



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC APPL. NO. 777 OF 2019**

**RIRUTA BAPTIST SCHOOL.....1<sup>ST</sup> APPLICANT**

**MOSES ODUOR JUMA.....2<sup>ND</sup> APPLICANT**

**VERSUS.**

**JAMES KARANI KIAI.....RESPONDENT**

**RULING**

1. The application dated 6<sup>th</sup> December, 2019 principally seeks the following orders:

**“1. Spent**

**2. Spent**

**3. Spent**

**4. That the court be pleased to order stay of execution of the judgment in Milimani CMCC number 7833 of 2016 delivered on 7<sup>th</sup> October 2019 pending the hearing and determination of the Appellant’s intended Appeal.**

**5. That this honourable court be pleased to grant the intended Appellant leave to file a Memorandum of Appeal as per the attached draft against the decision and judgment of honourable G.A. Mmasi dated the 7<sup>th</sup> October 2019 and Record of Appeal out of time and/or that time for filing and serving the same be extended.**

**6. That the Insurer of the Appellant/Applicant be allowed to deposit in an interest earning bank account in the joint names of the advocates for the parties the full judgment sum as security for due performance of the judgment/decree herein pending the hearing and determination of the appeal.**

**7. That such other additional, suitable and or alternative orders be made as are just and expedient all circumstances of the case and this application considered**

**8. That the costs of this application be provided for”**

2. The application is premised on the grounds stated therein and the two affidavits filed in support thereof. The Applicant is dissatisfied with the judgment of the Lower Court and wishes to Appeal. The delay in filing the Appeal is blamed on mis-diarization of the judgment date by the Applicant’s counsel. It is stated that efforts made to peruse the court file were not successful and it was not until 12<sup>th</sup> November, 2019 that a letter was received from the Respondent’s counsel informing the Applicant’s counsel that judgment was delivered on 7<sup>th</sup> October, 2019. It is stated that the award of damages is excessive and that the intended Appeal is arguable and stands to be rendered nugatory if the application herein is not allowed. The Applicant is willing to deposit the entire decretal sum in court.

3. In a replying affidavit filed in opposition to the application, it is stated that there is no good reason given for the delay. That the parties herein recorded a consent on liability at a ratio of 80:20. That the Appeal being on quantum only, at least half the decretal sum ought to be released to the Respondent if the application is allowed. It is further stated that the application is an abuse of court process and is meant to deny the Respondent the enjoyment of the fruits of the judgment. The Respondent has further averred that she is a woman of means who is engaged in business and is able to refund money paid to her in the unlikely event that the Appeal is successful.

4. Under Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 the conditions for stay of execution are as follows:

**“No order for stay of execution shall be made under sub-rule (1) unless –**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding**

5. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

**“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:**

**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 time, 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 respondents if the extension is granted;**

**6. Whether the application has been brought without undue delay; and**

**7. Whether in certain cases, like election petitions, public interest should be consideration for extending time.”**

6. The application was canvassed by way of written submissions. I have considered the application, the grounds of opposition and the submissions of counsel for the respective parties.

7. The judgment of the Lower Court was delivered on 7<sup>th</sup> October, 2019. The application at had was filed on 9<sup>th</sup> December, 2019. That is a delay of about one month and had been explained.

8. It is not denied that the parties herein entered into a consent on liability. The exhibited Draft Notice of Appeal reflects that the intended Appeal is on quantum. There is therefore no possibility that the Respondent will lose the entire decretal sum.

9. To balance the competing interests of the parties herein, I allow the application on condition that the Applicant do release 50% of the decretal sum to the Respondent and the balance be deposit in a joint interest earning bank account of the respective counsel for the parties or in court within 30 days from the date hereof. The intended Appeal to be filed within 14 days from the date hereof. Costs in cause

**Dated, signed and delivered at Nairobi this 21<sup>st</sup> day of Jan., 2021**

**B.THURANIRA JADEN**

**JUDGE**