



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi & 7 others v Mwangi (Miscellaneous Civil Case E024 of 2022)
[2023] KEHC 26828 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL CASE E024 OF 2022
CM KARIUKI, J
DECEMBER 21, 2023**

BETWEEN

**ELIUD MWANGI 1ST APPELLANT
CHARLES K MIGWI 2ND APPELLANT
SAMUEL W. MIGWI 3RD APPELLANT
LABAN J MIGWI 4TH APPELLANT
MARY W. MAINA 5TH APPELLANT
RUTH K MIGWI 6TH APPELLANT
AGNES W. MIGWI 7TH APPELLANT
BENERDATTE M. KAMAU 8TH APPELLANT**

AND

BETH W. MWANGI RESPONDENT

RULING

1. By a Notice of Motion dated 17th November 2022 the Applicants seek leave to appeal out of time and costs.
2. The same is supported by grounds on the face of the Notice of motion and affidavit of Eliud Mwangi sworn on even date.
 - a. The applicants were never informed of the ruling date.
 - b. The applicants were never informed delivery of the ruling
 - c. The applicants might suffer irreparable loss.



- d. The intended appeal has high chances of success as the respondent filed a succession cause for the estate of her late father without involving her other siblings.
3. The application is opposed via replying affidavit by Respondent filed on 13/12/2022.
4. The parties were directed to canvass same via written submission but only respondent filed written submission by the time of drafting the instant Ruling.

Respondent Submissions

5. The Applicants have filed the application dated 17th November 2022 seeking for leave to appeal out of time against the ruling delivered on 7th April 2022. The application is supported by the grounds stated on the application and the supporting affidavit sworn by the 1st Applicant. The Respondent has opposed the application by filing 'a replying affidavit sworn on 5th December 2022.
6. The application is brought under section 79G of the *Civil Procedure Act*, which provides; -

“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 appealed against, excluding from 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

7. In Re Estate of Kipsoi arap Kenduiwo (Deceased) [2022] eKLR the court outlined the principles to be considered while dealing with an application for leave to appeal out of time, thus; -

“15. As to the principles to be considered in exercising the discretion whether or not to enlarge time in *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 the court set out the factors to be considered in deciding whether or not to grant such an application and these are:

- i) The explanation if any for the delay;
- (ii) The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- (iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”

8. It is upon the Applicants to furnish the court with sufficient materials in order for it to consider the current application. It is the Applicant's case that the trial court had directed parties to file submissions to the application dated 15th August 2021. The Applicants filed their submissions. The Applicants have not stated what happened after the filing of submissions. It was expected of them to have stated that the matter was fixed for ruling on a particular date, and state what became of the ruling date. The Applicants have not stated why they did not appear during the ruling, and the follow ups they made



to know the position of the file. It is submitted that the Applicants have not given an explanation for the delay.

9. In *Anthony Maina Kinyua & another v Joseph Mwangi Njurai* [2021] eKLR, the court held; -

“The applicant did not use due diligence in that he was aware of his case and that he had an advocate but neither of them followed to find out the outcome of the case. This leads me to a conclusion that this application is an afterthought or it is designed to buy time. That they would have filed this application immediately for they were aware that by that time, three months had already lapsed since delivery of the ruling. I therefore find that on a balance of competing interests the scale does not tilt in favour of the applicants, as they have not satisfactorily explained why they took over 6 months to file the instant application.”
10. It is the Applicant's case that ruling was delivered on 7th April 2022. The Applicants have not stated when they learnt of the delivery of the ruling. This would have come in handy in order to ascertain whether there was inordinate delay. The current application was filed on 18th November 2022, which is a period of over 8 months from the date of the impugned ruling. It is submitted that a period of 8 months is inordinate delay, and there being no explanation given, court is urged to find as such.
11. The Applicants have not demonstrated how the intended appeal has arguable and triable issues. The Applicants have not attached any documents that were filed before the trial court, which were the subject of the ruling of 7th April 2022. The applicants have also not attached a copy of the ruling that they intend to appeal against. This court has thus not been furnished with any materials that would assist it to decide on whether the intended appeal has arguable issues.
12. In *Re Estate of GPO (Deceased)* [2021] eKLR, the Court held;

“ 32. Other than the extract order, no pleadings or ruling of the subordinate court was annexed to the application for this court to appreciate the real issues and reasoning behind the order impugned, and therefore whether the intended appeal is arguable is not clear cut to this court”.
13. The Respondent will be prejudiced if the Applicants are granted leave to appeal out of time. The Respondent has been in court from the year 2019, and there is no good reason that has been advanced by the Applicants in having this matter pending any longer. Litigation must come to an end, and it is time for the Applicants to quit and be contented with the orders of the court.
14. *Anthony Maina Kinyua & another v Joseph Mwangi Njurai* [2021] eKLR

“ 21. The respondent submits that the matter has been in court since 2009 and litigation must come to an end. The applicants have not indicated how they shall be prejudiced if the orders are not granted. In my view, the respondent will be greatly prejudiced as the applicants have not demonstrated any sufficient reasons why the respondent should be kept away from enjoying the fruits of his judgment”.
15. In view of the foregoing, it is submitted that the current application lacks merits, and we pray for its dismissal with costs. The trial court had condemned the Applicants to pay the costs, which led to the issuance of N.T.S.C against them.



16. In supporting Affidavit, the Applicant avers that:
- a. the court ordered the application dated 15th August 2021 to be heard by way of submissions.
 - b. submissions were duly filed, but ruling date was not given as earlier scheduled.
 - c. That when the ruling was delivered the same was not communicated to them either by the court or advocate for respondent.
 - d. That applicant came to learn the ruling was delivered after they were served with a notice to show cause and up perusal of the court file.
 - e. That applicants submit that they are likely to suffer irreparable loss as the respondent filed a succession cause of the estate of their father without involving the children of the deceased.

Issues Analysis And Determination

17. After going through the proceedings, pleadings and the submissions on record, I find the issues are; whether the applicants have established that the application is merited? What is the order as to costs?

18. The application is brought under section 79G of the Civil Procedure Act, which provides; -

“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 appealed against, excluding from 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:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

19. In re Estate of Kipsoi arap Kenduiwo (Deceased) [2022] eKLR the court outlined the principles to be considered while dealing with an application for leave to appeal out of time, thus; -

“15. As to the principles to be considered in exercising the discretion whether or not to enlarge time in *First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others* Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65 the court set out the factors to be considered in deciding whether or not to grant such an application and these are:

- “i) The explanation if any for the delay;
- (ii) The merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
- (iii) Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”



20. It is upon the Applicants to furnish the court with sufficient materials in order for it to consider the instant application. It is the Applicant's case that the trial court had directed parties to file submissions to the application dated 15th August 2021. The Applicants filed their submissions. The Applicants have not stated what happened after the filing of submissions. It was expected of them to have stated that the matter was fixed for ruling on a particular date, and state what became of the ruling date. The Applicants have not stated why they did not appear during the ruling, and the follow ups they made to know the position of the file. The Applicants have not given any plausible explanation for the delay.
21. In *Anthony Maina Kinyua & another v Joseph Mwangi Njurai* [2021] eKLR, the court held; -
- “The applicant did not use due diligence in that he was aware of his case and that he had an advocate but neither of them followed to find out the outcome of the case. This leads me to a conclusion that this application is an afterthought or it is designed to buy time. That they would have filed this application immediately if they were aware that by that time, three months had already lapsed since delivery of the ruling. I therefore find that on a balance of competing interests the scale does not tilt in favour of the applicants, as they have not satisfactorily explained why they took over 6 months to file the instant application.”
22. It is the Applicant's case that ruling was delivered on 7th April 2022. The Applicants have not stated when they learnt of the delivery of the ruling. This would have come in handy in order to ascertain whether there was inordinate delay. The current application was filed on 18th November 2022, which is a period of over 8 months from the date of the impugned ruling. The court finds that a period of 8 months is inordinate delay, and there is no explanation given, to explain the said period of delay.
23. The Applicants have not demonstrated how the intended appeal is arguable and nor demonstrate a triable issue. The Applicants have not attached any documents that were filed before the trial court, which were the subject of the ruling of 7th April 2022. The applicants have also not attached a copy of the ruling that they intend to appeal against. This court has thus not been furnished with any materials that would assist it to decide on whether the intended appeal has arguable issues.
24. *In re Estate of GPO (Deceased)* [2021] eKLR, the Court held;
- “ 32. Other than the extract order, no pleadings or ruling of the subordinate court was annexed to the application for this court to appreciate the real issues and reasoning behind the order impugned, and therefore whether the intended appeal is arguable is not clear cut to this court”.
25. The Respondent will be prejudiced if the Applicants are granted leave to appeal out of time. The Respondent has been in court from the year 2019, and there is no good reason that has been advanced by the Applicants in having this matter pending any longer. Litigation must come to an end.
26. In the case of *Anthony Maina Kinyua & another v Joseph Mwangi Njurai* [2021] eKLR the court held that;
- “ 21. The respondent submits that the matter has been in court since 2009 and litigation must come to an end. The applicants have not indicated how they shall be prejudiced if the orders are not granted. In my view, the respondent will be greatly prejudiced as the applicants have not demonstrated any sufficient reasons why the respondent should be kept away from enjoying the fruits of his judgment”.



27. In view of the foregoing, the court finds that the current application lacks merits, and court makes orders that;

- i. The application is dismissed with costs to the respondent

DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 21ST DAY OF DECEMBER 2023.

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C KARIUKI

JUDGE

