



**In re Estate of the Late Mbacha Mithamo (Miscellaneous Succession
Application E001 of 2023) [2024] KEHC 6702 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS SUCCESSION APPLICATION E001 OF 2023**

RM MWONGO, J

MAY 23, 2024

BETWEEN

JOHN MWANIKI MBACHA APPLICANT

AND

BEATRICE KARIKO MBACHA RESPONDENT

RULING

1. This is a notice of motion dated 4th January, 2023 in which the applicant seeks the following orders:
 1. That service of this application in the first instance be dispensed with and the application be heard ex-parte.
 2. This court do grant leave to the appellant to file an appeal against the respondent out of time over the judgment delivered in Kerugoya C.M Succession Cause No 37 of 2016.
2. The application is premised on the following grounds, also reiterated in his supporting affidavit:
 - i. That the judgment was scheduled to be read on 11/8/2022.
 - ii. That the applicant and his advocates made several enquires on 11/8/2022 about the judgment from the court were informed by the court clerk that the judgment would be read on notice.
 - iii. That it is only on 1/1/2023 that the respondent threatened to being surveyors to the Suitland that the applicant discovered that the judgment had been read.
 - iv. That the applicant was dissatisfied with the judgment
 - v. That the applicant has noted that the time for appealing has lapsed and it is in the interest of justice that he be granted leave to appeal out of time.



3. The respondent filed grounds of opposition and a replying affidavit urging the court to dismiss the application for being fatally defective. His grounds were:
 - i. That it is untrue that court that the lower Court 1 headed by Honourable Ithuku Chief Magistrate was not sitting.
 - ii. That when the applicant heard that we are ready to execute the grant, he started running around and ultimately came to court, with the current application for leave to appeal.
 - iii. That if at all court number one was not sitting nothing would have been easier than to annex a notice issued to litigants and advocate informing them that the court will not sit on 8th November, 2022.
 - iv. That the applicant uses the biggest part of the estate of our father hence he is not ready to let me distribute of the estate as per the court judgment hence the reason he is visiting the court to prevent us from enjoying the fruits of the judgment.
4. Parties filed submissions as directed by the court.
5. The applicant submits that appeals in succession proceedings are provided under Section 50(1) of the *Law of Succession Act* which provides as follows;

“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 shall be final.”
6. The above section does not provide for the time within which a succession appeal ought to be filed. However, Section 79G of the *Civil Procedure Act* provides that every appeal from a subordinate court shall be filed within thirty days from the date of the decree provided that an appeal may be admitted out of time if the applicant satisfies the court that he had a good and sufficient cause for not filing the appeal out of time. Reliance was placed on the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR.
7. The applicant submits that the judgment was to be delivered on 11th August, 2022 which date the applicant and her advocate were advised of by notice.
8. Further that the Judgment annexed as JMM1 clearly indicates that the applicant and her advocate were not present when the judgment was being read. The applicant only came to learn of the judgment on 1st January, 2023 when she was advised that the land was being subdivided and she immediately filed this application on 9th January, 2023 after confirming the same at the court's registry.
9. Consequently, the applicant argues that the application has been filed without inordinate delay since it was filed approximately four months from the date of judgment which was issued on 11th August 2022. The applicant has annexed his memorandum of appeal as “JMM2” and it raises arguable grounds. The Respondent has not demonstrated what prejudice she is likely to suffer if the application is allowed.
10. The respondent submits that the judgment was read on the 11/8/2022 in open court on that date, the court was actually sitting, simply meaning that the court doors were open and members of the public could access the physical court. The applicant's annexure JMMI on the last page of the judgment confirms that on the 11/8/2022 the court was sitting and it did deliver the judgment. The applicant himself confirms that he knew judgment was scheduled for the 11/8/2022.



