

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION NO. 2 OF 2021 (E004 OF 2021)

(Coram: Mwilu; DCJ & V P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

KENYA HOTEL PROPERTIES LIMITED..... APPLICANT

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

JUDICIAL SERVICE COMMISSION2ND RESPONDENT

JUDGES AND MAGISTRATES VETTING BOARD.....3RD RESPONDENT

WILLESDEN INVESTMENTS LIMITED.....4TH RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION.....5TH RESPONDENT

KENYA REVENUE AUTHORITY.....6TH RESPONDENT

(Being an application for extension of time to file a Supplementary Record of Appeal against the judgment of the Court of Appeal at Nairobi (Makhandia, Kiage & Murgor, JJ. A) delivered on 7th August 2020 in Civil Appeal No. 404 of 2018)

RULING

A. INTRODUCTION

[1] Before the Court is a Notice of Motion dated 17th February 2021 and filed on 18th February 2021, pursuant to Rules 3(5) and 15 of the Supreme Court Rules, 2020. The application seeks the following orders:

- a. That leave be granted to the applicant to extend time to file its Supplementary Record of Appeal out of time.*

- b. That the Supplementary Record of Appeal dated 8th February 2021 and filed on 9th February 2021 be deemed as duly and properly filed.
- c. That the costs of and incidental to this application abide the result of the appeal.

[2] The application is supported by an affidavit sworn on 17th February 2021 by **Allen Waiyaki Gichuhi**, advocate for the applicant.

[3] The Applicant filed a petition of appeal, being **Petition No. 16 of 2020** dated 28th August 2020, seeking to set aside the judgment of the Court of Appeal at Nairobi (*Makhandia, Kiage & Murgor, JJA*) delivered on 7th August 2020, in Civil Appeal No. 404 of 2018.

B. BACKGROUND

[4] **Willesden Investment Ltd**, the 4th respondent, who was at all material times the registered proprietor of L.R. No. 209/12748 IR No. 66986 from 15th September 1995, filed **HCCC No. 367 of 2000** against the **Kenya Hotel Properties Ltd** (the applicant), seeking damages for trespass to property and *mesne* profits arising from the applicant's use of the said property as a parking lot. The applicant had been using the property having leased it from the Nairobi City Council prior to the 4th respondent's registration as proprietor. The High Court, by its judgment dated 14th December 2006, awarded the 4th respondent **Kshs. 54,102,400** in *mesne* profits; **Kshs. 10,000,000** in general damages for trespass, **Kshs. 6,000,000** for loss of business opportunity together with interest and costs.

[5] Dissatisfied, the applicant appealed to the Court of Appeal in **Civil Appeal No. 149 of 2007** against the 4th respondent and by a judgment delivered on 2nd April 2009, that award was reduced to **Kshs. 22,729, 800** with interest at court rates from January 1994 to the date of payment. Dissatisfied further, the applicant filed a review application before the Court of Appeal. The appellate Court (*O'Kubasu, Onyango-Otieno and Aganyanya, JJ. A*) delivered its ruling on that

application effecting one correction, that interest at court rates be calculated from 15th September 1995, but otherwise dismissing the appeal with costs.

[6] Later, the applicant's advocate filed a complaint before the Judges and Magistrates Vetting Board, the 3rd respondent, against *O'Kubasu J.A* over his conduct in *Civil Appeal No. 149 of 2007*. The 3rd respondent, by its decision issued on 25th April 2012, decided that *O'Kubasu JA* was not suitable to hold the position of a judge because the judgment therein, principally authored by him; in its opinion contained various anomalies on whether arguments made on behalf the applicant there had been considered, the basis on which damages were computed and the manner in which interest was calculated. *O'Kubasu J.A* filed an application for review of that decision, but the same was dismissed on 20th July 2012, and so he stood removed.

[7] Subsequently, on 16th October 2015, the applicant filed ***High Court Constitutional Petition No. 438 of 2015***, seeking several orders namely: that the Court of Appeal's decision in ***Civil Appeal No. 149 of 2007*** was a nullity and should have been set aside; a declaration that the applicant's right to fair hearing was infringed by the bias shown by the presiding judge in ***Civil Appeal No. 149 of 2007***; a declaration that the Court of Appeal's judgment could not stand following the removal of the Judge by the 3rd respondent; an order of certiorari to quash that judgment; an order directing that the appeal arising from the judgment of the High Court in ***HCCC No. 367 of 2000*** be heard *de novo*; and a permanent injunction restraining the 1st and 4th respondents from executing the decree in ***HCCC No. 376 of 2000***. On 28th September 2018, the High Court (*Mwita J*) dismissed the petition for failing to meet the threshold for an application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom as contemplated under Article 23(1) of the Constitution.

[8] Aggrieved by that decision, the applicant filed **Civil Appeal No. 404 of 2018 Kenya Hotel Properties Limited v Attorney General & 5 others** on the grounds that the learned Judge erred in law by: restricting himself to one issue for determination concerning jurisdiction; failing to apply the spirit in Articles 10 and 259 of the Constitution to advance the rule of law, fundamental freedoms, equity, social justice and equity and a miscarriage of justice; failing to consider the purpose of Section 23(1) of the 6th Schedule to the Constitution; failing to consider that the Judgment in **Civil Appeal No. 149 of 2007** could not stand after *O’Kubasu JA’s* removal and set it aside; failing to consider that judicial bias undermined confidence in the Judiciary and infringed the right to fair trial under Article 50, an unlimited right under Article 25 of the Constitution and that the High Court had jurisdiction; and failing to correctly apply the Supreme Court’s *dicta* in the case of **Jasbir Rai & 3 others vs. Tarlochan Singh Rai (Estate Of) & 4 Others [2013] eKLR**. The applicant also filed an application for review in **Civil Appeal No.149 of 2007** which the appellate court heard together with **Civil Appeal No. 404 of 2018**. On 7th August 2020, the Court of Appeal (*Makhandia, Kiage & Murgor, JJA*) dismissed both the appeal and the application for review for lack of merit.

