

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc. Civ. Appli. 107 of 2006

JOHN NGUNIA MURAGURI..... PLAINTIFF

VERSUS

1. IMMACULATE WAITHERA KARIUKI)

2. CHARLES HENIA CHEGE)..... DEFENDANTS

RULING

The Applicant has brought an application under section 79G of the Civil Procedure Act and Order XLIX rule 5 of the Civil Procedure Rules. The applicant seeks an order for time to be extended in which to file a Memorandum of Appeal against the judgment of the Chief Magistrate's Court Nyeri Civil Case No. 144 of 2004. It is deponed by the applicant in his supporting affidavit that the judgment of the court in that case was delivered on 29th November 2005 without notice to him and his advocate. That that judgment was delivered after several adjournments. He was informed by his advocate of the outcome of that case by a letter dated 16th February 2006 which letter he received in mid March 2006. He was dissatisfied with that judgment and instructed his advocate to file an appeal. His advocate applied for lower court proceedings to be typed on 10th April 2006. The proceedings and a copy of the judgment were ready for collection in the lower court on 5th May 2006. Indeed he annexed a certificate of delay to the application showing that the proceedings and judgment were supplied on that day. The application was opposed by the Respondent. It was deponed in the Respondent's Replying Affidavit that the Applicant had failed to explain the delay from the date his advocate was informed of the judgement upto the date when the application was made.

I have considered the application, the affidavit in support and the Replying affidavit. It is not denied that the lower court's judgment was delivered without notice to the applicant. It does seem that the Applicant's advocate got information about that judgment from a letter written to him dated 13th February 2006 by the Respondent's advocate. The Applicant's advocate informed that Applicant by a letter dated 16th February 2006 but which was not received by the Applicant until mid March 2006. The proceedings and judgment were applied for on 10th of April. They were not ready for collection until 5th May 2006. Bearing the factors that surrounded the delivery of judgment without notice I am of the view that it is in the interest of justice to grant leave to the Applicant to file his appeal out of time. The request by the Respondent to have the Applicant deposit the decretal amount as a condition for the extension of time without a formal application would in my view be odious to the Applicant. Accordingly the order of this court is that the Applicant John Ngunia Muraguri is hereby granted leave to file his appeal out of time within 21 days from this date hereof in respect of Chief Magistrate's case at Nyeri Civil Case No. 144 of 2004. The cost of Notice of motion dated 27th May 2006 shall abide with the intended appeal.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 27th day of October 2008.

BY

M. S. A. MAKHANDIA

JUDGE