



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**CIVIL APPEAL NO 12 OF 2014**

**(Appeal against Decree in Murang'a Succession Cause No 136 of 1997 - L. Nyambura, RM)**

**MARGARET WANGECHI MUCHOKI.....APPELLANT**

**VERSUS**

**JULIA KANYIRI MUCHOKI.....RESPONDENT**

**RULING**

1. On 03/12/2014 a date was given in court for hearing of the Appellant's application (notice of motion dated 08/04/2014) for stay of execution of decree pending disposal of the appeal. Both parties were represented, and the date given was 10/03/2015.

2. Come 10/03/2015, when the matter was called out, it was stated that counsel for the Appellant was unable to attend court because he was before another High Court elsewhere. As for the Respondent's counsel, it was stated that he was within the court building. The court found that state of affairs to be unacceptable and dismissed the application.

3. The Appellant has come back to court by **notice of motion dated 02/09/2015** seeking an order to set aside the order of dismissal of 10/03/2015. The application is stated to be brought under section 1A and 3A of the **Civil Procedure Act, Cap 21** and **Article 159** of the **Constitution of Kenya, 2010**. The grounds for the application are that –

(i) It would be fair, expedient and just to reinstate the application dated 08/04/2014 for hearing on merits.

(ii) The Appellant's counsel failed to attend court on 10/03/2015 because he was engaged in Nairobi **HC Criminal Case No 2449 of 2012: Republic –vs- Joshua Kibet**.

(iii) The mistake of counsel should not be visited upon a litigant.

(iv) The Appellant's application sought to be reinstated has high chances of success.

The application is supported by the affidavit of Lamech J Mboha, learned counsel for the Appellant. He has deponed, *inter alia*, to his belief that criminal matters take precedence over all other matters.

4. The Respondent has opposed the application by grounds of opposition dated 12/02/2016. These grounds are –

(i) That the application has been brought after inordinate delay.

(ii) That the application for stay of execution was properly dismissed.

(iii) That there is no law that gives criminal cases precedence over civil ones.

5. I have considered the submissions of the learned counsels appearing. No authorities were cited. The court can take judicial notice that the High Court tries mainly murder cases in its original criminal jurisdiction. It can also take judicial notice of the fact that there is no way the High Court at Nairobi could have registered 2,449 murder cases in the year 2012! It is thus most likely that the criminal case that the Appellant's learned counsel attended at Nairobi was before a magistrate's court. I read this as a deliberate attempt by counsel for the Appellant to try to mislead the court into believing that he was before the High Court and not before a magistrate's court. There is also no law that prioritizes criminal matters over civil ones, assuming that the Appellant's learned counsel was before the High Court, which, as already noted, was highly unlikely! It is also to be noted that the date 10/03/2015 was given in court in the presence of both counsels.

6. Finally, there is the issues of delay in applying. The application sought to be reinstated was dismissed on 10/03/2015. The present application was not filed until 03/09/2015, nearly six (6) months later. No explanation was offered at all for this delay, which delay was inordinate in the circumstances of this case.

7. That being the case the plea that mistakes of counsels should not be visited upon a litigant rings hollow. In any event, a litigant has a remedy in professional negligence against his counsel should circumstances warrant it.

8. In the circumstances I find no merit in the notice of motion dated 02/09/2015. It is hereby dismissed with costs to the Respondent. It is so ordered.

**DATED AND SIGNED AT MURANG'A THIS 8<sup>TH</sup> DAY OF SEPTEMBER 2016**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT MURANG'A THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2016**