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| Case Number: | Application 8 of 2020 |
| Date Delivered: | 04 Sep 2020 |
| Case Class: | Civil |
| Court: | Supreme Court of Kenya |
| Case Action: | Ruling |
| Judge: | David Kenani Maraga, Mohammed Khadhar Ibrahim, Philomena Mbete Mwilu, Smokin C Wanjala |
| Citation: | University of Eldoret & another v Hosea Sitienei & 3 others [2020] eKLR |
| Advocates: | - |
| Case Summary: | **Whether a notice of appeal and petition of appeal filed out of time and without the requisite leave could be sanctified by court**<br><br>**University of Eldoret & another v Hosea Sitienei & 3 others [2020] eKLR**<br><br>**Application No. 8 of 2020**<br><br>**Supreme Court of Kenya**<br><br>**D K Maraga (CJ & P), P M Mwilu (DCJ & VP), M K Ibrahim, S C Wanjala, Lenaola, SCJJ**<br><br>**September 4, 2020**<br><br>**Reported by Chelimo Eunice**<br><br>***Jurisdiction*** *– jurisdiction of the Supreme Court – extension of time - jurisdiction of the Supreme Court to extend time within which to file an appeal – whether the Supreme Court could extend time within which to file an appeal – what were the grounds in which the Supreme Court could allow extension of time – claim that a delay of 560 days* |

*in filing an appeal was as a result of a litigant pursuing a review process before the Court of Appeal - whether the court could extend time within which to file an appeal in such a situation.*

***Civil Practice and Procedure*** *– appeals – appeals to the Supreme Court – time within which to file appeals before the Supreme Court – importance of filing of a notice of appeal – whether a notice of appeal and petition of appeal filed out of time and without the requisite leave could be sanctified by the court - Supreme Court Rules, 2020, rule 36.*

**Brief facts**

The applicants sought to stay execution of decree and orders arising from the judgment of the Court of Appeal delivered on October 18, 2018 and for extension of time to file notice of appeal and petition of appeal in relation to the judgment. The applicants argued that if the stay orders were not granted, the 1st applicant was going to suffer substantial losses because it would be required to expend public funds to satisfy the decretal sums amounting to Shs. 38,903,116.60 in favour of the 1st and 2nd respondents.

On the issue of leave to lodge the notice of appeal and appeal out of time, the applicants explained the delay by stating that after the delivery of the judgment by the Court of Appeal, they sought to review the same unsuccessfully as their application was dismissed. That a subsequent petition to the Supreme Court challenging the review ruling was also dismissed. They maintained that the steps they took revealed their concerted and diligent efforts made to access justice and that they were not indolent at any point.

The 1st and 2nd respondent opposed the application arguing that the Supreme Court had no jurisdiction to grant the prayers sought in the absence of a proper notice of appeal filed before it and that in any event, the application for stay was overtaken by events since the applicants' account had already been garnished. They further stated that the application had been brought more than 560 days after the decision was delivered, making the application for stay a non-starter, impish and

purely an abuse of the court process. They argued that ignorance of the law on the side of the applicants' legal advisors could not find a ground for extension of time and the court could not deem as properly filed documents lodged in court after 560 days without authority as that would amount to countenancing egregious actions.

**Issues**

i. Whether the Supreme Court could extend time within which to file an appeal.
ii. Whether the Supreme Court could allow extension of time in filing an appeal where the delay was as a result of a litigant pursuing a review process before the Court of Appeal.
iii. Whether an aggrieved party could apply for review of the decision complained of and pursue an appeal against the same decision concurrently.
iv. Whether a notice of appeal and petition of appeal filed out of time and without the requisite leave could not be sanctified by the court.

