



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL MISC. APPL. NO. 341 OF 2017

OLIVER WAKARI MARAGNA 1ST APPLICANT

ARCHDIOCESE OF NARIOBI 2ND APPLICANT

- V E R S U S -

RICHARD OMWENGA MARANGA.....RESPONDENT

RULING

1. Oliver Wakari Maranga and Archdiocese of Nairobi as the 1st and 2nd applicants herein, filed a notice of motion dated 23rd August 2017 in which it sought for the following orders:

1. THAT this application be certified urgent and service thereof be dispensed with in the first instance.

2. THAT this honourable court be pleased to extend time for the applicants to lodge an appeal against the judgment and subsequent decree of Hon. D. O. Mbeja (Mr) delivered on 2nd May 2017 in Milimani Civil Case No. 428 of 2014.

3. THAT this honourable court be pleased to grant the applicant herein leave to appeal against the judgment of Hon. D. O. Mbeja (Mr) delivered on 2nd May 2017 in Milimani Civil Case No. 428 of 2014 out of time, and that the draft memorandum of appeal exhibited on the annexed affidavit of Veronica Waweru be deemed properly filed after payment of the requisite fee.

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

2. The motion is supported by the affidavit of Veronica Waweru. When served, the respondent filed the replying affidavit of K. A. Nyachoti to resist the motion.

3. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. There were no written submissions.

4. The applicants avers that judgement was delivered on 2nd May, 2017 by Hon. D. O. Mbeja in Milimani Civil Suit No. 428 of 2018 in favour of the respondent herein as against the applicants. Due to an oversight, the applicants Insurer thought that he had instructed its counsel to appeal. By the time the applicants came to the realization that no such instructions had been issued, the time for appeal had lapsed. The applicants herein are aggrieved and dissatisfied with the said judgment and has instructed its advocates, to appeal against the same. The applicants are aware that time to file the appeal has lapsed but beseech this court to exercise its discretion to enlarge such time. It is the applicants averment that its

intended appeal has high chances of success and lastly that the respondent herein will not suffer any prejudice if this application is allowed.

5. The respondent on the other hand avers that the applicants have not met the threshold for the grant of the orders sought in their notice of motion. Since the applicants were aware of the judgment having had an advocate on record. From 2nd May 2017, when judgment was delivered to 4th August 2017, a period of four months the applicant had neither applied for proceedings nor obtained the decree for appeal purposes. It is the respondent's averment that the intended appeal has no merit, because the applicants did not call for evidence during trial to challenge the testimony of the respondent. The respondent states that applicants' sole intention is to deny him from enjoying the fruits of the judgment.

The provisions of Section 79G of the Civil Procedure Act provides as follows:

“ 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 of order.”

Under the **proviso** to the said Section 79G of the Civil Procedure Act, ***an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.***

The Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others, SC Appl 16/2014** laid down the following as the underlying principles which a court should consider in the exercise of discretion to extend time with which to file an appeal:

- i. 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;
- ii. The party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- iii. The court should exercise the discretion to extend time, it is a consideration to be made on a case by case basis;
- iv. the reason for the delay should be explained to the satisfaction of the court;
- v. Whether there will be any prejudice to be suffered by the respondents if the extension is granted;
- vi. The application should have been brought without undue delay; and
- vii. In certain cases, like election petitions, public interest should be a consideration for extending time.

6. A party who seeks extension of time has the burden of laying a basis for the cause of the delay in doing so. The applicant has clearly stated that the delay was caused by mistake of counsel. Being an oversight by counsel, the mistake cannot be visited on the litigant who did not collude nor connive. The applicants' motion was filed four months after judgment was delivered. The delay in filing the motion is prolonged but excusable in view of the explanation given. In the circumstances, I will exercise my discretion in favour of the appellants.

7. In the end, the motion is allowed. Consequently, the applicants are granted leave of 15 days to file an appeal out of time.

8. Costs shall abide the outcome of the appeal.

Dated, Signed and Delivered in open court this 20th day of December, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent