



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E006 OF 2025

– BETWEEN –

ELIUD KARANJA MATINDI APPELLANT/ RESPONDENT

AND

THE NATIONAL ASSEMBLY

REPUBLIC OF KENYA 1ST RESPONDENT

THE SPEAKER

NATIONAL ASSEMBLY OF KENYA 2ND RESPONDENT

THE CABINET SECRETARY, MINISTRY OF

NATIONAL TREASURY & PLANNING 3RD RESPONDENT

COMMISSIONER GENERAL-

KENYA REVENUE AUTHORITY 4TH RESPONDENT/APPLICANT

THE HON. ATTORNEY GENERAL 5TH RESPONDENT

(Being an application to extend the time for filing & serving the 4th respondent's replying affidavit and to admit the 4th respondent's replying affidavit, sworn on 13th March 2025)

Representation

Mr. Eliud Karanja Matindi, the Appellant/ Respondent
(In person)

Mr. Andrew Emacar, Advocate for the 1st and 2nd Respondents
(Andrew Emacar, Advocate)

Mr. Samwel Kaumba, Advocate for the 3rd and 5th Respondents
(The Hon. Attorney General's Chambers)

Ms. Fridah Mwongera, Advocate for the 4th Respondent/ Applicant
(Fridah Mwongera, Advocate)

RULING OF THE COURT

[1] UPON PERUSING the Notice of Motion dated 13th March 2025 and filed on 2nd April 2025 by the 4th respondent/applicant pursuant to Articles 50 and 159(2) of the Constitution, and Rules 31, 32 and 33 of the Supreme Court (General) Practice Directions 2020 and all other enabling provisions of the law, wherein the 4th respondent seeks the following orders, that:

1. *This Honourable Court be pleased to extend the time for filing and serving the 4th respondent's replying affidavit upon the appellant and the co-respondents.*
2. *The replying affidavit dated 13th March 2025 be admitted on record.*
3. *The costs incident to this application be in the cause.; and*

[2] UPON CONSIDERING the grounds on the face of the application, the affidavit in support sworn on similar date by Fridah Mwongera, counsel for the 4th respondent and written submissions of even date, asserting that the 4th respondent was required to file its response to the appeal by 11th March 2025, that is within fourteen days of 25th February 2025 being the date of service of the appeal; however, owing to the complexity of the matter and in-house deliberations, the 4th respondent issued instructions late in the day resulting in the replying affidavit being filed on 17th March 2025. Against this backdrop, and considering that the Court has jurisdiction to grant the orders sought, the 4th respondent relies on the principles relating to extension of time enunciated in the case of ***Salat Vs Independent Electoral and Boundaries Commission & 7 Others*** (Application 16 of 2014) [2014] KESC 12 (KLR) (***Salat Case***) and urges the Court

to extend the time for filing its replying affidavit, and to admit its replying affidavit sworn on 13th March 2025; and

[3] WHAT IS MORE, the 4th respondent urges that the appeal raises issues of public interest, the gravamen being the tax exemptions granted by the 3rd respondent vide Legal Notice No. 15 of 2021, and published on 26th February 2021, which exempted various Japanese companies, consultants and employees involved in the projects covered by the finance agreements between Japan and Kenya; that given the public interest element in tax matters, the application ought to be allowed; furthermore, relying on the rationale in ***Barclays Bank of Kenya Limited (Now ABSA Kenya PLC) Vs Commissioner of Domestic Taxes (Large Taxpayers Office); Kenya Bankers Association & Another (Interested Parties)*** (Petition (Application) 12 (E014) of 2022) [2024] KESC 78 (KLR) (***ABSA Kenya Case***), the 4th respondent avers that the two-day delay has been sufficiently explained and is, in any case, not inordinate; and that in any event, the appellant and other respondents will not be prejudiced if the application is allowed; and

[4] UPON FURTHER CONSIDERING the appellant/respondent's replying affidavit sworn on 24th April 2025 and filed on 30th April 2025, and submissions of even date opposing the application on the basis that the 4th respondent's application is not properly before the Court since it was filed on 13th March 2025 and written submissions filed on 2nd April 2025 contrary to Rule 31(1) of the Supreme Court Rules 2020 that requires an application and submissions to be filed simultaneously. The foregoing notwithstanding, the appellant submits that he was served with the application on 16th April 2025, outside the seven-day statutory timeline set out in Rule 31 of the Supreme Court Rules, 2020; and that, while the Court has power to extend time as highlighted in the ***ABSA Kenya Case***, the 4th respondent has consistently breached the rules of the Court without any plausible explanation and is therefore undeserving of the orders sought; and

