



**In re Estate of Celestine Agutu Okello (Deceased) (Succession Cause
3202 of 2014) [2024] KEHC 15033 (KLR) (Family) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15033 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 3202 OF 2014
HK CHEMITEI, J
NOVEMBER 28, 2024
N THE MATTER OF THE ESTATE OF CELESTINE AGUTU
OKELLO (DECEASED**

BETWEEN

PETER WAMAI NGUGI APPLICANT

AND

VERONICA ACHIENG OCHIENG 1ST RESPONDENT

CHRISTINA ACHIENG OKELLO 2ND RESPONDENT

RULING

1. This ruling relates to the applications dated 7th December, 2021 and 24th August, 2023.
2. The application dated 7th December, 2021, filed by VAO and CAO, the Applicants, seeks for ORDERS THAT:-
 - (a) The grant of probate with written will issued to the said VAO and CAO on the 7th day of April, 2015 be confirmed and varied in line with the Judgment delivered on 6th February, 2020 and ruling delivered on 24th September, 2020.
 - (b) The costs of this application be in the cause.
3. The application is supported by affidavit sworn by VAO and CAO on 6th December, 2021 and 29th November, 2021, respectively and further affidavit sworn by both of them on 30th September, 2022.



4. They aver, inter alia, that they are the executors of the deceased's Will whose grant of probate of written will was granted on 7th April, 2015. The deceased's husband, PWN, applied revocation and/or annulment of the issued grant and a judgment was delivered on 6th February, 2020 to wit,
 24. It will not be efficacious for the court to revoke and or annul the entire will as the properties were otherwise evenly divided amongst the children of the deceased. 25. In a bid to make reasonable provisions for the Applicant and in the interest of justice, I invoke the wide discretion donated to the court by, Sections 26, 27 & 47 of the Act and Rule 73 of Probate and Administration Rules and direct the executors to value the below mentioned properties within the next 30 days to enable the court take the necessary step towards giving final orders, namely i. A house in Plainsview ii. Nyayo Embakassi House iii. House in Simba Villas, Embakassi iv. Kiserian, Ngong View house v. Kisamis property and Kajiado town property.”
5. These properties and, vide ruling delivered on 24th September, 2020, the court directed that properties L.R. No. Ngong/ Ngong/55271, motor vehicle Mercedes Benz registration number KAU 811P and lorry registration number KAQ 911J to go to PWN.
6. PWN filed an application dated 2nd December, 2020 seeking for stay of execution of the orders in the judgment delivered on 2nd February, 2020 and Ruling delivered on 24th September, 2020 and for leave to appeal to which the court delivered a ruling on 25th June, 2020 dismissing the prayer for stay of execution.
7. They have given a fresh proposal for the distribution of the deceased's estate in line with the judgment delivered on 6th February, 2020, ruling delivered on 24th September, 2020 and ruling delivered on 15th July, 2022. The fresh proposed mode of distributed in the further supporting affidavit aforementioned has excluded property known as Title Number Nairobi/Block 93/ 965 Plainsview Estate which is the subject of PWN's appeal.
8. The application is opposed by replying affidavit sworn by PWN on 1st April, 2022. He avers, inter alia, that he is the Objector in the instant proceedings and that he was granted leave to file his appeal out of time against the ruling delivered on 24th September, 2020, on 25th June, 2021.
9. He thereafter filed a Notice of Appeal dated 28th June, 2021 and thereafter requested for certified copies of the proceedings and judgment vide letter dated 29th June, 2021 and they were yet to be supplied to him thus delaying the filing of the record of appeal. He avers that allowing the application dated 7th December, 2021 will compromise his appeal.
10. The Applicants have filed submissions dated 4th May, 2022 in support of the application dated 7th December, 2021 on the basis that the Respondent was not granted a stay of execution on the ruling of 24th September, 2020.
11. The Respondent, PWN, has filed submissions dated 5th May, 2022 against the application dated 7th December, 2021 seeking that it be disallowed pending the hearing and determination of his appeal.
12. The application dated 24th August, 2023 filed by PWN, the Applicant, seeks for ORDERS THAT:-
 - (a) This application be heard on priority to the current application on the part of the Respondents for confirmation of the grant of probate and/or in priority to any other application pending before this honourable court.
 - (b) This honorable court be pleased to grant leave to the firm of M/S J. K. Ouko & Company Advocates to come on record for the applicant in place of Mr. John Mwariri Advocate, c/o



Kituo Cha Sheria t/a Legal Advice Centre who have since intimated their intentions to cease acting for the applicant.

