



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**MISC CIVIL APPLICATION NO. 216 OF 2015**

**JULIUS G. MACHARIA** (*Suing as a legal representative to the estate of  
Humphrey Maina Macharia (DECEASED)*).....**PLAINTIFF/RESPONDENT**

**VERSUS**

**DANIEL MWAI RUGANO**.....**DEFENDANT/  
APPLICANT**

**RULING**

This application was brought under certificate of urgency dated 2nd November, 2015 seeking leave to appeal out of time against the judgement of the court of Senior Resident Magistrate at Embu, which was delivered on 21<sup>st</sup> July, 2015. Additionally, it also seeks stay of execution of the decree arising out of the same judgement.

The application is supported by a supporting affidavit of Sandra Nyakweva dated 2<sup>nd</sup> November, 2015 and Joseph Karanja dated 2<sup>nd</sup> November, 2015.

According to those affidavits, the applicant was ordered to pay the respondent/plaintiff a sum of Kshs 1,680,200/- being general damages arising out of a fatal road accident. They have also stated that counsel who was prosecuting the case on behalf of the applicant left the firm abruptly without a proper handing over, thus leading to the delay in filing and prosecuting the intended appeal and the related stay of execution of the monetary decree.

Furthermore, they have stated that by the time they discovered that judgement had been entered against the applicant, the time allowed for lodging the appeal had lapsed by 20<sup>th</sup> August, 2015.

They have further stated that they are ready and willing to pay half of the decretal sum of money to the respondent and deposit the balance in court pending the hearing and determination of the appeal.

Finally, they have stated that unless their prayers for leave to appeal out of time and for stay of execution are granted, the applicant's intended appeal will be rendered nugatory.

The respondent, although served, did not file any replying affidavit. The respondent did not attend court during the hearing of this application. The application proceeded ex-parte.

I have perused the affidavit evidence of the applicant and I find it credible. I accept their explanation of the delay in prosecuting this application was due to the departure of the applicant's counsel without a proper handing over of this matter. The delay is excusable.

Furthermore, I also find that there is merit in the intended appeal, which is evident from the memorandum of appeal, that is annex "SN 2" to the affidavit of Sandra Nyakweba.

In the light of the foregoing, I find that unless the two prayers are granted, the intended appeal may be rendered nugatory.

In the circumstances, I hereby grant the applicant's prayers No. 2 and 3 of the notice of motion.

However, the applicant will deposit the whole decretal amount in court within 30 days from today pending the hearing and determination of the intended appeal failing which the orders made herein and the application will be set aside.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this.....**11<sup>th</sup>**... day of **NOVEMBER,..2015**

In the presence of the presence of Ms Okwaro for applicant and in the absence of counsel for the respondent

Court clerk Mr Nyaga.

**J.M. BWONWONGA**

**JUDGE**

**11.11.15**