



REPUBLIC OF KENYA



**In re Estate of Benjamin Tali Namasaka (Deceased) (Succession Cause
115 of 2015) [2023] KEHC 19045 (KLR) (20 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
SUCCESSION CAUSE 115 OF 2015**

AC MRIMA, J

JUNE 20, 2023

BETWEEN

MURAMBWA NAMASAKA TALI 1ST PETITIONER

SABINA NANDUMU TALI 2ND PETITIONER

CHEPTE TALI NAMASAKA 3RD PETITIONER

AND

BEN NAMASAKA TALI OBJECTOR

RULING

Introduction

1. This ruling relates to an application by way of Notice of Motion dated 3rd November, 2022. The application was taken out by Murambwa Namasaka Tali, the 1st Petitioner/Applicant.
2. The application mainly sought for leave to appeal out of time against the judgment of this Court rendered on 5th May, 2020 and for stay of proceedings pending the outcome of the appeal at the Court of Appeal.
3. The application was opposed by the 2nd Petitioner, Sabina Nandumu Tali, and the Objector, Ben Namasaka Tali.

The Application:

4. The application invoked Articles 47, 50 and 159 of the *Constitution*, Section 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act* as well as Order 42 Rule 6 (1) and 51, Rule 1 of the *Civil Procedure Rules*.
5. The Applicant was dissatisfied with this Court's judgment which in essence nullified the deceased's will. The said decision consequentially caused the estate to proceed intestate.



6. The Applicant who swore the supporting affidavit to the application stated that he had since preferred an appeal to the Court of Appeal against the judgment. He explained that the application was only lodged in 2022 since he was scantily advised by his erstwhile Counsel at that time. In fact, he so stated, that he only learnt of the judgment when he visited the country in 2022 whence he instructed his current Counsel to come on record and file the present application.
7. Having said that, the Applicant deposed that although they instructed Messrs. Karanigrey & Company Advocates to appeal to the Court of Appeal, the said firm of Advocates only filed a Notice of Appeal in the name of the 3rd Petitioner instead of all Petitioners. It is for this reason that he sought leave to appeal out of time.
8. The Applicant justified that a stay of proceedings was necessary to avoid a miscarriage of justice. He contended that if the proceedings were allowed to go on then the appeal would be rendered nugatory.
9. In further legitimizing the application, the 1st Applicant stated that if not allowed, he stood to be greatly prejudiced and suffer substantial loss that could not be compensated.
10. He prayed that the application be allowed in the interest of fairness and justice.
11. The Applicant filed written submissions dated 19th January, 2023 in further support of the application. He argued that that the Objector's response, that is the Preliminary Objection offended the law and was thus for dismissal.
12. He submitted that the application had met the threshold for grant of the orders sought and urged this Court to allow it.

The Responses:

13. The Objector filed a Notice of Preliminary Objection dated 5th December, 2022 on in opposing the application. He also filed a Replying Affidavit and written submissions.
14. It was argued that this Court lacked jurisdiction over the application since the Applicant neither filed a Notice of Appeal nor sought leave to file one.
15. It was also observed that the Applicant was misleading the Court since the 3rd Petitioner had not filed a Notice of Appeal. He urged this Court to dismiss the application for being hopeless, incompetent, inordinate, mischievous and vexatious.
16. The Objector further argued that the application lacked merit because it was filed over 850 days after the impugned decision was delivered and no explanation was given for this inexcusable delay. He also observed that the Applicant failed to attach the intended Memorandum of Appeal thereby defeating his argument that his appeal was merited with high chances of success.
17. According to the Objector, the application was intended to defeat the cause of justice having been filed only 3 days before the hearing of the Summons for confirmation of the grant dated 26th July, 2022.
18. He lamented that the Applicant's appetite for an appeal to seek to be apportioned 60 acres was unjustifiably ravenous to deny the other beneficiaries an opportunity to enjoy the fruits of the judgment. Taking another cue, he argued that there are not proceedings capable of being stayed since the estate has been fully distributed.
19. The Objector continued that the stay orders sought will only serve to stall the conclusion of the matter which act will unfairly affect several innocent parties. He sensed perversity on the application since



the Applicant wanted 60-acre bequest as captured in the revoked Will. In that stead, the Court, in the interest of justice, ordered that he be awarded 25 acres which was still the lion's share.

20. The Objector submitted that the application failed to meet the required standard for grant of the orders sought on account of the following reasons; firstly, the application had been lodged over two and a half years after the impugned decision had been delivered; an affront to the wordings of Section 79G of the *Civil Procedure Act*. Secondly, the Applicant affirmatively participated in the proceedings post decision. Thirdly, the Applicant failed to attach a Memorandum of Appeal evincing the grounds in support of his appeal. Lastly, no reasons were furnished for stay of proceedings pending appeal.
21. The application was similarly opposed by the 2nd Petitioner. She deposed that the application was bad in law as no grounds were furnished to support the appeal. She accused the Applicant of being unclear, misleading and uncleanly purposed to defeat the course of justice.
22. The fact that the Applicant failed to attach a draft Notice or Petition of Appeal rendered his Application fatal and a non-starter.
23. Additionally, the 2nd Petitioner accused the Applicant of lethargy since he was well aware when the decision was delivered on 5th May, 2020 and that the 1st Petitioner had a propensity to change Advocates. She accused the 1st Petitioner/Applicant of not being candid since he alleged that it was only the current law firm on record that mysteriously properly advised him.
24. The 2nd Petitioner also noted that although the 3rd Petitioner filed a Notice of Appeal, the same was by her conduct abandoned.
25. She urged this Court to dismiss the application.
26. In her written submissions, the 2nd Petitioner propounded that the Applicant failed to meet the requirements set out in Order 42, Rule 6 (2) of the *Civil Procedure Rules*. Owing to the fact that the application was lodged more than 2 years after the decision coupled with the appointment of at least 2 firms of Advocates to act for him, the 2nd Petitioner urged that the application lacked merit.
27. It was also submitted that the 1st Applicant had proceeded substantively with the matter post the delivery of judgment and showed no intention of appealing against the judgment. It was also argued that since the Applicant greatly benefitted from the distribution, he stood to suffer no prejudice. She thus concluded that the application was baseless.
28. The 2nd Petitioner further observed that the Applicant had failed to attach the grounds supporting his appeal. As such, there were no cogent grounds or at all to allow him to appeal out of time.
29. It was further observed that the Applicant had appointed several Advocates and could not blankly blame them for his indolence.
30. She prayed that the application be dismissed.

Analysis:

31. This Court has carefully considered the application and the responses together with the written submissions and the decisions referred to by the parties.
32. As the application seeks two main prayers, that is the leave to appeal out of time and stay of proceedings, this Court will, in the first instance, deal with the aspect of leave.



Leave to Appeal:

