



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**MISC. CIVIL APPL. NO. 156 OF 2012**

**JOSEPH MURAGURI MBITU .....APPLICANT**

**Versus**

**FRANCIS NGARI WAMUNYU.....RESPONDENT**

**RULING**

1. The Application is a notice of motion dated 12th November 2012 brought under order 42 rule 691(2)(3) and order 50 rule 5 for orders
  - i. Leave to file his appeal against the ruling of subordinate court dated 1st December 2008 in Nyeri CMCC No. 607 of 2014 out of time.*
  - ii. Stay of execution of the decree and all consequential orders issued by the subordinate court in Nyeri Criminal No. 607 A of 2004 until the intended appeal is heard and determined.*
  - iii. The subordinate court be compelled to furnish the applicant with certified copies of the proceedings and judgment within 14 days.*
2. It is supported by the affidavit of Joseph Muraguri Mbitu the applicant wherein he deponed that the respondent sued him seeking order that he transferred to him 0.5 acres out of land NYERI/MWEIGA/304 or in the alternative a refund of Ksh. 62,500/- plus all expenses incurred to in connection with the sale agreement.
3. That he refunded Kshs. 62,500/- by way of a cheque No. 000241 and therefore the subordinate court misdirected itself in entering judgment for the deposit paid of Ksh. 62,500 plus a further Ksh. 62,500/- for alleged breach of contract.
4. That his Advocate applied for certified copies of proceedings and judgment which have not been supplied to date and that he has been served with notice to show cause why execution should not be issued against him and he stands to suffer loss since his appeal raised weighty issues of law with overwhelming chances of success.
5. The application is opposed by the respondent through a replying affidavit wherein the respondent deponed that the application is egregious and has been filed too late and only prompted by service of notice to show cause upon the applicant.
6. That the applicant ought to have obtained hand written copies of the proceedings and judgment and filed the appeal within time and that there is no annexed draft memorandum of appeal or ruling which he is seeking to stay.
7. That the applicant was granted conditional stay to act within three calendar months but did not and that on 27th September 2012 (26 calendar months later) he filed a motion to set aside the order for stay which was duly granted by court.

8. There are two issues herein which the court ought to deal with namely enlargement of time to file appeal and stay of execution pending the intended appeal.
9. On the enlargement of time order 50 rule 6 gives the court powers to enlarge time and provides as follows:

***“Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge such time upon terms (if any) as the justice of the case may require and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed at provided that cost of any application to extend such time and any order made therein shall be borne by the parties making such application unless the court order otherwise.”***

10. On the other hand section 79G of Civil Procedure Act provides as follows:

***“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for the preparation and delivery of the appellant a copy of the decree or order provided that the appeal may be admitted out of time if the appellant satisfy the court that he had good and sufficient cause for not filing the appeal in time.***

11. The applicant has explained that the same is unable to serve the typed copies of the proceedings judgment and decree thereon to enable them file the appeal despite having paid for the same which allegation has not been disputed by the respondent and I am therefore of the considered opinion that though the applicant should have filed a memorandum of appeal while awaiting the typed copies of proceedings I consider the reason given sufficient enough having taken into account the justice of this matter.
12. I will therefore grant leave to the applicant herein to file appeal out of time which appeal must be filed within the next 14 days from the date herein.
13. On the issue of stay pending appeal I have noted that since the appellant has been granted conditional stay in the lower court and noting that there is no appeal filed yet I shall grant the applicant temporary stay upon the said terms pending the filing of a formal application for stay after the 14 days herein should the same file the appeal failure of which execution to proceed.
14. In the interest of justice in this matters I hereby order the subordinate court to furnish the applicant with the certified copies of proceedings and judgment in Nyeri CMCC No. 607A of 2004 within the next 14 days from the date herein.

Dated and delivered at Nyeri this 26th day of September 2013.

J. WAKIAGA

JUDGE

26/9/2013

Before Hon. Justice J. Wakiaga

court clerk - Wanjohi

Mr. Muthoni for the Respondent.

Mr. Mugo for Muthui Kimani for applicant.

Court: Ruling delivered in open court in the presence of the above named.

J. WAKIAGA

JUDGE