



REPUBLIC OF KENYA



**Ahmed v Jaafar (Family Appeal E033 of 2022)
[2023] KEHC 18717 (KLR) (12 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E033 OF 2022**

**G MUTAI, J
JUNE 12, 2023**

BETWEEN

MOHAMED JAAFAR AHMED APPLICANT

AND

SAID AHMED JAAFAR RESPONDENT

RULING

Introduction

1. Before me is a Notice of Motion application dated 9th November, 2022. The said application is expressed to be brought under Sections 1A, 1B, 3A, 39, 79G and 95 of the *Civil Procedure Act*, orders 22 rule 22, 42 rule 6, 51 rule 1 of the *Civil Procedure Rules* and article 50 of the *Constitution of Kenya*, 2010. The Applicant seeks the following orders:-
 1. Spent;
 2. That this Honourable Court be pleased to grant leave to the Applicant to appeal out of time against the judgment of the Hon. Khamis Ramadhan, Senior Resident Kadhi dated 1st March, 2018;
 3. That there be ex-parte orders of stay of execution in Kadhi's Succession Cause Number 72 of 2016 and the proceedings and ex-parte order number 2 dated 13th of October, 2022 directing the Applicant herein to surrender the Original Title Deeds in respect of Plot No. Mombasa/Block XI/232 and Lamu/Block 1/1358 to Court for purposes of distribution;
 4. That there be ex-parte interim orders of stay of execution in Kadhi's Succession Cause Number 72 of 2016 and the proceedings and ex-parte order number 3 dated 13th of October, 2022 ordering the sale of Plot No. Mombasa/Block XI/232 and the proceeds thereof be distributed to the heirs;



5. That this Honourable Court be pleased to stay the proceedings in the said suit as well as the execution, decree, and the judgment delivered on 1st March, 2018 pending hearing and determination of the present application;
 6. That this Honourable Court be pleased to say these proceedings in this suit as well as the execution, decree and judgment delivered on 1st March, 2018 pending hearing and determination of the Appeal;
 7. That time to file the Applicant's Memorandum of Appeal be extended to 9th November, 2022 and the Memorandum of Appeal filed on the said 9th November, 2022 be deemed to be property on record;
 8. That the costs of this application abide the outcome of the Appeal.
2. The grounds upon which it is based have been enumerated in the body of the application. In summary, it is that the judgment in the matter before the Kadhi's Court was delivered on 1st March 2018. The Applicant's father, the Respondent in the matter before the Kadhi, rather than appeal to this honourable court filed a Judicial Review application before the Environment and Land Court Mombasa seeking to quash the said decision. Upon hearing the matter, the Environment and Land Court found that it had no powers to supervise the Kadhi's Court and struck out the judicial review application. The then Applicant was aggrieved by the decision of the said Court and filed an appeal to the Court of Appeal (Mombasa Court of Appeal Civil Appeal No. 21 of 2020). The said appeal was not heard, rather it abated once the Appellant died and was not substituted. The Applicant avers that there were negotiations for an out-of-court settlement of the matter. These negotiations are said to have appeared positive at first but subsequently failed.
 3. It is further averred that the intended appeal, whose admittance is the subject matter of this appeal, has high chances of success. Stay of execution of the Kadhi's Court orders is therefore sought as the Applicant fears that property which he argues do not belong to the estate may be sold pursuant to the orders of the said subordinate court.
 4. When the application was filed, this court (per Onyiego J) granted stay orders. These are still subsisting to date.
 5. The application is opposed. The Respondent filed a Replying Affidavit on 2nd December 2022. In the said affidavit he deposed that the Kadhi's Court delivered its judgment on 1st March 2018 in the present of counsels of the Plaintiff and the Defendant. The then Defendant was aware of the judgment and could have chosen to appeal to the right court. He deposed that he didn't. Instead he filed a judicial review application before the Environment and Land Court which was dismissed. The said decision was appealed to the Court of Appeal. The appeal abated after the Appellant died. The Respondent deposed that the Applicant has not been granted letters of administration and that he has no capacity to represent the estate of his deceased father. He argues in his deposition that the Applicant is guilty of laches, having not prosecuted his appeal at the earliest possible opportunity. He further argues that delay in the distribution of the property of his father, the Applicant's grandfather, was prejudicial to the beneficiaries of his estate.
 6. The Respondent stated that the Applicant has not met the test for grant of stay of execution pending appeal as it has not been demonstrated that he will suffer substantial loss nor has the Applicant provided security for the due execution of the judgment in the event his appeal does not succeed. It was also argued that the Applicant's father submitted to the Kadhi Court's jurisdiction and had the opportunity of challenging the decision to include the properties he disputes in the inventory



of the assets that belonged to the deceased. Such a question, the Respondent argues, is within the jurisdiction of the Kadhi's Court and could have been determined by him. The Respondent annexed to his affidavit: -

