



**Obala aka Obala Ombiro v Oluoch (Miscellaneous Civil Application  
E020 of 2022) [2022] KEHC 14210 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14210 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E020 OF 2022  
RE ABURILI, J  
OCTOBER 24, 2022**

**BETWEEN**

**ZAKAYO OBALA AKA OBALA OMBIRO ..... APPLICANT**

**AND**

**ARTHUR OOKO OLUOCH ..... RESPONDENT**

**RULING**

**The Application**

1. The applicant is Zakayo Obala aka Obala Ombiro while the Respondent is Arthur Ooko Oluoch. The applicant vide his Notice of Motion dated 1<sup>st</sup> August 2022 and filed on 2/8/2022 during the recess, seeks from this court orders that he be granted leave of this court to appeal out of time against the whole judgment of Hon. L.N. Sarapai, Principal Magistrate delivered at Ukwala Law Courts on 10/3/2022 in Ukwala PM Succession Cause No. 232 of 2018 and that the draft Memorandum of Appeal annexed be deemed to be filed upon payment of the requisite court filing fees. He also prays that costs of the application be in the cause.
2. The grounds upon which the application is predicated are that the impugned Ruling was delivered on 10/3/2022 and that the time allowed to file an appeal has lapsed. That circumstances have since arisen that have necessitated the filing of an appeal against the decision of the trial court and that the intended appeal is arguable and has high chances of success. The applicant also claims that the Respondent is unlikely to suffer any prejudice or if any that may not be compensated by way of costs upon determination of the intended appeal.
3. In addition, it was asserted that this court has unfettered discretion in granting leave to file an appeal out of time and finally, that it is in the interest of justice that this motion be allowed as prayed.
4. The application is further supported by an affidavit sworn by the applicant on 1<sup>st</sup> August 2022 wherein he deposes that he was the Objector in Ukwala PM Succession Cause No. 24 of 2016. That on



10/3/2022 the said court issued orders that the Respondent be allowed to administer 1/4 of land Parcel No. Ugenya/Simenya/289 as shown by annexed copy of the impugned order; that the said order would render the applicant and his family homeless and landless.

5. The applicant further claims that the deceased Timothy Oluoch Ombiro was never the rightful owner of or the proprietor of Land Parcel No. South Ugenya/Simenya/289; that the said land was owned by Omira Ogwindi & James Oduor Ogwindi, the applicants' Late father and the brother respectively; that Timothy Oluoch Ombiro was entitled to the property located at Rangala and not the suit property located in Simenya.
6. That the suit land has been developed and occupied by the family of James Oduor Ogwindi, Ombiro Ogwindi and the applicant together with the family of Oluo and Ombiro. That this court should allow the property to remain as it is on the ground and that there should be no permanent demolition of the already built homes.
7. The applicant further deposes that the grant was obtained fraudulently and through non-disclosure of material facts; and that the Respondent is using the fraudulently obtained grant with malicious intention of demolishing the applicant's home and that of his children.
8. The applicant reiterated the grounds and annexed a draft Memorandum of appeal which he stated that it has high chances of success.

### **The Respondent's Case**

9. Opposing the application by the applicant, the Respondent represented by Mr. Ooro Edwin Michael advocate filed a replying affidavit giving very detailed history of this matter and urging this court to dismiss the application with costs.
10. According to the Respondent, in his deposition, the Notice of motion is incurably and fatally defective and amenable to striking out as it is alien to the law governing succession.
11. The Respondent deposes in contention that the application is brought in bad faith and meant to deny the applicant the benefit of enjoying the fruits of litigation. That the applicant is guilty of laches with no reasonable explanation for the delay.
12. That the ¼ of Land of the Parcel No. S. Ugenya/Simenya/289 legally belongs to the estate of Timothy Oluoch Ombiro, his father who was one of the common registered properties of the said parcel, a quarter portion thereof as shown by the copy of the adjudication records duly signed by the applicant and the Green Card of the said land hence the applicant is lying to this court in his deposition that Timothy Oluoch Ombiro has never been the proprietor of the subject parcel of land hence his intended appeal is hopeless.
13. That the applicant and Timothy Oluoch Ombiro are biological brothers hence the Respondent is entitled to his late father's portion and as such, the applicant's family cannot be rendered homeless.
14. Further, that the applicant had encouraged his children to intermeddle with the subject estate by constructing on the land that never belonged to them, while engaging the Respondent in a long winding litigation hence the applicant lacks the legal and moral authority to lament that the Respondent intends to evict his family from the property.
15. That the applicant not being a beneficiary of the estate of the Respondent's father, he cannot inherit the same. That if the applicant's claim is that the Respondent's father should not have been registered as the proprietor of the disputed land / portion then he should lodge his claim before the Environment



& Land Court and not this court which is a succession court which is only concerned with distribution of the estate and free property of a deceased.

