



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Succession Cause 588 of 1996**

**IN THE MATTER OF THE ESTATE OF PENINAH NJERI – DECEASED**

**RULING**

Before me is an application by way of summons dated 25<sup>th</sup> August, 2005.

It seeks leave to file an appeal out of time against an order made on 18<sup>th</sup> July, 2003. It is supported by an affidavit sworn by Samuel Kahara Gage, the 1<sup>st</sup> Applicant, on 25<sup>th</sup> August, 2005.

The facts leading to this application are that instead of seeking leave of this court to file an appeal against the said order, the applicants filed a notice of appeal on 31<sup>st</sup> July, 2003. The appeal could not be filed within time in Court of Appeal after copies of proceedings and ruling were obtained. Then an application to file the appeal out of time was filed on 11<sup>th</sup> April, 2005 which came for hearing on 22<sup>nd</sup> June, 2005. The application was withdrawn so that the leave to appeal be obtained from this court.

This application then was filed on 25<sup>th</sup> August, 2006 after more than two months.

In fact the application is made after three years from the date the ruling was delivered and order made.

Apart from stating how the applicants made some mistakes, the delay of filing appeal before the Court of Appeal as well as the delay of more than two months from the date of withdrawal of the application is not explained. As a matter of fact, there is total silence on this issue, which rightly pointed out by the Learned Counsel for the Respondent, is very relevant factor to be considered by the court.

The application is also opposed on the grounds that the applicants are silent on the nature of grievances and the averments with reasons that the intended appeal has fair chance of success. These contentions are undisputable.

The bone of contention, as specified in paragraph 4 of the replying affidavit sworn by the 1<sup>st</sup> Respondent, is that the ruling of the court gave one acre from the estate property to a daughter of the deceased (sister to the 1<sup>st</sup> Applicant and Respondent) as per the family wishes after her marriage broke down.

It is trite law that while applying for the leave to appeal, the court should be satisfied that the proposed appeal shall have fair chance to succeed and that to enable the court to decide on that issue a draft memorandum of appeal or proposed grounds of appeal should be shown to the court.

I have nothing before me to determine the said issue.

Furthermore, instead of grabbing an opportunity to explain the issue of delay raised in the replying affidavit, the applicant in his further affidavit sworn on 12<sup>th</sup> January, 2006 stated in paragraph 7 thereof and I quote:

**“7: that there has not been any inordinate delay in the matter and everything has been done expeditiously.”**

I will be challenged if I find that even the delay of more than two months before filing this application is not explained. After taking a wrong channel, it was incumbent upon the applicant to file the necessary application without any further delay and the same is not done.

Overall there has been delay in the process culminating to this application which is not explained.

In the premises aforesaid, I do not see any merit in the application and order that the summons dated 25<sup>th</sup> August, 2005 be dismissed with costs.

Dated and signed at Nairobi this 14<sup>th</sup> day of June, 2006.

**K.H. RAWAL,**

**JUDGE**

**14.6.06**