

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Misc. Civ. App. 301 of 2008

DAMACRIN MORAA (A minor suing through the next friend

ROBERT ONSARE ONGUTI)PLAINTIFF/RESPONDENT

versus

MICHAEL KAMAU KARINGA 2ND RESPONDENT

RULING

An application is filed by Michael Kamau Karinga by way of notice of motion dated 18th December 2008. The main prayer is long winded seeking leave and extended time be given to file an appeal. The other prayer seeks stay of proceedings of CMCC Nyeri No. 151 of 2008 pending the determination of appeal. In respect of the 2nd prayer there is no pending appeal. The court therefore cannot issue stay as prayed. From the affidavit in support of the application one is able to gather that the applicant raised a preliminary objection in the said suit at the lower court which was heard on 12th November 2008. That objection was dismissed. On it being dismissed the court granted the applicant leave to appeal. The court however proceeded to give a hearing date of the suit. The advocate for the applicant in his affidavit in support then stated:-

“That I was given to understand that our client was out of town and efforts to seek further instructions within the time limit required by the law to file this appeal were in vain.”

The case in the lower court proceeded for hearing on 10th December 2008 and is now fixed for further hearing on 18th February 2009. The deponent stated that if stay of proceedings is not granted the appeal would be rendered nugatory. He thereafter made a bare statement in his affidavit stating that the respondent had not obtained leave to file suit out of time in the lower court. The affidavit had no annexures relating to the lower court proceedings and I am therefore unable to apprehend what is deponed by the advocate for the applicant. The application was opposed on the basis that the lower court suit is only awaiting the completion of the defence case. Further the respondent deponed that there was no explanation given why there was a delay in filing the appeal after leave was granted. In my view the application has no merit. The applicant after his preliminary objection was dismissed through his counsel applied for leave to appeal. Leave was granted on 12th November 2008. It is to be assumed that when counsel made an application for leave to appeal out of time he had his client’s instructions to that effect. It therefore does not follow when he stated in his affidavit that after leave was granted his client was out of town and he was unable to seek further instructions. Once leave was granted all that was required was a memo of appeal to be filed. There is no explanation why it was not filed. It does look like the applicant’s advocate sought leave in the lower court in vain. There is no basis laid before court for granting an extension of the leave. Prayer No. 1 cannot be granted. Leave having been granted by the lower court there is no necessity of it being extended. What the applicant should have sought was an extension of time to file the appeal. He did not pray for that and also that prayer is defeated. In the end the application by notice of motion dated 18th December 2008 is hereby dismissed with costs to the respondent ROBERT ONSARE ONGUTI.

Dated and delivered this 10th day of February 2009

MARY KASANGO

JUDGE