



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Sicily Mutina Gataye (Miscellaneous Succession Application E004 of 2022) [2023] KEHC 27074 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27074 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS SUCCESSION APPLICATION E004 OF 2022  
RM MWONGO, J  
DECEMBER 18, 2023  
IN THE MATTER OF THE ESTATE OF SICILY MUTINIA GATAIYE**

**BETWEEN**

**JAMES GATAIYI MUNYI ..... APPLICANT**

**AND**

**JOSEPH MURIITHI MUTINIA ..... RESPONDENT**

**RULING**

1. The applicant in his motion dated 8<sup>th</sup> June, 2022 seeks orders as follows:
  - a. That there be a stay of execution of Judgment in Baricho Cause No.383 of 2016 delivered on the 27/4/2022 pending the hearing and final determination of prayer No. 3 hereunder and the intended appeal.
  - b. That this court do grant leave to the applicant to file appeal against the judgment of the lower court dated 27/4/2022 outside the stipulated period.
2. The application is premised on the grounds that:
  - a. The applicant was aggrieved by the judgment delivered on the 27/4/2022 and wishes to appeal to the High Court at Kerugoya.
  - b. The applicant prepared his appeal on time and sent it to the High Court on the 26/5/2022 via email but the Court network was not functional on that day or on the 27/5/022; thus the applicant's effort to file his appeal was occasioned by poor internet connection and is excusable.
3. The applicant deposed a supporting affidavit the essential averments of which are that:
  - i. The applicant's advocate on record prepared an appeal as instructed but unfortunately the court internet was down.



- ii. The said advocate tried to file the appeal physically but all in vain as no assessment and/or registration could be done without a functional internet connectivity.
  - iii. The failure to file an appeal on time was not deliberate but was occasioned by the poor court network which factors are beyond my advocate's control.
  - iv. The respondent has threatened to execute the judgment of the court which will deprive me possession of a substantial part of the estate.
  - v. The applicant seeks stay of execution of judgment delivered on the 27/4/2022 ending the hearing of this application and the intended appeal to prosecute the subject matter.
4. In response the respondent filed a replying affidavit in which the essential averments were as follows: That he strongly opposes the application for leave to appeal out of time as it is not brought in good faith; that the application is only intended to circumvent justice and delay the actualization of the estate going to the beneficiaries; and that the applicant should tell the court on what basis he has been claiming to benefit from Mutinia estate while he claims to be a son of Munyi.

### **Parties' Submissions**

- 5. The parties made oral submissions.
- 6. The applicant submitted that he prepared his memorandum of appeal and filed it on 26<sup>th</sup> May, 2022 by email. He was informed that the court had internet challenges and the same could not be filed. He sent a representative the following day on 27<sup>th</sup> May, 2022.
- 7. He seeks to file the appeal out of time, and submits that he will be prejudiced if the prayer is not granted as sought.
- 8. The respondent opposes the application. He stated that there was no evidence of failed internet apart from the email provided; that there was no evidence of follow up to the registry the following day.
- 9. The respondent argued that the application is a delaying tactic, to delay beneficiaries from benefitting from the estate. He submits that no appeal has been filed; and that if any has been filed, it is filed without leave.

### **Issues for Determination**

- 10. The only issue for determination is whether leave to appeal out of time should be granted.

### **Analysis and Determination**

- 11. The applicant seeks leave to appeal out of time the Judgment in Baricho Cause No.383 of 2016 delivered on the 27/4/2022.
- 12. Section 79G of the *Civil Procedure Act* provides for appeals within thirty days as follows:

“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 a good and sufficient cause for not filing the appeal in time.” (Emphasis added).



13. The right to appeal is a fundamental right and ought not to be curtailed for reasons that are merely technical.
14. In the case of *Consolata Muthoni Kariuki v Martin Mutembei Kaburu & 2 others* [2020] eKLR the court held that payment of the decretal sum does not fetter a party's right to appeal the judgement. The court there stated:

“The right to appeal is a constitutional right enshrined under Article 50 of *The Constitution* that provides for the right to a fair trial and to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court ....”

15. In the case of Edith Gichungu Koine (supra) the Court of Appeal points out the factors to be taken into account in an application for extension of time is before a court which include:
  - a. the period of delay;
  - b. the reasons for the delay,
  - c. the degree of prejudice to Respondent if the application is granted, and
  - d. whether the matter raises issues of public importance,

#### **The length and reason for the delay**

16. The applicant asserts that he prepared his appeal on time and sent it to the High Court on the 26/5/2022 via email but that the court network was not functioning on that day or on the next day. Further, he tried to file the appeal physically, but this was in vain as no assessment and/or registration could be done without a functioning internet connectivity.
17. I have perused the email sent to the court by the applicant, and I note that it was sent on 26<sup>th</sup> May 2022, and also copied to the DR of the High Court. I see nothing to discredit the email, notwithstanding the respondent's submission that there was no evidence of failed internet apart from the email, or evidence of follow up to the registry the following day.
18. I am therefore satisfied that the applicant filed the email evidence to prove that he had attempted to file the memorandum of appeal within time. I also note that there is no clear evidence of any follow up by the applicant once the email failed. Nevertheless, the intent of the applicant and the timing are clear.
19. The next action by the applicant was made through the filing of the certificate of urgency for stay of execution filed on 15<sup>th</sup> June 2022. The appeal should have been filed on or before 27<sup>th</sup> May 2022. As such the period of delay is less than twenty (20) days

#### **The chances of the appeal succeeding**

20. On perusal of the draft memorandum of appeal dated 26<sup>th</sup> May, 2022 the appeal deals with distribution of the estate in terms of Section 38 of the *Law of Succession Act* as opposed to Kikuyu Customary law as the deceased died before the enactment of the *Law of Succession Act*.
21. This is an issue that requires to be litigated to finality. Hence, it would be unfair to lock out the appellant from appealing on this issue that goes to the root of the distribution of the deceased's estate.



## **Disposition**

22. Ultimately, I am satisfied that the delay is not inordinate and that it would be prejudicial to the applicant to lock him out of the appeal process which is a fundamental right in litigation.
23. I conclude as follows:
  - a. In respect of prayer 2 for stay of execution, the same is granted pending the hearing of the appeal;
  - b. In respect of Prayer 3, leave is granted to the applicant to file the appeal out of time.
  - c. Accordingly, the applicant shall file the record of appeal within forty five (45) days of the date hereof and fix the matter for hearing within sixty (60) days from the date hereof.
24. Costs shall abide the appeal.  
Orders accordingly

**DATED AT KERUGOYA THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

Naliaka, holding brief for Kiama for Applicant

Murigu, for Respondent

Murage, Court Assistant

