



**Gacheri v Kalaibua (Miscellaneous Application E086 of 2021)
[2022] KEHC 13403 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13403 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS APPLICATION E086 OF 2021
EM MURIITHI, J
SEPTEMBER 29, 2022**

BETWEEN

LYDIA GACHERI APPLICANT

AND

LUKE MICUBU KALAIBUA RESPONDENT

RULING

1. By an application dated November 15, 2021 the applicants seeks enlargement of time to file an appeal and a stay of execution of the ruling of Maua CMC Succession Cause No 133 of 2017 pending hearing and determination of the intended appeal.
2. The grounds of the application are set out in the notice of motion as follows:-

“On the grounds

1. That the applicant and their counsel had no notice of when the ruling herein was delivered.
2. That the applicant have only obtained the said ruling on October 29, 2021 when time for appeal had lapsed as the same had been delivered on 9/4/2021.
3. That the matter herein involved applicants who are grand children of deceased and their parents were excluded in the sharing of deceased estate which applicants lie on and dismissal of their application means they be evicted from the estate where they were left by their parents occupying.
5. That the orders of dismissal if not appealed against will occasion substantial loss and render applicants squatters and subject them to near death sufferings.



6. That the applicants have a very strong appeal in that the lower court held that the gazette notice was enough notification and were not supposed to be notified of the succession herein and their consent and involvement was not necessary contrary to principle of representation where a beneficiary has died.
 7. That it is in the best interest of justice this application is allowed.”
3. The application is opposed by the respondent by a replying affidavit of 22/3/2022 urging unreasonable delay and asserting no substantial loss if application for stay is refused as follows:-
- “2. That the applicants’ notice of motion dated the 15th day of November 2021 together with the supporting affidavit thereof have been read over and explained to me and it is in reply thereto I swear this affidavit.
 3. That the applicants filed summons for revocation of grant dated the 21st day of December 2020 in Maua Chief Magistrate’s Court Succession Cause No 133 of 2017.
 4. That after hearing the application, the Chief Magistrate’s Court fixed the date for ruling in the presence of both counsel for the parties.
 5. That actually both counsel were present on the 9th day of April 2021 when the ruling was delivered.
 6. That it is therefore not correct for the applicants to allege that they were not aware of the ruling date.
 7. That actually after the delivery of the court’s ruling on the 9th day of April 2021, I filed an application for lifting of inhibition on Land Parcel Number _Njia/Burieruri/4400 which I served on the applicants’ counsel on the 30th day of July 2021. Annexed and marked “LMK1” is a copy of the said application.
 8. That the said application made reference to the court’s ruling made on the 9th day of April 2021. It is therefore not true that the applicants came to know of the ruling on the 29th day of October 2021.
 9. That the applicants have not explained why it took them more than 7 months to lodge the notice of motion dated the 15th day of November 2021.
 10. That the applicants do not live on the estate of the deceased and therefore the issue of evicting them does not arise.
 11. That the 1st applicant lives with her husband in Meru Town while the 2nd applicant lives with his father one Muthine M’limbere at Antubeiya Village in Igembe Central Sub-County.
 12. That the applicants will not suffer any substantial loss if this application is not allowed.
 13. That I pray that the notice of motion dated the 15th day of November 2021 be dismissed with costs.”
4. The parties subsequently filed written submissions on their respective contentions and ruling was reserved. The court has considered the case law authorities cited by counsel [Nicholas Arap Korit Salat](#)



v IEBC & 7 others Supreme Court No 16 of 2014; *Richard Ncharpi Leiyagu v IEBC & 2 others* Nyeri CA 18/2013; *Tabro transporters Ltd v Francis Njega* [2018] eKLR *First American Bank of Kenya Ltd v Gulab P Shab & 2 Others* Nairobi HCCC 2255 of 2000 [2002] IEA 65; *Dilpack Kenya Limited vs William Muthama Kitonyi* [2018] eKLR.

5. Primarily the applicant set up a case of incidental delay and merit in the appeal while the respondent opposed the application on ground of inaction on the part of counsel of the applicant and went of substantial loss contending that the applicants do not live on the suitable and no issue of eviction therefrom therefore arose.
6. Having considered the matter the court finds the applicable principally for extension of time to be
 - 1) the length of the delay; and the explanation for the delay;
 - 2) the merits of the appeal;
 - 3) prejudice that may be occasioned the parties by the extension of time.

See *Nicholas Arap Korir & Salat* case (supra) and *First American Bank of Kenya Ltd v Gulab P Shab & 2 others* (supra)

7. The court respectfully notes the reasoning adopted by Sir Ralph Windham CJ in the High Court of Tanyanyika decision of *Daphine Parry v Murray Alexander Carson* [1963] EA 546 that:-

“Though the court should no doubt give a liberal interpretation to the words “sufficient cause”, its interpretation must be in accordance with judicial principles. If the appellant has a good cause on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time-barred, even at the risk of injustice and hardship to the appellant.”

I consider, however, that risk of injustice must be avoided.

