



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPLICATION NO. 28 OF 2018**  
**IN THE MATTER OF AN INTENDED APPEAL**  
**IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF TAXATION OF ADVOCATES/CLIENTS COSTS**  
**IN**  
**MISC. APPLICATION NO. 469 OF 2016**  
**BETWEEN**  
**LEMMY REGAU & COMPANY.....ADVOCATES - INTENDED APPELLANT**  
**VERSUS**  
**SHALON WANYUA KIOKO (Suing as the personal**  
**representative of the estate of Stanley Ndolo Muli).....INTENDED RESPONDENT**

**RULING**

1. The application dated 22<sup>nd</sup> January, 2018 is premised on the provisions of Sections 3A, 75, 78 and 79G of the Civil Procedure Act and all enabling provisions of the law. The applicant seeks the following orders:-
  - (i) That the court be pleased to grant leave to the intended appellant to appeal out of time against the ruling made by Hon. D. Wasike on 15<sup>th</sup> December, 2016; and
  - (ii) The costs of the application be provided for.
2. The application is anchored on the grounds on the face of it and the supporting affidavit of Lemmy Regau Nyawade Advocate sworn on 22<sup>nd</sup> January, 2018. The respondent filed grounds of opposition on 8th March, 2018.
3. Ms Kwaya, Learned Counsel for the applicant submitted that delay to file the appeal on time was due to mis-communication as after the lower court heard the parties, it orally indicated that the ruling would be delivered on 1st February, 2017.
4. Counsel further stated that the ruling the subject of the present application was delivered on 15th December, 2016 in the absence of both parties. She made reference to a copy of the said ruling attached to the affidavit as proof of the said fact.
5. It was submitted that the applicant became aware of the delivery of the said ruling in December, 2017 when the respondent's Counsel wrote to them and by then, the time for lodging an appeal had elapsed. Ms Kwaya made reference to the respondent's affidavit which states that he became aware of the ruling in December, 2017.
6. Mr. Manguro, Learned Counsel for the respondent opposed the application as per their grounds of opposition. He submitted that the

application was vexatious and scandalous because of the delay on the part of the applicant in filing an appeal. He stated that the doctrine of laches applied. He prayed for the application to be dismissed.

## **ANALYSIS AND DETERMINATION**

The issue for determination is if this court can exercise its discretion to enlarge time for filing a reference.

7. It is clear on the face of the lower court proceedings that on 21<sup>st</sup> November, 2016, the Deputy Registrar informed the Advocates that appeared before her that she would deliver the ruling on 1<sup>st</sup> February, 2017. She however delivered the ruling on 15th December, 2016 in the absence of the Advocates. The applicant filed the present application on 26th January, 2018. That was over one year past the date that the Deputy Registrar had given for delivery of the ruling. The applicant's Counsel claims to have attended court on 1st February, 2017 but the file could not be located and his clerk was informed that Hon. D. Wasike had proceeded on maternity leave. The applicant further deposes that he was under the mistaken belief that the ruling would be delivered on notice.

8. In his affidavit, the applicant has not stated what efforts he put in place to find out the position of the ruling after the 1<sup>st</sup> of February, 2017 such as by writing to the Executive Officer Mombasa Law courts to inquire about it. He sat back and relaxed as twelve (12) months passed by.

9. *Although the wording of the application is for leave to appeal out of time, in essence, the applicant is seeking to file a reference out of time. Paragraph 11(5) of the Advocates Remuneration Order, 2009 (as amended) provides as follows:-*

***“The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by Chamber Summons upon giving to every other interested party not less than three clear days’ notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.”*** (emphasis added).

10. The Supreme Court decision in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 7 Others** [2013] eKLR set out the following principles that should be considered in exercise of a court's discretion in extension of time:-

***“(i) 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;***

***(ii) A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court;***

***(iii) Whether the court should exercise discretion to extend time is a consideration to be made on a case to case basis;***

***(iv) Where there is a reasonable cause for the delay. The delay should be expressed to the satisfaction of the court;***

***(v) Whether there will be any prejudice suffered by the respondents, if extension is granted;***

***(vi) Whether the application has been brought without undue delay and;***

***(vii) Whether in certain cases, like Election Petitions, public interest should be a consideration for extending time.”***

11. Applying the above conditions to the present circumstances, it is this court's considered view that the explanation given by the applicant is not plausible and the inordinate delay in filing a reference was unjustifiable. This court cannot therefore exercise its discretion in favour of the applicant.

12. The result is that the application dated 22nd January, 2018 is hereby dismissed. Costs are awarded to the respondent.

**DELIVERED, DATED and SIGNED at MOMBASA on this 12th day of October, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Manguro holding brief for Mr. Lemmy Regau for the applicant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant