

REPUBLIC OF KENYA



THE JUDICIARY  
OFFICE OF THE SPORTS DISPUTES TRIBUNAL  
ANTI DOPING APPEAL NO E026 OF 2023

ANTI DOPING AGENCY OF KENYA..... APPELLANT

VERSUS

SAMUEL LOMOI..... RESPONDENT

**RULING**

*(Preliminary Objection dated 16<sup>th</sup> August, 2023)*

Panel:	John Ohaga SC	Chair
	Gabriel Ouko	Member
	Benard Wafula Murunga	Member

**Appearances:** Mr. Bildad Rogoncho *for the Appellant*; Mr. Franklin Cheluget *for the Respondent*

1. The Appellant, the Anti-Doping Agency of Kenya, (also known by its acronym 'ADAK') has filed this Appeal arising out of a decision delivered by the Tribunal on 23<sup>rd</sup> January 2023 through a Panel comprising the Hon. Deputy Chair of the Tribunal Hon. Elynah Shiveka, Hon. Gichuru Kiplagat and Hon. Allan Mola (**'the first instance Panel'**).
2. In the decision that is impugned by the Appeal of the Anti-Doping Agency of Kenya, the Tribunal found the athlete to have been in breach of the Anti-Doping rules by the use of substances on the Prohibited List which is an Anti-Doping violation and sanctioned the athlete to four (4) years period of ineligibility with effect from the date of the sample collection being 12<sup>th</sup> September 2021.

3. The Appellant filed the Appeal on 5<sup>th</sup> June 2023, which amounted to a period of 132 days between the date of the delivery of the Ruling and the date of filing of the Appeal.
4. The Respondent filed a Preliminary Objection to this Appeal whose primary substance was that the Appeal was filed out of time.
5. In the Submissions filed in support of the Preliminary Objection, the Respondent has averred that the basis of the Preliminary Objection is that the Anti-Doping Rules provides for timelines for appeals under Rule 13.7.2 which stipulates that the appeals must be lodged within 21 days from the date of the receipt of the decision by the appealing party.
6. The 21 days anticipated and those that were taken to file the appeal being 132 days were way beyond the allowed time frame for filing the Appeal with the presumption being made that the receipt of the decision by the Tribunal was on the same date that the decision was made.
7. At paragraph 4 of the Appellant's Submissions in Reply to the Preliminary Objection, the Appellant concedes that the Appeal was filed out of time. To quote the submissions, the filing of the Appeal

*“was not well within the 21 days as provided by Rule 13.7.2 of the ADAK ADR..” (meaning the Anti-Doping Agency of Kenya Anti-Doping Rules).*

8. The Appellant has then gone ahead to explain the delay in filing the Appeal in the following terms:
  - (a) *We submit that the reason for the delay was due to investigations on the athlete on the allegations that he participated in three (3) races, in November 2021, January 2022 and on 2nd April 2023, despite the mandatory provisional suspension imposed on him on 8th November 2021. The investigations revealed that indeed Samuel Lomoi (the athlete) did participate in the said races. That is the basis of filing the instant Appeal.*
  - (b) *It is our submission before the Tribunal that the delay to lodge the appeal was not carelessness, but it is as a result of the time it took to conduct thorough investigations to establish that the athlete did indeed violate his*

*period of provisional suspension and as such should not be allowed to benefit for a period he continued to earn a living by blatantly refusing to await the conclusion of his matter before the Tribunal.*

9. The Appellant has in addition made the following submissions in respect of the Respondent and his actions.

(a) *The athlete's actions are an exhibition of how less he cared for the proceedings before the Tribunal. He was well aware of the directive to wait until his matter was heard and determined before he could embark on participating in races. He chose to ignore and proceeded to participate, hoping that no one would know that he was continuously participating even when he was already facing charges before the Tribunal.*

(b) *We implore upon this Tribunal to allow us to proceed and demonstrate before the Tribunal how such an athlete without any due care or regard ignored the Tribunal's proceedings and continued to participate in races. We opine that dismissing the Appeal at this stage and based on a technicality [to which we have explained] would set a wrong precedent to athletes who make a mockery of this Honourable Tribunal's proceedings.*

(c) *We submit that, allowing the Appeal to proceed will not prejudice the athlete's rights since he is already serving a Period of Ineligibility. We are only praying to be given an opportunity to persuade the Tribunal to alter the date of commencement of the sanction from 12th September 2021 to the date when the Appeal Decision is rendered.*

