

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

MISC CIV APPLI 640 OF 2004

PETER MATHENGE NDEGWAAPPLICANT

VERSUS

PHYLIS WANJIRA MATHENGEDEFENDANT

RULING

In the Chamber Summons application dated the 25th May 2004, the Applicant seeks leave of the court to file an appeal out of time against the decision of the learned trial Magistrate in dismissing the Applicant's application for review of the judgment of the lower court. The application is premised on the seven grounds set out therein and supported by the affidavit of the Applicant made on the 26th May 2004.

In opposing the application on the basis of the Replying Affidavit of the Respondent made on the 31st May 2004, Mr. P.K. Njoroge argued that the application for leave ought, in the first instance, to be made in the lower court by virtue of the provision in order 42 rule 3 of the Civil Procedure Rules.

Mr. M.K. Chebii for the applicant contended that order 42 rule 3 aforesaid does not apply and referred me to section 79G of the Civil Procedure Act and order 49 rule 5 of the Rules aforesaid under which the application is made.

While I would respectfully agree with Mr. Chebii's submission, it is necessary to point out that the applicant did not require copies of the proceedings to lodge his appeal. All he required was a certified copy of a decree or order sought to be appealed from. Even in that case, order 41 rule 1A of the said Rules provides that the certified copy of the decree or order appealed from may be filed subsequently after the filing of the Memorandum of Appeal.

But even if one were to consider and accept the possibility that the file of the lower court was missing (which is challenged by the Respondent) and that the Applicant's former Advocate failed to seek leave to appeal out of time, the applicant has not shown how that prevented him from filing the requisite Memorandum of Appeal in this court soon after May this year when he discovered that no appeal had been filed. I am therefore not satisfied that the Applicant is entitled to the discretion sought. He has not shown "good and sufficient cause for not filing the appeal in time" in terms of section 79 G aforesaid.

Accordingly, I hereby dismiss the Chamber Summons application dated the 25th May 2004 with costs and so order.

Dated and delivered at Nairobi this Twelfth day of November 2004.

P. KIHARA KARIUKI

Ag. JUDGE