



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**MISCELLANEOUS APPLICATION NO.65 OF 2019**

**CHARLES KARIUKI.....APPLICANT**

**-VERSUS-**

**NAOMI GESARE.....RESPONDENT**

**RULING**

1. On the 31/5/2019 the applicant Charles Kariuki filed a certificate of urgency and a Notice of Motion dated the 29/5/2019 the applicant sought leave to appeal out of time and also order for stay of execution. The said application was to be heard 12/6/2019. On the said date 12/6/2019 the application was stood over to the 16/7/2019. On the 16/7/2019 the applicant did not present himself in court nor his lawyer. At 9.42a.m. the application dated the 29/5/2019 was dismissed for non-attendance by the applicant.

2. On the 29/9/2019 the applicant moved to court again by way of certificate of urgency and a Notice of Motion dated the 20/9/2019. The applicant in the said application seeks to have the orders of 16/7/2019 set aside. He also seeks orders for stay of execution of the judgment and decree in **Kisii CMCC NO.85 of 2013 Naomi Gesare –vs- Charles Kariuki**.

3. In his affidavit in support of the application the applicant claims that the order made on the 16/7/2019 was made through no fault or wrong on the part of the applicant and his counsel and that the matter was not cause- listed. This is not true. The applicant did not attach the cause list for the 16/7/2019. The record shows that the matter was properly before the court after it was cause listed and was called out twice before it was dismissed. The applicant other reason is that they could not get the court file from High Court Civil Registry and the file could not be traced.

4. I find that the applicant has not attached any letter addressed to either the Executive officer of the Deputy Registrar in charge of High Court indicating that his counsels firm had sought for the file and that it could not be traced.

5. His 3<sup>rd</sup> reason is that he is keen on pursuing the appeal as he feels aggrieved by the decision of Trial Magistrate. The applicant has a right to appeal. I note that in the application that was dismissed he sought to appeal out of time. He indicated he was aggrieved by the judgment and decree in **Kisii CMC No. 85 of 2017**. He avers that the delay occasioned in filing the application is not inordinate and that the court should exercise its direction and reinstated the application dated 25/5/2019.

6. The application was opposed on grounds that the applicant has not satisfactorily explained the reasons for filing the application on the 20/9/2019 yet the dismissal order was made on the 16/7/2019. That the delay is inordinate.

7. It is clear that the current application was filed about 2 months after the application dated 29/5/2019 was dismissed. 2 months in my view cannot be considered as inordinate delay. The applicant claims that he still wants to pursue his appeal. From what is deponed it's clear that it is his counsel who did not attend to the matter. I shall not punish the applicant for the mistake or omission of his counsel. I will therefore exercise my discretion and set aside the dismissal order dated 16/7/2019. The application dated the 25/5/2019 is reinstated for hearing. The parties shall take date for interpartes hearing of the said application in court. Costs shall be in the cause.

**Dated, signed and delivered this 8<sup>th</sup> day of October 2019.**

**R.E OUGO**

**JUDGE**

**In the presence of;**

Mr. Nyangacha h/b Mr. Ondande for the applicant

Respondent Absent

Ms. Rael Court Clerk