



**Kanambiu v Kaburi & another (Miscellaneous Civil Application
E048 of 2021) [2022] KEHC 12032 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 12032 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION E048 OF 2021**

LM NJUGUNA, J

APRIL 26, 2022

**IN THE MATTER OF THE ESTATE OF KANAMBIU KABURI
ALIAS SILAS MURIITHI (DECEASED)**

BETWEEN

EDITH GATURI KANAMBIU APPLICANT

AND

FAITH WANJIRA K. KABURI 1ST RESPONDENT

KAREN WAWIRA MURIITHI 2ND RESPONDENT

RULING

1. Before this court is the notice of motion brought under Sections 1A, 1B, 3A, 79G of the *Civil Procedure Act* and dated September 10, 2021 wherein the applicant seeks for orders that:
 - i. The applicant be granted leave to file an appeal out of time against the ruling delivered on January 25, 2021 by Hon. M.N. Gicheru.
 - ii. Costs of the application be in the intended Appeal.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant herein. The applicant's case is that after the ruling was delivered, she was not able to get a copy of the ruling on time and by the time she got the same, the 30 days period within which she ought to have appealed had almost lapsed. As such, the delay in filing the appeal was not intentional and the same not inordinate. She deposed that the applicant filed summons for Revocation of grant on the basis that the same was obtained fraudulently by making of a false statement or by concealment of something material but the same was dismissed by the court; that around the same time, her mother was taken ill and was admitted in hospital and later diagnosed with diabetes and by the time the applicant's mother was being discharged from hospital, she still had uncontrolled sugar problem and since she was



busy taking care of her, she could not file the appeal. It was her case that given that she has been acting in person and being a layman, she was not in the know that such suits are time bound and therefore it would only be fair that she be allowed to file the appeal out of time.

3. The 1st respondent opposed the application by filing grounds of opposition citing among other reasons that the applicant is guilty of laches in filing the application dated 10.09.2021; that the applicant did not plead any probable, sufficient and/or justifiable cause why she did not file an appeal within the stipulated statutory period. It was her case that the typed and certified copies of the impugned ruling was certified in the month of March, 2021 but the applicant has not supplied any letter requesting for proceedings or a certificate of delay to demonstrate a justifiable cause why the appeal was not filed within the stipulated time. Further, the 1st respondent contended that the certificate of confirmation of grant has been fully implemented and the objective of filing an appeal therefrom has been overtaken by events hence the appeal is an exercise in futility and that the application is therefore an abuse of the court process.
4. The applicant filed a further affidavit on the 24th January, 2022 in which she depones that, the 1st respondent is misleading the court by saying that the grant has already been executed yet the deceased properties are intact in the name of Kanambiu Kaburi. She reiterated that her mother was unwell during that period. Further that the 1st respondent is using all means to frustrate her intended appeal because she is well aware of what she did by taking advantage of her illiterate mother to write a consent for purposes of advancing her interest and thus disinheriting them.
5. The 2nd respondent did not file a response to the application despite having been granted time to do so, but she filed submissions on the 6th January, 2022.
6. Directions were given that the application be canvassed by way of written submissions wherein all parties complied. The applicant submitted that indeed she filed summons for revocation of grant but the learned magistrate dismissed the application. That she requested the court to supply her with a certified copy of the ruling and that a certified true copy of the ruling was later issued to her and upon reading it, she realized that the learned magistrate had misdirected himself and decided to appeal against the same but for the reasons given hereinabove, she was unable to file the appeal on time. It is her case that she has an arguable appeal as her, together with her other two sisters, have been disinherited by the first respondent's house by having the 2nd respondent sign a consent that she never understood and so, it would only be fair that this application be allowed.
7. The 1st respondent on the other hand opposed the application and submitted that the applicant did not file the intended appeal in time and as such, there is no appeal to date filed before this court. That the merits and demerits of the applicant's application is pegged on Section 79G of the [Civil Procedure Act](#), which requires the showing of a 'good and sufficient cause' for the delay. It was her case that the delay of 10 months is not reasonable or justifiable and the intended appeal is an afterthought motivated by malice and greed on the part of the applicant. She further submitted that the applicant was supplied with certified copies of the impugned ruling on March 27, 2021 but has not annexed the letter requesting for the proceedings indicating the exact date that she made the request and further she has not annexed the certificate of delay from the court to prove that the subordinate court caused the delay in delivery of the proceedings in time for the purposes of the filing of the appeal. Further that, there is no reasonable nexus between the filing of the appeal in time and her mother's sickness as she has not shown how her mother's sickness prevented her from filing the appeal. That the subject matter of the intended appeal has been overtaken by events in that, it no longer exists as the same has already been transferred to the beneficiaries and third parties. The 1st respondent thus prayed that the court should return a finding that this application is frivolous, vexatious and an abuse of the court process.



8. The 2nd respondent in supporting the application submitted that although Section 79 G of the Civil Procedure Act must come into play, the applicant being a layman and this being a family dispute, it is only just that the application be allowed.
9. I have considered the application, rival responses and the submissions filed herein.
10. When it comes to appeals from the subordinate court to the High Court, the applicable provision is Section 79G of the Civil Procedure Act which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown.
11. Section 95 of the Act further bestows this court with discretion to enlarge time. The said section provides as thus:-

“95 Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
12. The principles upon which the court should exercise the said discretion and grant leave to appeal out of time are now settled. The court is supposed to take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. (See Leo Sila Mutiso v Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) and Thuita Mwangi v Kenya Airways Limited [2003] eKLR.
13. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that she has a good cause for doing so.
14. The question therefore is whether the applicant has satisfied the above conditions.
15. As for the length of the delay, it is not disputed that the ruling of the trial court was delivered on January 25, 2021 and from the records, a certified true copy of the original was signed on March 3, 2021. The application herein was filed on 10.09.2021 which is slightly eight (8) months from the date of the said ruling. In the case of Jaber Mohsen Ali & Another v Priscillah Boit & Another E & L No. 200 of 2012 {2014} eKLR the Court stated that what is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after Judgment/Ruling could be unreasonable delay depending on the Judgment/Ruling of the Court and any order given thereafter.
16. In the circumstances of the instant case, the applicant has given reasons for the delay and which she has urged this court to have in mind when considering the application. Though she has stated that she applied for the copies of typed proceedings which were issued to her on March 3, 2021, the 1st respondent has submitted that the applicant neither attached a dated letter requesting for the proceedings nor a certificate of delay for the purpose of filing the intended appeal. I am in agreement with the 1st respondent that such piece of evidence was proper to prove that she indeed applied for typed proceedings before the trial court. In the case of Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR, the court was of the view that:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is



the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

17. In putting her case forward, the applicant has submitted that she is not learned and that even in the trial court, she represented herself and as such, she was not even aware that such a suit is time bound.
18. In that regard, I am guided by the Court of Appeal decision in *Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR (Nambuye J.A) while quoting with approval the case of *Richard Nchapi Leiyagu v IEBC & 2 Others* (*supra*); *Mbaki & Others v Macharia & Another* [2005] 2EA 206 and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazaiboy*, Civil Application No. 33 of 2003, right to be heard is not only constitutionally entrenched but it is also the corner stone of the Rule of law; a valued right; and is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.
19. As for the chances of the intended appeal succeeding, I have perused the draft memorandum of appeal. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. For the intended appeal to be termed as arguable, all that is needed in Law is that there be even one arguable point and that will suffice (See *Commissioner of Customs v Anil Doshi*, {2017} eKLR; *Joseph Gitabi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008).
20. I have perused the ruling by the trial court, subject of the intended appeal and further the grounds on the undated draft memorandum of appeal. It is clear that the intended appeal arises out a succession cause. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a *bona fide* issue for determination by the Court. The applicant urges this court to consider the fact that the law in regards to an intestate succession in a polygamous setting was not adhered to and further that Rule 41 (1) of the *Probate and Administration Rules* was not complied with and as such, the appeal herein should be allowed. In my view, the issues raised by the applicant are arguable; however it is essential to note that an arguable appeal does not necessarily mean an appeal that will or must succeed.
21. As for the prejudice which the respondent stands to suffer should leave be granted for the applicant to file an appeal out of time, from the 1st respondent’s grounds of opposition, I did not come across any credible evidence to indicate the prejudice that would befall her, that cannot be compensated by way of costs and especially considering the averments by the applicant in her further affidavit to the effect that the estate has not been distributed. It should be noted that the right to be heard is provided for in our constitution. The applicant having expressed her intentions to be heard on appeal, it is paramount that she be granted the said opportunity.
22. As I have already stated, extension of time to file appeal is a matter of exercise of judicial discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal has been satisfactorily explained. Discretion of the court must always be exercised judiciously. The applicant having expressed her intentions to be heard by this court on appeal and in the given circumstances, it is my considered view that an opportunity should be availed to her to ventilate her issues.
23. In the end, it is my considered view that in the interest of justice, the application should be allowed and I hereby allow the same and make the following orders;
 - i. That leave be and is hereby granted to the applicant to file an appeal out of time.



- ii. That the appeal be filed within 21 days from the date of this ruling. Thereafter, the applicant to file and serve the Record of Appeal within 21 days from the date of filing of the appeal.
- iii. That the cost of the application shall abide the outcome of the appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL, 2022.

L. NJUGUNA

JUDGE

.....for the Applicant

.....for the Respondent

