



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate Kibore Maina (Deceased) (Succession Appeal
E003 of 2024) [2024] KEHC 12892 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION APPEAL E003 OF 2024
RN NYAKUNDI, J
OCTOBER 25, 2024
IN THE MATTER OF THE ESTATE OF KIBORE MAINA (DECEASED)**

BETWEEN

JOHN LEMAYAN APPELLANT

AND

WILSON LEMISO RESPONDENT

*(Being an Appeal arising from the Ruling of the Honourable Principal
Magistrate Hon. N. Barasa delivered on the 27th day of October, 2023 in Eldoret
CMC P&A cause No. 18 of 2018 between John Lemayan and Wilson Lemiso)*

RULING

1. Before me for determination is a chamber summons application for the Appellant dated 14th June, 2023 expressed to be brought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules, Sections 79G and 95 of the Civil Procedure Act. The Appellant seeks orders that:
 - a. Spent
 - b. There be an order for stay of proceedings in Eldoret CM SUCC Cause NO. 18 of 2018 pending the hearing and determination of this application inter parties.
 - c. The court be pleased to grant stay of proceedings in the Eldoret CM SUCC Cause NO. 18 of 2018 pending the hearing and determination appeal against the said Ruling.
 - d. The Appellant be granted leave to appeal out of time against the Ruling delivered on 27th October, 2023 and the Memorandum of Appeal annexed hereto be deemed as duly filed on payment of the requisite fees.
 - e. The costs of this application be provided for.



2. The application is supported with an affidavit sworn by John Lemayan together with grounds as hereunder:
 - a. That by Ruling delivered by the Hon. N. Barasa on the 27th October, 2023, the Respondent was declared the only beneficiary of the Estate of the late Kibore Maina.
 - b. That the said decision was arrived at in the absence of the filing of any summons for confirmation of grant by parties in the suit, the said court having declined the parties an opportunity to file the same before it determined the issue of distribution of the Estate.
 - c. That the Appellant being aggrieved by the decision, wishes to appeal against the entire ruling out of time to this court.
 - d. That there was a pending application in the lower court file hence proceedings were yet to be filed and the time to appeal already lapsed.
 - e. That the Appellant will be greatly prejudiced unless leave to appeal out of time and stay of proceedings pending appeal is granted.
 - f. That unless the application is allowed as sought, the Appellant's application and the intended appeal shall be rendered nugatory and the Appellant will suffer irreparable damage.
 - g. That the Respondents are unlikely to be subjected to any prejudice should the application be allowed as prayed.
 - h. That the appeal should have been filed within 28 days from the date of delivery of ruling, and the delay is neither inordinate nor unreasonable. This court's unfettered discretion ought to be exercised in favour of the Appellant.
 - i. That the same is pending hearing of summons for confirmation of grant filed by the Respondent on the 26th June, 2024 and should the said hearing proceed the applicant's application shall be rendered nugatory.
 - j. That the Appellant has an arguable appeal with high chances of success.

Response

3. In Response to the application, the Respondent swore an Affidavit dated 26th July, 2024 stating:
 - a. That Eldoret Chief Magistrate Succession Cause No. 18 of 2018 was lodged by the applicant herein who made a false representation that he was the only beneficiary of the deceased estate and was consequently issued with a grant of letters of administration intestate thereto.
 - b. That I had thus lodged an application seeking for the revocation of the grant issued to the applicant as the same was obtained without full disclosure of the material facts to the court.
 - c. That the application for revocation of grant was heard and determined wherein the court declared the applicant and the Respondent as co-administrators of the deceased estate.
 - d. That the subordinate court had further directed that the distribution of the estate of the deceased proceed by way of affidavit evidence wherein the applicant and Respondent were to file their respective affidavits on how the deceased estate ought to be distributed and why each of us were entitled to the portions thereto.



- e. That they had thus filed their respective affidavits to support their respective claims on the deceased estate.
- f. That on the 27th October, 2023, the court delivered its ruling directing that I was the only dependant and/or person entitled to the deceased estate.
- g. That being dissatisfied by the said ruling, the applicant had consequently lodged an application for review of the said ruling seeking to have the court set aside and/or review its ruling delivered on the 27.10.2023
- h. That being opposed to the said application, I thus lodged my reply to the application for review of the court ruling.
- i. That the court had consequently heard and determined the application where it dismissed the review application on the ground that the same did not meet the test for review as enshrined under Order 45 of the Civil Procedure Rules 2010.
- j. That the court having dismissed an application for review of its ruling delivered on the 27.10.2023 thus marked the end of litigation of those issues.
- k. That I am informed by my advocate on record that the applicant after filing the review can no longer move to this court seeking for leave to appeal against a ruling that had been subject of a review.
- l. That the applicant after pursuing the review against the ruling and having had his application dismissed by the court cannot turn around and now seek to appeal against the said ruling.
- m. That the applicant has had his day in court and can thus not go on a fishing expedition in the hope that he could ultimately succeed in this court.
- n. That good legal practice and good governance demands that litigation must come to an end.
- o. That the said application has been lodged to prevent and/or derail me from inheriting the deceased estate as I am the only legitimate beneficiary thereof.

Determination.

