



Sundowner Lodge Limited v Kenya Tourist Development Corporation (Civil Application 2 of 2019) [2019] KESC 71 (KLR) (29 April 2019) (Ruling)

Sundowner Lodge Limited v Kenya Tourist Development Corporation [2019] eKLR

Neutral citation: [2019] KESC 71 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION 2 OF 2019
DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ
APRIL 29, 2019**

BETWEEN

SUNDOWNER LODGE LIMITED APPLICANT

AND

KENYA TOURIST DEVELOPMENT CORPORATION RESPONDENT

(Being an application for extension of time to file and serve a Notice of Appeal out of time against the judgement and orders of the Court of Appeal (Ouko, Kiage, and Murgor JJA) dated and delivered in Nairobi on the 28th September, 2018 in Civil Appeal No. 120 of 2017)

Procedural error by counsel for an applicant due to ignorance of the law is a valid ground for extension of time to file notice of appeal

Reported by Ian Kiptoo

***Civil Practice and Procedure** - notice of appeal-extension of time to file notice of appeal - application for - where counsel for the applicant was unaware of the amendment to the Supreme Court Rules allowing a party to file a notice of appeal even before obtaining certification/leave - claim that counsel's ignorance of the law was not one of the grounds for extending time - whether a procedural error by counsel for an applicant occasioned by ignorance of the amendment of the Supreme Court Rules in 2012 was a valid ground for extension of time to file notice of appeal*

Brief facts

The applicant filed an application for extension of time to file and serve a notice of appeal out of time against the judgment and orders of the Court of Appeal. The application was based on ground that counsel for the applicant was unaware of the amendment to the Supreme Court Rules allowing a party to file a notice of appeal even before obtaining certification/leave. The applicant argued that a procedural error of counsel should not be visited upon a litigant and urged the Court to grant it leave to file a notice of appeal out of time adding that no prejudice would be caused to the respondent.



The respondent argued that the application lacked merit; that it was every counsel's duty to keep abreast with legal developments; and that indolence or ignorance of the law was not one of the grounds for extending time.

Issues

Whether a procedural error by counsel for an applicant due to ignorance of the amendment of the Supreme Court Rules in 2012 was a valid ground for extension of time to file notice of appeal.

Held

1. Ignorance of the amendment of the Supreme Court Rules in 2012 making it unnecessary to obtain certification before lodging the notice of appeal was an innocent mistake which the applicant had not sought to hide. Moreover, a delay of only four months was not inordinate.

Application allowed

Orders

- i. *The applicant would file and serve its notice of appeal within 14 days of the date of the instant ruling. Failure to which the application would stand dismissed with costs.*
- ii. *Costs of the application would abide the result of the intended appeal.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Supreme Court Act

Advocates

None mentioned

RULING

1. The applicant's Notice of Motion dated 24th January 2019 and supported by the affidavit of Samuel Waruguru Kimotho, a director of the applicant, is brought under Section 3 of the [Supreme Court Act](#) and Rules 3(2) & (5), 31 and 53 of the Supreme Court Rules as well as other enabling provisions of the law. It seeks an extension of time to file a Notice of Appeal against the judgement and orders of the Court of Appeal (Ouko, Kiage, and Murgor JJA) delivered at Nairobi on 28th Day of September 2018.
2. The application is based on ground that counsel for the applicant was unaware of the amendment to the Supreme Court Rules allowing a party to file a Notice of Appeal even before obtaining certification/leave. Relying on the authorities of *Belinda Murai & 9 Others vs Amos Wainaina* [1979] eKLR; *Tropical Africa Bank Ltd vs Grace Were Muhwana* Civil Application No. 3 of 2012[2012] UGSC 8, (Ugandan SC); *Horizon Coaches Ltd Vs Edward Rurangaranga & Another* [Civil Application 18 of 2009 [2009] UGSC 7; *Onyebuchi Iroegbu & others vs Richard Okwardu & Others* Nigeria SC 291 of 1989; and *The Attorney General vs Oriental Construction Co. Ltd* [SC Application 7/90, the applicant argues that a procedural error of counsel should not be visited upon a litigant and urges this Court to grant it leave to file a Notice of Appeal out of time adding that no prejudice will be caused to the respondent. The applicant also relies on the case of *Nicholas Kiptoo Arap Korir Sala vs Independent Electoral & Boundaries Commission & 7 Others* [2014] eKLR, Application No. 16 of 2014 and urges us to exercise our unfettered discretion and allow this application.
3. Basing their arguments on the averments in the replying affidavit and written submissions, counsel for the respondent dismissed this application as lacking in merit. Citing the case of *Abok James Odera T/A A.J Odera & Associates vs John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, counsel



argued that a Notice of Appeal is a jurisdictional prerequisite that every litigant should be aware of. They urged that it is every counsel's duty to keep abreast with legal developments. In the circumstances, they argued that indolence or ignorance of the law, to make it worse, counsel's ignorance of the law, is therefore not one of the grounds in the Nick Salat case for extending time. They argued that as was stated in the case of Charo vs Mwashetani & 3 Others [2014] eKLR, timelines are a vital ingredient for effective governance under *the Constitution* and urged us to dismiss this application with costs.

4. Having considered the parties' rival submissions, we find that counsel's ignorance of the amendment of the Supreme Court Rules in 2012 making it unnecessary "to obtain ... certification before lodging the notice of appeal", was an innocent mistake which they have not sought to hide. Moreover, a delay of only four months is not inordinate. In the circumstances, we allow this application. The applicant shall file and serve its notice of appeal within fourteen (14) days of the date hereof failing which this application shall stand dismissed with costs. The costs of this application shall abide the result of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF APRIL, 2019

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D.K. MARAGA

CHIEF JUSTICE & PRESIDENT OF SUPREME COURT OF KENYA

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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

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court of Kenya

