



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL 117 OF 2005**

**ZACHARIA MBUGUA KARIUKI.....APPELLANT**

**VERSUS**

**CATHERINE WAMBUI KARIUKI.....RESPONDENT**

**RULING**

On 29th June, 2005 this court granted leave to the appellant to file an appeal out of time. It further ordered that the memorandum of appeal be filed within three days from the aforesaid date and thereafter the appellant was to take all the necessary steps so that the appeal could be heard and finalised within 30 days from the date of the said ruling. The registry was even directed to give this matter a date on priority basis. This was because the issues in question in the appeal relate to the welfare of some minor children of the parties herein.

The applicant stated that the appellant failed to meet the aforesaid conditions in that the appeal was filed on 26/7/2005 and has not even been set down for hearing. Certified copies of the proceedings in the subordinate court were procured by the applicant and had then been forwarded to the appellant's advocates on 16th July, 2005. The applicant therefore asserted that the appellant had no reason for delaying the filing of the appeal while he was enjoying an order of stay of execution of the lower court's order by which his one third salary was attached for the maintenance of his children with the applicant. The children were said to be currently out of school due to lack of school fees. One of the children was also said to be sickly and required to be attended to by a cardiologist and had been booked for medical examination at Kenyatta National Hospital on 5th October, 2005. Money was therefore required for his medication.

For the said reasons, the applicant urged the court to strike out the appeal or in the alternative vacate the order of stay of execution granted on 29th June, 2005.

The appellant did not file any affidavit in response to the applicant's affidavit but did file some grounds of opposition. The said grounds were filed one day prior to the hearing date of the said application in contravention of **Order L Rule 16** of the **Civil Procedure Rules**. The applicant's counsel urged the court to disregard the said grounds and deem the application as being unopposed. Mr. Gitonga for the appellant did not make any effort to explain why the grounds of opposition were filed late or why no replying affidavit was filed and I must therefore assume that there were no good reasons for so doing and consequently, I will disregard the grounds of opposition on record.

Considering that the appellant has already filed his appeal, albeit late, I will not strike it out but will discharge the order of stay of execution, which I hereby do, with the result that pending the hearing and determination of the appeal, the order of attachment of the appellant's one third basic salary as ordered by

the trial court shall continue to operate. The appellant shall bear the costs of this application.

DATED, SIGNED AND DELIVERED at Nakuru this 13th day of September, 2005.

**D. MUSINGA**

**JUDGE**

**13/9/2005**

Ruling delivered in open court in the presence of Kr. Kiplenge holding brief for Mr. Gitonga for the appellant and Mr. Machage for the applicant.

**D. MUSINGA**

**JUDGE**

**23/9/2005**