



In re Estate of Yohana Indakwa alias Indakwa Odera (Deceased) (Succession Cause 539 of 2006) [2022] KEHC 10248 (KLR) (22 July 2022) (Ruling)

Neutral citation: [2022] KEHC 10248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION CAUSE 539 OF 2006**

WM MUSYOKA, J

JULY 22, 2022

**N THE MATTER OF THE ESTATE OF YOHANA
INDAKWA ALIAS INDAKWA ODERA (DECEASED)**

RULING

1. The application that I am called upon to determine is dated October 8, 2021. It prays for a reopening of the file herein and for extension of leave to appeal out of time, and leave to file notice of appeal with respect to the ruling of May 12, 2015 of Chitembwe J, delivered on June 23, 2015 by Sitati J.
2. The application is at the instance of Silas Odera Indakwa. I shall refer to him as the applicant. He is a son of the deceased, who was the owner of East Wanga/Isongo/668. He was appointed the administrator of the estate of the deceased herein in 2007. A summons for revocation of the said grant was filed herein by his cousin Emmanuel Odera Omumasaba, in 2008, on grounds that the deceased was holding East Wanga/Isongo/668 in trust for his father, who was a brother of the deceased. The court heard the matter orally, and came to the conclusion that East Wanga/Isongo/668 was held in trust, and that the applicant herein had not disclosed that fact. His grant was revoked, and his cousin, who is named as the respondent to the application herein, was appointed administrator, his grant was confirmed and the property was shared between the applicant and the respondent at the ratio of 5.5.5 acres, respectively. That was the gist of the ruling of May 12, 2015. The applicant evinced an intention to file appeal against that verdict, by filing a notice of appeal herein on 2nd July 2015, dated June 30, 2015. It transpires that no further step was taken thereafter.
3. The principal prayer here is for extension of time to file appeal. The applicant did file notice of appeal, but it now transpires that he did nothing more thereafter, hence the instant application. Under rule 75 of the *Court of Appeal Rules*, a notice of appeal ought to be filed within fourteen days of the impugned decision. The said decision was rendered on June 23, 2015. The notice of appeal was filed on July 3, 2015, which meant it was lodged within the fourteen days allowed under rule 75. rule 82 of the same rules require that the appeal should be instituted within sixty days of the lodge of the notice of appeal, that would be the filing of the memorandum of appeal and record of appeal. These were not filed. The consequence of not filing those is, according to Rule 83, that the notice of appeal is deemed to have been withdrawn.



4. In any application for extension of time to file appeal, the principal consideration would be the reasons for the delay in filing appeal, and whether the delay in filing appeal was reasonable. In this case, the decision of May 12, 2015, was rendered on June 23, 2015. A notice to appeal was filed on July 3, 2015, and since then no appeal has been filed. It is now seven years since. The explanation for the delay is that the applicant assumed that his then Advocate had filed the appeal, and that he discovered that no appeal had been filed after I delivered the ruling of March 19, 2021.
5. Has a plausible explanation been given for the delay in filing appeal? I do not think so. It is seven years since the impugned orders were made, and since the applicant lodged a notice of appeal herein. He claims that he thought his Advocate had lodged appeal, only to learn last year that no such appeal had been filed. I appreciate that the mistakes of an Advocate ought not be visited on a party, if it can be said that the failure to file appeal herein was mistake of the Advocate, but then it is to be presumed that the case belongs to the party, and he has an obligation to follow up with his Advocate, to get updates on the progress in the matter. It would appear that he instructed his Advocate to file a notice of appeal, after which he went to sleep for the next six years. The explanation given is not plausible or reasonable, and I do not think I should exercise discretion to extend time to appeal based on it. The applicant comes out as a party who had no interest in pursuing the appeal, and is only reviving the matter now, because of the ruling of March 19, 2021.
6. Is the delay excusable? I do not think it is. It is seven years now since the order was made. A delay of seven years is neither reasonable nor excusable. If it was a matter of months or even a year, the court could consider exercising discretion to expand time to file appeal. Seven years is unreasonable and inordinate. The applicant may have a good case, but that, alone, is not adequate.
7. I find no merit whatsoever in the application dated October 8, 2021. It is so unmerited that it amounts to abuse of the court process, for which the respondent should be entitled to costs, which I hereby award to him. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22ND DAY OF JULY 2022

WM MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Ms. Kadenyi, instructed by Emily & Associates, Advocates for the applicant.

Mr. Amasakha, instructed by Amasakha & Company, Advocates for the respondent.

