



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS APPLICATION NO. 406 OF 2017

**MARY MWITHI MULI and JAMES KANIA MALANDI (Suing as administrators
of the Estate of JOHN MULI MALANDI (Deceased).....APPLICANT**

VERSUS

1. ASTRAL INDUSTRIES LTD

2. GEORGE KIANDA.....RESPONDENTS

RULING

1. The Applicant filed a notice of motion dated 15th December, 2017 seeking leave to file an appeal out of time; that the judgment delivered in Machakos CMCC No. 460 of 2016 delivered on 5th October, 2017 be set aside and that the memorandum of appeal annexed to the motion be deemed as duly filed and served upon payment of the requisite fee. The grounds upon which the motion is brought are that the trial court failed to consider the evidence on record on the issue of liability and wish to appeal against the same. That the delay in filing the appeal is inadvertent on his part and arose due to his inadvertent omission to instruct their advocates to file an appeal.

2. The substantive law on time for filing appeals is Section 79G of the Civil Procedure Act (CAP 21) Laws of Kenya which provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty 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.”

3. The Court of Appeal settled the guiding principles in the exercise of discretion to extend time in the case of **Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others**, [2014] eKLR as follows:

“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 a consideration for extending time.”

4. It follows therefore that the period of delay ought to be explained. The applicants herein admitted that they inadvertently omitted to

instruct their advocate to file an appeal in good time. This admission in my view is good faith on the part of the applicants. The question that follows is whether or not such delay is inordinate and inadvertent. The judgment sought to be appealed against was delivered on 5th October, 2017 and this application filed on 15th December, 2017. There is no indication that any execution process has commenced and in the circumstances the respondent shall not suffer any prejudice that cannot be compensated in costs. Further it is noted that the Respondent did not file a reply to the application which is unopposed. The Applicants right to appeal should not be impeded. So that the appeal is not rendered an academic exercise there is need to have the judgment stayed pending the outcome of the appeal. Consequently, I make orders as follows:

- a) The applicant is granted leave to file the intended appeal within the next seven (7) days from this date.
- b) The memorandum of appeal annexed to the motion be deemed as duly filed and served upon payment of the requisite court fee.
- c) There be stay of execution of the decree of the judgment delivered in Machakos CMCC No. 460 of 2016 and delivered on 5th October, 2017 pending the hearing and determination of the intended appeal.
- d) The costs hereof shall be in the cause.

Dated and delivered in Machakos this 28th day of September 2018

D. K. KEMEI

JUDGE

In the presence of:

Miss Ngatia - for Applicant

N/A Kamande for Respondents

Josephine - Court Assistant