



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

**SUCCESSION CAUSE NO. 9 OF 2015**

**IN THE MATTER OF THE ESTATE OF MARY WANJIKU WAWERU (DECEASED)**

**ISAIAH GICHIMU WAWERU.....APPLICANT**

**-VERSUS-**

**ELIJAH NGANGA WAWERU.....RESPONDENT**

**FORMERLY**

*CM’s Succession Cause No. 49 of 2010*

*In the matter of the estate of Mary Wanjiku Waweru (Deceased)*

*Isaiah Gichimu Waweru.....1<sup>st</sup> Petitioner*

*Elijah Nganga Waweru.....2<sup>nd</sup> Petitioner*

**CONSOLIDATED WITH**

*CM’s Succession Cause 134 of 2010*

*In the matter of the estate of Mary Wanjiku Waweru (Deceased)*

*Elijah Nganga Waweru .....1<sup>st</sup> Petitioner*

*Joel Njihia Waweru.....2<sup>nd</sup> Petitioner*

**RULING**

- 1) On 10<sup>th</sup> July, 2015 this court delivered a ruling in respect of the protest filed by Elijah Ng’ang’a Waweru against a summons filed by his step-brother **Isaiah Gichimu Waweru** to confirm a grant issued in his favour.
- 2) On 15/4/2016 the present Notice of Motion was filed by **Isaiah Gichimu Waweru** [Isaiah]. The application is expressed to be brought under Section 7 and 3A of the Appellate Jurisdiction Act, and is supported by the Affidavit of Isaiah. The Motion seeks the extension of time “for giving notice of intention to appeal..... or making an application for leave to appeal.”
- 3) The Applicant asserts that delay was occasioned by typing of the proceedings and other court processes

and that he will suffer prejudice if he is not allowed to apply for leave to canvass his otherwise merited appeal.

4) The application was opposed through the Replying affidavit of **Elijah Ng'ang'a Waweru** (Elijah). He states that delay has been inordinate; that this court has no jurisdiction to extend time; that no evidence was tendered to support the allegation that Applicant had applied for proceedings. That the application is an afterthought and will occasion further delay to the conclusion of the suit and prejudice to other dependants.

5) The parties disposed of the application through written submissions. The gist of Applicant's submissions is as follows:

**“The Applicant lodged an application dated 4/04/2016 .....the real intention was to seek leave out of time to file an appeal and stay orders on the ruling of 10/7/2015.”**

**Regrettably, the drafting and form of application has not been able to achieve objective. We submit for withdrawal of the application dated 4/4/2016 with a view to lodging an appropriate application in the circumstances and on instructions of our client. “Costs in cause.....”**

6) When he appeared before me on 22/11/2016 Mr. Kimani, referring to the application he filed on 28/10/2016 to withdraw from acting asked that it be held in abeyance pending ruling herein.

7) I do not see on record the submissions of the Respondent, Elijah and the court will treat the Replying affidavit as the sole response by Elijah.

8) I have considered the material presented before the court. Two issues stand out for determination, namely, whether to allow the withdrawal of summons as sought in the submissions and if not, whether the application before the court has merit.

9) Firstly, it is true that the drafting of the prayers in the application leaves a lot to be desired. The Applicant's submissions was that the intention was “to seek leave out of time to file an appeal and a stay of orders of the ruling of 10/7/2015”. I notice that the Applicant's advocate had filed a notice of withdrawal of the application alongside the submissions. It is based on some of the matters deponed to in the affidavit of the Applicant that indeed the Applicant also intended to seek stay pending appeal.

10) While this is an old matter, having commenced 2010, and in light of the pending application by counsel for the Applicant to withdraw from acting, I think it is more prudent and just to allow the withdrawal of the application filed on 15<sup>th</sup> April 2016. That way, the Applicant will have opportunity, if he so deems fit, to bring a fresh application consistent with his intention and based on the advice of the counsel of his choice.

11) However, the Respondent has incurred costs while responding to the said application, by appearances and the filing of a Replying affidavit. In the circumstances the application filed on 15/4/2016 is withdrawn but costs are awarded to the Respondent thereto.

Delivered and signed at Naivasha this 20<sup>th</sup> day of **December 2016**.

In the presence of:-

Mr. Gichuki for the 1<sup>st</sup> Petitioner

Mr. Obino for the 2<sup>nd</sup> Petitioner/Protester

Court Assistant Barasa

**C. W. MEOLI**

**JUDGE**