16. That when the respondent and his siblings approached the applicant, following the demise of Timothy Oluoch Ombiro, seeking to have the subject land shared between the 2 families, the applicant declined, leading to the Respondent's elder brother Philip Noel Otieno to file a Land Dispute before the Land Tribunal vide Siaya LDT Case No. 109/2007 which tribunal found that all the registered proprietors were entitled to ¼ share of the said parcel, and advised that succession be undertaken as all the other proprietors were dead except the applicant herein.
17. That the applicant herein who was the Respondent in the LDT case filed an appeal vide Nyanza Appeals Committee Case No. 92/2008 which appeal was dismissed as shown by the annexed copy of the decision which was adopted vide Siaya PM Land case No. 57/2008 as an order of the court on 19/12/2012 after which the succession proceedings were initiated at Ukwala PM Succession Cause No. 24/2016 the subject of these proceedings, following citation proceedings filed against the widows of the deceased co-owners.
18. That the applicant has been a vexatious litigant who has at all times opposed the legal processes followed by the Respondent to have the latter's father's estate administered as shown by the other pending proceedings vide HCCA No. E40/2021.

#### **Applicant's Submissions**

19. The application was argued orally with Mr. Okello advocate submitting on behalf of the applicant and relying on the grounds and supporting affidavit filed on 2/8/2022. He relied on the case of *Nicholas Kiptoo Arap Kori Vs EIBC* [2013]eKLR where the Supreme Court laid out the principles to be taken into account in the consideration of an application for leave to appeal out of time. He submitted that the test is the length of the duration of the delay as it is in the discretion of the court to grant leave to appeal out of time. Further, that in this case there is no inordinate delay as the impugned ruling was rendered on 10/3/2022 and the application was filed in August 2022. That the delay was due to the age of the applicant who is 100 years old and immobile and counsel had to link up with the applicant's son residing in Nairobi. That the applicant has unavoidable senility hence communication is difficult.
20. That the applicant has an arguable appeal with chances of succeeding; that land is emotive hence the applicant should be accorded an opportunity to be heard on the land he has lived on for over 100 years and he is ready to pay costs of the application if it is allowed.

#### **Respondent's Submissions**

21. Opposing the application, Mr. Ooro advocate for the Respondent submitted relying on the Replying affidavit sworn by the Respondent on 4/10/2022 and arguing that the application lacks merit because it has been filed after an inordinate delay; that the impugned decision having been rendered on 10/3/2022 yet there is no explanation on oath detailing the reasons for the delay. It is also submitted that the intended appeal has no chances of success and that it is an exercise in futility because the deceased was a common and registered owner of the land in question as per the annexed adjudication register yet the applicant lays claim to the estate property by alleging that he is the sole owner thereof which is a big lie.
22. Further submissions by Mr. Ooro were that proceedings conducted vide Siaya LDT No. 109/2007 affirmed the Respondent's position and that an appeal by the applicant to the Nyanza Land Appeals Committee vide Appeal No. 92/2008 as adopted vide Siaya Land case No. 57/2008 which decision remains unchallenged dismissed the applicant's claim.



23. Counsel for the Respondent submitted that the applicant should lay his claim on ownership of the land, if any, to the Environment & Land Court and not this court as his ¼ share remains intact hence the intended appeal seeks to deny the Respondent the fruits of his judgment. That the applicant having signed the Adjudication Register on 10/12/1970, his purported powers to distribute the estate ended since shares were divided to each person who became a co-owner. Counsel urged this court to dismiss this application with costs.
24. In a brief rejoinder, Mr. Okello advocate for the applicant submitted that the Respondent will suffer no loss if the application is allowed and that the issue of old age was in the applicant's affidavit and that the law is clear that an arguable appeal is not necessarily one that must succeed hence this court should grant the orders sought.

