



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISUMU**

**SUCCESSION CAUSE NO. 649 OF 2011**

**IN THE MATTER OF THE ESTATE OF THE LATE ALBERT ODONGO ODHUNO (DECEASED)**

**ISDORA ANYANGO OWUOR.....OBJECTOR/RESPONDENT**

**VERSUS**

**ZACHARY OMONDI ODONGO.....ADMINISTRATOR/APPLICANT**

**RULING**

The application dated 23<sup>rd</sup> April 2021 was for the following substantive reliefs;

***“4. THAT the Honourable Court be pleased to extend time for the applicant to file the application for leave to appeal out of time.***

***5. THAT upon grant of an order for extension of time in prayer 3 above, the applicant be granted leave to appeal to the Court of Appeal out of time, against the judgement of the Honourable Court delivered on 9<sup>th</sup> March 2017 and that the Notice of Appeal filed on 6<sup>th</sup> April 2017 be deemed properly filed and served upon grant of such leave.***

***6. THAT an order of stay of execution of the Order in the suit herein be granted pending the inter partes hearing of this application.***

***7. THAT an order of stay of execution of the Order in the suit herein be granted pending the hearing and determination of the intended appeal to the Court of Appeal.”***

1. The background to the application was that on 9<sup>th</sup> March 2017, Hon. Lady Justice E. Maina delivered a Judgment. By the said judgment, the learned Judge upheld the Objector’s case, and directed the Land Registrar Siaya District to rectify the Register, so that the land which was the subject matter in issue before the Court would vest in the Objector.

2. The land in question is **L.R. NO. SOUTH UGENYA/YIRO/ xxx**.

3. Prior to the judgment, the property was registered in the name of the Applicant.

4. Following the judgment, the Applicant felt aggrieved and instructed his advocates to lodge an appeal to the Court of Appeal.

5. The Applicant has informed this Court that, pursuant to his instructions, the advocate lodged a Notice of Appeal on 6<sup>th</sup> April 2017. Thereafter, the said advocates lodged the Record of Appeal on 23<sup>rd</sup> May 2017.

6. By his supporting affidavit, the Applicant informed the Court that the advocate who was then representing him, fell ill in the year 2018. According to the Applicant, the advocate succumbed to his illness in March 2020, after being in the Intensive Care Unit for a period of 4 months.

7. The Applicant attributes the delay in this matter, to the ailment of his former advocates. He said that due to the said ailment, the advocate was unable to offer sound advice.

8. But the Respondent submitted that the delay in moving the Court was inordinate. The Respondent noted that the alleged ailment of the Applicant's former advocate cannot be an explanation for the delay of 5 years.

9. On the question concerning delay, the Respondent quoted the following words of Lord Denning in ALLEN Vs ALFRED MC ALPINE & SONS [1968]EWCA 1;

*“The delay of justice is a denial*

*of justice .....*

*To no one will we deny or delay*

*right to justice. All through the*

*years, men have protested at the*

*law's delay and counted it as*

*grievous wrong, hard to bear.”*

10. In that case the Court held that when there had been a prolonged delay, which was inexcusable, there was a substantial risk that a fair trial may no longer be possible or that a grave injustice may be done to one party or the other or to both parties.

11. I fully concur that when there has been inordinate delay, and if there was no credible excuse for such delay, parties may fail to get a fair trial because memories fade with time.

12. Expedition in the conduct of cases must be encouraged; and that therefore implies that the Courts will frown upon indolence in the preparation and prosecution of cases.

13. However, the Courts always bear in mind the need to balance between expedition and the deprivation of a right to be heard.

14. Effectively therefore, each case must be determined on its own facts and circumstances.

15. In my considered opinion, that means that the considerations in respect to a case which is yet to go through trial, may be somewhat different from a case which has reached the stage of appeal. I so hold because at the appellate stage, there are no testimonies by witnesses, and therefore there was no risk that the memories of witnesses could fade because of delays in hearing the appeal. At the appellate stage, the parties and the Court delve into the record of the proceedings from the trial Court.

16. Nonetheless, the issue of delay remains one of the key ingredients to be taken into account when determining whether or not to extend the time for lodging an appeal.

17. In the case of ABDUL AZIZ NGOMA Vs MUNGAI MATHAYO & ANOTHER, CIVIL APPEAL NO. 55 OF 1975, the Court of Appeal held that;

*“..... this court's discretion to extend*

*time under rule 14 only comes into*

*existence after 'sufficient reason' for*

*extending time has been established*

*and it is only then that other*

*considerations such as the absence*

*of prejudice and the prospects or*

*otherwise of success in the appeal*

*can be considered.”*

18. To my mind, that decision of the Court of Appeal is significant because it does appear that the Respondent before me has focused primarily on the question regarding the efficacy of the substance of the appeal.

19. Whether or not an appeal would have overwhelming chances of success, or the converse, cannot be the main factor in determining when to grant or to reject a request for leave to appeal out of time.
20. Indeed, when, (as in this case) the appeal is from the decision of another Judge of the High Court, or even if it were to arise from my own decision, I find that it would be imprudent to ask that I assess the strength or the weakness of the intended appeal.
21. My view is that every time when a Court makes a determination, it has good reasons for believing that the said determination is correct. If the Court were to deliver a verdict which it did not have confidence in, that would constitute a serious travesty of justice.
22. In determining the application before me, I will therefore refrain from rendering my opinion on the strengths or weaknesses of the intended appeal, as the said intended appeal emanates from a Court of concurrent jurisdiction.
23. I will now revert to the specific circumstances of the matter before me.
24. First, I find that the Applicant's previous advocate was not sick for a period of 4 months only, as stated by the Respondent. At paragraph 11 of the supporting affidavit, the Applicant said that the advocate fell ill in 2018.
25. When the Applicant made reference to the period of 4 months, it is clear from his affidavit that that is the time which the Applicant's former advocate spent in the Intensive Care Unit.
26. I hold the considered view that when the advocate was ailing, as indicated, he was unlikely to be in a position to provide appropriate advice to the Applicant. Furthermore, the advocate would have been unlikely to take further steps in the matter.
27. Accordingly, the failure to take appropriate action between 2018 and March 2020, (when the advocate succumbed to his ailment) has been satisfactorily explained by the Applicant. It was not due to the indolence of the Applicant, that there was a delay.
28. If anything, the Applicant had given instructions to his advocates; and the said advocates had taken action, by filing the Notice of Appeal and the Record of Appeal.
29. However, the Applicant's advocates appear to have been oblivious to the provisions of **Section 7** of the **Appellate Jurisdiction Act**.
30. In **RHODA WAIRIMU KARANJA & ANOTHER Vs MARY WANGUI KARANJA & ANOTHER [2014]eKLR**, the Court of Appeal held as follows;

*“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction, with leave of the High Court or where the application for leave is refused, with leave of this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration.*”

*We think this is a good practice*

*that ought to be retained in order*

*to promote finality and expedition*

*in the determination of probate and*

*administration disputes.”*

31. In this case the Applicant had filed both a Notice of Appeal and a Record of Appeal. However, the error lay in the failure to obtain leave to appeal.

32. On the question concerning law, it is the Applicant's advocates who should have provided guidance. I would not expect the Applicant to instruct his advocate to seek leave to appeal.

33. Therefore, once the former advocate had filed the Notice of Appeal and the Record of Appeal, I find that the Applicant was entitled to believe that appropriate action had been taken to appeal.

34. It was not until the former advocate had passed away that the Applicant sought and engaged another advocate. And it is only then that reality dawned upon the Applicant, that he did not actually have an appeal in place.

35. In the circumstances, the explanation provided by the Applicant is satisfactory and reasonable.

36. I also find that there appear to be grounds which merit serious judicial consideration in the intended appeal. In particular, the existence of a decision by the Environment and Land Court in ELC CASE NO. 681 OF 2015, ZACHARY OMONDI ODONGO Vs KENYA COMMERCIAL BANK AND JOASH ONYANGO NYIERO gives rise to the question concerning the ownership of **L.R. NO. SOUTH UGENYA/YIRO/xxx**.

37. On 29<sup>th</sup> June 2016, Kibunja J. ordered, inter alia, that the Land Registrar, Siaya District shall rectify the title of that property by replacing the name of Joash Onyango Nyiero with that of the late Albert Odongo Odhuno.

38. On 9<sup>th</sup> March 2017, E. N. Maina J. delivered the judgment in this case, and directed that **L.R. NO. SOUTH UGENYA/ YIRO/xxx** be vested in the Applicant, Joash Onyango Nyiero.

39. To my mind, there is a need to resolve the apparent inconsistency between the decisions of the two learned Judges, so that the parties may know what the final position is.

40. I therefore grant leave to the Applicant to file the intended appeal out of time. The said appeal shall be filed within the next **SEVEN (7) DAYS**.

41. In order to conserve the subject matter of the intended appeal, I order that there shall be a stay of execution until the appeal is determined.

42. In order to further conserve the said subject matter, so that none of the parties can be prejudiced, I order that there shall be no dealings with the said property until the appeal is determined. Without prejudice to the generality of this order, I categorically order that none of the parties shall do anything with the title of the suit property which could result in any encumbrance, transfer or disposal of the said property.

43. Although the application is successful, I order that each party will meet his or her own costs thereof. I so order because the need for the application arose from a fault for which the Respondent cannot be held responsible. The error made by the Applicant's former advocates is what gave rise to the need for this application. The said advocate is deceased. Therefore, the Applicant cannot fall back against the said former advocate.

44. For those reasons, I reiterate that each party will meet his or her own costs of the application.

**DATED, SIGNED AT DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF OCTOBER 2021**

**FRED A. OCHIENG**

**JUDGE**