

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

Misc.Civ. Appli. 939 of 2007

DANIEL KIRONUA.....APPLICANT

-versus-

JOSHUA MUTENGI MULI.....RESPONDENT

R U L I N G

The Applicant in this Notice of Motion dated 6th December 2007 prays for orders enlarging time for him to file an appeal arising from the ruling delivered on 9th October 2007 in the Senior Resident Magistrate's Court Case Number 118 of 2006 at Kajiado.

In support of that application, the Applicant is saying that when the Ruling was delivered, the court granted leave to appeal within 28 days; a period which lapsed on 7th November 2007.

Previously the ruling had been scheduled for 13th September 2007 but was not ready on that day and a different date, 9th October 2007, was fixed. Mr. N. O. Sumba the Applicant's Counsel told the court that when the Advocate who had held his brief at the ruling – gave him the result, he, Mr. Sumba, made a mistake and recorded that the ruling had been delivered on 13th September 2007 so that he calculated the last day of the time he had to file a appeal to be 9th November 2007.

But as he prepared to file the appeal on 8th November 2007, he happened to receive copy of the Ruling which showed the date of the ruling as 9th October 2007 and made him realize he was already late to file the appeal as the 28 day, had lapsed. Hence this application.

The said application is opposed by Mr. Achoki, learned Counsel for the Respondent who relied on the Replying Affidavit where it is pointed out, that the ruling having been delivered on a preliminary objection on 9th October, 2007 the suit proceeds to hearing and that the Plaintiff's case is already closed on evidence and the Applicant has not indicated in the Magistrate's Court that he intends to appeal and has even been negotiating a settlement in the matter and that therefore the Applicant is not realistic. The Respondent does not accept the Applicant's explanation why the notice of motion was filed on 7th December 2007.

Having given careful consideration to what has been said on both sides I hold the view that no injustice may be caused if the Applicant is allowed to appeal in this matter where I am told the Plaintiff's case has been closed on evidence before the trial magistrate who is now waiting to hear the Defendant's case. I get the impression that Mr. Sumba has been honest in what he has told the court in support of this Notice of Motion as the only person to blame. Let him file the appeal he claims has very high chances of success, the chances I hope he is already showing in the record in the trial in which judgment may be delivered before he prosecutes the intended appeal.

Perhaps the parties may become wiser as they prosecute the suit in the Magistrate's Court and prosecute the appeal in the High Court.

This Notice of Motion is accordingly hereby granted and the intended appeal be filed within fourteen (14) days from the date of this Ruling.

The Applicant to pay costs of this Notice of Motion to the Respondent.

Dated this 31st day of October 2008.

J. M. KHAMONI

JUDGE