



**In re the Estate of Selenkia ole Mpapi (Deceased) (Succession Cause 231 of 2007) [2024] KEHC 9776 (KLR) (Family) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9776 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 231 OF 2007  
SN RIECHI, J  
JULY 31, 2024**

**IN THE MATTER OF ESTATE SELENKIA OLE MPAPI (DECEASED)**

**BETWEEN**

**LOICE SELENKIA ..... APPLICANT**

**AND**

**GRACE NANUE ANDREW ..... 1<sup>ST</sup> RESPONDENT**

**EMMANUEL MEMUSI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This matter relates to the estate of selenkia ole mpapi who died intestate on 5<sup>th</sup> October 1999 as evidenced by copy of death certificate on court record.
2. Following the death of the deceased, the Petitioners who are respondents herein petitioned for grant of letters of administration vide a petition dated 6.02.2007 as widow and brother of deceased respectively.
3. Subsequently the objector Loice Selenkia filed an objection to the petition dated 5.06.2008 on the grounds that the petitioners are not widow and brother to the deceased and they have no right as sought in the petition and they are not entitled to any share of the deceased's estate.
4. The matter was proceeded to hearing and upon hearing the parties the honourable Justice M.W.Muigai delivered a judgement on 27<sup>th</sup> February 2017 in which she ordered as follows;

“disposition

1. The Objection to making grant of 5<sup>th</sup> June 2008 is upheld to the extent the Objector 1<sup>st</sup> wife/widow of Objector was left out as Co administrator of the deceased's estate.



2. A grant shall be issued in the names of the 2 widows of the deceased namely; Loise Selenkia and Grace Nanew Andrew.
  3. The suit property Loitoktok/Rombo/A86 shall be distributed as follows;
    - a. The 1<sup>st</sup> family of the deceased-Objector/widow and 5 children shall have 2/3 of the land estimated at 20 acres
    - b. The 2nd family of the deceased 1st Petitioner and 3 children shall have 1/3 of the land estimated at 10 acres.
  4. The administrators shall file summons for confirmation of grant with the above distribution of the suit property.
  5. Any aggrieved party may apply or exercise right to appeal.
  6. Each party to bear own costs.”
5. Being aggrieved by the above judgment orders, the applicant /objector filed this instant application dated 17<sup>th</sup> June 2022 together with a Notice of appeal dated 17<sup>th</sup> June 2022 and a draft Memorandum of Appeal. In the application dated 17<sup>th</sup> June 2022 the applicant is seeking orders;
- i. Spent
  - ii. That this Honourable court be pleased to order that there be a stay of execution of the judgement of the court dated and issued on 27th February, 2017 and any subsequent or consequential orders or proceedings pending the hearing and determination of this application;
  - iii. That this Honourable court be pleased to order that there be a stay of execution of the judgement of the court dated and issued on 27th February, 2017 and any subsequent or consequential orders or proceedings pending the hearing and determination of the intended appeal;
  - iv. That this Honourable court be pleased to extend the time within which to appeal the judgment of the court dated 27th February, 2017 and to file a Notice of Appeal and Record of Appeal in respect of the intended appeal;
  - v. That the notice of appeal filed herewith be deemed properly filed and on record.
  - vi. That this Honourable court be pleased to issue any other orders that it may deem mete to meet the ends of justice.
  - vii. That the costs of this application be provided for.
6. The application is premised on the grounds on face of it and the supporting affidavit sworn by the applicant on even date. The applicant briefly stated that this court delivered its judgement in this matter on 27th February, 2017 in the absence. That the said judgment was not supplied or brought to the attention of the applicant herein until the month of August in the year 2021. It is the applicant’s case that the applicant does not read or understand English and the judgment was only read to her and the import thereof explained to her and the content of the letter dated 4<sup>th</sup> March,2021 which was forwarding the judgement. The applicant referred to attached copy of a letter marked LS1.
7. The applicant stated that she was dissatisfied with the services provided by her advocates, Solonka & Company Advocates, specifically for not informing her of the delivery of the judgment for a long



