



**In re Estate of Rose Akuku Aoko (Deceased) (Succession Cause 126 of 2014) [2023] KEHC 27492 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 27492 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
SUCCESSION CAUSE 126 OF 2014**

**RPV WENDOH, J**

**MAY 11, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE ROSE AKUKU AOKO (DECEASED)**

**BETWEEN**

**PHINIAS OKELLO MIREMBE ..... PROTESTOR**

**AND**

**RUTH OTIENO ..... PETITIONER**

**RULING**

1. Ruth Otieno (the ‘Applicant’) filed a Notion of Motion dated 1/8/2022. The application is based on the grounds on its face and is supported by the affidavit of the applicant sworn on even date. The applicant seeks the following orders: -
  1. Spent.
  2. Spent.
  3. There be a stay of execution of the decree dated 7/7/2021 pending the hearing and determination of this application and the intended appeal.
  4. That this court be pleased to extend the time within which the applicant shall lodge and serve Notice of Appeal against the judgement and decree of this court dated and delivered on 1/7/2021 and to generally extend time to lodge record of appeal to the Court of Appeal.
  5. Costs of this application be provided for.
2. The applicant deponed that on the date of the judgement, her Counsel was not in court; that she had been taken ill and was bedridden during the period between June and November 2021 and hence unable to follow up on this matter; that upon recovery, she learnt of the delivery of the judgement on 7/7/2021 and sought services of another Advocate to pursue this matter on her behalf at the Court



- of Appeal; that she is aware that the application to replace her previous Counsel was struck out by a ruling of this court dated 26/7/2022.
3. The applicant further deposed that she is desirous to pursue the appeal to the Court of Appeal and seeks indulgence of this court for leave to appeal out of time and unless that leave is granted, her appeal will be dismissed or will be a non-starter; that the circumstances leading to the delay in lodging a notice of appeal were beyond her control and the delay is not inordinate; that without an order for stay of execution of the decree, the protestor/respondent will be at liberty to execute the decree against her and she will be prejudiced. The applicant deposed that she is willing to abide by the court's conditions on the security pending appeal.
  4. The respondent opposed the application through grounds of opposition dated 22/9/2022. The grounds are as follows: -
    1. That this application is not different from the earlier application dated 1/2/2022, wherein this court found that the firm of Sam Onyango & Co. Advocates is a stranger to these proceedings and found that the application is incompetent and that there was no need to consider the other issues therein;
    2. That this application is brought very late in the day and that the suit land is no longer in the name of the respondent; that it was transferred to one Ernest Omondi on 29/8/2022 after the ruling of this court dated 26/7/2022;
    3. That litigation in this matter ought to come to an end, this being a matter of 2014;
    4. That this application is an afterthought, an abuse and misuse of judicial process and ought to be dismissed.
  5. Both parties filed their respective submissions. The applicant reiterated the facts of this case and submitted that the most pertinent issue is that advocates' mistake or omission did contribute to the unfortunate situation the applicant found herself in and the mistake of Counsel should not be visited upon an innocent litigant; that the applicant is seeking leave of this court to enable her exercise her right as provided for under the Succession Act, Cap 160 Laws of Kenya; that if the court fails to grant this application and the asset in the estate of the deceased is transferred to a third party, the intended appeal will not be of any benefit to her and hence the need of granting the stay of execution of the decree dated 7/7/2021.
  6. The respondent submitted that the suit land Suna East/Wasweta I/4358 was sold and transferred to Ernest Omondi Owino; that the judgement in this matter was delivered on 7/7/2021 over one year six months ago. That the delay is inordinate and no time should be extended for appeal purposes.
  7. I have carefully considered the application, the supporting affidavit, grounds of opposition and the rival submissions. The issue for this court's determination is whether the applicant is deserving of the orders sought.
  8. On the issue of Counsel representing the applicant, it is true that in the application of 1/2/2022, the firm of Sam Onyango & Company Advocates sought leave to come on record in place of the firm of J. Soire & Company Advocates. This court, in the ruling dated 26/7/2022, held that there was no proper service and the procedure for admitting a new Counsel to come on record in place of Counsel who represented a litigant in the trial proceedings, had not been adhered to as per Order 9 Rule 9 of the Civil Procedure Rules. The court struck out the application. In the instant application, the firm of J. Soire & Company Advocates are seized of this matter. The application is therefore competent.