C. PARTIES’ SUBMISSIONS

[9] On 24th March 2021, when the matter was mentioned before the Honourable Deputy Registrar of this Court to confirm compliance, **Allen Gichuhi**, advocate for the applicant, confirmed that all parties were served with the application; **Mr. Almadi** holding brief for the Attorney General, Judges and Magistrate’s Vetting Board and Kenya Revenue Authority indicated that the 1st, 3rd and 6th respondents did not oppose the application. There was no representation for the 2nd, 4th and 5th respondents despite being served with the Mention Notice.

[10] It is the applicant's submission that at the time of filing ***Petition No. 16 of 2020***, it did not have the certified order and typed proceedings from the Court of Appeal but duly filed the petition of appeal within 14 days of judgment.

[11] The applicant also urges that it diligently pursued the typed proceedings and the certified order which were supplied on 4th February 2021. It is submitted that the Supplementary Record dated 8th February 2021, was filed on 9th February 2021, within five days of receipt of the proceedings. The applicant maintains that no prejudice will be occasioned to the respondents as there has been no delay in filling the Supplementary Record and that if any delay occurred, the same was occasioned by administration issues at the Court of Appeal.

[12] Furthermore, the applicant urges that leave of this Court is required to have the Supplementary Record deemed as duly filed and time extended to 9th February 2021. It cites the cases of ***Ferdinand Ndungu Waititu Babayao vs. Republic***, SC Petition (Application) No. 2 of 2020; [2020] eKLR and ***Attorney General & another vs. Okiya Omtatah Okoiti & 4 others***, SC Application No. 24 of 2020; [2020] eKLR to support its argument.

[13] Finally, the applicant urges that the petition regarding the decision of the 3rd respondent is one of public interest, on the right to a fair hearing and remedies available to a petitioner faced with a Court of Appeal decision that was instrumental in the removal of a Court of Appeal judge who was found guilty of occasioning a miscarriage of justice.

D. ISSUE FOR DETERMINATION

[14] Having perused the pleadings of the parties there is only one issue for determination, namely, *whether this Court should grant an extension of time for the applicant to file a Supplementary Record of Appeal? If so, should the Court deem the filed Supplementary Record as properly filed?*

E. ANALYSIS

[15] Under Rule 15(2) of the Supreme Court Rules, 2020, this Court has the discretion to extend the time limited by the Rules or by any decision of the Court.

[16] The applicant has urged that he was not able to file the certified order and typed proceedings from the Court of Appeal within the stipulated timelines, that is, *30 days from the filing of the Notice of Appeal*, due to a delay occasioned by the Court of Appeal in issuing the same. It submits further that the same was filed on 9th February 2021, within five days of receipt of the same and that no prejudice will be occasioned to the respondents. More so, it maintains that the issues raised in ***Petition No. 16 of 2020*** are of general public importance and therefore, the application should be allowed.

[17] Having considered this Court's finding in ***Nicholas Kiptoo Korir Arap Salat v. Independent Electoral and Boundaries Commission & 7 Others***, SC Application No. 16 of 2014; [2014] eKLR (***the Nick Salat Case***) and ***Hassan Nyanje Charo v Khatib Mwashetani & 3 Others*** SC Application No. 15 of 2014; [2014] eKLR, the applicant's grounds in support of the application and its submissions dated 17th February 2021, we are satisfied that the applicant has provided a plausible and reasonable explanation for the delay in filing the Supplementary Record. We are equally satisfied that the delay in the circumstances was not inordinate. In addition, we note that the documents sought to be introduced through the Supplementary Record of Appeal are not prejudicial to any of the respondents and are considered necessary by the applicant. Consequently, we are inclined to extend time for the applicant to file its Supplementary Record.

[18] As to whether we should deem the filed Supplementary Record of Appeal as proper before us, our position, as held in the ***Nick Salat Case***, is that the appropriate remedy for curing a delay in filing an appeal is to seek an Order from the Court, extending the time within which to file the same. In ***County Executive***

of Kisumu v County Government of Kisumu & 8 others, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court found that an appeal filed out of time without leave of this Court is irregular and this Court will not invoke ‘novel’ principles so as to validate such a petition and deem it properly filed. The applicant has not demonstrated why we should depart from the said principles. Be it as it may, we have perused the record and noted that the said Supplementary Record, although electronically filed, did not comply with the filing procedures provided for under Rule 12(1) of the Supreme Court Rules, 2020 which state that filing is complete when a party submits both printed and electronic form. Therefore, for our purpose, the said Supplementary Record is not properly filed. Further, even if the same were filed in compliance with Rule 12(1), the same was invalid for having been filed out of time.

F. ORDERS

[19] Having made the foregoing determinations, we make the following orders:

- i. The Notice of Motion dated 17th February 2021 and filed on 18th February 2021 is hereby allowed.***
- ii. The applicant shall file and serve its Supplementary Record within the next 14 days from the date of this Ruling.***
- iii. The purported Supplementary Record dated 8th February 2021 and filed electronically on 9th February 2021 in Petition No. 16 of 2020, is hereby struck out and expunged from the Court’s Record.***
- iv. The costs of this application shall abide the cause.***

[20] Orders accordingly.

DATED and DELIVERED at NAIROBI this 16th Day of July, 2021.

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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. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA