



Saboigo & another v Saboigo & another (Miscellaneous Civil Application 71 of 2023) [2024] KEHC 16289 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
MISCELLANEOUS CIVIL APPLICATION 71 OF 2023
TA ODERA, J
DECEMBER 18, 2024**

BETWEEN

MARIA NYABOKE SABOIGO 1ST APPLICANT

BOSIBORI NYABATE SABOIGO 2ND APPLICANT

AND

ZABLON ARAKA SABOIGO 1ST DEFENDANT

REUBEN MANYISA SABOIGO 2ND DEFENDANT

RULING

1. The applicant filed the Notice of motion dated 8.5.24 seeking:
 - a.spent.
 - b. That this Honourable court be pleased to grant leave to the Applicants to file and appeal out of time against the Judgment delivered On the 14th days of February 2023 by Hon. C.A Ogweno in Kisii Chief Magistrate’s Cause No. 363 of 2017 in the matter of the Estate of Saboigo Menge (Deceased) between Reuben Manyisa Saboigo and Zablun Araka Saboigo and 8 others.
 - c. That the costs of this application be provided for.
2. The application is based on the annexed affidavit of Bosibori Nyabete Saboigo and the grounds that the applicant was aggrieved with the said judgment and he applied for the copies certified proceedings and judgment on 15.2. 23 and the same were supplied on 18.4.23. She thus said that the delay was neither intentional not due to her fault. Also that the time within which to file the appeal has lapsed and that the appeal has merit and good chances of success as evidenced by the annexed draft memorandum of appeal.



3. In her said affidavit the 1st applicant annexed a copy of the letter she wrote to court requesting for the proceedings and its receipt (“BNS 01a and 01b” respectively) and reiterated the grounds.
4. Reuben Manyisa Sabaigo the 1st respondent herein filed replying affidavit dated 3.7.23 on his own behalf and on behalf of the other beneficiaries. He deponed that the applicant was present during the delivery of the judgment and she ought to have filed a memorandum of appeal and thus the application is in bad taste. Also that the delay was not explained satisfactorily and that it was intentional. Further that litigation must come to an end. He said that one NOA Sance Hezekia Saboigo a son to applicant has been misleading her into delaying this matter which dates back to the year 2016 and that the applicant filed Civil appeal no. 142 of 2018 in this court and Hon Justice Majanja ordered her to pay costs of Kshs, 55,000/= to the respondent as per copy of proceedings “exhibit 2”. The petitioners’ then filed application for confirmation of grant and applicants filed application to revoke the grant which was allowed.
5. The applicants then filed an appeal to reinstate the grant and the same was allowed vide appeal no 113 of 2019 as per the copy of the judgment “exhibit 3”. Also that the respondent moved the lower court for confirmation of the grant and the parties filed a consent through their advocates allowing surveyor to move to the ground to identify and mark and the portions of the beneficiaries. A report was made to court which led to confirmation of grant. The applicant refused to sign the mutation forms and other documents to effect transfer at the land’s office and also failed to submit their KRA Pins. The respondents then proceeded to file to let the executive officer of the court to sign the forms on behalf of the applicants and then they rushed back to court seeking orders in the instant application. He deponed that all the beneficiaries are peacefully occupying their respective portions marked by the boundary features which the court saw on visit to locus in quo save for the son of applicant who is misleading her.
6. The 1st respondent deponed that the application is merely meant to delay the case and he sought its dismissal.
7. I have carefully considered the application, the response and the submissions. The applicant submitted that Article 48 of *the Constitution* provides for access to justice while Article 50(1) fair hearing and Article 159 (2) (d) enjoins the court not to dwell on technicalities in deciding cases

He cited the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR, Otieno-Odek JA had this to say on what to consider before allowing an extension of time within which to appeal: “I have anxiously considered the application, the affidavits on record, and the submissions of counsel. There can be no doubt that the discretion I have to exercise under rule 4 is unfettered and does not require establishment of “sufficient reasons”. Nevertheless, it ought to be guided by consideration of factors stated in many 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 if the application is granted, and whether the matter raises issues of public importance, amongst others – See Fakir Mohamed v Joseph Mugambi & 2 Others, Civil Application Nai. 332 of 2004 (unreported). There is also a duty now imposed on the Court under sections 3A and 3B of the *Appellate Jurisdiction Act* to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate, and affordable resolution of disputes before the Court.”