10. Finally, the Appellant has made the following plea to the Tribunal in face of the admission that the Appeal was filed out of time:

(a) *We are humbly requesting the Tribunal to admit the Appeal out of time based on the succinct reason adduced hereinabove.*

(b) *It is our plea that the Tribunal should take into consideration our reason for failing to file the appeal within the requisite time since the factors were outside our control.*

(c) *This Tribunal, as indeed all other judicial bodies, is constitutionally encouraged to be guided by the principle of meting out justice rather than disposing off matters based on technicalities.*

11. We have reproduced these averments by the Appellant *in extenso* because this Appeal will fall or remain on the basis of these averments, the Responses thereto by the Respondent and on the law that is considered by the Tribunal.
12. The Respondent has accused the Appellant of moving into the arena of factual contest by basing the response to the Preliminary Objection on issues of investigations into the conduct of the Respondent. The decision of the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 has been relied upon by the Respondent and in particular, page 700 paragraphs D-F Law JA as he then was said:

*....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.*

13. The Appellant, however, has raised the issue of fact in response to the Preliminary Objection which according to the Appellant is the basis for the Appeal as Article 13.1.1 of the World Anti-Doping Code states that the scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker. Consequently, the Appellant pleads, any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing.
14. There is no divorcing of the Preliminary Objection to the Appeal as the two are interconnected and the Appellant is well aware that the failure to defend the Preliminary Objection will render the Appeal spent or dismissed.
15. The Tribunal also acknowledges that other than the cited paragraph from Mukisa Biscuit by the Respondent, the said case also stated as follows as per the paragraph B-C by Sir Charles Newbold, P at page 701:

*... A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the*

*facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....*

16. By raising the Preliminary Objection on the filing of the Appeal out of time, whose defence is in the explanation of the delay to file the Appeal on time required the Appellant to explain the delay, it seems the Respondent has invited the factual explanation.
17. Indeed, as part of the averments in the Submissions by the Respondent, the Appellant has not taken any legally recognized steps to have the appeal filed out of time duly admitted by the Tribunal. The Respondent avers that taking a chance and filing the appeal out of time without proper leave of the Tribunal is not sufficient grounds to admit the appeal.
18. The Appellant has attempted through the Submissions Opposing the Preliminary Objection to have the Appeal admitted out of time. The Appeal Brief did not make mention of the filing of the Appeal out of time.
19. We have noted the school of thought as postulated by the Appellant that Section 79 G of the Civil Procedure Act provides that, '*...an appeal may be admitted out of time if the appellant satisfies to the court that he had good and sufficient cause for not filing in time.*'
20. This seems to be the same school of thought that is the holding in **Thuita Mwangi V Kenya Airways Ltd [2003] eKLR** that stated that in exercising the discretion the court should consider the period of delay; the reason for the delay and; the arguability of the appeal.
21. In **Ivita v Kyumbu (1984) KLR 41**, Chesoni J (as he then was) also elaborated on the test.

*"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents; and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the Court will exercise*

*its discretion in his favor and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the courts satisfied with the Plaintiff's excuse for the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."*

22. The litany of cases continues with **Mombasa County Government v Kenya Ferry Services and Another 2019 EKLK**, cited by the Appellant where it was held that a reasonable reason for the delay of the appeal that is explained to the satisfaction of the court was considered as a guiding principle for the extension of time.
23. In the other school of thought, the Supreme Court in **Nairobi Bottlers Limited vs Mark Nduma & Coca Cola Africa Central, East and West Africa Ltd App e038/2023** held that filing an appeal out of time without leave of Court and then seeking Court's discretion to extend time is presumptive, inappropriate and the "document" so filed is a nullity.
24. The Court made reference to the decision in **Nicholas Salat v IEBC Application No. 16 Of 2014** where the same Supreme Court stated as follows:

*What we hear the applicant telling the Court is that he is acknowledging having filed a 'document' he calls 'an appeal' out of time without leave of the Court. Pursuant to rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the notice of appeal. Under rule 53 of the Court's Rules, this Court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.*

*To file an appeal out of time and seek the Court to extend time is presumptive and in-appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.*

