

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

MISC. CIV. APPLI. 293 OF 2005

ZACHARIAH MBUGUA KARIUKI.....PLAINTIFF

VERSUS

CATHERINE WAMBUI KARIUKI.....DEFENDANT

RULING

The application before me is for leave to file an appeal out of time and stay of execution pending the hearing and determination of the intended appeal.

According to the applicant's affidavit, the ruling in Naivasha **SRMCC No. 4 of 2001** was to be delivered on 18th February, 2005 but on that day the same was not ready. The trial magistrate then indicated that it would be delivered on notice but the same delivered on 18/3/2005 without notice and only the respondent's advocate who ordinarily practices law in Naivasha was present. The applicant only got to know of the ruling when he noticed on 30/4/2005 that his salary had been attached pursuant to the said ruling. By that date, the 30 days limitation period for filing an appeal had expired.

In her reply, the respondent stated that the applicant had not sufficiently explained the reason for the delay in filing the intended appeal. She said that there was no indication by the trial magistrate that the ruling would be delivered on notice, saying that on 18/2/2005 the two advocates attended court and the learned magistrate stated that the ruling would be delivered on 18/3/2005 but on that date the applicant's advocates did not attend court. The respondent further stated that the order of stay of execution will deny the applicant's children their livelihood as they were depending on his one third salary which was the subject of the attachment.

I have looked at the record of the lower court and it is true it indicates that the ruling was to be delivered on 18/2/05. Thereafter, there is nothing to show that it was going to be delivered on 18/3/05. Infact there is nothing to show whether any advocate attended court on the 18/2/05. In the circumstances, I have no reason to doubt the averments made by the applicant.

In considering an application of this nature, the applicant is required by the proviso to Section 79G of the Civil Procedure Act to demonstrate that he had a good and sufficient cause for not filing the appeal in time. Apart from considering the reason for the delay, the court also has to consider the length of the delay, the chances of the appeal succeeding and the degree of prejudice that is likely to be occasioned to the respondent if the application is allowed, see **MUTISO VS MWANGI** C.A. Civil Application Number 251 of 1997 (unreported). In my view, the applicant has shown a good and sufficient cause for not having filed the appeal in time since he was not present on the date when the ruling sought to be appealed from was delivered, not having been notified of the same. From the date when he knew of the said ruling, it took him ten days to file the present application and it can be stated that there was no inordinate delay.

While it may not be easy for this court to assess the chances of success of the intended appeal as I do not have all the pleadings and proceedings of the trial court, all I would say is that prima facie, the proposed appeal does not seem to be frivolous and in any event, a party should not be deprived of his constitutional right of appeal particularly where it has been demonstrated that he had a good and sufficient cause for not having filed the appeal in time.

I grant the order sought by the applicant but, to ensure that the applicant's children do not suffer

unnecessarily due to these orders, I direct that counsel for the applicant files the memorandum of appeal within the next three days from the date hereof and thereafter proceeds to take all the necessary steps so that the appeal is heard and finalised within the next thirty (30) days from the date hereof. I direct the registry to give dates on priority basis for this matter. The costs of this application shall be in the appeal.

DATED, SIGNED & DELIVERED at Nakuru this 29th day of June, 2005.

D. MUSINGA

JUDGE

29/6/2005