



REPUBLIC OF KENYA



KENYA LAW
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**Kanegene v Mugo & 2 others (Miscellaneous Application
E047 of 2023) [2024] KEHC 9249 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9249 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS APPLICATION E047 OF 2023**

LM NJUGUNA, J

JULY 31, 2024

BETWEEN

JOYCE GICUKU KANEGENE APPLICANT

AND

SALESIUS KARIUKI MUGO 1ST RESPONDENT

MOSES MWANIKI 2ND RESPONDENT

JOYCE MATHIGA NJERU 3RD RESPONDENT

RULING

1. The applicant has filed a notice of motion dated 0September 4, 2023, which is supported by the grounds set out on the face of the application as well as the facts deposed in the supporting affidavit. The orders sought are as follows:
 - a. That this honourable court be pleased to grant the applicant leave to appeal out of time against the orders of Hon. M.N. Gicheru, CM issued on January 18, 2021 in Embu Chief Magistrate's Succession Cause no. 361 of 2018 formerly Embu High Court Succession Cause no. 5 of 1988; and
 - b. That costs be in the cause.
2. It is the applicant's case that the matter had been referred for out of court settlement and it was mentioned on several occasions before it was marked as closed on May 17, 2023. That she was not aware that the grant had been revoked because she is old and was not represented in the proceedings. That if she had known that the grant had been revoked, she would have appealed against the said decision. She stated that she is the beneficiary and in occupation of 2 acres of Ngandori/Ngovio/703 since 1989. That failure to appeal out of time is inadvertent. She urged the court to allow her appeal out of time.



3. The respondents opposed the application through a replying affidavit in which they stated that at the time of petitioning for grant of letters of administration, the applicant did not involve them as the grandchildren of the deceased, prompting them to seek revocation of the grant. That the deceased had 5 dependants, out of whom only the applicant is alive. That the matter was referred to mediation but the same was not forthcoming since the applicant refused to share the estate of the deceased with the respondents.
4. They stated that the applicant has never lived on the land parcel number Ngandori/Ngovio/703 and that she lives on parcel number Kiriari/Kabari/1360. They stated that the applicant has all along excluded them from the deceased's land and they have been struggling to earn a living. That the application is based on half-truths and lies which is why she seeks to appeal 3 years after the fact. They urged the court to dismiss the application.
5. The applicant filed a supplementary affidavit in which she deposed that at the time of petitioning for letters of administration, the respondents' parents were still alive and they gave their consent to the process. That the respondents sought for revocation of the grant 31 years after the grant was issued, which was an afterthought since her siblings consented to the proceedings. That she was unrepresented at the time when the grant was revoked and she only found out through her current advocate. That she is seeking leave to appeal against the said decision because she did not know that the grant was revoked, otherwise, she would have appealed on time.
6. The court directed the parties to file their written submissions and both parties complied with the directions of the Court.
7. The applicant submitted that she and her late brother Mbogo Kanegene each inherited 2 acres out of parcel number Ngandori/Ngovio/703 pursuant to the revoked grant. Reliance was placed on section 79G of the *Civil Procedure Act*. She submitted that the delay is inadvertent and that she was not aware that the grant had been revoked. She urged the court to grant her leave to appeal out of time.
8. The respondents submitted that when they were enjoined in the case, the applicant rushed to build a temporary structure on the suit land and asked his son to live in it. That the applicant refused to share the land with the respondents yet they were also beneficiaries to the estate. That the grant was revoked since the applicant made untrue allegations when petitioning for the grant. They submitted that the delay has not been explained and they urged the court to dismiss the application.
9. The issue for determination is whether the application has merit.
10. The timelines for filing of appeals are set out in Section 79G of the *Civil Procedure Act* as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”
11. The court is not an alien to the fact that sometimes delay in filing the appeal may occur and it will be guided by the proviso in the above-cited section of the *Civil Procedure Act*. The proviso creates leeway but only to an extent where the court may apply discretion on the matter and grant such orders



when it is satisfied with the reasons for the delay. In the case of *Edith Gichungu Koine Vs Stephen Njagi Thoitbi* (2014) eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

12. There is a 3-year delay in appealing and the applicant has stated that the delay was occasioned by lack of knowledge on her part, that the grant had been revoked. She stated that it is her current advocate who informed her that the grant had been revoked, prompting her to file the application herein. The relief sought is discretionary in nature. Article 48 of the *Constitution* of Kenya 2010 guarantees every person right of access to justice.
13. Further, Article 50(1) of the *Constitution* provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. This court is therefore inclined to grant the order only on the strength of the *Constitution* and in exercise of its discretion to enable the applicant to be heard on appeal.
14. In the end, having considered the arguments of both parties, and relevant laws, the application is hereby allowed and the following orders to issue:
 - a. The applicant is hereby granted leave to file the appeal out of time and the same to be filed within 14 days from the date of this ruling, failing which the appeal shall stand dismissed;
 - b. The appeal to be prosecuted within 120 days after filing of the same; and
 - c. Each party to bear their own costs.
15. It is so ordered.

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

L. NJUGUNA

JUDGE

..... for the Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent

