



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

In re Estate of Bagiru M'Juju alias Bagiri Juju (Deceased) (Miscellaneous Civil Application E026 of 2024) [2025] KEHC 407 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E026 OF 2024**

EM MURIITHI, J

JANUARY 23, 2025

IN THE MATTER OF THE ESTATE OF BAGIRI M'JUJU ALIAS BAGIRI JUJU

(DCD)

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPEAL OUT OF

TIME

AND

IN THE MATTER OF STAY OF EXECUTION PENDING APPEAL

BETWEEN

ADRIANO KINOTI M'RINGERA APPLICANT

AND

CONSULATA MPINDA GICHURU RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 26th September 2024 brought under Section 47 of the *Law of Succession Act*, Rule 49 & 73 of the Probate and Administration Rules, Order 42 Rules 6 of the Civil Procedure Rules and all other enabling provisions of the law, the applicant seeks that:
 1. Spent
 2. Spent
 3. This Honorable court be pleased to grant leave to the applicant to appeal out of time against the ruling of the Hon. T.A Sitati PM in Githongo SPMCC no. E006/2023 dated 9th February, 2024.



4. This Honorable court be pleased to order stay of execution of this Honorable court to grant stay of execution of the ruling of the Honorable Magistrate Hon. T.A Sitati PM in Githongo SPMCC No. E006/2023 dated 9th February, 2024 and the certificate of confirmation of grant issued on 11th March, 2024 and more particularly any subdivision of L.R No. Abothuguchi/Gitie/37 pending hearing and determination of the intended appeal.
5. The costs of this application abide the outcome of the intended appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Adriano Kinoti M'Ringera, the applicant herein and a grandson to the deceased sworn on even date. He avers that the deceased had during his lifetime bequeathed him 1 acre of L.R No. Abothuguchi/Gitie/37 and he has been in possession thereof for over 60 years, where he has cultivated food crops and erected semi-permanent house. His family including his grandchildren are also in possession of the said land, a fact well known to his aunt, the respondent herein. On or about 13/2/2023 the respondent was appointed as the administrator of the estate who is his aunt. When he attended court in October 2023 for confirmation of the grant, he was advised to file his protest, which his advocate neglected to file despite express instructions to do so. He belatedly learnt that the grant had been confirmed when the respondent began to threaten him. He now seeks leave to appeal out of time against the said decision and beseeches the court not to visit the mistake of his counsel upon him. He is a man of straw and thus unable to furnish security for costs, and he stands to suffer substantial loss if the certificate of confirmation of grant is acted upon.
3. The applicant swore a supplementary affidavit on 19/11/2024 reiterating that he has lived on the land for over 60 years.
4. The respondent opposed the application through her replying affidavit sworn on 30/10/2024. She avers that the applicant filed a protest on 24/1/2023 which he soon thereafter withdrew on 15/12/2023. The applicant was in court on 28/8/2024 and 18/9/2024 and upon the dismissal of his application for revocation of the grant, he did not file any appeal. The applicant is thus guilty of inordinate and unreasonable delay, the grant having been confirmed on 9/2/2024 over 7 months ago. The applicant is not a son of the deceased and does not live on the land as alleged. She is advised by advocate that the application is incompetent, bad in law and untenable since there is no appeal before the court and there are no valid reasons to seek stay of the distribution of the estate. The applicant has not shown that he will suffer substantial loss if stay is refused because they will be denied the fruits of the court orders. The applicant cannot blame his advocates because the case belonged to him and not his advocates and he had a duty to follow up on its progress. The applicant is not a man of straw because he is represented by counsel, and the application ought to be dismissed to pave way for distribution of the estate.

