



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 366 OF 2019

DANIEL NJOGU.....APPLICANT

VERSUS

FRANCIS NJOGU NJIHIA.....RESPONDENT

RULING

This is an application by way of Notice of Motion under Sections 79G and 95 of the Civil Procedure Act and Order 50 Rule 1 of the Civil Procedure Rules, for orders that leave be granted to appeal out of time and that the Notice of Appeal and Memorandum of Appeal annexed to the application be deemed to have been filed. The grounds for seeking the said orders appear on the face of the application alongside a supporting affidavit sworn by the applicant.

The application is opposed and there is a replying affidavit sworn by the respondent. Both parties have also filed submissions and cited several authorities which I have considered.

The ruling prompting the application was delivered on 13th February, 2019 in which the lower court found that the applicant did not offer proper explanation as to why a defence was not filed in good time. The applicant was also faulted for not applying to cross examine the process server. I have related the application to the Memorandum of Appeal, and the fact that the orders sought call for the exercise of the court's discretion.

Where an applicant offers security for due performance of the decree that may be issued against him, such a party should not be driven from the seat of judgment without a hearing. I say so because, whereas the respondent has a judgment in his favour, here is an applicant who wishes to be heard and exercise his right of an appeal.

The applicant has offered to post security as may be determined by the court. I am guided by several authorities as cited but more particularly, the decision of the Supreme Court in Application **No. 16 of 2014 Nicholas Kiptoo Arap Korir Salat vs. The independent Electoral and Boundaries Commission and 7 others.** In that case the court stated 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 a consideration for extending time.”**

Applying the principles set out in that decision, the applicant has established that the equitable remedy to extend time is deserving.

Accordingly I allow the application on condition that, the applicant deposits the entire decretal sum in an interest earning account in the joint names of the advocates for the parties within 30 days from the date hereof.

The costs shall abide by the decision of the appeal.

Dated, signed and delivered at Nairobi this 5th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE