



Yunus (Suing for and on behalf of the Estate of Alima Mbalalo Mathembe) v Kitetu (Environment and Land Miscellaneous Application 9 of 2023) [2023] KEELC 21637 (KLR) (14 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21637 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 9 OF 2023
LG KIMANI, J
NOVEMBER 14, 2023

BETWEEN

RUKIA SAID YUNUS APPLICANT
SUING FOR AND ON BEHALF OF THE ESTATE OF ALIMA MBALALO
MATHEMBE

AND

JOSEPH KITETU RESPONDENT

RULING

1. The applicant brings the application dated 22nd May 2023 seeking the following orders:
 1. That the proposed Appellant be granted leave to appeal out of time against the whole judgment of the Hon. S. Mbungi Chief Magistrate delivered on 28th October 2022 at Kitui.
 2. That this appeal do operate as a stay of execution of the judgment and decree of the Honourable Court pending hearing and determination of this appeal.
 3. That the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served.
 4. That the costs of this application be provided for.
2. The application is founded on the grounds that the judgment of the trial court was delivered on 28th October 2022 in the absence of the parties as the family was still grieving the death of the Plaintiff and the same dates were not communicated by the advocate on record. The Applicant realized that there was a judgment against the Plaintiff in January 2023, when the time of appeal had lapsed and immediately instructed an advocate to file for a Petition for letters of administration ad litem. Another



reason for the delay was given that the family had been experiencing financial constraints in raising legal fees to retain an advocate.

3. In her supporting affidavit, the Applicant deposed that they only knew that the judgment was delivered in January 2023, and by the time she and her family could come to terms with the death of their mother and raise money to sufficiently instruct an advocate, the time allowed to file an appeal had run out.
4. She deposed that she is aggrieved and dissatisfied with the said judgment and has instructed her advocate on record to appeal against the same and that the court has the power to enlarge the time within which to file the appeal. She stated that the delay is not so inordinate as to be inexcusable and has annexed the intended memorandum of appeal.

The Respondent's response

5. Counsel for the Respondent filed a Notice of Preliminary Objection dated 8th of July 2023 on the point that:
 1. The applicant is non-suited and lacks the *locus standi* to institute the application.
6. The Respondent also filed Grounds of Opposition dated 8th July 2023 on the following grounds:
 1. The application is a non-starter as the applicant is non-suited.
 2. The applicant was not a party in the lower court as such cannot appeal in the cause of other parties.
 3. There is no sufficient cause to show why the appeal was not lodged in time.
 4. The application should be dismissed with costs.
7. The respondent filed a replying affidavit sworn on 25th September 2023 where he stated that the suit land belongs to him absolutely and neither the deceased nor the applicant herein has ever lived on it.
8. He stated that in the course of the primary suit, Kitui CMCC 229 of 2013 the deceased had appointed one Rammah Said Yunis and later Rukia Said Yunis to be her recognized agent in respect of the said suit only and that the applicant has not been appointed agent for the appeal herein.
9. The respondent opposed the application on the ground that the grant relied on was issued to two persons yet only one administrator has brought the application herein. He also stated that the applicant has not sought substitution in the primary suit.

The Applicants' submissions

10. Counsel for the Applicant submitted that the Applicant has had control and possession of the suit land Kyangwithya/Tungutu/1169 where she has constructed a permanent house and has been cultivating on the suit land from the year 1986. It is her averment that the Defendant/Respondent fraudulently procured title for the aforementioned property and has been cutting down family-treasured and grown trees.
11. She therefore submits that she is bound to suffer irreparable loss and damage if the honourable Court does not allow the appeal and stay of execution out of time.
12. The Applicant also urges the Court to note that the judgment was delivered in open court without notice to the parties. It was on January 2023 when they learnt about the judgment and without delay instructed an advocate to file for letters of administration ad litem and later this application to file out of time.



13. The Applicant's submission is that the delay was not inordinate and relied on the case of *Aviation Cargo Ltd v St. March Freight Services Ltd* (2014) eKLR. She submits that there is no indication by the Respondent that he shall suffer any prejudice by the court in allowing this application.

Respondent's submissions

14. Counsel for the Respondent submitted that the applicant has not met the threshold for grant of leave to appeal out of time as envisaged under Section 79G of the *Civil Procedure Act*.
15. He also noted that the annexed Grant ad litem shows that two people were appointed as temporary administrators to the estate of the deceased but the instant application is only preferred by one of them without the consent of the other.
16. It was also submitted that the Applicant has not sought to be substituted in the primary suit before moving the court in the instant suit. They also note that the averment that the applicant lives on the suit land does not appear in the application or the supporting affidavit thereto and there is no evidence of the land's existence and status.
17. The Respondent's submission therefore is that the entire application is bad in law and devoid of any merits and should therefore be dismissed with costs to him.

Analysis and Determination

18. The applicant claims that the judgment at the Magistrates' Court was delivered on 28th October 2022 in the absence of the parties as the family was still grieving the death of the Plaintiff and the same dates were not communicated by the advocate on records. The Applicant states that they realized that there was a judgment against the Plaintiff in January 2023 when the time for filing an appeal had lapsed and immediately instructed an advocate to file a Petition for letters of administration ad litem. Another reason for the delay was that the family had been experiencing financial constraints in raising legal fees to retain an advocate.
19. The limited grant of letters ad litem was granted on the 12th of January 2023, when the Applicant stated that she learnt of the delivered judgment.
20. The Applicant has based his application on Section 79G and Section 95 of the *Civil Procedure Act*. Section 79 G provides that:
- “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 a copy of the decree or 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.”
21. Section 95 of the *Civil Procedure Act* provides that:
- “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”



22. Counsel for the Applicant relied on the case of *Aviation Cargo Support Limited v St. Mark Freight Services Limited* [2014] eKLR where the court held that:

“The order whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek an extension of time or leave to file out of time.”

23. The preliminary objection and grounds of opposition filed by the respondent state that the applicant has not sought to be substituted as a party in the suit before the trial court and therefore she has no locus standi to make the present application.

24. In the case of *Kipngetch Kalya Kones (Suing as the Administrator of the estate of Kipkalya Kiprono Kones (deceased) v Wilson Kiplangat Kones* [2021]e KLR the Court found that:

“The issue on locus standi is a primary point of law almost similar to that of jurisdiction and since the Plaintiff/Respondent was not an administrator to the deceased’s estate herein, he lacked the capacity to sue on behalf of the deceased’s estate which renders the suit incompetent. Indeed, the Court of Appeal authoritatively delivered itself on the issue of locus standi in *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another* (1982-99) 1 KAR, *Morjaria v Abdalla* [1984] KLR 490 and in *Trouistik Union International* (supra) to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.”

25. Order 24 Rule 3(1) of the Civil Procedure Rules, 2010 provides as follows:

“Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.”

26. The applicant seeks to appeal the decision of the trial court Hon S Mbungi in Kitui CMLC No 229 of 2013 and no application for substitution of the deceased has been made before the trial court. It is noted that the applicant did not address this objection during submissions. The said objection goes to the heart of this application.

27. Order 24 Rule 10 of the Civil Procedure Rules provides an exception to the requirement for substitution and it exempts execution proceedings and states that;

“Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”



28. This was confirmed by Alnashir Visram J (as he then was) stated concerning applications for substitution of a deceased person at the execution of decree stage in a suit in *Agnes Wanjiku Wang'onde V Uchumi Supermarket Ltd* [2008] eKLR.

Shailendranath Ghosh v Surendranath De (1934) I.L.R. 13 Pat. P. 777 *Khaja Mohamed Noor J.* says at p. 780:

“No doubt, there is no express provision for substitution of the name of a representative of the deceased decree holder during the pendency of the execution proceedings but, as is apparent from a number of cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII r. 12 read with rules 3 and 4 that an execution proceeding does not abate on the death of the decree holder. If so, there is no bar to the execution continuing at the instance of his representative.”

29. Order 24, rule 9 of the Civil Procedure Rules provides for the Application of Order 24 to appeals and states that;

“In the application of this Order to appeals, so far as may be, the word “plaintiff” shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.”

30. The court’s interpretation of the above provisions of the law is that the suit before the trial court was heard and determined and the only issue that remains in the said suit is execution. Order 24 Rule 10 renders unnecessary an application for substitution of a deceased person in execution proceedings. In the court’s view, the current application made by the administrator of the estate of the deceased is not even an execution proceeding but a new proceeding. The respondent did not cite any law that requires substitution where new proceedings commence.

31. Order 24 Rule 1 of the Civil Procedure Rules provides that a suit does not abate in the event of a party’s death if the right survives. In the court’s view, this rule presupposes that the suit or appeal referred to was commenced by the plaintiff or the appeal was commenced by the appellant and the said party dies while the suit or appeal is pending. The rule states that;

“The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”

32. In the court’s view, the administrator did not have to apply for substitution before the trial court in order for her to proceed with the current application.

33. Concerning the objection that the letters of administration were issued to two administrators and the application was filed by one administrator, the respondent has not cited any provision of the law to show that the filing of the current application violates the law. The court finds nothing wrong with the administrator’s action.

34. On the merits of the prayer for an extension of time to file the appeal against the whole judgment of the Hon. S. Mbungi Chief Magistrate delivered on 28th October 2022, the court has considered the reasons given for the delay being that the family was mourning the death of their kin who died on 23rd June 2022. The applicant claims that judgment was delivered on 28th October 2022 in the absence of the parties and the same was not communicated by the advocate on record. She states that they realized that there was a judgment against the plaintiff in January 2023 when the time for filing an appeal had lapsed



and immediately instructed an advocate to file a Petition for letters of administration ad litem. The said grant was issued on 12th January 2023. Another reason for the delay was given that the family had been experiencing financial constraints in raising legal fees to retain an advocate to file the proceedings before the court.

35. The court has considered the above reasons and found them to be sufficient especially considering that the case before the trial court did not belong to the applicant even though she had been given authority to represent the deceased plaintiff. On the authority cited by Counsel for the applicant Aviation Cargo Support Limited (*supra*) whether or not to grant an extension of time is discretionary. Such discretion is exercised judicially with a view to doing justice and each case depends on its own merit. The court has also considered the provisions of Article 159 2 (d) of *the Constitution* of Kenya that justice shall be administered without undue regard to procedural technicalities.
36. I do find that the delay from the date of judgment on 28th October 2022 to the date of filing the current application on 6th June 2023 was not inordinate in the circumstances of the parties hereto and the case herein.
37. Concerning the application for a stay of execution, the applicant relies on Order 42, Rule 6 which deals with stay of execution in case of appeal. The said legal provisions envisage a situation where there is an appeal in existence and state that;

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on the application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

38. In the present case, there is no appeal in existence and therefore the prayer for a stay of execution cannot be considered and/or granted by the court.
39. From the foregoing, the court finds that the application dated 22nd May 2023 partly succeeds and the following orders are hereby made;
1. The proposed Appellant be and is hereby granted leave to appeal out of time against the whole judgment of the Hon. S. Mbungi Chief Magistrate delivered on 28th October 2022 at Kitui.
 2. Prayer 2 is hereby dismissed.
 3. The Memorandum of Appeal is to be filed and served within 7 days from the date hereof.
 4. The costs of this application are awarded to the respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 14TH DAY of NOVEMBER, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

The ruling read virtually and in open court in the presence of-

Musyoki C/A

Maingi holding brief for Mwanzia for the Applicant



No attendance for the Respondent