25. The balance that the Tribunal considers is whether the provisions of the law as regards time have to be complied with for purposes of certainty on the time frame within which matters can be reopened at an Appeal stage and the need to safeguard the interests of justice where litigants who have a genuine reason for the delays to file appeals have a chance to prosecute their appeals with the mercy of the discretion of the Tribunal as their cushion.
26. In this particular matter, the reasons advanced also touch on the clean hands of the Respondent as the Appellant has enumerated the alleged transgressions of the same Respondent against the orders of the authorities by taking part in competitions whilst serving the provisional suspension. Has the athlete come before the Tribunal with clean hands as he files the Preliminary Objection? We are not persuaded so at the moment and unfortunately, if we allow the Preliminary Objection we may see the case of a person with potentially unclean hands enjoying the fruits of that uncleanliness by the supposed carelessness of the Appellant.
27. Yet at the same time, the Tribunal has to move away from technicalities and accommodate parties for the dispensation of justice that is fair – especially as a Sports Tribunal that deals with sports that have fair play as a centre of competition.
28. The uniqueness of the case lends credence to what the Supreme Court stated in Raila Odinga v IEBC that:

*However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.*
29. Notably, the Respondent is already serving the ineligibility sentence and is not due to compete until **11<sup>th</sup> September 2025** based on the impugned decision of the Tribunal.
30. The courts have held that in considering whether to extend time, one of the issues that has to be paid attention to must be whether the extension will prejudice the opponent. In determining this, the judge in Patrick Maina

*Mwangi v Waweru Peter [2015] eKLR* quoted the finding in *United Arab Emirates v Abdel Ghafar & Others 1995 IR LR 243* in which it was stated:-

*“.....a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of a procedural default, unless the default causes prejudice to his opponent for which an award of cost cannot compensate.....”*

31. The test, therefore, as set out in the case above is whether the Respondent will suffer irreparable prejudice if the application is granted.
32. There does not seem to be any prejudice that is suffered by the Respondent at this particular moment to the extent that he is serving the ineligibility.
33. It would, however, be remiss to consider the mere submission within the Response to the Preliminary Objection as being a formal application for leave to have the appeal admitted out of time. No formal application has been made towards this – and we say this knowing that we are not stretching ourselves to technicalities. The Appellant has simply failed to exercise judicial propriety at this moment and the Tribunal ought not to and will not countenance that.
34. The cases referred to that give the test for admitting an Appeal out of time are cases cited at the point when an application is before the Judicial Body for Leave to file the Appeal out of time. No such application is before us which is why the reasons advanced for filing the appeal late or the alleged uncleanness of the Respondent’s hands do not trump the procedure set out by law.
35. On the basis of the failure to approach the Tribunal formally seeking the leave to file the Appeal out of time, we find that the Appeal filed herein is incompetent and uphold the Preliminary Objection. We agree that to file an appeal out of time and seek the Tribunal to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Tribunal because at that time, there is no Appeal before the Tribunal.
36. It is also necessary for the Tribunal to consider one more window that is open for a party in a matter where new evidence is uncovered. Regulation 22 of the Sports Disputes Tribunal Rules 2022 allows a party to approach the Tribunal with an application for review.



*The Tribunal may on the application of any party or on its own motion review a decision in any of the following circumstances*

- (a) where after the exercise of due diligence, a new and important matter or evidence has been discovered which was not within their knowledge or could not be produced at the time when the decision was made;*
- (b) mistake or error apparent on the face of the record; or*
- (c) any other sufficient reason*

- 37. The 21 days for the Review is a simulacrum of the 21 days for the Appeal and it is expected that the Review would require to be admitted out of time. It is necessary to state this option so that the parties are also aware of the avenues available to them before the Tribunal.
- 38. Based on the reasoning as elucidated in the foregoing, it is the finding of the Tribunal that the Appeal as filed is not proper before the Tribunal.
- 39. Consequently, the Preliminary Objection application dated **16<sup>th</sup> August, 2023** is allowed.
- 40. Each party shall bear their costs.

**Dated and delivered at Nairobi this \_\_\_ \_\_\_ day of \_\_\_November, \_\_\_2023**



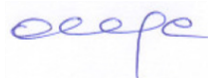
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**John M. Ohaga, SC, CArb  
Panel Chairperson**



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**Gabriel Ouko, Member**



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**Bernard Murunga Wafula, Member**