33. The power of the High Court to inter alia extend time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal is donated by Section 7 of the [Appellate Jurisdiction Act](#), Cap. 9 of the Laws of Kenya.
34. The provision states as follows: -
7. Power of High Court to extend time:
- 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.
35. Courts have over time developed the legal principles guiding the issue of extension of time.
36. The Court of Appeal in *Thuita Mwangi v Kenya Airways* [2003] eKLR stated as follows in respect to the matter: -
- It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; first, the length of delay; secondly, the reason for the delay; thirdly (possibly) the chances of appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent of the application is granted.”
37. And, in *Velji Shabmad v Shamji Bros. and Popatlal Karman & Co.* [1957] EA 438, the High Court expressed itself as follows: -
- In the interests of the public the court ought to take care that appeals are brought before it in proper time and before the proper court or registry and when a judgement has been pronounced and the time for appeal has elapsed without an appeal the successful party has a vested right to the judgement which ought, except under very special circumstances, to be made effectual. And the Legislature intended that appeals from judgements should be brought within the prescribed time and no extension of time should be granted except under very special circumstances.”
38. The guiding law on extension of time was finally settled by the Supreme Court of Kenya in [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR. The Apex Court derived the following underlying principles which a Court should consider: -
- i. 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;
 - ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
39. Having restated the law, this Court will now apply it to the circumstances of this case.
 40. According to the Applicant, the delay in timeously lodging the appeal is attributable to his Counsel. He asserted that the delay, which is over two and a half years, was due to lack of proper advice from his former Counsel. He also stated that he only became aware of the judgment in 2022.
 41. Starting with the issue as to when the Applicant became aware of the judgment, it is on record that he was, alongside the rest of the Petitioners, represented by Counsel in the matter. The Counsel appeared throughout the trial that eventually yielded the judgment that vitiated the will.
 42. Considering that the Counsel was the same for all the Petitioners and even lodged a Notice of Appeal on behalf of the 3rd Petitioner, coupled with the Applicant's disposition that the Petitioners had instructed the Counsel to lodge an appeal against the judgment, but Counsel only lodged one against the 3rd Petitioner, the contention that the Applicant only became aware of the judgment in 2022 cannot hold.
 43. Turning to the blame on Counsel, this Court is at a loss as to how the Counsel was to blame. The Counsel conducted the trial, received the judgement that was sent via Counsel's email address and was even instructed by the 3rd Petitioner to, and, lodged a Notice of Appeal. As the Counsel acted on the instructions of the 3rd Petitioner, the Applicant has not demonstrated why Counsel would not act on his instructions to appeal. It is highly possible that no such instructions were forthcoming.
 44. Going by the reasons given by the Applicant for explaining the delay of over two and a half years, this Court finds no satisfaction that indeed the delay has been sufficiently explained. It is not. The Applicant has not discharged that burden.
 45. In arriving at such a finding, this Court has also considered the Applicant's conduct in the application. It is on record that the Applicant stated that he lodged an appeal to the Court of Appeal by filing the requisite Notice of Appeal. But, that is not the case.
 46. There is only one Notice of Appeal which was filed by the 3rd Petitioner. It is dated 20th May, 2020 and was lodged on 15th June, 2020. Even going by that Notice of Appeal, the same was filed out of time. There is also no evidence that the Notice of Appeal was served within time.
 47. Further, since the delivery of the judgment on 5th May, 2020, the parties have severally appeared before this Court and extensively engaged on the issue of distribution of the estate. The efforts resulted to the filing of partial consents.
 48. It is also on record that at the delivery of the judgment, the Court granted parties leave to appeal and a stay of proceedings for 30 days.
 49. It seems that the Applicant was awoken from slumber by the filing of the Summons for confirmation of the grant dated 26th July, 2022. From the record and the parties' dealings, the Applicant has not



demonstrated what prejudice he stands to suffer if the leave to appeal is not granted in the face of failure to take steps to move the Court appropriately.

50. It is also in line with Article 159(2)(b) of the Constitution that justice ought to be dispensed expeditiously. The dispute has been in Court since 2015; that is a period of over 8 years.
51. The Applicant, having failed to sufficiently explain the delay infringes the maxim of equity that equity aids the vigilant and not the indolent. Indeed, by dint of Article 10(2)(b) of the Constitution, the common law doctrine of equity was elevated to a constitutional principle. The Applicant, therefore, by failing to act timeously infringed the Constitution.
52. It is on the basis of the foregoing that this Court finds that the prayer for leave to appeal out of timer cannot issue.
53. Having so found, the consideration of the prayer for stay of proceedings becomes academic and without any basis. The prayer is equally declined.

Disposition:

54. Deriving from the foregoing, the final following orders do hereby issue: -
 - a. The Notice of Motion dated 3rd November, 2022 is hereby dismissed with costs.
 - b. The Summons for confirmation of the Grant dated 26th July, 2022 shall be listed for directions on 26th July, 2023.
 - c. All beneficiaries be served to attend Court.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF JUNE, 2023.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of: -

No appearance for Mr. Mukhabane, Learned Counsel for the Applicant/1st Petitioner.

Mr. Gemenet, Learned Counsel for the 2nd Petitioner.

No appearance for Miss. Khayo, Learned Counsel for the 3rd Petitioner.

Ben Namasaka Tali, the Objector in person.

