



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Appeal 71 of 2008**

SOLIO RANCH LIMITEDAPPELLANT

Versus

WAITHIRA GITHINJI

(suing as the legal representative of the

estate of samuel githinji (deceasedRESPONDENT

RULING

Pursuant to S. 3A of the Civil Procedure Act, Waithira Githinji the Respondent herein, took out the motion dated 5th October 2009 in which she applied for the memorandum of appeal dated 5th September 2008 to be ordered struck out. She also applied for the decretal sum deposited in the joint interest earning account in the names of the advocates to be released to her as a condition for stay of execution. The motion is supported by the affidavit of Waithira Githinji sworn on the 5th day of October 2009. When served, Solio Ranch Ltd, filed the replying affidavit of R.P. Mugambi to oppose the motion.

It is the submission of the Respondent that the memorandum of appeal was served out of time. It is averred that since the appellant obtained an order of stay, it has not taken any steps to have the appeal listed for hearing. It is alleged that the current motion jolted the appellant to take steps to prepare the record of appeal

The appellant on its part gave a detailed explanation of what it has been doing since the appeal was filed. It is stated that the appeal was admitted on 15th July 2009 under order XLI rule 8 of the Civil Procedure Rules. Mr. Mugambi averred in the replying affidavit that when he perused the proceedings he discovered that the decree appealed against did not form part of the proceedings requested. The file had to be taken back to the trial court to extract the decree hence the delay. The appellant also pointed out that the rules does not give time limit when one should serve the memorandum of Appeal.

I have considered the averments contained in both the supporting and the replying affidavits. In the replying affidavit the Appellant explained the reasons for the delay to prepare the record of appeal. It is because, the lower court file had to be taken back to the subordinate for purposes of extracting the decree. This averment is not controverted by the Respodnent. I find the reason given to be plausible. In any case the delay pointed out in my view is not inordinate. Such a delay can be countenanced by this court so long as it is shown that the delay was not intentional nor reckless on the part of the appellant.

It has also been averred that the rules did not fix time within which the memorandum of appeal should be served, with respect, I agree with the submission of Mr. Mugambi, that the rules did not prescribe the time within which the appellant should serve the memorandum of appeal. That may be the reason why the Respondent did not cite the rule.

In the end I see no merit in the motion. The same is dismissed with costs to the Appellant.

Dated and delivered this 26th day of Februry 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kiama for Respondent and N/A Muthoga Gaturu for appellant.

J.K. SERGON

JUDGE

