



**Odhiambo (Suing as the Legal Representative of the Estate of
Nobertus Odhiambo Nyamulo) v Simwa (Probate & Administration
E001 of 2024) [2024] KEHC 5145 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5145 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
PROBATE & ADMINISTRATION E001 OF 2024**

KW KIARIE, J

MAY 15, 2024

BETWEEN

**JEREMIAH OTIENO ODHIAMBO (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF NOBERTUS ODHIAMBO NYAMULO) APPELLANT**

AND

HELLEN OGALO SIMWA RESPONDENT

RULING

1. Jeremiah Otieno Odhiambo, the applicant herein, moved the court through a Notice of Motion dated the 31st day of January 2024. The application is brought under sections 3A & 79G of the [Civil Procedure Act](#) and Order 40 of the [Civil Procedure Rules](#). He is seeking the following orders:
 - a. Pending the hearing and determination of the instant application, the honorable court be pleased to grant an Interim order of stay of proceedings vide Homa Bay Misc. application E.015 of 2023.
 - b. The honourable court be pleased to grant an order of stay of proceedings vide Homabay Misc. Succession E015 of 2023 pending the hearing and determination of the intended appeal.
 - c. The honourable court be pleased to grant leave to the application herein to file and mount an appeal out of the statutory period against the ruling and order of Hon. Toroitich, Resident Magistrate, made on the 15th day of September 2023 vide Homa Bay Misc. Application E015 of 2023, whereby the honourable court (sic) dismissed the applicant's application for citation dated the 17th day of March 2023.
 - d. Such further and other orders be made as the court may deem fit and expedient.
2. The application is premised on the following grounds:



- a. That this honourable court issued a ruling dated the 15th day of September 2023, *vide* Homa Bay Misc. Succession cause NO. E015 of 2023.
 - b. That in the said ruling, the court effectively dismissed the applicant's application dated the 15th day of September 2023, which sought to cite the respondent herein to take out a grant of letters of administration in the Estate of Simion Simwa to sue the respondent in his capacity as the administrator of the estate of the deceased Simion Ogalo Simwa before a competent court.
 - c. That in relation to the above citation, the applicant herein intended to challenge the fraudulent exercised from Gem/Kanyajwa/180 belonging to the late Nobertus Odhiambo Nyamulo.
 - d. That being dissatisfied by the ruling, the applicant herein wishes to appeal against the decree of the trial court delivered on the 15th of September 2023, but the permitted time has lapsed.
 - e. That the delay in filing the appeal was not intentional but was caused by the failure of the applicant to issue sufficient instructions within the prescribed time to allow the advocate herein to file the appeal.
 - f. That the property in contention belonged to the late Nobertus Odhiambo Nyamulo and was fraudulent transferred and registered to the respondent's deceased husband, and therefore, the applicant herein stands to lose the property that was legally owned by his father and transferred to the late Simion Ogalo Simwa under peculiar circumstances.
 - g. That the inaction and/or omission to file the appeal within the specified time was not intentional and thereby wishes the court to exercise its discretion in extending time to file an appeal out of the stipulated time.
 - h. The applicant contends that his intended appeal is arguable and meritorious and will, therefore, be rendered nugatory if a stay of execution is not granted
3. The application was opposed by the respondent on the following grounds:
 - a. That the applicant did not explain the reason for the delay.
 - b. That there are no proceedings to be stayed.
 - c. That the applicant did not demonstrate that he has an arguable appeal.
 4. Section 79G of the *Civil Procedure Act* provides for extension of time to appeal 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.



5. The order sought by the applicant is discretionary and the court must be satisfied that it is merited. The Supreme Court of Kenya, in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR said:

Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time, the whole period of delay should be stated and explained to the satisfaction of the court.

6. The applicant has not demonstrated to the satisfaction of this court why there was a delay from the 15th day of September 2023 to the 31st day of January 2024 when this application was filed. Secondly and very importantly, a succession court cannot adjudicate his claim that the deceased fraudulently exercised his father's parcel of land in 1971. This falls in the jurisdiction of a land and environment court. The learned trial magistrate's finding cannot be faulted.
7. Even if the applicant had appealed in time, his appeal could not succeed. I, therefore, dismiss the application with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 15TH DAY OF MAY 2024

KIARIE WAWERU KIARIE

JUDGE

