



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC CIVIL APPLICATION NO 111 OF 2018

WINNIE OWITI t/a EBENEZER LIFE CENTRE.....APPLICANT

VERSUS

GRACE WAIRIMU t/a WAIFRA SUPPLIERS.....RESPONDENT

RULING

1. By a notice of motion dated 18.6.18 brought under Sections 1A, 1B, 3, 3A and 79G of the Civil Procedure Act Cap 21 Laws of Kenya, Order 42 of the Civil Procedure Rules, Article 22(3)(d) and 159 of the Constitution and all enabling provisions of the law, the Applicant prays for orders that:

a.*Spent*

b. *This Honourable Court be pleased to grant the Applicant leave to appeal out of time against the judgment of Hon, M.AGUTU (RM) delivered on 16th February, 2018 in KISUMU CMCC NO. 501 OF 2014*

c. *THAT costs of the application be in the intended Appeal*

2. The application is based on the grounds that among others 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 18.6.18 by John Mark Emukule, advocate for the Applicant in which he reiterates the grounds on the face of the application. Annexed to the supporting affidavit is a copy of draft Memorandum of Appeal.

4. The Respondent though served neither filed a response to the application nor submissions.

5. I have considered the application in the light of the supporting affidavit and submission filed on behalf of the Applicant.

6. The impugned judgment was delivered on 16.2.18. This application was filed on 25.6.18 which is over 4 months from the date of the impugned judgment.

7. 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.”

8. The applicant’s counsel has explained that the instructions to appeal were given late. The applicant has herself not explained why she gave instructions to appeal late.

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 give the applicant an

opportunity to ventilate her intended appeal.

10. In the end, the notice of motion dated 18.6.18 is allowed on the following terms:

a. *The Honourable Court hereby grants leave to Applicant 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 13th DAY OF December 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

For the Applicant - N/A

For the respondent -N/A