



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL. NO. E560 OF 2020**

**UNITED WAY KENYA LIMITED ..... APPLICANT**

**VERSUS**

**CANNON ASSURANCE COMPANY LIMITED..... RESPONDENT**

**RULING**

1. The application dated 18<sup>th</sup> December, 2020 seeks orders that:

**“1. That the proposed Appellant be granted leave to appeal out of time against the whole judgment of the honourable E. Wanjala, Senior Principal Magistrate at the Chief Magistrates’ court at Nairobi delivered on 30<sup>th</sup> April, 2020 in Civil Case No. 267 of 2017.**

**2. That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.**

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

2. The application is based on the grounds set out in the application and the supporting affidavit sworn by the Applicant. It is stated that the Applicant was not aware of the delivery of the judgment. It is further deponed that when the Applicant was informed of the ruling, it gave it’s advocates instructions to appeal. That the delay is not inordinate and that the proposed Appeal has reasonable chances of success.

3. The application is opposed. It is stated in the replying affidavit that the delay in filing the application herein is unreasonable and not satisfactorily explained. That the intended Appeal is not arguable and ought not to be allowed to clog the court system. It is further averred that the Applicant’s advocates are not properly on record.

4. The Applicant filed a further affidavit and blamed the delay on the uncertainties visited on the delivery of services owing to the COVID 19 Pandemic. It is contended that the matter herein is fresh and requires no leave of the court for the Applicant’s advocates to come on record.

5. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties.

6. 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.”

7. It is not in dispute that the judgment of the Lower Court was delivered on 30<sup>th</sup> April, 2020. The instant application was filed about six months later. The delay is inordinate. However, this court takes judicial notice of the challenges caused by the outbreak of the COVID 19 Pandemic to the administration of justice. The explanation for the delay is accepted.

8. On the change of advocates, Order 9 rule 5 Civil Procedure Rules provides that:

**“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”**

9. Order 9 rule 9 Civil Procedure Rules which provides as follows:

**“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

10. This court’s view of the foregoing provisions is that the advocate on record at the time of the entry of judgment still remains the advocate on record in that file. If a new advocate is coming on board in that matter, then the filing of a consent between the previous advocate and the new advocate or the leave of the court is required

11. In the case at hand, what has been filed is a Miscellaneous Application which seeks the extension of time within which to file an Appeal. In that respect, I am persuaded by the decision in **Nginyanga Kavole v Mailu Gideon [2019] eKLR** where it was held

**“What is before me is a post judgment matter commenced by way of miscellaneous application. Under section 2 of the Civil Procedure Act “suit” means all civil proceedings commenced in any manner prescribed and “prescribed” means prescribed by rules while “rules” means rules and forms made by the Rules Committee to regulate the procedure of courts. While I appreciate that miscellaneous applications are not expressly provided for in the Rules, that procedure has acquired a force of law in the country by way of practice. It is therefore an accepted mode of commencing civil proceedings. By virtue of that practice it is now deemed as a prescribed manner of commencing civil proceedings by the Rules Committee. Therefore, the matter before me is a suit. That being the position, an advocate does not require leave of the court to commence a suit. Leave is only required for continuation of a suit where judgment has been entered. I therefore find that the application before me is not incompetent.”**

(see also the **Court of Appeal decision in Mary Nchekei Paul v Francis Mundia Ruga [2019] eKLR**)

12. With the foregoing, the application is allowed the application with costs to the Respondent. This being a Miscellaneous File, the Appeal to be filed and served within 14 days from the date hereof.

Date, signed and delivered at Nairobi this 27<sup>th</sup> day of May, 2021

**B. THURANIRA JADEN**

**JUDGE**