



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**Miscellaneous Application 53 of 2010**

**WINSTONE MURIITH NYAGA.....APPLICANT**

**VERSUS**

**STEPHEN KARURI NJAGI.....RESPONDENT**

**R U L I N G**

The Applicant through H.M.J. Utuku Advocate is seeking this court's leave to file an Appeal out of time. He says that he had filed an Appeal earlier on but the court struck it out for having been filed without leave. The same is opposed by counsel for the Respondent vide his grounds of opposition dated 22.05.2010. According to counsel for the Respondent the Applicant cannot move this court for leave under Section 79G of the Civil Procedure Act as he had already filed an Appeal which was struck out by the court for having been filed without leave. It is true that the Applicant ought to have moved the court for leave to file the Appeal out of time under Section 79G of the Civil Procedure Act in the first instance. He has not explained why he did not do so in his Affidavit. I do not nonetheless agree with Mr. Njage's submission on Section 79G of the Civil Procedure Act. Where an Appeal has been struck out my understanding is that the Applicant can still come back to court and seek an extension of time to enable him file a compliant Appeal. It is unfortunate that Mr. Utuku did not address me on that issue. I nonetheless feel that he is in order to bring his application under Section 79G and O.XLIX Rule 5 of the Civil Procedure Rules.

The law nonetheless enjoins an applicant to show the court sufficient cause as to why the appeal was not filed on time and explain the delay.

Granting leave to file an Appeal out of time is at the discretion of the court. The issue that a court needs to consider before exercising this jurisdiction in favour of an Applicant will include the length of the delay; reasons for the delay, possibly chances of the Appeal succeeding and ultimately the degree of prejudice to the Respondent if the Application is granted. In this case, I have noted that the length of the delay after receiving the typed proceedings from the court and the certificate of delay was not inordinate. Indeed it was less than a month and had Mr. Utuku then moved the court for leave, the same would have been granted as matter of course.

He has told the court that they were not informed by the Deputy Registrar about the striking out of the Appeal until they found out themselves from the Registry later. That assertion was not controverted. I note also that I have not been informed what prejudice the Respondent is likely to suffer if the application is allowed. Having balanced those 2 sides, I am satisfied that the balance tilts in favour of the applicant. Let him file his Appeal and the same be heard on merit whatever it is worth.

I will therefore allow this Application which I hereby do with costs to the Respondent. The appeal be filed within 7 days from the date of this Ruling.

**W. KARANJA  
JUDGE**

Delivered, dated and signed at Embu this 7<sup>th</sup> day of July 2010.

**In presence of:- Mr. Njage for Respondent . Mr. Utuku was**

**Absent.**