



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**MISC. APPLICATION NO. 179 OF 2015**

**JOSEPH NGIGI IBARE ..... PLAINTIFF/APPLICANT**

**VERSUS**

**1. MYOVI JAMES .....1<sup>ST</sup> DEFENDANT/APPLICANT**

**2. PAUL GAKUO MUREITHI ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

1. By an application dated 15<sup>th</sup> June 2015, the Applicants sought two orders:

1. That the Honourable Court be pleased to order stay of execution of decree in **Nakuru CMCC No.933 of 2009** pending hearing and Determination of this application.
2. That the Honourable Court be pleased to grant leave to appeal out of time against the judgment of Honourable Senior Resident Magistrate delivered on the 20<sup>th</sup> March 2015.

The application was brought under the provisions of **Order 51 Rule 1, Order 42 Rule 6, Order 22 Rules 22 of the Civil Procedure Rules** together with **Section 3, 3A and 1B of the Civil Procedure Act**.

The grounds upon which the application was based, and the reason for delay in filing the appeal within the prescribed period of 30 days was stated to be due to an inadvertent error on the part of the defendants advocates.

2. In support of the application is an affidavit sworn by one Paul Kibet described as the Legal Officer of APA Insurance Company Limited on whose behalf the primary suit was brought as the insurers of the accident motor vehicle on subrogation rights.

Reading the said affidavit it presents to me that the applicants Advocates did not attend court to take the judgment on the 20<sup>th</sup> March 2015 and learnt of the delivery on the 30<sup>th</sup> March 2015 when a letter by the respondent's advocate was received calling for the decretal sum. It also shows that the applicant's advocates were instructed to lodge an appeal on the 18<sup>th</sup> May 2015, fifty-eight days after the delivery of the judgment and twenty-eight days outside the requisite period of lodging an appeal. It further shows that the said advocates did not take immediate action and took almost a month(27 days) to bring this application to court.

3. In their written submissions, the applicants advocates did not explain the delay to file the appeal within time, and relied on **Article 159(2) (d) of the Kenyan Constitution** that Justice shall be administered without undue regard to procedural technicalities and **Section 79G of the Civil Procedure Act** that provides that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appellate in time.

4. On the second limb of the application, it is sought a stay of execution of the decree in the primary suit pending hearing and determination of this application. In my view the court's finding on the matter of filing appeal out of time will ultimately determine this second limb of stay of execution.

5. **The Respondent** opposed the application by his replying affidavit sworn on the 30<sup>th</sup> June 2015. The basis of his opposition is that no good or sufficient reasons/cause have been shown for not filing the appeal within time. It is his disposition that the applicant's advocates upon whose blame the applicant's placed did not swear any affidavit to clarify what inadvertent mistake or omission that caused the delay as indeed none was shown.

6. The court has considered the affinity evidence and written submissions by the parties.

The main ground advanced for not filing the appeal within time was an oversight, an inadvertent mistake by the applicants' advocates. The Advocates did not file any affidavit to show the court the nature of the mistake if any. That averment, in my view remains as such. Without any reasons, the court is unable to understand the difficulty so as to give it due consideration. The granting or denial of leave to file an appeal out of time is at the discretion of the court. However, the applicant has to satisfy the court that he has good and sufficient cause for not filing the appeal in time. The applicants did not attempt to justify or explain the delay in whatever manner. Admittedly, the delay may not be too inordinate but in one day delay ought to be explained. In my view even two days delay ought to be satisfactorily explained for the court to exercise its discretion in granting leave to file appeal out of time. Even when an intended appeal is meritorious, and the delay has not been explained, leave ought not be granted.

7. In **Misc. Application NAI 98 of 2013 Aviation Cargo Support Ltd -vs- Mark Freight Services Ltd (2014) K**

The Court of Appeal expressed itself that where delay is not explained, leave ought not be granted.

Further in **Christopher Mugo Kimotho -vs- AG Civil Application No. 131 of 2008** the court declined to grant leave to file appeal out of time because the delay was not explained. Delay and in action by the applicant in the manner stated above is inexcusable and the court will not assist an applicant who is indolent and is guided by the maxim -

**“equity aids the vigilant not the indolent.”**

Leave to file the appeal out of time is denied.

8. On the issue of stay of execution pending hearing of this application, it is clear what direction the court has taken.

I agree with the Respondents submission that no prayer for stay of execution pending hearing and determination of the intended appeal was sought.

Now that this application has been found to be unmeritorious, and dismissed, it follows that the prayer for stay of execution is likewise dismissed. It cannot stand on its own. It would be futile and an academic exercise to go into the merits or otherwise of that prayer.

In its totality, the application dated 15<sup>th</sup> June 2015 is dismissed with costs.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of January 2016.**

**JANET MULWA**

**JUDGE**