

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLANEOUS CIVIL APPLICATION NUMBER 249 OF 2002

WANGONDU MWENA & ANR..... APPLICANT

VERSUS

KIRUGUMI MWEMA..... RESPONDENT

RULING

The Notice of Motion dated 13th September 2002 is brought under order XLIX rule 5 of the Civil Procedure Rules. The only prayer that the applicant proceeded with at the hearing of that application is prayer No. 3 for leave to appeal out of time. In the Supporting Affidavit the applicant deponed that he was not able to raise the required amount to file the appeal until 26th August 2002. After that date the applicant applied for a copy of the order being appealed against. The order was signed on 28th August 2002 which was after the period of filing an appeal. She deponed that the only reason she did not file the appeal in time was due to poverty. In opposition the respondent argued that no good reason had been given why the appeal was not filed in time. The respondent also argued that he is not rich. In further affidavit in reply the respondent stated that it is not true that the applicant is poor because he has all along had an advocate representing him when the respondent was unrepresented.

I have considered the applicant's application. The application although filed on 26th September 2002 was not argued until 5th February 2008. The matter was last before court on 5th May 2005. On that day the parties agreed to adjourn the matter generally. The basis of adjourning the matter was to allow the parties to file further affidavits. The respondent did file a further affidavit on 9th May 2005. It is not clear to the court why the applicant did not fix the matter for hearing until 6th November 2007. On the merits I find that the applicant has not demonstrated lack of finances to appeal in time. In indeed I accept the argument of the respondent that the applicant having appointed counsel is probably better endowed than the respondent. The applicant's application is defeated for lack of merit and for the delay in bringing the application for hearing without explanation. Accordingly the Notice of Motion dated 13th September 2002 is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 22nd day of April 2008.

MARY KASANGO

JUDGE