



Muchugia & 2 others v Muchugia & 3 others (Miscellaneous Civil Application E011 of 2020) [2024] KEHC 11766 (KLR) (2 October 2024) (Ruling)

Neutral citation: [2024] KEHC 11766 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E011 OF 2020
RM MWONGO, J
OCTOBER 2, 2024**

BETWEEN

**PETERSON KINYUA MUCHUGIA 1ST APPLICANT
WACHIRA MUCHUGIA 2ND APPLICANT
MADARINA WAWIRA NJANJA 3RD APPLICANT**

AND

**JOSEPHINE WAMUTIRA MUCHUGIA 1ST RESPONDENT
PURITY WAINOI MUCHUGIA 2ND RESPONDENT
JULIA WANGARI MUGO 3RD RESPONDENT
JOHN KINYUA MUCHUGIA 4TH RESPONDENT**

RULING

1. This application is for leave to appeal out of time. It is supported by the joint affidavit of the applicants.
2. The applicants assert that:
 1. Antony Muchugia who is now deceased, was their father;
 2. Josephine Wamutira Muchugia petitioned the court for grant of letters of administration.
 3. With the consent of some of the beneficiaries, she was appointed as an administrator of their father's estate together with Purity Wainoi, Julia Wangari and John Kinyua.
 4. After the gazettelement, the three administrators filed the application for confirmation of grant and they signed the same except John Kinyua.



5. They proposed the suit land to be subdivided in equal shares among the beneficiaries but we did not consent to the same.
 6. Instead of the judgment being delivered on the 24th November, 2019, it was delivered on 29th March, 2019 in their absence.
 7. They learnt about the judgment at a later date and are dissatisfied with the contents of the judgment.
 8. Since time to file an appeal has lapsed, we have been advised by our current advocate, which advice we verily believe to be true, that we have to seek for leave of the court to file an appeal out of time.
 9. They have good appeal which raises weighty issues for this court's consideration.
 10. The delay is not deliberate but due to my not being informed about the judgment date.
3. The 2nd, 3rd & 4th respondents deposed to a Replying Affidavit on 27th January, 2021, substantially averring as follows:
1. That they are the administrators of the estate of Anthony Muchugia
 2. That the judgment was to be delivered on 24th November, 2018 and not 24th November, 2019 as stated in paragraph 7 of the supporting affidavit.
 3. That the Applicants were present in court on 24th November, 2018 when the Court indicated that the judgment was to be delivered on 29th March, 2019 when they chose not to attend.
 4. That upon the delivery of the judgement, we notified the Applicants of the same and invited them for a meeting when we selected a surveyor to partition the land.
 5. That we also invited the Applicants to come sign the relevant documents so that the estate could be distributed to the beneficiaries but they declined to come.
 6. That we filed an application for the executive officer of the Court to sign the forms and for Officer Commanding Station to provide security during the partitioning. The Applicants were served with the Application but they did not attend Court.
 7. That the Applicants have not explained the inordinate delay for two years.
 8. That the Applicants 'appeal is not arguable as the trial court judicially exercised its discretion and considered the evidence in making the judgment.
4. The applicants' supporting affidavit stated that:
1. judgment in the trial court was to be delivered on the 24th November, 2019.
 2. contrary to the respondent's allegations, there were no proceedings which were taken in court on the 24th November, 2018.
 3. in contrast to the respondent's allegations, judgment could not have been slated for the 24th November, 2018 since all the witnesses, PW1 to PW10 testified on the 28th November, 2018.
 4. that the trial court informed us on the 28th November, 2018 that judgment would be delivered on the 24th November, 2019 only for the same to be delivered without our knowledge on the 29th March, 2019.



5. The applicants deposed a supplementary affidavit substantially asserting that: under paragraph 9 of the affidavit sworn on the 29th October, 2020 we intended to adduce a copy of the typed proceedings and judgment as annexure PKM-1 and the memorandum of appeal as annexure PKM-2 under paragraph 11 thereof but the same were not attached thereto; and that they desired to adduce the said documents as annexures PKM- 1a and 1b respectively.
6. In their submissions, the applicants contend that the issue for determination is whether the applicants deserve to be granted leave to file their appeal out of time. They argue that under Section 79G of the *Civil Procedure Act* CAP 21 the law on filing of appeals to the High Court, which requires an appeal to be filed within thirty days of the judgment.
7. The rely on the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR where the factors to be considered in granting leave were stated.
8. The judgment intended to be appealed against was delivered on the 29th March, 2019 whereas this application was filed on the 16th November, 2020.
9. The applicants submit that the said delay ought not to be taken against the applicants for the reason that the applicants were misled by the lower court that judgment was to be delivered on the 24th November, 2019 only for the same to be delivered much earlier in their absence and without any notice to them whatsoever.
10. They submit that the respondents stand to suffer no prejudice whatsoever if the instant application is allowed since the suit land is family land and the parties herein had been living on the said land for over 40 years peacefully prior to the succession cause. The issue of land being such an emotive one, it would be in the interest of justice that the parties be granted their day in court.
11. They assert that the applicants were so intimidated or cowed by the lower court by inter alia issuance of warrants of arrest against them, that they did not even file their protest or any pleadings to articulate their case. They submit that vis a vis the adduced draft memorandum of appeal (annexure 1b in the supplementary affidavit sworn on the 18th October, 2023.) the applicants have an arguable appeal which raises triable issues with high chances of success.
12. The respondents submit that the issues for determination are: Whether the applicants have satisfied the conditions to be granted Leave to Appeal out of time; and Whether the Applicants have an arguable Appeal.
13. The Applicants say that they learnt about the Judgment of the trial Court at a later date. They have neither given that specific date nor explained the circumstances in which they became aware of the Judgment. They submit that before extension of time is given, it is important to take into account the length and reasons for the delay, as stated in the case of Anthony Maina Kinyua & Another v Joseph Mwangi Njurai (2021) eKLR where the Court held:

