



REPUBLIC OF KENYA



KENYA LAW
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**ARH v MAA (Civil Application E030 of 2020)
[2022] KECA 450 (KLR) (18 March 2022) (Ruling)**

Neutral citation: [2022] KECA 450 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E030 OF 2020
K M'INOTI, JA
MARCH 18, 2022**

BETWEEN

ARH APPLICANT

AND

MAA RESPONDENT

*(Application for extension of time to file notice of appeal from the
Judgment and Decree of the High Court of Kenya at Marsabit
(Chitembwe, J.) dated 23rd July 2018 in Matrimonial Cause No1 of 2017)*

RULING

1. Before me is one of those omnibus applications that this Court has decried time and again. (See, for example, *Riccardo Fannelli & 2 Others v. Frigrieri Graziano, Civil Application No. 51 of 2015* and *Christopher Iddi Moto & 15 Others v. Chiriba Nyambu Barua, Civil Application No. 43 of 2014*.)
2. The applicant seeks extension of time to file a notice of appeal and in the same application, an order for stay of execution of the judgment and decree that he intends to appeal. It is not rocket science to appreciate that under the Court of Appeal Rules an application for extension of time is the remit of a single judge whilst an application for stay of execution is the business of the full court. How exactly the same application can be heard in instalments, first by a single judge, and subsequently by the full Court, is not clear to me. Plus, a party cannot obtain stay of execution of a decree or judgment of the High Court without first filing a notice of appeal.
3. Accordingly, I shall treat the application before me is an application for extension of time only. The judgment that the applicant seeks to appeal was delivered on 23rd July 2018. By that judgment the High Court awarded the respondent 30% of the property known as Plot No. xx Marsabit (the suit property) which it found was matrimonial property to which the respondent had contributed. The application for extension of time was made on 8th July 2020, only 15 days shy of two full years from the



- date of the judgment. That delay is explained by the statement that there were protracted customary negotiations which did not bear fruit and that the applicant had not made up his mind whether to appeal the decision or not.
4. Those are the same grounds that the applicant elaborated on in his written submissions in support of the application. He added that the delay was not intentional, but was occasioned by the elders-led negotiations which fell through. He relied on *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others [2014] eKLR* and submitted that the delay was justified. He urged the Court to ignore procedural technicalities and render substantive justice.
 5. The respondent opposed the application on the basis of her replying affidavit sworn on 6th October 2020. The gist of her response is that contrary to the appellant's assertions, there were no negotiations. She added that in 2019 the applicant applied to the High Court for leave to sell the suit property and pay to the respondent 30% of the proceeds. The court directed the suit property to be valued and ultimately ordered the respondent to pay to the applicant Kshs 11,500,000 representing his 70% share. She complied and deposited the money in court, after which the suit property was transferred to her. She contended that at the time the applicant claimed he was involved in customary negotiations, he was instead busy in court seeking review and stay of execution of the order of the High Court She reiterated that she was not aware of and was not party to any negotiations. The respondent annexed to her affidavit several rulings from the High Court, rendered post-judgment and dated 26th November 2019, 3rd February 2020, 27th March 2020, and 16th June 2020 to support her contention that instead of negotiations, there was active litigation.
 6. I have carefully considered this application. The discretion of the Court to extend time is wide and unfettered, the only caveat being that it must be exercised judiciously rather than arbitrarily. The considerations that guide the court in the exercise of that discretion are well known. They include the period of delay, the reason for the delay, the degree of prejudice the respondent stand to suffer, the resources at the disposal of the parties and the public interest aspects of the intended appeal. (*See Fakir Mohamed v. Joseph Mugambi & 2 Others*, CA No. Nai. 332 of 2004 and *Leo Sila Mutiso v. Rose Hellen Wangari Mwangi, C.A. Nai. 251 of 1997*).
 7. The delay involved in this application is almost two years. That, by any stretch of imagination, is inordinate for a step that the [Court of Appeal Rules](#) require to be taken within 14 days. The length aside, another critical consideration is the explanation for delay. The applicant states that there were negotiations that were on going and that he wanted to give them a chance.
 8. The respondent has denied any such negotiations and annexed documents which leave no doubt over the two years, the applicant was busy pursuing the matter in the High Court. Indeed, the annexures to the respondent's affidavit show that after the High Court ordered the respondent, on 3rd February 2020, to pay the applicant for his 70% share of the suit property, the applicant lodged a notice of appeal and filed in this Court Civil Application No. 20 of 2020 for stay of execution, which was dismissed by a ruling dated 7th August 2020.
 9. I have formed a distinct impression that the applicant has not been candid with the Court in explaining the reason for the delay of almost two years. There is uncontroverted evidence on record that there were no negotiations and that the applicant was busy pursuing litigation over the suit property. I note too that in the litigation leading to the judgment that the applicant seeks to challenge, both parties were represented by counsel, and there is no reason why a notice of appeal, a mere one page formality of a document, had to wait for close to two years to be filed.



10. The respondent also contends that she stands to suffer serious prejudice as this litigation has gone on since 2017 and the suit property has already been transferred to her after paying the applicant's 70% share. I am persuaded that she indeed stands to suffer prejudice.
11. This Court has held numerous times that extension of time is an equitable remedy and that a party who is not candid with the Court does not deserve the benefit of an equitable remedy. (See [*James waweru Muturi v. Paul Thuo Njambi, CA No. Nai. 159 of 2017*](#)). For all the foregoing reasons, I do not find any merit in this application, and the same is dismissed with costs to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

