



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 258 OF 2018

K REP BANK LTD.....APPLICANT

VERSUS

MAXWELL IMBUGWA MOGA.....RESPONDENT

RULING

1. The application dated 23rd April, 2018 seeks orders that this honourable court be and is hereby pleased to grant the Applicant Leave to lodge an appeal from the judgment and decree in Milimani CMCC No. 2273 of 2013 delivered on 30th June, 2017 out of time.
2. It is stated in the grounds and the two affidavits in support of the application that the magistrate's court dismissed the Applicant's suit on 30th June, 2017. That the Applicant wishes to appeal but the time within which to do so has lapsed. The delay in filing the appeal within time is blamed on the time taken to have an application for setting aside or review of the judgment heard by the lower court and the time taken to be supplied with a copy of the judgment. It is further averred that the intended appeal has high chances of success and that the Applicant stands to suffer substantial loss.
3. The application is opposed as per the grounds of application dated 4th June, 2018. The grounds are that the application is defective, an abuse of the court process and fails to raise sufficient grounds for the court to exercise its discretion in the Applicant's favour. That the delay of ten (10) months is inexcusable and unacceptable. It is stated that the application for review was dismissed on 19th February, 2018. That under Order 45 Rule 1 Civil Procedure Rules a party cannot seek review and appeal on the same order.
4. The application was canvassed by way of written submissions. I have considered the said submissions.
5. As stated by the Court of Appeal in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR**:

“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.”**
6. 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)

7. The Applicant has explained the reasons for the delay. The Applicant’s evidence is that the application for review was heard first and that thereafter there was a delay in obtaining the copy of the judgment of the lower court remains uncontroverted by any other evidence. This court is satisfied with the explanation given.

8. With the foregoing, I allow the application on condition that the intended appeal be filed and served within 14 days from the date hereof.

Date, signed and delivered at Nairobi this 29th day of Nov., 2018

B. THURANIRA JADEN

JUDGE