



REPUBLIC OF KENYA



In re Estate of Mohamed Rashid Salim (Deceased) (Succession Cause 94 of 1982) [2025] KEHC 3224 (KLR) (11 February 2025) (Ruling)

Neutral citation: [2025] KEHC 3224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 94 OF 1982
G MUTAI, J
FEBRUARY 11, 2025
IN THE MATTER OF THE ESTATE OF MOHAMED RASHID SALIM (DECEASED)**

RULING

1. In a decision delivered on 16th September 2024, this court found as follows in paragraphs 42 and 43:-
 - “ 42. I find and hold that the executors have failed in their duties as executors. In the interest of justice, I give them 60 more days from the date hereof to complete the distribution of the estate. I also order that once the distribution is completed, and within 60 days of the date hereof, the executors shall produce to the court a full and accurate account of the completed administration;
 43. If the executors fail to carry out their obligations as ordered above within 60 days of the date hereof, then their appointment as executors shall cease forthwith. On the 61st day from the date hereof, in the event that the executors do not complete the administration, then the grant shall issue to the public trustee. “
2. Amina Mohamed Rashid was aggrieved by the said decision. Vide a Notice of Appeal dated 7th October 2024, she evinced an intention to appeal against the decision to the Court of Appeal.
3. Vide a Notice of Motion dated 8th October 2024, she sought the following orders: -
 - a. Spent;
 - b. That this honourable court be pleased to extend the time to lodge and serve the notice of appeal from the ruling and the orders of the High Court at Mombasa (Hon Mr Justice Gregory Mutai) dated 16th September 2024;
 - c. Spent;
 - d. That this court be pleased to issue an order of stay of execution of its orders and ruling dated 16th September 2024, pending the hearing and determination of its intended appeal;



- e. That the costs of this application be provided for.
4. The grounds upon which the application is brought is that this court delivered its consolidated ruling on two summons for revocation of grant dated 18th and 25th September 2023, on 16th September 2024. In the said ruling, the court found that the executors, including the applicant herein, had failed to complete the administration of the estate and gave them 60 days within which they were to do so, failing which the grant would be issued to the public trustees. It was stated that the administration of the estate by the public trustee would have far-reaching consequences as the estate would suffer. Further, despite the fact that the ruling was read on 16th September 2024, the applicant didn't receive a copy of the same in good time so as to instruct its advocates to file the requisite documents within the timelines set out in the rules of the Court. Leave to appeal out of time was therefore sought. The applicant stated that the application was filed without delay and that no prejudice would be suffered by the respondents.
5. The applicant annexed to her application a draft Notice of Appeal and a copy of the impugned decision of this court.
6. The application is opposed. Aisha Rashid Mohamed Rashid Almazrouei, who I shall hereafter refer to as Aisha, through her advocates, N A Ali & Co Advocates, filed grounds of opposition dated 28th October 2024, vide which she urged that: -
- a. That the applicant has failed to adduce any reasons for the delay in filing the notice of appeal that would warrant the exercise of this honourable court's discretion in its favour;
- b. That the delay in filing a notice of appeal is not reasonable and excusable;
- c. That the beneficiaries of the estate will suffer prejudice should the orders being sought by the applicant be granted as they would potentially be forced to again wait for the determination of an appeal which was not filed within time, having already been denied distribution of the estate for a period of 28 years;
- d. That the application is not deserving of stay of execution orders as that would effectively halt the essence of the limited period which the honourable court has granted the applicant to distribute the estate and would be in violation of the Law of Succession Act (Cap160 of the Laws of Kenya); and
- e. That the applicant does not have an arguable appeal.
7. The application was also opposed by Swaliha Din Mohamed, Izzat Ali Said, Muhsin Rashid, and Habwa Mbarak, each of whom deposed to separate affidavits, all dated 30th October 2024, in which they each averred that the applicant had not provided grounds upon which the court could issue orders sought, nor had she provided any satisfactory reason as to why she failed to file a notice of appeal within time. They deposed that the application was a delaying tactic by Amina, intended to frustrate the distribution of the estate, having neglected to do so for a period of over 28 years.
8. The deponents averred that the applicant had no arguable appeal and that granting the orders prayed for would be prejudicial to the beneficiaries of the estate who have suffered from the applicant's inaction and neglect of her duties as an executor of the estate. They stated that the 1st administrator was now deceased and that if the application was allowed, Aisha would be the sole administrator. It was further stated that allowing the application would increase the court's case backlog as the matter would remain unresolved for a further, unknown period of time.



