

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

Civil Case 143 of 1999

**FRANCIS ALIARO MAPESA 1ST PLAINTIFF
PATRICK ACHERO WAMBOKA 2ND PLAINTIFF**

V E R S U S

JARED NALLO DEFENDANT

R U L I N G

In the application dated 24th July, 2009 the defendant/applicant is seeking leave to file Notice of Appeal and filing of an Appeal to the Court of Appeal out of time. The applicant is also seeking orders of stay of execution of the judgement delivered on 30th October, 2008 pending the hearing and determination of the intended Appeal.

Mr. Elungata, counsel for the applicant submitted that by the time judgement was delivered on 30th October, 2009 the defendant had passed on. The applicant herein had to obtain letters of administration before taking over the suit. The respondents are in occupation and won't suffer prejudice. When applying for the grant of letters of administration, the applicant indicated that the intention was to enable him file an Appeal.

Mr. Shikanda, counsel for the respondent opposed the application and contends that the applicant is guilty of laches. The delay in bringing this application is inordinate. The applicant substituted the deceased on 22nd January, 2009 and the application was filed in July, 2009. Counsel urged the court not to grant a stay of execution as no Appeal has been filed and that the applicant has offered no security.

From the supporting affidavit to this application, the original defendant died on 6th June, 2008. The judgement of Justice G.B.M. Kariuki was read by Justice Fred Ochieng on 30th October, 2008. The applicant obtained the limited Grant on 17th November, 2008 and the application for leave to appeal out of time was filed on 24th July, 2009. It is not known when the applicant collected the grant issued to him. By 17th November, 2008 when the grant was issued by the court, the time for filing the appeal had not lapsed. The applicant filed his application dated 25th November, 2008 to have him substituted in place of the deceased defendant. This application was granted by consent on 22nd January, 2009 and by then time to file the appeal had lapsed. The current application was filed on 24th July, 2009 and this is almost six months after the applicant had been allowed to substitute the deceased. I find the period to be unreasonably long. No good reason has been given for the delay.

The next issue for consideration is whether the appeal is arguable and whether the respondents shall suffer any prejudice. According to evidence adduced during the trial, the respondents contended that they have been in occupation of the suit property for over 12 years and are currently still in occupation. The suit land measures **30** acres. The learned judge awarded the respondents **20** acres of the suit land **SOUTH WANGA/SHIKALAME/1072** and the applicant was granted **10** acres. This being the case, I do find that the respondents will not be prejudiced should the applicant be allowed to pursue his appeal. Having found that no prejudice will befall the respondents, I will not dwell on whether the appeal is arguable or not. I have seen the four grounds of the intended Appeal which raises some valid issues that can only be determined by the Court of appeal.

In the end, I do allow the applicant's application for extension of time to file notice of Appeal and Appeal out of time. The applicant to file his notice of Appeal within **seven (7)** days from the date of delivery of this ruling and the record of appeal shall be filed within thirty

days from the date of filing of the Notice of Appeal. Due to the unreasonable delay in filing the current application, I will condemn the applicant to pay the already taxed costs within **sixty (60) days** hereof. The execution of the main decree is hereby stayed. Parties shall continue residing in their respective portions. The applicant shall meet the costs of this application.

Delivered, Dated and Signed at Kakamega this 26th .day of November, 2009

SAID J. CHITEMBWE

J U D G E