

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc 35 of 2005

JULIUS KAGATHA.....APPLICANT

VERSUS

KARUNGE PROPERTIES LIMITED.....RESPONDENT

R U L I N G

By a notice of motion dated 15th February 2006 Julius Kagatha herein referred to as the applicant seeks leave of this court to appeal out of time against the judgment of Muranga Principal Magistrate's court in Civil Suit No. 66 of 2001 delivered on 26th May 2005. The application is supported by an affidavit sworn by the applicant's advocate in which he explains that a delay in filing the appeal was occasioned by a delay in the lower court in supplying the proceedings and judgment. A certificate of delay which is annexed to the affidavit confirms that the proceedings and judgment were applied for on 26th May 2005 but the same were supplied on 14th February 2006. Thereafter the applicant promptly brought this application on 16th February 2006.

Karunge properties limited, the Respondent herein objects to this application. Mr. Karango who appeared for the Respondent submitted that the applicant's intended appeal has no chances of success as the applicant did not tender any evidence at the hearing of the suit. Relying on *Kyuma vs Kyema [1988] K.L.R. page 185*, Mr. Karago submitted that a certificate of delay relied upon by the applicant is invalid as the same was issued in respect of proceedings and judgment and that the applicant did not apply for the decree as envisaged under Section 76 G of Civil Procedure Rules. The Respondent further buttressed the objection through an affidavit sworn by Wellington Irungu Macharia the secretary of the Respondent.

I have carefully considered the Applicant's supporting affidavit,

the affidavit in reply, as well as the proceedings, judgment and the draft memorandum of appeal. I concur with Mr. Karago that on the cited authority of *Kyuma vs Kyema*, the certificate of delay issued to the applicant was not a valid certificate under Section 79 G of the Civil Procedure Act as it was not a certificate of the time required to prepare and deliver to the applicant a copy of the decree or order of the magistrate. Like in the above cited case, the applicant mistakenly sought and was supplied by the lower court, proceedings, judgment and or order. He cannot therefore seek cover under Section 79 G of the Civil Procedure Act as that period does not qualify to be excluded from the computation of the 30 days right of appeal.

Notwithstanding the above this court has discretion to enlarge time where it is in the interest of justice to do so. I have therefore considered the draft memorandum of appeal but once again I concur with the Respondent's counsel that the appeal does not have a high likelihood of success. In the circumstances I find that there is no justification for exercising my discretion in the applicant's favour. I do therefore refuse to grant leave to the applicant to file his appeal out of time. The application is accordingly rejected.

Dated, signed and delivered this 12th day of April 2006.

H. M. OKWENGU

JUDGE