

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 596 OF 2012

WINNERS DELIGHT LIMITEDPLAINTIFF

VERSUS

JAMES NDEGWA THUKU.....DEFENDANT

RULING

The application dated 27/02/2019 seeks to have the Notice of change of advocates duly filed in court deemed as being regularly on record and that the Plaintiff be granted leave to lodge an appeal to the Court of Appeal out of time. The application was supported by the affidavit of Kennedy Asinuli, the Plaintiff's advocate sworn on 28/02/2019. He averred that after judgment was entered against the Plaintiff on 15/10/2018, the Plaintiff was aggrieved by the decision of the court and consulted its then Advocate, K. Macharia & Co. Advocates on whether it should lodge an appeal but the advocate informed it that an appeal was not feasible. He further deponed that the Plaintiff was dissatisfied with its then counsel's opinion and approached him and he perused the file and noticed that the Plaintiff had a good chance of appeal in this matter. He added that the consequences of the failure by K. Macharia & Co. Advocates to file a Memorandum of Appeal should not be visited upon the Plaintiff. He also deponed that the Defendant will suffer no prejudice or damage if the application for leave is allowed. Further, that the Plaintiff is prepared to pay the Defendant's costs for the application and to meet the reasonable conditions that the court may impose for enlarging time to file the appeal.

The application was not opposed. The court has considered the application and authorities in support of it and finds that the Plaintiff has come to court after inordinate delay of over four months after the judgment was delivered. Whilst the law gives the court the discretion to extend the time for lodging an appeal, it is up to the applicant to present before the. Then the court considers the application and balances the competing interests of the applicant who wishes to appeal and the respondent who has a right to enjoy the fruits of the judgment. The Respondent did not oppose the application, its advocate stated in court that he saw no need in responding to an unsigned application. The Plaintiff merely gave the change of advocates as the reason for the delay in bringing this application. If the Plaintiff was dissatisfied with the advice of its previous advocates and wished to pursue an appeal, it should have moved with speed and not waited for four and a half months which in the court's view is an inordinately long period to get another opinion and instruct a different Advocate. It is noteworthy that the Notice of Appeal and the Notice of Change of Advocates consent are both dated 9th November 2018. The application for enlargement of time is dated 27/2/2019 was filed on 18/3/2019.

The Applicant has failed to persuade the court that it should be granted an extension of time to appeal. The court dismisses the application dated 27/02/2019.

Dated and delivered at Nairobi this 13th day of December 2019

K. BOR

JUDGE

In the presence of:-

Mr. T. Balala holding brief for K. Asinuli for the Plaintiff

No appearance for the Defendant

Mr. V. Owuor- Court Assistant