



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**(CORAM: CHERERE-J)**

**CIVIL MISC. APPL. NO. E077 OF 2021**

**BETWEEN**

**AMBROSE GICHUNGE.....APPLICANT**

**AND**

**NEW LIFE CHURCH OF KENYA.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF SOCIETIES.....2<sup>ND</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Background**

- 1) By a ruling dated 05<sup>th</sup> March, 2020, the court in **MAUA CMCC CASE NO. 127 OF 2018** allowed a Preliminary Objection by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and directed that their names be struck out of the counterclaim.
- 2) The decision was based on the grounds that the court did not have judicial review jurisdiction and could not issue prerogative orders.
- 3) By a notice of motion dated 28<sup>th</sup> September, 2021 filed on 13<sup>th</sup> October, 2021, Applicant seeks orders for:
  - 1) **Stay of proceedings in MAUA CMCC CASE NO. 127 OF 2018 pending the hearing and determination of the intended appeal**
  - 2) **Leave to appeal the ruling delivered on 05<sup>th</sup> March, 2020 in MAUA CMCC CASE NO. 127 OF 2018 out of time**
  - 3) **Costs be provided for**
- 4) The notice of motion is premised on grounds among others that the Applicant is aggrieved by the ruling of the trial court and intends to appeal and further that the delay in filing the appeal was occasioned by Applicant's ill health.
- 5) The application is supported by Applicant's affidavit sworn on 28<sup>th</sup> September, 2021 in which he summarizes his case and the grounds of the intended appeal. Annexed to the affidavit are various documents in support of his claim, a draft memorandum of appeal and a bundle of medical records.
- 6) 1<sup>st</sup> Respondent opposed the application by way of an affidavit sworn by ISAAC TAITUMU who describes himself as the 1<sup>st</sup> Respondent's chairman. He defends the impugned ruling and faults the Applicant for inordinate delay in filing this application.

**Analysis and Determination**

- 7) I have considered the application in light of affidavits on record and the submission filed on behalf of the Applicant and the 1<sup>st</sup>

Respondent and I have deduced the issues for determination as stated hereunder:

1) **Whether there ought to be Stay of proceedings in MAUA CMCC CASE. 127 OF 2018**

2) **Whether the Applicant ought to be granted leave to appeal out of time.**

8) The powers of the court in deciding an application for extension of time to file an appeal are discretionary and unfettered. The law on extension of time is to be found in Section 95 of the Act which states as follows:

**“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”**

9) The procedural law relating to extension of time is to be found under Order 50 of the Civil Procedure Rules which states that:

**“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”.**

10) In Nicholas Kiptoo Arap Korir Salat vs IEBC and 7 Others (2014) eKLR which has been cited by both parties, the Supreme Court laid down the principles for extension of time for filing an appeal stating that:

**(1) Extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court.**

**(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**

**(3) Whether the court should exercise the discretion to extend, is a consideration to be made on a case to case basis.**

**(4) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**

**(5) Whether there will be any prejudice suffered by the respondent if the extension is granted.**

**(6) Whether the application has been brought without undue delay and**

**(7) Whether in certain cases, like election petition, public interest should be a consideration for extending time.**

11) This application was filed one year and seven months from the date of the impugned ruling. Whereas there is evidence that the Applicant has been undergoing treatment for some time, the Applicant has not discharged the evidential burden to demonstrate that during the 1 year and 7 months' period, he was so incapacitated by illness as to be unable to file the intended appeal.

12) From the foregoing, I find that the unexplained delay disentitles the Applicant to this Court's discretionary remedy for the reason that Equity does not aid the indolent.

13) Having dismissed the application for leave to appeal out of time, the application for stay of proceedings lacks legs on which to stand and the same must hence fail.

14) In the end, the notice of motion dated 28<sup>th</sup> September, 2021 and filed on 13<sup>th</sup> October, 2021 is disallowed with costs to the Respondent.

**DATED IN MERU THIS 24<sup>th</sup> DAY OF February 2022**

**T.W. CHERERE**

**JUDGE**

**Appearances**

**Court - Morris Kinoti**

**For Applicant - N/A for Ngunjiri Michael & Co. Advocates**

**For Respondent - Mr. Kinyanjui for Mbaabu M'Inoti Advocates LLP**