



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE APPEAL NO. E337 OF 2021

CREATIVE INNOVATIONS LIMITED.....APPLICANT

VERSUS

DALVERS NAMWAYA OKUKU.....1ST RESPONDENT

MAINA KINUTHIA.....2ND RESPONDENT

RULING

1. The Application dated 16th June, 2021 seeks orders that **the time for filing an appeal against the judgment and decree of the Hon. E. Wanjala, Senior Resident Magistrate be extended and the Memorandum of Appeal dated 15th June, 2021 filed herewith be deemed as duly filed.**
2. Secondly, **there be a stay of execution of the judgment and decree of this honourable court delivered on 13th May, 2021 pending the hearing and determination of the appeal filed herein.**
3. The Applicant is aggrieved by the judgment of the lower court and wishes to file an Appeal. The delay in filing the Appeal is blamed on the mistake of the counsel who erroneously reflected the wrong bring up date on the file. It is stated that the Appeal has high chances of success and that execution will render the same nugatory. The Applicant is willing to furnish security for the decretal sum.
4. The application is opposed by the 1st Respondent. It is deponed in the replying affidavit that the application is an afterthought, has no chances of success and is only meant to deny the 1st Respondent of the fruits of the judgment. That the Applicant has not demonstrated what substantial loss will be suffered if the decretal sum is paid and no security has been offered for the due performance of the decree. That if the court is inclined to allow the application, ½ of the decretal sum be released to the 1st Respondent and the balance be deposited in a joint interest earning bank account of the advocates on record for the parties and the Appeal be prosecuted within six months from the date hereof.
5. The 2nd Respondent did not participate in the application.
6. The application was canvassed by way of written submissions which I have considered.
7. 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.”

8. Order 42 rule 6(2) Civil Procedure Rules 2010 provides for stay of execution 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 on him has been given by the applicant.”

9. In the case at hand, the judgment of the lower court was delivered on 13th May, 2021. The instant application was filed on 17th June, 2021. The delay was just for a few days and has been explained to the satisfaction of the court.

10. The Appeal is on the entire judgment of the lower court. It would therefore not to appropriate to release any part of the decretal sum at this stage.

11. To balance the competing interests of the parties, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the Advocates on record for the parties or in court within 30 days from the date hereof. The requisite court fees for the filing of the Appeal to be paid within 14 days from the date hereof. The Record of Appeal to be filed and served within 60 days from the date hereof.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER, 2021.

B. THURANIRA JADEN

JUDGE