



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE MISC APPL. NO. 594 OF 2019

JOHN MOMANYI NYAMETE.....1ST APPLICANT

NYAMIRA LUXURY EXPRESS CO LTD.....2ND APPLICANT

VERSUS

JOHN OPIYO OGUTU.....RESPONDENTS

RULING

1. The Application dated 29th August, 2019 seeks orders **that this honourable court be pleased to extend time and grant leave to the Applicants to lodge a Memorandum of appeal out of time against the judgment and decree entered against the Applicants by Honourable E. Wanjala (Ms.) Senior Principal Magistrate, in Milimani Chief Magistrates Court Civil Suit No. 4430 of 2018 given on 9th May, 2019.**

2. Secondly, **that this honourable court be pleased to stay execution of the judgment and decree in Milimani Chief Civil Suit No.4430 of 2018 pending hearing and determination of the intended Appeal.**

3. The Applicants are aggrieved by the judgment herein and intend to appeal. The delay in filing the Appeal is blamed on the time taken by the Applicants to instruct their Advocates. It is further stated that execution is imminent and that the Applicants stand to suffer substantial loss and their Appeal rendered nugatory. The Applicants are willing to deposit security for the decretal sum.

4. The application is opposed. It is stated in the replying affidavit that the application is an abuse of court process. That the application is an afterthought and is intended to cause delay.

5. I have considered the application, the response thereof and the rival submissions.

6. 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.”

7. The judgment the subject matter of the application was delivered on 9th May, 2019. The instant application was filed on 2nd September, 2019. It is not explained what stood between the Applicants and the giving of instructions to their advocates in time. The Applicants are apprehensive that they may not be able to recover the decretal sum in the event that the Appeal is successful. The Respondent has not said anything to assuage these fears. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd -Vs- Aquinas Francis Wasike & Another:**

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”

8. To balance the competing interest of the parties, the application is allowed on condition that the decretal sum is deposited in a joint interest earning bank account of the advocates for the parties or in court within 30 days from the date hereof. The Appeal to be filed within 14 days from the date hereof. Costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021

B. THURANIRA JADEN

JUDGE