



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

**Miscellaneous Civil Application 103 of 2009**

**1. ATTORNEY-GENERAL**

**2. JOHNSTON M MUINDE.....APPLICANTS**

**V E R S U S**

**ONAMU APINDI.....RESPONDENT**

**R U L I N G**

1. In this application (**notice of motion dated 7<sup>th</sup> April 2009**) one main order is sought -  
**“That time limited by section 79G of the Civil Procedure Act (Cap 21) be enlarged to enable the Applicants appeal against the (order) of the Senior Resident Magistrate, Kitui (dated 7<sup>th</sup> October 2008 in Kitui PMCC No. 127 of 2006)”.**
2. By that order a preliminary objection to the Respondent’s suit made by the Applicants was overruled.
3. The grounds for the application appearing on the face thereof are -
  - (i) That the date of ruling “kept on being postponed... by the court”
  - (ii) That the Applicants were never informed of the date when the ruling was finally read.
  - (iii) That the Applicants only came to learn (that) the ruling had been read after one month...on 3<sup>rd</sup> November 2008.
4. There is a supporting affidavit sworn by one EPHANTUS N. NJUGUNA, a Litigation Counsel at the Attorney-General’s Chambers having conduct of the matter. It provides the evidential backing of the grounds for the application.
5. The Respondent has opposed the application by replying affidavit filed on 14<sup>th</sup> December 2009. From that affidavit the following grounds of opposition emerge -
  - (i) That the Applicants were not diligent.
  - (ii) That there is no merit in the application.

6. I have considered the submissions of the learned counsels appearing. No authorities were cited.
7. It is common ground that, given the nature of the proceedings that resulted in the order sought to be appealed against, leave of the court to appeal was necessary. Though at paragraph 9 of the supporting affidavit it is stated that such leave was sought by chamber summons dated 19<sup>th</sup> December 2008, it has not been disclosed if the application was heard and leave granted. At any rate, no such leave is annexed to the supporting affidavit.
8. Assuming that there was leave to appeal (and as already noted there is no evidence of the same), **section 79G of the Civil Procedure Act** provides as follows-
- “Every appeal from a subordinate court to the High Court shall be filed within a period of thirty (30) days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**
- Provided 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 appeal in time.”**
9. Even accepting that the Applicants learnt of the reading of the ruling (on 7<sup>th</sup> October 2008) on 3<sup>rd</sup> November 2008, it is to be noted that the present application was filed on 8<sup>th</sup> April 2009. Why did they wait five (5) months to apply?
10. The Applicants explain that the delay thus: they were supplied with the copies of the proceedings and ruling on 12<sup>th</sup> February 2009. But to exclude the time required for preparation and delivery of the ruling (order) there must a certificate of delay by the lower court. There is no such certificate.
11. In any case, after receiving the proceedings and ruling on 12<sup>th</sup> February 2009, why did the Applicants wait until 8<sup>th</sup> April 2009 to apply? There is simply no explanation given.
12. The Applicants have not placed before the court sufficient material to enable it to exercise its discretion in their favour, assuming that there was leave to appeal. The application has no merit and the same is dismissed with costs to the Respondent.
13. The delay in preparation of this ruling is deeply regretted. It was occasioned by my poor state of health the last few years. Thank God I have now regained my full health.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**

**JUDGE**

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**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2012**

**ASIKE-MAKHANDIA**

.....  
**JUDGE**