



**REPUBLIC OF KENYA**

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

**CIVIL MISC. APPL. NO. 18 OF 2018**

**ENTONOX ENTERPRISES LTD.....APPLICANT**

**VERSUS**

**GRACE MUINDO KATHOKA...Suing on behalf of**

**MUTEMI KYULI (DECEASED).....RESPONDENT**

**RULING**

1. In an application dated the **6<sup>th</sup> day of February 2018** filed herein on the **5<sup>th</sup> February 2018** the Applicant sought enlargement of time within which to file an appeal and stay of execution pending hearing and determination of the intended appeal.

2. By a Ruling dated the **19.8.2018** the court allowed the application on condition that the intended appeal be filed within 7 days and directed that stay of execution be deemed to have been granted if the applicant deposits in court the entire decretal sum within **seven (7)** days from the date of ruling.

3. On the **26<sup>th</sup> day of September 2018** the Applicant filed an application seeking extension of orders of stay of execution issued on the **19<sup>th</sup> September 2018** for a further fourteen (14) days directing the applicant to deposit the entire decretal amount of **Kshs. Three thousand sixty six, one hundred and thirty one (Kshs. 366,131/-)** as per the judgment of **Hon. Kibet Sambu**, Senior Principal Magistrate Delivered on **27<sup>th</sup> September 2017**.

4. This application is premised on grounds that the Applicant partly complied with the court order by filing a memorandum of Appeal and is in the process of issuing a cheque for the decretal amount. That time given to deposit the decretal sum was not sufficient for reasons that one of the signatory to the applicants bank account has not been in office. That if orders sought are not granted the application and appeal shall be rendered nugatory.

5. The Application is supported by an affidavit sworn by **Kelvin Ngure** Senior Claims Officer at Directline Assurance.

6. In response the Respondent opposed the application. She deponed that the applicant failed to comply with the court order and was only using the court as a tool to delay the finalization of this matter. That the applicant has not demonstrated the issue of a cheque being processed. That he has not explained about the alleged signatory who has not been in office and he has not approached the court with clean hands.

7. **Section 3A** of the **Civil Procedure Act** provides thus:

**“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”.**

8. The judgment of the Lower court was delivered on the **27/9/2017**. A notice of taxation of the bill of costs was received by the applicant's advocates on the **13<sup>th</sup> day of November 2017** and they choose not to attend court. The Notice may have been short but they made no effort of either following up the matter or even expressing the intention to appeal. They waited until **6<sup>th</sup> February 2018** when they filed the application for leave to appeal out of time. Despite the inexcusable explanation given, in the interest of justice this court gave them the opportunity to file the appeal out of time. Instead of complying with the time set they sat on their rights.

9. Now it is alleged without proof that one of the signatories to the bank account is not in office. Granting the order sought will be tantamount to granting the applicant the opportunity to perpetuate an injustice by abusing the due process of the court.

10. In the premises, I decline to grant orders sought with costs to the Respondent.

11. It is so ordered.

**Dated, Signed and Delivered at Kitui this 2<sup>nd</sup> day of October, 2018.**

**L.N. MUTENDE**

**JUDGE**