



REPUBLIC OF KENYA



KENYA LAW
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**Okemwa v Okemwa (Miscellaneous Succession Application
E005 of 2022) [2023] KEHC 2373 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MISCELLANEOUS SUCCESSION APPLICATION E005 OF 2022**

KW KIARIE, J

MARCH 28, 2023

BETWEEN

ALICE NYABOKE OKEMWA APPLICANT

AND

LYLIAN A. OKEMWA RESPONDENT

RULING

1. The applicant came to court by way of Notice of Motion dated November 14, 2022 and filed in court on December 16, 2022. It was brought under sections 1A, 1B, 63 (e), 79 & 79G of the [Civil Procedure Act](#), Cap. 21 Laws of Kenya and under Order 42 Rules 1, 2, 4 & 6 Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#). The applicant is seeking the following orders:
 - a. That this application be certified as urgent and be heard expert in the 1st instance.
 - b. That this honorable court be pleased to grant leave to file and serve appeal out of time against the whole of the ruling and orders of honorable RBN Maloba, delivered on the October 27, 2022 in Homa Bay Succession No 165 of 2018.
 - c. That this honorable court be pleased to grant an order for stay of execution of the ruling and the consequential order issued on the November 8, 2022 in Homa Bay CMC Succession Cause No 165 of 2018 pending the hearing and determination of this application.
 - d. That this honorable court be pleased to grant an order for stay of execution of the ruling and the consequential order issued on the November 8, 2022 in Homa Bay CMC.
 - e. Succession cause No.165 of 2018 pending the hearing and determination of the intended appeal.
 - f. That the costs of this application be provided for.



2. The application was premised on the following grounds:
 - a. That the delay in filing Memorandum of Appeal was inadvertently occasioned by the negotiations that were ongoing between the family in a bid to solve the dispute after delivery of the ruling that took some time after which the applicant was looking for funds to lodge the appeal.
 - b. That the applicant is not satisfied by the ruling delivered by honorable RBN Maloba, PM on the October 27, 2022 in favor of the respondent and wishes to appeal against the same.
 - c. That the period of and the reasons for the delay to file the Notice of appeal and Record of Appeal is excusable and the delay is not inordinate.
 - d. That the appeal is arguable and has overwhelming chances of success as per the draft memorandum of appeal annexed as shown in the supporting affidavit in this application.
 - e. That there is no degree of prejudice which could be suffered by the respondent if the extension is granted.
 - f. That the application is made in good faith without unreasonable delay and at the earliest opportunity.
 - g. That it will be in the interest of justice for the prayers sought to be granted.
3. The respondent opposed the application on the following grounds:
 - a. That the application is mischievous and only intended to defeat and/or delay justice.
 - b. That the applicant had all the time to lodge an appeal within time but failed to do so and has not given any tangible reason for the delay.
 - c. That the application is peddled on lies as there hasn't been any meeting between the applicant and the respondent or any other family with regards this issue.
 - d. That the applicant has not only failed to give reasons for the delay in filing the appeal but has also failed to meet the requirements of order 42 Rule 6 on the issue of stay of execution and equally does not deserve the orders.
4. The Supreme Court while addressing the issue of extension of time in *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR stated:
 - (23) It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as:
 - “the under-lying principles that a Court should consider in exercise of such discretion:
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
5. The applicant herein contended that she delayed to file the appeal while reaching out to the other members of the family to solve the dispute. This was not supported by anything tangible to show that indeed that was the position. The respondent has denied existence of such negotiations.
6. The applicant has not painted a picture of herself as a candid person. Whereas the application under certificate of urgency is dated November 14, 2022 it was filed in court on December 16, 2022 almost 30 days after it was signed. This delay was not explained.
7. Since this is a family issue, I am persuaded to overlook the want of explanation for the delay but on conditions. The applicant will pay the costs of this application to the respondent and she has to file and serve the appeal and the record of appeal within 30 days of this ruling. Failure to comply, the respondent will be at liberty to move the court for appropriate orders.
8. There will be a stay of execution of the ruling of October 27, 2022 in Homa Bay Succession No.165 of 2018 for 30 days. If the conditions above are met, then stay will have to await the outcome of the appeal. Noncompliance will mean that the stay will lapse on expiry of the 30 days window.

Delivered and signed at Homa Bay this 28th day of March, 2023

KIARIE WAWERU KIARIE

JUDGE.

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