



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISC. APPLICATION NO 66 OF 2010**

**ANTHONY KANYI MATHENGE.....APPLICANT**

**VERSUS**

**EPHRAIM GITARI NJUGUNA ).....RESPONDENTS**

**PURITY WANJIRA MURIITHI ).....RESPONDENTS**

**R U L I N G**

In the notice of motion dated 9/06/2010 the applicant seeks

- 1. That time be enlarged within which to file appeal from the judgment of the learned trial magistrate delivered on 25/9/2002 in Kerugoya PMCC No. 314/2001.**
- 2. That status quo in respect of L.R. NO. KABARE/GACHIGI/1348 be maintained.**

It is clear that the applicant was aggrieved by the decision of the trial court rendered on 25<sup>th</sup> September 2002 and filed Embu HCCA No. 43 of 2002 on 14/10/2002. The said appeal was heard and determined on 11/05.2010, albeit on technicality.

It is the contention of the applicant that at the time the High Court determined the appeal, his Advocates on record was out of the country. On returning from the alleged trip, the said advocates informed the applicant to look for another advocates to pursue his claim and/or cause of action. It is then M/s Maina Kagio & Co. Advocates were instructed.

It appears on instructions from the applicant, M/s Maina Kagio & Co. Advocates filed the present application under my determination. The question for my determination is whether this court has jurisdiction to entertain prayers sought by the applicant. In considering that question, it is important to understand that the applicant's appeal was filed within the mandatory period. It was heard and determined. It is the contention of the applicant that the said appeal was determined on technicality. It means the question of filing an appeal out of time from the decision of the learned trial magistrate in PMCC No 314/2001 cannot arise.

Equally the question and/or issue of enlarging time within which to file an appeal from the judgment of the lower court is also a non issue. It is non issue because the applicant filed an appeal within time but his appeal was dismissed on what he calls a mere technicality. If the applicant's appeal was heard and determined, then the issue of filing an appeal out of time cannot be a legitimate issue for canvassing and determination. No doubt the applicant filed a proper appeal which was heard and determined conclusively by a court of competent jurisdiction.

Indeed, it is important to appreciate that the applicant wants to have a second bite at the cherry. And in doing so, it is essential to approach the court in a proper and diligent manner. The application is an attempt to set aside the decision rendered by my learned sister through filing another appeal against the decision of the lower court. In my view the route taken and/or adopted by the applicant cannot be allowed, because it would make nonsense of a decision of a court of concurrent jurisdiction.

The question of unavailability of his advocates at the time, the decision of 11/05/2010 was delivered cannot be a basis, to seek an enlargement of time for a matter already filed, heard and determined by a court of competent jurisdiction. The issue of delay whether deliberate and/or explained is not also a factor in this application.

It is therefore my decision that the reasons advanced by the applicant cannot stand and cannot correct and/or substitute the decision rendered on 11/05/2010. The application is a clear attempt to side step or set aside the decision made on 11/05/2010 striking out appeal No. 43/02. The route to reinstate the appeal of the applicant through the present application is utterly misguided. It is misguided because, the applicant is using the wrong process, procedure and/or route to access a right which he genuinely lost by way of determination of his appeal against the decision of the lower court. I think there are two routes available to the applicant and the prayers sought do not fall within the perimeters of the said routes.

I reckon that the present application is incompetent to address the grievances of the applicant. Consequently it is my determination that the application an abuse of the court process. It is dismissed with costs to the respondent.

Dated, signed and delivered at Embu this 13<sup>th</sup> day of April, 2011.

**M. WARSAME**

**JUDGE**

***In the presence of:- Mr. Maina for the Applicant, N/A for Respondent in open court.***