



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

**Civil Appeal 304 of 2008**

**STEPHEN MATHEKA..... APPLICANT**

**VERSUS**

**THUKU MACHARIA.....RESPONDENT**

**R U L I N G**

By a notice of motion dated 31<sup>st</sup> July, 2005, Stephen Matheka the applicant has come to this court under Section 79G, Section, 63(e), and Section 3A of the Civil Procedure Act, and Order XLI rule 4 of the Civil Procedure Rules seeking *inter alia*, orders for leave to file the memorandum of appeal out of time and to have the memorandum of appeal already filed deemed as properly filed.

The applicant also seeks orders for stay of execution pending the hearing and determination of the appeal. The applicant explains that he was not able to file his appeal in court within time as he was only supplied with certified copies of proceedings and judgment after the time for filing the appeal had lapsed. The applicant further contends that his advocate was not personally present in court at the time when the judgment was delivered and the advocate who was holding his brief did not record the findings of the trial magistrate, hence the need for the certified copies of proceedings and judgment. The applicant also maintains that his appeal has high chances of success. The applicant has exhibited a copy of the memorandum of appeal and a certificate of delay from the lower court showing that the time taken for preparation and delivery of the certified copy of the ruling was from 7<sup>th</sup> December, 2007 to 19<sup>th</sup> May, 2008. The applicant has also deposited a sum of Kshs.192,899/= in accordance with the order which was made by this court on 11<sup>th</sup> July, 2008.

The application is opposed by the respondent Thuku Macharia who has sworn a replying affidavit contending that the application is fatally defective. The respondent maintains that the applicant has not given any good explanation for the delay in filing the memorandum of appeal. It is further contended that there is no competent appeal before the court and that the security offered by the applicant is inadequate.

I have carefully considered this application. The applicant has given a reasonable explanation for his delay in filing the appeal. That explanation has been supported by a certificate of delay which was exhibited. It is also apparent from the memorandum of appeal exhibited that the applicant has an arguable appeal. It is therefore only fair that he be given an opportunity to have his day in court.

Accordingly, I grant the applicant leave to file his appeal out of time and order that the memorandum of appeal filed on 10<sup>th</sup> June, 2008 be deemed as properly filed.

As regards the application for stay of execution pending appeal, the applicant has deposited in court a total sum of Kshs.192,899/= which is sufficient to cover the decretal sum. In the circumstances, it is appropriate that an order of stay of execution do issue to enable the applicant pursue his appeal. Nevertheless, it is necessary to take into account the interest of the respondent. I will therefore make the following orders: -

- (i) Leave be and is hereby granted to the applicant to file his appeal out of time and the memorandum

of appeal filed on 10<sup>th</sup> June, 2008 be and is hereby deemed properly filed.

(ii) An order of stay of execution pending appeal shall issue on condition that the amount deposited in court shall be released to the parties' advocates to be deposited into an interest earning account in the joint names of the parties' advocates within 15 days from the date of release.

(iii) The applicant shall file a record of appeal within four months from the date hereof and take all necessary action to facilitate the speedy disposal of the appeal.

Dated and delivered this 14<sup>th</sup> day of October, 2008

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mutheu H/B for Muya for the applicant

Muruka for the respondent