

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

MISCELLANEOUS APPLICATION NO. 417 of 2005

KENINDIA ASSURANCE CO. LTD APPLICANT

VERSUS

CHARLES NGUNJIRI KARIUKI RESPONDENT

RULING

In this application dated 23rd March, 2005, brought under Order 49, Rule 5, Order 41 Rule 4 of the Civil Procedure Rules and Sections 79 G, 95 and 3 A of the Civil Procedure Act, the Applicant seeks leave to file appeal out of time, and stay of execution. At this time, only the prayer relating to leave to file appeal out of time is before this Court. Of course, stay of execution pending appeal can only be granted once there is a valid appeal pending before this Court.

Judgment in the lower court was delivered on 10th February, 2005. The Applicant's reason for not filing the memorandum of appeal in time, that is within 30 days of the Judgment, is that the instructions to file appeal were received by the Applicant's advocates on 1st March, 2005, and thereafter they applied for certified copies of proceedings and judgment, which have still not been received. However, this application, together with a draft memorandum of appeal, was filed on 24th March, 2005, which is 14 days after the time to file appeal had expired.

Section 79 G of Cap 21 under which the application is made provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.” Now, the operative words, which guide the Court in the exercise of its discretion to admit an appeal out of time, are “good and sufficient cause” in the proviso to Section 79 G. So, has the applicant here demonstrated good and sufficient cause for not filing the appeal in time? Not, in my view. By 1st March, 2005, the Advocates had received the instructions to file the appeal, and they had nine full days to do so. But they waited until 22nd March, 2005 to apply for proceedings and judgment, which, incidentally, they have still not received. All they had to do was file the memorandum of appeal, and to do so, they did not need the proceedings. All they needed was a certified copy of the decree or order, which was the subject of this appeal, and then, too, this could have been filed subsequently – not necessarily with the memorandum. The fact that the Applicant has annexed the draft memorandum of appeal to this application shows that it did not need the proceedings or the decree or order for the purposes of filing the same. In any event, if the Applicant indeed needed the decree or order, and was unable to obtain the same, it ought to have obtained, and annexed, the certificate of delay issued by the Deputy Registrar in which case the time required for the preparation and delivery of the decree or order, would have been excluded in the computation of time for filing appeal. (See Section 79 G, Civil Procedure Act). This has not been done.

Accordingly, and for reasons outlined, I am unable to grant leave to file appeal out of time, and I dismiss the application dated 24th March, 2005 with costs to the Respondent.

Dated and delivered at Nairobi this 25th day of May, 2005.

ALNASHIR VISRAM

JUDGE