



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION 286 OF 2009

HELLEN WANZA MAEKE (suing as the widow and the administrator of the Estate of the late

WILLIAM JOEL MUTUA MAEKE (Deceased)..... APPLICANT

VERSUS

BERNARD NJOROGE GATHUA.....1ST RESPONDENT

MBURU WAMUGI.....2ND RESPONDENT

R U L I N G

1. By a Notice of Motion dated 2nd April 2009, Hellen Wanza Maeke, suing as the widow and the administrator of the Estate of the late William Joel Mutua Maeke, seeks leave to appeal out of time against the decision of the Senior Principal Magistrate dated 24th September, 2008. The applicant has not given the details of the file in respect of the judgment subject of the intended appeal, in her notice of motion or the attached draft memorandum of appeal. However, in her supporting affidavit, the applicant depones that the suit is Nairobi CMCC No. 84 of 2007.
2. The applicant further depones that judgment was delivered against her on the 24th September, 2008. She instructed her advocate to apply for certified copies of the proceedings and judgment, but the proceedings were not availed to them until 26th February, 2009. The applicant depones that she has a good appeal with high chances of success. She therefore urges the Court to grant her application.
3. Relying on *Tabaki Flying Services International vs. Aoko Midiwo Odembo t/a Binti Legacy Bookshop HCCA. No. 86 of 2007*, Mr. Odoyo who appeared for the applicant submitted, that the delay was not inordinate. He urged the Court to exercise its discretion and allow the appeal maintaining that no prejudice will be suffered by the respondent.
4. The application was opposed through grounds of opposition filed on behalf of both the 1st and 2nd respondents. For the 1st respondent it was contended that the application is misconceived and ill advised, that the applicant is guilty of laches and that the application lacks merit. For the 2nd respondent, it was contended that there was inordinate delay in bringing the application, that the delay was unreasonable and not excusable, as it was not necessary to await the typing of the proceedings and judgment before the filing of the memorandum of appeal.

5. I have carefully considered the application. It is evident that judgment subject of the appeal was delivered on 24th September, 2008 and that the applicant applied for copies of the proceedings and judgment on 3rd October, 2008. The certificate of delay confirms that the proceedings and judgment were ready for collection on 26th of February, 2009. This application was lodged by the applicant on 20th April, 2009.

6. The delay in filing the application was therefore about two months after receipt of proceedings and judgment. Although under section 79G of the Civil Procedure Act the time which is required to be excluded is the time requisite for the preparation and delivery to the appellant of the copy of the decree or order, it is understandable that copies of proceedings and judgment may be necessary in assisting the applicant's counsel in preparing the memorandum of appeal. The applicant has therefore adequately explained the delay. Given the circumstances, the delay is not so inordinate as would justify shutting out the applicant from the seat of justice.

7. Accordingly, I find it necessary to exercise my discretion in the applicant's favour. I do therefore grant leave to the applicant to file her appeal against the judgment delivered on 24th September, 2008 in Nairobi CMCC No. 84 of 2007 within 21 days from the date hereof. Costs of the application shall be in the cause. Orders accordingly.

Dated and delivered this 29th day of July, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Odayo for the Applicant

Kabunge holding brief for the 1st respondent

Charagu holding brief for Kimando for the 2nd respondent