### **Determination**

25. I have considered the application for leave to appeal of time, the grounds and supporting Affidavit together with the Replying affidavit as well as the oral submissions by both counsel for the parties.
26. In my view, the main and sole issue for determination is whether the application is merited. There are other questions which this court will resolve in answering the above issue.
27. The application herein was brought under the provisions of Section 79G of the *Civil Procedure Act*. That is a soft-landing provision in respect of appeals generally. However, the relevant provision for appeals in Succession orders or decrees from the Magistrates' Court to the High Court is Section 50(1) of the *Law of Succession Act* which provides that:

“ 50

- (1) An appeal 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 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.”

28. The only limitation is that section 50 of the *Law of Succession Act* does not stipulate the timelines within which an appeal from the Magistrate's Court to the High Court should be filed. It is for that reason that Section 79G of the *Civil Procedure Act* comes in to fill the gap. That section provides that:

79G. “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 copy of the decree of 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.”

29. The decision on whether not to grant leave to file an appeal out of time or to admit an appeal whose time for filing of the same has lapsed is an exercise of judicial discretion. That discretion, like all other



judicial discretions, must be exercised judiciously and based on principles which are established over time, not on the basis of mercy, benevolence or private opinions. The discretion must not be exercised in an arbitrary, whimsical or capricious manner. The discretion must be exercised on the basis of evidence and sound legal principles.

30. In the *First American Bank of Kenya Ltd Vs Gulab P. Shah & 2 Others* [2002] EA 65, the court set out factors to be considered in deciding whether or not to grant leave to appeal out of time as follows:
- i. the explanation if any, for the delay;
  - ii. the merits of the contemplated action; whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
  - iii. whether or not the Respondent can adequately be compensated in costs for prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.
31. The above principles were reiterated in *Edith Gichugu Koine v Stephen Njagi Thoitbi* [2014]eKLR where the Court of Appeal set out the principles guiding an application for leave to file an appeal out of time and stated that:
- “Nonetheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the Respondent if the application is granted and whether the matter raises issues of public importance, amongst others.”
32. Earlier on in *Leo Sila Mutiso Vs Hellen Wangari Mwangi* [1992]2 EA 231, The Court of Appeal spoke to the same principles as the ones stated above adding that the applicant must also demonstrate the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable are deserving a day in court or whether it is a frivolous one which would only result in the delay of the cause of justice, and fourthly, the degree of the prejudice to the Respondent if the application is granted and whether or not the respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion for the applicant.
33. In *Kenya Commercial Bank Ltd vs Nicholas Ombija* [2009]eKLR, it was held that an arguable appeal is not necessarily one that must succeed but one which ought to be argued fully before the court; and one which is not a frivolous case. See *Stanley Kangethe Kinyanjui V Tonny Ketter & 5 Others* [2013]eKLR.
34. In the Nicholas Salat case (*supra*) cited in various other decisions including *County Executive Kisumu Vs County Government of Kisumu & 7 Others* CA. No.3 of 2016, the Supreme court stated as follows:
- “23. It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as the under-lying principles that a Court should consider in exercise of such discretion:
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

35. Applying all the above principles to this case, and commencing with the question of delay, the decision in the lower court was made on 10.3.2022. This application was filed on 2/8/2022 which was 8 days short of 5 months.
36. The applicant even annexed an extract copy of the order which he intends to appeal against. He never annexed any evidence of applying for proceedings and ruling and the lower court failing to supply him the same within reasonable time.
37. In the grounds and supporting affidavit, the applicant simply claims that circumstances have arisen that have necessitated the filing of an appeal against the decisions of the trial court, and that the intended appeal has high chances of success. He does not substantiate what those circumstances that have arisen are. In addition, he makes no mention of the reasons why there is delay of nearly five months in filing this application.
38. The applicant’s counsel in the oral submissions attempted to explain the delay from the bar to the effect that the applicant is over 100 years old and that his son who lives in Nairobi had to be contacted because the applicant is undergoing the inevitable senility hence communication is difficult. That may be so, but then, if the applicant is undergoing the unavoidable senility due to old age and this court thanks God for elongating his life, the question is whether he was in a state of mind as to give instructions for filing of this application or to even swear the affidavit, or discover any new circumstances that would make him realize, nearly 5 months after the ruling of the court below that he ought to challenge that ruling.
39. The other question is, could the applicant’s adult children not have sought leave to be involved in the proceedings as guardians ad litem for the applicant? That is a question that cannot be answered here. However, it is obvious that the delay of 5 months is inordinate and is not explained at all to the satisfaction of this court.
40. On the degree of prejudice to the Respondent if the orders sought are granted, the applicant has deposed and his counsel has argued that the applicant’s family will be rendered homeless and landless unless the orders are granted and he is allowed to appeal.
41. Further, that land is an emotive matter and that the Respondent will not suffer any prejudice in any way since the land belonged to the applicant’s late father Omira Ogwindi and James Oduor Ogwindi, the latter being the applicant’s late brother. He claims that his intended appeal has high chances of success. He asserts that the Respondent herein is entitled to land situated at Simenya not the one subject of



the succession cause, South Ugenya/Simenya/289 which is developed and occupied by the applicant's family and that the families of Oluo and Ombiro.

