



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Civil Appeal 712 of 2008**

**GEMINIA INSURANCE COMPANY LTD.....APPELLANT**

**VERSUS**

**SUSAN NDUTA MWANGI.....1<sup>ST</sup> RESPONDENT**

**MAINA KIMANI.....2<sup>ND</sup> RESPONDENT**

**JOHN WAWERU JORAM.....3<sup>RD</sup> RESPONDENT**

**R U L I N G**

1. Following an application brought by Geminia Insurance Company Ltd., hereinafter referred to as applicant on 24<sup>th</sup> December, 2008, and the respondents not objecting, an order was granted on the 9<sup>th</sup> March, 2009 for an order of stay of execution pending appeal subject to the applicant depositing the decretal sum into an interest earning account in the joint names of all the parties counsel, within 14 days from that date. The applicant was also required to file a record of appeal within 90 days.
2. By a Notice of Motion dated 3<sup>rd</sup> June 2009 the applicant has now come back to this Court under Order XLIX Rule 5 of the Civil Procedure Rules, Section 3A and Section 95 of the Civil Procedure Act seeking an Order for enlargement of time for deposit of decretal sum as ordered on 9<sup>th</sup> March, 2009 for a further period of 45 days.
3. The applicant contends that due to inadvertence a cheque for the decretal sum drawn in the joint names of the advocates was deposited in Court on 29<sup>th</sup> March, 2009. By the time this mistake was realized the cheque had already been banked and the applicant was therefore advised to await either the clearance or return of the said cheque. The applicant contends that the delay was further contributed to by the unavailability of the Court file. He explains that the Court file was only traced on 22<sup>nd</sup> May, 2009 and that they had just paid for the proceedings.
4. In his affidavit sworn on 3<sup>rd</sup> June, 2009 Zacharia Ngome an advocate in the firm of Wangai Nyuthe and Co. Advocates who are on record for the appellants has reiterated the above facts and exhibited a copy of the cheque dated 23<sup>rd</sup> March 2009, issued by the applicant, a deposit receipt of the same date issued to the applicant's counsel by the Court and a copy of a cheque dated 19<sup>th</sup> May, 2009 issued by the Court to applicant's advocate.
5. The application was opposed through a replying affidavit sworn by Susan Nduta Mwangi in which it is deponed that the parties consented to the order of stay of execution being issued on condition that the decretal sum was deposited in an interest earning account operated by the three advocates. The Court was urged not to grant the prayers being sought as the applicant was trying to set aside a consent order. It was

maintained that there were no circumstances to justify the setting aside of the consent order.

6. During the hearing of the application, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not attend Court. Counsel for the applicant and 1<sup>st</sup> respondent each made submissions in favour of his client. Counsel for the 1<sup>st</sup> respondent also cited ***Benson Mbuchu Gichuki vs. Evans Kamende Munyua and 2 Others, Civil Appeal No. 304 of 2006.***

7. I have carefully considered the application and submissions made by counsel. The Court record is clear that on 9<sup>th</sup> March, 2009 no consent order was recorded as such. The counsel for the respondents did indicate that they had no objections to the application for stay of execution pending appeal being granted subject to the decretal sum being deposited in an interest earning account. The Court thereafter made an order granting the application for stay of execution subject to the requirement for deposit of decretal sum. Thus, the order made on 9<sup>th</sup> March, 2009 was not a consent order *stricto sensu*.

8. The applicant has demonstrated to this Court that there was an inadvertent mistake, in that the cheque for the decretal sum issued by the applicant in the names of the parties' advocates was actually deposited in Court and a receipt for that sum issued by the Court. It is further evident that the cheque was apparently cleared and another cheque subsequently issued in the name of the applicant's advocate for refund of the money. I find that the applicant has adequately explained the reason why it was unable to comply with the Court order of 9<sup>th</sup> March, 2009.

9. Under Order XLIX Rule 5 of the Civil Procedure Rules, this Court has powers where a limited time has been fixed for doing any act or taking any proceedings under the Civil Procedure Rules or by order of the Court to enlarge time upon such terms as justice of the case may require. I am satisfied that in the circumstances of this case it is fair and just that the time be enlarged for the applicant to deposit the decretal sum.

10. Accordingly, I hereby order that the time granted on 9<sup>th</sup> March, 2009 shall be enlarged for the applicant to deposit the decretal sum into an interest earning account in the joint names of the parties' advocates within 10 days from the date hereof. The applicant shall further file a record of appeal within 30 days from the date hereof.

Those shall be the orders of this Court.

DATED this 2<sup>nd</sup> day of July, 2009

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Mr. Ngome for the appellant

Advocate for the respondent, absent