



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 59 OF 2018

ERICK ODUOR OSEWE alias ERICK APPLICANT

VERSUS

OMIL GENERAL TRADERS LTD RESPONDENT

R U L I N G

1. By a Notice of Motion dated 20/2/2018 sought orders that :-

i) THAT the Honourable Court be pleased to certify the application as urgent and to dispense with service thereof in advance.

ii) THAT the Honourable Court be pleased to grant the Applicant an extension of time to file an Appeal out of time against the above named judgment of the learned Honourable Kiage delivered on 21/07/2017 in Mombasa in Senior Resident Magistrate's Court Case No. 170 of 2014, ERICK ODUOR OSEWE alias ERICK ODUOR VS OMIL GENERAL TRADERS LTD.

iii) THAT such Order as to costs as may appear to be just be made on the application.

2. The reasons given for failure to file the appeal in time are that the judgment was delivered on a day the court, it was notified, would not sit and that the Applicant only came to learn about the judgment on 14/2/2018 which decision aggrieved him and six days later the current application was lodged.

3. The matters to be considered in an application for extension of time to lodge an appeal were well settled by the supreme court in the decision in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others* to the effect that:-

“From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

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.

4. This court being guided and bound by the above decision proceeds from the stand point that every litigant ought to have its day in court, unhindered, by lapses that are inadvertent or excusable even if the same be negligent as blunders are to human beings and that the occurrence of a blunder should not be the only reason why a party should be driven away for the seat of justice^[1].

5. In this matter, there is an explanation that on the date scheduled for delivery of the judgment the court, it was indicated, would not sit and that having learnt of the judgment on 14/2/2018 he took some 6 days to bring the current application. The Applicant did not attend court because of the indication of non-sitting by the court on the day scheduled hence decision was rendered in his absence.

6. I consider the explanation given be plausible and sufficient and the delay not to be unreasonable or inordinate and consequently, I allow the application and order that the intended appeal be filed within 7 days from today.

7. Costs shall be in the intended appeal.

Dated and delivered at Mombasa this 11th day of July 2018.

P.J.O. OTIENO

JUDGE

^[1] Per Madan J in *Belinda Murai vs Amos Wainana* [1979] eKLR