



Luvandale & another v Luvandale (Miscellaneous Civil Application E004 of 2022) [2023] KEHC 21163 (KLR) (27 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CIVIL APPLICATION E004 OF 2022**

JN KAMAU, J

JULY 27, 2023

BETWEEN

WYCLIFF LUVANDALE 1ST APPLICANT

FRANCIS SEVENI 2ND APPLICANT

AND

PHILIP SHIKALE LUVANDALE RESPONDENT

RULING

Introduction

1. In their Notice of Motion dated and filed on August 30, 2022, the Applicants herein sought that they be granted leave to appeal against the Ruling that was delivered by Hon M Ochieng' (PM) in Hamisi SRMC Succession No 98 of 2018 on June 17, 2022 out of time and that their Memorandum of Appeal herein filed be deemed to have been properly and duly filed.
2. They also sought orders for stay of execution prohibiting the Respondent by himself, administrators, agents, servants and/or proxies from subdividing, distributing and/or interfering with the estate of the Luvandale Mwikhali (deceased) and preservatory orders pending the hearing and determination of the appeal herein.
3. On August 30, 2022, their advocate, Eunice Lumallas, swore an Affidavit on their behalf in support of their said application. She also swore a Replying Affidavit (sic) in response to the Respondent's Grounds of Opposition on February 28, 2023. The same was filed on March 1, 2023.
4. They Applicants were dissatisfied with the aforesaid Ruling and intended to appeal against the same. They asserted that the Summons for Revocation of Grant of Letters of Administration that was filed on 10th March raised weighty issues of law because the Respondent obtained the Grant of Letters of



Administration fraudulently, without knowledge and/or consent of all the deceased's dependants and failure to disclose material facts thus disinheriting the rightful beneficiaries.

5. They added that the subdivision and distribution of the estate the Respondent had proposed was unfair, malicious and inequitable as they had been left out completely in the process of administration and that it was the village elders who halted the said process.
6. They were categorical that there was no inordinate delay in bringing their application but, however, regretted the inadvertent and unintentional delay in filing the appeal which they averred was arguable with high chances of success. It was their assertion that failure to allow this application would occasion them substantial loss and irreparable damages.
7. They blamed the Respondent for having failed to respond to any issues they had raised occasioning delays in the hearing and determination of the present application. They added that it was premature for him to state that their intended appeal had no merit and that he was only opposing their application without rendering proof. They thus urged this court to dismiss his Grounds of Opposition and allow their application in the interest of justice and fairness.
8. The Applicants' Written Submissions were dated March 8, 2023. It was, however, not clear when they were filed as the file copy did not bear the court registry's stamp. The Respondent's Written Submissions were dated March 23, 2023 and filed on April 26, 2023. This Ruling is based on the said Written Submissions which the parties relied upon in their entirety.

Legal Analysis

9. Right at the outset, this court wishes to point out that although the Applicant's indicated to court that the Respondent had filed Grounds of Opposition, this court noted when it sat to write the Ruling herein, the same were missing in the court file. Be that as it may, this court was able to discern what constituted the said grounds as they were responded to in the Applicants' Replying Affidavit, which ought to have been titled Supplementary Affidavit as provided in Order 50 Rule 14 (3) of the [Civil Procedure Rules, 2010](#).
10. There were basically two (2) orders that the Applicants herein had sought. This court therefore found it prudent to address the same under the following distinct and separate heads.

I. Leave To Appeal Out Of Time

11. The Applicants explained that they were unable to lodge the appeal in time as they were unable to obtain the certified copy of the Ruling and the proceedings in good time and that they were only able to trace and peruse the file about a month after the said Ruling was delivered.
12. They pointed out that the Ruling was delivered on June 17, 2022 and that they moved this court on August 30, 2022 hence the delay was not inordinate for lodging an appeal.
13. They asserted that the Respondent had failed to demonstrate any prejudice that would be occasioned if the prayers they had sought herein were granted and that in the event, if there was any, he could recover by way of damages.
14. They referred this court to the provisions of Article 50(1) of the [Constitution](#) and Section 79G of the [Civil Procedure Act](#) and placed reliance on the cases of [Mbaki & Others vs Macharia & Another \(2005\) 2 EA 206](#) and [Visbva Stone Suppliers Company Limited vs RSR Stone \[2006\] Limited \[2020\] eKLR](#) where it was held that the right to be heard was a valued right. They also relied on the case of [Martha Wangari Karua vs IEBC & Others \[2018\] eKLR](#) where it was held that the rules of natural justice



