



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**MISC. CIVIL APPLICATION NO. 3 OF 2011**

**FRESHIA MUMBI MAINA.....APPLICANT**

**Versus**

**MUTHONI MWEHA.....RESPONDENT**

**RULING**

Freshia Mumbi Maina, the applicant herein, has taken out the motion dated 20<sup>th</sup> January 2011 pursuant to the provisions of section 79G of the Civil Procedure Act whereupon she applied for leave to appeal out of time against the ruling of honourable Wambilyanga, learned Resident Magistrate delivered on 9<sup>th</sup> August 2010 vide Nyeri C.M. Award case No. 9 of 2008. The applicant filed an affidavit she swore in support of the motion. Muthoni Mweha, the respondent herein, filed a replying affidavit to oppose the motion.

The applicant averred that she was unable to file her appeal within time because the trial court delayed to supply the typed copies of proceedings and ruling. A certificate of delay was annexed to the applicant's affidavit. The applicant further averred that she has a good appeal with high chances of success. The respondent urged this court to dismiss the motion on the basis that the intended appeal has slim chances of success.

I have considered the rival submissions and the material placed before this court. The discretion to enlarge time to appeal out of time is unfettered. Under s. 79G of the Civil procedure Act, the applicant is required to satisfy the court that he had good and sufficient cause which prevented him or her from filing the appeal within time. The applicant has simply given one main reason, that is to say that there was a delay in getting typed proceedings and ruling supplied. It is also said that the appeal has overwhelming chances of success.

From the material placed before this court, it would appear the applicant had filed a complaint before the Central Provincial Land Disputes Appeals Tribunal claiming for the eviction of the Respondent from L.R.

no. Karemeno/Block 4/134. In the end the Provincial Land Dispute Appeals Tribunal stated inter alia that the Respondent should vacate the land and move to settle on L.R. no. Mugunda/Karemeno Block 1/228. In its decision delivered on 25<sup>th</sup> July 2007. the applicants successfully applied for the decision to be adopted as the judgment of the Chief Magistrate's court, vide Nyeri C.M. award case no. 9 of 2008 on 30<sup>th</sup> July 2008. The applicant said she applied for the eviction of the Respondent from the aforesaid land but her application was dismissed on 8<sup>th</sup> July 2009. The applicant avers that she came to know of the dismissal order when she was served with execution papers for the recovery of costs in April 2010. The applicant states that she came to learn that her application was dismissed because there was a confusion in the parcel number. It is said that the actual land reference was L.R no. Mugunda/Karemeno/Block 1/143 instead of L.R. no. Mugunda /Karemeno/block 1/134. The applicant said she again filed an application to review the dismissal order but the application was dismissed on 9<sup>th</sup> August 2010 on the basis that the court lacked jurisdiction to correct the error. She said she instructed her advocated to appeal against the order. The applicant further claimed that she took time to obtain proceedings. After a careful consideration of the submissions I am convinced that the applicant has given good reasons to explain what prevented her from appealing in time. She was supplied with typed proceeding and ruling when the time to appeal had lapsed. The Respondent did not controvert this fact. I have considered the draft memorandum of appeal and I find that the same raises substantial arguable points of law.

I hereby allow the motion. I grant the applicant 10 days leave to file an appeal out of time. Costs of the motion to abide the outcome of the intended appeal.

Dated and delivered this 15<sup>th</sup> day of July 2011.

J.K. SERGON  
JUDGE

In open court in the presence of Gichohi h/b for G.K. Kibira for the Respondent and Muthoni for the Applicant.

J.K. SERGON  
JUDGE