42. Further that the Respondent obtained the grant fraudulently.
43. On the part of the Respondent, he has sworn a very detailed affidavit whose contents have been reiterated by his advocate in submissions that the applicant's intended appeal is frivolous and that it has no chances of success and that it is merely intended to deny the Respondent fruits of his judgment as the issues in question have been litigated upon by the applicant herein unsuccessfully and that his allegations that the land belonged to his father and brother is a lie since the adjudication register gives the shares of each co-registered owner. Further, that the applicant's family have their ¼ share of the estate in the subject parcel of land intact.
44. Determining this question of the prejudice that the Respondent is likely to suffer if the orders sought are granted requires that the court simultaneously considers whether the applicant shall suffer any prejudice if the orders sought are denied and whether the intended appeal is frivolous or a sham or is likely to succeed so that the applicant should not be denied his day in court as contemplated in Article 50(1) of the *Constitution* as read with Article 48 on the right to a fair hearing and to access justice.
45. I have carefully considered the affidavits and arguments by both parties as stated above. On the affidavit there are supporting annexures. I observe that the parties hereto have battled one another in court for quite a while over the estate of the deceased James Oduor Ogwindi, and Omira Ogwindi.
46. I further observe that from copy of the Adjudication Register and the Green Card or Certified Copy of the register annexed, which was opened on 23.1.1973, the land in dispute is South Ugenya/Simenya/289 and is registered in the block in the names of Timothy Oluoch Ombiro, Obala Ombiro, James Ogwidi and Omira Ogwidi, with each co-owner having ¼ share of the said parcel of land. Vide LDT case No. 109/2007 it was held that the family members of the deceased should apply for grant before subdivision of the said land. That decision was appealed against unsuccessfully in the Appeals Committee case No. 92/2008 which was adopted as the judgment of the court on 19/11/2012 vide Land case at Siaya SPM's court LC 57/2008.
47. It follows that if the applicant does not believe in the adjudication register or the certified copy of the Register and wants to lay claim on the entire parcel of land as opposed to the ¼ share registered in his father's name, then he must approach the Environment & Land Court for adjudication of his dispute which dispute was nonetheless settled by the Land Disputes Tribunal. He cannot purport to claim that the Respondent who simply filed succession proceedings in respect of his late father's share, did so fraudulently. The applicant has not demonstrated before the trial court and before this court any legitimate lawful beneficial interest that he claims he has over the disputed portion which the Respondent has petitioned for a grant to administer.
48. In my humble view, although the applicant has been very persistent in challenging the Respondent on the question of the subject portion of land, it is not how persistent one is in claiming for what is not legally theirs that makes such litigant entitled to the claim. I find the applicant to be vexing the Respondent yet he has no known lawful claim against the Respondent.
49. I find the intended appeal is a sham and frivolous. It is intended to vex the Respondent and his family. I find this application and incessant claims by the applicant to be brought in bad faith and seeking to abuse the process of this court with a multiplicity of unsubstantiated claims which are not actionable or supported by any facts or law.
50. This court will therefore not permit such application which has no substance even if the applicant was to be granted leave to appeal, to progress to the next level, to merely vex the adverse party in an



intended appeal that has absolutely no chance of success and it would therefore be vain and unjust to grant the orders sought.

51. I find this application be absolutely frivolous and vexatious and an abuse of court process. The intended appeal is merely intended to add to the list of cases in court yet it has no head or tail. I decline it and dismiss it.
52. As parties are family members despite the vexatiousness of the applicant, I will excuse him for now from payment of costs which the Respondent deserved, in the hope that the applicant will settle with what is rightly and lawfully belonging to him and his family and not to shout loudest in the hope that his empty loud noise in this court will attract sympathy or benevolence.
53. Each party to bear their own costs.
54. I so order and this file is therefore marked as closed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022**

**R.E. ABURILI**

**JUDGE**