- required that the court should not unnecessarily drive any litigant from the seat of justice without hearing him or her.
15. They further relied on the case of *Edith Gichungu Koine vs Stephen Njagi Thoithi [2014] eKLR* that the Respondent also referred to where the factors to consider in an application to enlarge time were stated to have included but not limited to the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application was granted and whether the matter raised issues of public importance amongst others.
 16. They further cited the case of *Stecol Corporation Limited vs Susan Awuor Mudemb [2012] eKLR* (sic) where it was held that although the discretion of the court to enlarge time for filing of a late appeal was unfettered, that discretion had to be exercised judiciously and not capriciously.
 17. The Respondent also relied on Section 79G of the *Civil Procedure Act*. He agreed with the Applicants that the decision of whether or not to grant leave to appeal out of time or to admit an appeal out of time was an exercise of discretion and added that the said discretion had to be exercised on the basis of evidence and sound legal principles with the burden of disclosing the material falling squarely on the applicant seeking such orders.
 18. To buttress his point, he relied on the case of *Feroz Begum Qureshi & Another vs Muganbhai Patel & Others (1964) EA 633* where it was held that there was no difference between the words 'sufficient cause' and 'good cause.'
 19. He also cited the case of *Daphne Parry vs Murray Alexander Carson (1963) EA 546* where it was held that although a provision for extension of time requiring sufficient reason should receive a liberal construction so as to advance substantial justice when no negligence, inaction, want of bona fides was imputed to the applicant, its interpretation had to be in accordance with judicial principles.
 20. He further quoted the case of *County Executive of Kisumu vs County Government of Kisumu & 7 Others Civil Application No 3 of 2016* (eKLR citation not given) where it was held that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the court.
 21. He argued that the Applicants did not offer reasons for the delay in filing the appeal in their application and affidavit evidence but simply argued the merit of the intended appeal. It was therefore their contention that the Applicants failed the test of discharging the burden of laying a satisfactory basis to court and disclosing the reasons for the delay.
 22. In exercising its discretion to allow an application seeking extension to file an appeal out of time, a court has to be satisfied that the omission to file the same within time was excusable. In other words, there must be a plausible explanation for the delay in filing the appeal.
 23. As was correctly submitted by the Respondent herein, the Applicants did not mention the reason for the delay in their affidavit evidence. Their explanation that the delay was due to failure to obtain proceedings in their Written Submissions was not procedural. This was not a point of law that could be raised in written submissions. To the contrary, this was factual evidence that ought to have been presented to the court by way of affidavit evidence.
 24. Be that as it may, the fact that they were not able to obtain the certified copy of the Ruling and the proceedings in good time was neither here nor there. This was not a sufficient or good cause for them not to have filed a memorandum of appeal in good time. Indeed, they had the option of filing a holding memorandum of appeal under Order 42 Rule 2 of the Civil Procedure Rules, 2010 and thereafter amend the said memorandum of appeal, if need be as envisaged in Order 42 Rule 3(1) and (2) of the Civil Procedure Rules once they obtained the proceedings.



25. Notably, Order 42 Rule 3 (1) and (2) of the Civil Procedure Rules provides that:-
1. The appellant may amend his memorandum of appeal without leave at any time before the court gives directions under rule 13;
 2. After the time limited under subrule (1), the court may, on application, permit the appellant to amend his memorandum of appeal.
26. Although the Applicants were represented by counsel who ought to have guided them properly, this court appreciated the fact that blunders by advocates ought not to be visited upon innocent litigants unless of course, the negligence was occasioned by the litigants themselves after being properly advised by their counsel.
27. In the case of *Republic vs Speaker Nairobi City County Assembly & Another Ex Parte [2017] eKLR*, it was held that blunders will continue being made and that just because a party had made a mistake did not mean that he should not have his case heard on merit. This court arrived at the same conclusion in several cases amongst them the case *Kenindia Assurance Company Limited vs Kling Development Limited [2020] eKLR*.
28. Going further, it is trite law that courts must exercise great caution from denying 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.
29. Notably, 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'.
30. Further, Section 79G of the *Civil Procedure Act* Cap 21 (Laws of Kenya) stated that:-
- ' Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order applied against, excluding such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.'
31. Against this backdrop, this court therefore perused the draft Memorandum of Appeal that was annexed to the present application. It did not, however, consider the merits or otherwise of the grounds of appeal that were set out therein as that was strictly under the purview of the appellate court. All that it was expected to do was to consider if the Applicants herein had demonstrated that they had arguable grounds of appeal.
32. The Applicants had averred that the Grant of Letters of Administration Intestate was obtained fraudulently and through failure to disclose material facts. They had also argued that if the deceased's



estate was sub-divided as the Respondent had proposed, they would be disinherited. These were weighty issues that required to be canvassed on appeal.

