



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT**

**CIVIL MISC. APPL. NO. 569 OF 2019**

**CHEROP KIBIWOT RONALD .....1<sup>ST</sup> APPLICANT**

**WILLY KIBET.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DANIEL MUNYAKA NDAYA .....RESPONDENT**

**RULING**

1. The application dated 15<sup>th</sup> August, 2019 principally seeks orders that:

**(a) That the honourable court be pleased to Exercise its Discretionary Powers and enlarge time within which to file an appeal.**

**(b) That the Applicants be granted leave to file appeal out of time.**

2. The Applicants' averment is that the trial court has already delivered its judgment. That there are no stay of execution orders in force and that the Applicants are exposed to execution. The delay in filing the Appeal is blamed on the Applicants' insurance which delayed in giving instructions to the advocate. It is stated that the intended Appeal has high chances of success but stands to be rendered nugatory. The Applicants are willing to furnish security for the due performance of the decree.

3. It is stated in the replying affidavit in opposition to the application that the application is an abuse of the court process and is aimed at delaying the Respondent from enjoying the fruits of the judgment. It is contended that the delay is inordinate and unexplained. That the accident the subject matter of the suit rendered the Respondent incapable of carrying out his work and now relies on handouts from friends and relatives. The Respondent urged the court to order payment of 50% of the decretal sum and the balance be deposited in a joint account.

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

5. Extension of time Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

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. The judgment of the lower court was delivered on 12<sup>th</sup> July, 2019. The instant application was filed on 26<sup>th</sup> August, 2019. The delay is not inordinate and has been explained.

8. On substantial loss, the Applicant is apprehensive that the Appeal may be rendered nugatory if execution is carried out. Although the Applicants have not commented on the Respondent’s ability to refund the decretal sum in the event that the Appeal is successful, the Respondent has explained to the court that he has no resources and is dependent on well wishers.

9. The Applicants are willing to furnish security. The Appeal is on the whole judgment. Consequently, this court has to balance the interest of both parties.

10. With the foregoing, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels for both parties or in court within 30 days from the date hereof.

**Date, signed and delivered at Nairobi this 23<sup>rd</sup> day of July, 2020**

**B. THURANIRA JADEN**

**JUDGE**