



REPUBLIC OF KENYA



Athman (Guardian ad litem of Y MA D) v Ahmed & 3 others (Civil Appeal E109 of 2023) [2023] KEHC 21636 (KLR) (4 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E109 OF 2023**

**G MUTAI, J
AUGUST 4, 2023**

BETWEEN

MUNA ABDIRABO ATHMAN (GUARDIAN AD LITEM OF Y MA D) APPELLANT

AND

**ABDALLA MOHAMED AHMED 1ST RESPONDENT
HASSAN SALEH AHMED 2ND RESPONDENT
MOHAMED OMAR MOHAMED 3RD RESPONDENT
MOHAMED SALIM MOHAMED 4TH RESPONDENT**

RULING

Introduction

1. There are 2 applications before me. The 1st is dated May 15, 2023. This application seeks the following orders: -
 1. That the instant application be certified urgent and service thereby be dispensed with at the first instance;
 2. That there be a stay of execution of the decree and judgment delivered on March 3, 2022 by the Principal Kadhi, the Honourable Habib Salim Vumbi, against Y MA D pending the hearing of this application interpartes;
 3. That there be a stay of execution of the decree and judgment delivered on March 3, 2022 by the Principal Kadhi, the Honourable Habib Salim Vumbi, against Y MA D pending the hearing of and determination of Civil Appeal No HCCA. No E109 of 2023;



4. That leave be granted to appeal out of time and the Memorandum of Appeal in HCCA No E109 of 2023 be admitted and be deemed to have been filed within time; and
 5. That costs of this application be provided for.
2. The Appellant is the spouse of YMA D (hereafter “the Patient”). On May 27, 2022 she was appointed by this Court (per Onyiego J) as the Manager/Guardian *ad litem* of her husband. In her grounds in support of the application the Appellant avers that she was unable to file her appeal within time as she was struggling to take care of her said husband despite being authorized upon being appointed as a guardian *ad litem*. She stated that he had been sued by the Respondents despite the fact that they were aware that he had mental illness. Lastly the Applicant states that the appeal raises triable issues and has high chances of success.
 3. In support of the application the Appellant attached the medical reports of the Patient, the rulings, judgments, and orders of the Court, amongst other documents.
 4. The application is opposed by the Respondents. The Respondents filed Grounds of Opposition dated June 19, 2023. The Respondents aver that the application is frivolous and vexatious and an abuse of the Court process. It is urged that the Appellant had not filed a Notice of Appeal. Thirdly the Respondent submits that the application seeks to remedy an illegality. Lastly, the Respondents contend that the application is an afterthought. They therefore pray that I dismiss the application with costs.
 5. On June 19, 2023 the Respondents filed a Notice of Motion. Vide the said Motion they sought: -
 1. Spent;
 2. That this honourable Court be pleased to strike out the application dated May 15, 2023 together with the affidavit sworn on even date in accompaniment thereto; the annexures attached thereof;
 3. That the honourable Court be pleased to strike out the purported Memorandum of Appeal filed herewith dated the 12th day of May 2023 having been filed without requisite leave of the Court to file appeal out of time;
 4. That the honourable Court be pleased to strike out the aforementioned pleadings in paragraphs (2) and (3) for being vexatious, frivolous litigant, and as such an abuse of the honourable Court’s process;
 5. That the honourable Court be pleased to issue such further orders in the interest of justice.
 6. The Respondents raised 12 grounds in support of the application. In summary, they are that the application offends the mandatory provisions of section 79G of the [Civil Procedure Act](#), the same is undeserving of the equitable remedy sought therein, that the Appellant/Respondent had the benefit of counsel during the course of the hearing of the matter before the Kadhi Court, the delay was inordinate, that the Appellant/Respondent is a frivolous litigant having filed numerous cases, that the test set by Order 42 Rule 6 of the [Civil Procedure Rules](#) had not been met, the substantial loss had not been pleaded, no good or sufficient reasons had been given to warrant the issuance of the orders sought and that the Appellant/Respondent would not suffer prejudice if the orders sought are not granted and lastly that it is in the large interest of justice that the honourable Court does strike out the Appellant/Respondent’s impugned Notice of Motion.
 7. The Supporting Affidavit of Mohamed Salim Mohamed appears to show that the litigants in this matter are related being members of the Damnan family. The Honourable Principal Kadhi, in Kadhi



Cause No. 268 of 2019 made a finding that the Patient due to his previous conduct was no longer entitled to any inheritance. This finding, as we shall see below, was made without the full participation of the Patient or his guardian ad litem.

8. As the Respondents' application seeks to strike out the Appellant's Notice of Motion application I shall consider it first.
9. I understand the Respondents as saying that the Appellant should have sought leave first before filing the Appeal. I am not able to agree with this position. The case of *Nicholas arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR wherein the Supreme Court held that:-

“to file an appeal out of time and seeks to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the “documents” so filed a nullity and of no legal consequence consequently; this Court will not accept a document filed out time without leave of the Court.”

relied upon by the Respondents/Applicants was found by the Court of Appeal in the case of *Charles Karanja Kiiru v Charles Gitthinji Muigwa* [2017]eKLR to have been in respect of Rule 53 of the *Supreme Court Rules* and as such inapplicable where *Rules of Court* granted a court discretion. The Court of Appeal thus validated an appeal filed out of time without leave of the Court.

10. I find it necessary to quote in extenso the finding of the Court of Appeal in the above referenced matters.

“This is the position this court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as fully filed applications without leave where leave is sought and subsequently granted. Learned counsel for the appellant submitted that this position as found to be untenable by the Supreme Court which pronounced itself as follows in the *Nicholas Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014]eKLR (Salat case):

“... counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the court is that he is acknowledging having file a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant to Rule 33(1) of the *Court’s Rules*, it is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal. Under Rule 53 of the *Court’s Rules*, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such ‘an appeal’, is tantamount to moving the court to remedy an illegality. This, court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate.no appeal can be filed out of time without leave of the court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.



Consequently, this court will not accept a document filed out of time without leave of the court.” (Emphasis added).

26. In our view however, the *Salat case* was in respect of Rule 53 of the [Supreme Court Rules](#) which simply provides as follows:

“The court may extend the time limited by these [Rules](#) or by any decision of the court.”

That Rule only applies to applications before the Supreme Court and not before any other court. Conversely, Rule 4 of the [Court of Appeal Rules](#) provides as follows on extension of time:

“The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the court, or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time as extended.” (Emphasis added).

We find it necessary to cite the above Rule in entirety because even assuming the learned Judge was wrong in deeming the appeal as having been deemed to have been duly filed, this court would still have jurisdiction to validate the said leave if it deemed it appropriate to do so, moreover, in our view under Order 50 Rule 6 of the [Civil Procedure Rules](#) on which the learned Judge relied, the court has power to enlarge time-

“Upon such time as the justice of the case may require.”

If therefore the learned Judge finds it in the interest of justice to deem an already filed document as having been duly filed then his discretion in that respect should not be fettered.”

11. Regarding section 79 of the [Civil Procedure Act](#) my view is that a party seeking to file an appeal out of time must provide “sufficient reasons” warranting the exercise of discretion in his/her favour.
12. The Supreme Court in the case [Nicholas Salat \(supra\)](#) set out principles which govern the Courts when considering applications for extension of time. The principles are trite law. I see no need to set them out here. Suffice to say that provision of “sufficient reason” is a key consideration.
13. I have already indicated that the litigants herein are relatives. The matter before the Kadhi proceeded to a large extent without the participation of the Patient and or his guardian ad item. The learned Principal Kadhi in page 5 of his judgment found that

“it is noted that the Respondent’s case was closed without calling any witnesses. It is trite law that where a party fails to call evidence in support of his case that party’s pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings.”



The Judgment was delivered on March 3, 2022, 1 year and 5 months ago as at the date of this ruling, not “2 years and three months” as deposed by Mohamed Salim Mohamed in paragraph 8 of his affidavit in support of the Notice of Motion dated June 19, 2023.

14. Justice in this matter calls for the hearing of the on case on merits rather than ex parte hearing or resort to technicalities. The Court of Appeal in *Kamlesh Mansukhlal Damji Patel v the Director of Public Prosecution & 3 others* [2015]eKLR said as follows:-

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the *Constitution* which succinctly states that

“judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.”

Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the *Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting the *Constitution* or interpreting the law to ensure, *inter alia*, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

15. The upshot of this foregoing is that I find no merit on the Notice of Motion dated June 19, 2023. I dismiss the same.
16. I now turn to the Appellant’s Notice of Motion dated May 15, 2023. Has the Appellant provided sufficient reasons justifying the exercise of discretion by this Court in her favour? I am satisfied that she has. Her husband has been found by this Court to be a person with mental illness. The matter in the Court below proceeded in the absence of the Patient. Adverse findings were made against him. He is in danger of losing his share of the inheritance. It would be in the interest of justice if his guardian ad litem is permitted to appeal.
17. The Appellant has explained that challenges with dealing with the mental health of her husband made her unable to deal with this matter. Her explanation is plausible. In my view she has provided sufficient reasons warranting the issuance of orders in her favour.
18. The foregoing therefore means that the Notice of Motion application dated May 15, 2023 is allowed in terms of prayers 2, 3 and 4 thereof. The Notice of Motion dated June 19, 2023 is dismissed. The parties will however bear own costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED AT MOMBASA THIS 4TH DAY OF AUGUST 2023 VIA MICROSOFT TEAMS.

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GREGORY MUTAI



JUDGE

In the presence of:-

Mr. Egunza for the Respondents;

No appearance for the Appellant; and

Mr. Arthur Ranyondo – Court Assistant.

