

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

AT NAIROBI

PETITION APPLICATION NO. 14 OF 2017

BETWEEN

KILUWA LIMITED 1ST PETITIONER/APPLICANT

SULEIMAN SAID SHAHBAL 2ND PETITIONER/APPLICANT

AND

BUSINESS LIASON COMPANY LIMITED 1ST RESPONDENT

MUORGATE HOLDINGS LIMITED 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

(Being an application seeking leave to file and serve a Supplementary Record of Appeal in Supreme Court Petition No 14 of 2017; Kiluwa Limited & Others vs. Business Liason Limited & Others)

RULING

A. BACKGROUND

[1] This is a Notice of Motion Application dated 11th September 2017 and filed on the 13th of September 2017.

[2] The Applicants have moved the Court for orders that:

- 1. This Honorable Court be pleased to grant leave to the Applicants to file a Supplementary Record of Appeal to the Petition No 14 of 2017 filed on the 3rd August 2017.**
- 2. The costs of and incidental to this Application be provided for and do abide the result of the Appeal in the said Petition.**

[3] The Applicants previously moved this Court via an Application by Notice of Motion dated 2nd February 2017, seeking to extend time for filing and serving the Petition and Record of Appeal. A single Judge of this Court *J.B. Ojwang SCJ*, allowed the Application via Ruing dated 26th July 2017.

[4] Subsequently, the Applicants filed the Petition and Record of Appeal on the 3rd of August 2017, serving the same on the 3rd and 4th Respondents on the 4th August 2017, and on the 1st and 2nd Respondents on the 7th of August 2017.

[5] On the 22nd of August 2017, the 1st and 2nd Respondents filed grounds of objection raising a preliminary objection that the complete proceedings of the Court of Appeal, specifically the court notes of *Makhandia & Ouko JJA* were omitted from the record as well as the order extending time by the *J. B. Ojwang SCJ* which was also not attached to the Petition and Record of Appeal.

[6] The Applicants have therefore sought to file a Supplementary Record of Appeal to include the entire set of the Court of Appeal proceedings.

[7] It is their case in that regard that the Application has been brought without undue delay and that there would be no prejudice suffered by the Respondent if leave to file a supplementary record of appeal is granted.

[8] The 1st and 2nd Respondents on their part submit that the Record of Appeal is defective as it does not comply with the mandatory provisions of Rule 33 of the Supreme Court Rules.

[9] It is their case that the Applicants in their Supportive Affidavit, have admitted failure in compliance with the Rules when they excluded the Court Notes of *Makhandia and Ouko, JJA*.

B. ANALYSIS

[10] We have considered the grounds in support of the Notice of Motion dated 11th September 2018, the grounds of objection and the submissions by counsel. Rule 33(1) of the Supreme Court Rules provides;

“An appeal to the Court shall be instituted by lodging in the Registry within thirty days of the date of filing of the notice of appeal-

- a) a petition of appeal;***
- b) a record of appeal; and***
- c) the prescribed fee.”***

[11] Rule 33(4) of the Supreme Court Rules also provides as follows:

“For purposes of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and shall further contain the following documents relating to the appeal in the first appellate court—

- a. the certificate, if any, certifying that the matter is of general public importance;***
- b. the memorandum of appeal;***
- c. the record of proceedings; and***
- d. the certified decree or order.”***

[12] Further, Rule 33(6) of the Supreme Court Rules states as follows:

“Where a document referred to in sub-rule (3) and (4) is omitted from the record of appeal, the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal.”

[13] As to the extension of time, this Court has already set the guiding principles in ***Nicholas Kiptoo arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others***, Sup. Ct Application No. 16 of 2014 where we stated:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

[14] In the case of ***County Executive of Kisumu v County Government of Kisumu & 8 others***, SC. Civil Appl. No. 3 of 2016; [2017] eKLR, this Court emphasized the need for the Applicants, *in an application for extension of time*, to satisfactorily declare and explain the whole period of delay to the Court. On the issue of delay occasioned by typed proceedings, we stated as follows:

“[24] a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered.”

[15] While it is stated that a court has the discretion to extend time, for this to be favorably exercised, a plausible and satisfactory explanation ought to be given by

an applicant. Similarly, it is imperative that such an applicant demonstrates that no prejudice will be suffered by the other parties to an appeal.

[16] Having examined the record, we note that the Applicants have stated that the exclusion aforesaid was an oversight when preparing the Record of Appeal, mistakenly believing that the Court of Appeal proceedings received from the Court of Appeal Registry were sent in triplicate and so they proceeded to include only part of the court notes and not all the notes.

[17] We also note that the Court notes are necessary for canvassing claims advanced in the Appeal, providing a just opportunity to all parties in the Petition including the Respondents and the explanation preferred for the oversight is also reasonable. Therefore, no prejudice will be suffered by the Respondents if we allow the Application.

[18] For the above reasons, we are inclined to allow the Application. The Applicants should bear the costs thereof.

D. ORDERS

[19] Consequently, we make the following Orders:

- i. The Notice of Motion dated 11th of September, 2017 be and is hereby allowed.*
- ii. The Applicants shall file and serve their Supplementary Record of Appeal within 7 days hereof.*
- iii. The Applicants shall bear the costs of the Respondents in this Application.*

DATED and DELIVERED at NAIROBI this 26th day of November, 2019.

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P. M. MWILU
JUSTICE OF THE SUPREME COURT
DEPUTY CHIEF JUSTICE & VP

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J. B. OJWANG
JUSTICE OF THE SUPREME COURT

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
N. 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