



REPUBLIC OF KENYA



**In re Estate of Kiage Omwenga (Deceased) (Family Miscellaneous Application E5 of 2023) [2024] KEHC 1427 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 1427 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
FAMILY MISCELLANEOUS APPLICATION E5 OF 2023**

**TA ODERA, J**

**JANUARY 23, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE KIAGE OMWENGA  
(DECEASED)**

**BETWEEN**

**ONTWEKA NDUKO HENRY ..... 1<sup>ST</sup> APPLICANT  
MARY KWAMBOKA ONTWEKA ..... 2<sup>ND</sup> APPLICANT  
CONZEFITA KERUBO ARAKA ..... 3<sup>RD</sup> APPLICANT  
PETER N. OMWENGA ..... 4<sup>TH</sup> APPLICANT  
ROSE KEMUNTO ISANDA ..... 5<sup>TH</sup> APPLICANT**

**AND**

**MARK KIAGE ONDIEKI ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 25.10.2023, and filed through the firm of Gichaba H.M. & Company Advocates, the Applicants herein sought the following orders: -
  1. Spent.
  2. This Honourable Court be pleased to grant leave to the applicants to file an appeal out of time against the ruling of Hon. C. Ocharo delivered on 20<sup>th</sup> July, 2023; and
  3. The costs of this application be provided for.
2. The grounds on the face of the application were that a Ruling was delivered in Kisii Succession Cause No.11 of 2017 on 20.7.2023 The Applicants were desirous of appealing against it but they could not since they did not have a certified copy of the ruling and the typed proceedings of the trial court which



are necessary before instituting an appeal. The statutory timelines had since lapsed and it was therefore necessary to obtain leave to appeal out of time.

3. The Application was supported by an affidavit sworn by Conzefita Kerubo Araka on 25.10.2023. She deponed that a Ruling was delivered in Kisii Succession Cause No. 11 of 2017 on 20.7.2023. She deponed that they were desirous of appealing against the said decision. However, they were unable to obtain the certified copy of the ruling and typed proceedings of the trial court to enable them lodge the appeal. In addition, she deponed that the reason that they could not obtain the certified copy of the ruling and typed proceedings was because the file was missing at the registry. They obtained the typed proceedings and certified copy of the ruling on 23.10.2023. Time had lapsed and it was necessary to get leave to appeal out of time.
4. The Respondent filed Grounds of Opposition dated 6.11.2023. The grounds were:
  1. That the reasons adduced by the Applicants for failure to file the purported appeal within time are not sufficient to warrant this Honourable Court to grant the Applicants an order of extension of time and or leave to file an appeal out of time in the manner prayed; accordingly, the Applicants' Application should be dismissed.
  2. That the period of delay; the reasons for the delay; the chances of the appeal succeeding if the application is granted; the degree of prejudice to the Applicants if the application is not granted, if any, all put into consideration works in favour of dismissing the instant application.
  3. That the Applicants have not satisfied the conditions for granting an order of filing an appeal out of time; and as such the Application as it stands is good for dismissal with costs.
  4. That accordingly, the Applicant's Notice of Motion application is untenable, misconceived, bad in law, inept, incurable defective mischievous and an abuse of this Honourable Court's process as it is not grounded and or supported by any law or facts and as it stands is good for dismissal and the Respondent prays that costs should be awarded to him.

## **Submissions**

### **Applicants' Submissions**

5. The Applicants filed their submissions dated 20.11.2023. They cited Section 79G of the [Civil Procedure Act](#) which provides that appeals from subordinate courts shall lie to the High Court and shall be filed within 30 days from the date of decree or order appealed against. They submitted that after delivery of the Ruling on 20.7.2023, their Advocate wrote to the Court vide a letter dated 3.8.2023 and paid for on 4.8.2023 requesting for certified copies of the Ruling and proceedings. The file was missing which prompted the Applicants' Advocates to write to the Court on 18.8.2023. The said documents were only availed on 23.10.2023.
6. They submitted that they were within time since the 30 days envisioned in Section 79G of the [Civil Procedure Act](#) since time started running on 23.10.2023 when they obtained the documents. The application for leave was filed out of abundance of caution.
7. The threshold in such applications was submitted to be:
  1. The period of delay;
  2. The reason for delay;
  3. The degree of prejudice to the respondent if the application is granted; and



4. Whether the matter raises issues of public importance.
8. They cited the case of *Edith Gichungu Koine vs Stephen Njangi Thoithi* (2014) eKLR and *Stecol Corporation Limited vs Susan Awuor Mudemb* (2021) eKLR. They submitted that the period of delay was 3 months and further that the period of delay had been sufficiently explained.
9. They further submitted that the delay was not inordinate and cited the case of *Charles N. Ngugi vs ASL Credit Limited* [2022] eKLR.
10. They further submitted that no prejudice would be occasioned on the Respondent.
11. They cited the case of *Kamlesh Mansukhalal Damki Patni vs Director of Public Prosecutions and 3 Others* (2015) eKLR on the purpose of courts being dispensation of justice and commitment to the national values and principles of governance.
12. The Respondent did not file any submissions.

