocates)

Mr. Otieno David for the Respondent/Applicant

(Owiti, Otieno & Ragot Advocates)

1. Upon perusing the notice of motion application dated September 29, 2023 by the respondent pursuant to article 163(5) of the *Constitution*, sections 3 and 21(2) of the *Supreme Court Act*, rules 31(6) and 65 of the *Supreme Court Rules, 2020* and all other enabling provisions of the law, seeking to strike out and expunge from the record the submissions, list and digest of authorities all dated and filed September 22, 2023 by the appellant; and
2. Upon examining the grounds on the face of the application, the supporting affidavit and further affidavit sworn on September 29, 2023 and October 19, 2023 respectively, by Otieno David, a Partner in the respondent's law firm in which he contends that: on August 7, 2023 the court's Deputy Registrar directed the appellant to file and serve submissions within 21 days; the appellant breached the timelines



- and filed the submissions 25 days out of time without the leave of the court and without reference to the respondent; no explanation for the delay was given by the appellant when the matter came up before the Hon. Deputy Registrar on September 25, 2023; and the appellant's subsequent reasons for delay as stated in its replying affidavit are unsupported by any evidence and are false;
3. Noting the respondent's Further arguments that: the rules of procedure, case management and the court's directions serve a vital role in attainment of justice; the sequence of filing or making submissions is well established in the practice of law with an appellant first filing its submissions, the respondent filing its response and thereafter an appellant has an opportunity to file a rejoinder restricted to matters arising in the response; it is prejudicial to the respondent who had to file submissions without the benefit of addressing the appellant's submissions; the appellant's actions were discourteous and disrespectful to the court, to the respondent, and was deliberately intended to cause a delay in the finalization of the petition;
 4. Considering the respondent's submissions dated September 29, 2023 and its supplementary submissions dated October 19, 2023 where it contends that: article 159 of the *Constitution* provides for the principles that guide all courts in Kenya in their exercise of judicial authority to include that justice shall not be delayed; the appellant's submissions and authorities remain unchallenged having been filed after the respondent had filed its submissions, thus prejudicial to the respondent's fair trial right under article 50(1) of the *Constitution*; the appellant having obtained a stay of proceedings and execution from this court, the respondent continues to be exposed to suffering due to the devaluation of the Kenya shilling while the appellant continues to benefit from the delay in conclusion of the matter; and that it is highly irregular and presumptive to file documents out of time without leave and thereafter seek the court's stamp of approval to deem them to be regularly on record. The respondent cites this court's decisions in *Okiya Omtata Okoiti & 3 others v The Cabinet Secretary National Treasury & Planning and 10 others* SC Application No. E029 of 2023, *Senate & 3 others v Speaker of the National Assembly & 10 others; Fund Board* (Interested Party) (Petition 19(E027) of 2021) [2022] KESC 20 (KLR) *Nicholas Kiptoo Arap Salat v IEBC & 7 others* and *Edwin Harold Dayan Dande & 3 Others v Director of Public Prosecutions & 2 others* SC Petition No4(E005) of 2022 to buttress its arguments; and
 5. Considering the appellant's replying affidavit sworn on October 11, 2023 by Martin Munyi and submissions dated October 11, 2023 in which the appellant opposes the application by stating that: the application is vexatious and misconceived, intended to impede the expeditious determination of the petition of appeal; the delay in filing the submissions was not inordinate; the delay was caused by exigencies of work and was not intended to circumvent the interests of justice; the appellant had not had sight of the respondent's submissions by the time it filed its submissions; the respondent has not demonstrated the prejudice it stands to suffer if the submissions remain on record as it can be afforded the opportunity to file submissions in rejoinder; counsel for the appellant expressed remorse for the belated filing of the submissions; and this court should decline the invitation to sway into a trajectory that defeats the fair, just and expedient determination of the dispute;
 6. Further considering the appellant's contention that the *Okiya Omtata case* (*supra*) is distinguishable from the instant case as it arose from an interlocutory application under rule 31 of the *Supreme Court Rules* which requires the application to be filed alongside the submissions; the application aims to elevate procedural issues over substantive questions of law which should not be countenanced; striking out of pleadings is draconian and doing so will have an effect to the larger public; the doctrine of proportionality calls for the prayer to strike out the impugned documents to be disallowed, citing the Court of Appeal decisions in *Cooperative Merchant Bank Limited v George Fredrick Wekesa* CA No. 54 of 1999, *Attorney General v Torino Enterprises Limited* [2020]eKLR, *John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission &*