- (c) This honourable court be pleased to grant an order of stay of confirmation of the grant of probate proceedings in this matter pending the hearing and determination of the instant application.
 - (d) This honourable court be pleased to grant an order of stay of confirmation of the grant of probate proceedings in this matter pending the hearing and determination of the intended appeal.
 - (e) This honourable court be pleased to enlarge the time granted to the applicant vide the ruling of this honourable court delivered on 25th June, 2021 allowing the applicant to file an appeal against the whole of the Judgment and Ruling of the Hon. Lady Justice Abida Ali Aroni delivered on 6th February, 2020 and 24th September, 2020 respectively.
 - (f) Time be enlarged for the applicant to file his appeal out of the 21 days period that was granted to the applicant vide the said ruling of the court of 25th June, 2021.
 - (g) This honourable court be pleased to grant any other orders as it may deem fit to further the ends of justice.
 - (h) The costs and incidentals of this application abide by the outcome of the intended appeal.
13. He avers, inter alia, that his previous advocate filed an application to cease acting for him without informing him. As such, he was in the dark on what was happening in court. He avers that mistake of counsel should not be meted upon him and that the delay in filing the appeal within the 21 days was inadvertent.
14. The application is opposed vide notice of preliminary objection dated 7th December, 2021 and replying affidavit sworn on 4th October, 2023.
15. The Notice of preliminary objection dated 7th December, 2021 is based on the grounds THAT:-
- 1. The prayers sought in the Objector's application dated 24th August, 2023 are res judicata for the following reasons:
 - a. The prayer seeking for stay orders of the confirmation of grant of probate proceedings currently and pending appeal was heard and determined.
 - b. The summons for confirmation of grant of probate was partly heard and orders and directions given on how it should proceed vide this honourable court's ruling delivered on 15th July, 2022.
 - c. The orders enlarging time granted to the applicant vide the ruling of the honourable court delivered on 25th June, 2021 allowing the applicant to file an appeal against the whole judgment and ruling of the Hon. Lady Justice Abida Ali Aroni delivered on 6th February, 2020 and 24th September, 2020 respectively were made and time enlarged vide this honourable court's ruling delivered on 15th July, 2022.
 - 2. The application is merely intended to delay the final hearing of the summons for confirmation of grant which application the objector has tried severally and made every effort to ensure it is not heard and concluded.



3. It is in the interest of justice that the grant of probate with written will issued on 7th April, 2015 be confirmed as prayed in the summons for confirmation of grant of probate with written will dated 7th December, 2021.
16. The replying affidavit opposing the application dated 24th August, 2023 is sworn by VAO and CAO on 4th October, 2023.
17. They aver inter alia that the matters raised in the instant application were determined vide ruling delivered on 25th June, 2021. It is 3 years since the decisions the Respondents intends to appeal against were delivered. He is keen on engaging in delaying tactics. The deceased's biological children are drained emotionally and financially on account of this protracted matter and they need closure.
18. PWN has filed submissions dated 26th February, 2024 placing reliance on the following:-
 - a. Josephine Wambui vs Margaret Wanjiru Kamau [2013] eKLR where the court stated, "We hasten to add that the Law of Succession Act is a self – sufficient Act of Parliament with its own substantive law and rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63 (1)."
 - b. In re Estate of Mary Karugi Mwangi (Deceased) [2018] eKLR where the court stated that Order 50 of the Civil Procedural Rules was applicable to succession matters by virtue of Rule 63 (1) of the Probate and Administrative Rules.
 - c. Stecol Corporation Limited v Susan Awuor Mudemb [2021] eKLR where the court stated, "No doubt, the discretion of this court to enlarge time for filing of a later appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously."
 - d. Thuita Mwangi v Kenya Airways Ltd [2003] eKLR where the court set out the factors to be considered when exercising to grant leave to file an appeal out of time. 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 Respondent if the extension is granted; v. the importance of compliance with time limits to the particular litigation or issue; and vi. The effect of any on the administration of justice or public interest if any is involved.
 - e. National Union of Mineworkers v Council for Mineral Technology [1988] ZALAC 22 where the court held, "... What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and string prospects of success may tend to compensate for a long delay."
 - f. Athuman Nusura Juma vs. Afwa Mohamed Ramadhan [2016] eKLR where the court stated, "Whether the intended appeal has merits or not is not an issue to be determined by a court when dealing with an application of this nature but by the court dealing with the merits of appeal, that is why the requirement that the intended appeal be arguable is preferred with the word "possibly."
 - g. Kenya Commercial Bank Limited v Nicholas Ombija [2009] eKLR where the court stated, "... arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. As to whether the intended appeal will succeed, we leave it to the bench that will hear and determine the issues."



- h. Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR where the court stated, “The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim. Sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the Respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”
- 19) The Respondents have filed submissions on the application dated 24th August, 2023 and notice of preliminary objection dated 30th September, 2023 placing reliance on the following:-
- a. Nicholas Kiptoo Arap Salat vs Independent Electoral and Boundaries Commission & 7 others where the supreme court held that extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.
 - b. Civil Appeal No. E033 of 2021: Benter Ogola Obange Austine Juma Aol vs Walter Owaga Oganyo & 4 Others where the court stated, “... Be that as it may such an application should be filed within reasonable time in line with Article 259 (8) of *the Constitution*, on the merits of the application beforehand, this court observes that the judgment sought to be impugned was delivered on April 26, 2022. This application was filed on September, 2022, five months and four days after the judgment and decree of this court. There is no explanation given in the affidavit sworn by the 2nd appellant/ applicant, or in the submissions for over 5 months delay. In my view, the delay is inordinate and unreasonable as no explanation has been given to the satisfaction of this court for the court to exercise discretion in favour of the applicants.”
 - c. Transtrade Services Limited v Sudi Salim Said & Salim Said (Suing as the Administrators Ad Litem of the Estate of Said Salim Said) [2021] eKLR where the courts stated, “... in an application for extension of time where discretion of the court is invoked, it is this court’s finding that the applicant has not even in the least attempted to explain the three months’ delay in the filing of the present application. In the said circumstances, this court concludes that the delay is inordinate, thus inexcusable.”
 - d. In Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Masukhlal Pattni where the court in an earlier application ruled that the application before it was res judicata as the issue of injunction had been twice rejected by the High Court and the Court of Appeal on merits and that the ruling by the high court had not been appealed against. The court further emphasized that the same application having been finally determined “thrice by the high court and twice by the court of appeal, it could not be resuscitated by another application.... That is to say, there must be an end to applications of similar nature, that is further, under principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of the *Civil Procedure Act* caters for.



- e. HCCC No. 2340 of 1991 (unreported) In Njangu vs Wambugu & another where the court held, “If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata... i. What issues were really determined in the previous application; ii. Whether they are the same in the subsequent application and were covered by the decision; iii. Whether the parties are the same or are litigating under the same title and that the previous application was determined by a court of competent jurisdiction.”
- f. Republic vs Attorney General and Another Exparte James Alfred Koroso where the court stated, “Access to justice cannot be said to have been when a person in whose favor judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by action or inactions of others.”
- g. In Kennedy Mokuia Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR where the court stated, “A decision of the court must be respected as fundamental to any civilized and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court. A decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be ‘substantially undermined’ if the court were to revisit them every time a party is dissatisfied with an order and goes back to the same court particularly when there is a change of a judicial officer in the court station. Whether a claim is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each case. The need for finality is the reason why such an application as was before court dated 5/ 10/ 2017 must be refused. In determining whether re judicata had arisen, there was no purpose to be served in inquiring into the reasons given or not given in the earlier application prior to the application being rejected. To permit such a broad inquiry is effectively to require a trial on the correctness of the earlier decision, directly undermining the principle of finality and allowing an appeal on one’s or colleague’s decisions.”

Analysis And Determination

- 20. Having gone through the applications before this court, the responses and submissions filed by the parties I think it is worthwhile to begin with the second application, that is the one dated 24th August 2023.
- 21. I have perused the court record and there is no evidence that John Mwariri Advocate ceased acting for the applicant. As a matter of fact the court on 5th July 2023 stated that:-

“Mr. Mwariri for the applicant filed an application to cease acting. He has not prosecuted that application and so he remains on record. Hearing for summons for confirmation of grant on 31/7/2023.”



22. With that it is evident that the Applicant's true counsel on record is the said Mr. John Mwariri and the application by the firm of J K OUKO is unlawful for all intend and purposes and contrary to the provisions of Order 9 rule 9 of the Civil Procedure Rules which states:-
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be”.
23. More importantly I do not find the application meritorious for several reasons. First of all, the same as rightly submitted in the preliminary objection is res judicata. The rulings of this court dated 6th February 2020 and 24th September 2020 by Hon Lady Justice Abida Ali Aroni (as she then was) gave the prayers being asked by the Applicant.
24. It appears that he went into slumberland and only woke up when the Respondents filed their application to have the grant confirmed. The issues of blaming his counsel on record cannot stand for the reason that he is still on record and he did not abandon him. He cannot therefore benefit on the famous cliché that the “mistakes of counsel cannot be meted against a litigant.”
25. Looking at the period the applicant took to bring up his application I agree with the Respondents that the whole idea is to delay the settlement of this cause. This court will not countenance.
26. In the premises I do not find merit in the application dated 24th August 2023 and dismiss it with costs to the Respondents.
27. On the other hand, I do find merit in the application dated 7th December 2021 as it is in line with the rulings and judgments of this court. It is allowed with costs to the applicants.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 28TH NOVEMBER, 2024.

H K CHEMITEI

JUDGE