### **Determination**

13. I have considered the Application herein, the grounds of opposition and the Applicants' submissions.

14. Section 79G 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 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.

15. Leave to file an appeal out of time is a discretionary matter which discretion ought to be exercised judiciously.
16. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court derived the following principles to be considered when exercising its discretion to extend time to file an appeal out of time:
  - a. 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;
  - 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 discretion to extend time, is a consideration to be made on a case-to-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 respondents if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.



17. In the case of *Thuita Mwangi v Kenya Airways Ltd.* [2003] eKLR, the Court of Appeal faced with an application for extension of time to file a fresh Notice of Appeal and Record of Appeal, the Court held as follows: -

“Over the years, the Court has, of course set out guidelines on what a single Judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997) (unreported), the Court expressed itself thus:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

These, in general, are the things a judge exercising the discretion under rule 4 will take into account. We do not understand this list to be exhaustive; it was not meant to be exhaustive and that is clear from the use of the words “in general”. Rule 4 gives the single judge an unfettered discretion and so long as the discretion is exercised judicially, a judge would be perfectly entitled to consider any other factor outside those listed in the paragraph we have quoted above so long as the factor is relevant to the issue being considered. To limit such issues only to the four set out in the paragraph would be to fetter the discretion of single judge and as we have pointed out, the rule itself gives a discretion which is not fettered in anyway.

Again, as we have pointed out, we do not think the Court intended that the list of four items it set out in Mutiso’s case, ante, was ever meant or intended to be exhaustive. It is also clear that the third issue for consideration, namely, the chances the appeal succeeding if the application is granted is merely stated as something for a “possible” consideration, not that it must be considered. This is understandable because the “chances of an appeal succeeding” is normally dealt with by this Court under the rubric of an “an arguable appeal” or “an appeal which is not frivolous” and the full Court normally considers that issue under rule 5(2)(b) of the rules when the question is whether or not there should be a stay of execution, an injunction and so on. The requirement for the consideration of whether an intended or proposed appeal has any chances of success appears to have its origins in the case *Bhaichand Bhagwanji Shah v D Jamnadas & Co Ltd* [1959] EA 838 where Sir Owen Corrie, Ag JA is recorded as saying at pg. 840 Letter I to pg 841 at Letter A:

“.....It is thus essential in my view, that an applicant for an extension of time under r 9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant’s affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application....”

18. This was the holding in the cases of *Charles Karanja Kiiru v Charles Gitinji Muigwa* [2017] eKLR; *Omar Shurie v Marian Rashe Yafar* [2020] eKLR; *Edith Gichugu Koine v Stephen Njagi Thoithi* [2014] eKLR where the Court of Appeal pronounced itself as such.



19. I am therefore tasked with determining whether the present application meets the requirements set out hereinabove.

### **Length of Delay**

20. The Ruling in question was delivered on 20.7.2023. 30 days therefore lapsed on or before 20.8.2023. The present application was filed on 26.10.2023- that is around 3 months after the fact.

