



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Miscellaneous Application 54 of 2009

EVANS OCHIENG

ORINDE.....PLAINTIFF

VERSUS

SHILOAH INVESTMENTS.....

RESPONDENT

R U L I N G

The application dated 12th March 2009 is for leave to file an appeal out of time from Winam SRMCC No. 635 of 2005 and is based on the following grounds:-

- (a) That upon delivery of judgment on 13th January 2009 the applicant's counsel sought instruction from the applicant on whether an appeal could be pursued on his behalf which instructions were given only recently.
- (b) That the delay in filing the appeal is inexcusable.
- (c) That the delay is not inordinate.
- (d) That the appeal intended present arguable chances of success.
- (e) That the applicant has explained the reasons for the delay.

The grounds are supported by a supporting affidavit deponed by the applicant's counsel dated 12th March 2009.

The respondent did not file a replying affidavit but filed the grounds of opposition dated 23rd March 2009.

The application together with the arguments in support of and those in opposition has been duly considered by this court and is found not to have passed the test or guidelines for the grant of leave to file the intended appeal out of time.

It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary and generally the matters which the court takes into account whether to grant extension of

time are first the length of delay, secondly, the reasons for the delay, thirdly the chances of the appeal succeeding if the application is granted, fourthly, the degree of prejudice to the respondent if the application is granted. (See Patel –VS- Waweru & Others [2003] KLR 361).

Herein, the delay is for a period of about three months or two. Even a delay of one day requires explanation. The explanations given herein is not satisfactory. The reason that the applicant delayed in instructing his counsel to appeal is unacceptable and tantamount to saying that it is alright if a client decides to take his sweet time prior to giving necessary instructions to an advocate.

The applicant did not depone an affidavit to explain why he had to take a long period of time before instructing his advocate. His delay in filing the appeal within the prescribed time was in the circumstances inordinate.

From the foregoing reasons alone, this application is not merited and is an abuse of the court process.

Even on the issue of the appeal having chances of success, there has been no demonstration of the fact from the supporting affidavit and the arguments in support of the application.

It is not enough to merely state that the applicant has an arguable appeal with chances of success.

In sum, the application must and is hereby dismissed with costs to the respondent.

[Read and signed this 28th day of July 2009.]

[In the presence of Mr. Njoga for applicant and Mr. Otieno for respondent].

J.R. Karanja

JUDGE

J.R.K/va