



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: OTIENO-ODEK, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 10 OF 2018 (UR 9/18)

BETWEEN

SUSAN OGUTU OLOO.....1<sup>ST</sup> APPLICANT

LUCIA ABAJA OLOO.....2<sup>ND</sup> APPLICANT

alias LUCIA OLOO AKINYI

JOYCE ATIENO OLOO.....3<sup>RD</sup> APPLICANT

alias JOYCE ATIENO OBUNDE

AND

DORIS ODINDO OMOLO.....RESPONDENT

*(Being an application for leave to file a Notice of Appeal out*

*of time in respect of the Ruling of the High Court at Kisumu, (D.S. Majanja, J.)*

*dated 10<sup>th</sup> October, 2016*

in

HC SUCCESSION CAUSE NO. 425 OF 1998)

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RULING

Before me is a Notice of Motion dated 1<sup>st</sup> February, 2018. It is an application seeking leave to file a Notice of Appeal out time against the ruling delivered by **Majanja, J.** on 10<sup>th</sup> October, 2016.

The grounds in support of the application is that the applicant's previous counsel did not update the applicants about delivery of the Ruling on 10<sup>th</sup> October, 2016; that the applicants only became aware of the ruling around January, 2018.

The second reason given for the delay is that the 2<sup>nd</sup> applicant, **Lucia Abaja Oloo** was admitted in hospital at Bondo between 9<sup>th</sup> October, 2016 and 17<sup>th</sup> October, 2016. She was thus not aware of the ruling of 10<sup>th</sup> October, 2016 and was unable to attend to her normal daily chores. The applicant further submitted the respondent will not be prejudiced if extension of time is granted. The instant application is supported by the affidavit of **Susan Ogutu Oloo** - deponed to on 31<sup>st</sup> January, 2018.

The respondent in opposing the application has filed a replying affidavit deponed by **M/s Doris Odindo Omolo** dated 19<sup>th</sup> April, 2018. The core of the affidavit is that when the ruling was delivered on 10<sup>th</sup> October, 2016, the applicants were represented by counsel who was present in Court. The applicants thus had notice and knowledge of the ruling as from 10<sup>th</sup> October, 2016.

The other ground in opposing the instant application is that the period of delay is inordinate. There has been a delay of one year and four months in this matter. That the delay is unconscionable, inconceivable and inordinately long and unjustifiable.

I have considered the grounds in support of the application and the replying affidavit.

The instant application is founded on **Rule 4** of the Rules of this Court. In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the **Supreme Court in Nicholas Kiptoo arap Korir Salat V. IEBC (2014) eKLR Sup. Ct. Application No. 16 of 2014.**

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted.

In the instant matter, the ruling of the High Court was delivered on 10<sup>th</sup> October, 2016. The present application for extension of time was filed on 20<sup>th</sup> April, 2018. This is after a delay of over one year and four months. It is incumbent upon the applicant to explain this delay of sixteen months.

In the affidavit in support of the application, there is no effort or attempt to explain the sixteen months delay. All the 1<sup>st</sup> applicant states, she was not aware the ruling had been delivered. The 2<sup>nd</sup> applicant is stated to have been admitted in hospital at Bondo between 9<sup>th</sup> and 17<sup>th</sup> of October, 2016.

In my considered view, the applicants have failed to offer satisfactory explanation for the sixteen months delay. In so far as the 2<sup>nd</sup> applicant is concerned, even if she was admitted in hospital, she was discharged on 17<sup>th</sup> October, 2016. From the date of discharge to when the present application was filed, no explanation for the delay has been given. I am satisfied the sixteen months delay is inordinate and no satisfactory explanation has been given.

I now wish to consider the explanation that the applicants were not aware the ruling has been delivered on 10<sup>th</sup> October, 2016. It is not in dispute the applicant's counsel was present in Court when the ruling was delivered.

In **Bi-Mach Engineering Limited –V- James Kahoro Mwangi [2011] eKLR – Civil Appeal Application No. Nai 15 of 2011 (UR 10/2011)**, it was stated the applicant has a duty to pursue his advocate to find out the position on litigation. In this matter, there is no evidence tendered to show that actions, if any, the applicants took to find out the outcome of their case from their advocate on record. It is not enough to simply accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter.

Likewise in **Habo Agencies Limited –V- Wilfred Odhiambo Musingo, Civil Appeal (Application) No. 124 of 2004**, it was stated it is not enough for a party in litigation to simply blame the advocates on record. Courts have always emphasized that parties have a responsibility to show interest in and follow up their cases even when they are represented by counsel.

In **Samuel Mbugua Githere –V- Kimungu [1984] eKLR, Civil Application No. Nai. 56 of 1983**, it was stated there can be no suggestion that the advocate could not obtain instructions. Why did he therefore not file the Notice of Appeal as a precaution. The Notice of Appeal is a simple document and could easily have been filed. (See also *Abdul Kadir Athman Salim Elkindy –V- Director of Public Prosecutions & Another [2018] eKLR, Civil Application No. 198 of 2017*).

Guided by the foregoing decisions, I am of the considered view the explanation for the sixteen months delay is not satisfactory. I am not convinced the applicants deserve the exercise of my discretion to extend time.

For the foregoing reasons, I find the applicants have not satisfactorily explained the sixteen months delay. I also find the applicants were represented by counsel when the ruling was delivered on 10<sup>th</sup> October, 2016. Even if I were to believe the applicants were not aware the ruling had been delivered (*which I do not believe*), there is nothing on record to show what steps the applicants had taken to get the information from their advocate on record.

I therefore decline to exercise my discretion to extend time. The Notice of Motion dated 1<sup>st</sup> February, 2018 be and is hereby dismissed with costs.

**Dated at Kisumu this 21<sup>st</sup> day of February, 2019.**

**OTIENO-ODEK**

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**JUDGE OF APPEAL**

I certify that this is a true

copy of the original.

**DEPUTY REGISTRAR**