



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**Misc Appli 761 of 205**

**RAPHAEL MUGWANJA WARARI..... APPLICANT**

**VERSUS**

**OLKEJUADO COUNTY COUNCIL ..... 1<sup>ST</sup> RESPONDENT**

**JACOB MWANTO WANGORA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

The Applicant by way of this Notice of Motion dated 22<sup>nd</sup> April, 2005 and expressed to be brought under Order XLIX Rule 5(1) of the Civil Procedure Rules and Section 79 G and 95 of the Civil Procedure Act seeks leave to file appeal out of time from the ruling delivered on 9-9-04 in RMCC No.6464 of 1995. The applicant filed the suit in the RM's Court seeking to restrain the Respondent from trespassing upon his premises in 1995. On 26-1-04, he applied for leave to withdraw the suit which application was granted with costs to the Defendants. The Respondents extracted the order and drew a decree.

On 25-6-04 the Applicant brought the instant application by way of Notice of Motion under Order XLIX Rule 5 of the Civil Procedure Rules and Sections 79G and 95 of the Civil Procedure Act for stay of execution and amendment of the decree to exclude the costs. That application was dismissed with costs on 9-9-04 hence this application. The Applicants application is premised on the ground that he had applied for certified copies of proceedings and ruling on 13-9-04 but the same were not availed to him until 19-1-05 and he blamed the delay on the court.

Mr. Chege Counsel for the Applicant submitted that the Applicant has arguable appeal and he annexed draft Memo of Appeal. The application is opposed by the Respondent Mr. Kinyanjui. Counsel for the Respondent submitted that the Applicant's application is misconceived and mischievous in that no leave to appeal was sought and granted by the trial Magistrate and that there was undue delay in bringing this application. Lastly he submitted that the Applicant has not demonstrated that he has arguable appeal. The main issue here is the costs awarded to the Defendants after the Plaintiff had applied to withdraw this suit and the application was granted with costs to the Defendants.

The Plaintiff had filed this suit against the Defendants in 1995. The Defendants were served with summons and filed defences. The suit has been in Court for the last 9 years. Usually costs follow the event.

The Applicant applied and was granted leave to withdraw this suit but was ordered to pay costs to the Respondents. I do not see how in such circumstances the Applicant would have slapped costs and it follows therefore that the intended Appeal has no chances of success. The Applicants Notice of Motion dated 22<sup>nd</sup> April 2005 is dismissed with costs to the Respondents.

**DATED** at Nairobi this 9<sup>th</sup> day of February 2006.

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**J.L.A. OSIEMO**

**JUDGE**