



REPUBLIC OF KENYA



In re John William Oyola Ligoo alias William Oyola Ligoo (Deceased) (Miscellaneous Succession Application 2 of 2022) [2022] KEHC 479 (KLR) (23 May 2022) (Ruling)

Neutral citation: [2022] KEHC 479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS SUCCESSION APPLICATION 2 OF 2022**

RE ABURILI, J

MAY 23, 2022

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL
OUT OF TIME AND STAY OF EXECUTION PENDING APPEAL**

BETWEEN

MICHAEL OGUNDE LIGOO APPLICANT

AND

MARY OUMA LIGOO RESPONDENT

(Application for leave to appeal out of time against the decision and or orders/ruling made in Bondo PM Succession Cause No. 305 of 2020 on 23rd February, 2022 by Hon. S.W. Mathenge, Resident Magistrate)

RULING

1. The applicant is Michael Ogunde while the Respondent is Mary Auma Ligoo. Vide Notice of motion dated 28th March, 2022, the applicant seeks two main prayers. The first prayer is for leave to appeal out of time against the decision and or orders/ruling made in Bondo PM Succession Cause No. 305 of 2020 dated 23rd February 2022 by the Hon. S.W. Mathenge, Resident Magistrate.
2. The 2nd prayer is for stay of registration and execution of any kind on land Parcel LR No. Bondo/Nyangoma/3187 as per the decision order/Ruling of the Hon. S.W. Mathenge (RM) Bondo delivered on 23/2/2022, pending the hearing and determination of the application and the intended appeal. The second prayer is spent as this court did grant an interim stay of execution which orders were extended until the date of this Ruling.
3. The application is supported by the applicant's affidavit sworn on 28th March 2022. The grounds upon which the application is predicated are that the delay is not inordinate; the intended appeal is arguable and that no prejudice shall be occasioned to the Respondent.



4. The supporting affidavit contains depositions giving the history of the dispute when the applicant objected to confirmation of the grant in Bondo PM Succession Cause No. 305 of 2020 which objection was dismissed on 23/2/2022.
5. According to the applicant, he could not file an appeal because leave to appeal was prerequisite to the filing of an appeal and that in the intervening period, the Respondent had commenced the process of evicting the applicant alongside other beneficiaries from the ancestral land known as LR No. Bondo/Nyangoma/3187 which they had lived on for over 75 years. That pursuant to the decision made which is sought to be impugned, their ancestral land was given away at full share to the Respondent.
6. Further, that the applicant's deceased father had caused the ancestral land No. Bondo/Nyangoma/3187 to be registered in the names of applicant's brother and husband to the Respondent herein one John William Oyola Ligoo alias William Oyola Ligoo who was the eldest in the family as the other sons were still very young and who ought to have the land transferred to all of them in accordance with the Luo Customs and Traditions. The applicant also deposed that he has an arguable appeal as shown by the draft Memorandum of Appeal. The Ruling and proceedings were also annexed.
7. The Respondent opposed the application. She filed her replying affidavit sworn on 9th April 2022 setting out 20 paragraphs contending inter alia that the application does not satisfy the requirements for the prayers sought for stay of execution of the Ruling dated 23/2/2022 and for leave to appeal to this court; that the application is an abuse of court process as the land in question has already been registered on 14/3/2022, 14 days before this application for stay was made as shown by copy of Title deed annexed.
8. That no reasons have been made why the present application and orders sought were not made in the lower court; that the applicant has not demonstrated that he will suffer substantial loss if the order is not given; that grant of the orders will prejudice the Respondent and keep her from enjoying the fruits of her judgment; that there was no evidence that the applicant had lived on the land for 75 years and that instead, the applicant had collaborated with others to intermeddle in the estate of the deceased who was her husband.
9. On the prayer for leave to appeal out of time, it was deposed that the same is overtaken by events as the Respondent had already executed the judgment in issue and that no reasons were given for the long delay and failure to seek these prayers in the lower court. That some of the issues raised by the applicant in his supporting affidavit can best be handled in the Environment and Land Court; that the intended appeal has no chances of success and that the applicant is only interested in delaying the resolution of the dispute; that it has not been demonstrated what irreparable/substantial loss he will suffer; that the respondent herein has already filed Bondo ELC No. E012/2022 seeking, among others, eviction orders against the applicant, on account of trespassing on her land. The rest of the detailed long depositions are argumentative like submissions and repetitive hence there is no point of reproducing them here.
10. The application was canvassed by way of written submissions, which submission echo the grounds, supporting affidavit and the Replying affidavit as filed by each of the parties with the Respondent's counsel filing unnecessarily lengthy submissions which I have nonetheless considered in this Ruling.

Determination

11. I have considered the application and the opposition thereto. I will first partially determine whether the applicant deserves leave of this court to appeal out of time. According to the applicant, he did not file an appeal after the ruling to be impugned was delivered because leave to appeal was prerequisite to the filing of an appeal. This is contained in paragraph 6 of the supporting affidavit.



12. I have perused the entire application and the submissions filed. I do not find any material supporting that deposition, not even the authorities cited require that for one to appeal against a decision of the magistrate's court to the High Court in a succession matter where the applicant sought for revocation of a grant issued to the Respondent, then he had to first seek leave to appeal. I note that the application is specifically brought under Section 79G of the [Civil Procedure Rules](#) and Sections 1A, 1B and 2A of the [Civil Procedure Act](#).
13. I will however restrain myself from delving too deep into this issue as matters leave to appeal are quite distinct from matters leave to appeal out of time, save to state that no such leave of the trial court to appeal to this court was necessary and that such leave is only necessary where a party in succession proceedings (appeal) wishes to appeal to the Court of Appeal.
14. Under section 50 of the [Law of Succession Act](#), Chapter 160 of the Laws of Kenya, Appeals shall lie to the High Court in respect of any order or decree made by a Resident Magistrate in respect of any estate and the decision of the High Court thereon shall be final. (2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhi's Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.
15. The Court of Appeal in [Peter Wahome Kimotho Vs Josephine Mwiyeria Mwanu](#) [2014] eKLR stated that:

“There is no provision for appeals from the High Court to the Court of Appeal. What are provided for are appeals from lower courts to the High Court. That is why Mr. Gikonyo argued that it was necessary for the appellant to seek leave of the Court as there was no automatic right of appeal. We must state that this is clearly a grey area as it may also be argued that Section 66 of the [Civil Procedure Act](#) is not automatically imported into the [Law of Succession Act](#). There is also a thin line to be drawn as to whether the order appealed against was a decree or a mere dismissal order that did not amount to a decree. This is because upon the dismissal of the application for revocation, the grant was confirmed thereby resulting into a decree. Be that as it may, this appeal was filed in 2011 after [the Constitution](#) of Kenya 2010 that gives the Court of Appeal jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament was operational. Under [the Constitution](#), all matters from the High Court are appealable to the Court of Appeal. We therefore find that this appeal is competently before us.”
16. Having said so as stipulated in section 50 of the [Law of Succession Act](#), I will now consider the issue of whether leave to appeal to this court out of time is merited, since there is an automatic right of appeal to this court which was not exercised by the applicant within the stipulated time of thirty days from the date of the ruling. I say thirty days because section 50 of the [Law of Succession Act](#) does not provide for the time within which an appeal from the decision of the Magistrate's Court to this court should lie and therefore this court must borrow from the practice of the court that decisions that lie as a matter of right to this court are to be filed within 30 days of the decision as stipulated in section 79G of the [Civil Procedure Act](#), noting that Rule 63 of the Probate and Administration Rules does not include Section 79G of the [Civil Procedure Act](#) on the applicability of the Civil Procedure Rules in succession matters.
17. The applicant asserts that the delay was not inordinate; the intended appeal is arguable and that no prejudice shall be occasioned to the Respondent.
18. The Respondent seriously opposes any leave to be granted and accuses the applicant of laches. Further, that the intended appeal is not arguable. In addition, she contends that the intended appeal is meant



to delay resolution of the dispute. Finally, that it is intended to deny her from enjoying her fruits of the judgment as she has already transferred the land subject of the dispute in her name.

19. Leave to appeal out of time is governed by Section 79G of the Civil Procedure of Act, the proviso thereof. The section provides 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 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.”

20. The above provision has been interpreted by this court in several cases and the interpretation accepted by the Court of Appeal in *Charles Karanja Kuru v Charles Gitbinji Muigwa* CA 71 of 2016 [2017]eKLR and *Martha Wambui v Irene Wanjiru Mwangi and another* [2016]e KLR as well as in *Stecol Corpration Limited v Susan Awuor Mudemb* [20121]e KLR.

21. On whether there is delay and if so, whether the delay is inordinate, I have perused the proceedings and ruling of the lower court. The Ruling sought to be challenged was delivered on 23/2/2022. The application herein was filed on 28/3/2022, just five days after the expiry of the thirty days. In my view, although there was delay, delay of 5 days cannot be, by any stretch of imagination, be inordinate.

22. From paragraph 5 of the supporting affidavit, it clearly appears that the applicant labored under the mistaken impression and belief that he required leave of court to appeal to this court which is not the case and as a result, instead of filing appeal as a matter of right within the 30 days stipulated in law, he filed this application 5 days later. The reason for the delay has not been explained satisfactorily. However, the delay of 5 days is not inordinate. I am therefore unable to find that the applicant is guilty of laches.

23. The applicant also submitted that he has an arguable appeal. It is now trite that whether an appeal to this court is arguable or not is not for this court to determine at this stage unlike the requirement under the Court of Appeal Rules.

24. This is not to say that this court would admit any appeal which on the face of it, is frivolous or vexatious or is an abuse of court process, or where the court is clearly deprived of jurisdiction to entertain the intended appeal. I shall however revert to this issue later after considering the issue of whether the prayer for stay pending appeal is merited.

25. On whether this court should grant stay of implementation of the Ruling dated 23/2/2022, stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules* which provides that:

“Stay in case of appeal [Order 42, rule 6.]

- (1) 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 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, 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.

- (2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

26. The Respondent has deposed and annexed copy of the title Deed showing that the land complained of has already been transferred into her name and that therefore this application, in her view, is overtaken by events.
27. I observe that there is no specific provision for stay pending appeal in the [Law of Succession Act](#). However, under Rule 49 of the Probate and Administration Rules:

“A person desiring to make application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary, by affidavit.”
28. Section 47 of the Act also empowers this court to entertain any application and to determine any dispute under the [Law of Succession Act](#). In addition, under Rule 73 of the [Probate and Administration Rules](#), the court may exercise inherent jurisdiction to grant appropriate orders in order to meet the ends of justice and to prevent abuse of the process of the court.
29. Article 159 of [the Constitution](#) commands court and tribunals to endeavour to administer substantive justice. The question is whether the applicant has demonstrated that he will suffer substantive injustice if stay of execution is not granted.
30. The objectives of stay of execution is to prevent the applicant from suffering substantial loss and to prevent the appeal from being rendered nugatory, should it be successful.



31. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR the court stated that:
- “The applicant must establish other factors which show that the executor will create a state of affairs that will irreparably affect or negate the very essential care of the applicant as the successful party in the appeal. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
32. According to the applicant, the Respondent is threatening to evict him from the only land that he has occupied for over 75 years hence unless stay is granted, he and other beneficiaries stand to suffer irreparably. On the part of the Respondent, she has deposed that she already had the land registered in her names and that she has gone ahead and instituted suit before Bondo ELC E012/2022 against the applicant seeking for orders, among others, the eviction of the applicant herein from the suit land.
33. I observe that in the succession proceedings, there were other parcels of land that the applicant herein was entitled to as a matter of right being Parcel Nos 3148 which was already in his name whereas Parcel No. 3187 was already in the name of the Respondent’s husband.
34. The applicant was also said to be having his rightful share in parcel No. 3146 & 3143. The applicant raised so many other issues of trust over the disputed parcel No. 3187, which issues the succession court has no jurisdiction to determine and the trial court correctly so pointed out. That being the case, and as there is an ELC case pending before court, the applicant is better placed to raise those issues in that court or file a substantive suit before the Environment and Land Court as this court cannot determine those issues for want of jurisdiction. Borrowing the words of Gikonyo J in Succession Cause No. 31/2017 *in the Estate of Wanga Ole Oiyie* [2022] eKLR:
- “The applicants are merely obsessed with getting particular portions or parts of the estate property. It would be dangerous proposition that occupation of a particular part or portion of land of the intestate estate should be the sole factor in the distribution of the estate of the deceased. I have lamented before, it would be insidious and preposterous a practice to encourage beneficiaries to embark as occupying and developing particular portions or parts of the intestate estate’s real property after the death of the deceased in the hope that the occupation and developments will confer or vest preferential interest during the distribution of the estate. Such would be the ablest architect of ruin.”
35. In the instant case, the trial court distributed the estate of the deceased comprising land only and the applicant is a beneficiary in two of those parcels. He claimed that he lived on parcel 3187 for over 75 years but he never invited the court to visit the locus in quo to establish those facts on the ground. The Respondent contends that the applicant is intermeddling with her husband’s estate. The applicant also admitted that he was arrested for trespassing on the said disputed parcel of Land.
36. No material has been placed before this court to show that the applicant shall suffer irreparable or substantial loss if stay of execution is not granted, noting that the land title had already changed from the deceased to the Respondent as at the time this application was lodged into this court.
37. As earlier stated, the applicant has an opportunity to approach the Environment and Land Court for any appropriate orders including his claims that the land in issue was held in trust for him and his other siblings by his elder brother, the Respondent’s late husband.
38. In the end, I find that the prayer for stay of execution which involves staying implementation of the impugned Ruling is not merited. Furthermore, the Respondent having filed suit against the applicant before Environment and Land Court, she can only carry out an eviction of the applicant through a



due process and in those proceedings, not on the basis of these proceedings arising from the succession cause which can only be produced in evidence in that other suit before the Environment and Land Court.

39. Moreover, if this court was to stay execution, it would be jumping into the arena of the already filed case before an Environment and Land Court and it would be usurping the jurisdiction of the Environment and Land Court which jurisdiction this court is deprived of by dint of Article 165 of *the Constitution*.
40. For the above reasons, I find and hold that the applicant has not made out a case for stay of implementation of the Ruling of 23/2/2022 rendered by the trial court at Bondo Principal Magistrate's Court. The prayer for stay of execution is found to be devoid of merit. It is hereby dismissed.
41. Back to the unresolved issue of whether leave to appeal out of time is merited, I observe that although there was no inordinate delay in bringing this application, however, from the draft grounds of appeal annexed, the applicant laments heavily on the alleged ancestral land having been registered in the name of the Respondent's husband to hold in trust for the applicant and his other siblings in accordance with the Luo Customs and Traditions as they were yet of age. Further, that the ancestral land hosts burial sites for all the applicant's deceased people including his late mother, father and the brother John William Oyola Ligoo, the respondent's husband. In addition, the applicant claims that that the applicant being the last born, he is entitled to own the said ancestral land in accordance with the Luo Customs and Traditions.
42. From all the above grounds, and as earlier stated when resolving the issue of whether stay of execution of the ruling to be impugned is merited, it is obvious that the basis of the intended appeal is the aspect of the disputed land being held in trust for the applicant's kindred by the late husband of the Respondent and ownership thereof, in accordance with the Luo customary law and practices.
43. With utmost respect to the applicant, he is asking this court to deviate and or overstretch its jurisdiction. If I was to grant leave to the applicant to appeal before this court, I would be inviting this court to usurp jurisdiction of a superior court (Environment and Land Court), which jurisdiction is specifically conferred on the ELC by dint of Article 162(2) (b) of *the Constitution* to deal with such disputes relating to ownership, occupation of and title to land. Furthermore, Article 165(5) (b) of *the Constitution* expressly bars the High Court from hearing and determining disputes whose jurisdiction is the preserve of the Courts contemplated in Article 162(2) of *the Constitution*.
44. It would not serve the interests of justice for this court to lift proceedings that touch on a resulting trust and bestow them on this court and purport to determine questions of customary trusts.
45. Jurisdiction is everything without which a court of law acts in vain. In *Motor Vessel "Lilian 'S' v Caltex Oil(K) Ltd* [1989]KLR 1 Nyarangi JA held as follows:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
46. This court's jurisdiction is conferred by *the Constitution* and the law. Therefore, this court cannot by craft arrogate itself of jurisdiction in the name of an appeal, and clothe itself with non-existent jurisdiction to hear and determine a dispute which falls totally outside the purview of a succession



court. It would also be futile and superfluous for this court to bring into this court the intended appeal knowing very well that it has no jurisdiction to determine the issues as contained in the memorandum of appeal, then embark on a journey of determining whether or not it has the necessary jurisdiction to determine the said appeal on its merits.

47. For the above reasons, I find the prayer for leave to appeal out time not merited. I dismiss it.
48. In the end, I find the application dated 28th March 2022 and the prayers therein devoid of any merit, the application in its entirety is hereby dismissed. Each party to bear their own costs.
49. File closed.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT SIAYA THIS 23RD DAY OF MAY, 2022

R.E. ABURILI

JUDGE

