



**Solian Investment Limited v KSC International Limited In Receivership
(Formerly known as Kundan Singh Construction) & 6 others (Civil Application
E034 of 2024) [2025] KECA 1533 (KLR) (3 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1533 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E034 OF 2024
SG KAIRU, JA
OCTOBER 3, 2025**

BETWEEN

SOLIAN INVESTMENT LIMITED APPLICANT

AND

**KSC INTERNATIONAL LIMITED IN RECEIVERSHIP (FORMERLY KNOWN
AS KUNDAN SINGH CONSTRUCTION) 1ST RESPONDENT**

CHIEF LAND REGISTRAR 2ND RESPONDENT

REGISTRAR OF LANDS KILIFI 3RD RESPONDENT

REGISTRAR OF TITLES 4TH RESPONDENT

DISTRICT SURVEYOR KILIFI 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

BANK OF BARODA 7TH RESPONDENT

*(Being an application for extension of time to institute an appeal out of time,
against the Judgment and Decree of the Environment and Land Court of Kenya
at Malindi (J.O. Olola, J.) dated 19th October 2022 in ELC Suit No. 22 of 2016)*

RULING

1. In its application dated 13th December 2024, the main prayer sought by the applicant, Solian Investment Limited, is for an order for extension of time to institute an appeal against the judgment of the Environment and Land Court (ELC)(Olola,J) delivered on 19th October 2022 in ELC case No. 22 of 2016. In that judgment, the ELC dismissed the applicant’s suit in which it had sought, among other reliefs, declarations that the Director of Survey, Kilifi had illegally amended or created a Registry



- Index Map in respect of Mtondia/Roka Registration Section and failed to consider the existence and boundaries of Title No. 15351 CR 22091 North Kilifi Creek and that a freehold title had illegally and unlawfully issued for Mtondia/Roka/11 as part of a Squatter Settlement Program when the same had already been alienated to the applicant as a leasehold title, namely, Title No. 15351, CR.22091 North of Kilifi Creek.
2. The applicant also sought declarations in that suit that the creation of Title No. Mtondia/Roka/11 was unlawful and a nullity in so far as its boundaries encompassed Title No. 15351, CR.22091 North of Kilifi Creek; and that KSC International Limited, the 1st respondent, did not acquire any lawful interest or title over Title No. Mtondia/Roka/11 in so far as its boundaries encompassed Title No. 15351, CR.22091 North of Kilifi Creek.
 3. In dismissing the applicant's suit, the learned Judge of the ELC stated that the court was not persuaded that the applicant had demonstrated as it claimed that the respondents had colluded to process the title No. Mtondia/Roka/11. The Judge held that the applicant had failed to prove that the 1st respondent's title was acquired unlawfully.
 4. Aggrieved, the applicant, through its then advocates Ms. Wanjiku Mohamed Advocates filed a Notice of Appeal on 3rd November 2022. It was a day late. That delay was however cured through the applicant's application dated 30th January 2023 in Civil Application No. E001 of 2023 culminating in a ruling of the Court (A. K. Murgor, JA) delivered on 8th March 2024 ordering that "the Notice of Appeal dated 3rd November 2022 and lodged on the same date be ... deemed as properly filed." The applicant asserts that subject to obtaining certified copies of typed proceedings, it should then have filed the Memorandum and Record of Appeal on or before 8th May 2024, that is, within 60 days after the ruling of 8th March 2024 deeming the Notice of Appeal as duly filed.
 5. It is common ground, however, that the typed proceedings were collected way back on 13th December 2022. In other words, by the time the application dated 30th January 2023 in Civil Application No. E001 of 2023 to deem the Notice of Appeal as duly filed was made, the typed proceedings had already been released, and nothing would have prevented the institution of the Memorandum and Record of Appeal immediately after the ruling of 8th March 2024. What then prevented the applicant from doing so and what is the explanation for the delay and justification for the present application?
 6. Based on the affidavit sworn in support of the present application by a director of the applicant Azim Lalji Nurani and the applicant's written submissions highlighted before me by Mr. James Singh learned counsel for the applicant during the hearing of the application on 17th July 2025, the grounds on which the present application is made are that the applicant's present advocates, the firm of LJA Associates LLP took up the prosecution of the appeal from Ms. Wanjiku Mohamed Advocates who had filed the Notice of Appeal on 3rd November 2022; that unknown to LJA Associates LLP advocates, the previous advocates had applied for certified copies of the proceedings, judgment and decree from the ELC; that ignorant of that fact, and after the order of the court made 8th March 2024 deeming the notice of appeal as duly filed, the firm of LJA Associates LLP advocates applied to the ELC to be issued with certified copies of the typed proceedings; that it was not until 21st August 2024 when the ELC through the Deputy Registrar informed LJA Associates LLP advocates that the typed proceedings had been collected way back on 13th December 2022 that LJA Associates LLP advocates then followed up with the previous advocates and collected the proceedings on 3rd September 2024.
 7. It is asserted for the applicant that even after collecting the typed proceedings from Ms. Wanjiku Mohamed Advocates on 3rd September 2024, the firm of LJA Associates LLP Advocates could not immediately file the appeal or this application because the pleadings and documents pertaining to