33. This court also noted that although the present application was filed on August 30, 2022, which was about two and a half (2 ½) months since the Ruling was delivered, this could not be said to have been inordinate delay.
34. In considering whether or not to grant an order for extension to do any act, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This court did not see any prejudice that the Respondent would suffer or was likely to suffer if the Applicants herein exercised their constitutional right of appeal. If there was any prejudice, then he did not demonstrate the same.
35. This was a family matter. Indeed, family matters are extremely emotive and have the potential of becoming very convoluted and causing unimaginable rifts amongst family members if disputes affecting them are not heard and determined decisively and conclusively. This court in fact found and held that it would be the Applicants who would suffer prejudice in the event their application was not allowed.
36. This court thus took the view that it was in the interests of justice (emphasis court) that the Applicants herein be granted leave to appeal the decision of the lower court out of time and that the intended appeal be heard on merit.
37. Indeed, the power to grant orders in the interest of justice and/or ends of justice (emphasis court) is well captured in Section 3A of the [Civil Procedure Act](#) that states that:

' Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'
38. This same inherent power is echoed in exact words in Rule 73 of the [Probate and Administration Rules, 1990](#) which stipulates that:-

' 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 or to prevent abuse of the process of the court.'

ii. Stay Of Execution Pending Intended Appeal

39. The Applicants reiterated the averments in their affidavits that they had met the threshold of being granted an order for stay of execution pending appeal.
40. They further invoked Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and cited the case of [RWW vs EKW \[2019\] eKLR](#) where it was held that the purpose of an application for stay of execution pending appeal was to preserve the subject matter in dispute so that the rights of the appellant who was exercising his or her right of appeal were safeguarded and that if the appeal was successful, it would not be rendered nugatory.
41. They argued that they stood to suffer irreparable substantial harm should this court refuse to stay execution pending the appeal because they had a merited appeal with high chances of success that would automatically be rendered nugatory if the orders they had sought were not granted.



42. In support of their submission that they had demonstrated that they would suffer irreparable loss, they relied on the case of *Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR* where it was held that for the applicant to obtain a stay of execution, it had to satisfy the court that substantial loss would result if no stay was granted.
43. On his part, the Respondent placed reliance on Order 41 (sic) Rule 6 of the Civil Procedure Rules and argued that as there was no existing appeal, the prayer for stay of execution was therefore premature.
44. Order 42 Rule 6 of the Civil Procedure Rules empowers a court to stay execution of its own orders or an appeal court to stay orders of the decision which was intended to be appealed from. However, before such an order can be granted, an applicant has to demonstrate the following:-
1. That substantial loss may result unless the order is made.
 2. That the application has been made without unreasonable delay.
 3. Such security as the court orders for the due performance of the decree has been given by the applicant.
45. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
46. This court noted that the Ruling that the Applicant intended to appeal against emanated from a dismissal of their application for revocation of grant. There was nothing that court could stay as far as the said Ruling was concerned because the same was a negative order.
47. Be that as it may, this court had the discretion to make any orders it deemed fit for the preservation of the deceased's estate in the interests of justice pending the hearing and determination of the Applicants' appeal as was envisaged in the aforesaid Rule 73 of the Probate and Administration Rules. The Respondent's argument that the present application was premature as there was no appeal that had been filed herein yet was therefore rendered moot. In any event, a court could still grant an order for stay of execution pending appeal even where an appeal had not been filed as provided in Order 42 Rule 6(1) of the Civil Procedure Rules.
48. The said Order 42 Rule 6(1) of the Civil Procedure Rules states that:-
- ' 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 (emphasis court) 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(emphasis), 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.'
49. The purport of this provision of the law is that a subordinate court can grant an order for stay of execution at the first instance after delivery of judgment and/or an order that is to be executed and it is no therefore necessary that an aggrieved party must have filed first an appeal at the appellate court before seeking such order for stay at such subordinate court.



Disposition

50. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated and filed on August 30, 2022 was merited and the same be and is hereby allowed in terms of Prayer (3) therein on the following conditions:-

1. THAT the Applicants be and are hereby directed to file and serve a Memorandum of Appeal in the appropriate file within fourteen (14) days from the date of this Ruling.
2. THAT the Applicants be and are hereby directed to file and serve their Record of Appeal in the appropriate file within one hundred and twenty (120) days from the date of this Ruling.
3. THAT the Summons for Confirmation of Grant filed or yet to be filed pursuant to the Ruling that was delivered in Hamisi SRMC Succession No 98 of 2018 shall be kept in abeyance pending the hearing and determination of the Applicants' intended appeal in the appropriate file.
4. For the avoidance of doubt, in the event, the Applicants shall default on Paragraph 50(1) and (2) hereinabove, the Respondent will be at liberty to move the court appropriately for the discharge and/or setting aside and/or vacating the order in Paragraph 50 (3) hereinabove to pave way for the administration of the estate of Luvandale Mwikhali (deceased).
5. This matter will be mentioned on 5th December 2023 to confirm compliance of the order in Paragraph 50 (1) and (2) hereinabove and/or for further orders and/or directions. As this is a family matter, each party will bear its own costs.
6. Either party is at liberty to apply.

51. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF JULY 2023

J. KAMAU

JUDGE

