

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

Misc Civ Appli 46 of 2005

MARIA ASIRO

LUBALEAPPLICANT

VERSUS

MAURICE ATIENO

OYIERARESPONDENT

RULING

In his application by Notice of Motion dated 23-5-05 filed in court on 4-7-05, the Applicant, MARIA ASIRO LUBALE, who was wrongly described as the Appellant, sought leave to appeal out of time against the judgement of the Senior Resident Magistrate at Mumias, Ms P. K. Sultan, delivered in SRMCC No. 78 of 2003 on 2-12-04.

In paragraph 5 of her affidavit in support of the Application, the applicant averred that she applied for certified copies of the proceedings and judgement and annexed a copy of a letter marked "EMBI" which her advocate had written to the trial court seeking the proceedings and judgement. The letter was dated 11-2-05.

The judgement and proceedings were received on 25-5-05. The time for lodging appeal elapsed on 2-2-05 (see section 79G of the Civil Procedure Act, Cap 21). However, the Applicant did not seek or obtain a certificate of delay under section 79G of the Civil Procedure Act. It is for that reason that the present application has been brought ostensibly under the proviso to section 79G (supra). Under the said proviso, it is incumbent upon the Applicant to satisfy the court that she had good and sufficient cause for not filing appeal in time.

After receipt of the proceedings and judgement on 23-5-05, the Applicant did not apply to court for leave to file appeal out of time until 4-7-05. The delay between 2 - 2- 05 when the time for appealing ran out and 4 - 7 - 05 when the application for leave to appeal out of time was filed has not been explained satisfactorily.

As the applicant received the proceedings and judgement on 23 - 5 - 05, one would have expected her to move with expedition to seek leave to file appeal out of time. However, it took her over one month to make the application. By the date the proceedings were received, the appeal was out of time by close to four months. In my view, a delay of six months in filing appeal from the date the time ran out on 2/2/05 to the date the application was made on 4/4/05 cannot be described as not inordinate. The applicant has I do not find merit in the application. I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kakamega this 5th day of May, 2006.

G. B. M. KARIUKI

J U D G E