



REPUBLIC OF KENYA



**Ndonga & 3 others v Ndonga & another (Miscellaneous Civil Application
E006 of 2020) [2023] KEHC 20257 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20257 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CIVIL APPLICATION E006 OF 2020**

A MSHILA, J

JULY 14, 2023

BETWEEN

**VICTORIA WAMBUI NDONGA 1ST APPLICANT
MARGARET WAHU NDONGA 2ND APPLICANT
CATHERINE WANGARI 3RD APPLICANT
ROSE NJAMBI NDONGA 4TH APPLICANT**

AND

**NELLY NYAKIO NDONGA 1ST RESPONDENT
WILLIAM NGAARA KIMANI 2ND RESPONDENT**

RULING

1. Before court is an application by way of Notice of Motion filed on November 17, 2020 and brought under Articles 48 and 165 (6&7) of the *Constitution*, Section 1A, 1B, 3A, 79G & 95 of the *Civil Procedure Act*, Cap 21, Order 42 rule 6, Order 43, Order 51 rule 1 of the *Civil Procedure Rules, 2010* Laws of Kenya and all other enabling provisions of the law. The Applicants sought for orders:-
 - a. Spent
 - b. That exparte and pending the hearing and determination of this application this Honourable Court be pleased to stay the entire ruling of the Hon T Nyangena dated February 19, 2020 enjoining William Ngaara Kimani as an Interested Party or otherwise allowing the Respondent's summons application dated May 17, 2019 with costs.
 - c. That exparte and pending the hearing and determination of this intended appeal this Honourable Court be and is hereby pleased to stay the entire ruling of the Hon Nyangena



dated February 19, 2020 enjoining William Ngaara Kimani as an Interested Party or otherwise allowing the Respondent's application dated May 17, 2019 with costs

- d. That this Honourable Court be pleased to grant the Applicants leave to appeal out of time against the entire ruling or orders emanating from the ruling delivered on February 19, 2020 by Hon Nyangena (SPM) in Succession Cause No 354 of 2018 In the Matter of the Estate of the late Wallace Ndonga Gatigwa.
2. The application is premised on the grounds that by a ruling delivered on February 19, 2020 by Hon Nyangena, William Ngaara Kimani was wrongly enjoined as an interested party to the succession cause of the late Wallace Ndonga Gatigwa which ruling the Applicants want to appeal. The delay in filing the appeal which appeal was attributed to ill health and Covid 19.
3. The application is supported by the affidavit of Victoria Wambui Ndongasworn on November 12, 2020 on her own behalf as the 1st Applicant and on behalf of the other Applicants being the beneficiaries of the deceased's estate. She deposed that the Respondent filed an application dated May 17, 2019 where he sought to be enjoined as an interested party in Succession Cause No 354 of 2018 which application she opposed. Nevertheless, in the ruling delivered by Hon Nyangena, the court proceeded to allow the application. However, due to ill health and Covid 19 they were not able to file the appeal. She sought for leave to commence the appeal as it is meritorious given that the interested party is not a beneficiary of the deceased's estate.
4. Margaret Wahu Ndongafiled a further affidavit on February 112021 as the 2nd Applicant and widow to the deceased. She reiterated that the interested party is the deceased's brother therefore, not a beneficiary. She urged the court to allow their application to avoid them from being shut from the seat of justice. She contended that she currently resides in USA where she is seeking medical attention and stands to be prejudiced if she is denied an opportunity to file the appeal.
5. William Ngaara Kimani filed his Replying Affidavit sworn on January 7, 2022, in opposition to the Applicants' application. He deposed that he was enjoined in the succession cause of his late brother following the attachment of property belonging to the estate of his late father Harry Gatigwa where he is the administrator. He further contended that he is currently the beneficial owner of land parcel number Ndumberi/tinganga/T.532. He stated that no evidence had been provided to show that the 2nd Applicant was abroad for medical reasons. The courts were said to have been in operation during Covid 19 pandemic as the same were conducted online. He further stated that the Applicants have not demonstrated sufficient grounds for the inordinate delay in filing the appeal.
6. Nelly Nyakio Ndongain opposing the application swore her Replying Affidavit on May 31, 2021. She stated that no good reason had been adduced for the delay in filing the appeal since the ruling was delivered on February 19, 2020. She urged the court not to allow the Applicants' application and/or stay proceedings in the lower court. She also claimed that the 2nd Applicant is currently in the country.
7. The application was canvassed by way of written submission; hereunder is a brief summary;

Applicants' Submissions

8. The Applicants filed submissions on June 26, 2023 and therein submitted that they have met the criteria necessary to warrant grant of leave to appeal out of time and that the court herein is clothed with the requisite jurisdiction. Reliance was placed in the case of *Pan African Paper Mills (EA) Ltd vs Olaka* (2001) KLR. In regard to the delay, it was submitted that the application herein was filed on November 12, 2020, two weeks after the Applicants received copies of the impugned ruling on October 27, 2020. Covid 19 pandemic was also said to have contributed to the delay as operations



were crippled. Reliance was placed in the case of *Emmanuel Ebei Oyen vs Richard Njuguna Wariara* (2021) eKLR. Lastly, the Applicants submitted that the Respondents have not demonstrated if they will suffer any prejudice. Reliance was placed in the case of *Multi Media University of Kenya vs Kenya Union of Entertainment and Music Industry Employees* (2019) eKLR.

Issues For Determination

9. Having considered the Applicants' application, the Replying Affidavits by the Respondents in opposition to the same and the Applicants' submissions. The issues framed for determination are as follows;
 - i. Whether the court should grant leave to the Applicants to file an appeal out of time; and
 - ii. Whether an order for stay of the Ruling is merited;

Analysis

Whether the court should grant leave to the Applicants to file an appeal out of time;

10. Section 79G of the *Civil Procedure Act*, which section provides that: -

“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 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.”
11. The provision of Section 79 G of the *Civil Procedure Act* provides that an appeal may be admitted out of time if the court is satisfied that the Appellant adduced good and sufficient cause for not filing the appeal in time.
12. Further, in deciding whether to grant an extension of time, the court should take into account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted.
13. The impugned ruling was delivered on February 19, 2020, while the current application was filed on November 17, 2021. The appeal was expected to have been filed within 30 days. However, there is a delay of about nine months from the date of delivery of the ruling by the trial court. The reason adduced by counsel for the Applicants as to the delay is the 2nd Applicant's ill health and covid 19 pandemic.
14. On the other hand, the 1st Respondent claims that the Applicants have not demonstrated sufficient grounds for the inordinate delay in filing the appeal. That no medical evidence had been provided and that courts were being conducted virtually during the Covid 19 pandemic.
15. Indeed the 2nd Applicant produced documentary evidence that she was receiving medical attention at Edward M Kennedy Community Health Centre where she was last seen on October 30, 2020. It is also noteworthy that during the nine month period courts operations had been downscaled before virtual courts were embraced. In the circumstances, this court does not find that the delay to be inordinate as to deny the Applicants an opportunity to ventilate their grievances by way of an appeal to this Court.



16. In regard to whether the intended appeal has high chances of success, from a perusal of the draft memorandum of appeal annexed, this court is satisfied that the intended appeal is arguable. The parties will have an opportunity to argue the appeal in relation to the merits or demerits of the appeal once filed.

Whether an order for stay of the entire Ruling dated February 19, 2020 is merited;

17. The Applicants sought an order to stay the entire ruling of the Hon T Nyangena dated February 19, 2020 enjoining William Ngaara Kimani as an interested party or otherwise allowing the Respondent's application dated May 17, 2019 with costs.

18. Order 42 Rule 6(2) of the Civil Procedure Rules which provides that:

“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.

19. 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 of 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.”

20. This court enjoys discretion to grant stay of execution of decree pending appeal. Refer to the case of *JMM v PM* [2018] e KLR where it was stated thus:-

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”



21. Order 42 rule 6 of the Civil Procedure Rules grants this court as an appellate court, as well as the trial court wide discretion to stay execution of decrees pending appeal. In the instant case, the court herein has already granted leave to appeal out of time as stated herein above, from the draft Memorandum of Appeal, it is safe to conclude that the appeal is arguable as it seeks the court to determine whether the trial magistrate erred in law and in fact in enjoining William Ngaara as an interested party to the Succession Cause 354 of 2018 - Kiambu.
22. In the circumstances, this court is satisfied that the application for the order for stay of the entire ruling of the Hon T Nyangena dated February 19, 2020 has merit.

Findings And Determinations

23. In the light of the forgoing above this court makes the following findings and determinations;
 - i. This court finds that this is a suitable case in which to exercise its discretion to enlarge the time in which to file the Appeal;
 - ii. The application is found to have merit and it is hereby allowed;
 - iii. The Applicants are hereby granted leave to file and serve the Intended Appeal against the Ruling dated February 19, 2020 within thirty (30) days from the date hereof;
 - iv. Pending the hearing and determination of the Intended Appeal an order be and is hereby issued staying the execution of the entire Ruling of the Hon Nyangena dated February 19, 2020 enjoining William Ngaara Kimani as an Interested Party.
 - v. In default of compliance with (iii) above the orders for stay herein shall stand discharged.
 - vi. The Applicants to bear the costs of this application.
 - vii. Mention on September 25, 2023 before the Deputy Registrar for compliance and directions.

Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 14TH DAY OF JULY, 2023.

HON A MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Miss Odongo h/b for Mr Wambui – Applicants

N/A – Respondents

Nyaberi – for Interested Party

