



**Ambwere v Lwagi (Succession Appeal E003 of 2021)
[2024] KEHC 14909 (KLR) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14909 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL E003 OF 2021
JN KAMAU, J
NOVEMBER 25, 2024**

BETWEEN

DANCAN AMBWERE APPELLANT

AND

CHRISTOPHER MUDANYA LWAGI RESPONDENT

(Being an appeal from the Ruling of Hon R. Ndombi (SRM) delivered at Vihiga in the Principal Magistrate's Court Succession Cause No 151 of 1995 on 25th November 2021)

RULING

1. In his Chamber Summons Application dated and filed on 25th January 2024, the Appellant herein sought that the orders that were issued on 5th of June 2023 be set aside and/or reviewed and/or vacated and reinstate the Appeal herein to allow him file Record of Appeal.
2. He swore an Affidavit in support of the aforesaid application on 25th January 2024. He averred that he lodged his Appeal herein on 8th December 2021 but he was unable to follow up his case due to poor health which rendered him immobile.
3. He added that he was born in 1958 of poor health and since 2005, he had suffered serious back complications with a dislocated spinal cord which he supported with a prescribed medical belt and that the condition had rendered him immobile for several months. He added that he was hypertensive and had undergone medical check-ups on several occasions.
4. He further averred that when he came to follow up his case at the Registry on 22nd January 2024, he was informed that the same had already been dismissed.
5. He stated that his Advocate informed him that he was not aware that the Appeal herein came up in court on 5th June 2023 when the same was dismissed. He asserted that had his Advocate known that the same was coming up, he would have attended court even without instructions.



6. He asserted that he had not delayed in filing his application herein and that no prejudice would be occasioned to any party if the same was allowed because all the beneficiaries of the deceased had all along co-existed peacefully. He contended that his Appeal raised triable issues with regard to the ancestral Land No North Maragoli/Kisatiru/1398 & 1399. He thUs urged this court to allow his application.
7. The Respondent swore a Replying Affidavit in opposition to the said Appellant's application on 12th April 2024. The same was filed on even date.
8. He averred that he was in shock for having been served with the application herein as neither him nor his Advocate was served with the Memorandum of Appeal, application dated 25th October 2022 and other documents in this Appeal.
9. He stated that the Succession Cause subject of this appeal was concluded on 3rd March 2021 after years of dragging that were occasioned by the Appellant's delay tactics. He asserted that the Appellant had actively participated in the aforesaid cause and was rightly awarded his beneficial share, which was not in dispute. He pointed out that his allegations of illness and medical conditions was a mere excuse tool to further delay justice as the medical sheets he annexed to his application were not clear as to where and when treatment was sought.
10. He was categorical that all along and during his entire life, the Appellant had been of good health as he knew him well as his blood brother and an immediate neighbour. He further stated that it was the duty of the Appellant and his Advocate to have ensured that the application dated 25th October 2022 was disposed of expeditiously and representation in court made.
11. He contended that the Appellant had taken over six (6) months to move this court thus an indication that he was not interested in having the matter heard and determined. He added that the application herein had been made in bad faith occasioning delay in distribution of the estate of the deceased. He termed the same as frivolous, baseless, devoid of merit, abuse of the court process and urged the court to dismiss the same with costs.
12. The Appellant's Written Submissions were dated 10th May 2024 and filed on 16th May 2024 while those of the Respondent were dated 14th June 2024 and filed on 18th May 2024 (sic). This Ruling is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

13. The Appellant reiterated his averments in his supporting Affidavit and submitted that he had established his case to warrant his application herein being allowed.
14. On his part, the Respondent invoked Order 42 Rule 11 and 35 of the *Civil Procedure Rules*, 2010 and submitted that it was three (3) years since the Appeal herein was filed. He stated that the delay in prosecuting the same had caused back log of cases in court. He urged the court not to entertain the same but uphold the order of 5th June 2023 as the Appellant was indolent.
15. Notably, the Appellant herein had filed Notice of Motion dated 25th October 2022 on even date seeking that the proceedings of the Succession Cause No 151 of 1995 at the Trial Court be stayed pending the hearing and determination of this appeal. The same came up for hearing on 5th June 2023. However, none of the parties were present. This court therefore dismissed the said application for want of prosecution.



16. The Applicant filed this application on 25th January 2024. This was about seven (7) months and twenty (20) days. In the mind of this court, this was not so inordinate and/or unreasonable considering that the Applicant may not have been aware of its decision. This delay was thus excusable.
17. Notably, courts must exercise great caution not to deny litigants their right to fair trial. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delays in doing an act, there is always a provision that would give it reprieve to seek justice.
18. Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
19. Against this backdrop, a perusal of the Memorandum of Appeal dated and filed on 8th December 2021 had disclosed an arguable appeal as it raised triable issues on the existence of a valid will which question could answer if the deceased died testate or intestate.
20. In determining whether or not to allow such an application, the court was required to consider if the opposing side would suffer any prejudice if the orders that had been sought were granted. This court did not see any prejudice that the Respondent would suffer or was likely to suffer if the Appellant herein pursued his constitutional right to be heard. If there was any prejudice, he did not demonstrate the same. In any event, the re-opening of the matter could always be compensated by way of costs.
21. Taking all the factors hereinabove into account, it was the considered view of this court that it was in the interests of justice (emphasis court) that the Appellant be given an opportunity to have its case heard on merit as it would suffer prejudice if it was denied an opportunity to fully present its case to be heard on merit.
22. Rule 73 of the Probate and Administration Rules provides as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court.”
23. Having said so, it was the Appellant’s responsibility to have followed up to check on its matter as was submitted by the Respondent. Failure to do so in good time and bearing in mind the nature of the orders that were likely to be granted showed that he was indolent. The Respondent had legitimate expectation that there would be no further litigation since the Appellant had taken long to move the court.
24. Under normal circumstances, the court would not have allowed the Appellant to go scot free and would have had to pay throw away costs to the Respondent herein to compensate him for being taken back in litigation. This court noted that both the Appellant and the Respondent were biological



brothers and it would cause more strain if the court directed the Appellant to pay throw away costs to the Respondent.

Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion Application dated and filed on 25th January 2024 was merited and the Prayer No (1) and (2) be and are hereby allowed in the following terms: -
 1. The Appellant be and is hereby directed to file Record of Appeal within one hundred and twenty (120) days from the date of this Ruling.
 2. This matter will be mentioned on 28th April 2025 to confirm compliance and/or for further orders and/or directions.
26. The court deviated from the general principle that costs follow the event because the Appellant and the Respondent are biological brothers and it would cause more strain if it awarded costs to one party to be paid by the other party.
27. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 25TH DAY OF NOVEMBER 2024

J. KAMAU

JUDGE