- 1) Replying Affidavit filed on 3rd April 2018 vide which jurisdiction of the Environment and Land Court was questioned;
 - 2) The Notice of Appeal filed on 23rd October 2019;
 - 3) Notice of Motion application dated 3rd October 2022 filed under a Certificate of Urgency vide which it was sought to substitute the Respondent therein Jaafar Ahmed Jaafar with his son Mohamed Jaafar Ahmed for purposes of collection of the two titles;
 - 4) Succession Petition dated 5th April 2016 together with the annexures thereto;
 - 5) The Answer to Petition dated 11th April 2016;
 - 6) The Petitioner's Further List of Documents dated 16th August 2016 (filed on 17th August, 2016);
 - 7) Notice of Motion application dated 8th June 2022 vide which the Kadhi's Court's consent was sought for the distribution of the estate of the deceased.
7. The Applicant filed a Supplementary Affidavit on 13th December, 2022. In the said affidavit he admitted that the Kadhi's Court had jurisdiction to hear and determine the matter before it. The appeal he intends to file, he deposed, arose out of the Kadhi's decision to include a property which didn't belong to the deceased. He blamed the previous advocates of his father for having misadvised him into filing a judicial review application when he should have appealed against the decision of the Kadhi. On the issue of his capacity, the Applicant argued that he was appointed to represent the estate of his father pursuant to the application filed by the Respondent. In those circumstances, it was argued the Respondent couldn't challenge his capacity to represent his father.
8. The Applicant reiterated his earlier contention that there had been negotiations between him and some other beneficiaries of the estate of the deceased and that he was surprised when he was served with the Kadhi's Court orders. He admitted that the appeal before the Court of Appeal abated after his father died. On the issue of providing security or depositing the title with the court, the Applicant deposed that
- “there is no need for security to be provided herein as there is no prejudice that will be suffered if the disputed titles are not deposited with court. No prejudice has been suffered to date and there has been no evidence tendered to prove any prejudice will be suffered if the titles are not deposited with the court”.
- He prayed that the time within which the intended appeal could be filed be extended and leave be granted to him so that he could appeal against the decision of the Honourable Kadhi out of time. Among the exhibits annexed to the Further Affidavit was a Memorandum of Appeal dated 9th November 2022 which was filed on 10th November 2022.
9. The parties agreed to have the matter proceed by way of Written Submissions. Orders to that effect were recorded. Thereafter the Applicant and the Respondent filed that respective submission which I shall now consider.



Submissions of the Parties

10. The Applicant submitted that he is served with the orders of the Kadhi Court on 13th October 2022. Upon being so served he reviewed the matter with his current advocates who advised him to appeal out of time. He blamed his previous ad advocates for having misadvised his father into filing a judicial review application before the Environment and Land Court. He further submitted that he wasn't opposed to the Kadhi's Court and recognized its jurisdiction. He was only dissatisfied with that aspect of the said Court's decision that included properties, which in his view, it shouldn't have.

Submissions of the Applicant

11. The Applicant identified the following as the issues that call for determination in this matter: -
- 1) Whether the Applicant has the legal capacity to file the appeal. The Applicant averred that he was appointed by the court upon the application of the Respondent. Having been so appointed by the Kadhi, in a matter in the Court below, the Respondent couldn't question his capacity;
 - 2) Whether the reason given for the delay in filing the appeal was substantive and persuasive. On this point the Applicant argued that his deceased father pursued his grievance in the wrong court but that he did so within the set timelines. The court was referred to the case of *Vishva Stone Suppliers Co. Ltd v RSR Stone [2006] Ltd* [2020] eKLR where Nambuye JA when considering the exercise of the jurisdiction Under Rule 4 of the *Court of Appeal Rules* said that orders under the said rule should be granted liberally unless the Applicant is guilty of unexplained and inordinate delay in seeking the court's indulgence or if the Court is satisfied that the appeal is not an arguable one. The Applicant argued that he had explained his reason for the delay. In his view the explanation that he gave was persuasive;
 - 3) Whether the Applicant had demonstrated that substantial loss will be suffered if the application to file the appeal out of time is not allowed. The Applicant submitted that the disputed properties belonged to his father. If the same is sold and the proceeds thereon shared, he and his siblings will suffer substantial loss. It was thus urged that time within which the appeal could be filed be extended. To prevent a clear and present possibility of occurrence of an injustice;
 - 4) Whether time should be extended to allow the Applicant to file the appeal out of time. It is submitted that the intended appeal has merit. The Court was referred to Article 159(2) (d) of the *Constitution*, section 79G of the *Civil Procedure Act* and order 42 rule 6 of the *Civil Procedure Rules*, 2010. I was also referred to the following cases *Charles Karanja Kiiri v Charles Githinji Muigwa* [2017] eKLR and *Richard Nchapi Leiyagu v IEBC & 2 others* [2013] eKLR. In the latter case, the Court enumerated the principles that Courts follow when considering whether or not to allow a party to file an appeal out of time. The Court was thus urged to allow the application and to permit the Applicant to file the appeal out of time.

