

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

**[CORAM: MARAGA, CJ &P, MWILU DCJ &VP, IBRAHIM, WANJALA
& LENAOLA SCJJ]**

CIVIL APPLICATION NO. 2 OF 2019

SUNDOWNER LODGE LIMITED.....APPLICANT

AND

KENYA TOURIST DEVELOPMENT CORPORATIONRESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal out of time against the judgement and orders of the Court of Appeal (Ouko, Kiage, and Murgor JJA) dated and delivered in Nairobi on the 28th September, 2018 in Civil Appeal No. 120 of 2017)

R U L I N G

[1] The applicant's Notice of Motion dated 24th January 2019 and supported by the affidavit of Samuel Waruguru Kimotho, a director of the applicant, is brought under Section 3 of the Supreme Court Act and Rules 3(2) & (5), 31 and 53 of the Supreme Court Rules as well as other enabling provisions of the law. It seeks an extension of time to file a Notice of Appeal against the judgement and orders of the Court of Appeal (Ouko, Kiage, and Murgor JJA) delivered at Nairobi on 28th Day of September 2018.

[2] The application is based on ground that counsel for the applicant was unaware of the amendment to the Supreme Court Rules allowing a party to file a Notice of Appeal even before obtaining certification/leave. Relying on the authorities of ***Belinda Murai & 9 Others vs Amos Wainaina*** [1979] eKLR; ***Tropical Africa Bank Ltd vs Grace Were Muhwana*** Civil Application No. 3 of

2012[2012] UGSC 8, (Ugandan SC); **Horizon Coaches Ltd Vs Edward Rurangaranga & Another** [Civil Application 18 of 2009 [2009] UGSC 7; **Onyebuchi Iroegbu & others vs Richard Okwardu & Others** Nigeria SC 291 of 1989; and **The Attorney General vs Oriental Construction Co. Ltd** [SC Application 7/90, the applicant argues that a procedural error of counsel should not be visited upon a litigant and urges this Court to grant it leave to file a Notice of Appeal out of time adding that no prejudice will be caused to the respondent. The applicant also relies on the case of **Nicholas Kiptoo Arap Korir Sala vs Independent Electoral & Boundaries Commission & 7 Others** [2014] eKLR, Application No. 16 of 2014 and urges us to exercise our unfettered discretion and allow this application.

[3] Basing their arguments on the averments in the replying affidavit and written submissions, counsel for the respondent dismissed this application as lacking in merit. Citing the case of **Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates** [2013] eKLR, counsel argued that a Notice of Appeal is a jurisdictional prerequisite that every litigant should be aware of. They urged that it is every counsel's duty to keep abreast with legal developments. In the circumstances, they argued that indolence or ignorance of the law, to make it worse, counsel's ignorance of the law, is therefore not one of the grounds in the **Nick Salat case** for extending time. They argued that as was stated in the case of **Charo vs Mwashetani & 3 Others** [2014] eKLR, timelines are a vital ingredient for effective governance under the Constitution and urged us to dismiss this application with costs.

[4] Having considered the parties' rival submissions, we find that counsel's ignorance of the amendment of the Supreme Court Rules in 2012 making it unnecessary "*to obtain ... certification before lodging the notice of appeal*", was an innocent mistake which they have not sought to hide. Moreover, a delay of only four months is not inordinate. In the circumstances, we allow this application. The

applicant shall file and serve its notice of appeal within fourteen (14) days of the date hereof failing which this application shall stand dismissed with costs. The costs of this application shall abide the result of the intended appeal.

It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of April, 2019

.....
D.K. MARAGA
CHIEF JUSTICE & PRESIDENT
SUPREME COURT OF KENYA

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & DEPUTY
PRESIDENT OF SUPREME COURT

.....
M. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. WANJALA
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