



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIAGE J.A (IN CHAMBERS))**

**KISUMU CIVIL APPLICATION NO. 96 OF 2020**

**BETWEEN**

**THE COUNTY GOVERNMENT OF BUSIA.....APPLICANT**

**AND**

**JOEL KIRWA TANUI T/A**

**ROTALINK ENGINEERING CO. LTD.....RESPONDENT**

*(An application for extension of time to file a Notice of Appeal against the Ruling of the High Court at Busia (W. Kiarie, J) dated 26th September, 2019)*

**in**

**Judicial Review No. 2 of 2019**

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**RULING**

The County Government of Busia, the applicant herein, has filed a Notice of Motion dated 18th August 2020 seeking, in the main, an order that;

***2. This Honourable Court be pleased to extend time for filing of the Notice of Appeal against the Ruling dated 26th September 2019, of the High Court of Kenya sitting in Busia, (Kiarie Waweru Kiarie), in Judicial Review No. 2 of 2019, Republic –vs- The County Government of Busia and exparte Joel Kirwa Tanui T/A Rotalink Engineering Co. Ltd.***

I have contemplated the application, the grounds in support thereof and the law. This being a **Rule 4** application, I shall be guided by the holding of this Court in **MURINGA COMPANY LTD V ARCHDIOCESE OF NAIROBI REGISTERED TRUSTEES**, Civil Application No. 190 of 2019 where the factors to consider, in the exercise of my discretion, which is free and unfettered, were stated as;

*“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party’s opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”*

**Nicodemus Mulaku**, the applicant’s County Secretary deposed that on 26th September 2019, W. Kiarie, J issued an order of mandamus directing the applicant to settle the decretal sum of Kshs. 1,739,990 plus costs and interest within 90 days in satisfaction of the judgment in **Busia CMCC No. 76 of 2013: Rotalink Engineering Co. Ltd vs Municipal Council of Busia**. The applicant still failed to settle the decretal sum prompting the respondent to serve Nicholas and the County Executive Secretary, Finance, with a *notice to show cause* dated 6th August 2020 for the decretal sum now escalated to. Kshs. 3,516,486.

Nicholas stated that the firm of Paul John Makokha & Company Advocates acted for the defunct Municipal Council in the initial suit and still had conduct of the matter at the time the Judicial Review application was filed but around that time, a dispute arose between the said firm and the applicant over fees payable for legal services rendered to the defunct Municipal Council.

Nicholas complained that because of that dispute the firm kept the applicant in the dark concerning the status of the proceedings. The firm also exercised a lien over the file, making it impossible for the applicant to know the status of its case. Upon service of the notice to show cause, the applicant instructed the advocates currently on record to take over the matter. To him, the delay had reasonably been explained.

Whereas there is no set minimum or maximum time period of delay, the Court must be satisfied that such delay has been reasonably explained. As we have had occasion to say before, a plausible and satisfactory explanation is the key that unlocks the Court’s flow of discretionary favour. See, **ANDREW KIPLAGAT CHEMARINGO V PAUL KIPKORIR KIBET [2018] eKLR**.

I have considered the reasons proffered for the delay and found them to be, with respect, patently unsatisfactory. It is not uncommon for advocates and their clients to dispute over legal fees or for a law firm to hold onto and deny the client access to a file due to such dispute. However, it is reasonably expected that a party to a suit would seek to peruse the court file and get appraised of the status of his case, a move made more urgent when the relationship with the advocate goes south.

Moreover, the applicant herein is far from a helpless individual. It is a County Government with resources in terms personnel and money at its disposal to enable it to confirm the status of its case, if it so wished. I therefore reject the assertion that the applicant had only one avenue by which to find out the status of its case and was therefore helplessly held at ransom by its former advocate. The applicant had been indolent for more than a year and was only jolted into action by the notice to show cause. I find that the applicant is not deserving of my equitable intervention. As goes the maxim, Equity aids the diligent, not the indolent.

I have come to the conclusion that the delay was not only inordinate but also inexcusable, as the explanation is wanting. In the result I decline to grant the prayer to extend time and accordingly dismiss the application with costs.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of December, 2020**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**



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