



In re Estate of Joel Ong'ai Okara alias Joel Ong'ayi Okara (Deceased) (Family Miscellaneous Application E003 of 2024) [2024] KEHC 16422 (KLR) (23 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16422 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
FAMILY MISCELLANEOUS APPLICATION E003 OF 2024**

S MBUNGI, J

DECEMBER 23, 2024

**IN THE MATTER OF THE ESTATE OF JOEL ONG'AI
OKARA ALIAS JOEL ONG'AYI OKARA(DECEASED)**

BETWEEN

ANDREW ASINULI ONG'AYI APPLICANT

AND

JEREMIAH ONG'AYI RESPONDENT

RULING

1. The applicant filed a motion under certificate of urgency seeking the following orders:
 - i. Spent.
 - ii. That the Honourable Court be pleased to stay execution or any form of distribution in the ruling delivered on 2nd August, 2023 by Honourable L. Kassan in Kakamega Succession Cause No. 96 of 2019 In the matter of the estate of the Late Joel Ong' ayi Okara (Deceased) pending the hearing and determination of the instant application.
 - iii. That the Honourable Court be pleased to enlarge time within which the Applicants may file the intended appeal.
 - iv. That the Honourable Court be pleased to grant leave to the Applicant to file the Memorandum of Appeal and the same be deemed as regularly filed upon payment of the requisite fees.
 - v. That the Honourable Court be pleased to stay execution or any form of distribution in the ruling delivered on 2nd August, 2023 by Honourable L. Kassan in Kakamega Succession Cause No. 96 of 2019 In the matter of the estate of the Late Joel Ong'ayi Okara (Deceased) pending the hearing and determination of the intended appeal.



- vi. That the costs of this application be in the cause.
2. The application was supported by the affidavit of Gailyah A. Matengo and Andrew Asinuli Ong'ayi. They stated that the applicant and respondent were parties in Kakamega Succession Cause No. 96 of 2019 as protestor and petitioner respectively.
3. They further stated that the protest was dismissed in the lower court and there was a delay in the applicant getting a copy of the ruling. Consequently, the applicant delayed in filing the appeal in time as they were unaware of the grounds on which the protest was dismissed.
4. They averred that if stay of execution against the ruling by the trial court was not granted, then the applicant would suffer immense loss since the property would have been distributed unfairly upon succeeding in the intended appeal.
5. They submitted that the applicant made this application without unreasonable delay and was willing to abide by any reasonable terms given by this court as a condition for the stay of execution pending the hearing and determination of the appeal.
6. The court directed that the application be canvassed by way of written submissions.

Applicant's Case.

7. The bulk of the applicant's submissions reiterated the facts deponed in the supporting affidavits. He submitted that the delay to lodge an appeal was not inordinate but because of matters that were out of their control hence satisfying the provisions of Section 79G of the [Civil Procedure Act](#).

Respondent's Case.

8. The respondent submitted that the applicant had no locus to move the court as per Order 9 Rule (9) and (10) of the [Civil Procedure Rules](#).
9. He submitted that the applicant has changed advocates as well and they have not sought leave to come on record, nor filed consent between themselves and the previous firm.
10. The respondent further disputed the applicant's reason for delay being that he was awaiting the ruling to be supplied to him, as the ruling was delivered in the presence of their then advocate on record hence fails to meet the threshold of section 79G of the [Civil Procedure Act](#).
11. The respondent averred that the delay by the applicant was inexcusable since the ruling by the trial court was delivered on 2nd August, 2023 and the application filed by the applicant is dated 27th February, 2024 which amounts to a period of 7 months after the ruling was delivered.
12. Lastly, the respondent submitted that as per the conditions set out in Order 42 rule 6(2) of the [Civil Procedure Rules](#), the applicant would not suffer substantial loss since he is a co-administrator in the estate. Further, he stated that the applicant had come to court with unclean hands, being well aware that the assets to be distributed have not been distributed because he is uncooperative.

Analysis and Determination.

13. Having looked at the application and submissions by both parties, I find that the main issue for determination is:
 - i. Whether the applicant should be granted leave to appeal out of time.



