



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL MISC APPL. NO. 272 OF 2019

EPCO BUILDERS LIMITED.....APPLICANT

VERSUS

MICHAEL ONDABU OMARE.....RESPONDENT

RULING

1. The Application dated 22nd March, 2019 principally seeks orders that this honourable court be pleased to grant the Proposed Appellant leave to lodge an Appeal out of time against the decision Hon. D. W. Mburu in Civil Case No.5536 of 2015, delivered on 17th August, 2018.
2. Secondly, that upon grant of leave to appeal out of time, the Memorandum and Notice of Appeal lodged herein be deemed as duly filed.
3. The application is predicated on the grounds stated therein and the supporting affidavit sworn by counsel for the Applicant. The delay in filing the Appeal is blamed on delivery of the judgment in the absence of the Applicant and without notice. That execution is imminent and the Applicant is likely to suffer substantial loss as it may be impossible to recover the decretal sum. The Applicant is ready to furnish security of Ksh.200,000/= for the due performance of the decree.
4. In a replying affidavit filed in opposition to the application, it is stated that all the parties were served with a notice for the delivery of the judgment and that the application herein is an afterthought. That the appeal raises no triable issues and that the Applicant is undeserving of the exercise of this court's discretion in its favour.
5. 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. In the case at hand, there is no document exhibited before this court to demonstrate whether the Applicant was served with the notice of judgment. This court therefore accepts the explanation given by the Applicant.

8. With the foregoing, I allow the application on condition that the Applicant do deposit the decretal sum in court or in a joint interest earning bank account of the counsels for the parties within 30 days from the date hereof. The requisite court fees for the filing of the Memorandum of appeal to be paid within 14 days from the date hereof. Cost to the Respondent.

Dated, signed and delivered at Nairobi this 24th day of Oct., 2019.

B THURANIRA JADEN

JUDGE