



**Abdullahi v Abdi (Miscellaneous Application E002 of 2023)
[2023] KEHC 23007 (KLR) (Family) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 23007 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS APPLICATION E002 OF 2023
JN NJAGI, J
SEPTEMBER 20, 2023**

BETWEEN

HALIMA ABDULLAHI APPLICANT

AND

AHMED RASHID ABDI RESPONDENT

RULING

1. The Applicant has filed a Notice of Motion dated March 6, 2023 seeking for orders that:
 - 1) Spent
 - 2) That this honorable court be pleased to order stay execution of judgement delivered by Hon. A. D Wako (Principal Kadhi) on January 3, 2023 in Kadhis Court Succ. Cause No. E015 OF 2020 pending hearing and determination of this Application.
 3. That this honorable court be pleased to grant the applicant leave to Appeal out of time against the judgement delivered by A. D Wako (Principal Kadhi) on January 3, 2023 In Kadhis Court Succ. Cause No. E015 of 2020.
 4. That this honorable court be pleased to order stay execution of the judgement delivered by A.D Wako (Principal Kadhi) on January 3, 2023 pending hearing and determination of the intended appeal.
 5. That costs of this Application be provided for.
2. The application was premised on grounds on the face of the application and supported by the affidavit of the applicant. The grounds in support are that judgment in the matter was delivered by the Hon Kadhi on the January 3, 2023 but the Applicant was unable to access the court file for perusal as she



was informed by court staff that the file was still retained by the Kadhi in chambers. That the court file was released to the court registry in the month of February 2023 upon which she applied to be supplied with certified copies of proceedings and judgment. That she paid for the same but it took time for proceedings to be typed and certified. That it is not until the February 28, 2023 that she was supplied with the said documents by which time the statutory period for filing appeal had lapsed.

3. The applicant contends that the delay in filing the appeal is not inordinate and is excusable. That it is in the interest of justice that the court allows the application. That she will suffer irreparable harm if the application is not allowed while the Respondent is unlikely to suffer any prejudice if the application is allowed. That she is ready and willing to abide by such terms as this court deems just and expedient in granting the orders sought.
4. The application was opposed by the respondent vide the replying affidavit of the respondent in which he deposed that the applicant has not shown that the appeal is arguable or that it has merit. That she has not demonstrated that she will suffer loss if the application is not allowed. That the application does not satisfy the requirement in Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. That the Applicant has not made any offer for deposit of security. That in the event that the court is inclined to allow the application, to order that a joint account be opened wherein the rental proceeds in respect to plot No.125 Moyale are to be deposited as a condition for stay orders.

Submissions

5. The applicant submitted that the delay in filling the appeal was not in her own making but rather out of circumstances beyond her control. That the applicant moved without any further delay to file the instant application upon being issued with certified copies of the judgment and proceedings. That the applicant has demonstrated that she deserves to be granted leave to file the appeal out of time. The applicant relied on the holding in the case of *Nicholas Kiptoo Korir Arap Salat v IEBC & 7 others* (2014) eKLR where the court set out the principles for extension of time.
6. On the issue of stay of execution of the decree, the applicant submitted that the appeal raises triable issues with high chances of success. That failure to stay execution of the judgment and decree will render the appeal nugatory. That the applicant stands to suffer irreparable loss if stay is not granted as the contested property is matrimonial property.
7. The respondent on the other hand submitted that whether or not to grant leave to appeal out of time is an exercise of discretion. That some of the factors to be considered include the period of delay; the reason for the delay; the arguability of the appeal; the degree of prejudice which could be suffered by the respondent if the extension is granted and the importance of compliance with time limits to the particular litigation or issue – see *Thuita Mwangi v Kenya Airways Ltd*(2003) eKLR.
8. The Respondent further submitted that the Applicant has not adduced sufficient evidence that she will suffer loss if the extension of time is denied.
9. It was submitted that the orders of the Hon.Kadhi were for applicant to avail figures to court for the rent proceeds from the suit property, plot no. 125, from the commencement of the case to the judgment date. That the applicant and the respondent are to open a joint account where the rent proceeds are to be deposited. That the court in deciding whether to grant the orders for stay has to balance the interests of the applicant with those of the respondent. That if orders for stay are granted the rights of the respondent and other beneficiaries to enjoy the fruits of their judgment will be curtailed. That the applicant has not shown any indication that she is willing to deposit security as may be ordered by the court.