### **Reason for the Delay**

21. The deponent deponed that she was awaiting a certified copy of the ruling and typed proceedings to enable them lodge an appeal. There was also an allegation that the file was missing in the lower court registry. In support of this allegation, the deponent attached a letter dated 3.8.2023 and served on 21.8.2023, addressed to the Chief Magistrate's Court, Kisii requesting for the certified copy of the Ruling and the proceedings. The said letter was served after the expiry of 30 days from the date of delivery of the Ruling. It is not clear why the applicant had to wait till the expiry of the Appeal days to serve the alleged "complaint letter" to court. The deponent attached another letter dated 18.8.2023 addressed to the Chief Magistrate's Court indicating that they had been unable to trace the file since 3.8.2023. The said letter does not bear a stamp for the Chief Magistrate's Court, Kisii to confirm when the same was received.
22. What it appears that the Applicants were aware that they were out of time hence made the letters addressed to the Chief Magistrate's Court, Kisii in a desperate bid to cover the delay.
23. In addition, the deponent told this court that it was necessary to obtain the typed proceedings and certified copy of the Ruling to initiate an appeal. Nothing could be further from the truth.
24. I have perused the *Law of Succession Act* and the *Probate and Administration Rules* and none speaks to what should be filed when appealing against a subordinate court's decision. I, therefore, rely on the *Civil Procedure Rules*, 2010 which provides for the procedural aspect in succession matters. Thus, an appellant is required a Memorandum of Appeal directly in the High court against a subordinate court's decision.
25. Order 42 Rule 1 of the *Civil Procedure Rules*, 2010 provides thus:  
Order 42- Appeals
1. Form of appeal
    - (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
    - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
26. Firstly, It is clear that an appellant wishing to appeal against an order or decree made by a Magistrate to the High Court is required to move the court directly by way of a Memorandum of Appeal as an appeal lies to the High Court as a matter of Right under Section 50(1) of the *law of succession Act* as a matter of right. The Notice of Appeal is filed in the Court of Appeal when appealing against a decision of the High Court or such other court or tribunal as required by the law. See Rule 75 of the *Court of Appeal Rules*, 2010.



27. Secondly, the law indicates that one files the Memorandum of Appeal within 30 days of the date of the decree or order appealed against and subsequently files a Record of Appeal which contains the typed proceedings, ruling/judgment, decree/order among other documents. See Order 42 Rule 13(4) of the *Civil Procedure Rules*, 2010. It is, therefore, not necessary to file typed proceedings and a certified copy of the Ruling at the time of lodging a memorandum of appeal.
28. I therefore find and hold that the Applicants have not given reasonable grounds for the delay.
29. Thirdly, the deponent argued that they were within time in filing the appeal. The said submission is not true given the very clear provisions of the law. In addition, if indeed the Applicants were confident of their argument, then they would have directly filed the appeal instead of filing the present application. In addition, it does seem like the Applicants were shooting themselves in the foot by acknowledging the delay and explaining it and also arguing that there was no delay.
30. That said, the thirty days start running from the date of the decree or order and not a day later as alleged by the Applicants.

### **Chances of the Appeal succeeding**

31. The Applicants have not attached a draft Memorandum of Appeal neither have they espoused the grounds in the Application or affidavit in support or misconceived notice of appeal.
32. As a Court, I am inclined to consider whatever grounds the Applicants have adduced. The grounds are garnered from the draft Memorandum of Appeal or in the Application itself. As held elsewhere in this Ruling (Par. [17]), "... It is thus essential in my view, that an applicant for an extension of time under r9 should support his application by a sufficient statement of the nature of the judgment and of his reasons for desiring to appeal against it to enable the Court to determine whether or not a refusal of the application would appear to cause an injustice. In the applicant's affidavit of September 19 last no indication whatever of the nature of the case is included and I hold that if that affidavit stood alone, not sufficient ground would have been shown for granting application..."
33. The Applicants have not fronted any grounds for the appeal and thus I am not able to make a determination on the chances of the intended appeal succeeding.
34. Without going into the merits of the matter, I note from the Ruling that the grant was revoked on 15/10/2019. The Trial Court directed parties to agree on a mode of distribution and a Summons for Confirmation of Grant dated 15.2.2021 was filed. The proposed mode of distribution was opposed. Once it became evident that the beneficiaries would not agree, the Trial Court directed that the Surveyor move to the ground and avail a report. A report compiled on 23.1.2023 was availed and the same also raised multiple complaints from the objectors. The Trial Court thus stayed the summons for confirmation dated 15.2.2021 to pave way for any aggrieved party to file a substantive suit.
35. It is not clear what portion of that Ruling the Applicants are aggrieved by.

### **Degree of Prejudice to the Respondent should the Application be allowed**

36. The succession matter was filed in the year 2017. 6 years later, the beneficiaries of the Estate have still not agreed on the matter.
37. Unnecessary and prolonged litigation no doubt creates anxiety in the minds of the affected individuals, not to mention wasting the judicial time and limited resources.
38. I find that allowing the application will further prolong this matter to the Respondent's prejudice.



39. That said, the Application dated 25.10.2023 is dismissed for lacking in merit. The Applicants shall pay the costs.

**DATED, DELIVERED AND SIGNED AT KISII THIS 23<sup>RD</sup> DAY OF JANUARY 2024.**

**T.A. ODERA**

**JUDGE**

In the presence of:

Nyamari holding brief for Gichaba for the Applicants

Godia Holding brief for Nyangacha for respondent for the Respondent

Alex Oigo: Court Assistant