9. The applicant deposed that at the time when the judgement was delivered on 7/7/2021 her Counsel was not present in court. There is evidence that Counsel for both parties were notified via their specific emails on 1/7/2021 on the date when the judgement was to be delivered. Counsel for the respondent attended court. The court noted that Counsel for the applicant was notified but he failed to attend court. Therefore, no blame can be placed on the court for the failure to notify Counsel for both parties of the judgement date. Counsel for the applicant has not attempted to explain to this court the delay in following up on the judgement, having known very well that he had a duty of care to his client.
10. The applicant claimed that she was ill between June to November 2021. She has not produced any evidence in terms of medical records to confirm that indeed she was ill and could not have communicated with her Counsel and issue further instructions on the outcome of the judgement. The application seeking time to file a notice of appeal out of time, was filed on 1/2/2022 this is about 7 months after delivery of the judgement of this court. The inordinate delay has not been satisfactorily explained.
11. The time within which a party who is desirous to file a notice of appeal is prescribed under Rule 59 of the Court of Appeal Rules. The law stipulates that the notice of appeal should be lodged in sextuplicate within 14 days from the date of the decision. The applicant ought to have filed the notice of appeal on or before 21/7/2021.
12. Section 7 of the [Appellate Jurisdiction Act](#) provides: -
 

"The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired: Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence."
13. The jurisdiction of this court in relation to proceedings before the Court of Appeal is to extend time for filing a Notice of Appeal notwithstanding that the time for giving such notice has expired. Section 7 of the Appellate Jurisdiction Court gives this court powers to extend time:-
  - a. For giving notice of intention to appeal from a judgement of the High Court.
  - b. For making an application for leave to appeal.
  - c. For a certificate that the case is fit for appeal.
14. In [Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another](#) (2000) eKLR Shah JA held:-

"The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of *Peter Njoroge Mairo v Francis Gicharu Kariri & another*, Civil Appeal (Application) No 186 of 1999, (unreported), said:

"In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of *Edward Allan Robinson & 2 others v Philip Gikaria Muthami*, (Civil



Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:

‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’

15. This court examined the applicability of Section 7 of the [Appellate Jurisdiction Act](#) in Migori Succession Cause No. 53 of 2015 [In the Matter of the Estate of Rioba Chacha Sirare \(Deceased\)](#) as follows: -

“The powers donated to the High Court under Section 7 of the [Appellate Jurisdiction Act](#) are clear and limited. This court can only come to the aid of a litigant who is desirous of filing a notice of appeal to the Court of Appeal for the first time and has run out of the stipulated timelines. This court does not have jurisdiction to grant leave to file an appeal out of time to the Court of Appeal. The powers to grant an applicant to file an appeal out of time lies within the purview of the Court of Appeal. This court can only extend the time for lodging a notice of appeal against the judgement of this court.”

16. The applicant has certainly run out of time in lodging her Notice of Appeal. This court has also observed that there is no reason advanced on the inordinate delay and even if there is any, there is no evidence produced in this court to back up the claims. Be that as it may, a litigant is entitled to pursue their case to the highest court and there should not be unnecessary hinderance of the same.
17. The applicant has asked this court to extend time to lodge a record of appeal to the Court of Appeal. As the Court of Appeal held in Trimborn Agricultural Engineering Limited (supra) the powers of the superior court is only to enlarge time. The prayer seeking leave to file the record of appeal out of time is hereby declined. It is only the Court of Appeal which can entertain such prayer.
18. On the stay of execution, the applicant states that if the same is not granted, the subject matter will be transferred to 3<sup>rd</sup> parties and the appeal will be rendered nugatory. The respondent attached a title dated 29/8/2022 which shows that the suit land was transferred to one Ernest Omondi Owino. The applicant has not fronted different evidence to controvert the alleged transfer. Therefore the stay orders, if granted, will be in vain. The prayer for stay is declined.
19. For the foregone reasons, the application partly succeeds. The following orders do issue:-
- i. The time for filing a Notice of Appeal is hereby extended;
  - ii. The Applicant is granted 7 days from the date of this ruling to file and serve a Notice of Appeal;
  - iii. The other prayers are declined;
  - iv. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 11<sup>TH</sup> DAY OF MAY, 2023**

**R. WENDOH**

**JUDGE**



**Ruling delivered in the presence of;**

Mr. Awino for the Applicant.

No appearance for the Respondent.

Emma / Phelix Court Assistant.