Analysis and Determination

10. I have considered the grounds in support of the application, the grounds in opposition thereto as well as the respective submissions of the advocates for the parties. The issues for determination are:
- (1) Whether the applicant has met the required principles for leave to appeal out of time.
 - (2) Whether the applicant has met requirements for grant of a stay of execution pending appeal.
 - (3) Costs.
11. The principles concerning leave to appeal out of time are well established. In the case of *Nicholas Kiptoo Korir Arap Salat v IEBC and 7 others* [2014] eKLR, the Supreme Court laid down the principles that are relevant and applicable in a request for leave to appeal out of time. The court stated that :
- The underlying principles a court should consider in exercise of such discretion include;
1. Extension of time is not a right of any 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 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 Respondent if the extension is granted;
 6. Whether the application has been brought without undue delay.
 7.
- See also the Court of Appeal decision in *Thuita Mwangi v Kenya Airways (supra)*.
12. Section 79G of the *Civil Procedure Act* requires an appeal to be filed within 30 days of the delivery of the judgment or order. The judgment of the Kadhi's court in this matter was delivered on the January 3, 2023 and the instant application filed on March 8, 2023. There was therefore over two months delay in filing the appeal.
13. The explanation given by the Applicant for the delay is that the trial court delayed in issuing her with copies of typed proceedings and judgment. Though the Applicant did not provide a certificate of delay, I find the explanation to be excusable.
14. In the case of *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR the court held that a delay of two months was not inordinate. Similarly, in the case of *Safaricom Limited v Josenga Company Limited & 4 others* [2021] eKLR, a delay of three months was held not inordinate. In the instant case, I am of the view that a delay of two months is not inordinate as to warrant this court to deny the applicant her right of appeal.



15. As to whether there is an appeal with chances of success, I am guided by the decision in *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR where the court held that:
- “An “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.”
16. Similarly, in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR the court held that:
- “...On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised...An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous...”
17. The applicant in this case contends that the Hon. Kadhi erred in failing to find that the contested property, Plot No.125, was matrimonial property. I find this to be a triable issue.
18. The second issue is whether the prayer for stay of execution of the judgment is merited. The conditions to be met before a stay is granted are provided for under Order 42 Rule 6(2) of the *Civil Procedure Rules* that states that:
- “No order for stay of execution shall be made under sub rule (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. I have already dealt with the issue of delay and found that it is not inordinate. The remaining issues are whether the applicant will suffer substantial loss if the prayers sought are not granted and the issue of security for due performance of the decree.
20. The purpose of issuing orders for stay of execution pending appeal is to prevent the applicant from suffering substantial loss during the pendency of the appeal. In this case the Hon. Kadhi issued two orders, to wit: the applicant avails to the court figures of rent collected from Plot No.125, Moyale from the date of commencement of the suit to date and that rent proceeds from Plot No.125, Moyale be deposited in a joint (bank) account of the Appellant and the Respondent. Whereas it is my view that it is not necessary to order the Applicant to account for the rent collected during the pendency of the appeal, there is no good reason to order stay of execution of the order for depositing rent from Plot No.125, Moyale in a joint account of the parties herein. I therefore grant an order for stay of accounting for rent collected pending the hearing of the appeal. I however decline the prayer for stay of execution of the rent proceeds from Plot No. 125 Moyale being deposited in a bank account of the parties.
21. The property that is the subject of this succession cause is land. I do not see the need to order for deposit of security for due performance of the decree.
22. In the final end, I find the application to be partly merited and I make the following orders:
- (1) Leave be and is hereby granted to the applicant herein to file, within 14 days from the date hereof, an appeal out of time against the judgement delivered by A. D Wako, Principal Kadhi, on 3rd January 2023 in Moyale Kadhi’s Court Succ. Cause No. E015 of 2020.



- (2) An order for stay of execution of the judgement delivered by A.D Wako, Principal Kadhi, on January 3, 2023 be and is hereby granted in terms of the applicant accounting for money collected from Plot No.125, Moyale from the date of commencement of the succession cause to the date of judgment pending the hearing and determination of the appeal.
- (3) The prayer for stay of execution of the rent proceeds from Plot No. 125 Moyale being deposited in a bank account of the parties is declined.
- (4) Each party to bear its own costs to the application.

Orders accordingly.

Delivered, dated and signed at MARSABIT this 20th September 2023

J. N. NJAGI

JUDGE

In the presence of:

No appearance for Applicant

No appearance for Respondent

Court Assistant –

30 days R/A.

HC MISC APPL. E002 OF 2023 Page 3 of 13

