



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**MISC CIVIL APPLICATION NO 90 OF 2018**

**FREDRICK OLUOCH ODUOR.....APPELLANT**

**VERSUS**

**CHANNAN AGRICULTURAL CONTRACTORS (K) LTD.....1ST RESPONDENT**

**KIBOS SUGAR & ALLIED INDUSTRIES LTD.....2ND RESPONDENT**

**RULING**

1. By a notice of motion dated 22.5.18 brought under Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Order 50 Rule 6 and 51 Rule 1 of the Civil Procedure Rules, the applicant prays for orders that

**a. ....Spent**

**b. The Honourable Court be pleased to enlarge and/or extend time for filing of an appeal out of time by the applicant against the judgment of Hon, P.K.RUGUT (SRM) delivered on 12th April, 2018 in TAMU SRMCC NO. 17 OF 2016 FREDRICK OLUOCH ODUOR V CHANNAN AGRICULTURAL CONTRACTORS (K) LTD AND KIBOS SUGAR & ALLIED INDUSTRIES LTD**

**c. The Honourable Court be pleased to grant leave to the applicant to file appeal out of time against the judgment of Hon, P.K.RUGUT (SRM) delivered on 12th April, 2018 in TAMU SRMCC NO. 17 OF 2016 FREDRICK OLUOCH ODUOR V CHANNAN AGRICULTURAL CONTRACTORS (K) LTD AND KIBOS SUGAR & ALLIED INDUSTRIES LTD**

**d. THAT costs of the appeal do abide in the Appeal**

2. The application is based on the grounds that among other things that the time for filing the appeal has elapsed and that the intended appeal has high chances of success

3. The application is supported by the affidavit sworn on 22.5.18 by Maureen Akoth Okumu, advocate for the applicant in which she reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a copy of draft Memorandum of Appeal.

4. The application is opposed on the basis of grounds of opposition dated 26.7.18 and filed on same date. The respondent argues that the application has been brought with unreasonable delay, is an afterthought, frivolous, vexatious and an abuse of the court process and ought to be rejected.

5. I have considered the application in the light of the supporting affidavit and grounds of opposition. I have also considered the draft Memorandum of Appeal. The impugned judgment was delivered on 12.4.18. This application was filed on 23.5.18 which is 41 days from the date of the impugned judgment.

6. 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. A party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court. In the case of CITY CHEMIST (NBI) & ANOTHER V. ORIENTAL BANK LIMITED Civil Application No. Nai 302 of 2008 (UR 199/2008), the court held: -

**“the overriding objective thus confers on the Court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. The overriding objective does not however facilitate the granting of orders seeking leave or extension of time to file record of appeal where the applicant has not shown to the satisfaction of the Court that the delay is not inordinate or has**

been explained to the satisfaction of the Court. In the instant application, the applicant is guilty of inordinate delay and has failed to explain it to the satisfaction of the Court. Consequently, I am unable to exercise my discretion in favour of the applicant as his application lacks merit.”

7. The applicant’s counsel has explained that she was instructed on time to file the appeal. She blames the delay on an accident that she was allegedly involved in in the last week of April, 2018, her forgetfulness and confusion.

8. In the case of *Philip Chemuolo & Another vs Augustine Kubenbe (1982-1988) KAR 103*, the court held:

“Blunders will continue to be made from time to time and it doesn’t follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merits. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court is often said to exist from the purpose of deciding the rights of the parties not for purpose of imposing discipline.”

9. Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya gives this court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I find that it would not be in the interest of justice to punish the applicant for his counsel’s blunders by denying him an opportunity to ventilate his intended appeal.

10. In the end, the notice of motion dated 22.5.18 is allowed on the following terms:

a. **The Honourable Court hereby grants leave to file appeal out of time and extends time to file the Appeal for 30 days from today’s date**

b. **The costs of this application shall abide the outcome of the appeal**

**DATED AND SIGNED AT KISUMU THIS 4th DAY OF October, 2018**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Felix

For the Applicant - Mr Barasa/Neto

For the respondent - Mr Bagada/Mr Ooko