



**Kenya Railways Corporation & 2 others v Okioti & 3 others (Petition
13 & 18 of 2020 (Consolidated)) [2022] KESC 2 (KLR) (10 February 2022) (Ruling)**

Neutral citation: [2022] KESC 2 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 13 & 18 OF 2020 (CONSOLIDATED)
PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA, NS NDUNGU & W OUKO, SCJJ
FEBRUARY 10, 2022**

BETWEEN

KENYA RAILWAYS CORPORATION 1ST APPLICANT

THE ATTORNEY GENERAL 2ND APPLICANT

THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY ... 3RD APPLICANT

AND

OKIYA OMTATAH OKOITI 1ST RESPONDENT

WYCLIFE GISEBE NYAKINA 2ND RESPONDENT

THE LAW SOCIETY OF KENYA 3RD RESPONDENT

CHINA ROAD AND BRIDGE CORPORATION 4TH RESPONDENT

(Being an application for leave to file a supplementary record of appeal)

Supreme Court extends time for filing a supplementary record of appeal over one year after the filing of the record of appeal.

Reported by Kakai Toili

***Jurisdiction** – jurisdiction of the Supreme Court – jurisdiction to extend the time for filing a supplementary record of appeal - whether the Supreme Court could extend the time for filing a supplementary record of appeal over one year after the filing of the record of appeal - Supreme Court Rules, 2020, rules 15(2) and 40.*

Brief facts

The applicant filed the instant application seeking leave to file its supplementary record of appeal being the replying affidavit of its then managing director. The applicant claimed that it inadvertently, by omission, failed to include as part of the record the replying affidavit by the then managing director of the applicant and that the omission was only discovered while the applicant was preparing submissions to the petition. Further, that upon realization, the applicant proceeded to file the instant application in good faith. The applicant also claimed that



the replying affidavit formed the crux of the interpretation of the law by the Court of Appeal and was integral to the disposition of the Court of Appeal.

Issues

Whether the Supreme Court could extend the time for filing a supplementary record of appeal over one year after the filing of the record of appeal.

Held

1. Though the applicant had invoked the court's jurisdiction to extend time under rule 15(2) of the Supreme Court Rules, 2020, the application did not seek any express relief for extension of time. Nevertheless, rule 40 of the Supreme Court Rules, 2020 dealt with the contents of a record of appeal which included the relevant pleadings required to determine the appeal. Under rule 40(4) where a document was omitted from the record of appeal under that rule, the appellant could within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record.
2. It was well over fifteen days and indeed over one year between the filing of the record of appeal and the instant application. The applicant's counsel merely stated in his affidavit that he discovered the absence of the supplementary record of appeal when preparing the submissions for the petition making it difficult to address the question of delay. The applicant had not explained the delay or when he made the discovery.
3. The nature of the proceedings was such that they involved matters of great public interest that deserved conclusive determination. Considering the nature of the document sought to be introduced through the supplementary record of appeal, the replying affidavit by the then managing director of the applicant was a very crucial document as it was the substantive response to the petition as filed at the High Court and it was placed before the Court of Appeal as part of the record that was considered by the appellate court in its decision. The applicant was deserving of the court's exercise of discretion in its favour and no prejudice would be occasioned to the respondents.

Application allowed; costs to abide the eventual decision of the petition.

Orders

- i. *The applicant to file and serve their supplementary record of appeal within 7 days from the date of the ruling.*
- ii. *The Deputy Registrar to issue any and further directions as could be deemed necessary in the circumstances.*

Citations

Cases

East Africa;

1. *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* Petition 14 of 2013; [2014] eKLR — (Followed)
2. *Okoti, Okiya Omtatah v Attorney General & another* Petition 56 of 2017; [2020] eKLR — (Followed)
3. Application No 24 (E008) of 2020; [2020] eKLR - (Explained)

Statutes

East Africa;

1. Constitution of Kenya, 2010 article 159(2) — (Interpreted)
2. Supreme Court Rules, 2020 (No 7 Sub Leg) rules 3(2)(4)(5); 15(2); 40(4) — (Interpreted)

Advocates

None mentioned



RULING

1. Upon perusing the notice of motion application dated 15th September 2021 and filed on 28th September 2021 by Kenya Railways Corporation, the 1st appellant and applicant herein, seeking leave to file its supplementary record of appeal being the replying affidavit sworn by AK Maina dated 20th February 2014 and the annexures thereon; the application being brought under the provisions of article 159(2) of the *Constitution*, rules 3(2),(4) & (5), and 15(2) of the *Supreme Court Rules 2020*;
2. Upon reading the grounds on the face of the application, the supporting affidavit sworn on 15th September 2021 by Prof Albert Mumma SC, counsel for the applicant and the written submissions by the applicant dated 24th September 2021, and in particular the grounds in support of the application that the applicant inadvertently, by omission, failed to include as part of the record the replying affidavit by AK Maina, the then Managing Director of the applicant, the record of appeal having been filed alongside the petition on 22nd July 2020; that the omission was only discovered while the applicant was preparing submissions to the petition and upon realization the applicant proceeded to file this application in good faith; that the said replying affidavit forms the crux of the interpretation of the law by the Court of Appeal and is integral to the disposition of the Court of Appeal; that greater public interest and interest of justice favours the applicant to have a complete record to be placed before this court as stated in *Law Society of Kenya v Centre for Human Rights & Democracy and 12 others* [2014] eKLR and that there is no prejudice suffered by the respondent, the replying affidavit having been part of the record at the Court of Appeal;
3. And considering that none of the parties are opposed to the said application;
4. We find that though the applicant has invoked this court's jurisdiction to extend time under rule 15(2) of the Supreme Court Rules 2020, the application does not seek any express relief for extension of time. Nevertheless, rule 40 of the Supreme Court Rules 2020 deals with the contents of a record of appeal to include the relevant pleadings required to determine the appeal. Under rule 40(4) where a document is omitted from the record of appeal under this rule, the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record. It is well over fifteen days and indeed over one year between the filing of the record of appeal and the present application. The applicant's counsel merely states in his affidavit that he discovered the absence of the supplementary record of appeal when preparing the submissions for the petition making it difficult to address the question of delay.
5. We note that the applicant has not explained the delay or when he made the discovery. The nature of the proceedings are such that they involve matters of great public interest that deserve conclusive determination as we noted in the related proceedings being *Attorney General & another v Okiya Omtatah Okoiti & 4 others* Supreme Court Application No 24 (E008) of 2020 [2020] eKLR. Considering the nature of the document sought to be introduced through the supplementary record of appeal, it is evident that the replying affidavit by the then Managing Director of the applicant is a very crucial document as it was the substantive response to the petition as filed at the High Court and it was placed before the Court of Appeal as part of the record that was considered by the appellate court in its decision.
6. Having considered the foregoing, we find that the applicant is deserving of our exercise of discretion in its favour and no prejudice will be occasioned to the respondents.



7. Consequently, the notice of motion dated 15th September 2021 and filed on 28th September 2021 be and is hereby allowed in the following terms:

- i. The applicant to file and serve their supplementary record of appeal within 7 days from the date of this ruling.
- ii. The Deputy Registrar shall issue any and further directions as may be deemed necessary in the circumstances;
- iii. Costs shall abide the eventual decision of the petition.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY, 2022.

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE

PRESIDENT OF THE SUPREME

COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

