



**Murage v Zakaria (Miscellaneous Civil Application E001 of 2023)
[2023] KEHC 3133 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2023**

LW GITARI, J

APRIL 13, 2023

BETWEEN

CHARLES MURITHI MURAGE APPLICANT

AND

PACIFICA KAGENI ZAKARIA RESPONDENT

RULING

1. This ruling relates to the Applicant's Notice of Motion application dated and filed on January 4, 2023. It seeks for the following orders:
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to grant leave to the Applicant/Intended Appellant to file an appeal to this Honourable Court against the ruling delivered in Chuka Chief Magistrate's Court Succession Cause No 241 of 2018 on October 19, 2022: In the matter of the Estate of Zakaria Muraga Rithaa alias Murage Nyaga (deceased), on October 19, 2022 out of time.
 - d. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of the application and supported by the affidavit of Charles Murithi Murage, the applicant herein, sworn on January 4, 2023.
3. It is the Applicant's case that he wishes to appeal against the ruling delivered on October 9, 2022 in Chuka Chief Magistrate's Court Succession Cause No 241 of 2018 on October 19, 2022: In the matter of the Estate of Zakaria Muraga Rithaa alias Murage Nyaga (deceased) but the stipulated time within which to file the appeal has lapsed. Further, that the intended appeal has overwhelming chances of success and thus, it is in the interest of justice for the instant application to be allowed.



4. The application is opposed by the Respondent's Replying Affidavit sworn on January 13, 2023. She deposes that the application lacks merit for the reasons that the applicant has not given any satisfactory reason as to why he did not file the appeal within the statutory time. Further, that the present application has been made with unreasonable delay which has not been explained. Finally, that the intended appeal has nil changes of success as the impugned ruling was delivered in accordance with the provisions of the law. The Respondent thus urged this Court to dismiss the application with costs.
5. The application was canvassed by way of written submissions. It was the Applicant's submission that his reason for not filing the intended appeal within the stipulated timeframes is because he was not notified when the ruling was delivered and only came to learn of the same long after the time to appeal had lapsed.
6. On the other hand, it was the Respondent's submission that the application should be dismissed as the same is an abuse of the court process. That the Applicant has not given any clear reason why he failed to file his appeal in time.

Analysis

7. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. 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.”

8. Section 79G permits the extension of time to file an appeal. Once the delay is convincingly explained, then time ought to be enlarged. The decision whether or not to grant leave to appeal out of time is an exercise of discretion by the court. Some of the factors that aid Courts in exercising this discretion were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR.

They include the following:

- i. The period of delay;
 - ii. The reason for the delay;
 - iii. The arguability of the appeal;
 - iv. The degree of prejudice which could be suffered by the if Respondent the extension is granted;
 - v. The importance of compliance with time limits to the particular litigation or issue; and
 - vi. The effect if any on the administration of justice or public interest if any is involved.
9. The subject ruling of the lower court was delivered on October 19, 2022 while the present application was filed on January 4, 2023. This was about 1 ½ months after the delivery of the subject ruling. The Applicant has explained that the delay in filing the intended appeal was because he was not notified when the ruling was delivered.

The grant of leave to appeal out of time is a matter of exercise of court's discretion. What the applicant is saying that he never became aware of the delivery of the impugned Ruling until after the time given



for filing the appeal had expired. If the applicant was not aware that the ruling had been delivered there was no way that he could have complied with the requirement to file the appeal within the statutory period of 30 days. The overriding objectives of the *Civil Procedure Act* as provided under Section 1A and 1B is to facilitate the just expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The courts are called upon to give effect to the overriding objectives when making decisions under the Act.

Section 1A and 1B of the *Civil Procedure Act* provides:

- “ 1A: (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the process
- (1B) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- a. the just determination of the proceedings;
 - b. the efficient disposal of the business of the Court;
 - c. the efficient use of the available judicial and administrative resources;
 - d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - e. the use of suitable technology.

Furthermore the *Constitution* mandates courts to do justice without undue regard to procedural technicalities. Article 159 (2) (d) provided that:

“ In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

Justice shall be administered without undue regard to procedural technicalities.”

It is my view that in observing these principles, the Court must lean on doing what amounts to substantive justice which allows the party to benefit from the principle other than denying the party the right. In this case this would be served by giving the party the opportunity to challenge the ruling on Appeal. See *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions and 3 others*, Court of Appeal, 2015 eKLR where the court stated that, “decisions of the Courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve.” And that “a court of law must be hesitant at closing the door to the corridors of justice prior to a litigant being heard, on his complaint.

Taking all these into consideration, I find that the delay of two and half months (2 ½) months in the circumstances of this case cannot be stated to be inordinate. I should therefore exercise discretion in favour of the applicant. The respondent is not likely to be prejudiced.

I therefore allow the application and order as follows:

1. Leave is granted to the applicant to file the intended appeal against the ruling delivered in Chuka Chief Magistrate’s Court Succession Cause No 24/2018 on October 19, 2022 out of time.



2. The appeal be filed within 30 days and be served on the respondents.
3. Costs shall abide the outcome of the Appeal.

Dated, signed and delivered at Chuka this 13th day of April 2023.

L W GITARI

JUDGE