Submissions

5. The applicant urges that there is imminent danger of eviction which will render him destitute, and cites *Shell Ltd v Kibiru and another* (1986) KLR 410 and *Re Estate of Kimani Kanyari Matongu (DCD)* (2021) eKLR. He urges that the delay in filing the application is explainable and not intentional, and cites *Scania East Africa Ltd & 2 others v Patrick Mutisya Kioko* (2022) eKLR and *Gianfranco Manethi & Another v Africa Merchant Assurance Co. Ltd* (2019) eKLR. He relies on *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 Others* (2014) eKLR, where the principles applicable in an application for leave to appeal out of time were enunciated.



6. The respondent urges that there is no appeal on record and in any event, the applicant is not a beneficiary of the estate. She urges that the applicant is an indolent litigant and his intention is to delay justice to her detriment and her sister who are the lawful beneficiaries to the estate.

Analysis and Determination

8. The issues for determination are whether leave to appeal out of time and stay should be issued.

Leave to appeal out of time

9. The principles for consideration on an application for extension of time to appeal out of time are that, the power is discretionary but the applicants must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay are plausible, that the appeal is arguable and not frivolous and that the respondent will not be unduly prejudiced by the order being made. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
10. The decision sought to be appealed against was made on 9/2/2024 while the instant application was filed on 26/9/2024. The applicant attributes the delay of approximately 7 months to the applicant's counsel deliberate failure to file the protest and patent inaction. The court notes from the lower court proceedings that the protest was indeed filed but subsequently withdrawn on 15/12/2023. The court thus finds the delay to be inordinate and the explanation as implausible.
11. However, an application for extension of time is competent even after the expiry of the time prescribed for the doing or taking of the step the doing or taking of which extension is sought. See Order 50 rule (5) of the Civil Procedure Rules, which provide that "such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed." The applicant may only be mulcted in costs in accordance with the Proviso thereto as follows:

"Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."
12. The applicant has not exhibited a Memorandum of Appeal to enable the court gauge on the arguability or otherwise of the intended appeal. Nonetheless, in the interest of justice and in keeping with the principle not to drive a litigant from the seat of justice, this court will extend time to appeal out of time for limited time.

Stay of Execution

13. Order 42 Rule 6 of the Civil Procedure Rules empowers a court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided under Rule 6 (2) as follows:

"No order for stay of execution shall be made under subrule (1) unless– (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."
14. There is no doubt that the application herein was filed with unreasonable delay. The applicant contends that he will suffer substantially as the respondent is actively trying to evict him from the estate land. That is substantial loss which justifies grant of stay.



15. It is urged that the applicant applied for revocation of the grant which was declined. The record shows that the applicant applied for review which was equally declined on the basis that he had been accorded innumerable opportunities to do so to no avail. The Court considers that the applicant is entitled to a reconsideration of the dispute by a higher court, and it will consequently grant stay pending the appeal to forestall such substantial loss by eviction.
16. On the issue of security, the court is minded that the subject matter herein is distribution of estate property and the subsequent issuance of the certificate of confirmation of grant and not a money decree where provision of security is most appropriate. Upon determination of the appeal, the distribution of the estate will be implemented in accordance with the decree of the Court and by transmission transfers which may be executed by the Deputy Registrar/Executive Officer of the Court, despite any default by a party and, in any event, it is the Respondent who is the administrator of the Estate.

Orders

17. Accordingly, for the reasons set out above, this court allows the applicant's application dated 26/9/2024 on the following terms:-
 1. The applicant is granted leave to appeal out of time.
 2. The implementation of the certificate of confirmation of grant is hereby stayed pending the hearing and determination of the intended appeal.
 3. The Memorandum of Appeal shall be filed within fourteen (14) days and the Record of Appeal to be filed within thirty (30) days from the date hereof.
 4. In the event of default, the stay hereby granted shall lapse and be of no effect.
 5. In terms of Order 50 Rule 6 of the Civil Procedure Rules, the costs of this application shall be paid by the applicant to the respondent.

Orders accordingly.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Kiogora Ariithi Advocate for Respondent.

M/s GNjoroge Advocate for Applicant.

