



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**MISC. APPLICATION NO. 188 OF 2017**

**CHARLES MUTUA KING'OLA**

**FELISTER NDUGE MUTUA** (suing as the legal representatives

of the estate of **MUENDO MUTUA**.....**RESPONDENTS**

**VERSUS**

**1. OWUOR CHRISTOPHER**

**2. STEPHEN MULINGE**.....**APPLICANTS**

**RULING**

1. The applicants filed a notice of motion dated 11<sup>th</sup> December, 2017 seeking extension of stay of execution orders of judgment and decree in Machakos Civil Suit No. 666 of 2013 that lapsed on 6<sup>th</sup> September, 2017 pending the hearing and determination of the intended appeal.

2. The application is based on the grounds on the body of the motion and the supporting affidavit of Marsden Osioma an advocate in conduct of this matter on behalf of the applicant. It was stated that when the matter came up for inter parties hearing, he was bereaved and away on leave and in the confusion did not find an advocate to hold his brief. That as a result of the same, orders of stay were not extended. He stated that the respondents will suffer no prejudice that cannot be compensated in costs if the order sought is granted.

3. In response thereto, Carolyne M. Bosco an advocate in conduct of the matter on behalf of the respondents filed a replying affidavit and a further affidavit on 17<sup>th</sup> January, 2018 and 19<sup>th</sup> April, 2018 respectively. She contended that the applicants do not advance sufficient grounds to warrant issuance of extension of stay orders sought. That the supporting affidavit is marred with falsehoods as the reason why the application was stood over generally was for non-attendance by the applicant and not both parties as alleged in paragraph 8. That the court in fact ordered that the applicants pay costs which order they ignored. She contended that the allegation that the delay in filing the memorandum of appeal was occasioned by inability to get a copy of the judgment is false as the applicant has not demonstrated by annexing any form to prove it. That the respondents continue to suffer as the applicants sit on the judgment.

4. I have given due consideration to the application, the rival arguments and submissions tendered herein. In deciding this application, I bear in mind the court's duty to do justice to the parties and to avoid injustice and hardship resulting from excusable mistake or error. Although the applicants' advocate has not annexed a form to establish that proceedings were applied for, I note that he acknowledged the mistake that led to the failure to apply for extension of the orders and attributed the same to bereavement and I am in the circumstances inclined to allow the application for furtherance of justice. The application herein is thereby allowed in the following terms:

a) There be stay of execution of judgment and decree in Machakos Civil Suit No. 666 of 2013 pending the hearing and determination of the intended appeal upon the Applicants depositing the decretal sums in a joint interest account in the names of the Advocates for the parties within forty five (45) days failing which a stay shall lapse.

b) The applicants herein do file the appeal within fourteen (14) days from the date hereof.

c) Cost shall be in the cause.

**Dated and delivered in Machakos this 28<sup>th</sup> day of September 2018.**

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

N/A Kairu Mc Court - for Applicants

N/A Anne Kiusya - for Respondents

Josephine - Court Assistant