



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL. NO. 805 OF 2019**

**JANE NDINDA.....APPLICANT**

**VERSUS**

**CHRISTOPHER KAYLO**

**T/A CHRIS KYALO AGENCIES.....RESPONDENT**

**RULING**

1. The application dated 17<sup>th</sup> December, 2019 seeks orders that:

**1. Spent.**

**2. Spent.**

**3. That the Applicant be granted leave to appeal out of time against the whole judgment of the Hon. Mrs. Gitonga, Resident Magistrate delivered on 18<sup>th</sup> January, 2019 at Nairobi.**

**4. That the honourable court be pleased to stay the execution of the judgment and decree given on 18<sup>th</sup> January, 2019 pending the hearing and determination of the Appeal.**

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

**6. That the costs of the application be provided for.**

2. The application is premised on the grounds stated therein and the affidavit in support and further affidavit sworn by the Applicant. It is stated that the judgment of the trial court was delivered on 18<sup>th</sup> January, 2019. That the Applicant is dissatisfied with the said judgment and wishes to Appeal. The delay in filing the Appeal is blamed on the delivery of the judgment in the absence of the parties. It is further stated that there was delay in obtaining the typed copies of the judgment and that the advocate also took time to obtain instructions from the Applicant. It is further averred that the Respondent has commenced the execution process.

3. The application is opposed. It is stated in the replying affidavit that the Applicant made a similar application before the lower court which was dismissed on 13<sup>th</sup> September, 2019. That the Respondent vide letter dated 22<sup>nd</sup> February, 2019 informed the Applicant of the delivery of the judgment. That the delay in filing the instant application is inordinate, inexcusable and meant to delay the enjoyment of the fruits of the judgment.

4. It is further stated that the intended Appeal has no chances of success and that the Applicant has not demonstrated what substantial loss she stands to suffer. That the Respondent is a man of means who is currently a Church Minister who runs several businesses and has inherited expansive land from his late father. It is further contended that no security has been offered for the due performance of the decree.

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

6. 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 on him has been given by the applicant.”**

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. The application herein was filed on 17<sup>th</sup> December, 2019. The lower court dismissed the application for stay on 13<sup>th</sup> September, 2019. There’s no evidence of the Notice issued to the parties before the delivery of the judgment. The delay has been sufficiently explained.

9. The Applicant is desirous of lodging an Appeal. The execution process has commenced. To balance the competing interests of the parties herein, I allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsel for the parties or in court within 30 days from the date hereof. The Appeal to be deemed as filed upon payment of the requisite court fees within 14 days from the date hereof. Costs in cause

**Dated, signed and delivered in Nairobi this 29<sup>th</sup> day of Sept., 2020**

**B. THURANIRA JADEN**

**JUDGE**