



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE APPEAL NO. E179 OF 2021**

**MORRIS NDENWA..... APPLICANT**

**VERSUS**

**GILBERT NZUKI.....1<sup>ST</sup> RESPONDENT**

**KEVIN NG'ANG'A GITAU**

**T/A ASTORIAN AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**ARNOLD NJOKA NGIGI.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Notice of motion dated 15<sup>th</sup> April, 2021 seeks orders **that this honourable court be pleased to enlarge time to appeal so that the applicant may appeal against the judgment in CMCC No. 5692 of 2015 rendered on 7<sup>th</sup> December, 2020 out of time.**
2. It is stated in the grounds and the affidavit in support of the application that the Applicant wishes to file an appeal but has ran out of time. The delay is blamed on the difficulties in obtaining a copy of the judgment due to challenges in accessing the e-filing system and further due to the outbreak of the COVID 19 Pandemic.
3. The application is opposed. It is stated in the replying affidavit that there is no evidence that the Applicant made a request to the court to be supplied with the copies of the judgment. That the Applicant could have filed a Memorandum of Appeal while waiting to be supplied with the copy of the judgment. That despite the outbreak of the COVID 19 Pandemic the courts have been holding virtual court sessions and that the e-filing system has also been in operation. The application was termed as an afterthought and the Applicant termed as guilty of laches.
4. The Applicant filed a supplementary affidavit and exhibited a copy of a letter dated 9<sup>th</sup> December, 2020 requesting for a copy of the judgment. He also exhibited a copy of the Memorandum of Appeal. It was stated that a perusal of the copy of the judgment was necessary for purposes of drafting of the Memorandum of Appeal. That it is still a challenge to access justice and that the effects of the COVID 19 pandemic are still being felt.
5. I have considered the application, the response to the same and the rival submissions filed.
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 of the lower court was delivered on 7<sup>th</sup> December, 2020. The application at hand was filed on 21<sup>st</sup> April, 2021. The delay is inordinate but has been explained. This court is inclined to give the appeal a chance on merits.

8. I allow the application on condition that the decretal sum is deposited in a joint interest earning bank account of the counsels on record for the parties or in court within 30 days from the date hereof. The Appeal to be filed and served within 14 days from the date hereof.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2021**

**B. THURANIRA JADEN**

**JUDGE**