



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**In re Estate of Jedida Wambui Njoroge (Deceased) (Succession Cause 541 of 2014) [2024] KEHC 1680 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1680 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 541 OF 2014  
SM MOHOCHI, J  
FEBRUARY 20, 2024  
IN THE MATTER OF ESTATE OF JEDIDA WAMBUI NJOROGE (DECEASED)**

**BETWEEN**

**JOHN KAMAU NJOROGE ..... APPLICANT**

**AND**

**ANN NAOPANAI TEKUTWA ..... 1<sup>ST</sup> PETITIONER**

**EDNA WAIRIMU NJUGUNA ..... 2<sup>ND</sup> PETITIONER**

**RULING**

1. Before me is a Notice of Motion Application dated 29<sup>th</sup> August 2022 filed pursuant to Order 42 Rule 6, Order 50 Rule 5 of the *Civil Procedure Rules, 2010*, Section 3A, and 95 of the *Civil Procedure Act* Cap. 21 of the Laws of Kenya, Article 159 (2) of the *Constitution* of Kenya, 2010 and all other enabling provisions of the law seeking the following reliefs;
  - i. Spent.
  - ii. That, this Honourable Court be pleased to extend and/or enlarge the time within which to file an appeal against the judgment of the Honourable Mumbua T Matheka delivered on 9<sup>th</sup> May 2022 in Nakuru
  - iii. That, the appellant be granted leave to appeal out of time against whole judgment of the Honourable Mumbua T Matheka delivered on 9<sup>th</sup> May 2022 in Nakuru.
  - iv. That, the draft notice of appeal be deemed as properly filed.
  - v. That, the costs of this application be provided for.
2. The Application was supported by a sworn affidavit of Joseph Kamau Njoroge and premised on the following fifteen (15) grounds;



- i. That, the applicant being aggrieved and dissatisfied with the entire judgment of the Honorable Mumbua T Matheka delivered on 9<sup>th</sup> May 2022 in Nakuru thereby seek to appeal against the said decision.
  - ii. That, the stay of execution granted upon delivery of the judgment has since lapsed.
  - iii. That, the prescribed statutory period within which to file the appeal has also lapsed.
  - iv. That, failure to file the appeal on time was not as a result of indolence on the part of the applicant.
  - v. That, the delay was occasioned by circumstances beyond the applicant's Control.
  - vi. That, on 5<sup>th</sup> May 2022, the matter was listed for ruling but the same was not delivered and the honourable Court directed that the ruling will be delivered on notice of parties and via email.
  - vii. That, the applicant's advocates on record was never notified of the ruling only came to learn of after perusal of the Court file that the ruling had been delivered on 9<sup>th</sup> May 2022.
  - viii. That, the delay in filing the appeal is not inordinate.
  - ix. That, the preferred appeal is meritorious with a high probability of success.
  - x. That, there being no stay of execution, the intended appeal shall be rendered nugatory if the orders sought herein are not granted as the Respondents may proceed to execute in satisfaction of the decree.
  - xi. That, the Respondents financial means are unascertainable and they may not be in a position to make good any loss/ damage suffered if the decree herein is enforced and the appeal ultimately succeeds and the decision of the trial Court is overturned and/or set aside.
  - xii. That, the Applicant is willing and able to furnish such security as this Honourable Court may order for the due performance of the decree.
  - xiii. That, the Respondents will not be prejudiced in any way if the orders sought herein are granted.
  - xiv. That, it is in the interest of justice and equity that the prayers sought herein are granted.
3. This Court had directed that the Application was to be heard and determined on the basis of filed written submissions of which the Applicant complied with and filed his written submissions on the 15<sup>th</sup> of August 2023 which the Respondent elected to only file grounds of objection dated 27<sup>th</sup> October 2022.

### **Applicants Case**

4. The Applicant framed two issues for determination, firstly whether the application herein is merited? And Whether the Honourable Court should admit the appeal out of time?
5. As to whether the application is merited, the Applicant urge and seek refuge on factors to be considered as are highlighted in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR where the honourable judges reiterated the considerations to be made in such a case to be as follows;
  - i. "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;



- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court;
  - iii. Whether the Court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis;
  - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
  - v. Whether there will be any prejudice suffered by the Respondents if the extension is granted;
  - vi. Whether the application has been brought without undue delay; and
  - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
6. It is the Applicant's submission that although an extension of time is not a right of a party, the right to appeal an equitable remedy is in line with the principles of natural justice enshrined in our Constitution as well as the right of appeal contained in Article 50(g) of the Constitution of Kenya 2010
  7. The Applicant places reliance in the case of Vishva Stone Suppliers Company Limited v RSR Stone Limited [2020] eKLR where the learned judge in discussing the request to allow Applicant to exercise their undoubted constitutionally, underpinned right of appeal out of time adopted the Tanzanian case of Abbas Sherally & Anor vs Abdul Fazaiboy, Civil Application No. 33 of 2003: for the holding *inter alia* that:
    - “(i) The right to a hearing is not only constitutionally entrenched but it is also Corner stone of the Rule of law;
    - (ii) the right to be heard is a valued right; and
    - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.”
  8. The Applicant submit that, the right of appeal is definite and like other right clearly enshrined in the constitution, the right to appeal supersedes the technicality of the manner and the time in which the appeal is made. Since the Applicant has a meritorious appeal that has a very high chance of success it would be a great peril to dismiss the application and appeal without giving the same a proper hearing and determination.
  9. That, in giving the reasons for the delay of appeal, the Applicant relies on grounds 5, 6 and of the application as well as paragraphs 6,7, and 8 of the accompanying supporting affidavit which emphasizes that failure to appeal on time was not as a result of indolence but rather the lack of notice of the proceedings in the Court as the realization of the existence of a ruling at a time whereby the time for appeal had already lapsed.
  10. The Applicant submit that, it would be a great injustice should the same not be considered by the Court and a bad precedent at that that an innocent litigant may be denied the right to appeal based on factors beyond their control. The Applicant therefore pray that this Court adopt the same reasoning and allow the Applicants' application.



11. As to whether the Court should admit the appeal out of time? It is the Applicant's contention that, having satisfied that the delay to appeal was never an afterthought, the same should not be rendered nugatory as envisioned in the case of *Almas Hauliers Ltd vs Abdulnasir Abukar Hassan* [2017] eKLR a delay of four months was found not to be inordinate.
12. Further reliance is placed on the case of *Stecol Corporation Limited v Susan Awuor Mudemb* [2021] eKLR the learned judge determined as follows:

“Courts have over time excused parties where such delay is not inordinate as is this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, Courts have accorded an opportunity to be heard on appeal.”
13. That this is a Court of justice that ought to consider the interest of both the Applicant and the Respondent. We share the sentiments that the delay is not ordinate in consideration of the fact that the Notice of Appeal though filed out of time was lodged for purposes of exploring the right of appeal and interests of justice.
14. That, Section 95 of the *Civil Procedure Rules* provides that:

“Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
15. This is in line as read together with Order 50 Rule 6 of the *Civil Procedure Rules 2010* which provides:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed....”
16. The Applicant submit that, the Court has the discretionary powers to enlarge the time and admit the appeal out of time in pursuit of the ends of justice. Delay especially when it's not in the fault of a litigant should not be a ground for prejudice on their part.
17. Further that no prejudice will be suffered by the Respondent. On the contrary, the Respondent shall be granted an opportunity to defend the appeal with merit. We, therefore, submit that the Applicant's appeal out of time should be allowed as prayed.
18. The Applicant submit that, the delay to appeal the ruling dated 9<sup>th</sup> May 2022 was not inordinate but rather unfortunate miscommunication that led to the Applicant realizing that a ruling had been rendered and the same had been done so far back that the time for appeal had lapsed.
19. That, it is in the Court's power, ability and discretion as conferred to it by the *constitution* to allow the appeal with undue regard for lateness or otherwise technicalities.
20. That the Applicant deserves the exercise of the Court's discretion to admit the appeal out of time which is in the interest of justice notwithstanding that plausible explanation has been rendered.



21. The Applicant urges from the Court the invocation of its inherent discretion to set aside the proceedings and judgment as captured in Section 3A of the Civil Procedure Act states otherwise:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make Such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

22. In finality of submission the Applicant relies on the locus classicus case of Kamlesh Mansukhalal Damki Pattni Vs 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.” (Emphasis added).

23. The Applicant thus prays that the notice of motion be accordingly allowed.

### **Respondent’s Case**

24. The Respondents opposed the Application by filing grounds of opposition dated 27<sup>th</sup> October 2022, with four (4) grounds as follows;

- i. That, the Application has been brought several months after the Judgement and there is no reasonable explanation to justify extension of time.
- ii. That, the Application is brought in bad faith by the Applicant who has failed to obey the Court Orders of accounting for the income of the property and continues to forcefully stay on the property with impunity.
- iii. That, the Applicant should be ordered to deposit security for costs for any continued/further application on this matter.
- iv. That, the Estate will suffer loss and damage if the Orders are granted.

25. The Respondents elected not to file any written submissions and relied wholly on the grounds filed.



## Analysis and Disposition

### The Law

#### Whether the Applicants have Satisfied the Conditions Set Out to Extend and Enlarge the Time Within which to File an Appeal.

