



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT THIKA**

**ELC NO 868 OF 2017**

**PAULINE NYAMBURA KARIUKI (Suing for and on behalf of the Estate of**

**SAMSON KARIUKI MANGAE).....PLAINTIFF/RESPONDENT**

**VERSUS**

**KARURA UMOJA INVESTMENT CO. LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. The instant Application dated 8/9/2021 is expressed under Section 1A, 1B, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules (CPR) seeks Orders THAT;

**a. Spent.**

**b. The Applicant be granted leave to file a Notice of appeal out of time.**

**c. The attached Notice of Appeal be deemed properly filed after payment of requisite fees.**

**d. Costs of this application be provided for.**

2. The Application is based on the grounds thereto and Supporting Affidavit of **Peter Kihoto Kiiru**, the Defendant/Applicant's director. He deponed that Judgment was delivered herein on 1/7/2021 in favor of the Plaintiff/Respondent. Dissatisfied with the outcome, the Applicant wishes to appeal against the same but the stipulated period for filing a Notice of Appeal has lapsed.

3. That the delay was caused by the Applicant's need to convene a special meeting with its Board of Directors to discuss the judgment and possible legal avenue to pursue including an appeal. Hence the formal instruction to appeal was given to their Advocate on 3/9/2021 as evidenced by annexure **PKK2**. He avowed that the intended appeal has high chances of success and no doubt this Court has the jurisdiction to enlarge time as prayed.

4. The Application is vehemently opposed.

5. The Respondent, **Pauline Nyambura Kariuki**, swore her Replying Affidavit on 27/10/2021. She averred that indeed Judgement was delivered in her favor on 1/7/2021. That the prescribed period granted for filing a notice of appeal lapsed on or about 15/7/2021. That the reasons advanced for the delay in filing the said notice are not plausible since the Applicant was well represented by Counsel. That its Counsel ought to have filed a notice of appeal as a matter of precaution even as they sought instructions from the client.

6. That the Applicant's counsel ought to have advised the Applicant on the stringent timeline to file such notice of appeal. She opposed the application as unmerited as it is intended to hinder her from enjoying the fruits of her Judgement. She urged the Court to dismiss the application with costs.

7. The application was prosecuted by way of written submissions.

8. As at **17/11/2021**, only the Respondent had filed her submissions dated 12/11/2021 and List & Bundle of Authorities of even date. The Respondent faulted the Applicant for the unreasonable delay in filing the instant application. Further that the reason advanced for the said delay is not sufficient as an appeal is a step that ought to be prioritized. The application was termed as an afterthought and having failed to annex a draft memorandum of appeal, the Court cannot therefore determine its viability. The Respondent entreated the Court to dismiss the application with costs.

## Analysis & Determination

9. The prayers sought by the Applicant without a doubt seek an exercise of discretion of this Court. Rule 39 of the Court of Appeal Rules provide that a party who wishes to prefer an appeal to it ought to file their Notice of appeal within 14 days of the decision appealed against. The Section 95 of the Civil Procedure Act is to the effect that;

### **“95. Enlargement of time**

**Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.**

10. Further Section 7 of the Appellate Jurisdiction Act states;

### **“7. Power of High Court to extend time**

**The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.”**

11. In the case of Nicholas Kiptoo Arap Korir Salat Vs The Independent Electoral And Boundaries Commission & 7 Others [2014] eKLR, the Court held that:-

**“..... It is clear that the discretion to extend time is indeed unfettered.**

**“It is incumbent upon the Applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the Applicant. “We derive the following as the underlying principles that a Court should consider in exercising such discretion:-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; Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the Court; Whether there would be any prejudice suffered by the Respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”**

12. In line with the foregoing cases, it is this Court’s opinion that the question that must then be answered is whether the Applicants have explained the reason for the delay to the satisfaction of this Court.

13. It is common ground that Judgement was delivered herein on 1/7/2021. The instant application was filed two months later. No doubt a delay of even one day can amount to inordinate delay bearing in mind the circumstances of a case. The Applicant has explained that there was a challenge in convening a meeting with the directors who are of advanced age. That in light of the Covid 19 pandemic that affected the said meeting, the Court should indulge the Applicant.

14. I find it fit to exercise discretion to ensure the ends of justice are met.

15. Final orders;

**a. The application is allowed.**

**b. The Applicant to file and serve the Memorandum of Appeal within 30 days from the date hereof failing which the leave so granted shall lapse.**

**c. Costs shall be in favour of the Respondent.**

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021.**

**J.G. KEMEI**

**JUDGE**

**DELIVERED ONLINE IN THE PRESENCE OF;**

**MS KATANA HOLDING BRIEF FOR KITHI FOR THE PLAINTIFF/RESPONDENT**

**MS. MWANGI HOLDING BRIEF FOR KANYI FOR DEFENDANT/APPLICANT**

