



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT MISC CASE NO. E188 OF 2021

DAVID MWAURA.....1ST APPLICANT

JOSEPH MAINA.....2ND APPLICANT

VERSUS

TIMOTHY JOE MWATHI

DAMARIS WANJIKU MBOGO (Legal representatives

of the estate of EVANS MWAURA).....RESPONDENTS

RULING

1. The application dated 23rd April 2021 principally 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 ruling/order entered against the Applicants by Honourable P. Muholi (Mr.) Principle Magistrate delivered on 7th December, 2020.**

2. The application is based on the grounds stated in the application and the supporting affidavit. It is deponed that on 7th December, 2020 the Applicants' Counsel sought adjournment and leave to file an application to cease acting for the 1st Applicant but was slapped with an order for payment of costs of Kshs. 40,000. That on 11th December, 2020 the Applicant filed an application for the review of the said orders which application was fixed for hearing on 14th December, 2020 but the application ended up not being cause listed.

3. It is further stated that the suit came up for hearing on 22nd April, 2021 but the Applicants were denied audience for failure to comply with the order for payment of costs.

4. It is averred that the intended Appeal has merits. That the delay herein is not inordinate and is excusable. That no prejudice will be suffered by the Respondent that cannot be compensated by way of costs.

5. The application is opposed as per the grounds of opposition dated 7th May, 2021 which state that:

1. The motion alludes to an application for review of the same orders sought to be appealed hence a legal conundrum which is illegal.

2. The motion seeks leave to Appeal from this court when such leave must, by dint of Order 43 rule 1(3) and Section 75 of the Act, be made in the first instance, to the court making the order sought to be appealed.

3. The motion is hopelessly incompetent having been filed outside the 14 days provided for under Order 43 rule 1(3).

4. No order was sought for extension of time before or after filing the motion.

6. I have considered the application, the response to the same 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 ruling complained of was delivered on 7th December, 2020. The application at hand was filed on 24th April, 2021, that is after a period of about four months. Although the Applicants have stated that the delay is not inordinate and inexcusable, they have not given any reasons for the delay. It is therefore not possible for this court to tell if the delay is excusable.

9. The Applicant’s position is that an application for the review of the orders in question was filed and is still pending before the trial court. Under Section 80 Civil Procedure Act and Order 45 rule 1 Civil Procedure Rules, the Applicant had an option to either file an Appeal or an application for review but cannot proceed with both.

10. With the foregoing, the court finds no merits in the Application and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER, 2021

B. THURANIRA JADEN

JUDGE