



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 338 OF 2017

AMAR HOLDINGS.....APPLICANT

VERSUS

JAMES NDIRANGU.....RESPONDENT

RULING

1. The application dated 16th August, 2017 seeks orders that:

1. That this honourable court is pleased to extend the time within which the Applicant ought to have filed and served the memorandum of Appeal from the Judgment and Decree in Milimani CMCC No. 8196 of 2013 delivered on 10th July, 2017.

2. That this honourable court is pleased to fix the time for filing the intended Memorandum of Appeal under the time so extended.

3. That this honourable court be pleased to make an order that the Applicant's memorandum of Appeal be filed within seven (7) days from the date of delivery of the Ruling herein.

4. That this honourable court be pleased to make any further order and/or direction that it deems just and fit to grant.

5. That the costs of the application be provided for.

2. It is stated in the grounds and the affidavit in support that the Applicant is aggrieved by the lower court's judgment delivered on 10th July, 2017 and wishes to appeal. That the appeal has high chances of success but the time within which to appeal has lapsed. The delay in filing the appeal is blamed on the delivery of the judgment without notification. It is further stated that there was a mistake on the advocate's side in the manner they handled the issue of filing the memorandum of appeal.

3. The application is opposed. It is stated in the replying affidavit that the Applicant's counsel did not attend court on the first day the judgment was scheduled to be delivered but was adjourned to another date. It is further stated that the intended appeal has no chances of success and is intended to cause delay.

4. I have considered the application, the response to the same and the submissions made by counsels for

the respective parties.

5. As stated by the Court of Appeal 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 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. It is conceded by the Respondent that the judgment was not delivered on 6th July, 2017 but was rescheduled. It is also conceded that the Applicant’s counsel was not in court on 6th July, 2017. That was a mistake. However, the Applicant’s counsel ought to have been notified of the new date that was set for the delivery of the judgment.

8. The delay was for about six (6) days and has been explained. The issues raised in the annexed draft memorandum of appeal are arguable. This court is inclined to give the appeal a chance to be heard on merits.

9. In the upshot, I allow the application. The appeal to be filed and served within 7 days from the date hereof. Costs to the Respondent.

Date, signed and delivered at Nairobi this 3rd day of Dec., 2018

B. THURANIRA JADEN

JUDGE