



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL APPEAL CASE NO. E313 OF 2020

TEACHERS SERVICE COMMISSION.....APPLICANT

VERSUS

ASHFORD TOURS & TRAVEL LTDRESPONDENT

RULING

1. The application dated 20/11/2020 seeks orders that **the Honourable Court be pleased to grant leave to the Applicant to file an appeal out of time against the Judgment of Hon. L. Gicheha in Nairobi CMCC No. 10402 of 2018 delivered on 15th September, 2020.**
2. Secondly, that **the draft Memorandum of Appeal annexed to the Notice of Motion dated 20th November, 2020 be deemed as filed with the leave of court.**
3. Third, that **the Honourable Court be pleased to order a Stay of Execution of Judgment and all consequent Orders pending the lodgment, hearing and determination of the intended appeal.**
4. The application is premised on the grounds set out in the application and the affidavit in support. It is stated that there was delay in supplying the Applicant with the typed and a certified copy of the Lower Court Judgment. That the intended Appeal is arguable with a high probability of success and stands to be rendered nugatory if the orders sought are not allowed. That the Applicant stands to suffer substantial loss while no prejudice will be visited on the Respondent that cannot be compensated by way of costs.
5. The application is opposed. It is deposed in the replying affidavit that the application is an abuse of the court process and that there is no arguable Appeal. That in the event that the application is allowed, the full decretal sum be deposited in an interest earning joint bank account of the Advocates for the parties.
6. I have considered the application, the response and the rival submissions filed.
7. On enlargement of time, the principles applicable were set out by the Supreme Court of Kenya in the **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** as follows:

“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.”

8. The Applicant has attached letters written to the court requesting to be furnished with the certified copy of the Judgment. The Applicant’s position that he was not supplied with the same in time remains uncontroverted. The explanation given for the delay in filing the Appeal is satisfactory.

9. The well settled principles guiding the grant of a stay of execution pending appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

10. The Judgment of the Lower Court was delivered on 15/9/2020. The instant application was filed on 23/11/2020. The delay is not unreasonable and has been explained to the satisfaction of the court. The Applicant has the right of Appeal while on the other hand the Respondent has the right to enjoy the fruits of the Judgment.

11. To balance the competing interests of the parties, I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account in the names of the Advocates for the parties or deposited in court within 30 days from the date hereof. The requisite court fees for the filing of the Appeal to be paid within 14 days from the date hereof.

12. Costs in cause.

Dated, signed and delivered at Nairobi this 8th day of July, 2021

B.THURANIRA JADEN

JUDGE