



REPUBLIC OF KENYA



**In re Estate of Rebo Karari (Deceased) (Family Appeal
20 of 2023) [2024] KEHC 3565 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL 20 OF 2023
FN MUCHEMI, J
APRIL 11, 2024**

BETWEEN

**NJERI NDERE 1ST APPELLANT
KARUNGURU REBO 2ND APPELLANT
MONICA WANDIA 3RD APPELLANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF KARARI REBO -
DECEASED**

AND

PETER GITHITU MUNGAI RESPONDENT

RULING

1. The application dated 20th June 2023 seeks for orders of leave to file an appeal out of time against the judgment delivered in Thika Succession Cause No 430 of 2008 on 28th November 2014. It also seeks for orders of stay of execution of the said judgment pending hearing and determination of the appeal.
2. In opposition to the application, the respondent filed Grounds of Opposition dated 14th December 2023.

Applicants' Case

3. The applicants state that judgment in Succession Cause No 430 of 2008 was delivered on 28th November 2014 in favour of the respondent where the trial court awarded the respondent 1 acre from LR No Ngenda/Karuri/693. The applicants contend that judgment was delivered in their absence as they were never notified of the said proceedings by the respondent. The applicants further contend that they only came to know about the proceedings when they were served with an application dated 31st March 2022 and amended on 26th September 2022. Being aggrieved by the judgment, the applicants



state that they instructed their advocates to lodge an appeal against the said judgment. The counsels advised them that the time stipulated for filing an appeal had lapsed.

4. The applicants argue that the application dated 31st March 2022 was canvassed viva voce and a ruling delivered on 27th February 2023 whereby the trial court issued an order on maintenance of the status quo on occupation of the suit property for a period of four (4) months.
5. Despite the four month period having lapsed, the applicants claim that the respondent has been issuing threats to them and the deceased's estate harassing them to vacate from the suit property. The applicants argue that if the orders sought are not granted, they stand to suffer irreparable loss. Further, the applicants argue that they stand to suffer substantial loss because they stand to lose the estate to a stranger.
6. The applicants state that they have a good appeal with high chances of success. Furthermore, the applicants state that the application has been brought at the earliest opportunity and without undue delay.

The Respondent's Case

7. The respondent opposes the application on the premise that it is bad in law as it has been based on illegal orders issued by a court that was not seized of jurisdiction and/or if at all it had, it exceeded its jurisdiction and/or mandate. The respondent further contends that the applicants are guilty of laches and they have failed to fulfill all the conditions for filing an appeal out of time and stay of execution of the judgment.
8. Furthermore, the respondent contends that the applicants have failed to demonstrate any reasonable or plausible grounds which are capable of warranting the grant of the orders sought. The respondent argues that the applicants have failed to show cause why the estate of the deceased was or is not under constructive trust on his behalf despite overwhelming evidence that the respondent ranks in superiority to the applicants in the estate as being a cestui que trust and then it is only upon grant of his share in the estate that the applicants become entitled to share amongst themselves.
9. The respondent states that the applicants have no locus standi to prosecute the application. Further, the respondent contends that in the event the court allows the application for stay, the applicants ought to deposit security of costs.

The Applicants' Submissions

10. The applicants submit they were appointed as administrators of the estate of the deceased following a ruling delivered on 27th February 2023 in Succession Cause No 430 of 2009 which revoked the grant issued earlier.
11. The applicants rely on Section 79G of the *Civil Procedure Act* and the case of *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR and urge the court to exercise its discretion in their favour and allow their appeal be admitted out of time.
12. The applicants submit that the judgment in Succession Cause No 430 of 2009 was delivered on 28th November 2014 which was nine (9) years ago. The applicants argue that although the period for delay is long, the reasons for the delay are plausible as they were never involved in the succession proceedings despite them being beneficiaries. The applicants contend that they only came to know of the proceedings when they were served with an application dated 31st March 2022. As such, the proceedings were faulty as the applicants were not involved in the distribution of the estate.