- the ELC matter were still held by the previous advocates; and that it was not until 14th November 2024 when LJA Associates LLP Advocates physically visited the offices of the previous advocates in Mombasa who then released the files to them after which they were in a position to institute the present application.
8. Meanwhile, in Civil Application No. E010 of 2024 the applicant applied for and obtained an order of injunction given on 25th October 2024 restraining dealings in the suit property pending the hearing and determination of the appeal.
 9. It was submitted by counsel for the applicant that the delay involved is excusable, is not deliberate nor inordinate, that the intended appeal is meritorious and that no prejudice will be occasioned to the 1st respondent as it is in possession of the property.
 10. To buttress the application, counsel for the applicant referred to the decision in *Africa Blooms Limited v Gatari* [2023] KECA 918(KLR) for the principles applicable in applications of this nature; the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 Others* [2015] KECA 674 (KLR) for the proposition that mistakes of the applicant's former counsel should not be visited on the applicant; and the case of *Soft White Beach Limited v Kombe & 4 Others*, Civil Application E018 of 2023, [2023] KECA 970 (KLR) for the argument that the question whether prejudice will be suffered involves balancing the competing interests of the parties.
 11. The application is opposed by the 1st respondent through a replying affidavit sworn by Henry Owino, an advocate in the firm of Walker Kontos Advocates and written submissions which were highlighted before me during the hearing by Mr. Omino, learned counsel for the 1st respondent. It is the 1st respondent's case that the reasons advanced by the applicant in support of the application are not valid; that it is conceded that the certified copies of the proceedings were collected on 13th December 2022; that when the LJA Associates LLP Advocates applied for the typed proceedings on 14th March 2024, it is not manifest that they enquired from the previous advocates whether they had applied for the same and neither is it shown that the new advocates perused the court file to establish the status; that in any event, despite having applied for the proceedings on 14th March 2024, there is no evidence of follow up with the registry until over five months later on 21st August 2024 when an email from the Deputy Registrar is shown to have been sent; that there is no demonstrable exercise of due diligence on the applicant's part.
 12. It was urged further that despite the proceedings having been received by LJA Associates LLP Advocates on 3rd September 2024, the present application was filed more than three months later; that regarding pleadings, the applicant has not shown what efforts, if any, it made prior to 14th November 2024 to contact or request the previous advocates for the same, which in any event would have been available from court; that even then, despite receiving the pleadings on 14th November 2024, the present application was not made until a month later on 13th December 2024. It is urged that the purported unavailability of typed proceedings and pleadings were in any case not a bar to bringing the present application for extension of time immediately after the expiry of the time prescribed for filing the record of appeal.
 13. It was urged that there has been inordinate delay in the handling of the matter by the applicant which has not been sufficiently explained, and the 1st respondent would be severely prejudiced by further delays in concluding the matter.
 14. Cited was the decision of the Court in *Hezekiah W. Gichobi v Uhuru Highway Development Limited & 2 Others* [2018] eKLR where an application for extension of time made in similar circumstances as the present was dismissed; the case of *Consolidated Bank of Kenya Limited v Samuel Okoth* [2012]



eKLR for the argument that to the extent that the applicant and its advocates were not diligent and did not act with dispatch, the delay is not excusable.

15. Learned counsel for the 7th respondent Mr. Ondego associated himself fully with Mr. Omino in opposing the application.
16. I have considered the application, the affidavits and the submissions. The principles applicable to applications under Rule 4 of the *Court of Appeal Rules*, such as the present application, are well established. Although the Court has unfettered discretion under Rule 4 of the *Court of Appeal Rules* to extend time, that discretion should be exercised judicially. As stated by the Court in *Fakir Mohamed v Joseph Mugambi & 2 Others* [2005] eKLR (Civil Application No. Nai. 332 of 2004 (Nyr. 32/04)):

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the stricture of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possible) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factor.”
17. In the same vein, the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court Application No. 16 of 2014 pronounced that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to the satisfaction of the court; that extension of time is a consideration on a case to case basis; and that delay should be explained to the satisfaction of the court. Other considerations include whether there will be prejudice suffered by the respondents if the extension is granted; and whether the application is brought without undue delay. Public interest is also a relevant consideration.
18. With those principles in mind, the judgment the subject of the intended appeal was, as already indicated, delivered on 19th October 2022. The applicant’s Notice of Appeal dated 3rd November 2022, though a day late, was validated by the Court and deemed as having been properly filed vide the ruling of the Court (Murgor, J.A.) delivered on 8th March 2024 in Civil Application E001 of 2023. Both parties are at one that the sixty (60) days prescribed under Rule 84 of the Court of Appeal Rules within which the applicant should have lodged the memorandum and record of appeal began to run on 8th March 2024 and the same should therefore have been done by 8th May 2024.
19. The explanation given by the applicant why that was not done is captured in the preceding paragraphs of this ruling. In a nutshell, it is that the present advocates took over the matter from the previous advocates; that unknown to them, the previous advocates had already applied and obtained certified copies of the proceedings, judgment and decree; that unaware of that fact, the present advocates applied for the same on 14th March 2024 and were only notified on 21st August 2024 by the Deputy Registrar of the ELC that the same had been collected way back on 13th December 2022; that the present advocates then sought to pursue a certificate of delay from the ELC to no avail; that it was not until 3rd September 2024 that they collected the proceedings from the previous advocates; that the pleadings and documents pertaining to the ELC suit were only received on 14th November 2024 and thereafter the present application made on 13th December 2024. According to the applicant, the delay involved is not deliberate nor inordinate, is satisfactorily explained and is excusable.



