



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI  
Miscellaneous Application 26 of 2010**

**CHARLES MAINA NDIRITU.....PLAINTIFF**

**VERSUS**

**SIMON MWANGI GITAU.....DEFENDANT**

**RULING**

CHARLES MAINA NDIRITU, the applicant herein, took out the motion dated 8<sup>th</sup> March 2010 in which he sought for the enlargement of time within which he can lodge an appeal against the judgment of the Resident magistrate's court delivered on 30/12/2009 vide Kigumo R.M.C.C.C. No. 29 2007. The motion is brought under Order XLIX rule 5 of the Civil Procedure Rules and under sections 3A and 95 of the Civil Procedure Act. The motion is supported by the affidavit of Lilian Munyiri sworn on 8<sup>th</sup> March 2010. Simon Mwangi Gitau opposed the motion by filing the replying affidavit he swore on 19<sup>th</sup> March 2010.

The applicant has beseeched this court to grant the orders because the delay to file an appeal on time was due to an inadvertent delay on the part of the applicant's insurer in giving instructions whether or not to appeal against the finding on liability and damages. The applicant further averred that the appeal has high chances of success. It is argued that the applicant will show on appeal that the award on damages was excessive and erroneous.

The Respondent urged this court to dismiss the motion on the ground that the reason given for the delay is not plausible. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the motion. This court is given a wide discretion under section 79G of the Civil Procedure Act to enlarge time to appeal so long as the applicant gives good and sufficient cause. The main reason advanced by the applicant which made him to delay in filing the appeal is that Gateway Insurance Co Ltd, his insurer delayed in deciding whether or not to appeal against the subordinate court's judgment. M/S Lilian Munyiri, the Deputy Legal Officer of Gateway Insurance CO Ltd admitted that it was her mistake which caused the delay. She averred that she inadvertently delayed to give instructions to appeal. I have carefully considered the rival arguments. It is apparent that the insured, the applicant herein, was not to blame for the delay to file an appeal within time. The delay is attributed to the applicant's insurer. Its legal officer has owned up. I am impressed by the forthrightness in the averments of M/S Lilian Munyiri. I am convinced she made a genuine mistake in failing to give instructions in time to the advocates appearing in matter on behalf of the applicant. I am of the view that the applicant should not be punished for the mistakes of his insurer. On the other hand the plaintiff is anxious to enjoy the fruits of his judgment. It is better for the plaintiff to suffer due to the little delay than to condemn the defendant for the mistakes of his insurer. In the circumstances of this case I am inclined to allow the motion but I will award costs of the motion to the plaintiff to justify his patience.

In the end I grant the applicant leave of 15 days to file an appeal out of time against the judgment of Kigumo Resident Magistrate's court delivered on 30/12/2009 vide Kigumo R.M.C.C.C No. 29 of 2007. Costs of the motion is given to the plaintiff/respondent in any event.

*Dated and delivered this 7<sup>th</sup> day of May 2010.*

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

In open court in the presence of Miss Meenye holding brief for Njomo for the Applicant. N/a Omondi for respondent.