



**Kuria v Murang'a County Contractors Association (Family Appeal
11 of 2023) [2024] KEHC 10429 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 11 OF 2023
FN MUCHEMI, J
AUGUST 23, 2024**

BETWEEN

FRASHIAH KURIA APPLICANT

AND

MURANG'A COUNTY CONTRACTORS ASSOCIATION RESPONDENT

RULING

1. The application dated 17th August 2022 seeks for orders of leave to file an appeal out of time against the ruling on the application dated 15th March 2022 in Thika CM Succession Cause No. 127 of 2020 delivered on 12th July 2022.
2. The respondent filed a Replying Affidavit dated 24th May 2024, in opposition to the application.

Applicant's Case

3. The applicant states that the ruling in Thika CM Succession Cause No. 127 of 2020 was delivered on 12th July 2022 and soon thereafter, she applied for copies of the judgment and proceedings. The applicant states that the copies of the judgment and proceedings was availed to her on 16th August 2022 when the time for filing an appeal had already expired.
4. The applicant argues that she has arguable grounds of appeal as per her draft memorandum of appeal.

The Respondent's Case

5. The respondent states that the applicant has not given any good or sufficient cause for the delay in filing the appeal within the time provided under Section 79G of the [Civil Procedure Act](#). The respondent further argues that the period of delay of two months is too long, the reason for the delay is unjustified, unreasonable and unbelievable. The draft memorandum of appeal raises misconceived grounds that are not arguable.



6. The respondent states that it shall suffer great prejudice if the court grants the applicant leave to file the appeal out of time. The respondent further states that the intended appeal was filed with the sole purpose of denying it the right to enjoy the fruits of its judgment. Further, the respondent states that the intended appeal is mischievous, contemptuous and an abuse of and misuse of the judicial process.
7. The respondent states it has filed a criminal case against one Lawrence Njau being Murang'a Chief Magistrate's Court Criminal Case No. E272 of 2024 whereby the applicant is a witness and therefore the determination of the appeal herein before the criminal case has been heard to conclusion will interfere with the proceedings in the criminal case.
8. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

9. The applicant submits that by the ruling of the trial court of 12th July 2022, the trial court stopped the distribution of the whole estate of the deceased other than the suit property namely LR No. LOC 20/Gakindu/Kambirwa/703. The applicant further submits that the order of the trial court is indefinite until unknown criminal and civil cases are investigated, filed and determined. The applicant argues that the order is unfair to the beneficiaries of the estate as they have to wait indefinitely to inherit properties of their mother on the premise that strangers fraudulently sold LR. No. LOC 20/Gakindu/kambirwa/703 to unsuspecting third parties without the involvement of the beneficiaries.
10. The applicant submits that the impugned ruling was delivered on 12th July 2022 and she applied for a copy of the ruling and typed proceedings the following day which was supplied by the court on 16th August 2022 when the time for filing the appeal had run out. The applicant further submits that there is no inordinate delay in filing the application.
11. The applicant argues that the respondent was cheated in purchasing the suit property and therefore they ought to follow their money from the accused person.

The Respondent's Submissions

12. The respondent submits that LR No. LOC 20/Gikindu/Kiambirwa/703 forms part of the estate of the deceased and is the subject of criminal investigations at the Murang'a Criminal Investigations Offices. Further, this fact was disclosed to the trial court and it informed the ruling delivered by the court.
13. The respondent submits that the applicant never filed a cross application requiring the court to confirm any of the other assets that are not involved in the fraud process and thus she cannot now raise concerns on the entire estate of the deceased being affected.
14. The respondent relies on Section 79G of the *Civil Procedure Act* and submits that the period of delay by the applicant is inordinate and the reason for delay remains unexplained. Further, the reason for the delay is unjustified, unreasonable and unbelievable. The respondent further argues that the draft memorandum of appeal has raised misconceived grounds that are not arguable. Further the respondent submits that they have annexed a charge sheet of the ongoing criminal case in Murang'a Law Courts to which the applicant is a witness.
15. The respondent submits that they shall suffer great prejudice if the court grants leave to the applicant to file her appeal out of time. The respondent argues that any appeal that may be heard whilst there is an active matter relating to the suit property shall have an unbecoming impact which may embarrass the judicial system at large.



16. The respondent states that the applicant did not serve them with the application to file an appeal out of time and the draft memorandum of appeal within seven days of filing as provided by Rule 12 of the Civil Procedure Rules.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time;

17. Section 79G of the Civil Procedure Act states:-

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 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 good and sufficient cause for not filing the appeal in time.

18. It is clear from the wording of section 79G of the Civil Procedure Act that before the court considers extension of time, the applicant must satisfy the court that that she has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited vs William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
19. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.



20. Similarly, in the case of *Paul Musili Wambua vs Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

21. The applicant faults the court below for the delay in filing her appeal as the registry took a long time in availing to the applicant a copy of the typed judgment and proceedings. The issue of delay of typed proceedings and judgment is a well-known issue in our legal system and courts have extended time holding that such delay is sometimes not on the part of the party but the court and this issue consist of facts beyond a party’s control. This was stipulated by the Supreme Court in the case of *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others* [2014] eKLR where the court stated:-

Counsel for the applicant has stated that he has exercised all due diligence to get the proceedings from the Court of Appeal, but to no avail.....

Would it be in the interests of justice then to turn away an applicant who has prima facie, exercised all due diligence in pursuit of his cause, but is impeded by the slow turning wheels of the court’s administrative machinery? We think not.

22. The Supreme Court further expounded in the case of *County Executive of Kisumu vs County Government of Kisumu & 8 Others* [2017] eKLR and held:-

However, we hasten to add that a ground of delay of getting typed proceedings is not a prima facie panacea for a case of delay whenever it is pleaded. Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.

23. In the present case, the trial court delivered its ruling on 12th July 2022 in the absence of both advocates. The applicant filed the instant application on 21st September 2022 which is approximately 2 months after the requisite period within which to file the appeal. The applicant annexed a copy of a letter requesting for a copy of the typed proceedings and the ruling but has not annexed any letters to the executive officer on follow-up on the copy of the proceedings and the ruling. Neither has the applicant attached a copy of a certificate of delay to show that the registry took long to avail the proceedings to him.

24. Furthermore, the applicant has stated that she received a copy of the typed ruling and proceedings on 16th August 2022, which was four days after the statutory time to file an appeal. However, the instant application and memorandum of appeal were filed on 21st September 2022. The applicant did not give any plausible explanation why it took her a whole month after getting the ruling and typed proceedings to file the memorandum of appeal. The period of two months cannot be said to be inordinate if supported with plausible reasons for delay. The applicant has an advocate on record who she had to



appoint to file this appeal and application for her and quite a bit of the time within the two months could have spent during such transaction.

25. The other area of consideration is the nature and grounds of appeal. I have looked at the grounds relied on which bring out the fact that indefinite orders staying the succession cause were given. Any indefinite orders pending determination of proceedings in another court are likely to hurt one or more parties in a case and especially the applicant herein who was not a party to the criminal case. The other beneficiaries in the estate are likely to be affected by such delay. In my considered view, these are sound grounds of appeal and it is important that the appellant be given his day in court.
26. For the foregoing reasons, I hereby allow the application dated 17th August 2022 in the following terms:-
 - a. That the applicant's memorandum of appeal is hereby admitted as properly filed.
 - b. That costs of this application shall abide in the appeal.
 - c. That the record of appeal be filled within 30 days.
 - d. That mention for compliance be on 14/10/2024.
27. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF AUGUST 2024.

**F. MUCHEMI
JUDGE**

