



**Jepchumba v Bett (Probate & Administration E039 of 2022)
[2023] KEHC 639 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 639 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PROBATE & ADMINISTRATION E039 OF 2022
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

MARSELLAH JEPCHUMBA APPLICANT

AND

CAROLINE CHEPCHIRCHIR BETT RESPONDENT

RULING

1. By a Notice of Motion dated October 24, 2022, the Applicant seeks the following orders: -
 1. Spent.
 2. That leave be granted to the Applicant to appeal out of time.
 3. That the memorandum of appeal filed vide Eldoret High Court Probate and Administration Appeal No 3 of 2022 be deemed as properly filed and served.
 4. That there be stay of execution of the ruling delivered on March 3, 2022 vide Eldoret CMCC Ad Litem Cause No 244 of 2021 and or all its consequential orders pending the hearing and determination of this application interpartes.
 5. That upon the grant of prayers (a), (b) and (c) above, there be stay of the ruling delivered on March 3, 2022 vide Eldoret CMCC Ad Litem No 244 of 2021 and/ or all its consequential orders pending the hearing and determination of Eldoret High Court Probate and Administration Appeal No 3 of 2022.
2. The application is premised on the grounds therein and it is further supported by the affidavit of Marsellah Jepchumba, sworn on October 24, 2022.



The Applicant's Case

3. The Applicant is aggrieved by the ruling delivered in Eldoret CMCC Ad Litem Cause No 244 of 2021 on March 3, 2022 and is desirous of preferring an appeal against it. The Applicant deposed that she is yet to be supplied with a certified copy of the ruling albeit having the requisite payment. That the aforesaid ruling led to the revocation of the grant that had been issued to the Applicant on June 29, 2021, specifically for purposes of instituting Eldoret CMCC ELC No 139 of 2021 and defending ELC No 125 of 2018 which cases are currently pending hearing and determination.
4. The Applicant contends that she became aware of the impugned ruling through her Counsel on record who also became aware upon being served with an application seeking to strike out Eldoret CMCC No 139 of 2021 on October 13, 2022.
5. The Applicant contends that by the time the aforesaid service was being effected, the time within which to appeal had lapsed hence requiring that leave of Court to extend time within which to prefer an appeal to be sought. The Applicant further maintains that due to financial constraints she was not able to file this instant timeously and thus the same has been filed without undue delay.
6. The Applicant contends that the legality of the aforementioned Grant of Letters of Administration Ad Litem is what forms the substratum of the intended appeal hence rendering stay orders necessary in the circumstances. Further that the Respondent has already moved the Court seeking to strike out the proceedings in Eldoret CMCC ELC No 139 of 2021 solely on the ground that the Applicant lacks legal capacity in view of the revocation of his grant as aforesaid.
7. The Applicant is apprehensive that if stay is not granted, then the intended appeal will be rendered nugatory as the primary suit may have been struck out on the aforementioned ground. The Applicant contends that there is likelihood that the aforesaid suit will be struck out yet the appeal may be decided in her favour.
8. The Applicant further asserts that the Respondent herein in conjunction with third parties has intermeddled with the estate of her late brother Kiptanui Joshua Kemei. The Applicant maintains that the issue of intermeddling is what forms the substratum in Eldoret CMCC ELC No 139 of 2021.
9. According to the Applicant the intended has a very high chance of success.
10. The Applicant maintains that the summons dated September 15, 2021 were primarily filed to defeat the ends of justice in Eldoret CMCC ELC No 139 of 2021.
11. The Applicant believes that the 1st Defendant in Eldoret CMCC ELC No 139 of 2021, having sought a refund in her counter-claim confirms the illegality through which she was registered as the owner of parcel of land known as Pioneer/Ngeria/Block 1(EATEC)/8638 after the demise of her brother.
12. The Applicant maintains that that aforesaid suit property was purchased from the proceeds from their ancestral land being LR No Nandi/Ndalat/163. The Applicant maintains that the above sale by his late brother necessitated the filing of ELC No 125 of 2018 which is currently pending before the Environment and Land Court at Eldoret.
13. The Applicant is apprehensive that the application seeking to strike out Eldoret CMCC ELC No 139 of 2021, will only deny her and her siblings their day in court to defend their rights over the suit property.



The Respondent's Case

14. The application is opposed by the Replying Affidavit sworn by Caroline Chepchirchir Bett, on November 3, 2022.
15. The Respondent deposed that the estate to which these proceedings relate belongs to her late husband Kiptanui Joseph Kemei.
16. The Respondent contends that there is no way her sister-in-law the Applicant herein will apply for the grant of letters of administration with respect to her late husband's estate while she and the children of the deceased are still alive.
17. The Respondent deposed that the Applicant herein instituted citation proceeding being Eldoret High Court Citation Cause No 8 of 2021. The Respondent further deposed that while the citation cause was still pending in Court the Applicant then proceeded to the Subordinate Court where she sought and obtained a grant of letters of administration with respect to her late husband's estate.
18. The Respondent contends that the Applicant herein is incapable of protecting the interests of her late husband as she has already taken the view that her late husband did not have any property as his property belonged to the Respondent's mother-in-law.
19. The Respondent contends that it is presumptuous for the Applicant to file an incompetent appeal then use it to seek stay of execution of a negative order. The Respondent maintains that the Applicant ought to have sought for enlargement of time and thereafter if allowed file the intended appeal. The Applicant further contends that there is nothing in the ruling of the Subordinate Court capable of being stayed.
20. The contends that issues of land administration cannot be dealt with by this Court.
21. The Applicant urged the Court to dismiss this instant application with costs.
22. The Court directed that the application be canvassed vide written submissions. The Applicant filed submissions on November 21, 2022 whereas the Respondent did not file any.

