



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPEAL NO 46 OF 2018

HEZBON OPANDE

(Suing as administrator of the estate

of the late Florence Pande Nyaidho).....APPELLANT

VERSUS

JAMES A. OBURA.....RESPONDENT

RULING

1. By a notice of motion dated 13.6.18 brought under Sections 3A, 79G and 95 of the Civil Procedure Act Cap 21 Laws of Kenya; Article 159 of the Constitution and all enabling provisions of the law, the applicant/appellant prays for orders that

a.Spent

b. The Honourable Court be pleased to extend time limited for lodging an appeal

c. THAT the costs of this application be in the cause

2. The application is based on the grounds that among others that the time for filing the appeal has elapsed; that the delay in lodging the appeal was purely inadvertent and that the appeal has merit and high chances of success.

3. The application is supported by the affidavit sworn by the applicant on 30th May, 2018 in which he reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a copy of the Ruling dated 29.3.17 by which his application to file suit out of time was dismissed and a copy of Memorandum of Appeal challenging the said ruling marked **APN 1** and **APN 2** respectively.

4. The impugned ruling was delivered on 29.3.18. This application was filed on 21.6.18 which is about 3 months from the date of the impugned ruling.

5. 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. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court. In the case of **CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008)**, the court held: -

“the overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has been explained to the satisfaction of the Court. In the instant application, the applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the Court. Consequently, I am unable to exercise my discretion in favour of the applicant as his application lacks merit.”

6. The applicant has not explained the 3 months delay in filing the appeal on time, to the satisfaction of the court. The foregoing notwithstanding, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya gives this court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I find that it would be in the interest of justice for the applicant to ventilate his intended appeal.

7. In the end, the notice of motion dated 13.6.18 is allowed on the following terms:

a. The Honourable Court hereby extends time to file the Appeal for 14 days from today's date

b. The costs of this application shall abide the outcome of the appeal

DATED, DELIVERED AND SIGNED THIS 31st DAY OF July 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Applicant - Ms. Adwar

For the respondent - N/A