**Held**

1. The Supreme Court had jurisdiction to extend time and the exercise of that jurisdiction was an issue of its judicial discretion. A particular consideration being whether the applicants had a reasonable reason to explain their delay to the court's satisfaction.
2. The main contention by the applicants was that they had sustained a diligent quest for justice only that they relied on their advocates' honest belief and advice in pursuing a review of the Court of Appeal judgment and subsequent appeal before the Supreme Court. That course, unfortunately for them, did not yield their expected outcome, hence, the reason they were seeking another opportunity to go at it albeit by way of appeal on the substantive judgment of the Court of Appeal.
3. Following the decision of the Court of Appeal, the applicants were faced with two

options, to either file for review of the decision to the same court or pursue an appeal before the Supreme Court within either of the applicable jurisdictional contours. The applicants, as advised by their advocates, chose the former. They could not concurrently pursue both options as that would be an outright abuse of judicial process. However, where a litigant had more than one option to pursue, he had to settle on one of them. The decision on which course to pursue was taken in advance and once it was taken, the other option was no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option did not succeed. That meant that when choosing, the litigant was expected to choose the best available option since he could not have any further recourse.

4. When the applicants preferred to pursue a review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at the instant stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. That would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants' options to cherry pick and engage in trial and error at the altar of judicial process without the attendant consequences.
5. The delay which the applicants sought to be excused from was largely as a result of the applicants' pursuit of the review process before the Court of Appeal and the resultant appeal before the Supreme Court. That delay was 560 days. Whereas the applicants would have diligently been pursuing their options whose success could have had an implication on the need for the instant proceedings, the court was not inclined to accept such explanation.
6. Rule 36 of the Supreme Court Rules

provided for the filing of a notice of appeal within fourteen days of a decision of the Court of Appeal from which an intended appeal was founded. The filing of a notice of appeal was not premised on any occurrence or condition to be fulfilled by the appellant. It signified the intention to appeal. The applicants appreciated as much in filing their notice of appeal against the review decision of the Court of Appeal. The applicants could not, therefore, argue that they did not know the importance of that step. The applicants had not explained why they never attempted to comply with that important step at the time.

7. The prevailing circumstances did not enable the court to evaluate any satisfactory reasons that excused the applicants from the apparent non-compliance. The purported filing of a notice of appeal and petition of appeal without the requisite leave could not be sanctified by the court, notwithstanding that a case number was issued to the applicants. The alleged notice of appeal and petition of appeal, therefore, had to be struck out from the court record for having been filed without the court's sanction and out of time. The notice of appeal not having been filed on time, the court could not resuscitate anything in the matter. The prayer for extension of time, thus, failed.
8. In the absence of a subsisting appeal, the prayers for stay in both applications were superfluous. The principle objective for grant of orders of stay was to preserve the subject matter of an appeal. The applicant had to satisfy the court that the intended appeal was arguable and not frivolous, and that unless the stay order sought was granted, the appeal or intended appeal would be rendered nugatory.
9. The applicants' intended appeal would, but for the court's finding, been arguable. The applicants sought to challenge the manner in which the Court of Appeal exercised its jurisdiction and how that related to articles 25 and 50 of the Constitution. The issues raised in the matter related to the court's determination

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| | of the doctrine of *res judicata* a similar issue pending before the court.<br>10. As for the other consideration whether or not the intended appeal would be rendered nugatory, the applicants' position was contradictory. The garnishee proceedings were as a result of lawful legal process arising from a decree issued by a competent court. That in itself could not justify grant of stay particularly in the wake of the status of the appeal. Accordingly, the court was not persuaded to grant stay orders under the circumstances, as it would have served no purpose.<br><br>*Applications dated May 6, 2020 and May 22, 2020 dismissed, petition of appeal dated May 6, 2020 struck out, with each party bearing own costs.* |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Nakuru |
| Docket Number: | - |
| History Docket Number: | Civil Appeal No.55 of 2017 (as consolidated with Civil Appeal No. 58 of 2017 |
| Case Outcome: | - |
| History County: | Nakuru |
| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Maraga CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala, Lenaola, SCJJ)*

**APPLICATION NO. 8 OF 2020**

**BETWEEN**

**UNIVERSITY OF ELDORET…...…….…….1ST PETITIONER**

**THE VICE CHANCELLOR, UNIVERSITY OF ELDORET……2ND PETITIONER**

**VERSUS**

**HOSEA SITIENEI……...……...….....1ST RESPONDENT**

**PROFESSOR EZEKIEL KIPROP...…….……...….2ND RESPONDENT**

**THE CABINET SECRETARY FOR EDUCATION**

**SCIENCE AND TECHNOLOGY.....……...……...3RD RESPONDENT**

**ATTORNEY GENERAL……...…….....4TH RESPONDENT**

*(Being applications for stay of execution of the decree and orders arising from the judgment of the Court of Appeal at Nakuru (Lady Justice Nambuye, Lady Justice Sichale & Mr. Justice Kantai JJA) delivered on the 18th October 2018 in Civil Appeal No.55 of 2017 (as consolidated with Civil Appeal No. 58 of 2017) and for extension of time to file Notice of Appeal and Petition of Appeal in relation to the said judgment)*

**RULING OF THE COURT**

***Introduction***

**[1]** On 30th April 2020, we delivered a ruling on two applications brought by the parties to this matter. The first application filed on 23rd August 2019 by the applicants sought a stay of execution of the judgment and decree of the Court of Appeal at Nakuru delivered on 18th October 2018, the same judgment subject to the present intended appeal. The second application by the 1st and 2nd respondents (the respondents) sought the striking out of both the Notice and Record of this Appeal. The appeal subject to those applications was in respect of a ruling delivered by the Court of Appeal on 9th July 2019 in which the petitioners had sought to review the judgment made on 18th October 2018. In our ruling, we struck out the petition of appeal and dismissed the application for stay of execution. Other than the 1st and 2nd respondents, the other respondents, just like in those applications subject to the ruling on 30th April 2020, did not participate in the present applications.

**[2]** On 7th May 2020, the applicants were back before the Supreme Court. They filed a petition being **Petition No. 6 of 2020** against the respondents. Contemporaneously, they filed a Notice of Motion application on the same date seeking in effect the following

prayers:

a) This matter be certified as urgent and service thereof be dispensed with in the first instance.

*b)* This Honourable Court be pleased to grant an interim stay of execution of the judgment and decree of the Court of Appeal at Nakuru made *on the 18th October 2018 in Civil Appeal No.55 of 2017 (as consolidated with Civil Appeal No.58 of 2017) and all proceedings, awards and orders consequential upon the said judgment including the decree emanating from the judgment delivered on 9th July 2019 by the Employment and Labour Relations Court in Nakuru Employment and Labour Relations Court Cases No.3 & 4 of 2019 pending inter partes hearing of this application and pending the hearing and determination of the Petition of Appeal filed herewith;*

*c) This Honourable Court be pleased to grant leave to the applicants to file a Notice of Appeal and Petition out of time against the said decision of the Court of Appeal made on 18th October 2018;*

*d) The Notice of Appeal lodged in the Court of Appeal at Nakuru on 6th May, 2020 and the Petition of Appeal dated 6th May, 2020 be deemed duly filed and to be properly on record;*

*e) This Honourable Court be pleased to direct that the proceedings herein be heard by way of video conference or other appropriate technology pursuant to Rule 3(3) of the Supreme Court Rules 2020;*

*f) The costs of the application be costs in the appeal.*

***[3]*** *The application is supported by the affidavit of STEPHEN ANDITI, the 1st applicant's Legal Officer. The applicants' advocate ERIC GUMBO filed a Supplementary Affidavit dated 7th day of May 2020 in which he annexes the Petition of Appeal No.6 of 2020 filed together with the present application and the Court of Appeal judgment delivered on 18th October 2020, subject to the intended appeal. The applicants also filed written submissions in respect of the application.*

***[4]*** *On 22nd May 2020, the applicants filed another application under certificate of urgency seeking the following prayers:*

a) The application herein be certified as urgent and service thereof be dispensed with in the first instance.

