



**Ayako v Oronje (Civil Miscellaneous Application 103 of 2023)
[2024] KEHC 7641 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL MISCELLANEOUS APPLICATION 103 OF 2023
SC CHIRCHIR, J
JUNE 20, 2024**

BETWEEN

PHANICE AYAKO APPLICANT

AND

CATHERINE ORONJE RESPONDENT

RULING

1. Through the Notice of motion dated 12th July 2023, the Applicant seeks for the following orders;
 - a. spent
 - b. That this honourable court be pleased to grant the Applicant leave to appeal out of time against the ruling delivered by Hon. G.P Omondi PM on 22nd March 2023.
 - c. That the Honourable court be pleased to issue an order for stay of execution of the judgment entered and delivered herein against the Applicant on 22nd March 2023 pending the hearing and determination of the intended appeal.
 - d. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on the face of the Application and the supporting affidavit of Phanice Ayako.
3. The applicant's case is that she sought for an order at the trial court to compel the respondent to issue an introductory letter to her, to enable her file succession proceedings in respect to the Estate of the Late Daniel Okanga Olunga (Deceased).



4. That the said Application was dismissed on 22.3.2023 for want of appearance on her part ; that she was not informed about the hearing by her previous Advocate and avers that she only came to learn of the ruling on 26th June 2023 from her brother, who sent her a copy.
5. She was dissatisfied with the ruling and has instructed her present advocate to apply for enlargement of time to file an Appeal.
6. She stated that she was the Administrator of the deceased's Estate; that the deceased died without being married and that he was survived by two children and his mother.
7. She states that the Application should be allowed in the interest of the deceased's children. That the person purporting to be the wife of the deceased has not given enough evidence to show that she is entitled to administer the Estate

The Respondent's case.

8. . In its replying affidavit dated 10th July 2023, the respondent , the chief of Shianda location , states that the deceased was survived by a wife, a child and his biological mother.
9. She averred that the applicant was represented by an advocate throughout the trial at the lower court , and hence it is untrue for her to plead ignorance on the delivery of the ruling
10. She acknowledges that she had written an introductory letter for the deceased's family when they sought financial assistance for funeral expenses from the deceased employer, for NHIF benefits and SACCO shares; that at the time there was no mention of an extra child belonging to the deceased; that when the deceased's family filed declaration forms for NSSF, they had acknowledge one Doroty Milka Apiyo as the wife of the deceased.
11. She argues that the intended Appeal has no chances of success since she had already issued a letter, which apparently did not meet the demands of the Applicant.
12. The Application was canvassed by way of written submissions.

Applicant's submissions.

13. On the delay to file the Appeal on time , the Applicant reiterates that the Ruling was delivered in her absence. She also added that her counsel was also absent and that she later kept calling her Advocate but he was unreachable. She submits that the mistake was that of her previous Advocate and the said mistake should not be visited on her.
14. On whether the Intended Appeal has any chance of succeeding, she states that the estate of the deceased comprised of the minors and the deceased aging mother, and that the respondent's was not an Administrator within their jurisdiction and hence did not know the immediate family members of the deceased.
15. The Applicant has relied on the case of Fakir Mohammed vs. Joseph Mugambi & 2 others as cited in the case of Mukunga Njoka vs. Wanjiku Njoka (2005) eKLR and Charles N. Ngugi vs. ASL Credit Limited (2022) eKLR.
16. She finally submits that no prejudice will be suffered by the respondent if the orders sought are granted.



Respondent submissions

17. It is the respondent's submissions that the Applicant's submission has been overtaken by events, as she had already issued the introductory letter to the widow of the deceased; that there are already objection proceedings filed by the Applicant in the succession cause.
18. She further submits that in any event, under section 35 and 37 of the *law of succession Act*, the spouse and the children have priority in the order of inheritance of the deceased's Estate.

