



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL MISC APPL. NO. 344 OF 2019

KENYATTA NATIONAL HOSPITAL.....APPLICANT

VERSUS

LOISE KINGORI (suing as legal administrators & Personal Representative of the

estate of the late JOSEPH MAINA KINGORI).....RESPONDENT

RULING

1. The Application dated 18th April , 2019 seeks orders that this honourable court be pleased and hereby grants the Applicant leave to file the appeal against the judgment of Hon. P Muholi Senior Resident Magistrate in Nairobi Milimani CMCC Suit No. 2074 of 2014 delivered and dated 19th September, 2018 out of time.

2. Secondly, the Memorandum of Appeal dated 18th April, 2019 be and is hereby deemed as filed and served on the respondent within the prescribed time.

3. The Applicant is aggrieved by the judgment of the lower court and wishes to appeal. The delay in filing the appeal is blamed on the non availability of the lower court judgment and proceedings.

4. The application is opposed on the grounds that:

1. That order 42 rule 1(1) of the Civil Procedure Rules, 2010 provides that “every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”

2. That order 42 rule 2 of the Civil Procedure Rules, 2010 provides that “where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such a certified copy as soon as possible and in any event within such time as the court may order, and the court need not consider whether to reject the appeal summarily under section 79B of the Act until such certified copy is filed.”

3. That judgment in this matter was delivered on 19th September, 2018 the delay in filing this appeal is inordinate and the reasons given are not reasonable based on the aforestated Civil Procedure Rules.

4. That the application is an afterthought, misconceived and deceitful.

5. I have considered the Application, the response to the same and the submissions filed.

6. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95

of Civil Procedure Act Cap 21 Laws of Kenya)

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 court therefore has the discretion to extent time within which to file an appeal.

9. The judgment of the lower court was delivered on 19th September, 2018. The application at hand was filed on 6th May, 2019. The delay is inordinate but has been explained. The uncontroverted position given by the Applicant is that the initial application for stay was filed in the lower court and that it took time before the lower court availed the copies of the typed judgment and proceedings to the Applicant. A letter dated 28th September, 2018 requesting the judgment and the proceedings has been exhibited herein. A certificate of delay has also been exhibited. This court is therefore persuaded to allow the application.

10. In the upshot, I allow the application on condition that the decretal sum is deposited in an interest earning joint bank account of the counsels for both parties or in court within 30 days from the date hereof. The Memorandum of Appeal filed herein dated 18th April, 2019 to be deemed as duly filed upon payment of the requisite court fees within 14 days from the date hereof. Costs in the cause.

Dated, signed and delivered at Nairobi this 21st day of Nov., 2019

B THURANIRA JADEN

JUDGE