



**Little Theatre Club v Talentos Beach Resort & 2 others (Environment and Land Miscellaneous Case E096 of 2024) [2025] KEELC 5320 (KLR) (16 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5320 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND MISCELLANEOUS CASE E096 OF 2024**

**SM KIBUNJA, J  
JULY 16, 2025**

**BETWEEN**

**LITTLE THEATRE CLUB ..... APPLICANT**

**AND**

**TALENTOS BEACH RESORT ..... 1<sup>ST</sup> RESPONDENT**

**NDUTUMI AUCTIONEERS ..... 2<sup>ND</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Notice Of Motion Dated 27th November 2024**

1. The applicant filed the notice of motion dated the 27<sup>th</sup> November 2024 seeking for inter alia:
  - a. “Spent.
  - b. That this honourable court do enlarge time to file the annexed memorandum of appeal against the entire ruling of Hon. G. Sogomo, PM, in Mombasa MCELC No. E070 of 2024 delivered on 21<sup>st</sup> June 2024.
  - c. That this honourable court be pleased to make such orders or further orders as are just and proportionate in the circumstances pending the determination of this matter and issuance of final orders.
  - d. That the costs of this application be provided for.”

The application is based on the ten (10) grounds on its face marked (1) to (10) respectively, and supported by the affidavit of Nolly Wilson Raye, the Secretary of the applicant, sworn on the 27<sup>th</sup> November 2024, among others deposing that upon the trial court delivering the ruling on 21<sup>st</sup> June 2024 dismissing its preliminary objection dated 18<sup>th</sup> April 2024, that objected to the court’s



jurisdiction, the applicant prepared a memorandum of appeal dated 18<sup>th</sup> July 2024 and filed it within time on the 19<sup>th</sup> July 2024 inadvertently before the High Court, being HCCA No. E212 of 2024; that the applicant vide an oral application made on the 26<sup>th</sup> November 2024, withdrew HCCA No. E212 of 2024 and subsequently filed this application; that the appeal had been filed before the High Court by mistake of counsel which should not be visited on the party; that as the application has been filed without delay, and the intended appeal raises serious legal issues with high probability of success, the application should be allowed.

2. The application is opposed by the 1<sup>st</sup> respondent through the replying affidavit of Peter Chebulobi Mindila, director, sworn on the 28<sup>th</sup> February 2025, in which he inter alia deposed that upon the applicant filing HCCA No. E212 of 2024, it reached out to their counsel and offered to pay costs of Kshs.15,000 to withdraw the appeal so that the matter before the trial court could proceed to hearing; that the applicant went against their earlier promise to abandon the appeal, and surprisingly filed this application more than five months after the trial court's ruling; that the intended appeal has no probability of success and application should be dismissed with costs.
3. The court issued directions on filing and exchanging submissions on the 10<sup>th</sup> March 2025, and subsequently, the learned counsel for the applicant and 1<sup>st</sup> respondent filed their submissions dated the 12<sup>th</sup> May 2025 and 12<sup>th</sup> June 2025 respectively, that the court has considered.
4. The issues for determination by the court on the application dated 27<sup>th</sup> November 2024 are as follows:
  - a. Whether the applicant has established a case for enlargement of time to file an appeal against the ruling of 21<sup>st</sup> June 2024.
  - b. Who pays the costs?
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence tendered, submissions by both learned counsel, superior courts decisions cited thereon and come to the following conclusions:
  - a. The learned counsel for the applicant has in his submissions referred to section 79G of the [Civil Procedure Act](#), which provides for admission of appeals out of time where the applicant satisfies the court that he had good and sufficient reasons for not filing the appeal on time. The learned counsel cited the cases of Edith Gichungu Koine versus Stephen Njagi Thoithi & Another [2015] KECA 874 (KLR), Onyango versus Tribe Hotel Limited [2024] KECA 766 (KLR) and Stecol Corporation Limited versus Susan Awuor Mudemb [2021] KEHC 2912 (KLR), and submitted that the applicant has met the threshold for granting enlargement of time to lodge their appeal, and their application dated 27<sup>th</sup> November 2024 should be allowed in its entirety. Counsel undertook to file the record of appeal in one day as it is ready if the application is granted.
  - b. The learned counsel for the 1<sup>st</sup> respondent submitted that the wording of section 79G of the [Civil Procedure Act](#) requires the applicant to satisfy the court that they have good and sufficient cause for filing the appeal out of time. The counsel cited the cases of Diplack Kenya Limited versus William Muthama Kitonyi [2018] eKLR, Paul Musili Wambua versus Attorney General & 2 Others [2015] eKLR, Mwangi & Another versus Muiruri Civil Appeal No. 327 of 2023 [2024] KEHC 5830 (KLR) (23 May 2024) (Ruling), Githau versus Kagiri & Another (Civil Appeal No. 314 of 2023) [2024] KEHC 6320 (KLR) (6 June 2024) (Ruling) and Supreme Court of Kenya case of Nicholas Korir arap Salat versus IEBC and 7 Others [2014] eKLR, on the principles to be applied in applications for leave to appeal out of time, and submitted



that the applicant has not met the threshold required by the law and the application should be dismissed with costs.

- c. Having considered the submissions by counsel, and applying the principles enunciated by the superior courts in the various decisions cited among others to the facts before me, I find the applicant has proffered only one reason or cause for the delay in filing the appeal before this court, and that is it had inadvertently filed an appeal being HCCA No. E212 of 2024 within time on the 19<sup>th</sup> July 2024 before the High Court. That upon discovering the mistake it caused the said appeal to be withdrawn on 26<sup>th</sup> November 2024, and as time had by then lapsed filed the instant application for enlargement of time. While it is not disclosed when the applicant got to know the appeal filed on 19<sup>th</sup> July 2024, that is HCCA No. E212 of 2024, had been filed before the wrong court, it is apparent the applicant acted without delay in days and filed the current application after that appeal was withdrawn. The fact that the applicant had filed HCCA No. E212 of 2024 within time though in the wrong court, which is a mistake it has owned up and reportedly paid thrown away costs upon withdrawing it, and the filing of the instant application without inordinate delay, can only be taken as a reflection of its determination to pursue its appeal. I find the applicant has presented before the court sufficient and reasonable explanation that clearly satisfies the court on its delay in filing an appeal before this court. The application is therefore meritorious.
  - d. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event except where the court has good reasons to direct otherwise. In this case, though the applicant is successful in their application, the costs should abide the outcome of the appeal, as the mistake of not filing the appeal before this court in time can only be blamed itself and its counsel.
6. Flowing from the conclusions set out above in respect of the notice of motion dated the 27<sup>th</sup> November 2024, the court finds and orders as follows:
- a. That the said application is allowed in terms of prayer (b), and leave to file the intended appeal granted.
  - b. That the Memorandum of Appeal be filed and served in seven (7) days from today, and in default the leave granted to lapse automatically.
  - c. The costs in the application to abide the outcome of the intended appeal.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 16TH DAY OF JULY 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Applicant : Mr. Mwamboje

Respondents : No Appearance

Shitemi-court Assistant.

