



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. 12 (E014) OF 2022

– BETWEEN –

BARCLAYS BANK OF KENYA LIMITED

(NOW ABSA KENYA PLC).....PETITIONER/RESPONDENT

– AND –

COMMISSIONER OF DOMESTIC TAXES

(Large Taxpayer's Office).....RESPONDENT/APPLICANT

– AND –

KENYA BANKERS

ASSOCIATION.....1ST INTERESTED PARTY/ RESPONDENT

MASTERCARD ASIA PACIFIC PTE

LIMITED.....2ND INTERESTED PARTY/RESPONDENT

(Being an application seeking leave for extension of time to file the Respondent's submissions out of time)

Representation:

Mr. Richard Bett h/b for Ms. Malik for the Petitioner
(Kaplan and Stratton Advocates)

Mr. Ochieng Gaya for the Respondent
(G.O. Ochieng Advocate)

Ms. Faith Macharia- Okaalo and Edel Ouma for the 1st Interested Party
(Anjarwalla & Khanna LLP)

Ms. Georgina Amayo and Mr. Onyango Owino for the 2nd Interested Party
(Anjarwalla & Khanna LLP)

RULING OF THE COURT

[1] **UPON PERUSING** the Notice of Motion dated 23rd August 2024 by the respondent, filed on 26th August 2024 pursuant to Sections 21 and 24 of the Supreme Court Act 2011, Rules 3(2), 3(5), 15(2), 15(1), 23(3), 31 and 32 of the Supreme Court Rules, 2020 seeking leave for extension time to file their submissions; and

[2] **UPON PERUSING** the affidavit sworn by George Ochieng, counsel on record for the respondent, on 23rd August 2024 in support of the Motion and written submissions of even date and further affidavit sworn on 10th September 2024 and further submissions of even date wherein they contend that the respondent's submissions were filed on 23rd August 2024 instead of the stipulated date of 22nd August 2024; that the delay was occasioned by counsel's inadvertent oversight of the prescribed timelines, compounded by a period of illness that hindered the completion of the respondent's written submissions as initially scheduled; that a genuine mistake of counsel should not be visited upon the respondent who is desirous of ventilating its case on merit; that relying on the case ***Salat vs. Independent Electoral and Boundaries Commission & 7 Others*** [2014] KESC 12 (KLR), the delay was not inordinate since there were valid reasons for the said delay and lastly, no prejudice would be suffered by the other parties; and

[3] **TAKING INTO ACCOUNT** the replying affidavit sworn by Wilson Murage, the petitioner's Senior Legal Counsel, on 2nd September 2024 and the written submissions of even date opposing the Motion wherein the petitioner contends that the respondent has failed to establish a proper basis for the delay, as no

application for extension of time was made prior to the expiration of the stipulated timelines. Furthermore, that the respondent ought to have presented a doctor's report and in the absence of one, a sick sheet from a pharmacy does not suffice; and

[4] NOTING the replying affidavit sworn by Raimond Molenje, the Ag. Chief Executive Officer of the 1st interested party, on the 3rd September 2024 and the written submissions of even date opposing the Motion wherein 1st interested party contends that the respondent was, in fact, required to file their submissions by 14th August 2024 as opposed to 22nd August 2024 as asserted, representing an eight-day delay beyond the stipulated deadline; that this Court will be sanctioning an illegality by allowing the submissions that had already been filed without leave to remain on record; and that extension of time is an equitable remedy which is only available to the deserving party; and

[5] APPRECIATING that this Court is clothed with unfettered discretion under Rule 15(2) of the Supreme Court Rules to extend the time for filing any document; and that the principles that govern the exercise of such discretion as delineated in the *Salat Case* are as follows:

“...

1. *Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;*
2. *A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;*
3. *Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;*

4. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;*
5. *Whether there will be any prejudice suffered by the respondents if the extension is granted;*
6. *Whether the application has been brought without undue delay; and*
7. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”*

[6] WE NOW OPINE as follows:

- i. Upon review of the record, it is undisputed that the respondent filed their submissions on 23rd August 2024 following a mention of the matter before the Honourable Deputy Registrar on the same date, during which any further extension of time to file any pleading in the matter was denied. Counsel for the respondent has attributed the delay to an inadvertent oversight of the prescribed deadlines, compounded by a period of illness that hindered the timely completion of the submissions, as evidenced on the record of 23rd August 2024. Counsel has urged that this oversight should not prejudice his client.
- ii. While the petitioner and the 1st interested party take a contrary stance, we give the respondent’s counsel the benefit of doubt as an officer of the Court. Consequently, we find that the respondent has adequately established a plausible reason for the delay. Moreover, the delay was neither unreasonable nor inordinate.

- iii. Based on the foregoing, we are inclined to exercise our discretion by extending time within which the respondent is to file its submissions. Towards this end, the respondent is hereby granted seven days from the date of this ruling, within which to file and serve its submissions. Both the petitioner and the 1st interested party shall have seven days from the date of service, within which to file any responses thereto.
- iv. Taking into account the foregoing and this Court's decision in ***Rai & 3 others v. Rai & 4 Others*** [2014] KESC 31 (KLR), we deem it just to order that costs of the motion shall abide the outcome of the appeal.

[7] CONSEQUENTLY, and for the reasons aforesaid, we make the following Orders:

- (i) ***The Notice of Motion dated 23rd August 2024 and filed on 26th August 2024 is hereby allowed.***
- (ii) ***Costs of the Motion shall abide the outcome of the appeal.***

It is so Ordered.

DATED and DELIVERED at NAIROBI this 13th day of December 2024.

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P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT
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

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA

