



REPUBLIC OF KENYA



In re the Estate of the Late Kipsang Chepkowny (Deceased) (Succession Cause 8 of 2004) [2024] KEHC 9680 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9680 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
SUCCESSION CAUSE 8 OF 2004**

JK SERGON, J

JULY 31, 2024

IN THE MATTER OF THE ESTATE OF THE LATE KIPSANG CHEPKWONY (DECEASED)

BETWEEN

**EZEKIEL KIPKEMOI 1ST APPLICANT
NANCY CHEPKOECH SANG 2ND APPLICANT
ELIZABETH CHEPKEMOI SANG 3RD APPLICANT
ANNAH CHEPKORIR KIMETO 4TH APPLICANT
SELLY CHELANGAT KIMETO 5TH APPLICANT
SARA CHERONO SANG 6TH APPLICANT**

AND

JANE CHEPKIRUI CHEPKWONY RESPONDENT

RULING

1. The application coming up for determination is a notice of motion dated 30th November, 2023 seeking the following orders;
 - (i) Spent
 - (ii) That the honourable court be pleased to grant leave to the firm of M/s Gordon Ogola Kipkoech & Company Advocates to come on record in this matter for the applicants herein
 - (iii) That this honourable court be pleased to issue for stay of execution of the ruling entered and delivered herein against the applicants on 15th February, 2018 pending hearing and determination of this application.



- (iv) That this honourable court be pleased to grant the applicant leave to appeal out of time against the ruling delivered by the Hon. Lady Justice Mumbi Ngugi, dated 15th February, 2018 in High Court Succession Cause No 8 of 2004.
 - (v) That this honourable court be pleased to issue orders of extension of time for giving notice of appeal and filing the record of appeal and service thereof in relation to the ruling of Hon. Lady Justice Mumbi Ngugi, dated 15th February, 2018 in High Court Succession Cause No 8 of 2004
 - (vi) That this honourable court be pleased to issue an order for stay of execution of the ruling entered and delivered against the applicants on 15th February, 2018 pending the hearing and determination of the intended appeal.
 - (vii) That costs of this application be provided for.
2. The application is supported by grounds on the face of it and the supporting affidavit of Ezekiel Kipkemoi the applicant herein on behalf of the co-applicants.
 3. The applicant avers they are intent on appealing against the ruling and orders of Hon. Lady Justice Mumbi Ngugi, dated 15th February, 2018 in High Court Succession Cause No 8 of 2004. They are aggrieved with the said ruling, which was largely informed by the mode of distribution proposed by the respondent/petitioner. The applicants intend to appeal against the aforesaid ruling and have it set aside.
 4. The applicant avers that due to a regrettable inadvertent error, they failed to lodge a notice of appeal and the record of appeal within the prescribed statutory period. The applicants further aver that they have since obtained the typed proceedings together with a certified copy of the ruling and prepared a record of appeal. The applicants were therefore seeking for an extension of time to lodge a notice of appeal and to appeal.
 5. The applicant avers that the respondent in a bid to enforce the aforementioned ruling is threatening to evict his family from Nakuru/Njoro Ngata/ Block 2/832 and that they would be rendered homeless as a result.
 6. The applicant avers that the intended appeal is merited and raises arguable grounds discernable from the memorandum of appeal and that it is not frivolous, vexatious or scandalous or an abuse of the court process.
 7. The applicant avers that they are willing to deposit any amount that this court shall direct as security for costs and that the respondent will not suffer prejudice if the time for serving the notice of appeal and the record of appeal is extended.
 8. The applicant avers that they are desirous of exercising the right to be heard at the court of appeal, which right ought not be denied by reason of procedural technicalities and excusable delay.
 9. The respondent herein Jane Chepkirui Chepkwony filed a replying affidavit in response to the instant application.
 10. The respondent avers that the application was not brought in good faith but was meant to further frustrate and/or delay the distribution of the estate of the deceased's as directed by this court vide a ruling delivered on 15th February, 2018 and the amended certificate of confirmation of grant issued in conformity with the ruling.



11. The respondent avers upon issuance of the grant she had made arrangements for survey and subdivision of the properties for purpose of effecting the final distribution of the estate but her efforts were rebuffed by the applicants.
12. The respondent avers that she lodged an application for orders to facilitate the final distribution of the estate and the said application was allowed on 27th July, 2023.
13. The respondent avers that the applicants did not meet the prerequisite conditions for grant of an order of stay of execution. The respondent faulted the applicants for filing the instant application close to six years after the ruling they sought to appeal was delivered without offering a plausible reason for the delay. The respondent avers that the applicants only rushed to court after they learnt of the intended visit by the surveyor for purposes of implementing the amended certificate of confirmation of grant.
14. The respondent urged this court to resist the applicants' invitation to sanctify their indolence. The respondent further avers that in the event that the instant application is allowed, she would suffer irreparably, as the applicants have and continue to deprive her of her rightful inheritance and enjoyment of her beneficial portion of the estate of the deceased.
15. The parties were directed to file written submissions for consideration by this Court.
16. The applicant submitted that this Court is bestowed with the jurisdiction and the discretion to grant leave to the applicants' to lodge an appeal out of time and they cited section 7 of the [Appellate Jurisdiction Act](#) which provides as follows;

