



**REPUBLIC OF KENYA
IN THE HIGH COURT
AT BUNGOMA
MISC. CIVIL APPL. NO.154 OF 2009**

CHARLES S. WEYAO
 **APPLICANT**

~VRS~

HERBERT M. TOYWA
 **RESPONDENT**

RULING

The Applicant Charles S. Weyao in his application dated 24/07/2009 brought under section 79 G of the Civil Procedure Rules seeks for orders that he be granted leave to appeal out of time. The parties recorded a consent that the court prepares its ruling based on the affidavits of the parties.

In his supporting affidavit and on the face of the application, the Applicant states that after requesting for certified copies of proceedings the court file went missing as a result of which the time allowed for filing the appeal ran out. The Applicant also contends that he has good grounds of appeal. The Applicant wrote to the court on 17/02/2009 requesting for proceedings which was one day after the judgment was delivered. The bill of costs was assessed on 16/03/2009 with stay of execution for 45 days.

The Respondent opposed the application on grounds that the Applicant made no reasonable efforts to trace the court file since no correspondence on the missing file was addressed to the Deputy Registrar.

I note that the court file was available for filing of the bill of costs after the judgment. This is because the assessment of costs was done on 16/03/2009 one month after the judgment by consent of both parties. It is on that date that the 30 days for appeal were expiring. Thereafter the Respondent filed an application in the same file and served the Applicant with a letter to come and fix a hearing date by consent. This is evidence that the file was available in the registry. After the Applicant applied for certified copy of proceedings, it appears he did not follow up the matter. The Respondent knew the file was available when his counsel appeared in court to record a consent on the costs. This was only one (1) month after the judgment. If the Applicant intended to appeal, he would have filed a notice of appeal as he waited for the proceedings. No such notice has been availed. I do not find the ground of the missing file tenable.

The Applicant filed this application on 28/07/2009. This was more than five (5) months after judgment. No reason has been given for this long delay. I agree with the Respondent that the issue of the missing file or the delayed proceedings ought to have been taken up with the court by the Applicant. This was not done because no such correspondence was annexed to the application. The Applicant is under a duty to explain this delay to justify the exercise of the court’s discretion in his favour.

On the ground that the Applicant’s appeal has high chances of success, I refer to the grounds in the annexed memorandum of appeal. The grounds raise a number of legal issues. However, in the absence of a copy of the judgment or the proceedings of the court, I find that it is not possible for me to assess

whether the appeal is likely to succeed or whether it is arguable.

I find that the Applicant has failed to convince this court that he deserves the orders sought. The application lacks merit and I dismiss it with costs.

F. N. MUCHEMI
JUDGE

Ruling dated and delivered on the 30th day of November, 2010 in the presence of Mr. Waswa for Nanzushi for the Applicant.

F. N. MUCHEMI
JUDGE