



REPUBLIC OF KENYA



KENYA LAW
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**Makhanu v Mutunguti; Mutunguti (Interested Party) (Succession Cause
2 of 2020) [2024] KEHC 16285 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 2 OF 2020
REA OUGO, J
OCTOBER 11, 2024**

BETWEEN

CHRISTOPHER NYONGESA MAKHANU APPLICANT

AND

FELIX NYONGESA MUTUNGUTI RESPONDENT

AND

DAVID WANJALA MUTUNGUTI INTERESTED PARTY

RULING

1. In an application dated the 12.3.2024 the applicant seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. The Honourable Court be pleased to grant leave to the applicant to appeal to the Court of Appeal against the Ruling delivered by Hon. Justice S. N. Riechi on the 13th of June 2023.
 - iv. That the costs of the application.
2. The application was opposed. The application is supported by the applicant's supporting affidavit dated 12.3.2024 and opposed by the respondent's affidavit dated 2nd April 2024. Parties canvassed the application by way of written submissions.
3. I read the said affidavits and submissions. There is no doubt that after the ruling was read on 13.6.2023 the applicant did not seek leave to appeal. In succession matters, the applicant is required to seek leave to appeal. The applicant has explained that his former counsel did not seek leave to appeal, the said counsel went quiet on him, and its only after he perused the court file that he discovered that no leave had been sought. By then the period within which he was required to appeal had lapsed. He is aggrieved



- by the Ruling and intends to appeal to the Court of Appeal. The mistake of his Counsel should not visit the mistake of his former upon him. He has an arguable appeal with a likelihood of success which ought to be interrogated on its own merits by the court of appeal.
4. The respondent in his replying affidavit averred that the applicant has not met the threshold for the court to exercise its discretion in granting leave to appeal out of time. The applicant is guilty of laches as the application to appeal out of time has been brought 9 months after the court delivered its Ruling and the applicant has not satisfactorily explained why it has taken him the said period to seek leave to file an appeal. The documents filed by the applicant FNM-1, the Notice of Appeal, and FNM-2 Memorandum of Appeal both relate to Nicholas Makhanu and not the applicant. Had the applicant been diligent he should have known in June 2023 that no appeal has been filed, he has slept on his rights and he cannot claim innocence. The applicant has not demonstrated that he has an arguable appeal with any chances of success. He will suffer prejudice if the applicant's application is granted. The application should be dismissed with costs.
 5. Parties filed written submissions. I have read and considered them together with the rival affidavits. The issue for determination is whether the applicant should be granted leave to appeal. As correctly submitted the applicant was required to seek leave to appeal after the Ruling was delivered. In my view he has sufficiently explained the delay. His advocate let him down. I will not penalize him for the acts of omission of his former counsel. 9 months in my view is not an inordinate delay. He sought help immediately after he learned of the conduct of his former. On the issue of the wrong name, there is no doubt that the applicant was the applicant in the Ruling dated 13.6.2023. The applicant in his submissions has explained the error on the attachment. I accept the explanation.
 6. On whether the appeal has high chances of success. The applicant is aggrieved by Ruling and has in his affidavit explained the issue for consideration before the Court of Appeal. Succession matters are very emotive.
 7. I find merit in the application and grant the applicant leave to appeal to the court of appeal against the Ruling delivered on 13.6.2023. The same to be done within 30 days from the date of the ruling. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED AT BUNGOMA ON THIS 11TH DAY OF OCTOBER 2024.

R. E.OUGO

JUDGE

In presence of;

Applicant -Absent

Mr Onkangi - For the Respondent

Wilkister - C/A

