



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**MISC. CIVIL APPLICATION NO. 32 OF 2013.**

**JOSEPHAT MULONGO WEKESA:::::::::::::::::::::::::::::::::APPLICANT.**

**VERSUS**

**THE CLERK COUNTY COUNCIL OF LUGARI::::::::::::RESPONDENT.**

**RULING**

**INTRODUCTION.**

1. On the 13<sup>th</sup> day of April, 2015 this court granted the applicant herein leave to file his appeal out of time. The court ordered that the appeal be filed within fourteen (14) days from the date of delivery of the ruling which ruling was delivered on the 18<sup>th</sup> day of June, 2015.

2. The applicant failed to file the appeal as ordered by court and has again come to this court by way of a Notice of Motion dated 14<sup>th</sup> July, 2016 brought under order 50 rule 6 of the Civil Procedure Rules and sections 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya seeking to be granted an extension of time to file the intended appeal. He claims that he was not informed about the ruling which was delivered on 18<sup>th</sup> day of June, 2015 and that his failure to file the appeal as ordered was not deliberate.

3. His advocate PAUL KASSIM SIFUMA has annexed his affidavit in support of the application wherein he depones that the ruling of his application dated 26<sup>th</sup> March, 2013 was to be delivered on notice but he never received any notification from the deputy registrar of the court of the ruling on his application. He depones that it was not until 28<sup>th</sup> June, 2016 after his client had complained about the delay to the ombudsman that he came to know that a ruling had been delivered on 18<sup>th</sup> June, 2015. For those reasons he opines that he deserves another chance.

4. His application is however opposed by the respondents who have filed 4 grounds of opposition which are:-

*(1) That the said application is devoid of merit, baseless and an attempt to derail the course of justice;*

*(2) That the applicant's application is an attempt to abuse and frustrate the court process;*

*(3) That the application is misplaced, fatal, misconceived, defective and an abuse of court process;*

*(4) That the application is an afterthought as the applicant has been aware of the orders that were*

issued on 18<sup>th</sup> June, 2015.

5. The respondent wants the application dated 14<sup>th</sup> July, 2016 dismissed with costs.

### **Submissions.**

6. The application was canvassed by way of written submissions which have been filed and exchanged between the parties. The applicant maintains in his submissions that he was not notified of the ruling dated 13<sup>th</sup> June, 2015 that was to come up on the 18<sup>th</sup> June, 2015 and which granted him leave to file his appeal out of time.

7. It was only until 20<sup>th</sup> June, 2016 that the applicant found out that the ruling had actually been delivered in his favour and he was required to file the appeal within fourteen (14) days from the date of the ruling. He further claims to have come to court in good faith and not to abuse the course of justice. He wants the application allowed with costs.

8. On their part, the respondent submits that the time the applicant was given started running from the 18<sup>th</sup> June, 2015 but the applicant failed to file his appeal as ordered. They claim that the applicant is not a diligent litigant and that he never followed up his case despite writing to the deputy registrar of this court on the 5<sup>th</sup> June, 2015. They are not sure whether those letters were received by the registrar or not and claim that the acts by the applicant were a tactic to cover up their indolence. He maintains that equity aids the vigilant and not the indolent.

9. They further claim that communication was made to the effect that ruling would be delivered on 18<sup>th</sup> June, 2015 thus the reason why the respondent was represented on the said date. He adds that the applicant's advocate has failed to satisfy this honourable court that the failure to file the appeal within the stipulated time was not out of his fault and further that the intended appeal has reasonable prospects of success or his preparedness to file the appeal.

10. He adds that the unfettered discretion of the court to extend time within which an appeal may be filed should be exercised judicially or on sound reason rather than whine, caprice or sympathy. To the advocates for the respondent the delay by the applicant is inordinate and the explanation is not satisfactory.

### **Determination.**

11. The only issue for determination in this application is whether this court should again extend time to the applicant to file his appeal having extended the same earlier. As regards extension of time, it was held in **NICHOLAS KIPTOO ARAP KORIR SALAT VS. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS [2014] eKLR:-**

***“..... It is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant.”***

***We derive the following as the underlying principles that a court should consider in exercising 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 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) Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court;***

***(5) Whether there would be any prejudice suffered by the respondent, if 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.”***

12. The issue raised by the applicant in support of his application is that he was not notified of the ruling dated 18<sup>th</sup> June, 2015. He has explained that since the judge who heard his application was on transfer the ruling would be on notice.

13. There is a notice on record dated 3<sup>rd</sup> day of June, 2015 giving notice to counsel for the applicant and respondent when the ruling will be delivered. It seems that the same was served upon the advocates for the respondent who attended court on the 18<sup>th</sup> June, 2015 but was not served upon the applicant's advocate. Although there is no affidavit of service to prove that the Notice was served.

14. It was incumbent upon the respondents counsel to inform the applicant of the outcome of the court's ruling. This is good practice, to avoid such an occurrence as the one now seen here. Although the applicant was not vigilant in pursuing his case, he has an interest in appealing. I say so because of the effort he puts after realizing his mistake. He quickly filed the present application seeking the court's leave to appeal.

15. I find therefore that the applicant is desirous of appealing his case and for the interests of justice it would be unfair to shut him out at this stage. It is upon him now to exercise due diligence to see to it that at least he files the appeal as ordered by the court.

16. Having found that his reasons are genuine the applicant is allowed to file his appeal within 14 days of this ruling. The costs of the application will be to the respondent.

**SIGNED, DATED and DELIVERED at KAKAMEGA this 1<sup>ST</sup> day of DECEMBER, 2016.**

**C. KARIUKI**

**JUDGE.**

**In the presence of:-**

**.....Manyoni for Kassim .....for the Applicant.**

**.....N/A .....for the Respondent.**

**.....Lilian .....Court Assistant.**