



**In re Estate of Janet Meresia Malago (Deceased) (Succession Cause  
2459 of 2011) [2022] KEHC 11390 (KLR) (Family) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11390 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 2459 OF 2011  
AO MUCHELULE, J  
JUNE 20, 2022  
IN THE MATTER OF THE ESTATE OF JANET MERESIA MALAGO -(DECEASED)  
BETWEEN  
JACOB ROBERT OWALA MALALA ..... APPLICANT  
AND  
QUEENVELLE JOAN ATIENO OWALA ..... RESPONDENT**

**RULING**

1. The notice of motion dated 1<sup>st</sup> February 2022 is seeking leave for the applicant Jacob Robert Owala Malala to appeal the decision of this court that was made on 23<sup>rd</sup> May 2019. It further seeks the stay of execution of the orders contained in the decision of 23<sup>rd</sup> January 2019 pending the filing of the intended appeal.
2. At the time of the judgment of 23<sup>rd</sup> May 2019 that is sought to be appealed from, the applicant was represented by Ms Matemba Katasi & Associates. Through the instant application, Otieno Okeyo & Co. Advocates came on record for them. The applicant states that when he instructed his new advocates, they perused the file and found that the previous advocates had on 18<sup>th</sup> June 2019 filed a Notice of Appeal to challenge the judgment, but that the Notice has been filed without leave as is required in law. According to him, the Notice of Appeal was defective for want of leave and that is why the present application has become necessary.
3. The 1<sup>st</sup> respondent, Queenvelle Joan Atieno Owala opposed the application through her, replying affidavit dated 14<sup>th</sup> February 2022. According to her the Notice of Appeal that was filed on 18<sup>th</sup> June 2019 was served on them and therefore the matter is now before the Court of Appeal. Secondly, the applicant had on 6<sup>th</sup> December 2019 filed an application to stay further proceedings pending the hearing and determination of review application; a review application that was not filed. The



application was found to be incompetent and was struck out with costs. According to the respondent, after the application for review was dismissed, the present application cannot be entertained. However, in the ruling of 18<sup>th</sup> January 2022 it was observed that no application for review had been filed by the applicant.

4. The history of this dispute is that the deceased Janet Meresia Malago Owala died on 15<sup>th</sup> September 2011. She was the wife of the applicant. They had four children, the respondents being two of them. The respondents petitioned the court on the basis of an oral Will in which she had bequeathed her property to her children equally. The applicant filed an objection and cross-petition for the grant. The dispute was heard by Justice Farah S.M. Amin who substantially decided against the applicant by finding that the deceased had left an oral Will. She had further found that, owing to the bad blood between the applicant and the respondents, the estate be managed by the Public Trustee. This is the judgment that aggrieved the applicant who filed the above Appeal.
5. Strictly speaking, the Notice of Appeal is now the property of the Court of Appeal. This court cannot discuss the Appeal's competence. This court cannot recall it. The present application that seeks to challenge or recall it would be misconceived. The applicant states that the present Notice of Appeal –  

“is defective and amounts to no notice as it is filed in court outside the legal period for filing such notice from the date of the judgment and without leave of this court.”

The Notice of Appeal was filed outside the required 14 days. However, the application did not seek to withdraw the Notice of Appeal. There is therefore in place a Notice of Appeal, as defective as it may seem.

6. Assuming that the applicant has a competent application for leave to appeal out of time, it is considered that the judgment was delivered on 23<sup>rd</sup> May 2019 while the application was brought on 1<sup>st</sup> February 2022. The applicant blamed it on his advocates, but it is clear that a delay of about 3 years would be inordinate and inexcusable. It is also considered that the application is not addressed to the Public Trustee who is the administrator of the estate of the deceased.
7. I find no merit in the application which I dismiss with costs.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE, 2022.**

**A.O. MUCHELULE**

**JUDGE**