13. The applicants further contend that they had no way of knowing that judgment was entered in favour of the respondent. Moreover, the applicants contend that judgment was entered without any of the parties present.
14. The applicants submit that the appeal has merit as the respondent was illegally awarded 1 acre from the suit property without consideration of the rules of evidence. Further, the applicants submit that the parties present in the proceedings concealed material facts as is evidenced from the typed proceedings.
15. The applicants contend that they stand to suffer a great deal of prejudice as the respondent is a stranger to the deceased and his alleged purchase of the property from the deceased was not substantiated by evidence. To support their contentions, the applicants rely on the case of *Re Estate of Owenga Omoro (Deceased)* [2020] eKLR.
16. The applicants rely on Order 42 Rule 6(2) of the *Civil Procedure Rules* and the case of *Nicholas Stephen Okaka & another v Alfred Waga Wesonga* [2022] eKLR and submit that they stand to suffer substantial loss as the estate of the deceased will be alienated from its beneficiaries to the respondent causing the estate to waste away.

The Respondent's Submissions

17. The respondent filed submissions however his submissions address the substantive appeal.

Issues for determination

18. The two main issues for determination herein are:-
 - a. Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;
 - b. Whether the applicants have met the prerequisite for grant of stay of execution pending appeal;

The Law

Whether the court should exercise its discretion to grant the applicants leave to file their appeal out of time;

19. Section 79G of the *Civil Procedure Act* states:-

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 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.

20. It is clear from the wording of section 79G of the *Civil Procedure Act*, that before the court considers extension of time, the applicants must satisfy the court that they have good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.



21. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 others* [2014] eKLR 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.

22. 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.”

23. The applicants argue that they delayed in lodging the appeal as they were never informed of the succession proceedings in the trial court and they only came to know of the proceedings when they were served with an application dated 31st March 2022. I have perused the court record and noted that judgment was delivered on 28th November 2014. The instant application was filed on 26th June 2023. This is about 9 years 7 months after the prescribed period of 30 days provided by the law for filing within which to file an appeal. I have further perused the court record and noted that the applicants did not participate in the succession proceedings in Succession Cause No 430 of 2009. Although the applicants are listed as beneficiaries, the court record does not show that they were present during the hearing of the summons for Confirmation of grant. It is noted that, the administrator and the protestor of the estate of the deceased were the brothers of the deceased and not the children of the deceased. This was explained in the evidence of the protestor that the deceased was registered owner of LR Ngenda/Karuri/693 in trust for himself and his siblings. The applicants had filed an application dated 31/03/2023 and amended on 26/09/2022 in Succession cause No 430 of 2009 seeking revocation of the grant which application was successful in that the applicants were appointed administrators of the estate. They were advised to lodge an appeal against the judgment of the court delivered on



28/11/2014 which led to filing of this appeal. There is evidence on record that the applicants have been in occupation of their respective portions as allocated by the deceased for a long time. The respondent has been using his one-acre portion for years after the court bequeathed him of the land. It is therefore, unlikely that the applicants were not aware of the judgment in the succession cause. The applicants have not given any plausible explanation as to why they delayed further the filing of the application after the ruling of the Magistrate delivered about one (1) year ago which addressed some of the issues affecting them. Thus it is my considered view that the delay of over (ten) years has not been explained. In my considered view, the period is inordinate and inexcusable.

24. I have further perused the grounds of appeal as set out in the Memorandum of Appeal and without delving into the merits of the appeal, I am of the view that the applicants have not demonstrated grounds of appeal with high chances of success. Therefore, it is my considered view that the applicants have not established to the satisfaction of the court why time should be enlarged to enable them file their appeal.
25. In my considered view, the prayer to file the appeal out of time is unsuccessful. As such, the court will not delve into the second prayer seeking for stay pending appeal. In fact, this matter was registered as an appeal while in fact it was a Miscellaneous Civil application.

Conclusion

26. I therefore find that the application dated 20th June 2023 lacks merit and is hereby dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT THIKA THIS 11TH DAY OF APRIL 2024.

F. MUCHEMI

JUDGE