[5] **BESIDES**, contends the appellant, since the 4th respondent failed to file its response as per the Deputy Registrar's directions of 24th February 2025, he (the appellant) proceeded to file his submissions in support of the appeal without the benefit of the said response; that given the 4th respondent's conduct throughout the proceedings, and guided by the rationale in ***Okoiti & 3 Others Vs Cabinet Secretary for the National Treasury and Planning & 10 Others*** (Application E029 of 2023) [2023] KESC 69 (KLR), the appellant urges that the 4th respondent has failed to accord this Court the respect it deserves and the application ought to be dismissed with costs; and

[6] **TAKING INTO ACCOUNT** that the 1st, 2nd, 3rd and 5th respondents did not file any documents in opposition or support of the application; and

[7] **BEARING IN MIND** that Rule 15(2) of the Supreme Court Rules, 2020 grants this Court the power to extend time limited under the Rules, and the guidelines set out in the ***Salat Case*** being that:

- i. *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.*
- ii. *A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the Court.*
- iii. *Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.*
- iv. *Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.*
- v. *Whether there will be any prejudice suffered by the respondents if the extension is granted.*
- vi. *Whether the application has been brought without undue delay.*
- vii. *Whether in certain cases, like election petitions, public interest should be a consideration for extending time.; and*

[8] HAVING CONSIDERED the totality of the application, the response and submissions put forth, **WE NOW OPINE** as follows:

- a. According to the Court record, on 24th February 2025, the Deputy Registrar issued instructions that the appeal dated 13th February 2025 be served upon the respondents by close of business the same day. The respondents were also granted fourteen days, upon service, to file and serve their responses, while the appellant was granted a further seven days from the date of service of the responses to file a rejoinder, if any. The matter was then slated for mention on 17th March 2025, and according to an affidavit of service sworn by the appellant, he served the 4th respondent's counsel with the appeal on 24th February 2025. Therefore, in line with the Court's directions, the 4th respondent was required to file its response by 10th March 2025. However, the 4th respondent electronically filed a replying affidavit dated 13th March 2025 on 17th March 2025, with the hard copies provided on 2nd April 2025, upon prompting by the Deputy Registrar, which the 4th respondent now erroneously contends was a delay of only two days.
- b. On 17th March 2025, the Court record reflects that only the appellant, the 1st and 2nd respondents were present when the matter was mentioned for further directions. The Deputy Registrar of this Court on that day confirmed that all parties present had filed their respective pleadings and, accordingly, issued directions on the hearing of the appeal. On the subsequent mention date, 24th March 2025, counsel for the 4th respondent informed the Court that she had logged into the court session of 17th March 2025 after the matter had been called and directions issued. She further explained that, upon indicating that she had filed an application seeking extension of time to file the 4th respondent's replying affidavit, she was instructed to provide hard copies of the said replying affidavit. She added that she was also advised that

there was no need to pursue the application, as the matter was still within the case management period.

- c. The appellant opposes the application, citing the 4th respondent's violation of multiple procedural rules. In particular, he notes that although the instant application was filed electronically on 17th March 2025, the physical copies, together with the written submissions, were only filed on 2nd April 2025, contrary to Rule 31(1) of the Supreme Court Rules, 2020. He further contends that he was served with the application on 16th April 2025, seven days out of time. On this basis, he urges the Court to find that there is no valid application before it.
- d. On our part, and upon reviewing the proceedings of 17th March 2025, which are recorded and transcribed, we find no indication or entry supporting the 4th respondent's account of events. In the absence of any contrary record, we are minded to revert to the applicable procedural framework under Rule 31(3) of the Supreme Court Rules, 2020, which requires that an interlocutory application, together with the written submissions, be served within seven days of filing. Read alongside Rules 12(1) and 31(1) of the Supreme Court Rules, 2020, it is evident that the instant application, having been filed on 2nd April 2025, ought to have been served no later than 9th April 2025.
- e. This Court has, on numerous occasions, underscored the importance of compliance with orders, rules and practice directions. See ***Okoiti & 3 Others Vs Cabinet Secretary for the National Treasury and Planning & 10 Others*** (Application E029 of 2023) [2023] KESC 69 (KLR) and ***Independent Electoral and Boundaries Commission Vs Cheperenger & 2 Others*** (Petition 5 of 2016) [2018] KESC 46 (KLR). However, we have equally affirmed that minor procedural lapses, particularly where no prejudice is occasioned or demonstrated, will not

