In re Estate of Hezron Buyoywa Mukenye (Deceased) (Miscellaneous Civil Application 2 of 2023) [2024] KEHC 7803 (KLR) (24 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7803 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

MISCELLANEOUS CIVIL APPLICATION 2 OF 2023

JN KAMAU, J

JUNE 24, 2024

IN THE MATTER OF THE ESTATE OF HEZRON BUYOYWA MUKENYE (DECEASED)

BETWEEN

HENRY MUKUNZI BUYOYWA .... APPLICANT

AND

DAMARY KAVUSHIRWA BUYOYWA .... 1ST RESPONDENT

MESHACK MUKENYE BUYOYWA .... 2ND RESPONDENT

PATRICK BUYOYWA .... 3RD RESPONDENT

MIRIAM AMAGOVE .... 4TH RESPONDENT

RULING

1. In his Notice of Motion dated and filed on 13th July 2023, the Applicant herein sought for orders that the time limited by the Act (sic) within which an appeal could be filed be extended and that he be granted leave to lodge an appeal from the Judgment and Decree in Succession Cause No 87 of 2007. He also sought for an order for stay of execution of the said decree pending the hearing and determination of the intended appeal.

2. He swore an Affidavit in support of the said application on 13th July 2023. It was his case that he instituted his protest *vide* Affidavit of Protest dated 12th February 2017 and the Trial Court delivered its Judgment on 14th July 2022 whereby it dismissed his claim. He averred that neither his Advocate nor himself were present during the delivery of the said decision but that his Advocate made a follow up to know the outcome of the same.

3. He further contended that his Advocate proceeded to apply for copies of typed Judgment and proceedings to enable them prepare and lodge a memorandum of appeal but that there was delay in

supplying of the same. He stated that the said typed Judgement and proceedings were certified on 12th September 2022 and he received them on 14th July 2022 (sic).

4. He was emphatic that his intended appeal was arguable and had reasonable chances of success as demonstrated in their draft Memorandum of Appeal.

5. He pointed out that his application herein had been brought within reasonable time from the date when he received copies of typed proceedings and Judgment. He asserted that in the interest of justice the prayers he sought ought to be granted.

6. The 2nd Respondent swore a Replying Affidavit on 28th September 2023 in opposition to the Applicant's application on his own behalf and that of the 1st, 3rd and 4th Respondents.

7. It was their case that from the court's record, it was clear that the Applicant was personally present in court on 14th July 2022 when the impugned Judgement was delivered and therefore, he was aware of the said Judgment. They stated that if indeed the Applicant received the proceedings on 14th July 2022 as averred, then he was within the stipulated time for appeal but failed to lodge the same.

8. They pointed out that courts have held several times that delay in supply of proceedings could not be a reason for failure to lodge appeal within the stipulated time. They asserted that there had been delay of one (1) year and no effort had been made to explain the delay as required. They were categorical that the application was an afterthought and that the grounds upon which the same was made and the averments in the supporting affidavit did not meet the threshold for the proviso in Section 79G of the *Civil Procedure Act*.

9. Although the Applicant was directed to file his Written Submissions by 11th March 2024, the same were missing in the file as at the time of writing this Ruling. The Respondents' Written Submissions were dated 22nd January 2024 and filed on 25th January 2024. This Ruling was therefore based on the Applicant's affidavit evidence and the said Respondents' Written Submissions only.

Legal Analysis

10. The Respondents invoked Section 79G of the *Civil Procedure Act* and were emphatic that appeals from a subordinate court to the High Court ought to be filed within thirty (30) days of the making of the decision sought to be challenged and further that the discretion to extend time must be exercised within the established principles of the law.

11. They pointed out that the factors to be considered when determining an application seeking leave to appeal out of time were discussed by the Court of Appeal in the case of *Omar Shurie vs Marian Rashe Yafar* (Civil Application No 107 of 2020) (eKLR citation not given) being the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted.

12. They further placed reliance on the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR where it was held that extension of time was not a right of a party, but that it was an equitable remedy that was only available to a deserving party at the discretion of the court.