8. In this matter, the ruling sought to be appealed from was delivered on 9/4/2021 and the application for extension of time was filed on November 17, 2021. As the applicant had 30 days to file appeal by virtue of section 79 G of the *Civil Procedure Act*, the applicant’s day was 6 months.
9. The explanation for the delay on the ground that counsel did not know when the ruling was delivered and only obtained the ruling on October 29, 2021 is dispelled, on a balance of probabilities, by the evidence of the respondent that he served on the applicant’s counsel on 30/7/2022 an application for lifting of inhibition on the suit parcel of land in which reference to the ruling of 9/4/2022 was made. I would find that there was inaction in that part of counsel for the applicant at least since 30/7/022 when he was served with the application for removal of inhibition until November 17, 2021 – a period of 3 ½ months in when the present application was filed. However, I do not find this period to amount to inordinate delay.
10. On the merits of the appeal, the drafts memorandum of appeal dated November 15, 2021 raises among others substantial questions on the right of inheritance of children whose parents who are entitled to inherit a deceased person are themselves deceased. The two ground of appeal are set out as follows:-

- “2. That the honourable magistrate erred in law and fact by holding that appellants were not beneficiaries to deceased estate to take share of their parents who were children of deceased and also deceased.



3. That the honourable magistrate erred in law and fact by holding the principle of representation where a beneficiary had died was inapplicable in succession proceedings.”

11. In its ruling of April 9, 2021, the trial court (Tito Gesora, CM) held as follows:-

“In my view, the resolution of this matter rests on the issue of dependency and right to succeed.

The net estate devolves to surviving children equally by virtue of section 38 of the Law of Succession Act cap 160 subject to section 41 [which] provides that the people whom the net estate devolve to and for whom it is to be held in trust are male children who haven't attained the age 18 or female children of the deceased who marry before the age of 18 and the share of a child who has children and who predeceases the deceased. The applicants have brought the application on the ground that they are children of the deceased daughter but a look at the dates of the death of their mother and grandfather respectively show that the deceased only died on 15/3/2010 and January 1, 2020 therefore their mother did not predecease her father. They are therefore out of the purview of section 41 of the Law of Succession Act in case of the 1st applicant.”

12. Section 41 of the *Law of Succession Act* is in the following terms:-

“Property devolving upon child to be held in trust

Where reference is made in this Act to the "net intestate estate", or the residue thereof, devolving upon a child or children, the property comprised therein shall be held in trust, in equal shares in the case of more than one child, for all or any of the children of the intestate who attain the age of eighteen years or who, being female, marry under that age, and for all or any of the issue of any child of the intestate who predecease him and who attain that age or so marry, in which case the issue shall take through degrees, in equal shares, the share which their parent would have taken had he not predeceased the intestate.”

13. It is clear from the ruling of the trial court on the background of the provision of section 41 of the *Law of Succession Act* that the court has made a profound statement of law on the matter, which is of great public importance whose impact transcends the parties and situation before the trial court.

14. The review and determination by high court on appeal in this court on first appeal and court on first appeal and thereafter the court of appeal on 2nd application is crucial for the final settlement of the issue of the right of children of deceased heirs of a deceased to inherit him,

15. The court shall therefore grant the extension of time to appeal because although there has been a delay of three and half months, the same is not inordinate and the public importance in the settlement of the question of right of inheritance of children of deceased children of a deceased person whose estate is subject of the succession proceedings; and no prejudice on the respondent which cannot be compensated by costs has been shown. The court shall make an order for leave to appeal to be paid by the applicant to the respondent, to be assessed by consent or taxed in default of agreement.

16. On the application for stay of execution the applicant is required to demonstrate substantial loss. The security for the due performance of the decree is guaranteed by the very fact of estate asset remaining in the name of the deceased and therefore available to the successful suitor. The court should not suffer an injustice on an appellant occasioned by the action of the respondent in the meantime before the



hearing and determination by the intended appeal. This is the principal that a valid appeal should not be rendered nugatory by refusal to grant stay of execution of the judgment or order appealed from pending hearing and determination of the appeal.

17. Although the applicants may not be in occupation or possession of the suit land, execution of the trial courts' order for the distribution of the estate without a share for the applicants may put the estate asset out of reach of the applicants should they eventually be decreed to be entitled to inherit the shares of their deceased parents heirs of the deceased whose estate is subject of the succession proceedings before the trial court.

Orders

18. Accordingly, for the reason set out above, the court grants the applicants application dated November 15, 2021 upon terms that:
1. The applicant shall file their memorandum of appeal within 7 days and the record of appeal within 21 days from the date hereof.
 - 2) There shall be stay of execution of the ruling of the trial court of 9/4/2021.
 - 3) The applicant shall pay costs of application to the respondent, to be agreed or taxed in default of agreement.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER, 2022.

EDWARD M. MURIITHI

JUDGE

APPEARANCES:

M/S Mutembei & Kimathi Advocates for the Applicants.

M/S Nkunja & Co. Advocates for the Respondent.

