



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**OF KISII**

**Miscellaneous Civil Application 133 of 2008**

1. DOUGLAS ONYANCHA .....
2. HILARY ONYANCHA.....SUING THRO'
3. KEVIN ONYANCHA THEIR NEXT FRIEND..... APPLICANT
4. NAOMI ONYANCHA .....FRANCIS KIBAKI

**VERSUS**

**JANE KEMUNTO ONYANCHA ..... RESPONDENT**

**RULING**

The Applicant seeks to be allowed to file his appeal out of time. It is appeal from the judgment of a subordinate court at Nyamira dated 11<sup>th</sup> June, 2008. The application has been bought under **Order 41 rule 5** of the **Civil Procedure Rules** and **sections 3A** and **95** of the **Civil Procedure Act**.

In the Grounds and Supporting Affidavit, the Applicant is saying that his case was dismissed on 11<sup>th</sup> June 2008 without notice to him. He then instructed his Advocate on 16<sup>th</sup> June 2008 to appeal. The Advocate is **Samson Mauti Sagwe** who said the he applied for certified copy of judgment and proceedings and paid Kshs.200/= as deposit for typing on 19<sup>th</sup> September, 2008 he received only the proceedings. Judgment was not given to him. By this date the time of the filing of the appeal had passed. Counsel swore that the Applicant had an appeal with high chances of success.

The Respondent filed a Replying Affidavit in which he swore that the parties had notice of the judgment and therefore that there was no reason for the delay. She swore that the Applicant had not demonstrated that this appeal had high chances of success.

Since the judgment was not annexed to the Affidavit in support of the application it may not be easy to assess the chances the appeal may have. I have looked at the Memorandum of Appeal, but without the judgment the court may not conclude that the trial magistrate erred or did not in reaching the decision to dismiss the suit with costs.

Under **Order 79G** of the **Civil Procedure Act** the appeal was supposed to be brought within thirty days of the judgment. The section provides that such an appeal may be admitted out of time if the Applicant satisfies the court that he had good and sufficient cause for not filing the appeal in time. In the case of **Mugo and Others vs. Wanjiru and Another [1970] EA 481** it was held that normally sufficient reason

for an extension of time must relate to the inability or failure to take the particular step. Reading through the annexed proceedings the defence closed its case on

2<sup>nd</sup> April 2008. The parties and the Counsel were present. The court reserved judgment to 30<sup>th</sup> April, 2008. On that day the parties were present but the Advocates not. Judgment was not ready and was adjourned to 14<sup>th</sup> May, 2008. On the day the parties were present without their advocates. They were asked to come on the 11<sup>th</sup> June 2008. There is no dispute that on that day judgment was delivered. The parties were present without their advocates. It follows that when Mr. Sagwe swore that his client had no notice of the judgment that is not true. The other reason given by Counsel in his Affidavit was that there was delay in the processing of proceedings. I would have expected him to avail a Certificate of Delay from the subordinate court. Once again, I find his allegation not supported.

In short, I find no merit in the application. However, considering that twice the trial court did not deliver judgment on time and when ready did not ensure that Counsel were present, and in order that the Applicant is not punished and denied his day in court, I allow the application but ask the Respondent be paid costs of the same.

**Dated, Signed and Delivered** at KISII this 16<sup>th</sup> day of June, 2009

**A. O. MUCHELULE**

**JUDGE**

**16/6/2009**

Before A. O. Muchelule Judge

Mongare c/c

Mr. Sagwe for Applicant

**Court:** Ruling in open court.

**A. O. MUCHELULE**

**JUDGE**