



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Gerald Musau Kili (Deceased) (Succession Cause E003 of 2023) [2024] KEHC 12295 (KLR) (16 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE E003 OF 2023**

FR OLEL, J

OCTOBER 16, 2024

IN THE MATTER OF THE ESTATE OF GERALD MUSAU KILILI (DECEASED)

BETWEEN

JACQUELINE MWENDE KAMWANZA APPLICANT

AND

PHILIP MULEI KILILI 1ST RESPONDENT

ANDREW KILILI MULWA 2ND RESPONDENT

BREND MASISTA MULINDI 3RD RESPONDENT

RULING

1. The Application before the court for determination is the Chamber Summons application dated 5th June 2024 seeking the following orders;
 - a. Spent
 - b. That this Honourable Court be pleased to review and/or vary the orders issued on 17th January 2024 requiring the deposit of Kshs.200,000/= in court as security for the appeal within sixty (60) days and in place the court be pleased to substitute the same with a security of Kshs.100,000/=.
 - c. That in the alternative to prayer b, this Honorable Court be pleased to extend the sixty days to enable the appellant to deposit the security so directed.
 - d. That the costs of the application be in the cause.
2. The Application is supported by the Affidavit of the applicant, who contends that she is running a small shop at Tala Market, where she sells clothes and earns about Kshs.7,000/= to Kshs.10,000/= per month. She is blessed with two children, one aged nineteen (19) years with a disability and the other is



nine (9) years old. Based on her earnings, she had not been able to raise the full sum of Kshs.200,000/= required as security and thus prayed for a review of the earlier orders of 17.01.2024 and/or for extension of time to comply.

3. She was apprehensive that unless the orders sought were granted, the Respondents would execute and register the suit property under their names to her detriment as the deceased wife. Further, the Respondents were solely benefitting from the rental income of the suit property despite this court's order that the same be deposited in a joint account held by both advocates.
4. The 1st Respondent filed a Replying affidavit on his behalf and that of the 2nd and 3rd Respondents opposing this application and stated that the Application under consideration was fatally defective, incurably incompetent, and ought to be dismissed with costs. It was deposed that the Applicant was in contempt of court orders of 17.01.2023, had come to court with unclean hands, and had not given a proper reason for the review, and/or for enlargement of time given, that more than 5 months had lapsed since the order was made. Further, the applicant did not provide evidence of her financial status and/or demonstrate how she would pay the Kshs.100,000/= proposed. The respondents therefore urged this court to dismiss this application, as the Applicant has had no intention of complying with the orders earlier issued.
5. The Applicant filed a further affidavit dated 11.07.2024 in which she stated that the income she gets from her small business at Tala Market, is used to sustain herself and her two children, one who is a minor and the other one is disabled. She faulted the respondents for wrongly condemning her yet they had failed to comply with the preservatory order directing that all rents collected from the property known as L.R. NO 13767/118 be deposited in a joint account held in the names of the advocates for both parties. She indicated that her advocate wrote to the Respondent's advocates with the account opening forms and sent a follow-up email on 20.03.2024 but the same was ignored. She contended that no prejudice would be suffered by the respondents if she was allowed to deposit Kshs.100,000/= as security.

Determination

6. I have considered the court record, the application, and the response thereto, and the issues before this court for determination are;
 - a. Whether the court order of 17th January 2024 should be varied and/or reviewed to extend the time to comply.
 - b. Who should bear the costs of this application?

Whether the court order of 17th January 2024 should be varied and/or reviewed to extend the time to comply.

7. Rule 63 of the Probate and Administration Rules allows for the application of certain provisions of civil procedure rules in succession matters and Order 45 of the civil procedure rules is among them. Rule 67 of the Probate and Administration Rules also allows for the court to extend the time for a party to comply, notwithstanding the period earlier given had expired.
8. Section 80 of the *Civil Procedure Act* gives the court discretion to review of its decision. It provides as follows: -

“ Any person who considers himself aggrieved—



- a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

9. Order 45 Rule 1(1) of the [Civil Procedure Rules](#), 2010 sets out the grounds for review and provides as follows: -
 - “ 1. (1)Any person considering himself aggrieved—
 - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

10. Section 47 of the [Succession Act](#), Cap 160, and Rule 73 of the probate and Administration Rules also allow the court to entertain any application and determine any dispute under this Act and make any necessary orders as may be expedient and necessary for ends of justice to be met. Based on the above clear provisions of law, this court can exercise its discretion and has the powers to review and extend time where circumstances so dictate/justify.

11. The court did on 17th January 2024 direct the Applicant to deposit a sum of Kshs.200,000/= as security for the Appeal and gave her two months to do so. By this application under consideration, she seeks for extension of time to comply and have the security amount reduced to Kshs.100,000/= based on her peculiar economic/ social circumstances.

12. The Supreme court in the case of [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR stated as follows;

“ Extension of time being a creature of equity, one can only enjoy it if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.

13. This court then went ahead to set out the conditions for extension of time to file an appeal as follows;
 - a. Extension of time is not a right of a 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 to 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 respondents if the extension is granted;
 - f. Whether the application has been brought without undue delay; and
 - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
14. The delay in filing this application is about two months and that is not inordinate given that the applicant has also explained that she was trying to source for money to meet the conditions of stay as earlier granted. Secondly, the reasons advanced for seeking review are valid and the court takes cognizance of the difficulties a widow will face in being a sole provider for her family and raising money for security within the short period as directed. The reasons for delay are therefore justified.
15. Finally, the Court, in exercising its discretion, when confronted with such circumstances as presented herein, should always opt for the lower rather than the higher risk of injustice and should make such orders as may be necessary for the ends of justice. The court will consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
16. This was appreciated in *Nicholas Kiptoo Arap Korir Salat -Vs- Independent Electoral and Boundaries Commission & Others* [2013] eKLR, the Court of Appeal stated concerning the application of the overriding objective principle;

The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder... The overriding objective principle aims to enable the Court to achieve fair, just, speedy, proportionate, time and cost-saving disposal of cases before it... the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness....

17. The High Court in *John Gachanja Mundia vs. Francis Muriira Alias Francis Muthika & Another* [2016] eKLR also observed that:

“..... However, I will be guided by a greater sense of justice. Courts of law have said that, with the entry of the overriding principle in our law and the anchorage of substantive justice in the *Constitution* as a principle of justice, courts should always take the wider sense of justice in interpreting the prescriptions of law designed for grant of relief.”

C. Disposition

18. I do therefore find that the Application dated 5th June 2024 is merited and grant the following orders;
- a. This Honourable court order's issued on 17th January 2024 are hereby reviewed and extended. The Appellant/Applicant is directed to deposit a sum of Kshs.100,000/= in court as security for this Appeal.



- b. The same is to be deposited in court within the next twenty-one (21) days from the date of this Ruling.
- c. The costs of this Application is awarded to the Respondent.

19. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS ON THIS 16TH DAY OF OCTOBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 16th day of October, 2024.

In the presence of: -

Ms Ngulukyo for Appellant

No appearance for Respondent

Susan Court Assistant

