



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL OF KENYA**

**AT MACHAKOS**

**CIVIL MISCELLANEOUS APPLICATION 19 OF 2007**

**DANIEL MUTUKU NGOVI ..... APPLICANT**

**AND**

**TITUS TUTA NGWILI ..... 1<sup>ST</sup> RESPONDENT**

**KANGUI TUTA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. I should begin by setting out the background to the Application dated 26/3/2007 which I will shortly determine. The originating proceeding in this miscellaneous cause is a Notice of Motion dated 5/2/2007. The substantive prayer in that Motion is that of leave to appeal out of time. A collateral prayer is that of stay of execution initially pending hearing inter-partes and later pending the hearing and determination of the appeal that was intended to be filed.

2. On 7/2/2007, Sitati J granted the interim order pending hearing inter-partes with the condition that the execution of the decree in **CMCC No. 958/1997** subject of the intended appeal be stayed upon deposit into court of Kshs.20,000/= within 7 days of the order being made. The money was only deposited on 29/3/2007 but prior to that, on 26/3/2007, the present Application was filed and from a casual reading of it, what the Applicant is seeking is a reinstatement of the orders of stay of extension of time to deposit the Kshs.20,000/=. What of course happened is that the Applicant, three (3) days after filing the Application decided to deposit the money and so the money is already safely in court.

3. From the Affidavits of the Applicant and that of his advocate, Mrs Florence Mwangangi both sworn on 26/3/2007 what caused the delay in depositing the money was that although the banker's cheque in favour of this court was issued by Kenya Commercial Bank on 12/2/2007 (annexture "DMNI") both deponents state that the cheque was misplaced in the advocate's chambers and it was only traced on 15/3/2007 by which time, the period granted to deposit it had already lapsed. The orders are now sought to explain the delay and deposit the money as has already been done.

4. The Respondent is opposed to the orders sought and states that the explanation for delay is unreasonable and since there is no appeal to-date, there is nothing to which the stay orders are predicated

on. That the sum in contest is only Kshs.30,000/= which can be re-paid should the intended appeal succeed. That therefore the litigation should be brought to an end and since the Application is incompetent, it should be dismissed with costs.

5. My mind is clear that the explanation given for delay in depositing the money is both reasonable and acceptable. I say this because I have seen a copy of the banker's cheque issued on 12/2/2007 by Kenya Commercial Bank. This was done 5 days after Sitati J's Ruling and within the 7 days granted to do so.

6. The present Application would have been unnecessary had the deposit been made two days after the cheque was drawn. The advocate for the Applicant has deponed on oath that she misplaced the cheque. That contention has not been challenged and the fact that the money has already been deposited in this court testifies to the seriousness with which the Applicant views the matter. I see no indolence on his part and will not punish him for inadvertence on the part of his advocate.

7. In any event, the issues raised in response to the Application while pertinent and important should be raised when opposing the originating proceeding which is the Motion dated 5/2/2007.

8. In the event I will extend the time to deposit the Kshs.20,000/= and the deposit already made is deemed to have been done with leave of court and within time.

9. Parties should now proceed and take a date for hearing of the Application dated 5/2/2007.

10. I shall make no orders as to costs.

11. Orders accordingly.

Dated and delivered at Machakos this 27<sup>th</sup> day of **May** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Musyoka for Applicant**

ISAAC LENAOLA

JUDGE