



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**MISC. CIVIL APPLICATION NO.154 OF 2010**

**JULIUS NJUKI GACHOKI.....APPLICANT**

**VERSUS**

**KASAM NJOGU.....RESPONDENT**

**RULING**

1. By a notice of motion dated 9<sup>th</sup> October, 2010, Julius Njuki Gachoki (hereinafter referred to as the applicant), seeks to have time extended under Section 79G of the Civil Procedure Act and Order XLIX Rule 5 of the Civil Procedure Rules, for him to file his intended appeal. The applicant contends that he was prevented from filing his intended appeal by the lower court's failure to provide him with copies of proceedings of the lower court in time.

2. The applicant's counsel Morris Njagi has sworn an affidavit in support of the application in which he explains that the judgment intended to be appealed against was delivered on 17<sup>th</sup> November, 2009, proceedings were applied for on 23<sup>rd</sup> November, 2009, but the same were not supplied until 24<sup>th</sup> August, 2010, a certificate of delay from the lower court has been exhibited.

3. Kassam Njogu who is the respondent to the intended appeal objects to the application maintaining that the same lacks merit, is incompetent and bad in law. Ms Kaara who appeared for the respondent pointed out that the applicant did not annex any draft memorandum of appeal. Counsel further points out that the applicant has not explained why he collected the certificate of delay two weeks after it was issued. It was further pointed out the certificate of delay was issued under Rule 81 of the Court of Appeal Rules which is not applicable in this matter.

4. I have carefully considered this application and the submissions made before me. Section 79G of the Civil Procedure Act, states 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 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.”***

5. In this case, no copy of the judgment or decree intended to be appealed against has been

availed. However, counsel for the applicant has deponed that the judgment was delivered on 17<sup>th</sup> November, 2009. Therefore, accepting that to have been the date of the decree or order, the appeal ought to have been filed within 30 days from that date excluding any period certified by the lower court as necessary for the preparation and delivery to the applicant of a copy of the decree or order.

6. The certificate of delay issued by the lower court talks about the time necessary for the preparation and delivery of the certified copies of the proceedings and judgment. Section 79G of the Civil Procedure Act does not make any exception for time required for the preparation of copies of proceedings and judgment. Therefore, the certificate of delay issued by the lower court does not satisfy the requirement of Section 79G of the Civil Procedure Act. But even assuming that it did, judgment having been delivered on 17<sup>th</sup> November, 2009 and the applicant having applied for certified copies of the proceedings and judgment on 23<sup>rd</sup> November, 2009, and the period from 23<sup>rd</sup> November 2009 to 24<sup>th</sup> August 2010, being excluded as period necessary for the preparation and delivery of the proceedings and judgment, time started running again on 25<sup>th</sup> August, 2010 and therefore this application having been filed by 12<sup>th</sup> October, 2010. The applicant has thus exceeded the allowance given to him for the preparation of the proceedings and judgment.

7. I am mindful of the fact that there is a proviso for the Court to admit an appeal out of time if it is satisfied that the applicant had sufficient cause for not filing the appeal in time. Apart from the fact that the applicant contends that they were awaiting certified copies of proceedings and judgment, the applicant has not given any reason why certified copies of proceedings and judgment had to be awaited before the appeal could be filed. Indeed, not even a copy of the judgment has been exhibited nor a draft memorandum of appeal, to demonstrate any complexities in the case that made it necessary for counsel to await the proceedings and judgment before preparing the appeal. Moreover, even after obtaining the certified copies and the proceedings, counsel did not move with speed, but took almost another month before filing this application. All in all, I find that the applicant has not satisfied this court that there is a good and sufficient cause to justify extending time for him to file his appeal.

8. Accordingly, I decline to extend time for the applicant to file his intended appeal. I dismiss the application with costs.

**Signed this 20<sup>th</sup> day of May 2011.**

**H. M. OKWENGU**  
**JUDGE**

**Dated and delivered this 31<sup>st</sup> day of May 2011.**

**G. DULU**  
**JUDGE**

In the presence of: -

.....for the applicant  
..... for the respondent  
..... Court clerk