



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**Misc Civ Appli 157 of 2005**

**SIMEON KYULI KASESE ..... APPLICANT**

**VERSUS**

**FIDELIS MUTUA KASESE ..... RESPONDENT**

**R U L I N G**

Before me is the application dated 8/6/05 seeking the stay of the decree dated 25/4/03 of the Senior Resident Magistrate, Kangundo in SRMCC 204/00 pending hearing of this application inter partes and that the court do enlarge the time for filing of an appeal against the said decree and Judgement. The applicant also seeks costs of the application.

This application is supported by grounds found in the body of the application and an affidavit dated 8/6/05 and sworn by Simeon Kyuli Kasese, and the annexures thereto.

The application was opposed and a replying affidavit was sworn by Fidelis Mutua Kasese.

The applicant cited two authorities in support of the application.

**1. *FREDRICK G.K WAITHAKA versus THUO KAMAU C.A 71/94 and***

**2. *NAIROBI HOME ECONOMICS TRAINING CENTRE versus AFRICAN HERITAGE LTD.***

As was well put in the Nairobi Home Economics Training Centre Case, in such an application, the court will first consider the reason for the delay in filing of the appeal; whether there is reasonable explanation and in most cases, the court does consider the merits of the appeal or merely if one has an arguable appeal. It is the applicant's contention that he was the defendant in SRMCC 204/00 and that the said case proceeded without him being accorded an opportunity to call witnesses and in addition he was not notified of the date of Judgement of 25/4/03 but learnt of it on 10/2/04 when he was served with Notice to Show Cause as to why he should not be arrested and jailed. That upon receipt of the notice, he instructed Meenye and Kiume Advocates to apply for Stay of Execution of the decree and the said Advocates kept telling him that they had taken the necessary steps till he was arrested on 15/5/05 in execution of the decree. He claims to be old, 70 years old, dissatisfied with the lower court judgement and wishes to appeal and therefore seeks the leave of the court to appeal out of time.

In opposing the application, the counsel for Respondent, Mrs Mwangangi, submitted that the application is misconceived, bad in law, brought in bad faith and defective. It is said to be defective for failure to comply with Order 50 Rule 5 (2) Civil Procedure Rules. It was further urged that there has been inordinate delay in bringing this application as Judgement was delivered over 2 years ago and no sufficient reason has been given to move the court to exercise its discretion. The counsel urged that the

applicant failed to honour a consent Judgement recorded on 7/5/05 and on 19/5/05 when the applicant agreed to liquidate the decretal sum in instalments and that the applicant intends to delay the plaintiff/Respondents enjoyment of fruits of his Judgement and that he has therefore not come to court with clean hands.

The applicant did not file his intended appeal with copies of the decree or order of the lower court. The court is not able to appreciate whether or not the applicant's allegations that he was not allowed to call witnesses are true or not because the lower court proceedings are not before this court. The Respondent argues that infact the applicant was served and attended court on some occasions. I have seen the Return of Service annexed to the replying affidavit. It is only the affidavit dated 16/11/01 and that of 15/3/02 that the applicant was allegedly served. In the other 3 affidavits, the process was served on his wife and that cannot be taken as proper service as the process server had not made any efforts to serve the applicant personally. Having raised doubt that he may not have been served and that he was not aware of the matter till 10/2/04, the question is what did he do? The applicant contends that he instructed Meenye and Kiume Advocates to Act for him. He annexed several receipts as evidence of payment of legal fees to the advocate. Apart from the names of the applicant appearing and some amounts having been received in the said receipts, there is no evidence that these receipts relate to this case. The court file number is not indicated. They bear a file number for that office and it is quoted as 30/287/02. A reading of this number does indicate that the case was of the year 2002 as I believe the last two figures represent the year. The applicant however only went to instruct the alleged Advocates after 10th February 2004 and so their file cannot be dated 2002. I find it doubtful that the receipts annexed to the applicant's affidavit relate to this case at all. It follows that the applicant has not given a good explanation to this court as to why he took no steps to bring this application after he learnt of the Judgement on 10/2/04. This application was filed on 8/6/05 over a year later. That delay has not been explained and I do hold that the delay is inordinate and inexcusable. In this case I do not believe that there is any advocate to blame for the delay as was held in the case of FREDRICK WAITHAKA (Supra) that mistakes of Advocates will not be visited on their clients.

The Respondent contends that they had entered into a consent agreement with applicant for the payment of the decretal sum on 7/5/05 but the Respondent failed to honour it. Further consent was entered on 19/5/05 and similarly, he did not honour it and that is when he came to court on 8/6/05. The applicant has not denied these facts that he had agreed to pay and failed to do so. Furthermore, when he came to court under Certificate of Urgency, the court ordered a Stay of Execution on condition that a sum of 50,000/= was paid. None was deposited with the court. Is the applicant really serious with having the appeal prosecuted or is the application meant to delay the Respondent's enjoyment of fruits of his Judgement?

There has been inexcusable and inordinate delay in bringing this application, the applicant has been unable to provide security as required though he had agreed to pay. This is a discretionary remedy and the parties should come to court with clean hands. From my observations above, I doubt that the applicant came to court with clean hands and this court is unable to exercise its discretion in this case for the above given reasons and the application is hereby refused and dismissed with costs to the Respondents.

**R.V. WENDOH**

**JUDGE**

Dated at Machakos this 17th day of August 2005

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**