



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
Miscellaneous 183 of 2009**

**JOSELINE KINANU
MURIUNGI**
*(Sued as the legal representative and
administrator of the estate of
STANELY
MICHENI)*
.....APPLICANT

**ANICETA
KAJUJU.....**
.....RESPONDENT

VERSUS

RULING

The applicant filed a Notice of Motion dated 19th November 2009. that application is brought under Section 79G of the Civil Procedure Act and Order XLI Rule 4(1). The applicant seeks leave to file an appeal out of time and stay of execution of the Meru CMCC No. 122 of 2008 pending the hearing of determination of appeal. In support of the application, the advocate for the applicant swore an affidavit on behalf of the applicant. In that affidavit he stated that the court entered judgment in favour of the respondent in Meru CMCC No. 122 of 2008 for Kshs. 700,000/= general damages and Kshs. 123410/= in special damages on 17th September 2009. On that judgment entered, the advocate deponed as follows:-

“That our firm thereafter duly advised our instructing client M/S Kenya Alliance Insurance Co. Ltd of the aforesaid judgment on 22nd September 2009 and called upon the said client to furnish us with further instructions.”
He went further to say that it was not until 17th November 2009 that instructions came for him to appeal against the lower court judgment. The advocate further deponed as follows:-

“That I am advised by the legal officer of Kenya Alliance Insurance Co. Ltd which advise I verily believe to be true that our letter advising them of the judgment in this matter had been misfiled in a different file and the mistake was only realized much later after the lapse of the period allowed for filing of appeals.

That I am advised by the applicant which advise I verily believe to be true that she stands to suffer irreparable harm if execution is levied against her as the sole reason as (sic) to why she was sued is because she is the administrator of the estate of her deceased husband.

Those two paragraphs are contradictory. Firstly, the initial paragraph breaches Order XVIII Rule 3 (1) of the Civil Procedure Rules. By that Rule, the deponent was required to disclose his source of information. As can be seen from that paragraph, there is no name assigned to the information thereof. The contradiction that I see in the two paragraphs is that the instructing client is Kenya Alliance Insurance Co. yet the party seeking court orders in this application is Josephine Kinanu Muriungi. It is therefore not clear whether the stay sought is by Josephine or by Kenya Alliance. As said before, the initial paragraph breached Rule 3(1) of Order XVIII. That Rule provides as follows:-

“3. (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”

As can be seen from that Rule, the deponent needed to disclose the identity of the person who told him that the letter had been misfiled. Having failed to make that disclosure, that paragraph is struck out. That being so, there is no sufficient reason on record showing why the applicants intended appeal was not filed within time. The applicants request for the court to exercise its discretion to extend the time

to appeal out of time cannot therefore be entertained. The court requires material to be placed before it for it to be moved to exercise its discretion in favour of the applicant. The prayer for leave to file appeal out of time will therefore be dismissed. In that regard, there can be no basis of staying the lower court judgment because there is no pending appeal. Accordingly, the Notice of Motion dated 19th November 2009 is dismissed with costs being awarded to the respondent. The stay of execution issued in this matter is hereby vacated.

Dated and delivered at Meru this 7th day of May 2010.

MARY KASANGO
JUDGE