

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Misc Civ Appli 34 of 2006

JAPHET MAINA MBOGO

JULIUS KAGATHA

JOSPHINE NYAMBURA

.....APPLICANTS

VERSUS

KARUNG'E PROPERTIES LIMITED.....

....RESPONDENT

R U L I N G

By a notice of motion dated 15th February 2006 brought under Section 79 G of the Civil Procedure Act and order XLIX rule 5 of the Civil Procedure Rules, the applicants herein seek to have time extended to enable them file an appeal out of time against the judgment of Muranga Principal Magistrate's Court delivered in Civil Suit No.67 of 2001 on 26th May 2005. The application is supported by an affidavit sworn by the applicant's advocate T. M. Njoroge. It is the applicants' contention that the failure of filing the appeal in time was caused by the lower court not supplying the proceedings and judgment in time. The applicants further contend that they have a good appeal as per the draft memorandum of appeal which they have filed.

The Respondent objects to the application through a replying affidavit sworn by the Respondent's secretary Wellington Irungu Macharia. It is contended that the applicants' appeal has no chances of success and that the application should therefore be dismissed.

From the certificate of delay issued by the Principal Magistrate Muranga, it is evident that the applicants applied for copies of proceedings and judgment on the 26th May 2006 that is on the same day of judgment. The same were however not supplied until 14th February 2006. This application was filed on 15th February 2006 which means that it was brought immediately upon receipt of proceedings and judgment. Under section 79 G of the Civil Procedure Act the period which the lower court certifies as having been required for the preparation and delivery to the applicants of a copy of decree or order is required to be excluded from the computerization of 30 days right of appeal.

In this case the applicants did not apply for a copy of decree or order, but as per the certificate of delay applied for certified copies of proceedings and judgment. This means that Section 79G of the Civil Procedure Act cannot be used to exclude the period taken by the lower court in providing the required documents. The applicants have therefore to satisfy this court that it is necessary for the court to exercise its discretion in their favour and extend time to enable them file their appeal.

It is evident that although the applicants did not file their appeal within the required period of 30 days, the applicants are essentially not guilty of inordinate delay as they applied for proceedings and judgment immediately after the judgment was delivered and have also brought this application immediately after receiving the proceedings and judgment.

I have also considered the proceedings, the judgment, and the draft memorandum of appeal. My

impression is that the appeal cannot be said to be without merit. I find that in the circumstances of this case it will be fair and just for this court to exercise its discretion in the applicant's favour. I do therefore allow this application and grant leave to the applicant to file his appeal within 14 days from the date hereof.

I further order the costs of this application to be costs in the intended appeal. Those shall be the orders of this court.

Dated, signed and delivered at Nyeri this 12th April 2006.

H. M. OKWENGU

JUDGE