



REPUBLIC OF KENYA



KENYA LAW
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**Cheres v Marusoi (Miscellaneous Civil Application 10 of 2023)
[2024] KEHC 13226 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION 10 OF 2023
JK SERGON, J
OCTOBER 30, 2024**

BETWEEN

EDA CHEPNGENO CHERES APPLICANT

AND

RAELI MARUSOI RESPONDENT

(Being an application to file an appeal out of time being an application for extension of time to file an appeal out of time to the decision of Hon.F.M Nyakundi, Senior, Resident Magistrate delivered on 12th June, 2024 in regard to the rectified certificate of grant dated 21st September, 2023)

RULING

1. The application coming up for determination is a notice of motion dated 1st December, 2023 seeking the following orders;
 - (i) This Honourable Court be pleased to extend time to the applicant for purposes of filing a notice of appeal and memorandum of appeal.
 - (ii) The Applicant be allowed to file a notice of appeal and memorandum of appeal, whose draft is annexed herewith, within seven (7) days of grant of such leave.
 - (iii) The delay to file the intended appeal out of time was not deliberate but owing to inadvertence and causation beyond the applicant's control.
 - (iv) This honourable court be pleased to issue conservatory orders as far as dealing or transacting with the subject property in the Re Estate of the Late Chumo Maina alia Chumo A. Maina; Succession Cause No. 188 of 2019; Eda Chepngeno Cheres v Raeli Marusoi by the respondent in any way pending the hearing and determination of this application and the appeal.
 - (v) Cost of this application be provided for.



2. The application is premised on the grounds set out on the face of it and the facts deponed in the supporting affidavit of Eda Chepngeno Cheres the applicant herein.
3. The applicant avers that she filed the instant application seeking an extension of time to enable her to file an appeal against the decision of the trial court in Succession Cause No. 188 of 2019 the estate of the Late Chumo Maina alias Chumo A. Maina.
4. The applicant avers that she filed the succession cause and obtained a certificate of confirmation of grant which was objected to by Raeli Marusoi and the court directed that the beneficiaries to agree on the mode of distribution. The applicant further avers that Raeli Marusoi made a document purporting that the beneficiaries had consented to the mode of distribution resulting in the rectification of the grant on 21st September, 2023.
5. The applicant avers that the delay in filing the intended appeal was not deliberate.
6. The applicant further avers that the intended appeal has a good chance of success.
7. The applicant has also averred that she is apprehensive that should leave to appeal out of time not be granted and the respondents not temporarily restrained from dealing with the subject property in the primary succession, the prayers sought in the application and intended appeal will be rendered nugatory.
8. On 24.9.2024 the matter came up for inter partes hearing, Mr. Bett for the Applicant stated that there is an appeal in the matter with a similar application for stay of execution pending appeal and for conservatory orders. Mr. Bett therefore urged this court to adjourn the hearing pending a ruling of the application.
9. Mr. Miruka for the Respondent on his part stated that there was no need to adjourn the matter and that an appeal had already been filed.
10. I have considered the pleadings and the oral submissions made by both parties and the issue (s) for determination are whether to allow an extension to file an appeal out of time and whether to issue conservatory orders.
11. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court.
12. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following:
 - (i) The period of delay; (ii) The reason for the delay; (iii) The arguability of the appeal; (iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted; (v) The importance of compliance with time limits to the particular litigation or issue; and (vi) The effect if any on the administration of justice or public interest if any is involved.
13. . It is the finding of this court that the application for leave to appeal out of time has since been overtaken by events as there is an appeal on record to wit Civil Appeal No. E024 of 2024 an appeal from the ruling of Hon.F.M Nyakundi, Senior, Resident Magistrate delivered on 12th June, 2024 in regard to the rectified certificate of grant dated 21st September, 2023.
14. On the issue as to whether to issue conservatory orders, this Court finds that the applicant did not meet the threshold required for granting of conservatory orders restraining dealings or transactions



with the subject property in Succession Cause No. 188 of 2019 pending hearing and determination of the appeal.

15. This court wishes to point out that *the Constitution* of Kenya, 2010 envisages that conservatory orders should be granted within the framework of articles 22 and 23. Similarly, the applicant has not met the threshold for a grant of an interlocutory injunction which principles are well settled and laid out in the cases of *Giella v Cassman Brown and Co Ltd* 1973 E.A 360, *Mrao v First American Bank of Kenya Ltd and 2 Others* 2003 KLR 125, and *American Cyanamid Co v Ethicon Ltd* 1975 1 All E.R. The principles are: (a) an applicant must show a prima facie case with a probability of success (b) in an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages. (c) and if in doubt in any of the above conditions the court will decide then on a balance of convenience.
16. The upshot is that there is no merit in the application. The same is thereby dismissed with no orders as to costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OCTOBER, 2024.

J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Bett for Applicant