*b)* This Honourable Court be pleased to order interim stay of any execution arising from or relating to the subject matter of the proceedings pending before this Honourable Court, being the Decree and Orders arising from the Judgment of the Court of Appeal at Nakuru delivered on *18th October 2018 in Civil Appeal No.55 of 2017 (as consolidated with Civil Appeal No.58 of 2017) pending the hearing and determination of the application dated 6th May, 2020;*

*c)* The Court be pleased to stay execution proceedings in the Employment and Labour Relations Nakuru ELRC Case No.3 and 4 of 2019, arising from the decision of the Court of Appeal in Civil Appeal No.55 and 58 of 2016, the subject of these proceedings, and in particular the attachment levied on the 1st Applicant's Bank Account No.01021073342500 domiciled at National Bank of Kenya, Eldoret in the credit of the 1st applicant to answer to the Decree for the sum of Shs.38,903,116.60 (Decretal sums) as well as any execution of the 1st Applicant's property in satisfaction of the Decretal sums pending the hearing and determination of the application dated 6th May 2020 *pending the hearing and determination of the Petition of Appeal filed herewith;*

d) *This Honourable Court be pleased to direct that the court file in Nakuru Employment and Labour Relations Court Case No.3 & 4 be transmitted to this Honourable Court for appropriate directions during the hearing of the application dated 6th May 2020.*

This application is further supported by the affidavit of the said Stephen Anditi.

**[5]** The application is grounded on the main fact that while this Court is seized of the application dated 6th May 2020, the 1st and 2nd respondents initiated execution proceedings against the 1st applicant's stated account and obtained a *Decree Nisi* for garnishment of the account in the sum of Shs.38,903,116.60 from the Employment and Labour relations Court at Nakuru which is the exact same subject matter of the application pending before this Court. The Employment and Labour Court had directed the Garnishee to appear in court on 2nd June 2020 to show cause why the *Decree Nisi* should not be made absolute.

**[6]** The applicants further stated that the effect of the execution is to freeze all monies in the 1st applicant's bank account causing unnecessary hardship to the 1st applicant's operations as it is unable to undertake any transactions in relation to the account. That unless this Court intervenes, public funds will be irrecoverably lost to the 1st and 2nd respondents and lead to undermining this Court's judicial authority and integrity and it is necessary to preserve the substratum of both the application dated 6th May 2020, the substantive appeal and the directions made by this Court's Honourable Deputy Registrar on 18th May 2020.

***Applicants' case***

**[7]** The submissions filed on 7th May 2020 on behalf of the applicants address three issues – jurisdiction of this Court to entertain appeals in respect of judgments of the Employment and Labour Relations Court on two constitutional proceedings as well as the legality of the appeal judgment in a case where the Court of Appeal acted without jurisdiction contrary to Article 164(3) of the Constitution; the discretionary power of this Court to grant leave to parties to file an appeal out of time and the power, even duty of this Court to preserve the subject matter of such an appeal.

**[8]** The applicants ask the Court to take into consideration certain factors which they deem relevant. These are: that the grave miscarriage of justice occasioned to the applicants by the appeal judgment, the impending execution proceedings of a decree of the Court of Appeal in the sum of Shs.38,903,116.60 which the applicants contend was rendered without jurisdiction will, unless arrested, render the intended appeal academic as per the principles in **Moi High School Kabarak & Another vs Malcolm Bell**; that this is in an appropriate case where the Court should exercise its discretion and grant the order for leave to file an appeal out of time taking into account the principles in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others** [2014] eKLR.

**[9]** The applicants submit that the matter raises constitutional issues in relation to the appeal falling squarely within Article 163(4)(a) of the Constitution. These issues relate to the jurisdiction of the Court of Appeal in which it expanded the scope of its decision beyond the single issue of *res judicata* raised since the ELRC never heard or determined the dispute beyond the issue of *res judicata* and the applicants non derogable right to a fair hearing under Articles 50(1) and 25(c) and to equal protection and benefit of the law under Article 27 of the Constitution.

**[10]** On the prayer for stay, the applicants indicate that this is a proper case for which the prayer should be granted as the appeal is arguable and not frivolous in light of the constitutional questions raised. They proceed to argue that if the orders are not granted, the 1st applicant will suffer substantial losses because it will be required to expend public funds to satisfy the decretal sums amounting to Shs.38,903,116.60 in favour of the 1st and 2nd respondents.

