



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS APPLICATION NUMBER 839 OF 2009**

**JOHN KARIUKI THUO. ....APPLICANT**

**VERSUS**

**TEMAN MACHARIA MUGO. .... RESPONDENT**

**R U L I N G**

Before me is a Notice of Motion dated 26<sup>th</sup> November, 2009. The application was filed under section 79G of the Civil Procedure Act (Cap 21 Laws of Kenya), and Order 49 Rule 5 of the Civil Procedure Rules.

The application has three prayers. They are as follows: -

- 1. THAT this Honourable Court be pleased to grant leave to the applicant to file appeal out of time.**
- 2. THAT this Honourable Court be pleased to grant a stay of execution of the Order/Decree made herein on 17<sup>th</sup> April 2007 in the Chief Magistrate's Court (Kiambu) Civil Case Number 66 of 1987 pending the hearing of this Application and the hearing and determination of the intended appeal.**
- 3. THAT costs of this application be in the intended appeal.**

The application has grounds on the face of the Notice of Motion. The grounds are brief, and they are as follows: -

- a) Judgment in Civil case No. 77 of 1987 in chief Magistrate's Court (Kiambu) was delivered on the 17<sup>th</sup> April 2007 in the absence of the applicant or his then advocate.**
- b) Certified copies of the judgment and proceedings were availed to the applicant on 1<sup>st</sup> October, 2007.**
- c) There was pending in this court Miscellaneous Application No. 463 of 2007 which was finalized by this Honourable court on the 5<sup>th</sup> March, 2009.**
- d) There was pending in the Chief Magistrate's Court (Kiambu) an application in Civil Case No. 66 of 1987 which application was disposed of on the 28<sup>th</sup> May 2009.**

The application was filed with a supporting affidavit sworn by the applicant on 26<sup>th</sup> November 2009. It was deponed, inter alia, that the applicant applied for certified copies of proceedings on 3<sup>rd</sup> July, 2007;

that on 23<sup>rd</sup> July 2007 the applicant filed an application dated 18<sup>th</sup> July, 2007 seeking the orders sought in this application; that this court heard the application and on 5<sup>h</sup> March 2009 ruled that the application ought to have been filed by the advocates who represented the applicant in the subordinate court; that the applicant filed a fresh application on 2<sup>nd</sup> April 2009 to regularize the representation in the Chief Magistrate's case herein, and on 25<sup>th</sup> May 2009 same was allowed by consent; that there was now, pending before the Chief Magistrate's Court an application dated 25<sup>th</sup> May 2009; that because of the delivery of judgment in the absence of the applicant or his advocate and also the application dated 25<sup>th</sup> May 2009 in the Chief Magistrate's case, the applicant was unable to file an appeal within time; that his appeal has great chances of success; that if leave was granted the appeal would be filed immediately as record of appeal and draft memorandum of appeal had already been prepared; that the subordinate had ordered that the applicant be evicted with his extended family of over 60 people from LR No. Escarpment Jet Scheme/202; that the High Court had in HCCA No. 208 of 1988 ordered the Chief Magistrate (Kiambu) to hear the case on merits; and that the Chief Magistrate had on two occasions ordered that the applicant and his family be evicted from the suit land without being given an opportunity to present his defence. The applicant also filed a further affidavit.

The applicant, through his counsel, also filed written submissions of 1<sup>st</sup> December 2010. It was contended that because the respondent filed grounds of objection and thereafter, a replying affidavit, he would not rely on both. It was the contention that in terms of Order 50 Rule 16(1) of the Civil Procedure Rules – LN No. 128 of 2001, the respondent could only rely on the grounds of objection. Counsel for the applicant M/s Mwaura Shairi & Company Advocates contended that there were only two issues for determination, as follows: -

- ***Whether the applicant has good and sufficient reasons for not filing the appeal in time.***
- ***Whether it is fair and just to grant the applicant the orders sought.***

It was contended that there were good and sufficient reasons for the delay as the judgment was delivered without notice to the applicant and his counsel. Thereafter, when the applicant became aware of the decision he immediately took steps to file the necessary requests for proceedings and also applied for leave to appeal out of time.

It was also contended further that it was fair and just to give a chance to the applicant to appeal firstly, because the applicant's defence in the subordinate court was not considered and secondly, because though the High Court in Civil Appeal No. 208 of 1988 had on 18<sup>th</sup> February, 1993 ordered the subordinate court herein to hear the parties afresh, the Kiambu court failed to comply with this order, by refusing to hear the applicant although he was present in court.

Reliance was placed on the case of **ADOLF GITONGA WAKAHILUIA & OTHER VS MWANGI THIONGO** – Civil Appeal No. 58 of 1985 – wherein the Court of Appeal stated, inter alia, that: -

***“(a) It is basic law that no one should be condemned to a judgment passed against him without being afforded a chance of being heard”.***

It was counsel's contention that the Court of Appeal allowed the above appeal on ground.

It was contended that the respondent's grounds of objection (opposition) were not well grounded in law. Firstly, the applicant could not file an appeal without obtaining prior leave to do so. Secondly, grounds (A) and (B) of objection relate to matters of evidence.