13. They were categorical that the Applicant was undeserving of the remedy because of the length of delay and the reason he gave for the delay. It was their contention that the delay of one (1) year was inordinate delay. In this regard, they cited the case of *Mwangi S. Kimenyi vs Attorney General & Another* [2014] eKLR where it was held that the litmus test of an inordinate delay was that it should be an amount of delay which led the court to an inescapable conclusion that it was inordinate and therefore inexcusable.

14. They further contended that the delay of whatever nature had to be sufficiently explained. To buttress this point, they relied on the case of *Susan Ogutu Oloo & 2 Others vs Doris Odindo Omolo* [2019]eKLR where it was held that a party who sought extension of time had the burden of laying a basis to the satisfaction of the court and that the reason for the delay must be explained to the satisfaction of the court.

15. They were emphatic that the Applicant had lied to court that he was not present during the delivery of the impugned Judgment and pointed out that he who came to equity had to come with clean hands which was not the Applicant's case as he was dishonest. They added that the reason the Applicant gave was not watertight as proceedings and Judgment could only be given to a party upon request and upon payment of the requisite fees for the same. They asserted that he had not annexed a copy of the letter requesting for proceedings, receipt for payment of the same nor certificate of delay from the Trial Court confirming that indeed there was delay in supply of proceedings.

16. They contended that failure to get certified copies of proceedings could not be a bar to filing an appeal on time and that the least the Applicant could have done was to file the appeal on the basis of the Judgment which was available and then obtain a Certificate of Delay in the event the proceedings were not supplied on time. It was their averment that the application should fail on the said ground.

17. They further invoked Order 42 Rule 6(2) of the *Civil Procedure Rules* and placed reliance on the case of *Kenya Shell Limited vs Kibiru* (1986) KLR 410 where it was held that if there was no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event as substantial loss was the cornerstone of both jurisdictions for granting stay and it was what had to be prevented.

18. In that regard, they argued that the Applicant had not substantiated how he would suffer substantial loss unless the orders of stay pending appeal were granted. They added that his protest against confirmation of the Grant, claiming entitlement of the deceased's estate by way of gifts inter vivos was dismissed.

19. They further contended that as per Section 83 (g) of the *Law of Succession Act*, the administration of the deceased's estate had closed at the end of six (6) months from the date of the Certificate of Confirmation of Grant thus his application herein was filed way out of time. They added that he ought to have established other factors to show that the execution would create a state of affairs that would irreparably affect the very essential core of the Applicant as the successful party in the appeal.

20. In that regard, they cited the case of *Osero & Company Advocate vs Easy Properties Limited* [2014] eKLR as cited in *George Wekesa vs Multi Media University* [2017]eKLR where it was held that filing of an appeal was not proof of substantial loss occurring in the sense of Order 42 Rule 6 of the *Civil Procedure Rules*, otherwise there would be no need to apply for stay of execution pending appeal. It added that much more was needed to show that the appeal would be reduced to pious venture unless stay was the way ordered.

21. They were emphatic that the Applicant's application failed to meet the threshold for grant of the orders sought and asked that the same be dismissed with costs.

22. Indeed, in exercising its discretion to allow an application seeking extension to file an appeal out of time, a court had to be satisfied that the omission to file the same within time was excusable. In other words, there had to be a plausible explanation for the delay in filing the appeal.

23. It was apparent from the court record that the decision the Applicant intended to appeal against was delivered on 14th July 2022. The present application was filed on 13th July 2023. About one (1) year had since passed. This was an inordinately long period.

24. Going further, as the Respondents pointed out, the proceedings of 14th July 2022 indicated that the Applicant was present. The same read as follows:

> 14.7.2022
>
> "Before Hon S. Ongeri-SPM
>
> Court Assistant Albert
>
> Petitioner absent
>
> 1st Protestor present
>
> 2nd Protestor present
>
> Mr Athunga for 2nd Protestor
>
> Ms Khadenyi for Petitioners
>
> Court-Judgment delivered dated and signed this 14th July 2022."