11. Further the respondent points out that the respondent deponed that she sat all through the mentions of the cases that were handled on that day, and that court can verify from days return for court 1 headed by Chief Magistrate Honourable Alex Ithuku.
12. As such that respondent submits that since the applicant was in court on the 11/8/2022 and he knew about the judgment a delay of 4 months from the 11/8/2022 to the time of filing this application is definitely inordinate.
13. The respondent further notes that the applicant states that he was told judgment shall be read at unspecified date but a notice shall be sent. Since the court was sitting and the applicant has deponed that he attended court he chose to sit on his right. He who wants equity must come with clean hands. The applicant advocates never swore an affidavit to support the applicant's application, and there is no good reason given for the delay.
14. Finally, the respondent notes that the appeal deals with a will allegedly dated 2/4/2008, that is, the issue of a written will as against an oral will dated 2004. The deceased never died within the 3 months stipulated by law, when one makes an oral will. Issues of health were raised but no documentary evidence was provided. The applicant herein did not want his sisters to share their father's estate, very selfish indeed. What the applicant is forgetting is that if the estate was to be shared intestate, he will get less than what the will gave him. The respondent submits that the appeal has no merit and should not be used as a ground to extend time to file the same.
15. Finally, as to the prejudice likely to be suffered by the respondent, he argues that the applicant uses the biggest portion of the estate following the judgment; that the succession cause was filed in the year 2008, transferred to Kerugoya as Succession no.695/2015., and that 14 years have elapsed yet the applicant wants to go on appeal while still enjoying his portion at the expense of the respondent and others. This prejudices the other siblings.
16. The law on applications to appeal out of time is stated in Section 79G of the Civil Procedure Act 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 a good and sufficient cause for not filing the appeal in time.”
17. In the case of *Thuita Mwangi v Kenya Airways Limited* [2003] eKLR, the Court of Appeal then held as follows:

“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 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”.
18. Thus, the only issue is whether the delay is unreasonably long and unsatisfactorily explained for the court to exercise its discretion. The issue of the chances of appeal is secondary and ought to arise only after due consideration of the first two grounds



19. The Court of Appeal gave further guidance that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoitbi* [2014] eKLR thus:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”
20. The applicant submits that on 11/8/2022 when the judgment was to be delivered the applicant and her advocate were advised that the court was to issue the judgment on notice. The applicant only came to learn of the judgment on 1st January, 2023 when she was advised that the land was being subdivided and she immediately filed this application on 9th January, 2023 after confirming the same at the court's registry.
21. The respondent submits that the judgment was read on the 11/8/2022 in open court on that date, the court was actually sitting, simply meaning that the court door were open and members of the public could access the physical court.
22. It is clear that the applicant made attempts to follow up the reading of the judgement but was not present in court when the same was delivered. He indicates in his supporting Affidavit that the court clerk informed them that the judgement would be delivered on notice.
23. Thus, the applicant should not be condemned for inadvertent failure to attend court when the judgement was delivered.
24. In *Stecol Corporation Limited v Susan Awnor Mudembi* [2021] eKLR it was stated that:
- Article 48 of *the Constitution* guarantees every person access to justice, in addition, under Article 50(1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
25. I have perused the file and proceedings and have not seen any evidence of notice issued to the applicant for the reading of the judgment. Thus I do not see that the application has been filed without inordinate delay since it was filed approximately four months from the date of judgment which was issued on 11th August, 2022
26. On The chances of the appeal succeeding, a perusal of the draft memorandum of appeal, shows that the appeal deals with a will dated 2/4/2008 and the issue of a written will as against an oral will dated 2004. The appellants appeal is against the validity of the will as the testator allegedly lacked capacity to make the will.
27. This is an issue that requires to be litigated to finality. Hence, it would be unfair to lock out the appellant from appealing on this issue that goes to the root of the distribution of the deceased's estate.
28. *In re Estate of John Ndungu Mubia (Deceased)* [2021] eKLR, the court made it clear 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.



29. I am therefore not satisfied that this is a case where the court should not exercise its discretion in favour of the applicant. Not to do so in the present the circumstances would amount to unfairly denying the applicant his full right to pursue an appeal where there is hardly any prejudice to the respondent
30. Accordingly, I allow the application. The applicant shall file the appeal within 45 days of the date hereof.
31. Orders accordingly.

DATED AT KERUGOYA THIS 23RD DAY OF MAY 2024

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R MWONGO

JUDGE

Delivered in the presence of:

Ndungu - holding brief for Makworo for Applicant

Nyaga G - holding brief for Munene Muriuki for Respondent

Court Assistant, Murage