- ii. Whether the applicant has made out a case for this court to grant stay of execution of the ruling delivered by the trial court.
14. The applicant places reliance on Section 79G of the *Civil Procedure Act*, which stipulates that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for 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.”
15. In the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, the Court of Appeal held that:

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the respondent if the application is granted.”
16. The applicant has stated that they delayed to file the appeal as they awaited to be supplied with a copy of the typed ruling from the trial court which took extensive time. The applicant states that they were supplied with a copy of the ruling on 29.01.2024; this instant application was filed on 17.02.2024. I therefore find that there was no inordinate delay in filing of the application by the applicant. The reason given for delay is plausible for the applicant had no control in the time taken in availing a copy of the ruling. The delay can be said to have been occasioned by the court registry.
17. From the foregoing, I find that I have no reason to deny the applicant leave to file the intended appeal out of time. I have seen a copy of the memorandum of appeal, the same shall be deemed as duly filed upon payment of requisite court fees.
18. On the issue of stay, Order 42 rule 6 of the *Civil Procedure Rules* states as follows: -

Stay in case of appeal [Order 42, rule 6.]

 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
19. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see [Butt v. Rent Restriction Tribunal](#) [1979]).
20. The three conditions to be fulfilled can be summarized as follows;
- i. that substantial loss may result to the applicant unless the order is made.
 - ii. application has been made without unreasonable delay
 - iii. security as the court orders for the due performance.
21. The trial court gave its ruling on 02.08.2023. The present application seeking stay of execution was filed on 17.02.2024. He explained that the delay was occasioned by the court for delaying to avail a copy of the ruling in time. I find this to be a plausible explanation since the applicant had no control of the court over the issue.
22. Secondly, the applicant has stated that they stand to suffer loss if the orders sought are not granted, since the estate may be distributed unfairly and disposed off before the intended appeal is heard and determined.
23. In the case of [James Wangalwa & Another v Agnes Naliaka Cheseto](#) [2012] eKLR the court expressed itself as follows:
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [CPR](#).



This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

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25. Taking into consideration the above holding, it is prudent to preserve the status quo.
26. This being a family matter I shall not impose any condition in granting the stay i.e there is no need of security on the part of the applicant.
27. Before I pen off, I have to address the issue raised by the respondent; that is the failure of the counsel of the applicant to seek leave of the court to come on record on behalf of the applicant since judgment had already been entered or seek consent of the respondent as provided for in Order 9 Rule 9(a) and (b) and Rule 10 of the *Civil Procedure Act*. It is my take that this was not necessary for the *law of Succession Act* is both substantive and procedural and the only instances when provisions of the *Civil Procedure Act* can be applied in succession proceedings is contained in Rule 63 of the *P & A Rules*. Order 9 of the *Civil Procedure Rules*, is not among those provisions of the Civil Procedure Rules applicable in succession proceedings.
28. In the case of *Kathiaka v Muraguri* (Civil Appeal 7 "B" of 2019) [2022] KEHC 506 (KLR) (12 May 2022) (Ruling) my sister Hon L. Njuguna(Judge), was of the same view when she held in part:

“The appellants have taken issue with the representation of the respondent and has cited Order 9 Rule 9(a) and (b) and Rule 10 of the *Civil Procedure Act*. He avers that the *law of Succession Act* is both substantive and procedural and the only instances when provisions of the *Civil Procedure Act* can be applied in succession proceedings is contained in Rule 63 of the P & A Rules. It was submitted that the former Order 111, currently order 9 of the *Civil Procedure Rules*, is not among those provisions of the *Civil Procedure Rules* applicable in succession proceedings.”

29. In conclusion, I find that the application has merit. It is allowed as shown herein above. Each party to bear its own costs of the application.
30. Right of appeal 30 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 23RD DAY OF DECEMBER, 2024.



S.N MBUNGI

JUDGE

In the presence of :

Ms. Matengo for the Applicant present

Respondent - absent

Court Assistant – Elizabeth Angong'a