20. The chronology of events post judgment of the ELC the subject of the intended appeal tells an interesting story. The Notice of Appeal was drawn and filed by the applicant's previous advocates. It is not clear, as it is not indicated precisely when LJA Associates LLP Advocates took over the matter from the previous advocates. What is clear, is that by 30th January 2023, LJA Associates LLP advocates had taken over the matter from the previous, because on that date, that firm on behalf of the applicant made the application in E001 of 2023 to deem the notice of appeal as duly filed. By that time the certified typed proceedings had already been made available.
21. The newly appointed advocates for the applicant knew, or ought to have known, as early as 30th January 2023, that under the proviso to Rule 84 of the Court of Appeal Rules, an application for a copy of the proceedings in the ELC should have been made within 30 days if the time for preparation of the same was to be excluded in the computation of the time within which the appeal is to be instituted. It is noteworthy that in his affidavit sworn on 30th January 2023 in support of the applicant's application dated 30th January 2023 to deem the notice of appeal as properly on record, Azim Lalji Nurani deposed in paragraph 10 thereof as follows:
- “That notwithstanding the foregoing, the Plaintiff's advocates filed a Notice of Appeal on 3rd November 2022 and requested for certified copies of the proceedings...”
22. Exhibited to that affidavit was a copy of the letter dated 4th November 2022 addressed to the Deputy Registrar, ELC, bespeaking a copy of the proceedings and the judgment.
23. Similarly, in the present application, the applicant states that prior to the appointment of its current advocates, the applicant's previous advocates had applied to be issued with the certified copies of the proceedings and judgment. Evidently, therefore, the applicant knew, as early as 30th January 2023 that an application for the typed proceedings had been made. With that early knowledge, it is not clear why on the 14th March 2024 a fresh application for certified copies of the typed proceedings was made or deemed necessary without first seeking to establish, either from the court or from the previous advocates, the fate of the request for proceedings dated 4th November 2022.
24. There is merit therefore in the submission by counsel for the 1st respondent that existence of the typed proceedings could have been established by exercise of diligence by the applicant through perusal of the court file or inquiry with the previous advocates. The circumstances, in that regard are not dissimilar to those in *Hezekiah W. Gichobi v Uburu Highway Development Limited & 2 Others* (2018) eKLR to which I was referred where the Court declined to exercise its discretion in favour of an applicant having expressed:
- “Having received instructions in December 2016, the current advocate for the applicant waited until March 2017 when he perused the court file and found that the applicant's former advocate had collected the proceedings in August 2012.”
25. It bears repeating what was stated by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, (above), extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court and the party seeking extension of time has the burden to lay a basis to the satisfaction of the court. In my view, the explanation for the delay involved in that regard is not plausible. It bears repeating that a perusal of the court file, or a direct enquiry with the previous advocates would have revealed that the typed proceedings were collected as early as December 2022.



26. Even with the information given by the ELC on 21st August 2024 that the proceedings had long since been collected, and the advocates for the applicant having then collected the same from the previous advocates on 3rd September 2024, the explanation given why the present application was not made immediately thereafter and had to wait until 13th December 2024 is not in my respectful view satisfactorily explained. It is asserted that the pleadings and documents had not been received from the previous advocates, and that they were obtained on 14th November 2024. Yet, that had not stopped or prevented the applicant from making the application dated 30th January 2023 for extension of time with respect to the notice of appeal, and neither did that stop the applicant from making its application in E010 of 2024 seeking stay of execution of the judgment that culminated in the orders of the court given on 25th October 2024.
27. As this Court stated in *Sakari v Anyumba* (Civil Application E170 of 2021) [2024] KECA 790 (KLR) mistake of counsel is not an automatic reason to excuse delay as the case belongs to a litigant and not to his counsel.
28. As regards prejudice, it is shown that the suit commenced in 2016 and the 1st respondent is indicated to be in receivership and the 1st respondent is justified to complain that further delay in conclusion of the matter is prejudicial.
29. All in all, I am not satisfied that this is a proper case for the Court to exercise its discretion in favour of the applicant. The application fails and is accordingly dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MALINDI THIS 3RD DAY OF OCTOBER 2025.

S. GATEMBU KAIRU, C.Arb, FCIArb.

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR

