



**Okello v Ochieng (Family Appeal E001 of 2024)
[2025] KEHC 8223 (KLR) (13 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E001 OF 2024**

**DK KEMEL, J
JUNE 13, 2025**

BETWEEN

JOHN OCHIENG OKELLO APPLICANT

AND

LUCAS ONYANGO OCHIENG RESPONDENT

JUDGMENT

1. The Appellant filed an application dated 13/12/2023 seeking for the following reliefs:
 1. Spent.
 2. That the Honourable Court be pleased to grant leave to the Appellant to file Notice of Appeal out of time and subsequently deem both the Notice of Appeal and Memorandum of Appeal as having been duly filed.
 3. That the Honourable court be pleased to issue witness summons to compel the attendance in court of the Land Registrar Siaya and one Morris Otieno Obam.
 4. That the Honourable court be pleased to order the Land Registrar to share with the court and the Appellant the impugned transfer documents allegedly including the Respondent's name in the suit property as co-owner, all search documents used to lodge the restriction on the suit property, certified copy of the title issued on 18/1/2012 and 6/1/2020.
 5. That the Honourable court be pleased to order that the hearing of the application be by way of viva voce evidence.
 6. The costs be provided for.
2. The application is supported by the grounds set out thereunder and by the affidavit of the Appellant sworn on even date. The Appellant's gravamen is inter alia; that the Appellant is one of the beneficiaries



within the meaning of Section 29 of the Law of Succession Act as he had applied for and was issued with letters of Administration Intestate but which were revoked after the Respondent filed summons for revocation; that the Respondent produced some Green Cards from the Land's Registry which are extremely suspicious as there are no entries recorded to support the same; that the Land Registrar Siaya has refused to share the records; that this court in order to resolve the issues emanating from the grey areas should compel the Land Registrar to avail the requisite documents; that the Respondent will not suffer any prejudice if the orders sought are granted; that it is in the interest that the orders sought are granted.

3. The application was opposed by the Respondent who filed a replying affidavit sworn on 26/4/2024 wherein he averred inter alia; that the application is an afterthought meant to frustrate the wheels of justice; that the ruling complained of was delivered in the presence of both parties and that the Applicant ought to have exercised due diligence and filed the appeal on time; that the court should consider the period of delay and whether the appeal is arguable; that the Applicant has not satisfied the conditions for leave to file appeal out of time; that the Respondent is being denied the right to enjoy the fruits of the judgment; that the intended appeal does not raise any substantial issues; that the application is an abuse of the court process; that the Respondent stands to suffer great prejudice yet litigation must come to an end.
4. The application was canvassed by way of written submissions. Both parties duly complied.
5. I have given due consideration to the application, the rival affidavits as well as the submissions filed. I find the issue for determination is whether the application has merit.
6. First and foremost, the Applicant has sought for a raft of orders some of which cannot be granted by this court as an appellate court because the prayers sought can only be entertained by the trial court. The Applicant cannot convert the appellate court into a trial court. The Applicant is at liberty to pursue those prayers once he succeeds in the intended appeal. That being the position, prayers No. 3, 4 and 5 must be rejected summarily. This then leaves prayer No. 2 and 6 for consideration.
7. As regards the prayer for leave to lodge appeal out of time, it is noted that the impugned ruling was delivered on 9/11/2023 and that the Applicant was expected to lodge his Memorandum of Appeal within 30 days thereafter ie on or before 9/12/2023. The Applicant approached this court on the 13/12/2023 and has presented his draft memorandum of appeal of even date. This means that the Applicant was late by 4 days. The Applicant claims that the cause of delay was the non-cooperation of the Land Registrar and that he instructed his advocate to file an appeal after seeking audience with the Land Registrar. I find the said delay not to be inordinately late. Section 79 G of the Civil Procedure Act provides as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 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 Applicant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies that he had good and sufficient cause for not filing the appeal in time.”

I have perused the Applicant's grounds in support of the application as well as the affidavit in support and note that the Applicant has made a raft of allegations against the Respondent as well as the trial court as can be seen from the prayers he has sought in paragraphs 3, 4, and 5 which can only be granted by the trial court in the event the appeal succeeds. However, it is noted that this is a succession matter in which the dispute involves relatives of the deceased and therefore the interest of justice demand that



a party be given an opportunity to ventilate his grievances. In any event, the delay is only 4 days and that no prejudice will be suffered by the Respondent if the leave sought is granted.

8. The factors to be considered when a court determines applications for extension of time were succinctly stated by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* [2014] eKLR when it held as follows:
 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deriving 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 deal; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
9. From the foregoing authority, it is clear that the Applicant’s application meets a threshold for consideration by this court. The draft memorandum of appeal raises triable issues worthy of consideration by this court and therefore the Applicant should be given an opportunity to ventilate his intended appeal. Under Section 95 of the *Civil Procedure Act*, the Court may in its discretion from time to time enlarge periods for the doing of certain acts even though the period originally fixed or granted may have expired. I find that this court must exercise its discretion and admit the appeal out of time since good and sufficient reasons have been presented.
10. As earlier noted, the Applicant’s prayers as sought in No. 3, 4 and 5 are not only premature but the same cannot be granted by an appellate court. Hence, I find no merit in the Applicant’s said prayers.
11. In view of the foregoing observations, it is my finding that the Applicant’s application dated 13/12/2023 only succeeds in terms of prayer No. 2. The rest of the prayers No. 3, 4 and 5 stands dismissed. The cost of the application shall abide in the appeal.

DATED AND DELIVERED AT SIAYA THIS 13TH DAY OF JUNE 2025.

D. KEMEI

JUDGE

In the presence of:

Opiyo.....for the Appellant/Applicant

M/s Kiprof.....for Respondent

Okumu.....Court Assistant