Submissions of the Respondent

12. The Respondent submitted that the application ought to be dismissed. He has enumerated 5 grounds which I shall refer to in turns.
13. The first ground is that the application is incompetent. The Respondent avers that the Applicant has no authority to represent the estate of his deceased father as he is not his personal representative. The court was referred to Rules 5, 11 and 171 of the *Kadhi's Courts (Procedure and Practice) Rules*, 2020.



It was therefore urged that the Applicant has no capacity to bring the application before court and the same should be struck out with costs.

14. Replying in the Supreme Court's decision in *Nicholas Kiptoo arap Korir Salar v the Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR the Respondent argued that it was wrong for the Applicant to file an appeal out of time without leave of court. It was thus submitted that the appeal having been thus filed was incompetent and should be struck out.
15. The Respondent argued that the Applicant had been aware all along of the proceedings before the Environment and Land Court and also the Court of Appeal. It was submitted that despite his knowledge he had never bothered to defend the interests he was now purporting to advance. The Respondent submitted that equity aids the vigilant and not the indolent. It was further submitted that the Respondent had come to Court with clean hands as he had failed to disclose the death of his father nor to procure his certificate of death.
16. The Respondent urged that there was a delay of over 4 years and 9 months between the time the judgment of the Kadhi was delivered and the application now before the court was filed. The Respondent submitted that the said delay was inordinate and ought not to be excused.
17. On the reason for the delay the Respondent submitted that the Applicant had competent legal advisers. If it were true that he was misadvised, then his cause of action lay in a suit for professional negligence against them.
18. It was submitted that allowing the application would be prejudicial to the Respondent and other heirs of the deceased as the estate had not been distributed despite the fact that the deceased died in March 2011.
19. The Respondent further submitted that the intended appeal had very low chances of success as the Kadhi Court made a decision that was within its legal remit. The Applicant's father; it was submitted, had submitted to the Kadhi Court and had not objected to the said Court's jurisdiction to hear and determine ownership of the two plots in dispute. It was urged that the Applicant is estopped under the provision of section 120 of the *Evidence Act* from resiling from the said position. The Respondent also submitted that there was no question of great public importance in this matter as would warrant the court to extend the time within which the appeal could be filed.

Analysis of the Law and the Facts

20. This court is called upon to determine whether the appeal already filed, without leave, should be admitted out of time and if a stay of execution of the judgment and the decree of the Kadhi's Court, pending appeal, could be issued. Before I do so however I must first establish what the issues are in this matter.

Issues for Determination

21. In my opinion the following are the issues that call for determination by this court: -
 1. Whether the Applicant has the standing to file the appeal notwithstanding the fact that he is not the personal representative of Jaafar Ahmed Jaafar (deceased)?
 2. Whether the Applicant is guilty of laches /inordinate delay in prosecuting the appeal?
 3. Whether an appeal can be filed out of time without leave of Court?
 4. Whether the mistakes of counsel can excuse the delay on the part of the Applicant?



Does the Applicant have the standing to prosecute the appeal?

22. The cause before the Kadhi Court was between Said Ahmed Jaafar (as the Plaintiff) and Jaafar Ahmed Jaafar (the father of the Applicant as the Defendant). The Applicant seeks to file the appeal as the son of Jaafar Ahmed Jaafar (now deceased). It is common ground that he has not been appointed as the personal representative of the estate of the late Jaafar Ahmed Jaafar. Can he lawfully do so? The powers of the personal representative are provided for in section 82 of the *Law of Succession Act*. The said section provides as follows in part: -

“ 82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best...”

23. The Court of Appeal in the case of *Trouistik Union International and Ingrid Ursula Heinz v Jane Mbeyu and Alice Mbeyu*; Nairobi CACA No. 269 of 1997 referred to the decision in the famous burial case of *Orieno v Ougo* and held that: -

“The Court gave vent to an important principle of law of universal application with respect to the right of a party to fulfil the role of an administrator of an intestate without obtaining letters of Administration. The Court, *inter alia*, observed: -

“the administrator is not entitled to bring an action as administrator before he was taken letters of administration. If he does the action is incompetent at the date of its inception”.

