



**Onyango v Rateng (Family Miscellaneous Application E008 of 2022)
[2023] KEHC 1154 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY MISCELLANEOUS APPLICATION E008 OF 2022
RE ABURILI, J
FEBRUARY 22, 2023**

BETWEEN

HILDA ANYANGO ONYANGO APPLICANT

AND

MONICA ATIENO RATENG RESPONDENT

RULING

1. This ruling determines the applicant's Notice of motion dated 9/12/2022 and filed in court on 14/12/2022.
2. The applicant is Hilda Anyango Onyango. She seeks from this court leave to file an appeal out of the statutory 28 days stipulated in section 79G of the *Civil Procedure Act*, and that the attached Memorandum of Appeal be deemed to be duly served upon payment of the requisite court fees.
3. The applicant sets out ten (10) grounds in support of the prayers and a sworn affidavit of the applicant on 9/12/2022. She asserts that the Ruling sought to be impugned was rendered on 9/11/2022 without notice to her; that she made numerous calls to the trial court registry and that it was not until 9/12/2022 a month later that one Wilfred Omukala Thuma perused the subject file being succession cause No. 1 of 2018 at Ukwala law courts that he discovered that the ruling had been delivered on 9/11/2022.
4. That she is only late in the filing of intended appeal by almost 2 days and is desirous of challenging the decision of the lower court.
5. That she was married to the Respondent's brother Vincent Anyango Odongo now deceased for over 30 years and that he had put up a matrimonial home for the applicant on the portion of land given to him by the Respondent's father.
6. That the Respondent who is married elsewhere secretly filed a succession cause in respect of her late father's estate one Joseph Rateng Odongo alias Rateng Odongo who is the applicant's father in law,



- obtained a confirmed grant, subdivided the property and sold part of it thereby leaving the applicant a destitute in her matrimonial home.
7. That the Respondent obtained a grant by concealment of material facts.
 8. That the applicant has children born on the said land and who are over 30 years of age. That two days delay is excusable and finally, that it is in the interest of justice that the application be allowed.
 9. The applicant annexed a Memorandum of appeal dated 9/12/2022. The affidavit in support of the application is a reiteration of the grounds reproduced above in all material particulars.
 10. Opposing the Notice of motion, the Respondent through her counsel Mr. Odhiambo B.F.O swore an affidavit on 18/1/2022 in reply thereto. That he perused the succession file at Ukwala Law Courts and discovered that the applicant's counsel was notified by the court of the Ruling date vide his email address on 3/11/2022 and that it is the Respondent's counsel who was never notified. He annexed copy of email send on Thursday November 2, 2022 at 12.42 pm from the said court to Ashioya Advocates
 11. Counsel therefore deposed that it was untrue for the applicant to claim that the Ruling was delivered without Notice to her. That she had not come to equity with clean hands and that her counsel was therefore misleading the court.
 12. That the blood relations claimed by the applicant to the deceased's husband and the Respondent's father is incorrect. That the application is brought in bad faith.
 13. The court had directed that the application be canvassed orally but the parties' counsel who appeared virtually on 25/1/2022 dropped off the court's virtual platform and they instead, opted to file written submissions which are on record hence, this ruling upon the court giving directions yesterday 21/2/2023 that the submissions as filed canvass the application.
 14. The applicant's counsel's submissions are filed on 1/2/2023 reiterating the grounds and the supporting affidavit. He cites Siaya HC Misc. Application E024/2021 *Stecol Corporation Limited v Susan Awuor Mudemb* and Nairobi HC Civil Misc. Application No. E488/2021 *Charles N. Ngugi v ASL Credit Limited*. The earlier case is on whether the court can allow a draft Memorandum of Appeal to be deemed to be filed in an appeal whereas the second decision sets out the factors to be considered in an application for leave to appeal out of time. I shall revert to this later in my analysis.
 15. On behalf of the Respondent, her counsel filed submissions on 14/2/2023 contending that the applicant had failed to demonstrate to the satisfaction of this court that she deserves the discretion of the court to be exercised in her favour since her advocate was notified by the court of the ruling date.
 16. That she had not explained the delay. Reliance was placed on Meru ELC 15/2018 *Josua Ngatu v Jane Mpinda & 3 Others* [2019]eKLR.
 17. It was submitted that in this case, no stay of execution of the ruling of the lower court; that the applicant had not come to court with clean hands and had instead lied that she had no Notice of the date of delivery of the Ruling.
 18. Further reliance was placed on *Coop Bank of Kenya Limited v Bank Insurance & Finance Union (K)* [2015]eKLR.
 19. Further submission was that the applicant's husband was never a brother of the Respondent hence she is not related to the Respondent or the Respondent's late father. That the applicant has no ownership of the property and that the succession cause was done in accordance with the law. Finally, it was