Determination

19. The only issue for determination is whether the applicant has made out a case for enlargement of time within which she can file an Appeal.
20. . Section 79G of the *Civil Procedure Act* provides that:

‘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.
21. In determining an Application brought under the proviso to section 79G, the courts have repeatedly given a number of guidelines to aid the Courts in the exercise of the discretion . In *Thuita mwangi v Kenya Airways Ltd [2003] e KLR* it was held that the courts should consider :
 - i. “ The period of delay;
 - ii. the reason for the delay;
 - iii. the arguability of the appeal;
 - iv. the degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue; and
 - vi) The effect if any on the administration of justice or public interest if any is involved.”
22. The judgment was delivered on 22nd March, 2023 while the present application was filed on 12th July 2023, four (4) months after the lapse of the 30 days stay of execution granted by the trial court.
23. The appellant has submitted that the delay was occasioned by his former advocate's failure to follow up on the ruling and the fact that he was uncooperative.
24. There is however no evidence on record to show that the applicant was vigilant in following up her case. The importance of giving a sufficient reason for the extension of time to appeal was discussed



in the Court of Appeal case of Susan Ogutu Oloo & 2 Others v Doris Odindo Omolo (2019) eKLR where it was held:-

“In an application for extension of time, the single Judge has discretion. I am aware that the discretion I have is to be exercised judiciously and not whimsically or capriciously. The guiding principles on the issue of extension of time was laid out by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v IEBC (2014) eKLR Sup Ct Application No 16 of 2014.*

The Supreme Court aptly stated extension of time is not a right of a party; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the Court. Of paramount importance, the reason for delay must be explained to the satisfaction of the Court. Further, the application for extension must be brought without undue delay and it must be demonstrated if the respondent will not suffer prejudice if extension is granted”.

25. The applicant has not demonstrated a “good and sufficient cause” for not filing the appeal in time other than the fact that her advocate was uncooperative, and that he failed to follow up on the outcome of the ruling. She has not demonstrated what initiative she took on her own to find out the outcome of the Ruling, upon realising that her Advocate was not cooperating.
26. On the question of the exercise of judicial discretion, the Supreme Court observed in the case of Telkom Kenya Limited V. John Ochanda and 996 Others [2015] eKLR that:

“..... Parties should comply with the procedure, rather than look to the Court’s discretion in curing the pleadings before it. This Court’s position is that the circumstances of each case are to be evaluated, as a basis for arriving at a decision to intervene, in instances where full compliance with procedure has not taken place....”
27. On the length of the delay, am of the view that four month’s delay was not inordinate.
28. However, I have looked at the arguability of the Appeal. From what I can decipher from the lower court’s ruling, the Applicant sought an order from court compelling the chief to write a letter confirming her relationship to one Daniel Okanga Olunga. The Applicant wishes to administer the Estate of the said Olunga . She is apparently wants to challenge the authority of one Dorothy Milka Apiyo to administer the deceased’s Estate. Her contention is that the said Dorothy was never the wife of the deceased.
29. I should point out that the act of issuing a chief’s letter or that of local Administration in succession proceedings is Administrative , not legal, on the part of the local Administrator.
30. The courts, traditionally , require the chiefs to assist the court to ascertain the immediate kindred of a Deceased person . The chiefs are considered reliable, as it is expected that he/she is well acquainted with the residents of his location. However there is no law that binds the chiefs to issue such a letter (s).
31. I have not had the benefit of seeing the Application that was filed before the lower court , and therefore am not in a position to know what law it was brought under. However, there is no law, save for a plea based on violation of constitutional rights, that compel the chiefs to write such introductory letters. The Applicant’s Application in the lower court therefore had no basis in law.
32. In view of what I have stated in paragraph 29 to 31 of this ruling, am not convinced that the Applicant’s intended Appeal is arguable. The extension of time may not be of any benefit to the Applicant therefore.



33. Consequently, the application for extension of time, and stay pending Appeal is unmerited. It is hereby dismissed.

34. Each party to meet their own costs.

Dated, signed and delivered this 20th day of June 2024.

S. Chirchir

Judge

In the presence of :

Godwin – Court Assitant.

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