26. The Applicant have sought for orders to extend and enlarge the time within which to file an appeal against a ruling of Hon T. Matheka Dated 9<sup>th</sup> May 2022 and has relied on Section 95 of the Civil Procedure Act we have Section 50 of the Law of Succession Act and Rules 63 and 73 of the Probate and Administration Rules, there is no time prescribed by Section 50 of the Law of Succession Act as to when one ought to lodge an appeal. Section 50 provides: -

“An appeal shall lie to the High Court in respect of any order or decree made by a resident magistrate in respect of any estate and the decision of the High Court thereon shall be final.”

27. Although Section 50 of the Act does not explicitly prescribe a timeline for when to lodge an appeal to the High Court, the instant application ought to be determined on the basis of whether sufficient cause has been shown for stay for purposes of Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules. The sentiments of Warsame J. (as he then was) in Samir Trustee Limited vs Guardian Bank Limited [2007] eKLR are instructive: -

“The Court in considering whether to grant or refuse an Application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the Court in a particular manner. But the yardstick is for the Court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence, the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...At the stage of the application for stay of execution pending appeal the Court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the Court is to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the Court...”

28. Looking at the competing interests of the parties, the Applicants contend that they came to know of the ruling dated 9<sup>th</sup> May 2022 when out of curiosity his advocates decided to peruse the file after a lengthy wait of the notice only to find a copy of the ruling in the Court file. The Applicant is unspecific as to when exactly he became aware of the Ruling and has always been represented by counsel and in any event they ought to have followed up with the registry on their own or through their advocates what transpired in the matter since 5<sup>th</sup> May 2022. The applicant did exercise due diligence, in that he was aware of his case and that he had an advocate but neither of them followed-up to find out the outcome of the case. This leads me to a conclusion that this application is an afterthought or it is designed to buy time. That they would have filed this application immediately for they were aware that by that time, three months had already lapsed since delivery of the ruling. I therefore find that on a balance of competing interests the scale does not tilt in favour of the Applicant, as he has not satisfactorily explained why they took over 3 months to file the instant application.



29. The Applicant in my considered view, have not satisfactorily explained the delay, which was no doubt inordinate.

### **Whether the Applicant Ought to be Granted Leave to Appeal Out of Time**

30. Notably, the powers of the Court in deciding an application to seek leave to file an appeal out of time are discretionary and unfettered. The parameters for the exercise of a Court's discretion have been concisely laid out in the case of *Mwangi vs Kenya Airways Ltd* [2003] eKLR where the Court of Appeal expressed itself thus:-

“It is now well 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 or not 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.”

31. The above requirements have not been satisfied by the Applicant. I have already said that the Applicant has not explained satisfactorily why it took him over three (3) months to file the instant application.

### **Whether the Applicants have Established that they have a Prima Facie Arguable Case**

32. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. *Cooperative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
33. Additionally, on perusal and scrutiny of the Application reveals that no Draft Memorandum of Appeal was annexed to enable the Court generally determine if the Appeal was arguable or not, I am therefore not convinced that this intended appeal is arguable and has good chances of success. The Applicant in my view by not including the draft Memorandum of Appeal, have not raised arguable grounds of appeal.

### **The Degree of Prejudice should the Application be Disallowed.**

34. The Applicants have not indicated how they shall be prejudiced if the orders are not granted. In my view, the Respondents will be greatly prejudiced as the Applicants have not demonstrated a prima facie arguability of the Appeal.
35. For the reasons discussed above, I am of the opinion that the Applicant has not satisfactorily convinced the Court that time should be extended to allow him to lodge an appeal.

### **Conclusion**

36. Even though no time is prescribed for lodging an appeal under Section 50 of the *Succession Act*, it is my considered view that the conduct of the Applicant is paramount in determining the success or otherwise of his application to extend time or to grant leave to appeal. The applicant relies on Section 58 of the *Interpretation and General Provisions Act* which provides: -

“Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises”



37. The foregoing provisions calls for a party to act without unreasonable delay even where time to do a certain thing is not prescribed by the law. The Applicant herein has not passed the test of acting without unreasonable delay given that he took three (3) months to file this application from the date of delivery and no effort has been made to account for the delay in a satisfactory manner and this application seems to be an afterthought.
38. It is my finding that the Applicant has failed to persuade this Court that he deserves the exercise of its discretion in this application.
39. Consequently, I find no merit in this Application dated 29<sup>th</sup> August 2022 and dismiss it accordingly.
40. The Administrators are to file a return on distribution and settlement of the estate within the next sixty (60) days from the date of this ruling
41. This being a family matter there shall be no Order as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 20<sup>TH</sup> DAY OF FEBRUARY, 2024.**

.....

**S. MOHOCHI**

**JUDGE**