submitted that the applicant has no locus standi to deal with the suit property and that she has not adduced evidence to warrant grant of the orders sought to appeal out of time.

Analysis and Determination

20. I have considered the application dated 9/12/2022, the grounds, affidavit in support, the Replying affidavit by the Respondent's counsel as well as the respective parties' counsels' written submissions. The main issue for determination is whether the application is merited.
21. Section 79G of the *Civil Procedure Act* stipulates that appeals from a subordinate court to the High Court in civil cases ought to be filed within thirty (30) days of the date of the making of the decisions sought to be challenged.
22. However, the proviso to the said section stipulates that an appeal may be admitted out of time if the appellants satisfy the court that they had good and sufficient cause for not filing the appeal in time.
23. Extension of time to file an appeal is a matter of judicial discretion to be exercised upon considering the merits of the application for enlargement of the time which has already lapsed for filing of an appeal. The discretion must be exercised judiciously and not capriciously or whimsically.
24. There are various provisions of the law, apart from section 79G of the *Civil Procedure Act* that allow enlargement of time which has already lapsed. The provisions include sections 95 of the *Civil Procedure Act*; section 59 of the *Interpretation and General Provisions Act*; and order 50 rule 6 of the *Civil Procedure Rules*.
25. Despite the law giving latitude for extension of time, the exercise of that discretion by the courts must be done within the established legal principles or parameters.
26. The factors to be considered in determining an application for leave to appeal out of time have been discussed in several court decisions by not only the High Court and courts of equal status but also by the Court of Appeal and the Supreme Court. This court is therefore spoilt for choice in terms of legal authority on this common subject.
27. In *Omar Shurie v Mariab Rasbe Yafan* (Civil Appl. No. 107/2020), the Court of Appeal set out the following as the principles applicable in extension of time for appeal:
 - a. the length of the delay;
 - b. the reason for the delay;
 - c. the chances of the appeal succeeding if the application is granted; and
 - d. the degree of prejudice to the Respondent if the application is granted.
28. I shall discuss each element in that order.
29. On the length of delay, I observe that the Ruling sought to be impugned on appeal was delivered on 9/11/2022. It was therefore expected that a party aggrieved by that ruling would file the appeal on or before the 9/12/2022- being the last day.
30. In the instant case, the applicant did not file the appeal within time and on 14/12/2022, she filed the application subject of this ruling, seeking extension of time to file an appeal. The 9th of December 2022 was a Friday and therefore it was the last day for filing of the appeal. She filed this application five (5) days later and not 2 days late. 14th December 2022 was a Wednesday.
31. In my view, five days late is not inordinate delay.



