



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 634 OF 2019

ANTHONY NDUNGU NDICHU.....APPLICANT

VERSUS

EVERLYNE MORAA MACHOGU.....RESPONDENT

RULING

1. The application dated 27th September, 2019 seeks orders **that the proposed Appellant be granted leave to appeal out of time against the judgment on quantum of the Hon. Kivuti (Mr.) Senior Resident Magistrate, delivered on 19th July 2019 in Milimani CMCC No. 5904 of 2013 Everlyne Moraa Machogu v Anthony Ndungu Ndichu.**
2. Secondly, **that the Memorandum of Appeal annexed hereto be deemed as duly filed and served.**
3. It is stated in the grounds and the affidavit in support of the application that the judgment of the trial magistrate was delivered on 19th February, 2019. The Applicant is dissatisfied with the said judgment and wishes to Appeal. It is contended that the delay in filing the Appeal is due to the delivery of the judgment without Notice. It is averred that the proposed Appeal has high chances of success and that the Applicant is willing to abide with any reasonable conditions set by the court.
4. The application is opposed. It is stated in the replying affidavit that the application is aimed at delaying the Respondent from enjoying the fruits of her judgment. That the delay is inordinate and unexplained and that the Applicant has not placed any material before the court to demonstrate that the Respondent is not capable of refunding the decretal sum. The Respondent urged the court to balance the interests of the parties and order release of half the decretal sum to the Respondent and the balance be deposited in a joint interest earning account if the application is allowed.
5. I have considered the application, the response to the same and the submissions filed by counsel for the Applicant. The Respondent's side did not file any submissions as per the directions of the court.
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 application at hand was filed on 1st October, 2019. The impugned judgment was delivered on 19th June, 2019. That’s inordinate delay. The Applicant’s position is that they did not have any Notice of the delivery of the judgment. On the other hand, the Respondent has not commented on whether their side received any judgment Notice nor has any been exhibited before the court. This court therefore accepts the explanation given for the delay.

8. There are not allegations made by the Applicant regarding the Respondent’s capability to refund the decretal sum. If there were any such allegations, the onus would have been on the Respondent to place material before the court to demonstrate such capability. Be as it may, the court has to strike a balance between the competing interests of both parties. The Applicant has his right of Appeal while the Respondent is entitled to the fruits of her judgment.

9. The court observes that the draft Memorandum of Appeal raises the issue of liability. Given the Appeal can go either way, it would therefore not be prudent to release any part of the decretal sum at this stage.

10. With the foregoing, the application is allowed on condition that the decretal sum is deposited 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 Appeal to be deemed as duly filed upon payment of the requisite court fees within 14 days from the date hereof. Costs to the Respondent.

Date, signed and delivered at Nairobi this 29th day of Sept., 2020

B. THURANIRA JADEN

JUDGE