“The High Court may extend the time for giving notice of intention to appeal from a Judgement of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”
17. The applicant submitted that they met the required threshold to merit grant of an order for extension of time for giving notice of intention to appeal. The applicant also cited the case of [Karny Zabrya & another v Shalom Levi](#) [2018] eKLR where the court observed as follows; “ Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.’
18. Firstly, an applicant has to demonstrate that the delay has not been long and inordinate. The applicants submitted that the delay in the instant matter was occasioned by the health condition of the 1st applicant, the breadwinner of the family and the only person capable of conducting and financing the appeal. On account of his illness, he could not instruct any lawyer or raise any money towards the appeal.
19. Secondly, an applicant has to demonstrate that there is no prejudice that the respondent will suffer if the application is allowed. The applicants submitted that prior to filing of the succession cause, the respondent was leading a normal and comfortable life without the properties sought in the succession cause, hence, awaiting the outcome of the intended appeal would not prejudice the life she enjoyed before and still enjoys now. The applicants submitted that should the application be disallowed,



- the applicants would be prejudiced as they would be evicted from their home. The applicants were therefore adamant that they should be allowed to agitate their case on appeal.
20. Thirdly, an applicant has to demonstrate arguability and merit of the appeal. The applicants argued that they annexed a draft memorandum of appeal and that weighty issues had been raised including the fact that beneficiaries to the estate were not ascertained.
21. The applicants argued that they were entitled to an order for stay of implementation pending appeal and set out the principles guiding the stay of execution pending appeal under order 42 rule 6 (2) of the [Civil Procedure Rules](#) which provides as follows;
- “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.”
22. The applicants further submitted that if the order for stay is not granted, it will result in substantial loss and the appeal would be rendered nugatory. The applicants argued that they risk being evicted and being rendered destitute and homeless. The houses they built, crops and other investments are on the estate property over the years risk being permanently destroyed. They would suffer irreparable loss that cannot be restituted by monetary compensation and thus the need to maintain the status quo pending the hearing and determination of the appeal. The applicants cited the case of [James Wangalwa & another v Agnes Naliaka Cheseto](#) [2012] eKLR, where the court stated that; “ ... The applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...”
23. The applicants also submitted that they were ready and willing to deposit security in court.
24. The respondent filed her submissions in which she contended that the applicants are not entitled to grant of leave to file an appeal out of time as they have not met the threshold required for grant of the same and cited the Court of Appeal case of [Thuita Mwangi v Kenya Airways Ltd](#) (2003) eKLR which set out as follows; “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”
25. The respondent reiterated that the instant application seeking leave to appeal has been filed after a period of more than five years from the date of delivery of the ruling.
26. The respondent contended a cursory perusal of the memorandum of appeal revealed that the grounds set out were mainly to challenge distribution of the estate of the deceased. The respondent maintained that the ruling dated 15th February, 2018 was delivered upon the court taking into consideration both parties’ respective modes of distribution and that the Learned Judge made her determination in line with the provisions of the [Law of Succession Act](#).
27. On the degree of prejudice, the respondent reiterated that the applicants did not demonstrate how they would be prejudiced if the orders sought are not granted, the respondent argued that she would



- be gravely prejudiced in the event the orders ought are granted since the applicants are in occupation of a larger share of the estate and have used force and intimidation to frustrate her efforts to implement the grant so as to obtain her rightful share.
28. The respondent reiterated that the applicants rushed to court when they learnt of the intended visit by the surveyors for purposes of implementing the amended certificate of confirmation of grant.
 29. The respondent reiterated that the applicants had not established sufficient grounds to warrant an order for stay of execution.
 30. The respondent argued that the applicants had not demonstrated substantial loss, in the event stay of execution was not granted, as they had been duly provided for in the amended certificate of confirmation of grant issued in conformity with the aforementioned ruling.
 31. The respondent reiterated that pursuant to the said ruling delivered on 15th February, 2018, amended certificate of confirmation of grant and court orders issued on 4th August, 2023, she made arrangements for survey and subdivision of the properties for purposes of affecting the final distribution of the estate.
 32. The respondent contended that the ruling subject of the instant application was delivered on 15th February, 2018, the application for stay of execution was filed on 30th November, 2023 which delay was not satisfactorily explained and can therefore be termed as inordinate. The respondent reiterated that the applicants have not shown sufficient cause and/or satisfied the requisite conditions for grant of stay of execution.
 33. Having considered pleadings and submissions by the parties, the substantive issue for determination by this court is whether to grant leave to the applicants to file appeal out of time and orders for stay of execution pending appeal.
 34. On the issue as to whether to grant leave to file an appeal out of time, this Court is persuaded by the reasons advanced by the applicants explaining the delay in filing an appeal in time. Though the delay is long, nevertheless there are plausible reasons given for the delay. I find that the explanation offered by the applicants for taking a period of over five years to file the instant application as sufficient to sway this court to exercise its discretion in their favour. There is no denial that the applicant was ill during that period.
 35. The applicants had also sought for leave for the Firm of Gordon Ogola Kipkoech & Co., Advocates to come on record and appear for them. There is no objection. The order is granted as prayed.
 36. Consequently, this court grants an order extending time for giving notice of appeal and filing the record of appeal and service thereof in relation to the ruling of Hon. Lady Justice Mumbi Ngugi dated 15th February, 2018 in this case.
 37. An order for stay of implementation and or execution of the ruling of 15th February, 2018 is granted pending the hearing and determination of the intended appeal.
 38. Costs to await the outcome of the intended appeal.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 31ST DAY OF JULY, 2024.

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J.K. SERGON

JUDGE



In the Presence of:-

C/Assistant – Rutoh

Kipkoech for the Applicant

Kipkorir holding brief for Miss Sang for Respondent