- 4. From the analysis of the application and the affidavit in response, the two issues that distill themselves for determination; whether the appellant ought to be granted leave to file an appeal albeit out of time and whether an order can issue staying the proceedings in Eldoret CM SUCC Cause No. 18 of 2018.
- 5. The powers of the court in deciding an application to seek leave to file an appeal out of time are discretionary and unfettered and the party seeking such discretionary orders which are only given on a case to case basis, not as a matter of right, must satisfy the court by placing some material before the court upon which such discretion may be exercised. Applications for enlargement of time within which to appeal will not be granted if the delay is inexcusably long, where injustice will be caused to the other party or where there is no reasonable justification. In the instant case, the impugned ruling was delivered on 27th October, 2023 and the present application was filed on 21st June, 2024 close to 8 months later.
- 6. Section 79G of the *Civil Procedure Act* provides:

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

7. The Appellant/Applicant’s request to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal out of time. The supreme court of Kenya in the case of *County Executive of Kisumu vs County Government of Kisumu & others* [2017] eKLR while relying to its decision in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR the Hon. Judges reiterated the considerations to be made in such a case to be as follows:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

8. The Appellant/Applicant argued that there was a pending application in the lower court file hence proceedings were yet to be filed and the time to appeal lapsed. He stated that he would be prejudiced unless leave to appeal out of time and stay of proceedings pending appeal is granted. The Respondent on the other hand contended that the Appellant/Applicant had filed an application seeking review of the impugned ruling, which application was dismissed and the Appellant cannot now turn to seek leave to file an appeal against a ruling that was subject of review.

9. Has the Applicant given a sufficient reason for this court to invoke its discretionary powers? What constitutes “sufficient reason” will naturally depend on the circumstances of each case. It was held in *Shanti v Hindocha and others* [1973] EA 207, that;

“The position of an applicant for an extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing sufficient reason (read special circumstances) why he should be given more time and the most persuasive reason that he can show is that the delay has not been caused or contributed to by dilatory conduct on his own part. But there are other reasons and these are all matters of degree.”

10. Despite the fact that in most cases circumstances ordinarily relate to the inability or failure to take a particular step within the prescribed time which is considered as a persuasive reason, it is not the only acceptable reason in my view. The delay of filing an appeal ought not be limited to explaining the delay. An applicant who has been indolent, has not furnished grounds to show that the intended appeal is meritorious may in a particular case yet succeed because of the nature of the subject matter of



the dispute, absence of any significant prejudice likely to be caused to the respondent and the Court's constitutional obligation to administer substantive justice without undue regard to technicalities.

11. In the application before me, I take the view that the applicant has not given reasons enough to persuade the court in granting leave to file an appeal. However, I am hesitant to lock out the Applicant from accessing justice considering that the issue in question is over dependency and given that from the trial court proceedings he had initially been recognized as a co-administrator and the estate is yet to be distributed. To deny the applicant that right in the circumstances of this application, would in essence be denying him access to justice and a fair hearing both of which are guaranteed by the Constitution under Article 50 as read with Art. 165(e) on appeals jurisdiction from the subordinate courts.
12. The prayer for stay of proceedings is an equitable relief. The conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified. However, the conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
13. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. In the case of *David Morton Silverstein vs. Atsango Chesoni (Supra)*, the Court of Appeal citing *Kenya Commercial Bank Ltd vs. Benjob Amalgamated Ltd & Another* [1998] eKLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.
14. Further, in the case of *Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya)* [2001] eKLR, Onyango-Otieno, J (as he then was) held that: -

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”
15. It is equally instructive and relevant to the circumstances of this application to state that though the right of Appeal is provided for in the *Constitution* the court also should be concerned with challenges posed to its authority by the parties who are not complying with its rules, directives and orders. The timelines set in the statute binds every litigant unless there is sufficient compelling and exceptional circumstances why the failure was occasioned to warrant leave to extend time. This non-compliance is a dangerous threat to the rule of law and administration of justice when the court's authority is undermined by inexcusable and persistent for its regard and orders. The court is also concerned that the constitutional premise of Art 159(2)(d) should not be used as a panacea to undermine the clear provisions of the statute. The parties are always encouraged to utilize the scarcest of resources which is its time. In fact, the reasons submitted by the intended appellant are inexcusable putting together the entire spectrum of what they intend to pursue on appeal. Furthermore, what is appealed against is the impugned ruling of the trial court and not the entire proceedings. I therefore do not agree with the submissions which always emerge that the delay to file an appeal was occasioned by the typing of the proceedings of the trial court. I take judicial notice that most of the session magistrates of the trial courts are now supplied with laptops and have competently unless otherwise demonstrated that they take each positive steps to type their decisions. This is therefore a case where I had to carry out a balancing exercise of the rights of the respective parties bearing in mind the constitutional imperative on the right of appeal, the provisions of Art 50 of the *Constitution* and Art 48. That means if I was to consider the factorial of the non-availability of typed proceedings, the making of the application



for an extension of time which to appeal is inordinate and inexcusable. That by itself could not have warranted the grant of the orders sought.

16. I have perused through the record and the impugned ruling and I form the opinion that the appellant might lose his beneficial interest in the event he is not heard on merit. It will be just and fair to have the applicant ventilate his appeal on merit and as such the application dated 14th June, 2024 is allowed with the following terms:

- a. I hereby extend time for the filing of an appeal, as prayed by the applicant.
- b. The annexed memorandum of appeal is hereby adopted as the basis of the appeal, subject to payment, within seven days of the date hereof, of the requisite registry fees.
- c. The Court shall give further directions regarding the hearing of the appeal.
- d. Each party shall bear its own costs.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 25TH DAY OF OCTOBER 2024

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R. NYAKUNDI

JUDGE

Representation:

M/s Tororei & Co. Advocates

M/s Akenga Kimutai & Co. Advocates

