



**Abdalla & 5 others v Hamisi & another (Miscellaneous Application
E253 of 2024) [2025] KEHC 4401 (KLR) (Family) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

MISCELLANEOUS APPLICATION E253 OF 2024

H NAMISI, J

APRIL 8, 2025

BETWEEN

HALIMA JUMA ABDALLA 1ST APPELLANT
ABDALLAH JUMAA MUNYU 2ND APPELLANT
FATUMA JUMAH ABDALLAH 3RD APPELLANT
MARIAM JUMA 4TH APPELLANT
BAHATI JUMA ABDALLAH 5TH APPELLANT
MWANAISHA JUMA ABDALLAH 6TH APPELLANT

AND

MOHAMMED MATIKU HAMISI 1ST RESPONDENT
AMINA ALI 2ND RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 31 October 2024 seeking the following orders:
 - i. (spent)
 - ii. That leave be granted to the Applicants to file an appeal out of time with respect to Milimani Kadhi's Court Succession Cause No 49 of 2020- In the Matter of the Estate of Jumaa Abdalla Munyu alias Jumaa Abdallah;
 - iii. That this Honourable Court be pleased to issue an order for the stay of execution of the judgement entered and delivered herein against the Applicants on 8 November 2023 pending the hearing and determination of this application;



- iv. That this Honourable Court be pleased to issue an order for stay of execution of the judgement entered and delivered herein against the Applicants on 8 November 2023 pending the hearing and determination of the intended appeal;
 - v. That costs of this Application be provided for.
2. The Application is supported by the Affidavit of Halima Juma Abdalla and premised on the following grounds:
- a. That the Applicants were Respondents in Kadhi's Court at Upper Hill, Nairobi Milimani Succession Cause No 49 of 2020 wherein judgement was delivered on 8 November 2023;
 - b. The Applicants being grossly dissatisfied with the judgement of the Kadhi's court desires to appeal against the said judgement and finding of the Kadhi's Court;
 - c. That the time allowed to file an appeal has run out;
 - d. That the delay was not intentional but was caused by their previous Advocates who failed to follow their instructions to file appeal and became uncooperative;
 - e. That the Respondent is unlikely to suffer any prejudice;
 - f. That the delay herein is not inordinate or so great as to be inexcusable;
 - g. That the appeal has high chances of success;
 - h. That it is in the interest of justice to allow the instant application
3. The Supporting Affidavit reiterates the grounds on the face of the Application. The deponent has attached the Authority to Swear and a copy of the judgement dated 8 November 2023.
4. In a brief response to the Application, the 2nd Respondent filed a Replying Affidavit in which she averred that the 1st Respondent renounced his executorship, leaving the 2nd Respondent as the sole executor. The 2nd Respondent further avers that the Application herein is vague, frivolous and ambiguous as it does not state which judgement and/or ruling the Applicants seek to appeal against.
5. The 2nd Respondent noted that rather than lodge their appeal within the prescribed time, the Applicants opted to file an application in the Kadhi's Court dated 11 December 2023 seeking to revoke the Grant. The application was heard and dismissed on 17 May 2024. It was further noted that the Applicants have been represented by 3 law firms so far. They have opted to change representation each time they have lost.
6. Parties canvassed the Application by way of written submissions.
7. The Applicants submitted that the failure to lodge their appeal almost 10 months following the judgement was due to their Advocates not following instructions. They relied on the case of *Stecol Corporation Ltd v Susan Awuor Mudemb* [2021] eKLR and contended that their explanation for the delay is plausible and ought to be considered.
8. On the issue of stay of execution, the Applicants relied on the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 in arguing that if the decision of the lower court is executed, the same will greatly affect the appeal in that by the time the ruling of the High Court is rendered, the Respondents might already have interfered with the estate of the Deceased.
9. On their part, the Respondents argued that the Applicants waited a whole year to file the present application, which amounts to inordinate delay. They relied on the case of *Utalii Transport Company*



Ltd & 3 others v NIC Bank Ltd & another [2014]. They submitted that the Applicants have not provided any evidence of the instructions to their counsel which were subsequently ignored and/or not followed.

10. The Respondents further submitted that the Applicants have not attached a draft of their Memorandum of Appeal or Notice of Appeal as is required by Rule 86 (2) of the Kadhis' Court (Procedure & Practice) Rules. The Applicants have not demonstrated the grounds that they intend to rely on in the appeal or the prospects of its success.
11. In determining the Application, I have considered the grounds, the Supporting Affidavit, Replying Affidavit and the written submissions. The main issue for determination is whether the application has any merit and, therefore, whether the orders sought should be granted.
12. The impugned judgement was delivered on 8 November 2023. The Applicants filed the present application almost one year later. The only reason advanced for the delay is that their Advocates did not follow instructions.
13. In Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 others [2015]eKLR, the Court of Appeal held that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld.

For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.”

14. Based on the material placed before me, I am satisfied that the delay in filing the present application was inordinate and unreasonable.
15. Further, on the issue of filing an appeal out of time, I am guided by the Court of Appeal decision in Charles Karanja Kuru v Charles Githinji Muigwa, Case No 71 of 2016, where the Court stated thus:

“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on 24th October 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the Civil Procedure Act to mean that an appeal filed out of time can be



admitted as being properly on record once extension of time is granted. Emukule J. in the *Gerald M'Limbine v Joseph Kangangi* [2009] eKLR stated that:

“my understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court’s permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court’s process under Section 79B.”

16. In the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR, the Supreme Court enunciated the principles applicable in an application for leave to appeal out of time. The court stated inter alia that:

“The underlying principles a court should consider in exercise of such discretion should include:

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.

17. Similarly in the case of *Paul Musili Wambua v Attorney General & 2 others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

18. In the instant application, the Applicants have not attached any draft Memorandum of Appeal to enable this Court appreciate whether the same raises any pertinent issues of law.
19. On the issue of stay of execution pending appeal, it is trite that an applicant in application for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), namely



- (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
20. The Applicants have not demonstrated any substantial loss that may result, save for their submission that the Respondents are likely to interfere with the estate. Further, they have not provided any security. Having already determined that the Application was filed inordinately late with no reasonable explanation, it is clear that the Applicants have not satisfied the requirements to warrant orders of stay of execution.
21. In view of the foregoing, I find that the Application is unmeritorious and dismiss the same. Costs are awarded to the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 8 DAY OF APRIL 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

.Mr. Munyaka.....for the Applicants

Ms. Kioko..... for the Respondents

Libertine Achieng.....Court Assistant

