



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 326 OF 2015**

**DANIEL GITHUKA GICHARU.....APPELLANT**

**VERSUS**

**KIPTUM KOIMET.....RESPONDENT**

**RULING**

1. The Preliminary Objection dated 24<sup>th</sup> October, 2018 and the application dated 7<sup>th</sup> August, 2019 were argued simultaneously. This ruling therefore covers both of them.
2. The Preliminary Objection seeks orders that the Appeal herein be struck out on the grounds that the same was filed out of time and is therefore incompetent.
3. The Appellant subsequently filed the application seeking orders that the Appeal herein be admitted out of time and be deemed properly filed and served.
4. It is stated in the grounds and the affidavit in support of the application that the judgment of the lower court was slated to be delivered on 19<sup>th</sup> December, 2014 but was instead delivered without notice on 12<sup>th</sup> February, 2015. That while following up on the matter, the Appellant found out that his suit had been dismissed with costs and a decree issued on 22<sup>nd</sup> June, 2015. That the Appeal herein was filed on 6<sup>th</sup> July, 2015, a period of 14 days from the date of receipt of the decree.
5. The application is opposed. It is stated in the replying affidavit that the application herein was filed after a delay of about 4 years. That the filing of the Appeal out of time was done deliberately to defeat the course of justice. That the Appellant is undeserving of this court's discretion to extend time. It is further averred that the extracted decree is defective as it does not bear the date of the judgment. That even after the issue of the filing of the Appeal out of time was raised, the Appellant went to sleep and filed the application at hand one year later. That the Appellant is on the one hand seeking orders that the Appeal be admitted out of time while at the same time he contends that the Appeal was filed within time.
6. I have considered the application, the response to the same and the submissions by the respective counsel for the parties.
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 judgment of the lower court was delivered on 12<sup>th</sup> February, 2015. The record of the lower court reflects that none of the parties was present and the parties were to be informed of the judgment. It is not clear from the record how this was to be done. The lower court had initially fixed the judgment for delivery on 19<sup>th</sup> December, 2014. Notice of delivery of judgment ought to have been issued before the date of delivery.

9. The Appeal herein was filed on 6<sup>th</sup> July, 2015. The Memorandum of Appeal reflects that the Appeal is from the judgment and decree dated 22<sup>nd</sup> June, 2015. Clearly this was misleading in respect of the date of judgment which was delivered on 12<sup>th</sup> February, 2015.

10. The Appellant’s side has argued that under Section 79G Civil Procedure Rules, time starts running on the date of the decree. Section 79 G Civil Procedure Act states as follows:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:”**

11. The court was also referred to Order 21 rule 8 Civil Procedure Rules which states as follows:

**“A decree shall bear the date of the day on which the judgment was delivered.”**

12. Under Order 42 rule 1, Civil Procedure Rules Appeals to the High Court are lodged by filing a Memorandum of Appeal. A certified copy of the decree or order appealed from can be filed at a later stage. There was therefore no procedural requirement for the Appellant to file the Memorandum of Appeal simultaneously with the copy of the decree appealed against. The Appeal therefore ought to have been filed within 30 days from the date of the decree which for purposes of appeal is the date of the judgment herein. The judgment was appealable whether the decree had been extracted or not.

12. Section 2 of the Civil defines a decree as follows:

**“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include-**

**a. Any adjudication from which an appeal lies as an appeal from an order; or**

**b. Any order of dismissal for default:**

**Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up:”**

13. The reasons given in support of the application for extension of time within which to file the Appeal are not satisfactory. There is no plausible explanation why it took about four years before the application at hand was filed. By the date of the filing of the Appeal herein the Appellant was already aware of the judgment and the delay in filing the Appeal. The delay is inordinate and inexcusable. It seems the Appellant was only woken up by the filing of the preliminary Objection herein.

14. With the foregoing, this court upholds the Preliminary Objection and dismisses the application. Consequently, the Appeal herein is hereby struck out with costs.

**Date, signed and delivered at Nairobi this 13<sup>th</sup> day of Feb., 2020**

**B. THURANIRA JADEN**

**JUDGE**