



REPUBLIC OF KENYA



**KENYA LAW**  
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**Soft White Beach Limited v Kombe & 4 others (Civil Application  
E018 of 2023) [2023] KECA 970 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 970 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MALINDI  
CIVIL APPLICATION E018 OF 2023**

**JW LESSIT, JA**

**JULY 28, 2023**

**BETWEEN**

**SOFT WHITE BEACH LIMITED ..... APPLICANT**

**AND**

**MASUMBUKO YERRY KOMBE ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KASHURU MUMBO ..... 2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

*(An application for leave to extend time to file and serve the notice of appeal  
from the judgment of the Environment and Land Court at Malindi,  
delivered by J.O. Olola, J. on 13th May 2020 in ELC No. 30 of 2011)*

**RULING**

1. By a notice of motion dated April 18, 2023, brought under Rule 4, 41 and 44 of the [Court of Appeal Rules, 2022](#), Soft White Beach Limited, the applicant, seeks extension of time to file and serve its notice and record of appeal out of time, with costs in the cause.
2. The application is based on the grounds the applicant filed a notice of appeal in Malindi Civil Appeal No E15 of 2020 dated May 20, 2020. That the notice of appeal was served out of time and erroneously to the wrong email address in regard to the 2<sup>nd</sup> respondent's advocates. That consequently, the applicant's appeal was struck out on March 31, 2023 on application by the 2<sup>nd</sup> respondent. The applicant deposes that the error was inadvertent and the mistake a mere technicality that can be cured. That the applicant prays this Court to grant an extension of the time limited by the Rules of the Court



to file and serve the notice of appeal and record of appeal. It is deposed that the respondents will not suffer prejudice or inconvenience if the orders sought are granted.

3. Zipporah Nyaguthii Gitonga, the director of the applicant swore an affidavit stating that the applicant lodged its appeal (Application) No E024 OF 2021 via a notice of appeal dated May 18, 2020 and filed on May 20, 2020 against the judgment of the Environment and Land Court delivered on May 13, 2020. That Masumbuko Yerry Kombe, the 2<sup>nd</sup> respondent, filed a notice of motion dated June 21, 2021 seeking to have the applicant's appeal struck out. That the appeal was struck out on March 31, 2023. The applicant deposed that the respondents will not suffer prejudice or inconvenience. It was deposed that there has been no delay in presenting the application. The applicant deposes that it is desirous of prosecuting its appeal.

## Background

4. The background of this application is that the applicant filed a suit against the respondents before the Environment and Land Court (ELC) seeking three declarations: that the Land Plot No Chembe/Kibabamshe/393; that title deeds to Plot Nos Chembe/Kibabamshe/651 and 652 are valid and that the applicant was the indefeasible and absolute proprietor of both of them: and, a permanent injunction restraining the respondents from selling or in any manner whatsoever dealing with Plot No. Chembe/Kibabamshe/393.
5. In the defence and counter claim, the 1<sup>st</sup> respondent pleaded that Plot No Chembe/Kibabamshe/393 was issued to him by the Settlement Fund Trustee and that he properly acquired title over the Plot and then regularly sold it to the 2<sup>nd</sup> respondent.

The learned trial ELC Judge was satisfied that the 1<sup>st</sup> respondent's title was the genuine one, and that the 2<sup>nd</sup> respondent was a bona fide purchaser of the property. The applicant's suit was therefore dismissed, and judgment entered for the 1<sup>st</sup> and 2<sup>nd</sup> respondent.

## Submissions

6. The application was heard on the June 14, 2023. Present at the hearing was learned counsel Mr Joseph Munyithya, Mr Diro and Mr Kevin Kokebe for the 2<sup>nd</sup> respondent, and Ms Lutta for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents. There was no representation for the 2<sup>nd</sup> respondent who was said to be deceased.
7. Mr Munyitya urged that it was appreciated that it was in the Court's discretion to grant or decline to grant the application. He relied on his submissions dated May 25, 2023. Counsel placed reliance on the Supreme Court decision in *Nicholas Kiptoo Arap Salat v IEBC (2014) eKLR*, in which seven (7) principles that guide consideration for an application for extension of time which he urged the applicant had placed itself under the aegis of.

He placed reliance on *Philip Chemwolo & Another v Augustine Kubebe (1986) eKLR* for the proposition that blunders will continue to be made but it should not justify to decline a hearing to the party. Counsel urged that there has been no delay in bringing the instant application and that the applicant is deserving of the equitable orders sought.

8. Mr Diro and Mr Kokebe for the 2<sup>nd</sup> respondent relied on the affidavit sworn by the Mr Kokebe, counsel for the 2<sup>nd</sup> respondent. Mr Kokebe deposed that the application has been made three (3) years from the date of judgment and 36 days from the date of the impugned ruling. He deposed that the application was an afterthought, was in bad faith and intended to deny the 2<sup>nd</sup> respondent the fruits of his judgment.



