



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**MISC. CIVIL APPLICATION NO. 61 OF 2017**

**MARCELLA GAKII (legal administratrix of the estate of the late  
M'IRIANKI MURUNGI) .....APPLICANT**

**-VS-**

**ANDREW KABURU M'RINKURI.....RESPONDENT**

**RULING**

**Appeal out of time and stay of execution**

[1] Two significant orders have been sought in the Notice of Motion dated 17<sup>th</sup> November 2017, to wit:-

**a. Leave to appeal out of time; and**

**b. Stay of execution of the judgment –decree and all the consequential orders in Meru CMCC No. 351 of 2010 made on 27<sup>th</sup> September 2017 pending the hearing of the intended appeal.**

[2] The motion is expressed to be brought pursuant to **Order 42 Rule 6(1) of the Civil Procedure Rules 2010, Section 79G and 95 of the Civil Procedure Act and all other enabling provisions of the law.**

[3] The grounds upon which the application is brought are set out in the application and the supporting affidavit of Marcella Gakii sworn on 17<sup>th</sup> November 2017. It is asserted that the delay in lodging the appeal was purely inadvertent and excusable, for there was a delay in obtaining the proceedings and that she changed advocates as her previous counsel kept her in the dark on the said judgment which she got wind of when time had already lapsed. The respondent is threatening to execute the said judgment against the applicant, yet, the intended appeal has high chances of success.

[4] The motion was opposed by Andrew Kaburu M'Rinkuri through his replying affidavit sworn on 6<sup>th</sup> February 2018. He deposed that the application is grossly incompetent and should be dismissed *ab initio*. The applicant was in court when the judgment was read thus she cannot blame her former counsel for the delay. The applicant stands to suffer no harm or damage as she does not have both possession and title which are in respondent's name. Besides, the case in the lower court was dismissed because it was filed out of time. No reason has been given by the applicant for not filing the appeal in time. As for the application of stay of execution, it cannot be filed in a miscellaneous application which makes the application grossly incompetent. Therefore, this application should be dismissed as it does not meet the threshold.

c. This matter was canvassed by way of written submissions. The applicant submitted by reiterating what she had stated. She added that once she learnt of her advocate's failure she filed the appeal. If stay of execution pending appeal is not granted her appeal would be rendered nugatory since it has high chances of success.

[5] The respondent repeated the above averments in the submissions and insisted that the applicant cannot hide behind her former counsel.

**ANALYSIS AND DETERMINATION**

[6] I should determine whether to grant leave to file appeal out of time, and stay of execution pending appeal.

[7] Under Section 79G of the Civil Procedure Act, an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time. The court will consider the explanation provided for the delay. But, in calculating the time for filing appeal, the time certified by the trial court to have been necessary for the preparation and delivery to the appellant of a copy of

the decree or order appealed from is excluded. See the section below:-:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:**

**Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”**

[7] Has the applicant satisfied the court that he has a good and sufficient cause for not filing the appeal in time? The Court of Appeal in the case of Annah Mwhaki Wairuru v Hannah Wanja Wairuru [2017] eKLR referred to the case of Leo Sila Mutiso v Rose Hellen Wangari Mwangi. (Civil Application No. Nai. 255 of 1997) (unreported) where the Court of Appeal held as follows:

***“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.***

[8] Applying the test, Judgment herein was delivered on 27<sup>th</sup> September 2017. The applicant filed the current application dated 17<sup>th</sup> November 2017 two months later after the time had lapsed. She stated that the reason for the delay was the delay in obtaining the proceedings. She has not attached any letter or any documentation that she was experiencing some difficulty in acquiring the proceedings. She further stated that her previous advocate kept her in the dark on the said judgment and she got wind of it when the time for filing had already lapsed. The respondent refuted this and stated that the applicant was present in court when the judgment was read.

[9] From the judgment of the trial magistrate, the suit was time barred as it was lodged more than 31 years later. It was instituted after the expiry of time considering the plaintiff/applicant had knowledge of the defendant’s occupation on the land. However, in spite of this the court went ahead to determine the claim on its merits. It concluded that the case lacked merit as the plaintiff did not establish any fraud committed by the defendant to effect transfer of the parcel of land. Against this backdrop, the appellant stated that her appeal has high chances of success. The applicant asserted that her entire family will be rendered squatters, vagabond and homeless as they have no other place to call home considering the deceased’s estate shall benefit a total stranger. The applicant got to know of the respondent’s occupation and possession of the land in 1974 of which he has been up to date. From the foregoing, prejudice would indeed be impacted on the respondent.

[10] The foregoing notwithstanding, in deference to the applicant’s unfettered right of appeal, I will give the applicant an opportunity to file appeal. Accordingly, appeal be filed in 30 days. Except, however, as I have stated, great prejudice would be impacted on the respondent if I issue an intrusive order such as stay of execution. I will therefore not grant stay of execution in order to avert prejudice to the respondent. It is so ordered. No order as to costs.

**Dated, signed and delivered in open court this 22<sup>nd</sup> day of May 2019**

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**F. GIKONYO**

**JUDGE**

**IN PRESENCE OF**

**M/s Gachogo for M/s Kithaka for respondent**

**Abubakar for Kiogora for applicant**

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**F. GIKONYO**

**JUDGE**