



**Kimeu v Matano & 4 others (Civil Miscellaneous Application
E058 of 2022) [2023] KEHC 1772 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION E058 OF 2022**

**FR OLEL, J
MARCH 16, 2023**

BETWEEN

JUSTINA ITUMBI KIMEU APPELLANT

AND

MARIA MATANO 1ST RESPONDENT

AGNES MUKONYO MATANO 2ND RESPONDENT

ATHANUA MUEKE MATANO 3RD RESPONDENT

TOTO KISESE KIMEU 4TH RESPONDENT

DAVID KATIKU KIMEU 5TH RESPONDENT

*(Being an application for leave to appeal out of time, against the ruling and order of
Honourable M Opanga (SRM) dated 14/10/2021 in Kangundo Succession cause No 24 of 2015)*

RULING

1. The application before this court is the Notice of Motion application dated March 11, 2022 brought pursuant to provisions of Section 1A, 1(B) and 3A, 63(e) of the *Civil Procedure Act*, Order 40 Rule 2, 6(1), 6(6) and Order 51 rule1 of the *Civil Procedure Rules* and all other enabling provision of law. Prayers 1 and 2 of the said application are basically spent and the main prayer sought is prayer (3) that;
 - a. That this Honourable court be pleased to allow the applicant to appeal out of time, the order of Honourable M Opanga (SPM) of October 14, 2021 in Kangundo succession No 24 of 2015; RE in the matter of the Estate of Jonathan Matano
2. This application is supported by an affidavit of the appellant/applicant one Justina Itumbi Kimeu dated March 11, 2022 and submissions filed by the appellants counsel dated May 18, 2022 and file in court on May 23, 2022.



3. This application is opposed by the respondents who filed a replying affidavit dated April 18, 2022 and written submissions filed in court on April 22, 2022.
4. The Applicant stated that she filed summons for revocation of grant dated October 12, 2021 in the subordinate court; Kangundo Succession No 24 of 2015 Estate of the late Jonathan Matano, where she argued that the inclusion of land parcel number Makueni/Unoa/319 as part of the estate was an error . Unfortunately the trial magistrate summarily dismissed the said application without giving her a hearing and proceeded to close the file. She reiterated that she nor her advocate was heard before the dismissal order was issued.
5. The applicant also further states that the delay in filing the appeal is attributed to her being elderly and has been in and out of hospital due to hypertension, further the delay the court file was misplaced and it was not until March 3, 2022 when her advocate was able to extract the order appealed against. She further averred that failure to file the appeal out of time was not out of negligence or indolence on her part or on the part of her advocate and the same was excusable given the circumstances of this case.
6. Finally the applicant also stated that she stands to suffer irreparable loss and damage as she is likely to be evicted form the suit property where she has resided for over seventy (70) years and she has nowhere else to go.
7. The Respondent posited that it was not true that parcel Makueni/Unoa/319 forms part of the estate of the late Jonathan Matano (Deceased). That the parties had all consented to transfer the said property to the estate of the late David Kimeu and a rectified grant issued to the respondents. The respondents also stated that the trial court was right to dismiss the applicant’s application for revocation of grant as the court lacked jurisdiction and directed the applicant to ventilate her dispute on proprietary interest before the Environment and land court.
8. The respondents further submitted that the function of the probate court is to facilitate collection, preservation of the estate, identification of survivor’s and beneficiaries and distribution of the assets of the estate but was not to deal with and/or confer proprietary interest in land.
9. Finally the respondents stated that as per the amended certificate of confirmation of grant the suit property was given to Toto Kimeu & Katiku Kimeu, and that the applicant should sue them and/or their beneficiaries for her share. The respondent also stated that the applicant’s contention that she was unwell was unsubstantiated and evidence presented insufficient and thus the said application should be dismissed with costs.

Submission

10. The Appellants in their submissions stated that under Section 79G of the *civil procedure Act* a party is allowed to appeal within 30 days. But where there was a delay, the court could admit the appeal out of time if the applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time. Further the applicant relied on the Supreme cause citation of *Nicholas Kiptoo arap Korir Salat Vs IEBC & 7 Others (2014) eKLR* where the following principles of extension of time was laid down;
 - 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 case by case basis;



- d. Whether there is a reasonable explanation 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.
11. The appellant submitted that they had given plausible reasons as to why they were unable to file the appeal on time and their delay cannot be said was out of negligence or indolence on their part. The appellants also relied on the provisions of Section 1A, 1B & 3A which granted the court inherent powers to issue such orders as it may deem necessary and further enjoined court to determine disputes in a just manner while considering the lower rather than higher risk of injustice.
 12. The applicant also relied on the citation of [*Shabbir Ali Jusab Vs Anaar Osman Gamrai & another \(2013\) eKLR*](#) where it was held that; the court should focus on substantive justice and disregard procedural technicalities
 13. The applicant also stated that unless allowed to appeal she will suffer irreparable loss and damage as she has resided on the suit property for over seventy (70) years and would be evicted without being given an opportunity to ventilate her case in court.
 14. The Respondents in the submissions filed did reiterate that the applicant wrongly moved court as her dispute related to proprietary right over a parcel of land and thus should have filed her suit at the Environment and land court They relied on the citation of [*Re Estate of Alice Mumba Mutua \(deceased\) 2017 eKLR*](#) which stated that issues between the estate and third parties are not determined within the succession cause
 15. The Respondent also urged this court to find that the applicant had not given sufficient reason as to why extension of time should be granted to her. She stated that delay in getting proceedings and/or decree is not prima facie panacea for a case of delay whenever pleaded. That delay of six months is inordinate and should be refused as they will be prejudiced by inability to distribute the estate property.