“Notably, the powers of the Court in deciding an Application to seek leave to file an Appeal out of time are discretionary and unfettered. The parameters for the exercise of a Court's discretion have been concisely laid out in the case of Mwangi v Kenya Airways Ltd [2003] eKLR where the Court of Appeal expressed itself thus:-

“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 or not 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”

14. The respondents submit that the applicants have not disclosed when and how they become aware of the Judgment to escape liability. Judgment in this matter was delivered on 29th March, 2019 yet the Application was filed on 16th November, 2022, almost two years after; this inordinate delay has not been explained.
15. As to whether there is an arguable appeal the respondents submit that there was none; and that the trial Court record shows that the applicants were determined to frustrate the administration of the estate of the deceased.
16. They assert that first, a Citation had to be issued, which despite service, they did not attend Court. Later, the Court had to issue warrants of arrest twice, against the Applicants. Secondly, that when the Applicants were arrested and taken before the trial Court, they did not give an alternative mode of distribution that was different from what the Respondents had proposed. They had an opportunity to give an alternative mode of distribution. This again demonstrates that they had no arguable appeal before this Honourable Court.
17. The Applicants frustrated the Respondents so much that they had to file an Application for the Executive Officer of the Court to sign transmission forms on the Applicants behalf even during the Hearing of this Application, the Applicants failed to attend despite Service.

Issues for determination

18. The only issue for determination is whether there is justification for the applicants to be granted leave to file their appeal out of time.

Analysis and Determination

19. The Applicants’ main thrust for leave to appeal out of time is that the Judgment in the Chief Magistrate Court at Kerugoya Succession Cause number 284 of 2017 was delivered in their absence. Section 79G of the *Civil Procedure Act* provides 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.”

20. Have the applicants satisfied the conditions to be granted leave to Appeal out of time? On this, the court ought to take into account several factors as observed in the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR which set out factors to be considered as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not 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.”



21. The applicants depose that instead of the judgment being delivered on the 24th November, 2019, it was delivered on 29th March, 2019 in their absence. They learnt about the judgment at a later date and are dissatisfied with the contents of the judgment hence the need to appeal out of time.
22. The respondents deposed that the Applicants were present in court on 24th November, 2018 when the Court indicated that the judgment was to be delivered on 29th March, 2019 but they chose not to attend.
23. It is clear from the attached proceedings that the trial court informed the parties on the 28th November, 2018 that judgment would be delivered on the 24th November, 2019. However, judgment was delivered on the 29th March, 2019.
24. In the circumstances, the applicants' reason for the delay in filing the appeal is understandable as they were not aware that the judgment was delivered at an earlier date. Further, they have attached a memorandum of appeal dated 29th October, 2020.
25. As to the degree of prejudice to the respondents; it was argued by the applicants that the respondents stand to suffer no prejudice whatsoever if the instant application is allowed since the suit land is family land and the parties have been peacefully living on the said land for over 40 years prior to the succession cause. The issue of land being such an emotive one, it would be in the interest of justice that the parties be granted their day in court.
26. The respondents deposed in their replying affidavit that the applicants have never had the interest of the estate, and the application is meant to delay the winding up of the estate.
27. This court does not consider that the respondent will suffer any prejudice if the application is allowed.
28. As to whether there is an arguable appeal, all that need be shown is whether there are triable issues with a chance of success as evident in the draft Memorandum of appeal which raises several arguable grounds. In *Kiu & another v Khaemba & 3 others (Civil Appeal (Application) E270 of 2021)* [2021] KECA 318 (KLR) (17 December 2021) (Ruling) it was stated:

“In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the courts invitation to the opposite party to respond thereto.

Disposition

29. Ultimately, the application succeeds and leave is granted to file the appeal.
30. The record of appeal shall be filed and served within forty-five (45) days of the date hereof.
31. Orders accordingly.

DATED AT KERUGOYA THIS 2ND DAY OF OCTOBER, 2024.

R. MWONGO
JUDGE

Delivered in the presence of:

1. Mwangi M. for Respondents



2. Nyaga Muchiri - holding brief for Macharia for Applicants

3. Court Assistant, Murage

