



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OTIENO ODEK, J.A (IN CHAMBERS))**

**CIVIL APPLICATION NO. 2 OF 2019**

**BETWEEN**

**CYPRIAN SHIVACHI SHISANYA ..... APPLICANT**

**VERSUS**

**EMILY SUSAN KAYANDA ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An Application for leave to file a notice of appeal and file a record of appeal out of time against the decision of the High Court of Kenya at Eldoret, (Hon. A. Omwayo, J) dated 28<sup>th</sup> June, 2018*

**in**

***ELDORET ELC NO. 422 OF 2013)***

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**COURT RULING**

Before me is a Notice of Motion dated 19<sup>th</sup> December, 2018 seeking extension of time within which to file a Notice of Appeal and Record of Appeal out of time.

The Application is supported by the affidavit of the applicant Mr Cyprian Shivachi Shisanya dated 19<sup>th</sup> December, 2018. The judgment against which an appeal is to be preferred was delivered on 28<sup>th</sup> June, 2018 by the Eldoret ELC Court.

The instant application dated 19<sup>th</sup> December, 2018 was filed on 20<sup>th</sup> December, 2018. This is after a delay of a period of about six months after delivery of the judgment. The applicant needs to explain the reasons for delay in filing the Motion within time and the delay in lodging the instant application.

At the hearing of the application, learned counsel **Mr. Momanyi** for the applicant relied entirely on the grounds stated on the face of the application and in the supporting affidavit. Learned Counsel for the 1<sup>st</sup> Respondent **Mr. Andambi** relied on the Replying Affidavit deposed by **M/S Susan Emily Kayanda**, the 1<sup>st</sup> respondent herein.

Senior State Counsel **M/S Lung'u** associated herself with the replying affidavit of the 1<sup>st</sup> respondent.

In the case of **Nicholas Kiptoo Arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 7 Others (2014) eKLR**, the Supreme Court laid down the guiding principles governing an application for extension of time. One of the principle's is that an applicant must give a satisfactory explanation and reasons for delay.

In this matter, the applicant deposes that he was not aware of the delivery of the judgment of the ELC till late September, 2018. The record of proceedings before the ELC court on 28<sup>th</sup> June, 2018 clearly shows the applicant was not present in court when the judgment was delivered. The record of proceedings similarly shows the initial date for delivery of the judgment was 1<sup>st</sup> March, 2018.

There is nothing on record to show that all parties were made aware of the new judgment date slated for 28<sup>th</sup> June, 2018. For this reason I am satisfied the application was not aware of the date of delivery of the judgment.

However, notwithstanding the foregoing, the applicant states he became aware of the judgment in September, 2018. It is thus incumbent upon the applicant to explain the delay between September, 2018 and 20<sup>th</sup> December, 2018 when the instant application was filed.

In his written submissions the applicant states that the delay in lodging the present application was occasioned by the need to file a Notice of change of Advocates. There is nothing on record to show there has been a change of Advocates. There is also nothing on record to show when the present firm of Anassi Momanyi & Co. Advocates were instructed. That the other reason for delay is that the applicant had to get the requisite legal fees and court fees to file the present application.

I have considered the explanation given for the delay in filing the present application. I am not satisfied with the explanation. It has not been indicated when the firm of Anassi Momanyi & Co. Advocates were given instruction to come on record. In addition, this explanation is not contained in the supporting affidavit. It is an explanation made in the written submissions. Time and again, it has been stated written submissions are not part of the evidence on record. For this reason, I find the applicant has not given any explanation for the delay between September, 2018 and 20<sup>th</sup> December, 2018 when the instant application was filed.

Further, the applicant has not stated the prejudice the respondent stands to suffer if extension is granted. It does not suffice to simply state there shall be no prejudice.

In the supporting affidavit the applicant stated that immediately he became aware of the judgment, that is in September, 2018, he instructed the firm of Annasi Momanyi & Co. Advocates to pursue an appeal. There is nothing in the supporting affidavit to show what steps Annasi Momanyi & Co. Advocates did between September and 20<sup>th</sup> December 2018.

In the absence of such explanation, I find the present application was filed after a delay that has not been satisfactorily explained.

For the foregoing reasons, I decline to exercise my discretion to extend time to file and serve the Notice of Appeal in this matter.

The Notice of Motion dated 19<sup>th</sup> December, 2018 be and is hereby dismissed with costs to the Respondents.

**Dated at Eldoret this 8<sup>th</sup> May, 2019.**

**OTIENO ODEK**

.....

**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

**DEPUTY REGISTRAR**



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