**[11]** On the question of leave to lodge the notice of appeal and appeal out of time, the applicants rely on **Rule 15(1)** of the Supreme Court Rules 2020 which provide for the Court's discretion to extend time and the test set out in **Nicholas Salat** case. They explain the delay by stating that after the delivery of the judgment by the Court of Appeal, the applicants sought to review the same unsuccessfully as their application was dismissed on 9th July 2019. A subsequent petition to this Court in **Petition No.13 of 2019 - University of Eldoret & Anor. vs Hosea Sitienei & 3 others** challenging the review ruling was also dismissed by this Court vide a

ruling made on 30th April 2020. That the applicants, as advised by their counsel, could only pursue one of the rights under the law at a time and whereas the review motion was on a limited question of law, it had the potential, if appropriately determined on the basis of the law, to resolve the whole issue.

**[12]** The applicants maintain that the steps they took reveal the concerted and diligent efforts made to access justice, the applicants not being indolent at any point. Further, the Notice and Petition of Appeal, now pending, have already been lodged with the Court. The applicants refer us to the case of **Hassan Nyanje Charo v Khatib Mwashetani & 3 others** [2014] eKLR and **John Ochanda v Telkom Kenya Limited** [2014] eKLR in which this Court allowed the applicants to file their appeals out of time.

**[13]** The applicants submit that the respondents will not suffer any prejudice if the orders sought are granted as the issues in relation to the Employment and Labour Relations Court petitions between the parties have to date never been determined on merits.

***1st and 2nd Respondent's case***

**[14]** In opposition to the application, the 1st respondent, Hosea Sitienei, on his own behalf and on the authority of the 2nd respondent swore a replying affidavit dated 27th May 2020 and filed on 29th May 2020. He denies that their advocates were served with soft copies of the application and petition and were only served on 23rd May 2020. He states that the Court has no jurisdiction to grant the prayers sought in the absence of a proper Notice of Appeal filed before the Court and that in any event the application for stay is overtaken by events, the applicants' account at National Bank of Kenya, Eldoret Branch having already been garnished. He further depones that the application and intended appeal have not been authorized by the University Council whose term has ended making the application and intended appeal incompetent.

**[15]** The 1st respondent states that the decision subject to the intended appeal was made on 18th October 2018 and was not appealed from within fourteen days and the Court has not extended the time. That this application has been brought more than 560 days after the decision was delivered, making the application for stay a non-starter, impish and purely an abuse of the court process. He states that the ignorance of the law on the side of the applicants' legal advisors cannot found a ground for extension of time and the Court cannot deem as properly filed documents lodged in Court after 560 days without authority as that would amount to countenancing egregious actions.

**[16]** He depones further that the applicants were afforded all the opportunities to be heard and the Court is *functus officio* as the issue of the judgment delivered on 18th October 2018 was prosecuted in **Petition No.33 of 2019** but the Court noted that though the same was ingenious, it could not be entertained. He goes on to state that the application is not about prudent expenditure of public resources as casually suggested by the applicants but rather a cash cow by the respondents as the cases have already gobbled up Shs.58,313,158/- in legal fees which is colossal and more than what the respondents were awarded and that the applicants have further paid approximately Shs.15,000,000/- which is astronomical for a public institution funded by taxpayers.

**[17]** The deponent adds that as a former Finance Officer of the 1st applicant, he can tell that the legal fees have skyrocketed since 2015 after the 2nd respondent attempted to kick out of the university those not from her tribe and that the application herein adds to the plethora of applications and appeals for siphoning funds from the university for purposes of self-aggrandizement and flogging a dead horse. He states that the application is mischievous and prays that it should be dismissed with costs.

**[18]** The 1st and 2nd respondents buttress their position through the submissions filed on 29th May 2020. They cite **Board of Governors, Moi High School Kabarak & Another v Malcolm Bell,** SC Applications Nos.12 and 13 of 2012 to assert that in the absence of a pending appeal, no stay orders can arise. They further aver that execution has taken place and the Court should not issue orders *in vacuo* and that the present case is not in public interest as set out in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR. The respondents submit that the applicants have not adduced, at the outset, cogent reasons why

the Court should extend time and are merely aimed at pursuing individual interests.