9. The Court, on 24th October 2024, directed the parties to file written submissions. Aisha's submissions are dated 21st November 2024. Those of Aisha are dated 27th November 2024. I shall summarize the submissions below.
10. Through her counsels Amina urged that she was unable to file a Notice of Appeal on time as she did not receive a copy of the decision of this court on time. The application, it was urged, was filed without delay and would not occasion the respondents an injustice as what was sought was to present the appointment of the public trustee as the administrator of the estate.
11. Amina's Counsel submitted that under Section 7 of the *Appellate Jurisdiction Act*, the High Court could extend the time the Notice of Appeal could be filed. Reliance was placed on the decision of the court in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR. It was thus submitted that it would be in the interest of justice to extend the time for filing the Notice of Appeal.
12. On the second prayer for a stay of execution, it was urged that the estate, the subject of those proceedings, was vast. There had been a significant effort to distribute the same. Having the estate administered by the Public Trustee would be prejudicial to her and other beneficiaries and would delay the completion of the said distribution. Reliance was placed on the decision of the court in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR and *RWW v EKW* [2019]eKLR for the proposition that stay of execution was intended to preserve the subject matter of a dispute pending determination of the appeal.
13. Aisha's advocates opposed the application. They urged that there was no statutory definition of what unreasonable delay is and that what is key is whether there has been an explanation. In support of this contention, counsel asked the court to consider the decision of the High Court in *Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR. Further reliance was placed on the court's decision in Civil Application No 3 of 2016: *County Executive of Kisumu v County Government of Kisumu & 7 others*.
14. It was urged that there was no satisfactory explanation for the delay. Given the paucity of the explanation, the court was not in a position to tell whether the delay was reasonable or not.
15. Aisha's counsel urged that no good reason had been given to warrant the extension of time. Counsel submitted that if the execution was stayed the beneficiaries at the estate would be prejudiced as they would endure delays as the appeal was canvassed. That would create an undue hardship for other beneficiaries, compounding the difficulties they had experienced over the last 28 years.
16. The 1st respondent did not file written submissions.
17. I have considered the application, the grounds of opposition, and the replying affidavits as well as the written submissions of the parties. I must now consider if the two orders sought ought to be issued, to wit:-
 1. If the period within which the Notice of Appeal may be filed could be extended; and
 2. Whether a stay of execution ought to be issued.
18. Amina's reason for not filing the Notice of Appeal on time is that her counsels received a copy of the ruling late and could not, therefore, obtain the necessary instructions from her on time. Is this the case? From the court file, I note that the ruling was delivered on 10th September 2023, in the presence of Mr Salim for the applicant in the motion before the Court. The ruling, annexed to the application, was uploaded on 19th September 2024 at 13:54:03, 3 days later, as seen on page 8 of the ruling printed from the CTS /e-filing portal.



19. No explanation has been given for why the Notice of Appeal wasn't filed shortly thereafter. Parties whose details are in the CTS/e-filing portal are notified automatically through SMS every time a decision of the court is uploaded.

20. I agree that an explanation for a delay in filing a document is very important. I rely on the decision of the court in the case of *Andrew Chemaringo (supra)*, where it was held that: -

“The law does not set out any minimum or maximum period for delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation of delay is the key that unlocks the court's flow of discretionary favour. There has to be a valid and clear reason, upon which discretion can be favourably exercisable.”

21. Having said the foregoing, a delay of 7 days in filing the Notice of Appeal does not appear to me to be inordinate. In my view, this is a matter where the exercise of this court's discretion is called for. I am guided by the decision of the Supreme Court in *Nicholas Kiptoo Arap Korir Salat (supra)*, where it was held that:-

“From the above caselaw, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive 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.

22. Having found that the prayer for extension time is merited, should this court allow the prayer for a stay of execution?

23. Order 42 Rule 6 (2) of the *Civil Procedure Act* provides as follows: -

“(2) 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.”

24. In *Butt v Rent Restriction Tribunal* [1979] eKLR the court held that: -

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No 2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

25. In *RWW v EKW* [2019] KEHC 6523 (KLR) it was held that:-

“8. The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

26. Will the applicant suffer substantial loss if the application is not allowed? The applicant, save for stating that the appointment of the Public Trustee as an administrator of this estate would delay the distribution of the part of the estate that remains undistributed, did not say how else she would suffer loss. Her concern for the quick distribution of the estate must, of course, be taken with a pinch of salt; the fact that the estate hasn't been fully distributed 28 years after the grant was issued speaks volumes.
27. It is evident that the applicant has had more than ample time to conclude the administration of the estate. Even with all that time, she failed to complete her work. The Public Trustee, a public body created by an Act of Parliament, on the other hand, manages the estates of deceased persons. I do not know how the work of such a body would cause a substantial loss to the applicant. In any case, the Public Trustee would be accountable to the Court and, if appointed, would be legally obligated to prepare and file statutory reports on its work. I do not see how its work may be abused.
28. In the circumstance, I am not persuaded that the applicant demonstrated that she would suffer substantial loss unless the orders that she seeks are granted.
29. The requirements under Order 42 Rule 6 (2) of the *Civil Procedure Rules* are conjunctive; all the elements must be present. Since the first ingredient is missing, the application for a stay of execution pending appeal cannot succeed.



30. The orders, therefore, that commend themselves to me are: -
- a. Period within which the applicant may file a Notice of Appeal is extended by 7 days from the date hereof; and
 - b. Prayer for a stay of execution pending appeal is denied.
31. As this is a family matter, each party shall bear its own costs.
32. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Hassan, for Aisha

No appearance for the Respondents;

No appearance for the Applicant; and

Arthur – Court Assistant.