The application was opposed. Grounds of objection were filed on 28<sup>th</sup> May, 2010 by M/s Kamau Kinga & Company Advocates for the respondent. The said grounds are as follows: -

- a) That there is no appeal filed.***

- b) *That no leave to appeal out of time has been sought.*
- c) *The application is an abuse of court process.*

The respondent's counsel also filed a replying affidavit sworn on 10<sup>th</sup> June 2010 by the respondent.

The respondent's counsel further filed written submissions on 17<sup>th</sup> January, 2011. The respondent sought to reply on both the grounds of objection and the replying affidavit, because Justice Rawal granted him leave to file a replying affidavit. In my view, and I will state this here straight away, he can choose to rely only one of those documents. Since he filed the replying affidavit later, and with leave of court, I will only consider the replying affidavit.

It was contended that the applicant was personally present in court when the date for delivery of judgment was set.

It was the contention that the judgment having been delivered on 17<sup>th</sup> April 2007, the applicant was guilty of inordinate delay as he only applied for certified copy of proceedings only on 3<sup>rd</sup> July and that that delay of two (2) months had not been explained. Reliance was placed on the case of **GICHUHI KIMURA VS SAMUEL NGUNU** – Nbi Civil Application No. 243 of 1995 (unreported) cited with approval in the later case of **KENYA CONSUMERS ORGANIZATIONS VS MINISTER FOR TRANSPORT & COMMUNICATIONS** – Nbi Civil Application No. 77 of 1997 in which it was stated thus: -

***“I am aware that litigation ought to come to an end and that it is unfair that one case should hangover the heads of parties indefinitely. But that consideration must be weighed against the wider interests of justice, namely that where possible cases should be brought to a close after the hearing on merits.....”***

It was contended that the letter requesting for proceedings was not copied to the respondent thus leaving him in uncertainty. It was contended further that the applicant first applied for stay of execution on 23<sup>rd</sup> July 2007, which indicated that this was merely an attempt to delay the respondent's rights to enjoy the fruits of the judgment.

In addition, it was contended that the applicant had not filed a certificate of delay to prove that the delay was not of his making.

It was contended that granting the prayers asked for would not be fair and just, because the respondent was entitled to be allowed to enjoy the fruits of the judgment. Reliance was placed on the case of **LEO SILA MUSILA –V- ROSE HELLEN WANGARE – Civil Application No. Nai 251 of 1997** which was cited with approval in **AMUTTU –vs- RUTH KALEKYE (2005)** eKLR. I was urged to dismiss the application.

I have considered the application, the documents filed and submissions. The decision whether or not to extend time for filing an appeal is essentially discretionary. In **LEO SILA MUTISO VS ROSE HELLEN WANGARE MWANGI** – Civil Application Nai.251 of 1997, the court held, inter alia that: -

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which the court generally takes into account in deciding whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay. Thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”***

Indeed, in this matter there is a delay of a number of years between the date of judgment in 2007 to today. The respondent claims that this is a delay of 24 years. The delay is actually about 4 years.

It is an unfortunate case where a litigant seems to have been abandoned by an advocate who was on record. That was an unfortunate incident, since the applicant is obviously a layman in legal matters.

Possibly, there was no sufficient instructions to the advocate. However, the honourable and professional thing for an advocate to do much a case is to seek to withdraw from acting, not to abandon a client. It gives the profession a bad name to abandon a client half way through a case. It also amounts to professional misconduct.

The applicant was denied audience at the trial before the magistrate because he did not pay court adjournment fees. He has not said to date whether that fees has been paid. Court orders are there to be obeyed. One cannot disobey court orders with impunity and then expect to get justice from the same court.

Considering the circumstances of the matter, I am of the view that the respondent will not suffer prejudice, if the applicant is allowed a chance to appeal. I hope that the applicant and his advocate are serious this time.

If I grant leave to appeal, I do not see why I cannot grant stay. If the applicant is evicted from the land, the intended appeal will be rendered nugatory.

If the previous advocate for the applicant was still on record, I would have ordered that he pays personally the costs of this application. However, because the applicant has come to court in this application through a fresh advocate, I will order that costs abide the results of the appeal to be filed.

For the above reasons, I allow the application and order as follows: -

- 1. Leave to file an appeal out of time is granted. The appeal will be filed within 14 days from today.***
- 2. The applicant will pay to this court the court adjournment fees not yet paid, which is assess at Ksh.1000/- within 14 days from today.***
- 3. Stay of execution of the Order/Decree made on 17<sup>th</sup> April 2007 in the Chief Magistrate's Court (Kiambu) Civil Case No. 66 of 1987 is granted pending hearing and determination of the intended appeal.***
- 4. If any of orders (1) and (2) above are not complied with, the stay hereby granted will automatically lapse and the respondent will be at liberty to execute.***
- 5. Costs of this application will abide the results of the appeal, unless the applicant fails to comply with (1) or (2) above, in which case the applicant will pay the respondent's costs of this application.***

Dated and delivered at Nairobi this 3<sup>rd</sup> day of March 2011.

.....  
**GEORGE DULU**  
**JUDGE**

**In the presence of**

Mr. Narangwi holding brief for Mr. Kinga for respondent.

C Muendo – court clerk