



**Solian Investments Limited v KSC International Limited in Receivership
(Formerly known as Kundan Singh Construction Ltd) & 6 others (Civil
Application E001 of 2023) [2024] KECA 230 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 230 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E001 OF 2023
AK MURGOR, JA
MARCH 8, 2024**

BETWEEN

SOLIAN INVESTMENTS LIMITED APPLICANT

AND

**KSC INTERNATIONAL LIMITED IN RECEIVERSHIP (FORMERLY KNOWN
AS KUNDAN SINGH CONSTRUCTION LTD) 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

*(An Application for extension of time to file an appeal out of time against
the decision of the Environment and Land Court of Kenya at Malindi
(Olola, J.) dated 19th October 2022 in 2 Malindi ELC NO. 22 OF 2016)*

RULING

1. By a Notice of Motion dated 30th January 2023, brought pursuant to section 3A and 3B of the *Appellate Jurisdiction Act*, rule 4 of the *Court of Appeal Rules*, 2022 the applicant, Solian Investments Limited, seeks:
 - (i) that time be extended for lodging the Notice of appeal against the judgment of the Environment and Land Court of 19th October 2022 in Malindi ELC No. 22 of 2016; and



- (ii) that the Notice of appeal filed on 3rd November 2022, be deemed as admitted and properly on record or in the alternative, that time be deemed to be extended.
2. The Notice is brought pursuant to the grounds on its face and an affidavit in support sworn by Azim Lalji Nurani, a Director at the applicant company where he contended that the applicant is a Limited Liability Company and is the registered proprietor of Title No. 15351, C.R. 22091 North of Kilifi Creek, Kilifi County (the suit property) measuring 4 hectares where a Certificate of Title was issued on 15th February 1992; that the applicant has been in occupation of the property until September 2015. The applicant's suit is against the 1st respondent whom it claimed had trespassed onto the suit property and constructed a wall. The 1st respondent denied the claim and stated that it was the rightful owner having acquired it from Magomeni Properties Limited and subsequently charged it to the Bank of Baroda.
 3. On hearing the parties' evidence, the learned Judge dismissed the applicant's suit and affirmed the 1st respondent's title. The applicant contended that despite the suit being filed in the Environment and Land Court at Malindi, the judgment was delivered in open court and virtually on 19th October 2022 at Nyeri via Microsoft Teams without any notice to the applicant; that it learnt of the judgment when it was published in the Business Daily of 25th October 2022; that this prompted its Advocates to file a Notice of appeal on 3rd November 2022 and to requested for certified copies of the proceedings; that the Notice of appeal was filed one day late as it ought to have been filed by 2nd November 2022.
 4. It was averred that the reasons for delay in filing the Notice of appeal has been duly explained and are plausible; that the delay in lodging the Notice of appeal was not inordinate, and the applicant had brought this application without unreasonable delay; that further, the 1st respondent has since filed an application seeking to strike out the Notice of appeal dated 3rd November 2022, and unless the application is granted to enable the applicant pursue conservatory orders and an appeal, the 1st respondent may sell or the Bank of Baroda might realize the security which would render the appeal nugatory. The applicant is also concerned that owing to the current status of the 1st respondent, it might be unable to meet any financial awards that might be eventually made and that the appeal has a good chance of success.
 5. Learned counsel for the applicant, Mr. Zakayo relied on the applicant's written submissions and submitted that the delay was of a single day and was beyond the applicant's control as it was occasioned by the lack of notice of delivery of the judgment, which he submits was delivered virtually in Nyeri in the absence of parties. It was submitted that the intended appeal raises weighty issues for this Court's consideration and that the applicant will suffer great prejudice should the orders sought not granted.
 6. The 1st respondent filed a replying affidavit sworn by Kerito Marima, a certified Insolvency Practitioner and Receiver Manager of KSC International Limited in Receivership (Formerly Known as Kundan Singh Construction Ltd) on 12th September 2023 and written submissions the contents of which were highlighted by learned counsel Mr. Wafula on behalf of the 1st respondent who opposed the motion. Counsel submitted that the 1st respondent had filed a Notice of motion dated 22nd November 2022 seeking to strike out the Notice of appeal, which is pending before this Court, and should have been heard prior to this motion. Counsel further submitted that the applicant had failed to provide an explanation for the delay in filing the Notice of appeal from the time the applicant learnt of the judgment until the 3rd November 2023 when the Notice of appeal was filed; that it also failed to explain why this application was lodged three months later on 30th January 2023.
 7. Also in response to the application, the 2nd to 6th respondents filed a replying affidavit sworn by Martin Mwarome Munga, learned counsel for the State on 14th September 2023, where he contended that after



