

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 182 of 2002

WILFRED WASONGA OWINO..... APPELLANT

VERSUS

SOLOMON OGOT.....1ST RESPONDENT

STEPHEN JUMA.....2ND RESPONDENT

R U L I N G

There are two applications pending before me. One is the respondents' notice of motion dated 11th July, 2007 in which the respondents seek to have the appellant's appeal filed on 24th April, 2002, i.e. 29 days after the ruling of the tribunal, struck out as filed out of time without leave of the court. It is further contended that the appeal is incompetent as no decree has been extracted to date. In this regard reliance has been placed on ***HCCA No.141 of 1993 Paul Adwal vs Gedion Kaunga***.

The appellant on his part has brought an application dated 24th June, 2008 in which he seeks to have the appeal filed on 24th April, 2002 admitted out of time and the memorandum of appeal deemed to have been properly filed. The appellant admits that the appeal was filed out of time without leave of the court. He however blames his former Counsel whom he claims to have instructed to file the appeal within time, but who failed to do so. In this regard Counsel for the appellant cited the case of ***Kiarie vs Njoroge (1986) KLR 402***. The appellant pleads with the court to exercise its unfettered discretion in his favour as he was not to blame for the delay in filing the appeal.

I have considered this application. As regards the submission that the appeal is defective as no decree has been extracted, Order XLI Rule 1A of the Civil Procedure Rules provides for the filing of a certified copy of the decree or order appealed against either at the time when the memorandum of appeal is filed or as soon as possible and any event within such time as the court may order. In this case, the Deputy Registrar has called for the original record of the lower court, together with the certified copy of the judgment/order and extract of the decree to enable the court consider the appeal for admission. To date these documents are still being awaited. No record of appeal has been filed and the court has not asked the appellant to file an extract of the order or decree. The issue of the decree would not therefore arise at this stage.

From the record, the appellant was formerly represented by Singh Gitau Advocates who prepared and filed the memorandum of appeal. That advocate has since ceased to act for the appellant. The court is not therefore in a position to confirm the allegation that the advocate was given instructions to file the appeal on the date of the ruling of the tribunal but filed the appeal out of time. Nevertheless, the appellant has now come to court seeking to regularize the position by applying for leave to file the appeal out of time. The case of ***Kiarie vs Njoroge*** which was cited by the appellant's Counsel is a case in point that the court has wide discretion in granting leave to file an appeal out of time and that an applicant ought not to be penalized for the mistake of his agent. I will therefore grant this application and issue orders for leave to file the appeal out of time and also to have the memorandum of appeal deemed to have been properly served. In order to facilitate the speedy disposal of this matter, I order that the Deputy Registrar shall send a reminder to the Tribunal calling for the records of the lower court. I further order the appellant shall file a record of appeal within 90 days from the date hereof. The respondents shall have costs of this application.

Those shall be the orders of this court.

Dated and delivered this 5th day of August, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Amuga for the appellant

Ogutu for the respondent