

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Miscellaneous Civil Application 63 of 2009

JAMES NGETHEAPPLICANT

V E R S U S

MARGARET AKHONYA1ST RESPONDENT

**PETER LUTIA2ND
RESPONDENT**

R U L I N G

The applicant in his application dated 6th April, 2009 is seeking to be granted leave to file an Appeal out of time. Mr. Manyoni counsel for the applicant submitted that judgement in Mumias Senior Resident Magistrate Court Civil Case No.816 of 2005 was delivered on 21st October, 2008 but the applicant came to know about it when his property was attached by auctioneers. Counsel further contended that the intended appeal has high chances of success as exhibited in the proposed memorandum of Appeal.

Mr. Nyongesa, counsel for the first respondent opposed the application and submitted that the intended Appeal lacks merit and that the applicant had been ordered by the lower court to deposit the decretal sum in court but has defaulted. Counsel further submitted that there was no evidence to the effect that the applicant was not aware about the judgement.

Similarly, Mr. Khayumbi, counsel for the 2nd respondent opposed the application and concurred with the submissions of counsel for the 1st respondent.

An application for leave to file Appeal out of time is not an application for stay of execution pending Appeal. The applicant in an application for leave to Appeal out of time has to explain the cause of delay. The applicant herein states that he was not aware about the delivery of the judgement until when his goods were attached. The lower court record shows that judgement was delivered on 21st October, 2008 in the presence of Mr. Kiveu, Advocate for the 2nd defendant. The applicant herein was the 2nd defendant and it has not been explained whether the lower court record was not properly recorded as he was represented by the firm of Owinyi & Company Advocates. On 19/01/2009 parties presented a consent letter before the lower court dated 5th December, 2008 and signed by both counsels for the plaintiff and defendant consenting to costs of KShs.53,400/= and a stay of execution of 30 days. The applicant has not explained the above circumstances.

The proclamation by M/S Eshikhoni Agency Auctioneers is dated 20th February, 2009. The proclamation indicate that the Auctioneers were to return the warrants by 20th April, 2005. The current application was filed on 7th April, 2009.

The dispute herein involves a road traffic accident that resulted into the plaintiff sustaining injuries. The applicant contends that the accident was a collision of two motor vehicles and the trial court ought to have apportioned liability against the 2nd respondent.

It is my view that the delay in filing the application for leave is not unreasonably long. The

judgement was delivered on 21st October, 2008 and the application was filed in April, 2009. For the interest of justice, it is fair and just to allow the applicant to pursue his appeal. I do find that the application is merited and the same is allowed. The applicant is hereby granted leave to file his appeal out of time. The said appeal should be filed within fourteen days from the date of delivery of this Ruling. Each party shall meet its own costs.

Delivered, dated and signed at Kakamega this 17th day of September, 2009

SAID J. CHITEMBWE

J U D G E