32. On the reasons for the 5 days delay, the applicant asserts and deposes in her affidavit that she was never given Notice of the date of delivery of the Ruling. However, in the email annexed to the Replying affidavit sworn by counsel for the Respondent, it is clear that her advocate Mr. Oye Ashioya was notified of the Ruling date on 3/11/2022 by the court. The applicant has not countered that evidence by the Respondent. It follows that the applicant's assertions and depositions have been impugned as not being true.
33. However, as I have stated earlier, the 5 days delay in the filing of this application is not inordinate although it is not explained to the satisfaction of the court.
34. The applicant's counsel also complained that Ukwala Law Courts had not supplied them with copies of proceedings and Ruling. However, there is no evidence that they paid for the same and secondly, to file a Memorandum of appeal, one does not necessarily require certified proceedings and the decision to be appealed against. Counsel could peruse the court file and craft grounds of appeal and file an appeal which can be amended as there is no requirement that proceedings and or judgment must accompany a Memorandum of appeal. However, for purposes of advising a client or seeking a client's instructions on whether to appeal or not, it is critical that court proceedings and judgment or ruling are supplied to the parties expeditiously.
35. Furthermore, for expedition of the appeal once filed, proceedings and judgment (as certified) as required for compiling and filing of a record of appeal which is normally filed as stipulated in order 42 of the Civil Procedure Rules and received before an appeal can be admitted to hearing.
36. In *Nicholas Kiptoo Arap Korir Salat v IEBC* [2014]eKLR Supreme Court Appl. 16/2014, the apex court made it clear that extension of time is not a right of a party; that a party who seeks extension of time has the burden of laying a basis to the satisfaction of the court' that the reason for delay must be explained to the satisfaction of the court and that the application must be brought without undue delay and it must be demonstrated if the Respondent will not suffer prejudice if extension is granted.
37. On the question of delay in obtaining proceedings and the Ruling which have not yet been supplied to date as this Court is aware that for over one year now, there has been no secretary serving Ukwala Law Courts hence the proceedings which have been typed and certified have had to be typed by our dedicated secretaries at Siaya High Court, ELC and Magistrate's court.
38. This Court on more than one occasion has had to summon the Court's Administrator at Ukwala to avail court files for perusal by the court where need has arisen to peruse the files in applications for stay pending appeal or for submission of the files for typing of proceedings to expedite the hearing and determination of the appeals.
39. It follows that indeed, if the applicant wanted to peruse certified copies of the court proceedings and Ruling, then the same are not yet ready and that delay cannot in any way be attributed to the applicant. Needless to say, that parties are entitled to court proceedings and decisions of the court expeditiously to enable them peruse and make up their decision on whether to appeal or not.
40. On the chances of the intended appeal, the applicant has annexed a draft Memorandum of appeal which challenges the decision of the trial court. She faults the trial magistrate for failing to hold that she is related to the Respondent as a sister in law and hence, her entitlement to a share of her late husband's share of the estate of his late father, among other grounds of appeal.
41. I find this first ground alone, even without the other 2 grounds is arguable. An arguable appeal is not necessarily one that must succeed and it is not for me at this stage to delve deep into the merits of the



intended appeal, as to do so might embarrass the court that will preside over the appeal should I grant leave to appeal out of time which appeal turns out not to be successful on all fours.

42. The Respondent contends that no stay of execution of that Ruling has been sought and that the applicant is not related to the Respondent in any way. This court will not concern itself with an application or prayer which is not before it. In addition, factual matters of evidence shall be dealt with on appeal and more so, this court shall on appeal, should this application succeed, not be concerned with ownership of title to land but that this matter which relates to the estate of a deceased person, the court shall be concerned with the question of whether the applicant falls in the categories of dependants as defined under section 29 of the *Law of Succession Act* or whether she has any locus standi to claim what she is claiming through her late husband whom she claims was the brother to the Respondent hence the latter cannot inherit the estate of her late father to the exclusion of the applicant who takes her husband's position.
43. On what prejudice the Respondent will suffer should the applicant for leave to appeal out of time be granted, the Respondent has not made any averment on what prejudice she will suffer and neither do I phantom any prejudice being occasioned to her.
44. I am alive to the fact that the estate of the deceased comprises only land and that land is an emotive issue in this country. That being the case, it is important that each party be granted the opportunity to ventilate their grievances beyond the trial court. The applicant claims that she is rendered destitute and her hope that her dignity can be restored as she lives on the land in issue.
45. I therefore find that the interests of justice tilts in favour of the applicant who I find, deserves a chance to challenge the decision of the trial court on appeal.
46. In the end, I make the following orders:
 1. Leave be and is hereby granted to the applicant Hilda Anyango Onyango to file an appeal out of time from the Ruling delivered on 9/11/2022 at Ukwala Law Courts in Succession Cause No. 1 of 2018 by Hon. L. Sarapai, Principal Magistrate.
 2. The Memorandum of Appeal shall be filed and served within 21 days of the date of this Ruling.
 3. The appeal as intended shall be filed in a separate appeal file as this file was opened as a miscellaneous civil application and not appeal file.
 4. The applicant to ensure this order for leave is extracted and filed together with the appeal.
 5. Costs shall be in the main Appeal.
47. I so order.
48. This file is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 22ND DAY OF FEBRUARY, 2023

R.E. ABURILI

JUDGE