Analysis & Determination

16. I have carefully considered the Application, Supporting Affidavit, the 1st Respondent's Replying Affidavit and party's respective submissions and the only issue for determination is whether the Applicant should be granted leave to appeal out of time from the ruling/order of Honourable M Oponga dated October 14, 2021 delivered in Kangundo Succession Cause No 24 of 2015; RE In the matter of the Estate of Jonathan Matano.
17. Section 79G of the [*Civil procedure Act*](#) 2010 does provide that;

' Every appeal from a subordinate court to the high court shall be filed within a period of 30 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 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.'



18. Order 50 rule 6 provides that;

' Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by summary notice or by order of the court, the court shall have powers to enlarge time upon such terms (if any) as the justice of the case may require, and such enlargement maybe ordered although the application for the same is not made until after the expiration of the time appointed or allowed.'

19. There is no doubt that the discretion to extend time is not a right of the party, but is an equitable remedy that is only available to a deserving party after laying a basis to courts satisfaction that there exists reasonable explanation as to why there has been a delay. The court will also consider if any prejudice will be suffered by the respondent and if the application has been brought without unreasonable delay. See Nicholas Kiptoo Arap Korir Salat Vs IEBC and 7 others eKLR.

20. In *Imperial Bank ltd (in receivership) & Ano Vs Alnasir popat and 18 others* the court observed that;

' Some of the considerations to be borne in mind while considering an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercised its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a parties opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; public interest issues implicated in the appeal or intended appeal and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration it must be born in mind that it is not really the role of a single judge to detriment definitely the merits of the appeal. That is for the full court if and when it is ultimately presented with the appeal.'

21. In the Salat case(supra)the supreme court did observe that;

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

22. The order sought to be appealed against was made on October 14, 2021 and the application for extension of time was filed on March 11, 2022 , which is a period of about this is a period of about four (4) months excluding the period when time does not run in December. This period cannot be said to be inordinate. Further the applicant has adequately explained herself that she is elderly and has been unwell resulting to hospitalization at Kibwezi Sub county Hospital on different occasions. This was proved by the medical report from the said Hospital.

23. The applicants conduct and that of her advocate cannot be said to be negligent, nor has it been shown that the deliberately sought to delay or obstruct the cause of justice. In the case of [*Winnie wambui Kibinge & 2 others Vs Match Electrical limited civil suit No 222 of 2010*](#) the court did hold that 'it does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.'



24. On the likelihood of suffering substantial loss, and or prejudice, it is my considered view that the applicant stands to suffer more prejudice if the orders sought are not granted for the simple reason that she maybe evicted from her only home where she has resided for over 70 years and is unlikely to survive such action given her advance age. The respondent's on the other hand have the confirmed grant distributing the estate to themselves and may proceed to dispose off the same to the appellants' detriment. In the respondents replying affidavit there is the family meeting held on 10th November February 2, 2017 where the family discussed sharing of the suit parcel and it was acknowledged that the applicant had a share in the said parcel, which share was specified at 4.25 acres. This is proof enough that she has an interest and has co-existed with the appellants. Letting her stay thereon as the appeal is heard will thus not prejudice them in any way.
25. Finally on the issue of prejudice, it is clear from the proceedings that the application dated October 12, 2021 was dismissed suo moto without the applicant and/or her advocate being heard. whether her case falls under the law of succession and or is a claim under the Environment and Land court is not a matter for this court to determine at this stage, what is not in doubt is that the appellant was clearly prejudiced and the court in considering this application finds that not allowing her to appeal creates a higher risk of injustice as compared to the alternative.

Disposition

26. Taking all relevant factors into consideration;
- a. I do allow the notice of motion application dated March 11, 2022 in terms of pray 3.
 - b. The applicant is hereby grant 14 days within which to file and serve the memorandum of appeal to challenge the ruling of Hon M opanga (SRM) delivered on October 14, 2021 at Kangundo SPM succession cause No 24 of 2015 In the matter of the Estate of the Jonathan Matano (deceased).
 - c. The costs of this Application are awarded to the Respondent and is taxed at Ksh 20,000/= which shall be paid with 30days in default execution to issue for the same
27. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 16TH DAY OF MARCH, 2023.

RAYOLA FRANCIS

JUDGE

In the presence of:-

