



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL MISC. APPLICATION NO. 69 OF 2011**

**DORCAS WAYUA MUSYOKA .....PLAINTIFF/ RESPONDENT**

**VERSUS**

**1. DAVID MUTUA**

**2. MBUTHI SAMUEL ..... DEFENDANTS/ INTENDED APPELLANTS**

**RULING**

Before me is an application by way of Notice of Motion dated 24<sup>th</sup> March 2011 filed by the Defendants, intended Appellants. It seeks leave to file appeal out of time from the decision in Machakos CMCC No. 1142 of 2009 delivered on 17<sup>th</sup> June 2010. It also seeks stay of execution of the judgment and decree pending hearing and determination of the appeal.

The application is opposed by the Plaintiff on the ground that there was inordinate delay in filing the application for leave to appeal out of time, that is, 10 months. On stay, the Plaintiff opposes the request on the ground that the Defendants will not suffer substantial loss, if the stay is not granted.

I observe that the Defendants were granted stay of execution pending hearing of this application, on condition that they deposit Kshs.365,000/= in court.

I have considered the application. I have also perused the draft memorandum of appeal.

In my view, the Defendants have explained the delay in filing appeal – See HENRY MBIJIWE –VS ERASTUS NZIOKA KILAKA – Machakos H.C. Misc. Appl. No. 158 of 2009 cited by the Plaintiff/Respondent. The delay in filing an appeal was caused by stay orders issued by the court on 25<sup>th</sup> June 2010 in Nairobi High Court Petition No. 231 of 2010. Those orders affected all cases in which Directline Assurance Co. Ltd were the insurers. The present matter was one of them. This application for leave to appeal out of time was filed on 25/03/2011 after the said stay orders were vacated on 1<sup>st</sup> March 2011. I find no inordinate delay in bringing the present application, as the delay has been adequately explained.

I find no reason to depart from the initial decision of this court for deposit into court of Kshs.365,000/=. In my view, the said cash deposit provides adequate security for the appeal, in favour of the winning party.

I therefore allow the application and order as follows:-

- 1. I grant prayer 3 of the application. The appeal will be filed in the next 14 days.**
  
- 2. I grant prayer 4 of the application, provided the Defendants deposit into court Kshs.365,000/=. This means that the amount already deposited in court as previously ordered will remain so deposited till determination of the appeal. If the appeal is not filed within 14 days, the stay order herein will automatically lapse.**
  
- 3. Costs of the application in the cause.**

Dated and delivered at Machakos this 12<sup>th</sup> day of **March** 2012.

**George Dulu**

**Judge**

**In presence of:-**

Mr Langat for the Defendants/Intended Appellants

Mr A.K. Mutua for the Plaintiff/Respondent

Nyalo – Court clerk