Paul Musyimi Nzengu [2018]eKLR and this court's decision in *Raila Amolo Odinga & another v Independent Electoral & Boundaries Commission & 2 others* [2017]eKLR; and

7. Taking into account the mention before the Hon. Deputy Registrar of the court on 7th August, 2023 when directions were issued for the appellant to file its submissions within 21 days with the respondent having corresponding period to file submissions thereafter, and the mention before the Hon. Deputy Registrar of 25th September, 2023 where it was noted that the appellant had failed to comply with the timelines set for filing submissions;
8. Cognisant of the provisions of section 21 of the *Supreme Court Act* which grants this court general powers to make any ancillary or interlocutory orders, and rule 65 of the *Supreme Court Rules* 2020 which empowers this court to issue such directions as may be appropriate where a provision of the *Rules* or *practice directions* is not complied with, having regard to the gravity of the non-compliance and the general circumstances of the case;
9. Further noting the provisions of article 159 of the *Constitution* which set out the guiding principles of the exercise of judicial authority which include that justice shall not be delayed and shall be administered without undue regard to procedural technicalities;
10. We have considered the application, responses and submissions filed by the parties and now opine as follows:
 - i. This court has in several of its decisions reiterated that compliance with its orders and directions on filing and service of documents is imperative. As we stated in the *Okiya Omtatab case* (*supra*) compliance with court orders goes to the root of the rule of law as well as the dignity of the court.
 - ii. We note that from the directions issued by the Hon. Deputy Registrar on August 7, 2023 the appellant ought to have filed and served its submissions on or before August 28, 2023. It was not until September 22, 2023 that the appellant filed its submissions online, and filed its hardcopies on September 25, 2023 thus delaying to comply with the court's directions by over 25 days. As noted in rule 12(1) of the *Court's Rules*, filing is deemed complete when the document is submitted both electronically and physically.
 - iii. The appellant having failed to comply with the court's direction, the respondent proceeded to file its submissions online on September 22, 2023 aware of the impending mention to confirm compliance on September 25, 2023. The delay in compliance by the appellant was therefore prejudicial to the respondent who was deprived the opportunity to respond to the appellant's submissions. Upon exhaustion of the timelines, the Hon. Deputy Registrar proceeded to certify the matter as ready for hearing.
 - iv. Guided by this court's decision in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* SC Petition No.5 of 2016 [2018] eKLR where we underscored the importance of complying with court orders and given directions, every party has an obligation to honour the court's directions. Whereas late filing of submissions is not incurable, and this court has discretion to allow such late filing, the appellant has not moved the court appropriately by way of an application for extension of time to file the said documents, however, is that fatal?
 - v. This court is granted general powers to make any ancillary or interlocutory orders by the provisions of section 21 of its *Act*. Similarly rule 65 of the *Court's Rules* empowers the court to issue such directions as may be appropriate. The bottom line in all cases is for parties to litigation to reasonably access justice.



- vi. The consideration to bear in mind here is what prejudice has been suffered by the respondent due to the applicant's failure to timeously file its submissions and whether the respondent can be facilitated to mitigate such prejudice as may have been suffered. Conversely, would the applicant be able to still argue their appeal without the submissions? The answer to both enquiries, we find, are in the affirmative. At the hearing, the applicant can well argue their appeal orally. The respondent can always be granted leave to file supplementary submissions in reply to the submissions by the appellant which were filed out of time all in the interest of justice and to an expeditious disposal of this litigation.
- vii. Consequently, and under powers granted by section 21 of the Supreme Court Act and rule 65 of the Court's Rules, we order that the late filed submissions be admitted and deemed to have been filed within time. The respondent is hereby granted 14 days therefrom to draw, file and serve supplementary submissions.
- viii. On the issue of costs, this court in Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012 [2014] eKLR held that costs follow the event. On this account and in the circumstances, the appellant shall bear the costs of the respondents.

Orders

11. Consequently, we make the following orders:

- i. The respondent's notice of motion dated September 29, 2023 be and is hereby disallowed;
- ii. The appellant's submissions, list and digest of authorities all dated September 22, 2023 and filed on September 25, 2023 be and are hereby admitted as part of the record;
- iii. The respondent be and is hereby granted fourteen (14) days from the date of this ruling to draw, file and serve supplementary submissions;
- iv. The appellant shall bear the costs of the application.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.

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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

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT



.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

