



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 209 OF 2008**

**LEPOSO OLE KOILA.....1<sup>ST</sup> APPELLANT**

**BENSON SAOLI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ISAAC KIREU.....RESPONDENT**

**RULING**

1. This is a ruling on application dated 21<sup>st</sup> January 2018. It seeks leave to file appeal out of time and/or extension of time to lodge notice of appeal.

2. Grounds on the face of the application are that the defendant/applicant was aggrieved with judgment delivered on 6<sup>th</sup> December 2018 and had intentions of filing appeal but could not give express instruction immediately to counsel due to financial challenge.

3. That the applicant was able source funds to give instructions after 46 days, which is beyond the statutory period for lodging notice of appeal.

4. That the applicant has applied for typed and certified copy of decree and proceedings; and the application herein has been brought without delay and the respondent will not suffer any prejudice if orders sought herein are granted.

5. The application is supported by affidavit sworn by applicant's Advocate. He restated grounds on the face of the application and added that the intended appeal raises weighty issues and has high chances of success.

6. In response, the respondent filed replying affidavit sworn by the 1<sup>st</sup> plaintiff on 25<sup>th</sup> January 2019.

He averred that all parties were informed of the judgment and if applicant was aggrieved, he ought to have filed notice of appeal within 14 days as required by rule 75 of the court of appeal rules.

7. Further that the applicant has failed to give honest, reasonable and acceptable explanation; that the application is an afterthought and lacks merit and is intended to avoid payment of decretal sum. The respondent averred that litigation herein has taken a period of 10 years and that the respondent should be allowed to claim decretal amount and file bill of costs for expenses incurred. He urged court to order deposit of decretal amount in the event it deems fit to allow the application.

8. In their oral submissions counsel for applicant restated grounds on the face of application and averments in the supporting affidavit. Counsel for the respondents also fully relied on averments in the replying affidavit.

**ANALYSIS AND DETERMINATION**

9. I have considered arguments herein. At the time of filing this application, the applicant was 46 days in filing notice of appeal. The applicant has confirmed that they were aware of delivery of judgment. Reason given for delay is unavailability of funds to instruct counsel to file appeal. The applicant had option of personally filing notice of intention to appeal as he sourced funds to instruct his lawyer to file appeal. Not much money would have been required for that. 46 days is a long period for a party who is truly aggrieved.

10. I have however perused the memorandum of appeal filed and I am of the view that the appellant should be granted an opportunity to present the intended appeal before the High court for determination of issues raised therein.

**FINAL ORDERS**

1. I therefore allow the applicant to file appeal out of time on condition that the decretal amount is deposited in court within 30 days from the date of this ruling.

2. Appeal to be filed within 30 days from today's date.

3. Failure to comply with orders 1 and 2 above Appeal herein to stand dismissed.

**Ruling Delivered, Dated and signed at Nakuru this 12<sup>th</sup> Day of March 2019**

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**RACHEL NGETICH**

**HIGH COURT JUDGE**

**In the Presence of:-**

Schola Wangui Court Assistant

Mr. Karanja holding brief for Naikuni Counsel for Applicant

Mr. Mutai Counsel for Respondent