

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA

(Coram: Njoki & Lenaola, SCJJ)

APPLICATION NO. 19 OF 2016

MUTANGA TEA & COFFEE LIMITED.....APPLICANT

—VERSUS—

SHIKARA LIMITED.....1ST RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA.....2ND RESPONDENT
(Now County Government of Mombasa)

(Being an application for extension of time to file an application for review of the Court of Appeal decision denying leave to appeal to the Supreme Court in Civil Appeal No. 54 of 2014 (Makhandia, Ouko, M’Inoti, JJ.A), delivered on 17th June, 2016)

RULING

1. **UPON** perusing the Notice of Motion application dated 5th July, 2016 and filed on 18th July, 2016, for extension of time to file an application for review of the Court of Appeal decision and to deem the review application filed by way of Originating Motion dated 30th June, 2016 as duly filed; and
2. **UPON** reading the applicant’s affidavit sworn by MOSES MWAKISHA on 5th July, 2016, the 1st Respondent’s replying affidavit sworn by ALICE GITHERE on 16th January, 2017 and the 2nd respondent’s replying affidavit sworn by FRANCIS M.O. KADIMA on 11th November, 2016, and;

3. **UPON** considering the written submissions on record for applicant and the respondents, wherein the applicant contends that the 17 days' delay was inadvertent and was occasioned by the fact that the deponent to the affidavit in support of the application, a pilot by profession, was out of reach and could therefore not sign the affidavit within time and further, that the process of scanning the documents for purposes of electronic filing in compliance with the Supreme Court Rules consumed part of the remaining time; and

The 1st respondent in opposing the application questions the veracity of the applicant's assertions and states that it has not been proved that the deponent to the applicant's affidavit was out of the country or that he could not be reached to sign the affidavit; and urges therefore that the delay is inexcusable. On its part, the 2nd respondent contends that the applicant has not laid a satisfactory basis to warrant extension of time.

4. **AND** having considered the application, by a unanimous decision of this Bench, we make the following Orders under Section 23(2) (b) of the Supreme Court Act, and Rule 21 and 23 of the Supreme Court Rules, 2012(as amended).

ORDERS	REASONS
a. The Notice of Motion Application dated 5 th July, 2016 is hereby allowed in terms of prayer for extension of time only.	<p>The explanation given by the applicant is satisfactory and reasonable, we do not regard the 3 weeks delay as inordinate.</p> <p>Furthermore, there is no apparent prejudice confronting the respondents if the prayer is granted as prayed.</p> <p>The prayer seeking leave to file a supplementary affidavit and to deem the Originating Motion dated 30th June,</p>

	2016 as duly filed cannot be granted because the applicant must first be granted leave before filing the Review application. In any event, the subsequent Order (c) herein, disposes off this issue.
<p>b. The Originating Motion dated 30th June, 2016 is hereby struck out and expunged from the Court's records.</p> <p>c. The applicant is granted leave to file and serve the application for Review within fourteen (14) days from the date hereof.</p> <p>d. There shall be no order as to costs.</p>	<p>After the lapse of 14 days, no application for Review can be filed, without leave of the Court.</p> <p>This finding was affirmed in the case of <i>Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others</i>, Appl. No. 16 of 2014, which held that, “...where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires....Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court.”</p>

DATED and DELIVERED at NAIROBI this 24th day of March, 2017.

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S.N. NJOKI
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