



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL MISC. APPL. NO. 340 OF 2018**

**RAHA ALI DAHIR.....1<sup>ST</sup> APPLICANT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**SAID KASSIM ORINDA.....RESPONDENT**

**RULING**

1. The application dated 12<sup>th</sup> June, 2018 seeks orders as follows:

**“1. Spent**

**2. That this Honourable court be pleased to grant the 1<sup>st</sup> Applicant herein leave to file appeal out of time against the whole judgment and decree by the Hon. Mr. I. Gichobi SRM in Chief Magistrate’s Civil Case Number 1362 of 2012 at Nairobi on 8<sup>th</sup> September 2017.**

**3. That the Memorandum of Appeal Annexed herewith be deemed to have been duly filed.**

**4. That this Honourable Court do order a stay of execution, against the 1<sup>st</sup> Applicant herein, of the Judgment and decree made by Hon. Mr. I Gichobi, SRM, in Chief Magistrate civil Case Number 1362 of 2012 at Nairobi pending the inter parties hearing and determination of this application.**

**5. That the Honourable court be pleased to issue such further orders as it may deem fit in the interests of justice.**

**6. That the costs of this application be provided for.”**

2. It is stated in the grounds and the affidavit in support of the application that the Applicant is desirous of filing an appeal but that the time within which to appeal has lapsed. The delay in filing the appeal is blamed on the delay in being supplied with the lower court file. It is stated that the Respondent is a casual labourer and will not be in a position to refund the decretal sum in the event that the appeal is successful and would thereby render the appeal nugatory. The Applicant is ready to deposit security for the due performance of the decree. It is further averred that the appeal is arguable.

3. The application is opposed. The Respondent has filed grounds of opposition and a replying affidavit. It is stated that this court lacks jurisdiction to entertain the application. It is further stated that the application has been filed after inordinate delay and without sufficient explanation. That the Applicant was only moved to file this application after it’s goods were proclaimed by Auctioneers. It is contended that the Applicant’s remedy lies in a claim of negligence against his former advocate.

4. The application was canvassed by way of written submissions. I have considered the said submissions.

5. As stated by Supreme Court in the case of **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR:**

**“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.”

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. Order 42 rule 6 (1) of the Civil Procedure Rules provides as follows:-

**“ No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”**

From the foregoing provisions of the law, it is clear that this court has jurisdiction to entertain the application at hand.

8. Order 42 rule 6 (2) of the Civil Procedure Rules, 2010 provides as follows:

**“No order for stay of execution shall be made under sub-rule (1) unless –**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

9. In the application at hand the delay is for about nine (9) months. The delay is inordinate. However, the Applicant has exhibited in his further affidavit a letter requesting for the proceedings and judgment of the lower court. The said letter is stamped as received in court on 25<sup>th</sup> September, 2017. A certificate of delay dated 2<sup>nd</sup> August, 2018 issued by the lower court has also been exhibited. The delay has been explained.

10. The Applicant has stated that the Respondent may not be able to refund the decretal sum. The Respondent has not said anything about it. As stated by the Court of Appeal in the case of **Nrb Civil Application 238 of 2005 (UR 144/2005) National Industrial Credit Bank Ltd - Vs- Aquinas Francis Wasike & Another:**

**“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or the lack of them. Once an applicant expresses a reasonable fear that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge – see for example section 112 of the Evidence Act, Chapter 80 Laws of Kenya.”**

11. The Applicant has expressed willingness to deposit security. I allow stay of execution pending appeal on condition that the Applicant do deposit the decretal sum in an interest earning bank account of the counsels for the parties herein or in court within 30 days from the date hereof.

**Dated, signed and delivered in Nairobi this 19<sup>th</sup> day of Nov., 2018**

**B. THURANIRA JADEN**

**JUDGE**