



REPUBLIC OF KENYA



**In re Estate of Ahmed Muhsin Alwi (Deceased) (Miscellaneous Application
36 of 2022) [2023] KEHC 20652 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 36 OF 2022**

SM GITHINJI, J

JULY 12, 2023

BETWEEN

KHADIJA HUSSEIN SALIM PETITIONER

AND

HUSSEIN AHMED ABDI 1ST INTERESTED PARTY

ALWI HUSSEIN ALWI 2ND INTERESTED PARTY

RULING

1. The Applicant herein has filed a Notice Motion application under Section 1A, 1B and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 and Order 51 of the [Civil Procedure Rule](#) seeking the following orders;
 1. Spent.
 2. That the 1st and 2nd applicants/ respondents be granted leave to file their appeal out of time.
 3. That there be a stay of execution of the ruling/ decree issued on March 22, 2022 pending the inter-parties hearing and final determination of this application.
 4. That there be a stay of execution of the ruling/ decree issued on March 22, 2022 pending the hearing and determination of the intended appeal herein.
 5. That the draft Memorandum of Appeal annexed herein be deemed as properly filed and served upon payment of prerequisite fees.
 6. That costs of this application be costs in the intended appeal.
2. The application is supported by the affidavit sworn by Hussein Ahmed Abdi who deponed that the Petitioner/ Respondent has obtained a ruling against them and execution of the said ruling/ decree will occasion irreparable harm and loss against them. He also deponed that the 2nd interested party/ applicant is the deceased's son and his name was included in the will as a beneficiary to his father's



property. According to him, the intended appeal will be rendered nugatory unless the orders sought herein are granted since the Petitioner/ Respondent is in the process of subdividing the said property with intention of selling the same.

3. In response, the Respondent filed a Replying Affidavit sworn by the Petitioner on June 16, 2022. She asserted that the Intended interested parties have no right to the Estate of the Deceased as they are not the Deceased children. That they are only cousins of the deceased and none of them produced their birth certificates at the Kadhi's court yet they were granted the chance to defend their actions of intermeddling with the Deceased's property. She also asserted that no harm shall be caused to the Interested parties as they have never had possession of the property.

Further, she asserted that the intended interested parties herein have not come to court with clean hands for misleading the court into granting orders staying execution of which order had been overtaken by events as the property had already been subdivided, which subdivision commenced in December, 2021 and thereafter sold. She further contended that the interested parties had the opportunity to file the Memorandum of Appeal within 30 days but did not do so within the required period.

Analysis and Determination

4. I have considered the application, its grounds, affidavit in response, submissions and authorities cited by counsels. The applicant seeks leave to file appeal out of time and stay of execution of the judgment and decree pending the hearing of the intended appeal.

Section 79G of the [Civil Procedure Act](#) provides:

“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.”

5. The applicants' request to file appeal out of time can only be accepted if they satisfy the court that they had good and sufficient cause for not filing the appeal within time. The supreme court of Kenya sitting at Kisumu in the case of [County Executive of Kisumu vs County Government of Kisumu & others](#) (2017) eKLR while relying on its decision in the case of [Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 others](#) Application No. 16 of 2014 (2014) eKLR reiterated the considerations to be made in such a case as follows:

1. 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;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
6. I have perused the affidavit in support of the application and I am not persuaded that the applicant has set out any tangible reasons as to why there was a delay in initiating the appeal within the prescribed period.
- On the issue of stay of execution Order 42 Rule 6(2) of the Civil Procedure Rules provides:
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
7. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417 the court of Appeal gave guidance on how a court should exercise discretion in an application for stay of execution and held that:
1. “The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
8. I have taken into account the competing interests of the parties in this application and I do find that the applicants cannot benefit from any stay orders that may be issued by this court as the orders being sought have already been overtaken by events owing to the fact that the property was subdivided way back in 2022. Having denied the applicant leave to appeal out of time, the subsequent prayer is unfounded and even if granted would serve no purpose having been overtaken by events. The application is thus dismissed with costs to the respondent.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 12TH DAY OF JULY, 2023.

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S.M. GITHINJI



JUDGE

In the absence of; -

Mr Wanga to the Applicant

Miss Mwangi for the Respondent

They be notified.

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S.M. GITHINJI

JUDGE

12/7/2023

