

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Misc Civil Appli 59 of 2005

PAUL MACHARIA THUA.....APPLICANT/PLAINTIFF

Versus

NANCY KIRIGO WACHOME.....1ST DEFENDANT/RESPONDENT

WAMAE KINYUA.....2ND DEFENDANT/RESPONDENT

RULING

The Notice of Motion before Court is brought under *Section 3A* and *79G* of the Civil Procedure Act and *Order XLIX Rule 5* of the Civil Procedure Rules. The Applicant seeks by that Notice of Motion that leave be granted to file an appeal out of time and that there be Stay of Execution pending the determination of the appeal. The affidavit in support of that application is sworn by the Applicant's advocate. He stated that he applied for proceedings and judgment on 24th December 2004. That the same were not supplied until 22nd February 2005. He said at the time at his firm he had an assistant by the name of Dadson Mathaiya Baru. He handed his file to his assistant with instructions but he failed to do so. He left his employment abruptly without handing over. Consequently this file was brought to the advocate's attention on 7th June 2005. He proceeded thereafter to file the present application.

The application is opposed. The Respondent deponed in his Replying Affidavit that judgment in the lower court case was delivered on 1st December 2004. The advocate now acting for the Applicant was still on record for him at the lower court. He further deponed that there is nothing to show there was delay in supplying the proceedings and in any case the Applicant is guilty of inordinate delay in bringing the present application for hearing. In oral submission, counsel for the Respondent faulted the Applicant's application by saying that it is incompetent for having been brought under *Section 3A* whilst there was provision in the Civil Procedure Act for such an application. I would respond to that argument by stating that the application is additionally brought under *Section 79G* and *Order XLIX Rule 5* and accordingly it cannot be said to be incompetent for having also relied on *Section 3A*. In the Respondent's argument that the Applicant has delayed in prosecuting the present application I find that I am in agreement with that argument. The application was filed on 13th June 2005. A date was not taken until 2nd February 2006 for hearing on 7th November 2006. When the matter came for hearing on 7th November 2006 the Applicant sought an adjournment and obtained it to enable him to file a supplementary affidavit. When the matter came before me on 16th May 2007, the Applicant had not filed a supplementary affidavit and therefore it does seem that there was no reason to adjourn this matter previously. I do also agree with the Respondent that the Applicant has failed to attach any evidence of when the Applicant was supplied with the lower court proceedings and judgment. The explanation given that the Applicant's advocate's assistant left the firm is not sufficient reason for this court to grant the orders sought. Those are internal matters that the advocate is mandated by virtue of his responsibility of that firm to ensure that they do not happen. He also does not explain who eventually brought to his attention this file. All these issues needed explanation and may I add they needed candid explanation in order to move this court to exercise its discretion in favour of the Applicant. When the court finds that there are blanks left in explanation of why the appeal was not filed on time, those blanks will be construed against the Applicant. I find that the court is unable to grant the order for the appeal to be filed out of time in view of that lack of explanation of the reason why there was failure to file it in time.

The Applicant also seeks stay pending appeal. He does not specify what stay he needs and he also does not specify what provisions of the decree he requires to be stayed or when the order for which stay is sought was issued. That prayer also is incompetent and will lead the whole application to fail. The end result is that the Notice of Motion dated 13th June 2005 is hereby dismissed with costs to the Respondent.

Dated and delivered at Nyeri this 27th day of July 2007.

MARY KASANGO

JUDGE