

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO 1092 OF 2013

1. MASTER ZEPHANIA MAGAMA
2. CHRIS WEARS LIMITEDAPPLICANTS

VERSUS

1. AGNES MAKENA KARIA
2. SIMON GITHINJI MURUGU.....RESPONDENTS

R U L I N G

1. This application (**notice of motion dated 14/11/2013**) seeks leave to lodge appeal out of time against the decree of the lower court passed on 05/09/2013 in a case that has not been identified fully in the papers filed herein. The Applicants have stated that the judgment of the lower court was delivered without notice, and that the present application was filed as soon as possible after their advocates became aware of the judgment and obtained instructions to appeal. That is explained in the supporting affidavit sworn by one **Peter Ogwandi**, the Commercial Manager of the Applicants' insurers.

2. The Respondent has opposed the application by a **replying affidavit filed on 11/03/2014**. The main ground of opposition urged is that judgment was delivered on the date reserved by court at conclusion of the hearing, and that the said date had been given in the presence of advocates for both sides.

3. As at present the court does not have before it proceedings of the lower court in order to verify the contested issue regarding whether the lower court delivered its judgment with notice to both sides.

4. Under the **proviso to section 79G** of the Civil Procedure Act, Cap 21 the court may admit an appeal out of time "if the appellants satisfy the court that he had good and sufficient cause for not filing the appeal in time".

5. It may well turn out that the judgment of the lower court was delivered without notice to the Applicants. I am persuaded, upon the material now before the court, that after learning of the judgment the Applicants' advocates sought instructions, and subsequently filed the present application as soon as they could after obtaining such instructions. I am thus satisfied that the Applicants had good and sufficient cause for not filing the appeal in time.

6. In the event I will allow the application and grant the leave sought. The Applicants shall file their memorandum of appeal within fourteen (14) days of today. Costs shall be in such appeal. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 8th DAY OF MAY 2014

H.P.G. WAWERU

JUDGE

DELIVERED THIS 9TH DAY OF MAY 2014

