



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MACHAKOS  
CIVIL CASE MISCELLANEOUS NO.279 OF 2001**

**MUTEMI MWASYA:.....:PLAINTIFF**

**VERSUS**

**MUTUA KASUVA:.....:DEFENDANT**

**Coram: R. Nambuye – Judge  
Mr. Nyaberi – Advocate for Applicant  
Mr. Muli – Court/Clerk**

**R U L I N G**

The applicant has come to this court under order 41 rule 4(1) and order 49 rule 5 and order 21 rule 22 of the Civil Procedure rules by way of notice of motion seeking among others an order that the applicant be allowed to file an appeal out of time, that there be stay of execution of the decree herein pending the hearing of this application, subsequently pending the determination of the intended appeal, that the defendant's memo of appeal to be deemed to be properly filed and that costs to be in the cause.

The defendant was served but filed no papers and this court being satisfied that they had due notice allowed the applicant to proceed exparte.

The grounds in support are that the appellant was not aware of the proceedings, he was not served with a copy of the ruling, the appeal has high chances of success, that if the orders being sought are not granted the appeal will be rendered nugatory, that the file went missing and so the proceedings could not be supplied on time until after the 28 days for the right of appeal had lapsed, that they have given sufficient reasons to warrant them being granted a chance to be heard on appeal. They rely on the case of *Cut Tobacco Kenya Ltd. Versus British American Tobacco (K) Ltd. Nairobi Court of Appeal Civil Appeal No.336/99* (CR) where the court observed at page 2 "that in an application for extension of time the court is exercising its discretion and it is upon the applicant to explain to the satisfaction of the court that this discretion should be exercised in his favour. Although this was unfettered discretion but like all judicial discretion. It must be exercised on reason not caprice and the exercise must not be arbitrary or oppressive and at page 5 "it is now well settled that the decision whether or not to extend the time for appealing is essentially dissatisfactory. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are first the length of delay. Secondly, the reason for the delay. Thirdly, possibly the chances of appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted". I have applied these principles to the facts of this case and I find that indeed in the proceedings of 7th June 2000 the award read to the parties read that the land had been awarded to the plaintiff, costs were later assessed in favour of the plaintiff.

I have looked at the proceedings of 17th May, 2001 and find that the defendant was present in court and he made oral representations, there was no indication that the plaintiff had been informed of that day's proceedings. The learned trial magistrate talks of having seen correspondences from the area D.C. The same thing is mentioned in the ruling. It is, therefore, clear that it has not been shown how the court was moved to reopen the matter, how it proceeded without being moved to set aside the earlier orders.

I am of the opinion that the applicant has a genuine complaint to take on appeal. He has earned the discretion of this court. Prayer 2 and 3 of the application dated 28th September, 2001 be and are hereby allowed to the effect that:-

***(1) The applicant is allowed to file an appeal out time against the ruling of the lower***

*court, which is undated.*

*(2) The appeal to be filed within 7 days from the date of the reading of this ruling.*

*(3) Stay of the lower court orders is granted pending the hearing and final determination of the intended appeal.*

**Dated, Read and delivered at Machakos, this ..... day of .....2001.**

**R. Nambuye**

**Judge.**