



**In re Estate of Tobias Ayoki Kew (Deceased) (Family Miscellaneous Application
E001 of 2023) [2023] KEHC 20253 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY MISCELLANEOUS APPLICATION E001 OF 2023**

DO OGEMBO, J

JULY 13, 2023

IN THE MATTER OF THE ESTATE OF TOBIAS AYOKI KEW (DECEASED)

BETWEEN

MARY SYLVIA AYOKI APPLICANT

AND

ROSEMARY AYOKI 1ST RESPONDENT

PHOEBE ATIENO AYOKI 2ND RESPONDENT

RULING

1. The applicant Mary Sylvia Ayoki, has moved this court by way of a Notice of Motion Application dated 10-1-2023. This application is brought under section 48, 49 and 50 of the *Law of Succession Act* and Order 51 of the *Civil Procedure Rules*. It seeks the following orders:
 1. That the court grants leave to the applicant to appeal against the Ruling of the Honourable James Ong'ondo delivered on 30-4-2020 in Siaya PMCC No. 204 of 2019.
 2. That the court be pleased to stay the orders of the Hon. James Ong'ondo delivered on 30-4-2020 pending the hearing of this application.
 3. That the Honourable court be pleased to order a stay of proceedings of Madiany SRM Misc. Application No. 1 of 2022 pending the hearing and determination of this application.
 4. That the Honourable court be pleased to order a stay of proceedings of Madiany SRM Misc. Application No. 1 of 2022 pending the hearing and determination of the intended appeal.
 5. That the order directing that the estate of the deceased be distributed equally among the 3 widows be set aside and the matter be heard *viva voce*.



2. The applicant has also prayed that costs of this application be provided for. The application is supported by the Affidavit of the applicant sworn on 10-1-2023. The Respondents oppose this application. This application was canvassed by way of written submissions following an order of the court issued on 14-2-2023.
3. The submissions of the applicant filed in court on 12-4-2023 were that an appeal is a right afforded to parties and that there is no bar in the Law of Succession Act to a party appealing against a ruling and order of a lower court (*GK Associates Ltd and Another -Vs- National Bank of Kenya Ltd* [2017] eKLR. counsel relied on section 79G of the *Civil Procedure Act* on leave to appeal out of time and also the cases of *County Executive of Kisumu -Vs- County Government of Kisumu and others* (2017) eKLR and *Nicholus Kiptoo Arap Korir Salat -Vs- IEBC and 7 others* (2014) eKLR.
4. Counsel added that the delay in lodging the appeal was occasioned by the fact that the impugned ruling was delivered without Notice on 30-4-2020 and in the absence of the applicant or her Advocate.
5. On the prayer for stay of the proceedings of Madiany SRM Misc Application No. 1 of 2022, it was submitted that Order 42 Rule 6 (2) of the Civil Procedure Rules allows for such an order where substantial loss may result, and that the applicant may be ordered to avail such security as may be ultimately binding (*Butt -Vs- Rent Restriction Tribunal* (1982) KLR 417.)
6. That the applicant stands to lose irreparably if the aggrieved orders are not stayed since the home of the applicant is built on the land parcel North Sakwa/Ajijo/437 to be sub-divided equally according to the order. Further, that stay orders are issued at the discretion of the courts issued after due consideration. Counsel based his submissions on Global Tours and Travels Ltd NAI, winding up Cause No.43 of 2000. It was submitted that the applicant has a prima facie arguable case, has filed this application expeditiously and that it is in the interest of justice to grant the orders sought.
7. Lastly, relying on *Simon Thuo Mwangi -Vs- Unga Feeds Ltd* (2015) eKLR, the applicant urged that the court should set aside the orders directing that the estate of the deceased be distributed equally among the 3 widows and the matter be heard viva voce.
8. The Respondents on the other hand, have submitted that the applicant had an Advocate on record who should have exercised due diligence by inquiring from the court whether the ruling had been delivered or not. That the delay has been inordinate at 3 years. It was denied that the part of the land claimed by the applicant belongs to her, not that the court erroneously ordered for written submissions, not that these was any proper application for confirmation of grant filed in court. Counsel quoted section 40 of the *Law of Succession Act*, that where the deceased died intestate while polygamous, the estate should be distributed amongst the houses taking into account the number of children per house.
9. I have considered the submissions of both sides and the authority relied on. The first issue for determination is whether the applicant deserves grant of leave to file an appeal out of time.
10. As rightly submitted by the applicant, section 79G of the *Civil Procedure Act*, at it's proviso, states;

“ 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.”
11. The act therefore gives provision for leave being granted to a party to file an appeal out of time if the party gives a justification for the failure to file the appeal within the stipulated time. The 2 cases relied on by the applicant i.e. *County Executive of Kisumu -Vs- County Government of Kisumu and others*, and *Nicholus Kiptoo Arap Korir Salat -Vs- IEBC and 7 others*, give a guide on factors that may be considered on an application such as this. That;



- 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 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 given.
 - vi. Whether the application has been brought without undue delay;
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
12. I am well guided by the above authorities. In this case, it has been submitted by the applicant that she had no notice that the aggrieved ruling had been delivered and that neither her nor her advocate were present when same was delivered. This is a fact the Respondents have not denied. If the applicant had no notice of the said ruling, I am persuaded by the applicant's submissions that the applicant could not have had the opportunity to file an appeal within the prescribed time. To this end, the application for leave to file appeal out of time succeeds.
13. In any case, I do not see any prejudice that the Respondents would suffer should leave be granted herein since it is agreed by both sides, that all the 3 parties (widows of the deceased) have their separate homesteads.
14. And with regard to Madiany, SRM Misc. Application No. 1 of 2022, I am persuaded that the same is intertwined and has a bearing with estate of the deceased, subject of this matter, and that there is a possibility that should the same proceed, then there are chances that the applicant's intended appeal may be rendered nugatory. It is therefore the view of this court that to preserve the estate and the status quo, an order of stay of these proceedings would rightly lie.
15. I have noted that in the submissions of the parties, the parties delved into other issues which in my view are really not for this application. The issues raised include, whether *viva voce* evidence ought to be ordered for in certain respects, whether the aggrieved ruling ought to be set aside at this stage, issues to do with mortuary charges or legal fees *e.t.c.* To me, these are issues that would better be canvassed during the hearing of the main appeal should the applicant file any.
16. The issues raised by the applicant are serious and arguable and it is in the interest of justice that the applicant is accorded the opportunity to ventilate the same in the intended appeal. It is for this reason that I find merit in the applicant's application dated 10-1-2023. I allow the same on the following terms:-
- i. That leave be and is hereby granted to the applicant to file the intended appeal against the ruling of the Hon. James Ong'ondo delivered on 30-4-2020 in Siaya succession cause no. 204 of 2019 out of time.
 - ii. That the Applicant file the intended appeal within 21 days from the date of this ruling.



iii. That an order be and is hereby issued of stay of proceedings of Madiany SRM Misc. Application No. 1 of 2022 pending the hearing and determination of the intended appeal of the applicant, if filed.

17. In views of the nature of this matter, being a dispute amongst close family members, I order that each party will bear own costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 13TH DAY OF JULY, 2023

D. O. OGEMBO

JUDGE

13.7.2023

Court:

Ruling read out in open court in the presence of Mr. Mwamu for the Applicant and absence of Mr. Anyumba.

D. O. OGEMBO,

JUDGE

13.7.2023

