



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civil Appli 25 of 2007**

**ROSEMARY TENTY AKAI KONA ..... APPLICANT**

**VERSUS**

**SAMUEL EPOKHORR KONA ..... RESPONDENT**

**RULING**

The application before the court is dated 22.5.07 and was filed on the same date. It seeks for extension of time within which the applicant who was respondent in the lower court, wishes to appeal.

The record shows that Judgment by the lower court was to be delivered on 24.11.06. This was announced to both parties or their counsel in court on 29.9.06 by the court. On 24.11.06 for inexplicable reasons, neither of the parties was in court when the trial magistrate announced that the Judgment which was then not ready, would now be delivered on 8.12.06. Again on 8.12.06, both parties failed to attend court and the court was forced to defer the delivery of the Judgment to 15.12.06. The record confirms that Judgment was promptly delivered on 15.12.06 in the presence of the Petitioner but in the absence of the respondent who is herein the applicant.

The grounds upon which this application is brought is that she did not know when the Judgment was delivered or that she did not know that the Judgment was delivered on 15.12.06. However, from the facts tabulated above it was nobody's fault except hers that the Judgment was delivered on 15.12.06 after being prevented from being delivered on 8.12.06 because of both parties' absence from court without any reasonable explanation. In my view, there was no good ground for being absent from court by the applicant on 15.12.06.

Furthermore the record shows that the applicant applied for a certified record of proceedings and Judgment on 25.1.07 when she was already ten days out of appealing time of 30 days from 15.12.06. Since the applicant's failure to attend court to take Judgment on 15.12.06 was her own fault, contrary to her arguments which blame the lower court unreasonably, this court lays the blame on her for the 10 days delay between 15.1.07 when the appeal period ended and when she applied for typed certified proceedings on 25.1.07.

Secondly, the record shows that she obtained a certified copy of proceedings and Judgment on 15.3.07. This is confirmed as well by the court certificate of delay. However the record shows that the applicant failed to file this application until 22.5.07. She has not explained or accounted for the delay of over 66 days in her supporting affidavit, although it was incumbent upon her to do so in order to persuade this court in her favour. In my view, failure to so do does not give this court a fair chance or grounds to exercise court's discretion favourably. This is because courts discretion should not be exercised on whims, or sheer sympathy, but on reasonable grounds. The conduct of the applicant would help the court to conclude as to whether he/she deserves being given a chance to ventilate an appeal especially if other factors and circumstances are in her favour. In this case the court sees a party who fails to attend court to take delivery of Judgment and yet comes out blaming the court for her failure, notwithstanding the courts deliberate act to postpone delivery to wait for parties. And finally, the court sees a party who failed to seek extension immediately after receiving the certified Judgment and who sleeps on her right for another 66 days which is not explained.

In addition, the court observes that this is divorce matter where the marriage is clearly irretrievably broken down since the year 2001. An appeal even when allowed will not have the capacity to retrieve such a marriage. Other issues such as custody and maintenance have other open channels through which

they can be adjusted in the ends of justice.

In conclusion, the intended appeal has remote chances of succeeding. There are therefore no good grounds for prolonging this litigation by opening up a new corridor to the parties to do so.

For the above reasons, this court finds no merits in this application to extend the period to enable the filing of an appeal out of time. The application is rejected and dismissed. No order is made as to the costs of the application. Orders accordingly.

Dated and delivered at Nairobi this 25<sup>th</sup> day of September, 2008.

**D.A. ONYANCHA**

**JUDGE**