- period and resolved to terminate the services on 21<sup>st</sup> December, 2021 and collected her file from the said advocate. The applicant referred to a copy of file discharge note dated 21<sup>st</sup> December,2021 attached to the application.
8. The objector/applicant stated she instructed her current counsel at the end of January, 2021.It is applicant's case that the new counsel could not effectively execute the applicant's instructions to stay the execution of the judgment and the proceedings and also appeal the judgment without perusing the court proceedings as the court file was missing from the registry.
  9. The applicant stated that her new advocates upon reading the office file noted that the judgement was delivered in the absence of the parties and her former counsel became aware and applied for the judgement on 30<sup>th</sup> September,2020 as evidenced by a copy of a letter marked LS3 attached to the application. The applicant stated further that her former advocates applied for a certified copy of the judgment from the court on 12<sup>th</sup> October,2020. She referred to a copy of email attached to the application.
  10. The applicant averred that the judgement herein was delivered in absence of the parties. The applicant averred that she is dissatisfied by the judgement and wish to appeal against the said judgement. The applicant stated that she has an arguable appeal as evidence by the annexed draft memorandum of appeal and notice of appeal marked LS5(a) and LS5(b).
  11. The applicant stated the court file was missing and the court file was traced at the end of March, 2022 after the perusal of which the applicant issued instructions to the advocate on record for filing of the instant application.
  12. It is applicant's case that as a result of the lack of information on the passing of the judgment, the applicant was not able to act on the judgment in the prescribed statutory time. That the applicant has filed this application belatedly due to mistake of counsel of not informing her of the judgment which she is dissatisfied with and wishes to exercise her right of appeal as granted by the court in the judgment.
  13. The applicant averred that she has an arguable appeal with high chances of success and no prejudice will be suffered by the respondents as the grant herein has not been confirmed.
  14. The respondents opposed the application and filed a replying affidavit by Grace Nanew Andrew dated 20<sup>th</sup> July 2022. She briefly stated herself and the respondent are the co administrators of the deceased's estate vide a Grant issued by this honorable court on 29th June, 2017.
  15. She stated that the Applicant herein has been grossly indolent in her conduct in relation to this matter, and that the Applicant's application is an afterthought and made long after the Applicant's previous Advocates had been served with the Application for Confirmation of Grant and which could have been heard by now but have failed to be listed twice as on the two instances the Judge was not sitting.
  16. The respondent stated that the Applicant has not availed sufficient reasons to explain why she was not following up with the objection proceedings she herself initiated from the year 2009 when she alleges she was last in court to the year 2021 when she allegedly learnt of the outcome of the judgment. The respondent stated the Applicant was at all times ably represented by her Advocates in the course of the litigation and the timing of the change of the Advocates long after judgement was delivered, a period of 5 years is not persuasive.
  17. The respondent stated the applicant the Applicant has not demonstrated at all that she has an arguable appeal that would enable the court to give to extend the time for appeal. That the applicant to seek a stay of judgement after 5 years after the same was delivered would greatly be prejudicial to respondent



and her children who have never been able to enjoy the estate of their late father which constitute only land Title Loitokitok/ Rombo/ A86.

18. By consent of parties the application was canvassed by way of written submissions. The Applicant filed written submissions dated 10<sup>th</sup> August, 2022. The 1<sup>st</sup> respondent filed written submission dated 17<sup>th</sup> August 2023.
19. The applicant briefly submitted the instant application is merited and is not abuse of court process. She submitted she has arguable appeal and failure to file the same in time was occasioned by mistake by her advocates. The applicant referred this court to the decision in Bank Of Africa Kenya Limited V Put Sarajero General Engineering Co.ltd & 2 Others[2018]EKLR among others.
20. The 1<sup>st</sup> respondent briefly submitted that the Applicant has blamed her previous Advocates on record for failure to inform of her of the judgement for the unreasonable delay in presenting this application. She submitted there is no evidence that the Applicant on her own accord wrote to the said Advocates enquiring on the outcome of the Judgement. The respondent submitted that the Applicant attended the hearing and gave evidence in the matter, it follows that she expected that there would be a judgement. The respondent submitted that the Applicant's Advocates participated in the proceedings from the beginning to the end despite the fact that it would always be the Applicant's Advocates acting on the further progress of the matter.
21. The respondent submitted the applicant in this matter has not offered any security in the event that the appeal fails. The condition of security has therefore not been met. The respondent submitted the applicant has not given a reasonable explanation for the delay but has simply sought to shift the blame to his former counsel.
22. From the application, affidavits and submissions filed by respective parties which I have considered. The issue arising for determination is whether the Applicant has satisfied the requirements set out in Order 42 Rule 6 of the Civil Procedure Rules.
23. It is trite law that for application seeking stay pending appeal the Applicant must meet the statutory requirements set out in Order 42 Rule 6 which states: -
  - (2) No order for stay of execution shall be made under sub rule (1) unless-
    - (a) The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
    - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
24. With regard to substantial loss, the applicant has submitted that the deceased estate comprise of only Loitokitok/Rombo 'A' 86 and if the objector is denied the opportunity to appeal the judgement of court the applicant will suffer irreparable harm and substantial loss that cannot be compensated by costs.
25. The applicant has submitted that this court delivered its judgement in this matter on 27th February, 2017 in the absence. That the said judgment was not supplied or brought to the attention of the applicant herein until the month of August in the year 2021. The applicant has submitted that this was occasioned by mistake on part of her Advocate.
26. This matter/cause relates to succession of the estate of the deceased and distribution of his estate. Both parties are beneficiaries of the estate and indeed Co-Administrators. The applicant has indicated her desire to appeal against the ruling delivered by that court. I note that the court directed for filing of



summons of confirmation which has not been done because of the supplicant indication to file appeal. I find that the respondent will not suffer any prejudice if this application is granted. I therefore grant the following orders;

1. The applicant is granted leave to file appeal out of time.
2. The applicant to file appeal within 30 days.
3. There be stay of execution for 60 days from today's date.
4. If the appeal is not filed within 30 days that orders of stay to automatically lapse on the 31<sup>st</sup> day.
5. Each party to bear own costs.

**DATED AT NAIROBI THIS 31<sup>ST</sup> JULY, 2024.**

.....

**S. N. RIECHI**

**JUDGE**

