



**Base Titanium Limited v County Government of Mombasa & another  
(Petition 22 of 2018) [2019] KESC 9 (KLR) (17 December 2019) (Ruling)**

*Base Titanium Limited v County Government of Mombasa & another [2019] eKLR*

Neutral citation: [2019] KESC 9 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**PETITION 22 OF 2018**

**MK IBRAHIM, JB OJWANG, SC WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

**DECEMBER 17, 2019**

**BETWEEN**

**BASE TITANIUM LIMITED ..... APPLICANT**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**Supreme Court allows an application seeking extension of time to file an appeal where the delay was occasioned by change of respondent’s advocates**

*In this case the Supreme Court allowed an application seeking extension of time to file an appeal where the delay was occasioned by change of respondent’s advocates.*

Reported by Moses Rotich

*Civil Practice and Procedure – appeals – appeals to the Supreme Court – timelines for filing appeals - extension of time – extension of time to file a supplementary record of appeal – whether an applicant’s claim that it was unable to extract the formal order of the Court of Appeal and file it within the stipulated period of 15 days of filing a notice of appeal at the Supreme Court, was a valid reason to allow extension of time– Supreme Court Act, 2011, section 21(2); Supreme Court Rules, 2012, rules 21(1) and 53.*

**Brief facts**

The application sought enlargement of time to file a supplementary record of appeal. The applicant had filed a record of appeal on time but without including the formal order being appealed against. The applicant contended that the delay in extracting and filing the order was occasioned by the 1<sup>st</sup> respondent’s change of advocates immediately after receipt of the notice of appeal. Unaware of the change of advocates, the applicant stated that it sent a draft to the 1<sup>st</sup> respondent’s previous advocates (on record) for their approval as was required by law in extracting a court order but received no response. The 1<sup>st</sup> respondent’s new advocates filed a notice of change advocates two days before the expiry of the specified 15 days within which a party could file a



supplementary record of appeal without leave of court. The applicant asserted that it was practically impossible to agree on the wording of the order, extract and file the same within 2 days.

#### **Issues**

- i. Whether an applicant's claim that it was unable to extract the formal order of the Court of Appeal and file it within the stipulated period of 15 days of filing a notice of appeal at the Supreme Court was a valid reason to allow extension of time.

#### **Held**

1. The applicant made a compelling case for the court to exercise discretion in its favour in accordance with the provisions of section 21(2) of the Supreme Court Act, 2011 and rules 21, 23 and 53 of the Supreme Court Rules, 2012. The forty-eight day delay had been satisfactorily explained by the applicant. The inability by the applicant to obtain the approval of its draft order timeously compounded by the change of advocates by the 1<sup>st</sup> respondent adequately explained the delay in filing the supplementary record of appeal.

*Application allowed.*

#### **Orders**

- i. *The applicant was ordered to file its supplementary record of appeal within 14 days from the date of judgment.*
- ii. *Costs would be in the cause.*

#### **Citations**

#### **Statutes**

None referred to

#### **Advocates**

None mentioned

## **RULING**

1. Upon perusing the Notice of Motion application dated 28<sup>th</sup> September 2018, and filed on even date for enlargement of time to file a Supplementary Record of Appeal out of time in an appeal against the Judgment and Orders of the Court of Appeal delivered on 15<sup>th</sup> July, 2018 in Civil Appeal No. 69 of 2017, brought under the Provisions of Rules 21(1) and 53 of the Supreme Court Rules, 2012; and
2. Upon reading the Applicant's supporting affidavit sworn by Desterio OyatsI on 28<sup>th</sup> September, 2018; and
3. Upon considering the written submissions filed by the Applicant on 17<sup>th</sup> October, 2018 wherein it is contended that the Applicant was unable to extract the formal Order appealed against from the Court of Appeal within the stipulated period of fifteen 15 days from the date of filing a Notice of Appeal, hence omitting the said Court Order from the Record of Appeal before this Court; that the delay in extracting the Order was occasioned by the 1<sup>st</sup> Respondent's change of advocates immediately after receipt of the Notice of Appeal that unaware of the change of advocates, the Applicant, as is required by law in extracting a Court Order, sent a Draft to the 1<sup>st</sup> Respondent's previous advocates on record for their approval; that the previous advocates failed to respond to the Applicant's request for approval; that the 1<sup>st</sup> Respondent's new advocates only filed a Notice of Change of advocates on 27<sup>th</sup> August 2018; that as at the said dated, the Appeal however had been filed on 15<sup>th</sup> August 2018, and only 2 days were remaining to the expiry of the specified 15 days within which a party can file a Supplementary Record of Appeal without leave of court; that it was practically impossible to agree on the wording of



the Order and extract the same within 2 days; that upon receipt of the Notice of Change of Advocates, the Court of Appeal Order was promptly extracted, and the parties requested for a mention date to record a consent order, allowing for the filing of a Supplementary Record containing the said Order, but were advised to file a formal application for enlargement of time to file the same, hence the present application; and

4. Upon noting that the 2<sup>nd</sup> respondent, has neither filed any response to the instant application, nor appeared before this Court on 12<sup>th</sup> October 2018, 23<sup>rd</sup> October 2018, and 18<sup>th</sup> July 2019, despite service of Mention Notices;
5. We Have Considered the question at the core of the application viz: whether on the basis of the supporting written submissions of the 1<sup>st</sup> Respondent, the Applicant herein, has made a compelling case for this Court to exercise discretion in its favour and thereby grant the orders sought. By a unanimous decision of this Bench, pursuant to the provisions of Sections 21(2) of the Supreme Court Act, 2011 and Rules 21, 23 and 53 of the Supreme Court Rules, 2012, we find as follows:

The forty-eight day delay, has been explained to our satisfaction by the Applicant. We are persuaded that, the inability by the Applicant, to obtain the approval of its Draft Order timeously, compounded by the change of advocates by the 1<sup>st</sup> Respondent, adequately explain the delay in filing the Supplementary Record of Appeal.

6. We hereby Order that:

ORDERS	REASONS
1.	<p><i>The Application dated 28<sup>th</sup> September, 2018 is hereby allowed.</i></p> <p>The application satisfies the principles on extension of time, established by this Court in <i>Nicholas Kiptoo Korir Salat v. Independent Electoral and Boundaries Commission &amp; 7 Others</i> Application No. 16 of 2014; and <i>Hassan Nyanje Charo v. Khatib Mwashetani &amp; 3 Others</i> SC Application No. 15 of 2014.</p>
2.	The applicant shall file its Supplementary Record of Appeal within 14 days from the date hereof.
3.	Costs shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2019.**

.....  
**M. K. IBRAHIM J. B. OJWANG**



**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

.....

**S. C. WANJALA NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**

**SUPREME COURT OF KENYA**

