

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 194 OF 2014

IN THE MATTER OF: AN INTENDED APPEAL BETWEEN KIMANI MUNGAI

**JOSEPH (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF JOHN SIMON K. M. GAI THO –DECEASED) AND
CECILIA M. SPENCER**

AND

IN THE MATTER OF: AN APPLICATION FOR ENLARGEMENT OF TIME TO

APPEAL KIMANI MUNGAI JOSEPH APPLICANT

RULING

1. The Notice of Motion dated 4th June 2014 is filed by Kimani Mungai Joseph. Although it was entitled “**Ex parte**” the Court ordered on 5th June 2014 the same be served upon Cecilia Spenser for hearing interpartes. The same was served by Registered Post but on the hearing day it was not opposed nor did Ms Spencer attend Court.
2. The application seeks an order to file an appeal out of time against the judgment delivered on 12th July 2011 in **CMCC NO. 3696 of 2001** (Mombasa). In that Magistrate's Case Cecilia M. Spenser sued John Gaitho who is now Deceased. Gaitho the Deceased was the father of the Applicant Kimani Mungai Joseph. By his affidavit Kimani stated that he had obtained Limited Letters of Administration to enable him proceed with this matter. His father passed away on 17th June 2013. During his life time he was sued in CMCC 3696 OF 2001. Kimani deponed that neither he nor his late father were ever informed that the judgment in the Magistrate's Court had been delivered and it was until Kimani received a letter from an Advocate representing Spenser in June 2013, which letter was seeking to execute the Judgment of the Magistrate's Court that he realized it had been delivered. It is then that he decided to pursue the matter and hence the present application.
3. From the reading of the Judgment of the Magistrate's Case the Court found that the late Gaitho had encroached a road reserve and was therefore denying the other occupants access. Kimani has deponed that if the judgment does get executed he will suffer injustice and prejudice.
4. In view of the fact that Kimani has sufficiently explained the reasons why the appeal was not filed within time, I am minded which I shall do to grant him the following prayers-
 - a) **Leave is hereby granted to the Applicant to file an appeal against the judgment delivered on 12th July 2011 in Mombasa CMCC No. 3696 of 2001 within thirty (30) days from this date hereof.**
 - b) **The costs of the Notice of Motion dated 4th June 2014 shall be in the cause.**

It is so ordered.

DATED and DELIVERED at MOMBASA this 9TH day of OCTOBER, 2014.

MARY KASANGO

JUDGE