25. Thus, the Applicant was not truthful that he was not in court when the impugned Judgment was delivered. Be that as it may, the fact that he was in court on the said date did not mean that he had access to the proceedings to enable him to have filed a Record of Appeal within the time stipulated in Section 79G of the *Civil Procedure Act*. Even so bearing in mind that the typed Judgement and proceedings were certified on 12th September 2022 and the present application was filed on 13th July 2023, a delay of over one (1) year was inordinate and/or unreasonable. Indeed, no reason was advanced to explain the delay. This was inexcusable.

26. Having said so, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of the *Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.

27. Notably, Order 50 Rule 6 of *Civil Procedure Rules*, 2010 empowers the court to enlarge the time to do a particular act. The said Order 50 Rule 6 of Civil Procedure Rules stipulates as follows:-

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise".

28. Against this backdrop, this court therefore perused the draft Memorandum of Appeal that was annexed to the present application. It did not, however, consider the merits or otherwise of the grounds of appeal that were set out therein as that was strictly under the purview of the appellate court. All that it was expected to do was to consider if the Applicant herein had demonstrated that he had arguable grounds of appeal.

29. The grounds in the Applicant's draft Memorandum of Appeal showed that he was aggrieved by the Trial Court's decision regarding distribution of the deceased's estate. He sought that the appellate court determine if the Trial Court erred in law and in fact. These were arguable points of law.

30. While considering whether or not to grant an order for extension to do any act, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This court did not see any prejudice that the 1st, 2nd, 3rd and 4th Respondents would suffer or were likely to suffer if the Applicant herein exercised his constitutional right of appeal. If there was any prejudice, then they did not demonstrate the same.

31. Notably, as the Respondents submitted, the administration of the deceased's estate must have closed six (6) months from the date of confirmation of grant as per Section 83 (g) of the *Law of Succession Act* and hence no execution was to be levied against them as the Applicant's claim had been dismissed. His prayer for orders of stay of execution thus fell on the wayside.

32. Taking all the factors hereinabove into account, it was the considered view of this court that that it was in the interests of justice (emphasis court) that the Applicant be given an opportunity to have his intended Appeal heard on merit as he would suffer prejudice if he was denied an opportunity to fully present his Appeal to be heard on merit.

33. Indeed, the power to grant orders in the interest of justice and/or for the ends of justice (emphasis court) is well captured in Section 3A of the *Civil Procedure Act* that states that: -

> "Nothing in the 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 (emphasis court) or to prevent abuse of the process of the court."

34. Having said so, it was the Applicant's responsibility to have followed up to check on his matter. Failure to do so showed that he was indolent. He could therefore not be allowed to go scot free and had to pay throw away costs to the 1st, 2nd, 3rd and 4th Respondents herein to compensate them for being taken back in litigation when they were expected to have presumed that there would be no further litigation in view of the long period the Applicant had taken to move the court.

Disposition

35. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated and filed 13th July 2023 was merited and the same be and is hereby allowed in terms of Prayer No (2) and (3) therein on the following conditions: -

    1. That the Applicant be and is hereby directed to file and serve his Memorandum of Appeal in the appropriate file within fourteen (14) days from the date of this Ruling.

    2. That the Applicant be and is hereby directed to file and serve his Record of Appeal in the appropriate file within one hundred and twenty (120) days from the date of this Ruling.

    3. That the Applicant be and is hereby directed to pay the 1st, 2nd, 3rd and 4th Respondents throw away costs in the sum of Kshs 20,000/= within one hundred and twenty (120) days from the date of this Ruling failing which the 1st, 2nd, 3rd and 4th Respondents will be at liberty to commence legal proceedings for the recovery of the same in the normal manner.

    4. That this matter will be mentioned on 28/10/2024 to confirm compliance of the order in Paragraph *35* (1) and (2) hereinabove and/or for further orders and/or directions.

5. Costs of the application herein will be in the cause.

6. Either party is at liberty to apply.

36. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JUNE 2024

J. KAMAU

JUDGE