



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OKWENGU, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 115 OF 2019

BETWEEN

JULIUS MASIVA OBUGA..... APPLICANT

AND

JACKSON MANDAGO.....1ST RESPONDENT

COUNTY GOVERNMENT OF UASIN GISHU.... 2ND RESPONDENT

SYLVESTER METTO 3RD RESPONDENT

(Application for leave to file a motion of appeal out of time against the whole judgment of High Court of Kenya at Eldoret (**D. O. Ogembo, J**) delivered on the 28th day of July, 2017 in **Eldoret HC Misc. No. 24 Of 2016**)

RULING OF THE COURT

[1] By a notice of motion dated 11th March, 2019 the applicant seeks to have time to lodge and serve the notice of appeal and the record of appeal against the decision of the High Court in Eldoret (**Ogembo, J**) extended.

[2] The applicant had filed a petition in the High Court seeking orders to have the 1st and 3rd respondents barred from holding any public office; the 1st and 2nd respondent ordered to refund all earning enjoyed financially to the county; and all the appointees made by the 1st respondent after dissolving the 2nd respondent to make good the refund. The petition was dismissed by the learned judge who found it frivolous and meritorious and an abuse of the court process.

[3] In an affidavit sworn by the applicant in support of his motion, the applicant deposes that he was not aware of the ruling delivered on 26th July, 2017 as he was not aware of the date of delivery and only became aware of the ruling when he was served with the bill of costs for taxation sometime in January, 2018.

[4] The application is opposed through a replying affidavit sworn by **S. K. Lelei**, the County Attorney of the 1st and 2nd respondents. He deposes that the applicant cannot claim to have been unaware of the delivery of the ruling when he filed an application for review dated 27th February, 2018 for review of the ruling dated 26th July, 2017.

[5] It is further deponed that the applicant is not deserving of the orders sought as he has not offered any valued reason as to why he did not serve the letter bespeaking proceedings, and that no notice of appeal against the ruling of 26th July, 2017 was ever lodged or served upon the respondents as required under Rule 77(1) of the **Court of Appeal Rules**.

[6] The respondents also filed written submissions in which they urged that the applicant is not deserving of the exercise of Court discretion under Rule 4 of the Court Rules as the applicant has not satisfactorily explained the delay in filing the notice of appeal against the judgment and that the applicant having opted to apply for review he cannot now opt to appeal against the same judgment after the review is unsuccessful. In addition, it is submitted that the intended appeal is not arguable as it raises no substantive issues.

[7] I have considered the applicants motion, the contending affidavits and the submissions filed. Under **Rule 4** of the Court Rules, I do have discretion in considering such an application. However, the discretion must be exercised judicially. The principles for exercising discretion in an application for extension of time have been clearly summarized by the Supreme Court in Nicholas Kiptoo Arap Salat -vs IEBC [2014] eKLR S. C. Application No. 16 of 2014:

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.

[8] In this case, the judgment subject of the intended appeal having been delivered on 26th July, 2017 there has been a delay of about 3½ years. The applicant’s main contention is that he was not aware of the judgment until January, 2018. Even if I am to give him the benefit of doubt in that regard, there would still be a delay of about 3 years.

[9] It is clear from the ruling dated 27th November, 2018 that the applicant opted to file an application for review of the ruling on 26th July, 2017 instead of an appeal. Having been unsuccessful, he now turns back in an attempt to pursue his right of appeal. But even then, the applicant has not explained why he took no action from 27th November, 2018.

[10] I find that the applicant is not deserving of the exercise of this Court’s discretion. The application is accordingly dismissed with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR