

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC.CIVIL APPLICATION NO. 57 OF 2004

IRENE WAMBUI MWANGI.....PLAINTIFF

-versus-

LYDIA WAMBUI GITAU.....DEFENDANT

R U L I N G

The Applicant has moved the Court under Order 49 Rule 5 of the Civil Procedure Rules by a Chamber Summons application dated the 5th January 2004 and filed on the 21st of January 2004 for an order granting the Applicant leave to appeal out of time against the Judgment of the Thika Chief Magistrate's in Civil Case Number 423 of 2002 delivered on the 31st July, 2003.

In support of the two grounds stated in the application is the supporting affidavit of the Applicant made on the 21st January 2004 and the annexes thereto. Mr. Kamiro , for the Applicant, in his submissions contended that the Respondent's Grounds of Objection dated the 24th February 2004 cannot apply as the Applicant has, by law, an automatic right of appeal against the said Judgment.

Mr. Njoroge, for the Respondent oppose the application but only on grounds (a) and (e) of the said Grounds of Objection, having abandoned the other three grounds therein. He drew my attention to the Ruling of the Court of Appeal dated the 24th May 2002 in **J.P. MACHIRA t/a MACHIRA & COMPANY ADVOCATES –vs- (1.) WANGETHI MWANGI and (2.) NATION NEWSPAPERS LIMITED** (Civil Application No. Nai 433 of 2001) (unreported) arguing that the Applicant's draft Memorandum of Appeal is not meritorious as it does not disclose issues which merit serious judicial consideration.

Mr. Kamiro in his brief reply distinguished such decision of the Court of Appeal as inapplicable on the basis that the appeal therein arose from an order granted under Order 49 Rule 4 of the Civil Procedure Rules.

I have considered the application in light of the submissions of both counsel and I am satisfied that it should be allowed.

Accordingly, it is ordered that in terms of paragraph (a) of the said Application dated the 5th of January 2004, the Applicant be and is hereby granted leave to appeal out of time against the said Judgment of the Thika Chief Magistrate's Court in Civil Case No. 423 of 2002 delivered on the 31st July 2003.

It is further ordered that the question of costs be reserved until the hearing of the appeal with leave to either party to move the Court if any step in the appeal is not taken within the due or reasonable time.

Dated and delivered at Nairobi this 5th day of March 2004.

P. Kihara Kariuki

Ag. Judge