the hearing before the Environment and Land court was concluded, parties were directed to file and serve their respective submissions; that before delivery of the judgment, the learned Judge, Olola, J. was transferred to Nyeri and directions were issued that the judgment would be delivered on notice; that on 14th October, 2022 the Environment and Land court at Nyeri issued a notice that Malindi ELC No. 22 of 2016, together with other matters listed in the notice would be delivered on Wednesday 19th October, 2022 at 9.00 a.m in court before Hon. Justice Olola; that from the time the judgment was delivered on 19th October 2022, no Notice of appeal was filed by the applicant until the 3rd November 2022; that the draft Memorandum of appeal comprises general grounds of disagreement with the lower court's finding, and as such, the intended appeal has no chance of success; that therefore, the application for extension of time to file an appeal out of time should be dismissed with costs to the respondents, for the reason that the explanation of delay is not plausible and falls short of the established principles.

8. The 2nd to 6th respondents filed written submissions which reiterated the contents of the affidavit in reply. Learned Counsel Mr. Ojwang holding brief for Mr. Munga informed the Court that they would be relying on their written submissions in entirety.
9. The 7th respondent neither filed a response, nor any submissions, and learned counsel Mr. Ondego who appeared on its behalf informed the Court that they would not be opposing the appeal, and would leave the determination of the motion to the Court.
10. Under rule 4 of this *Court's rules*, the Court has unfettered discretion to extend the time limited by the rules. This Court in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 sets out the principles to be applied in the exercise of its discretion in determination of any application under rule 4 thus:

“...the decision whether or not to extend time is discretionary. The Court in deciding whether to grant an extension of time takes into account the following matters: first, the length of the delay; second, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
11. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR this Court in considering delay observed that:

“... the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's flow of discretionary favour. There has to be valid and clear reasons upon which discretion can be favourably exercisable.”
12. It is trite that there is no maximum or minimum period of delay set out under the law. However, an inordinate delay is more likely than not to disentitle the applicant to the leave. Likewise, the reason or reasons for the delay must be reasonable and plausible.
13. In this case, the applicant seeks for time to be extended to file the Notice of appeal filed on 3rd November 2023. Based on the above stated principles, I will begin by determining whether the applicant has satisfactorily explained the delay in filing the Notice of appeal. The judgment was delivered on 19th October 2022, and the Notice of appeal which ought to have been filed within 14 days, on the 2nd November 2023, was not filed until 3rd November 2023. The delay was therefore one day.
14. The applicant has explained that the judgment was delivered virtually in Nyeri on 19th October 2022 without it having been served with any notice; that it learnt of the decision from the Business Daily of



25th October 2022, and immediately thereafter filed the Notice of appeal on 3rd November 2022, one day after the period had lapsed. The 2nd to 6th respondents asserted that all the parties were notified of the date for delivery of judgment, and they attached a notice dated 14th October 2022 addressed to all litigants and advising that judgments and rulings would be delivered on 19th October 2022. The notice is also entitled, “<https://bit.ly/3yasyyb-Nyeri> ELC”.

15. A review of the record does not disclose that any other notice was issued specifically to the parties of the Malindi court. In addition, the notice does not clearly indicate that Malindi judgments and rulings were for delivery on that date. I have also considered the Environment and Land court judgment. It shows that on the date of delivery, there was no appearance from any of the parties. What becomes clear is that, the notice issued by the court in Nyeri was insufficient for parties whose matters were filed, and heard in Malindi, hence, their non- attendance, and the reason for the delay in filing the Notice of appeal by the applicant. Notwithstanding that it had only 8 days left to lodge the Notice of appeal, the applicant was able to lodge it one day after expiry of the prescribed period. Given the circumstances, I do not consider the one-day delay in filing the Notice of appeal to have been inordinate, and I am satisfied that the delay has been adequately explained.
16. As concerns the filing of this application, it will be observed that this was not what was before the Court for determination.
17. As to whether the intended appeal has any chances of success, the applicant has filed a draft memorandum of appeal where it is seeking to ventilate various grounds before this Court, and having regard to the circumstances of the case, it should have an opportunity to do so. I do not envisage that there will be any prejudice visited on the respondents, particularly since, this being a dispute over land, it will be important to have it determined with finality one way or the other.
18. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time to lodge the appeal. Accordingly, the Notice of appeal dated 3rd November 2023 and lodged on the same date be and are hereby deemed as properly filed. Costs in the appeal.
19. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