Determination

23. I have carefully considered the application, the grounds and supporting affidavit, the response thereof as well as the submissions and the applicable law. The main issues for determination are whether the Applicant deserves the orders for extension of time to file an appeal and secondly, whether this court should stay execution of decree in the lower court.
24. 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.



25. It is trite to note that 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. That discretion, however, must be exercised judiciously.
26. Matters involving extension of time to file an Appeal have been discussed by the superior courts as a jurisprudential question and the attendant principles. This within the domain of judicial discretion to grant or decline any relief on extension of time. It is perhaps worthy considering the settled principles on this context. In this respect, the court of Appeal in *Paul Wanjohi Wathenge v Duncan Gichane Mathege* (2013) eKLR appraising other decisions held as follows:

“That the discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice, I take not that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance. In *Henry Mukora Mwangi v Charles Gichina Mwangi*-Civil Application No Nai 26 of 2004 this court held

“it has been stated time and gain that in an application under rule 4 of the Rules is unfettered. It may be appropriate to re-emphasize this principles by referring to the position in *Mwangi v Kenya Airways Ltd* (2003) KLR 486 in which this court sated “Over the years, the curt has of course set out guidelines on what a single judge should consider when dealing with an application for extension of time under rule 4 of the Rules. For instance, in *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*.Civil Application No Nai 255 OF 1997 (unreported) the court expressed itself thus:-

“ It is now well settled that the decision whether or not to extend the time for appealing is essential discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant or extension of time are, first the length of the delay. Secondly the reason for 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”

27. In the landmark case by the *Apex Court in Salat v Independent Electoral & Boundaries Commission & 7 Others* (2014) KLR-SCK the jurisprudence on extension of time was seasoned by the judges as follows:

1. 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.
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis
4. Whether is a reasonable reasons for the delay. The delay should be explained to the satisfaction of the court
5. Whether there will be any prejudice suffered by the respondents if the extension is granted.
6. Whether the application has been brought without undue delay and



7. Whether in certain cases, like election petition public interest should be a consideration for extending time.
28. Of note the affidavit in support of this application, as sworn to the grounds which barred the Applicant from approaching the seat of justice within the provided time line in the statute. That prima facie evidence has not been fully challenged by the defendant to convince the court to decline exercising discretion in favour of the Applicant. In calculating delay I have taken into account the period between the decision of the trial court and the extended time when the application was lodged seeking the extension of time. It is against this background primarily I find that the question of delay has been explained satisfactory. It is obvious emphasised that the application to extend time must demonstrate that if discretion is not exercised in his or her favour is likely to suffer substantial loss. In so far as the facts outlined in the affidavit both parties a reasonable inference can be drawn that they would be no prejudice suffered to the respondent in granting an application to extend time canvass the intended appeal on the merit.
29. The Application for stay of judgment is primarily governed by the terms of Order 42 Rule 6 of the Civil Procedure Rules. The conditions to be met by an Applicant in order to be entitled to an order for stay are provided in the following terms:
6. No appeal or second appeal shall operate as a stay of execution or proceedings
 - (1) under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under sub-rule (1) unless—

The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
30. In the present case, the Applicant has not annexed the ruling which she desires to appeal against. The Applicant has only annexed a copy of a letter dated October 14, 2022 in which she seeks for a certified copy of the said ruling. Indeed, without a copy of the ruling delivered by the trial Magistrate, this Court is not in a position to evaluate the basis of the learned Magistrate's decision. The reason for requiring the attachment of a copy of the decision, subject of appeal is in order for the Court to examine by reading the decision and satisfy itself as to its correctness, legality or propriety. This statutory requirement is most of the time ignored by Applicants invoking the courts discretion in granting the remedy in stay of execution. Notwithstanding that position the hallmark of this first limb on stay is propounded in the cases of James Wangalwa & another v Agnes Naliaka Cheseto (2012) and



in the case of *Gentury Oil Trading Company Ltd v Kenya Shell Limited* Nairobi (Mlimani) HCMCA No 1561 of 2007 thus in the later case the court held

The “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that.. where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement”

31. Will the Appeal be rendered nugatory if I do not grant an order for stay of execution? My answer to that question lies on the perusal of the trial court record and affidavit evidence of the intended appellant. In my considered view, I answer it in the affirmative.
32. In the interest of justice, and in particular my duty under the overriding objective subscribed under section 1(A) and 1(B) of the *Civil Procedure Act* both limbs of remedies as premised in the Notice of Motion dated 24th day of October 2022 be and are hereby granted. Further the applicant to file the record of Appeal within 21 days from today’s date and have it served upon the respondent together with brief submissions on the grievances occasioning invocation of the Right of Appeal to this court. In default of compliance, the very orders issued shall lapse automatically without reference to this court. The costs of this application to abide the outcome of the Appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF FEBRUARY, 2023.

.....

R. NYAKUNDI

JUDGE

