



**In re Estate of George Omolo Rombo (Deceased) (Succession Cause
257 of 2017) [2024] KEHC 11539 (KLR) (Family) (14 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 11539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 257 OF 2017

SN RIECHI, J

AUGUST 14, 2024

**IN THE MATTER OF THE ESTATE OF GEORGE OMOLO ROMBO
(DECEASED)**

BETWEEN

YUKIE SAITO ROMBO PETITIONER

AND

KENNETH OMONDI OKELLO APPLICANT

RULING

1. The application for determination is dated 11th March 2024 filed by the applicant seeking for orders that;
 1. That this Honourable Court be pleased to stay the execution of the judgment delivered on 17TH November 2023 pending the hearing and determination of this application and the intended appeal.
 2. That this Honourable Court be pleased to grant leave to file an appeal to the Court of Appeal against the entire judgment delivered on 17TH November 2023 and the order issued on 8th December 2023.
 3. That this Honourable Court be pleased to enlarge the time limited for filing an Appeal against the entire judgment delivered on 17th November 2023 and the order issued on 8th December 2023.
 4. That costs to be in the cause.



2. The application is premised on the grounds on face of it and the supporting affidavit of Kenneth Omolo Omondi sworn on even date.
3. The applicant briefly deponed that at the time of delivery of the said judgment, the Applicant was not present since he was not aware of the judgment date, and he was sick.
4. The applicant deposed that on 23rd June 2023 when the matter was in court in the presence of the petitioner's advocate and the Applicant, the court indicated that judgment was to be delivered on notice. However, the Applicant was not informed of the date of judgment.
5. The applicant stated that on 26th February 2024 the Applicant came to know that judgment had been delivered by this court when he was called by the Manager of Kenyatta University Staff Retirement Benefits Scheme, a Scheme where the deceased had pension benefits which are subject of this cause. The said manager informed him that the Petitioner had requested for the funds that had been apportioned / set -aside for the minors.
6. The applicant stated that the delay in filing this application was occasioned by sickness of the Applicant and the Applicant being unaware that the judgment had been delivered as he was not served with the judgment notice. The applicant stated that If stay of execution is not granted, the Applicant and the minors intend to suffer since the deceased's pension scheme benefits' that had been set —aside for the use by the minors for payments of school fees and their maintenance is likely to be released to the Petitioner, as a result the best interests of the children would be at stake. The applicant stated that there are no orders of stay in force and the applicant stand a risk of the deceased's pension benefits set-aside for the minors to be released to the Petitioner
7. The respondent opposed the application and filed a Replying Affidavit dated 11th April 2024 in opposition to the application. The respondent briefly deposed that the court upon observance of the character of the applicant herein at paragraph 63 of the judgment concluded that; "clearly the objector is not an honest witness". The respondent stated that the delay in filing the application for leave to appeal is therefore inexcusable.
8. The respondent deponed that the impugned judgment was made after the parties had been granted fair opportunity to prosecute and close their respective cases. For his part, the applicant gave evidence and was able to call all his witnesses to wit Joseph Rombo (the biological brother of the late George Omolo), Gordon the respondent stated that the Judgment was made with the benefit of court hearing, assessing and evaluating the evidence of all the parties and is therefore solid on facts and the law.
9. By consent of parties the application was canvassed by way of written submissions. The applicant filed written submissions dated 26th April 2024 and the respondent filed written submissions dated 14TH may 2024 I have carefully analyzed and considered the submissions and case law relied on by the parties.
10. The main issues arising for determination are:
 - i. Whether this court should grant stay of execution of judgement delivered on 17th November 2023.
 - ii. Whether this court should grant the appellant leave to file appeal out of time.
11. On the 1st issue 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.
12. With regard to substantial loss, the applicant has submitted that there are no orders of stay in force and the applicant stand a risk of the deceased's pension benefits set-aside for the minors if the same are released to the Petitioner and / or if the petitioner commences execution. He submitted that the minors, John Yona and Fenny Adhiambo intend to suffer since 40% of the deceased's pension scheme benefits had been set –aside for them i.e. payment of school fees and their maintenance contrary to the best interests of the children order.
13. The respondent on his part submitted that the order as framed is incapable of stay for reason that it is a negative.
14. I have analyzed the judgment delivered on 17th November 2023 and I note that there is nothing to be stayed. I therefore disallow the same.
15. On the 2nd issue the applicant is seeking order to file appeal out of time. Article 50 of *the Constitution* of Kenya, 2010 provides that. "every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body."
16. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights... it would seem that the main purpose of litigation namely the hearing and determination of disputes, should be fostered rather than hindered. See the case of Branco Arabe Espanol Vs Bank of Uganda (1999) 2 EA 22 (SCU). The same sentiments were echoed in the case of Bamanya Vs Zaver (2002) 2EA 329 (CAU) where the Judge observed: -

“The other principle governing the application is that administration of justice requires that all substances of disputes should be heard and decided on merits and for the aforesaid reasons, errors or faults of the counsel should not necessary debar a litigant from enforcing his rights.”
17. The court went on to say, the right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. The Appellants in this case contend he has an arguable appeal and he has also explained why he was not able to file the appeal on time. I allow him to file the appeal out of time as disallowing the same would go against the spirit of the overriding objectives and also the provisions of Article 159 of *the Constitution*. I also note that the respondent herein will not suffer prejudice if the appeal is admitted.
18. In the upshot, I make the following orders: -
 1. I hereby decline to issue order of stay of execution of judgment delivered on 17th November 2023.
 2. The Applicant is hereby granted leave to file appeal out of time.

DATED AT NAIROBI THIS 14TH DAY OF AUGUST, 2024

S. N. RIECHI



JUDGE

