



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**MISC. APPLICATION NO. 56 OF 2011**

FRANCIS KIMANI MACHARIA.....1<sup>ST</sup> APPLICANT

KANYORO ALICE.....2<sup>ND</sup> APPLICANT

VERSUS

DAMARIS WANJIKU MUIGAI (Suing on behalf of the Estate of

MUIGAI CHEGE (DECEASED).....RESPONDENT

**RULING**

**Francis Kimani Macharia** and **Kanyoro Alice**, the applicants herein, took out the Motion dated 1<sup>st</sup> April 2011 in which they asked for the following orders:

1. *That this application be certified urgent, service be dispensed with thereof and the same be heard ex part in the first instance.*
2. *That this Honourable Court be pleased to order stay of execution of the judgment and decree made by the Honourable Magistrate's court at Kigumo on the 30<sup>th</sup> April 2010 in Civil Case Number 237 of 2008 pending the hearing and determination of this application.*
3. *That the proposed Appellants be granted leave to appeal out of time against the whole judgment of Hon. Mr. Mutuku Senior Principal Magistrate delivered on 30<sup>th</sup> April 2010 at Kigumo.*
4. *That the Memorandum of Appeal annexed hereto be deemed as duly filed and served.*
5. *That the costs of this Application be provided for.*

The Motion is supported by two affidavits of Lilian Waweru sworn on 1<sup>st</sup> April 2011 and 7<sup>th</sup> May 2011 respectively.

The Applicants' main ground argued in support of the Motion is that they were not served with a notice for the delivery of the judgment which was delivered on 30<sup>th</sup> April 2010 until the Respondent's advocate wrote to the Applicants' advocate on 17<sup>th</sup> May 2010 to notify them that judgment had been entered against them. It is the Applicants' submission that the subordinate Court's file went missing hence they were unable to take the necessary steps to file the appeal within time. The applicants appear to have filed an application to seek for similar orders as those sought in this matter on 15<sup>th</sup> June 2011 but the same was ordered struck out on 24<sup>th</sup> August 2010 on the basis that an execution of the decree and proceedings had been stayed by this Court vide **Nairobi H.C.C.C. No. 231 of 2010**. The affidavit evidence indicates that the Applicants too filed another miscellaneous application using the case number of the already struck out Motion. The Applicants argued that the Applicants have an appeal with high chances of success. I have considered the affidavit evidence plus the oral submissions of learned counsels from both sides. It is important to note that the Respondent herein, Damaris Wanjiku Muigai did file a replying affidavit to controvert the facts deponed by the Applicants. In other words there is denial that the applicants were unable to file the appeal in time because the lower court file could not be traced hence proceedings could not be supplied. It is also not denied that in the first instance there was a delay to file the appeal because the Applicants were not given notice of delivery of judgment. The Respondent's advocate urged this court to find that there was an inordinate delay in filing the application for leave to appeal out of time. Under *Section 79G* of the Civil Procedure Act, an aggrieved party from the decision of the subordinate court was required to file an appeal within a period of 30 days. This Court was given power to extend time to appeal where good and sufficient reasons are provided to the Court. I am convinced the reasons advanced by the Applicants are good and sufficient. I agree that there was an inordinate delay to file the current motion. I am alive of the fact that the trial court's file went missing almost immediately after judgment was delivered. In the circumstances delay was bound to occur. I am convinced I should grant the Applicants leave to appeal out of time. I grant the Applicants leave to appeal out of time. The draft Memorandum of Appeal is deemed to have been filed and served out of time with leave of court.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of November 2011.***

**J. K. SERGON**  
**JUDGE**

In open court in the presence for Mr. Mungai holding brief Mugo for the Applicant. No appearance for the Respondent.