derail the Court's overarching constitutional mandate: the fair, just and expeditious determination of meritorious appeals. In this case, although there was a seven-day delay in serving the application, the appellant has not demonstrated any resulting prejudice. Accordingly, and guided by our constitutional mandate to prioritize substantive justice above other considerations, we are not inclined to dismiss the application solely on the basis of procedural missteps which are apparent to us. We shall, therefore, proceed to consider the application on its merits as below.

- f. It is well-established that an applicant seeking leave to regularize a procedural lapse must declare the entire period of delay and offer a cogent and credible explanation for such delay. In this instance, based on the Court's record, the 4th respondent filed its replying affidavit seven days out of time. This delay is attributed to the late receipt of instructions, which counsel links to the complexity of the matter and the need for internal consultations by the 4th respondent. We are inclined to give counsel the benefit of the doubt and accept this explanation, noting that the delay was neither inordinate nor suggestive of bad faith. Furthermore, the appellant has not demonstrated any prejudice arising from the delay, and retains the right to file a rejoinder to the 4th respondent's replying affidavit. In the circumstances, we are satisfied that the explanation proffered is sufficient and that the delay does not warrant the exclusion of the 4th respondent's response.
- g. Regarding the 4th respondent's contention that the appeal raises issues of significant public interest, we note that the appeal concerns the constitutionality of Legal Notice No. 15 of 2021. Specifically, it questions whether it was discriminatory and in violation of Articles 24(3) and 27(4) of the Constitution; whether it qualifies as a statutory instrument under the Statutory Instruments Act CAP 2A of the Laws of Kenya and therefore, ought

to have been subjected to public participation; and whether it complied with Article 210(2) of the Constitution with respect to the public disclosure of tax exemptions. We agree with the 4th respondent's counsel that the appeal indeed raises issues of a public nature, and it would be in the interests of justice to hear the 4th respondent on its replying affidavit.

- h. Even so, we reiterate the caution we highlighted in the ***Salat Case***; that it is highly irregular and presumptive for a party to file documents out of time and thereafter seek the Court's stamp of approval on such an obvious illegality. Following the course adopted in the ***Salat Case*** and ***Senate & 3 Others Vs Speaker of the National Assembly & 10 Others*** (Petition 19 (E027) of 2021) [2023] KESC 7 (KLR), we hereby expunge the 4th respondent's replying affidavit sworn on 13th March 2025 and filed on 17th March 2025. The 4th respondent is, however, hereby granted leave to file and serve afresh their replying affidavit in line with our grant of leave to do so.
- i. Since costs follow the event, and consistent with ***Rai & 3 Others Vs Rai & 4 Others*** (Petition No. 4 of 2012) [2014] KESC 31 (KLR), costs shall abide the outcome of the substantive appeal.

[9] CONSEQUENTLY, and for the reasons aforesaid, we make the following orders:

- a) ***The application dated 13th March 2025 is partly allowed to the extent that the time for filing the 4th respondent/applicant's replying affidavit is hereby extended.***
- b) ***The replying affidavit sworn by Isaac Kweyu on 13th March 2025 and filed on 17th March 2025 on behalf of the 4th respondent/applicant is hereby expunged from the record.***

- c) *The 4th respondent/applicant shall file and serve its replying affidavit within seven days of the date of this ruling.*
- d) *The appellant is at liberty to file a rejoinder thereof within seven days of service of the said replying affidavit, if so minded.*
- e) *For the avoidance of doubt, all the other prayers are hereby denied.*
- f) *The costs of this application shall abide the outcome of the substantive appeal.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 14th day of November, 2025.

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P.M. MWILU
DEPUTY CHIEF JUSTICE AND 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.