24. Dulu J in the case of *In the Matter of the Estate of Geoffrey Meitamei Lonina (deceased)* [2012] eKLR held as follows: -

“Indeed, under section 45 (1) & (2) of the *Law of Succession Act* (Cap 160), this court has powers to protect the assets of a deceased person. However, in my view, only an administrator or an interested party in an existing administration cause, can apply for protection of the deceased’s assets. In the present matter, no application for letters of administration has been filed under sections 51, 53 or 54 of the *Law of Succession Act*. Therefore, in my view, the provisions of section 45 of the Act cannot be brought into play by the applicant. She has no legal standing in law to bring the present application. On that account, I find that the application is misconceived.”

25. Without being appointed as a personal representative of the estate of the late Jaafar Ahmed Jaafar the Applicant cannot purport to take over and prosecute an appeal in respect of a matter his father had been sued. He has no standing to do so. I have not seen the orders vide which he claims that the Kadhi appointed him to represent his father. In my view grants of representation are issued subject to succession proceedings. Having not filed any in respect of his father’s estate it isn’t possible that he



would have been issued with a grant. Without a grant of representation in his favour an application that he has filed must fail. And I so hold.

26. Although I have dismissed the application I must nevertheless consider if I would have granted it had the Applicant been in possession of a valid grant of representation.

Was the application filed without undue delay? Is the Applicant guilty of laches?

27. The father of the Applicant was represented before the Kadhi, at the Environment and Land Court, and at the Court of Appeal. He had the benefit of very able counsel. Although the Applicant has blamed advocates for the predicament he finds himself in I note that he has not been particularly keen to prosecute the matter. His father died in March 2021. He admits that he has not sought grant of representation in respect of his estate. No reason is given for the said failure. He appears to have swung into action only when the Kadhi ordered him to avail the title document in respect of the property he says belonged to his father. The appeal, that had been filed at the Court of Appeal, abated as no action was taken to substitute the deceased within the time contemplated by the Rules of the Court of Appeal.
28. An appeal should have been filed to this court from the decision of the Kadhi's Court, as the latter Court is subordinate to it. That would appear to me to be an elementary matter. It nevertheless my view that the Applicant's father was complicit in the error and cannot run away from it. Consequently, in this case I must agree with what Ringera J (as he then was) said *Charles Omwata Omwoyo v African Highlands & Produce Co. Ltd* [2002] eKLR that:-

“The interests of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court. But even if the court had discretion in the matter, it may be asked whether to file a suit in a court without jurisdiction may be treated as the kind of mistake by an advocate which the court may overlook. In *Mawji V Laiji & Others* [Civil application No.236 of 1992] Kwach J.A. drew a line between negligence, pure and simple and a genuine error or mistake on the part of an advocate. He went on to cite with approval the dicta of Lord Griffins in the case of *Kettleman v Hansel Properties Ltd* [1988] 1 All ER. 38, at P.62, where the Learned Lord of Appeal in ordinary said:

“ Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted, efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings.”

I am of the same persuasion. Even if the matter involved an exercise of discretion (and not want of jurisdiction as is the case here) I would have declined to exercise the court's discretion in favour of the applicant on the grounds that he found himself in a predicament as a result of his advocate's alleged mistake. I think the time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour.



Can an appeal be filed out of time without seeking leave of Court?

- 29. I was referred to the Supreme Court decision in *Nicholas Kiptoo arap Korir Salat v the Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR for the proposition that I may not deem an appeal filed without leave as being proper. I do not agree with that submission. The said decision is only applicable in matters before the Supreme Court pursuant to the *Rules of that Court*. The correct position, as I understand it, is that this Court can allow a pleading filed without leave provided that adequate reasons are given for the action.
- 30. I am guided by the decision of the Court of Appeal in *Charles Karanja Kiiru v Charles Gitbinji Muigwa* [2017] eKLR wherein the Nicholas Salat decision was distinguished.
- 31. Having so said nothing turns on it. As I have indicated the application was filed by a party without standing.

Had there been a valid application would this Court have granted stay pending appeal?

- 32. The principles under which Courts grant stay pending appeal are given in Order 42 Rule 6 of the *Civil Procedure Rules*. These are that:-Firstly Appellant will suffer substantial loss unless stay is granted;The application for stay has been filed without undue delay; andSecurity for the due performance of such a decree or order as may be ultimately binding on him as been given by the Applicant.
- 33. I have already found that there was a 4 years and 9 months delay in bringing this application. That delay in my view is inordinate and inexcusable. I would therefore not have granted stay pending appeal in the circumstances of this case.
- 34. The upshot of the foregoing is that the application lacks merit and is dismissed.
- 35. I make no order as to costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 12TH DAY OF JUNE,2023 AT MOMBASA VIA MICROSOFT TEAMS

.....
GREGORY MUTAI
JUDGE

In the presence of: -

Ms Midia for the Applicant

No appearance for the Respondent

Ms. Gillian – Court Assistant