***Reply by the applicants***

**[19]** In reply to the 1st and 2nd respondents' affidavit, the applicants filed a further affidavit by Stephen Anditi on 9th June 2020. He asserts that electronic service was effected upon the respondents' advocates through the email used by the said advocates to acknowledge the directions issued by the Court on 18th May 2020 and that the email of service was copied to the Registrar of this Court. An affidavit of service was filed in Court on 22nd May 2020 annexing the hard copy of the email. The said mode of service was in accordance with Practice Directions published vide Gazette Notice No.3137 and 2357. In any event physical service was eventually effected on 23rd May 2020.

**[20]** The deponent avers that the respondents hastily prosecuted the garnishee proceedings before the Employment and Labour Relations Court in Nakuru in a deliberate effort to take the subject matter out of the 1st applicant's reach before the conclusion of this Court's proceedings. He depones that the Garnishee Order absolute was eventually issued on 4th June 2020. He believes that the ruling on the garnishee proceedings does not affect the substantive cause of action as the application No.8 of 2020 and Petition No.6 of 2020 ought to be considered on the merits and appropriate findings made in the interests of justice.

**[21]** He disputes the contention that the court is *functus officio* or lacks jurisdiction adding that the court merely pointed out its jurisdiction under Article 163(4) and **Petition No.33 of 2019** and **Petition No. 6 of 2020** relate to separate and distinct decisions.

**[22]** The affidavit points out that the issues relating to payment vouchers and legal fees payable to the applicants' lawyers have no bearing to the dispute, are deviously crafted to divert the Court from addressing the real issues in controversy and are part of a choreographed smear and defamatory campaign against the applicants and their advocates on record, the entire contents of some of the 1st respondents affidavit having been published in the Standard Newspaper of 30th May 2020, barely 24 hours after filing in the Court. Shortly after the publication, attempts were made to disseminate the falsehoods through various bloggers and other social media actors following the tangent of the story in the *Standard* Newspaper.

**[23]** The applicant accuses the respondents of orchestrating chaos and unrest in the University seeking to oust the Vice Chancellor solely on the basis of her ethnicity. The applicants point out that they should not be faulted for expenditure defending themselves over a multiplicity of suits numbering over sixteen, eleven of which were initiated by the respondents against the applicants.

***Issues for determination***

**[24]** From the foregoing, the following issues arise for determination:

*a) Whether to extend time within which to file the appeal; and*

b) *Whether to grant the orders of stay*.

***Analysis***

**[25]** Before delving into the merits of the matter, we note that these are no ordinary applications where we merely focus on the prayers sought and exercise our discretion. The present applications come on the backdrop of previous court process before us by the same applicants arising, yet again, from the same decision of the Court of Appeal made on 18th October 2018.

**[26]** Briefly, the 1st and 2nd respondents were the 1st applicant's Finance Officer and Deputy Vice Chancellor, Finance and Administration respectively. In July 2015, they were suspended from duty pending investigations on allegations of involvement in the unrests at the 1st applicant at the time. They filed suit before the Employment and Labour Relations Court (ELRC) at Nakuru (No.8 of 2015) seeking to stop the intended investigations. On 6th November 2015, Radido J., declined to halt the investigations directing the 1st applicant to serve them with the investigation results before undertaking any disciplinary action against them. The 1st applicant instead commenced disciplinary proceedings prompting the respondents to separately file petitions (Nos. 1 and 2 of 2016) seeking similar reliefs. The ELRC did not interfere with the disciplinary process and the respondents were subsequently terminated from employment.

