



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**HIGH COURT CIVIL MISC. APPL. NO. 109 OF 2018**

**FELIX ODUOR ODHIAMBO & DAVID ODHIAMBO**

**ODUOR** (both suing as the administrators of the estate

of the late **ALICE NYAMBURA ODUOR** .....**PLAINTIFF/RESPONDENT**

**VERSUS**

**KIMANGARA KIMEMIA** .....**DEFENDANT/APPLICANT**

**RULING**

1. The application dated 7<sup>th</sup> February, 2018 seeks orders that this Honourable court be pleased to grant leave to the Applicant to lodge a memorandum of appeal out of time against the judgment and/or decree of Honourable D. O. Mbeja, Senior Resident Magistrate delivered on the 1<sup>st</sup> November, 2017 in Milimani CMCC No. 7620 of 2012.
2. Secondly, that this Honourable court be pleased to stay execution of the judgment and decree in Milimani 7620 of 2012 pending hearing and determination of the intended appeal.
3. It is stated in the grounds and in the supporting affidavit that the impugned judgment was delivered on 1<sup>st</sup> November, 2017 and the Applicant held 100% liable to the Respondent. The Respondent was awarded ksh.952,000/= as general damages. The Applicant is aggrieved by the said judgment and wishes to appeal. However, the time within which to file an appeal has lapsed. The delay in filing the appeal within time is blamed on the time taken by the Applicant's Advocate to seek another opinion on whether to appeal or not as matter was complex. It is stated that the appeal has merits and the Applicant will suffer substantial loss as the Respondent may not be able to refund the decretal sum in the event that the appeal is successful. The Applicant is willing to furnish security for the due performance of the decree.
4. The application is opposed. It is stated in the replying affidavit that no good reason has been given for the long delay. It is further stated that the issue whether the appeal has merits is not a matter for determination by this court. It is further asserted that the Applicant did not require over 100 days to decide whether to appeal or not.
5. The parties opted to proceed with the application by way of written submissions. I have considered the application, the reply to the same and the submissions filed by the Applicant's counsels. The Respondent did not file any.

6. The conditions to be met in an application for stay of execution are set out in Order 42 rule 6(2) Civil Procedure Rules as follows:

**“No order for stay of execution shall be made under sub-rule**

**(1) unless –**

**(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**

**(b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”**

7. Section 79G of the Civil Procedure Act provides that:

**“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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.”**

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

8. In the case at hand, the delay was for about three and half (3 ½) months and has been explained. The Applicant has offered to give security. It has not been demonstrated in the replying affidavit that the Respondent is capable of refunding the decretal sum

9. To balance the competing interests of both parties, I exercise discretion and allow the application on condition that the Applicant do deposit the decretal sum in a joint interest earning bank account of the counsels for both parties herein or in court within 30 days from the date hereof.

**Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of June, 2018**

**B. THURANIRA JADEN**

**JUDGE**