The applicant also cited the case of Kamlesh Mansukhalal Damki Patni vs DPP & 3 Others [2015], where it was held that “to lay emphasis on the exercise of judicial authority in ensuring that litigants access justice. They urged the Court to consider the risk of significant prejudice they stand to suffer should they not be granted leave to pursue their appeal, and which will have negative consequences on their livelihoods.

(“ BNS 01a and 01b” respectively).



The respondent submitted that the applicant has not given sufficient reasons to warrant grant of the extension of time and cited the case of *Jyoti Jigish v Dickson Odingo Chiro, Yaska Petroleum Limited & District Land Registrar* [2022] KEELC 1987 (KLR)

Where it was held “Order 50 Rule 6 of the *Civil Procedure Rules* provides 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.”

The 2nd Respondent has not met the threshold for enlargement of time. Although the 2nd Respondent has given out reasons for the delay in its Supporting Affidavit this court finds that the reasons are not sufficient. The 2nd Respondent has not demonstrated the degree of prejudice that the Applicant herein is likely to suffer in the event the orders sought in the Application are granted.

In the case of *Leo Sila Mutiso –vs- Rose Hellen Wangari Mwangi*, Civil Application No. NAI 255 of 1997 (unreported) cited by the Applicant, when it 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.”

In the case of *Andrew Kiplagat Chemaringo –vs- Paul Kipkorir Kibet* [2018] eKLR, the court held that: -

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

8. The principles to be considered before granting leave to appeal out of time are that the applicant must show the period of delay, the sufficient reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance.
9. On the period of delay, the applicant says the delay was from February to April 2023 which is a period of 2 months and this is not denied. This is not inordinate delay.
10. On the reasons for delay, the applicant says that the delay was occasioned by the delayed proceedings and judgment by the court which he applied for on 15th February 2024 and were supplied on 18th April 2023. The respondents said that the delay was deliberate and is meant to prolong the case. I have perused the annexures “BNS 01a and 01b” respectively herein and I note that the proceedings were applied for on 16.2.23 and applicant says that the same were supplied on 18.4.23. No certificate of delay has been filed but this court takes juridical notice that there have been delays in issuance proceedings in the Kisii Magistrate’s Court and so the applicant cannot be blamed for the delay which I have already found that was not inordinate.



11. On whether the applicant should have filed a memorandum of appeal since they were in court when the judgment was delivered as submitted by the respondent. Section 79 G of the Civil Procedure Act provides for filing of appeal within 30 days from the date of delivery of judgment. The applicant has a right to be supplied with the proceedings to enable them adequately prepare for the appeal. The said argument thus does not hold.
12. The respondent deponed that the applicant was ordered to pay them costs in the sum of Kshs. 55,000/= by Justice Majanja on 8.2.19 which is yet to be complied it todate. I have perused the said order and I note that it was not an order for costs but further court fees in the sum of Kshs. 55,980/=. Further court fees is payable to the court not a party.
13. On prejudice, the respondent deponed and submitted that the succession cause has been protracted for long and that this application is a delaying tactic. I have perused the lower court file and I confirm that indeed the succession cause has been pending since 2017 but this is not a ground to deny the applicant right of appeal. This is a family matter involving inheritance and the applicant is entitled to exhaust court processes to the end for justice to be seen to be done.
14. On public interest this is a family matter and thus not of public interest.
15. I find that the applicant has met the threshold for grant of extension of time to file appeal out of time.
16. I proceed to allow the application dated 8.5.23 without costs as this is a family matter.
17. The intended appeal be filed and served within 14 days from today.
18. This file is closed.

T.A ODERA

JUDGE

18.12.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Oigo: Court assistant

Parties: Absent