**[27]** Dissatisfied, the duo filed, at the ELRC, **Petitions numbers 10 and 11 of 2016** challenging their termination for being unlawful, irregular and illegal, contending that it violated constitutional and statutory provisions and the orders of 6th November 2015. They also contended that as constituted, the University Council did not have the mandate to undertake disciplinary process and accordingly sought declaratory reliefs or in the alternative, compensation. The applicants opposed the petitions contending that they were *res judicata*; that they were misconceived for merely raising personal and private law issues disguised as constitutional issues; that the disciplinary process was fair and lawful; and that members of the 1st applicant's Council were legally in office.

**[28]** By a judgment dated 24th November 2016, the petitions were dismissed by Marete J. as being *res judicata*. The respondents' separate appeals were consolidated by the Court of Appeal and allowed through the judgment dated 18th

October 2018. The Court of Appeal also dismissed the applicants' applications for review provoking **Petition of Appeal No.33 of 2020** before us which was struck out as per our ruling on 30th April 2020 the details of which we need not rehash.

**[29]** In the same breadth, we also do not find it necessary to make a finding on whether the respondents were duly served electronically or not. The important consideration is that the 1st and 2nd respondents were eventually in a position to respond to the applications by filing the replying affidavit, submissions and list and digest of authorities and articulate their position before the Court.

*a) Extension of time*

**[30]** It is trite that we have jurisdiction to extend time and the exercise of that jurisdiction is an issue of our judicial discretion. **Rule 15(2)** of the **Supreme Court Rules 2020** is instructive on this issue. Moreover, this Court has considered and laid down several principles as was pointed out by the parties. We re-emphasize the principles in the **Nicholas Salat case** (supra) and in particular consideration on whether the applicants have a reasonable reason to explain their delay to the Court's satisfaction.

**[31]** The main contention by the applicants is that they have sustained a diligent quest for justice only that they relied on their advocates' honest belief and advice in pursuing a review of the Court of Appeal judgment and subsequent appeal against that before the Supreme Court. This course, unfortunately for them, did not yield their expected outcome and they now seek another opportunity to go at it albeit by way of appeal on the substantive judgment of the Court of Appeal. The applicants further invoke a public interest consideration bearing in mind the nature of the institution and its funding from public coffers. This public interest angle is strenuously objected to by the 1st and 2nd respondents who instead allege that the proceedings are a cash cow for the applicants to expend extraneous amounts in legal fees. With respect to the respondents, we think this approach is unnecessary as the issue before the Courts was never about the legal fees payable to the counsel. This in our view is a factual matter below our scope especially as a second appellate Court and particularly at this interlocutory stage.

**[32]** The respondents maintain that the reasons offered by the applicants are not plausible, the delay is inordinate and the ignorance of the law by the applicants in pursuit of their action is no defence. In any event, the applicants have not filed their Notice of Appeal

which is a jurisdictional prerequisite for the court to entertain the matter further.

**[33]** It is evident that following the decision of the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same Court or pursue an appeal before this Court within either of the applicable jurisdictional contours. The applicants, as advised by their advocates, chose the former. We agree with the applicants' advocates that they could not concurrently pursue both options as that would be an outright abuse of judicial process. However, following from our decision in ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others*** [2015] eKLR, where a litigant has more than one option to pursue, he/she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to choose the best available option since she may not have any further recourse.

**[34]** We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants' options to cherry pick and engage in trial and error at the altar of judicial process without the attendant consequences.

**[35]** The delay which the applicants seek to be excused from is largely as a result of the applicants' pursuit of the review process before the Court of Appeal and the resultant appeal before the Supreme Court. This delay, the 1st and 2nd respondents indicate is 560 days which the applicants do not contest. Whereas the applicants may have diligently been pursuing their options whose success may have had an implication on the need for these proceedings, we are not inclined to accept such explanation based on what we have already stated.

**[36] Rule 36** of the **Supreme Court Rules 2020** provides for the filing of a Notice of Appeal within fourteen days of a decision of the Court of Appeal from which an intended appeal is founded. The filing of a Notice of Appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a Notice of Appeal signifies the intention to appeal. The applicants appreciated as much in filing their Notice of Appeal against the review decision of the Court of Appeal. The applicants cannot therefore be heard to argue that they did not know the importance of this step. The applicants have not explained why they never attempted to comply with this important step at the time.

