



REPUBLIC OF KENYA



**In re Estate of Joash Arende - Deceased (Civil Appeal
225 of 2023) [2024] KEHC 2289 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL 225 OF 2023
RPV WENDOH, J
MARCH 7, 2024**

BETWEEN

JEREMIAH ODERO APPELLANT

AND

BENARD OUMA KAMA RESPONDENT

RULING

1. The Notice of Motion (application) for determination is dated 31/8/2023. Jeremiah Odero (the appellant) seeks the following orders:-
 - a. That this court admits filing of this appeal out of time.
 - b. Costs of the application be in the cause.
2. The application is based on grounds found on the face of it and supported by the affidavit of Jeremiah Onsare Soire, Counsel acting on behalf of the appellant. Counsel deposed that he received instructions to file an appeal on 23/6/2023 and he wrote a letter requesting for the proceedings and a copy of the judgement to enable him draft a memorandum of appeal; that the copies of the proceedings and judgement were ready on 15/8/2023 and he was able to pick them on 22/8/2023; that filing the appeal out of time was beyond the appellant's control and it is in the best interest of justice that the appeal be filed out of time.
3. The application was opposed. Benard Ouma Akama (the respondent) filed grounds of opposition dated 16/10/2023. In which he argued that the application is an abuse of the court process and it is res judicata for reasons that it raises issues already canvassed before this court in Succession Civil Appeal No. 24 of 2018 and Civil Appeal No. 149 of 2019; that this court in Civil Appeal No. 149 of 2019 established a customary trust and directed the lower court to proceed with distribution of the estate of the deceased which the lower court complied; that the appeal does not disclose new evidence to warrant an admission/trial; that the appeal is vexatious, frivolous and a waste of court's time.



4. Both parties filed their respective written submissions. I have considered both submissions and the following issues are for determination:-
 - a. This appeal is res judicata.
 - b. The appeal should be admitted out of time.
5. The respondent raised the issue that this appeal is res judicata by dint of the previous decisions of this court in Succession Civil Appeal No. 24 of 2018 and Civil Appeal No. 149 of 2019. Section 7 of the *Civil Procedure Act* makes provision for the doctrine of res judicata. The law prohibits courts from determining matters in which the same parties litigated an issue (s) which were substantially the same and adjudicated upon to their finality, there being no appeal or review arising from the decision therefrom.
6. In *Christopher Kenyariri vs Salama Beach* (2017) eKLR, the court outlined the principles to be satisfied when determining res judicata as follows: -

“...the following elements must be satisfied...in conjunctive terms;

 - a) The suit or issue was directly and substantially in issue in the former suit
 - b) Former suit between same parties or parties under whom they or any of them claim
 - c) Those parties are litigating under the same title
 - d) The issue was heard and finally determined.
 - e) The court was competent to try the subsequent suit in which the suit is raised.”
7. In Succession Civil Appeal No. 24 of 2018 which was an appeal from the decision of Hon. Kamau (SRM), Mrima J faulted the trial Magistrate for not distributing the estate of the deceased in accordance with the customary laws applicable to the deceased at the time of his death. The succession proceedings were remitted back to the trial court for distribution.
8. In Civil Appeal No. 149 of 2019 this court once again reiterated the findings in Succession Civil Appeal No. 24 of 2018 and directed that the lower court do follow the proper laid down procedure in distribution of the estate of the deceased in accordance with the *Law of Succession Act*. In paragraph 23 of this court’s ruling, this court directed that apart from relying on affidavits and the title to the suit parcel of land, the trial court should proceed by way of viva voce evidence, by summoning competent witness (es) or expert (s) to guide the court on the distribution of the deceased’s estate in accordance with Luo Customary Law. On this basis, this court set aside the grant issued in the lower court. Hence, there was in fact no proper confirmed grant in the estate of the deceased.
9. I have considered and appreciated the lower court’s proceedings. In compliance with this court’s directives in Succession Civil Appeal No. 24 of 2018 and Civil Appeal No. 149 of 2019, the trial court heard the parties claiming an interest in the deceased’s estate on diverse dates between 13/10/2022, 11/11/2022 and 9/3/2023. The trial court then delivered its judgement on 8/6/2023.
10. The appellant is dissatisfied with the decision of the trial court in distribution of the estate of the deceased. This court did not make any pronouncement on the distribution of the deceased’s estate. Therefore, this appeal is not res judicata.



11. On whether the appellant should be granted leave to appeal out of time, it is common ground that an appeal from the decision of the lower court should be filed within 30 days from the date of the ruling, order or judgement where an appeal lies as a matter of right. Section 79G of the [Civil Procedure Act](#) provides: -

“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 anytime which the lower court may certify as having been requisite for 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.”
12. The requirement to file an appeal within 30 days is not cast in stone. The law gives the court discretion to admit an appeal out of time if the appellant demonstrates good and sufficient cause.
13. In exercising its discretion to grant extension of time to file appeal out of time, the appellate court has to take into account the length of the delay, the explanation or the reason for the delay, chances of the appeal succeeding if the leave is granted and the degree of prejudice to be suffered by the respondent as it was held in *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi Nairobi Appeal 255 of 1997*.
14. On the length of the delay, the judgement was delivered on 8/6/2023. The appeal should have been instituted on or before 8/7/2023. The appellant explained that the delay was occasioned by the fact that the proceedings and the judgement were supplied late. The appellant proved this by producing a letter dated 23/6/2023 in which Counsel asked for certified copies of the proceedings and judgement. The certified copies of the proceedings were ready for collection on 15/8/2023. The appellant however has not annexed a copy of the judgment.
15. The appellant’s Counsel deposed that he was able to pick the proceedings on 22/8/2023. The instant application was filed 7 days later on 31/8/2023. I find that the delay in filing the appeal has been explained and the appellant was prompt in filing the application seeking leave to file the appeal out of time.
16. I have considered the grounds of appeal. The appellant’s main concern is that the trial Magistrate erred in considering the families of the deceased brothers as beneficiaries in the estate of the deceased as they were not direct beneficiaries. I find that this is an arguable ground of appeal.
17. The respondent has not told this court and/or expressed his apprehension on the degree of prejudice he will suffer in the event this court allows the appeal to proceed.
18. I find that the application is merited and the following orders do issue:-
 - a. The applicant to file and serve the draft Memorandum of Appeal within 7 days hereof upon payment of the requisite court fees;
 - b. The applicant to file and serve the record of appeal within 30 days hereof;
 - c. Mention before the Deputy Registrar on 15/4/2024 to confirm compliance.
 - d. Costs of this application do abide the outcome of the appeal.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 7TH DAY OF MARCH, 2024

R. WENDOH



JUDGE

Ruling delivered in the presence of:-

Mr. Soire for the Appellant.

Mr. Juma for the Respondent.

Phelix Court Assistant.

