

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Civ. Appli. 5 of 2007

JOHN MURIU NGIGI..... APPLICANT

VERSUS

ALICE WAMBUI KAHONU.....RESPONDENT

R U L I N G

John Muriu Ngigi (hereinafter referred to as the applicant) has come to this court under Order XLIX Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking leave of this court to file an appeal out of time. The applicant explains that he had filed an application in the lower court in respect of which ruling was to be delivered on 26th September, 2006. The ruling was however not delivered as the trial magistrate was on leave. On 7th December 2006, the applicant was served with a notice to show cause, upon which he consulted his advocate. The advocate perused the court record and discovered that the ruling was delivered against the applicant on the 13th November, 2006. The applicant maintains that no notice of delivery of the ruling was served upon him. The applicant's advocate immediately applied for a copy of the proceedings and ruling. He received the same on the 15th December, 2006 by which time the period for filing the appeal had already lapsed. The applicant therefore urges the court to extend time to enable him file the appeal.

The application was served on Alice Wambui Kahonu, who is the respondent to the intended appeal. The respondent objects to the application maintaining that the applicant is guilty of laches and that the delay is unreasonable and inordinate. It is further contended that the application is only intended to deprive an innocent child of his statutory and constitutional rights.

I have considered the application. I note that the ruling subject of the intended appeal is alleged to have been delivered on 13th November, 2006 and therefore the applicant's appeal ought to have been filed by 13th December, 2006. Although the applicant has not annexed the certificate of delay he had annexed a letter addressed to the Chief Magistrate Thika Law Courts applying for proceedings and ruling. That letter was received by the court on 8th December, 2006. A receipt which is also annexed shows that payment for the proceedings was made on the 11th December, 2006. The applicant's advocate maintains that he received the proceedings on the 15th December, 2006. I find that the delay in filing the appeal has been explained and that the delay was not inordinate. In the circumstances, it is only fair and just that the applicant be given an opportunity to present his appeal.

Accordingly, I allow the application and grant leave to the applicant to file his intended appeal within 15 days from the date hereof. Costs of this application shall be costs in the appeal.

Orders accordingly.

Dated and delivered this 24th day of September, 2008

H. M. OKWENGU

JUDGE

In the presence of: -

Ngechu H/B for the applicant

Mungai H/B for the respondent