**[37]** Having said so, we echo our previous position that filing of the Notice of Appeal is a jurisdictional prerequisite. The prevailing circumstances specific to this case make it very difficult for the Court to evaluate any satisfactory reasons that excuse the applicants from this apparent non-compliance. Moreover, as we noted in **Nicholas Salat** case, the purported filing of a Notice of Appeal and Petition of Appeal without the requisite leave cannot be sanctified by the Court, notwithstanding that a case number was issued to the applicants. The alleged Notice of Appeal and Petition of Appeal therefore have to be struck out from the Court record for having been 'filed' without Court sanction and out of time. The Notice of Appeal not having been filed on time, the Court cannot resuscitate anything in this matter.

**[38]** The inevitable conclusion we must draw on this issue is that the prayer for extension of time must fail, and it is so ordered.

*b) Whether to grant orders of stay*

**[39]** In the absence of a subsisting appeal as we have found above, the prayers for stay in both applications are superfluous. The principles for grant of orders of stay were enunciated in **Board of Governors, Moi High School Kabarak & Another** case (supra) the principle objective of which being to preserve the subject matter of an appeal. The applicant must satisfy the Court that the

intended appeal is arguable and not frivolous, and that unless the stay order sought is granted, the appeal or intended appeal would be rendered nugatory.

**[40]** Applying this to the facts, there is no doubt that the applicants' intended appeal would, but for our finding, been arguable. The applicants sought to challenge the manner in which the Court of Appeal exercised its jurisdiction and how this related to Articles 25 and 50 of the Constitution. The issues raised in the matter relate to the Court's determination of the doctrine of *res judicata* a similar issue pending before Court as in ***John Florence Maritime Services Limited case*** (supra).

**[41]** As for the other consideration whether or not the intended appeal would be rendered nugatory, the applicants' position is contradictory. While the applicants in the affidavit in support of the application filed on 22nd May 2020 at paragraph 15 indicate that the orders sought are necessary to preserve the substratum of both proceedings pending before the Court, their position changed upon the conclusion of the garnishee proceedings. Paragraph 9 of the Further Affidavit filed on 5th June 2020 on behalf of the applicants indicate that the substantive cause of action set out in Petition No.6 of 2020 is not at all affected by the ruling in the garnishee proceedings and that the matter should be considered on the merits and appropriate findings made in the interests of justice.

**[42]** In our view, the garnishee proceedings are as a result of lawful legal process arising from a decree issued by a competent Court. This in itself cannot therefore justify grant of stay particularly in the wake of the status of the appeal as already found. Accordingly, we are not persuaded to grant stay orders under the circumstances as it would serve no purpose.

**[43]** Before we conclude, we note that there was certain conduct involving the use of social media that we found unbecoming. Though that may not be directly linked to the applications, we expect decorum from litigants and especially counsel as officers of the Court. Matters before the Court should best be litigated and left to the Court for determination. It is not a coincidence that the 1st and 2nd respondents' averments found their way to the media both print and by bloggers. Whereas this may not have a bearing on the Court's decision, we need to emphasize that as officers of the Court, Counsel should be able to advise their Clients accordingly on their conduct relating to matters *sub judice*.

**[44]** In conclusion, the parties have had their share of litigation and we would not want to extend it any further, more so on the limited issue of costs as a result of these applications. There must be an end to litigation however much the applicants are dissatisfied.

**Determination**

**[45]** In the end we disallow the applications and make the following orders:

a) The application dated 6th May 2020 and filed on 7th May 2020 is hereby dismissed.

b) The application dated 22nd May 2020 and filed on 22nd May 2020 is hereby dismissed;

c) The petition of appeal dated 6th May 2020 and filed on 7th May 2020 is struck out;

d) Each party shall bear their own costs.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 4th day of September, 2020**

**D.K. MARAGA** **P.M. MWILU**

**.....**
**.....**

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

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

**M.K. IBRAHIM** **S. C. WANJALA**

**.....** **.....**

**JUSTICE OF THE SUPREME COURT**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**