

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISC. CIVIL APPLICATION NO.24 OF 2011

JOHN H. O. MWANZA APPLICANT

V E R S U S

LAWRENCE MUBATSI KUNDU RESPONDENT

R U L I N G

The applicant moved this court by notice of motion pursuant to the provisions of **Section 79G** of the **Civil Procedure Act** seeking orders of the court for extension of time by which he may file his appeal against the decision of the trial magistrate in **Mumias SRM CCC No.433 of 2008 John H. Mwanza v Lawrence M. Kundu**. The applicant explained the reason why he did not file the appeal within the requisite period after the delivery of judgment was because it took time before he was supplied with the duly certified copies of the proceedings from the subordinate court. He was issued with the proceedings on 18th January 2011. Another reason he failed to file the appeal in time was because he had difficulty in raising the money to pay his advocate to lodge the present appeal. He urged the court to allow the application since in his view he had a good appeal which ought to be ventilated on its merits. The application is supported by the annexed affidavit of the applicant. The application is opposed. The respondent swore a replying affidavit in opposition to the application. In the said replying affidavit, the respondent basically raised issues regarding the merit or otherwise of the appeal. It was the respondent's opinion that the appeal did not have merit and therefore the court would be wasting valuable judicial time if it allowed the application.

At the hearing of the application, this court heard oral rival submissions made by Mr. Kasamani for the applicant and by Mr. Simasi for the respondent. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respecting opposing positions. Under **Section 79G** of the **Civil Procedure Act**, this court has power to extend time in which a party aggrieved by decision of a subordinate court may appeal to the High Court if it is satisfied that there are good and sufficient reasons for the delay. The Section of the **Civil Procedure Act** is reinforced by the provisions of **Order 50 Rule 6** of the **Civil Procedure Rules** which provides that the court may extend time if the justice of the case requires. In the present application, the applicant explained that he was not able to file the appeal within the stipulated period because of the fact that he was unable to raise funds in time to pay his advocate to lodge the appeal. He also stated that the typing of proceedings of the subordinate court took longer than the period that he was required to lodge the appeal. The respondent opposed the application basically by challenging the merits of the intended appeal.

Having evaluated the facts of this application, it was clear to the court that the dispute between the applicant and the respondent relates to ownership of land. The applicant was aggrieved by the decision of the subordinate court which dismissed his suit. He wishes to exercise his constitutional right of appeal. The reasons given by the applicant for delay in lodging the appeal in time are sufficient and persuasive to enable this court exercise its discretion in his favour. It was clear from the application that the applicant is desirous of pursuing his appeal before this court. If there is any prejudice that the respondent will suffer, he shall be compensated by an award of costs.

In the premises therefore, this court exercises its discretion in favour of the applicant. The applicant is granted leave to appeal out of time. The appeal shall be filed and served within fourteen (14) days of

today's date. The applicant shall pay to the respondent the sum of KShs.5,000/= being the costs of this application. The said amount shall be paid within thirty (30) days of today's date or in default, the respondent shall be at liberty to execute. It is so ordered.

DATED AT KAKAMEGA THIS 22ND DAY OF JUNE 2011

L. KIMARU
J U D G E