



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**

**Misc Appli 153 of 2007**

**MICHAEL M. NDEGWA**

**THOMAS NDEGWA WAMBUGU..... APPLICANTS**

**VERSUS**

**JOHN MURAGURI SUSAN ..... RESPONDENT**

**RULING**

The application before court is a notice of motion dated 1<sup>st</sup> October 2007. The same seeks stay of execution of judgement and decree in CMCC NO. 347 of 2006 pending appeal. The applicant also seeks the enlargement of time within which to file an appeal. The application is brought on the ground that the appeal was not filed within the prescribed time because of the advocates inadvertence and mistake. In support of that ground the applicant stated that the judgement having been entered on 19<sup>th</sup> July 2007 the same was discussed with their then advocate and a decision was made that the appeal be filed. The advocate prepared the memorandum of appeal and forwarded it to his clerk for filing. The clerk failed to file the memorandum in court and instead kept it in the file in the office. That it was not until 20<sup>th</sup> august 2007 that the advocate discovered that the memorandum had not been filed. It is further deponed that the applicants have an arguable appeal with high chances of success. The applicants are willing to furnish security if stay of execution is granted. The applicants are apprehensive that the respondent may be unable to repay the decretal amount if the appeal is successful. The application was opposed. The respondent in his opposition stated that the applicants were guilty of delay in making the application. Further the respondent stated that liability cannot be subject of the appeal because the applicants had been charged with the traffic offence in the lower court and had been found guilty of that offence. In reply to the argument that the applicants had a high chance in succeeding in their appeal the respondent stated that the award made by the lower court was in accordance with the pleadings in the lower court and that in particular the award of special damages had been supported by documents. In respect of future medical expenses that the same was supported by the applicant's doctors' report.

I have considered the application before me. The same seeks two prayers. Stay of execution and enlargement of time to file the appeal. I will start by considering the application for stay. Order XLI rule 4 (6) of the Civil Procedure Rules provides as follows;-

***“Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with”.***

It is clear from the provisions of that rule that the procedure for instituting an appeal has to be complied with before stay of execution pending appeal can be entertained. In this case there is no appeal. Indeed the applicants are seeking by this same application to enlarge the time for filing the appeal. I am therefore of the view that to grant stay in that background would be in contravention of that rule. Accordingly the prayer for stay pending appeal is dismissed. In respect of the prayer for enlargement of time to file an appeal the applicant seeks to invoke the discretion of this court. The applicants state that judgement of the lower court was delivered on 19<sup>th</sup> July 2007. The advocate for the applicants in the affidavit in support of the application stated that the applicants instructed him to file the appeal. He does not indicate in that affidavit the date which he was so instructed. He further stated that on preparing the

memorandum of appeal he forwarded it to his clerk for filing in court. Again the date the said memorandum was forwarded to the clerk was not disclosed. But perhaps of more concern is that the advocate discovered that the memorandum was not filed on 20<sup>th</sup> August 2007. Despite making that discovery it was not until 1<sup>st</sup> October 2007 that this present application was filed. The applicants in seeking to invoke this courts discretion ought to have made full disclosure of the background of their failure to file the memorandum of appeal in time. Discretion is not exercised on caprice nor on likes or dislikes nor on sympathy but on reasons based on time tested principles which have been established by the court. Indeed all discretion must be judiciary exercise. I am of the view that the applicant has not provided material upon which this court can exercise its discretion. In considering the said prayer I am tempted to adopt the statement by E.O.O. 'Okubasu J.A in the case of **JOHN ONGERI MARIARIA & OTHERS AND PAUL MATUNDURA CIVIL APP. NAI 301 OF 2003**, where he said,

***“Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent.”***

Having in mind the inordinate and unexplained delay I am of the view that this is not a fit and proper case for me to exercise my discretion to enlarge the period of filing the memorandum of appeal out of time. In the end the applicant's application dated 1<sup>st</sup> October 2007 fails and the same is dismissed with costs to the respondent.

***Dated and delivered at Nyeri on 10<sup>th</sup> December 2007.***

**MARY KASANGO**

**JUDGE**