



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Miscellaneous Case 119 of 2008

ALFRED MURIITHI NJERU.....APPLICANT

VERSUS

SIMON MUNYI GACHOKI.....RESPONDENT

RULING

I have heard counsel on the application dated 22/8/2009. The application basically seeks 2 orders:- i.e an order for leave to appeal out of time under Order XLIX Rules 5 of the Civil Procedure Rules and an order for stay of execution. I have considered the grounds on its face and the supporting affidavit dated 22/8/2008. Counsel for the Respondent filed what he dubbed a notice of intention to raise a preliminary objection dated 11/11/2009 but what he did in court was not to raise the preliminary objection but to oppose the application. I had not seen the said document then as the court copy had been misfiled and I was meant to believe that the said document contained grounds of opposition. It was on that premise that we proceeded. I have looked at the document now and I must say that both counsel misled the court on the nature of the same. I have considered the same along with the said application. I note that the subject matter herein is land and usually whichever party loses always feels that they lost unfairly and they should therefore be given another chance. I agree with Mr Githinji for the Respondent that the inordinate delay was not sufficiently explained. I will nonetheless allow the applicant leave to file an appeal out of time so that he can be heard.

On the 2nd prayer for stay of execution, I find that however magnanimous and indulgent, I want to be to the applicant, I cannot give him that order.

Firstly, he has not moved the court properly. His application has only cited Order XX1 with no Rule whatsoever. Order XX1 has 91 Rules. It is not my duty or responsibility to pick out the Rule he wanted to rely on. On that ground only, that prayer would fail.

I nonetheless also note that the defect notwithstanding, counsel did not even remotely attempt to convince the court that the stay was merited. He did not even make a feeble attempt to satisfy the necessary ingredients an applicant needs to satisfy before a stay can be granted. Does he have sufficient cause; was the application filed timeously; will he suffer any loss or prejudice if the stay is not granted; will his intended appeal be rendered nugatory; has he offered any security for costs etc. I have no basis whatsoever to grant the prayer for stay of execution. I will therefore grant then leave to file the appeal out of time but decline to grant them a stay of the lower court's Judgment and decree. The Appeal must be filed within 14 days from the date of this ruling.

Each party will also bear its own costs of the application.

**W. KARANJA
JUDGE**

Delivered, signed and dated at Embu this 26th day of April 2010.
In presence of:-Mr. Kariithi for Applicant.