



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 19 OF 2019**

**MOSES GITUMA IMPWI ..... APPLICANT**

**-VS-**

**BEATRICE NKATHA M'IPWI ..... RESPONDENT**

**RULING**

[1] The significant orders sought in the Notice of Motion dated 26<sup>th</sup> February 2019 and which is expressed to be brought pursuant to **Section 1A, 1B, 3A, 79G and 95 of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules**, are among others:-

1. **Extension of time to lodge a notice of appeal out of time in respect of the judgment delivered in the Meru High Court Succession Cause No. 255 of 2010 on 19<sup>th</sup> December 2018 and**
2. **Stay against the said judgment.**

[2] The application was premised upon the grounds stated in the application and supporting affidavit of Moses Gituma Impwi sworn on 26<sup>th</sup> February 2019. It is contended that the applicant made the impression to his advocates that he was not interested in appealing against the judgment and consequently they did not file the notice of appeal. He believed that it is only upon getting certified copies of the judgment that he could properly instruct his advocates. That he is truly aggrieved and dissatisfied with the judgment and that the respondent is unlikely to suffer any prejudice should the application be allowed.

[3] The respondent opposed this application through her replying affidavit sworn on 22<sup>nd</sup> May 2019. She deposed that judgment delivered on 19<sup>th</sup> December 2018 divided the estate amongst all the beneficiaries. That the applicant has failed to demonstrate why he never preferred the appeal within 30 days. That the intended appeal is an afterthought only to buy time as the appeal raises no pertinent issues and has no chances of success.

**ANALYSIS AND DETERMINATION**

[4] Extension of time to file appeal out of time is at the discretion of the court. The discretion will however be exercised in favour of the applicant if the delay is explained to the satisfaction of the court, and of course after weighing the prejudice that the respondent may suffer if extension is granted. See the decision by the Court of Appeal in **Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nai. 255 of 1997) (unreported)** where it stated:

***“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”.***

[5] The judgment that the applicant seeks to appeal against was delivered on 19<sup>th</sup> December 2018. The applicant filed this application on 26<sup>th</sup> February 2019. According to **Rule 75(2) of the Court of Appeal Rules** it provides that notice of appeal be lodged within fourteen days of the date of the decision against which it is desired to appeal. Judgment was delivered on 19<sup>th</sup> December 2018 and application filed on 26<sup>th</sup> February 2019. Therefore, the application was filed about two months later which is quite an inordinate delay.

[6] The applicant stated the reason for the delay to be that; (1) his advocate thought that the applicant was not interested in appealing; and (2) being a lay man he believed that it is only upon getting certified copies of the judgment that he could instruct his advocate. A suit belongs to the litigant and not the advocate. Again, he was ably represented. I should also state that ignorance of the law is no defence. Couple this with the fact that the judgment herein distributed the estate of the deceased equally amongst all the beneficiaries. Although I do not wish to speculate the chances of the intended appeal or whether the journey would be futile, I should state that these matters are important

considerations nonetheless. That notwithstanding, in deference to the applicant's right of appeal but albeit with great reluctance, I grant him extension of time to file notice of appeal in 14 days of today.

[7] Be that as it may, I am acutely aware that, as heirs of the deceased, the respondents are entitled to immediate and full realization of the judgment herein. In the circumstances of this case and for reasons I have stated, the respondents are likely to suffer prejudice if I grant stay of the judgment. Accordingly, I decline the invitation to stay the judgment. It is so ordered.

**Dated, signed and delivered in open court this 8<sup>th</sup> July, 2019.**

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**F. GIKONYO**

**JUDGE**

In presence of

Kaimba for M/S Soy for applicant

Respondent in person – present

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**F. GIKONYO**

**JUDGE**