9. In their submissions, Mr Kokebe in his oral submission started by raising an issue not raised in his written submissions, that the 2<sup>nd</sup> respondent were at a loss as the nature of the application because the record of appeal was struck out on March 31, 2023 by a three Judge bench of this Court. He did not elaborate.

Counsel relied on the case of *Imperial Bank Ltd [Under receivership] vs Alnasir Popat & 18 others (2018) eKLR* for the proposition that the principles that guide the Court in such an application includes consideration of the length of delay; the reason for the delay and the prejudice that any party stands to suffer. Relying on Nicholas Salat, supra, cited by the applicants, he urged that the delay was inordinate being 3 years, and that the delay was not explained. He cited *James Kanyutu Nderitu vs AG & another (2019) eKLR* and urged that the applicant had the correct email address of his office and so there is no reasonable explanation for service to wrong address.

10. In response, Mr Munyiya urged that time started running on the March 31, 2023 and that as they filed the application on April 22, 2023, that cannot be regarded as inordinate delay. He also urged that the fact a three Judge bench of this Court struck out the appeal does not mean the current application could only be made before a three Judge bench. The application is made under Rule 4 of this Court and that a single Judge had jurisdiction to consider the application.

### Determination

11. I have considered this application. The issue for determination is only one, whether the applicant has proved that it is deserving of the exercise of discretion of this Court to grant the orders sought. The discretion of a single judge under rule 4 is wide and unfettered. (See *Leo Sila Mutiso v Rose Wangari Mwangi, CA No Nai 255 of 1997*). However, it is equally trite that the discretion must be exercised judiciously and upon reason rather than arbitrarily, capriciously, on whim, or sentiment.
12. By Mr Kokebe cited a case that set out the principles that guide the Court in the exercise of its discretion in an application of this nature was on. The Court of Appeal in *Imperial Bank Ltd [Under receivership] vs Alnasir Popat & 18 others (2018) eKLR* held:

' Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully ventilate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be borne in mind that it is not really the role of the single judge to determine definitively the merits of the intended appeal.'

13. Mr Kokebe suggested that the period of the delay was three (3) years from the date of judgement of the ELC, but later changed and said it was 36 days from the date of ruling striking out the appeal to date the application was made.
14. I have considered the explanation the applicant gave for the delay. It has been shown that the applicant filed the notice and record of appeal timeously, and that is not in dispute. However, the notice of appeal sent to the advocate for the 2<sup>nd</sup> respondent was sent to the wrong email, the counsel for the appellant has maintained that it was inadvertent and a mistake. The counsel for the 2<sup>nd</sup> respondent maintained



that the appeal was an afterthought as they had the correct email on the notice of appeal they sent to the wrong address.

15. It is clear that the applicant's advocate made a blunder, sending the notice of appeal to the wrong address of the 2<sup>nd</sup> respondent's advocate. Can that be reason to say that the appeal was an afterthought that is not a correct conclusion since the notice to the other parties was sent to the correct addresses? As the Court held in *Philip Chemwolo & Another v. Augustine Kubebe* (1986) eKLR the court observed that 'blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit.'
16. M'Inoti, JA had this observation to make concerning blunders in *Bupinder Singh Dogra vs Coast Development Authority [2019] eKLR* in the following words:

' I am prepared to take it that by some blunder of counsel the defendant applicant has found itself with a judgment it views should not have been entered if not for the blunder. I resist the temptation that the mere occurrence of blunder should condemn the defendant unheard. I am minded to set aside and I do grant to the defendant/applicant the orders sought'.
17. I am satisfied that the applicant gave a reasonable explanation for the delay that it was by a mistake, not inaction of the applicant's advocate, I am satisfied that the mistake was genuine, not out of deliberate act to ignore the Rules of the Court. See *Sokoro Savings and Credit Co-operative Society Ltd v Mwamburi (Civil Application E032 of 2022) [2023] KECA 381 (KLR)*
18. As to whether there will be any prejudice suffered by the either party, this is an issue of balancing the interests of all the parties. The 2<sup>nd</sup> respondent has a judgment in his favour that he is desirous to enjoy. The applicant on the other hand has a right to appeal with a constitutional underpinning. In this case, I see no justification to deny the applicant an opportunity to be heard on appeal.
19. I find that the applicant has shown that it is deserving of the exercise of discretion in his favour. Accordingly, I allow the applicant's application dated April 18, 2023. Costs will abide the outcome of the appeal.

**DATED AND DELIVERED IN MOMBASA THIS 28<sup>TH</sup> DAY OF JULY, 2023**

**J. LESIIT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

