



REPUBLIC OF KENYA



**Ogendi v Achieng (Miscellaneous Civil Case E025 of 2023)  
[2023] KEHC 20697 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20697 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
MISCELLANEOUS CIVIL CASE E025 OF 2023**

**KW KIARIE, J**

**JULY 19, 2023**

**BETWEEN**

**CASMIEL MBORI OGENDI ..... APPLICANT**

**AND**

**FRANCISCA ACHIENG ..... RESPONDENT**

**RULING**

1. Casmiel Mbori Ogendi, the applicant herein, moved the court by way of Notice of Motion dated June 5, 2023. The application is brought under sections 47 & 50 of the Law of Succession Act, sections 1A, 3A & 79G of the Civil Procedure Act & articles 22(1), 23, 27 (1), 48, 50 (1), 159, & 165 of the Constitution of Kenya. He is seeking the following orders:
  - a. The instant application be certified urgent and same be heard on priority basis.[Spent]
  - b. The honorable court be pleased to grant leave and/or permission to the applicant herein to lodge an appeal out of time against the ruling of Hon. B.O. Omwansa, Senior Principal Magistrate, date 16<sup>th</sup> November, 2022 vide Oyugis PMC Citation Cause No.60 of 2022.
  - c. Consequent to prayer (2) above being granted, the applicant do lodge the intended appeal within 14 days from the date of the order of this honorable court and/or such other duration as the honorable court may deem fit and expedient.
  - d. Costs of this application do abide the intended appeal.
  - e. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is premised on the following grounds
  - a. The applicant herein cited the respondent vide Oyugis PMCC Citation Cause number 60 of 2022 for purposes of the respondent herein taking out Grant of Letters of Administration in



respect of the estate of one Johnson Odhiambo, now deceased and husband of the respondent herein.

- b. Subsequently upon being served with the citation therein, the respondent herein entered appearance and lodged a replying affidavit in opposition of the said citation.
- c. For clarity, the applicant vide the affidavit in support of the citation deponed that same had been possession and/or occupation of a portion measuring 0.5Ha of LR number West Kasipul/Kodera/410 which parcel of land was registered in the name of Johnson Odhiambo, now deceased.
- d. Besides, the applicant in his pleadings presented vide Oyugis PMCC Citation Cause number 60 of 2022 expressed that same was laying a claim in the estate of the deceased hence the need for the respondent herein to take out the Grant of Letters of Administration.
- e. Consequently, the Citation was heard and a ruling was delivered on the 16<sup>th</sup> November, 2022 whereby same was dismissed with costs.
- f. Despite the said ruling, the applicant's previous advocates one M/s Gogi & Associates Advocates failed to inform and/or advise the applicant on the way forward noting that the ruling was not in favor of the applicant herein.
- g. Other than the failure of the applicant's previous advocates to properly advise the applicants herein, same had been suffering from a terminal disease for a long time and the said illness took a toll on the applicant who became immobilized most of the time thus could not access legal services on time for purposes of lodging an appeal within the prescribed time.
- h. Notwithstanding the foregoing, the applicant herein is aggrieved and/or dissatisfied with the ruling and/or order vide Oyugis PMCC Citation Cause No. 60 of 2022.
- i. Consequently, the applicant is desirous to prefer and/or mount an appeal against the whole of the said ruling and/or order.
- j. Nevertheless, the intended appeal cannot be mounted until and/or unless leave of this honorable court is granted.
- k. The intended appeal raises several salient and pertinent issues of law and fact.
- l. In the circumstances, the intended appeal is arguable.
- m. The delay in filing the appeal in time was purely due to failure on the part of the applicant's previous advocates to advise the applicants on time on way forward post the delivery of the ruling. Besides, the applicant's medical condition worsened and thus same required medical attention that prevented him from lodging the intended appeal.
- n. At any rate, the application is made in good faith and without inordinate delay.
- o. In any event, the intended appeal has overwhelmed chances of success, is arguable and not without merit.
- p. As a result of the failure to lodge the intended appeal within the statutory duration, the applicant is bound to suffer substantial loss as same is still in occupation of a portion of the property belonging to the respondent's deceased husband.
- q. On the other hand, the respondent and her children have commenced interfering with the applicant's occupation of the disputed portion of land.



- r. Consequently, the applicant is desirous to ventilate his grievances before this honorable court.
  - s. The respondent shall not suffer any prejudice or at all, if leave is granted unto the applicant to appeal out of time.
  - t. The applicant is ready and willing to abide by such terms and/or conditions, as the court may deem fit and expedient.
  - u. It is in the interest of justice that the appellant be afforded a window and/or opportunity to appeal.
  - v. The instant application ought to be allowed ex debito justitiae.
3. The application was opposed by the respondent on ground that the applicant did not explain the reason for delay.
  4. Section 79G of the *Civil Procedure Act* provides for extension of time to appeal as follows:

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 order sought by the applicant is discretionary and the court must be satisfied that it is merited. The Supreme Court of Kenya in the case of *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR said:

Each case has to be determined on its own merit and all relevant circumstances considered. It is worth reiterating that in considering whether or not to extend time the whole period of delay should be stated and explained to the satisfaction of the court.
  6. The applicant has blamed his previous advocate for failure to advise him in good time. He also gave a reason of ill health. There was a delay of four months. This being a succession matter, in the interest of justice, I will grant the leave to appeal out of time on condition that the appeal is filed within 14 days of this ruling.

**DELIVERED AND SIGNED AT HOMA BAY THIS 19<sup>TH</sup> DAY OF JULY, 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

