

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Ibrahim, Ojwang, Wanjala, Njoki, & Lenaola, SCJJ)

PETITION (APPLICATION) NO. 22 OF 2018

—BETWEEN—

BASE TITANIUM LIMITED.....APPLICANT

—AND—

THE COUNTY GOVERNMENT OF MOMBASA1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an application for enlargement of time to file a Supplementary Record of Appeal in an appeal against the Judgement and orders of the Court of Appeal in Civil Appeal No 69 of 2017 (Visram, Karanja & Koome, JJ.A) delivered on 5th July, 2018)

RULING OF THE COURT

[1] UPON perusing the Notice of Motion application dated 28th September 2018, and filed on even date for enlargement of time to file a Supplementary Record of Appeal out of time in an appeal against the Judgment and Orders of the Court of Appeal delivered on 15th July, 2018 in **Civil Appeal No. 69 of 2017**, brought under the Provisions of Rules 21(1) and 53 of the Supreme Court Rules, 2012; and

[2] UPON reading the Applicant’s supporting affidavit sworn by DESTERIO OYATSI on 28th September, 2018; and

[3] UPON considering the written submissions filed by the Applicant on 17th October, 2018 wherein it is contended that the Applicant was unable to extract the formal Order appealed against from the Court of Appeal within the stipulated period of fifteen 15 days from the date of filing a Notice of Appeal, hence omitting the said Court Order from the Record of Appeal before this Court; that the delay in extracting the Order was occasioned by the 1st Respondent's change of advocates immediately after receipt of the Notice of Appeal that unaware of the change of advocates, the Applicant, as is required by law in extracting a Court Order, sent a Draft to the 1st Respondent's previous advocates on record for their approval; that the previous advocates failed to respond to the Applicant's request for approval; that the 1st Respondent's new advocates only filed a Notice of Change of advocates on 27th August 2018; that as at the said dated, the Appeal however had been filed on 15th August 2018, and only 2 days were remaining to the expiry of the specified 15 days within which a party can file a Supplementary Record of Appeal without leave of court; that it was practically impossible to agree on the wording of the Order and extract the same within 2 days; that upon receipt of the Notice of Change of Advocates, the Court of Appeal Order was promptly extracted, and the parties requested for a mention date to record a consent order, allowing for the filing of a Supplementary Record containing the said Order, but were advised to file a formal application for enlargement of time to file the same, hence the present application; and

[4] UPON noting that the 2nd respondent, has neither filed any response to the instant application, nor appeared before this Court on 12th October 2018, 23rd October 2018, and 18th July 2019, despite service of Mention Notices;

[5] WE HAVE CONSIDERED the question at the core of the application *viz*: whether on the basis of the supporting written submissions of the 1st Respondent, the Applicant herein, has made a compelling case for this Court to exercise discretion in its favour and thereby grant the orders sought. By a unanimous decision of this Bench, pursuant to the provisions of Sections 21(2) of the Supreme Court Act, 2011 and Rules 21, 23 and 53 of the Supreme Court Rules, 2012, **we find** as follows:

The forty-eight day delay, has been explained to our satisfaction by the Applicant. We are persuaded that, the inability by the Applicant, to obtain the approval of its Draft

Order timeously, compounded by the change of advocates by the 1st Respondent, adequately explain the delay in filing the Supplementary Record of Appeal.

[6] We hereby Order that:

	ORDERS	REASONS
1.	<i>The Application dated 28th September, 2018 is hereby allowed.</i>	The application satisfies the principles on extension of time, established by this Court in <i>Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others</i> Application No. 16 of 2014; and <i>Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others</i> SC Application No. 15 of 2014.
2.	The applicant shall file its Supplementary Record of Appeal within 14 days from the date hereof.	
3.	Costs shall be in the cause.	

DATED and DELIVERED at NAIROBI this 17th Day of December, 2019.

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

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J. B. OJWANG
JUSTICE OF THE SUPREME COURT

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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