



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Wanjiru Mbogo (Deceased) (Civil Appeal E196 of 2022)
[2023] KEHC 22743 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22743 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E196 OF 2022**

A MSHILA, J

SEPTEMBER 22, 2023

IN THE MATTER OF THE ESTATE OF WANJIRU MBOGO (DECEASED)

BETWEEN

LUCY NJERI NJUNA 1ST APPELLANT
CAROLINE WAMBUI KIBE 2ND APPELLANT
SAMUEL KIMANI NJOROGE 3RD APPELLANT
PETER MBOGO WANJIKU 4TH APPELLANT
MARY WAMAITHA GICHANE 5TH APPELLANT

AND

SIMON MWANGI MACHARIA 1ST RESPONDENT
JAMES NGIGE KARIUKI 2ND RESPONDENT

RULING

1. Before court is an application by way of Notice of Motion filed on 31st August, 2022 and brought under section 47 of the [Law of Succession Act](#), rule 63, 67 and 73 of the [Probate and Administration Rules](#), sections 1A, 1B, 3A & 79G of the [Civil Procedure Act](#), order 42 of the [Civil Procedure Rules](#) and all other enabling provisions of the law. The Appellants/Applicants sought for orders:-
 - a. Spent
 - b. That there be stay of execution of the judgment issued in favour of the Respondents herein comprised in this Cause pending the hearing and determination of this Application inter-partes.



- c. That there be stay of execution of the judgment issued in favour of the Respondents herein comprised in this Cause pending the hearing and determination of the Appeal herein.
 - d. That a temporary injunction be issued restraining the Respondents their agents, servants and/ or anybody else acting on their instructions from transferring, alienating, selling, charging, leasing and/ or dealing in any manner whatsoever with Land Parcel Number Ruiru/Ruiru East Block 2/2255 and/ or its subdivisions pending the hearing of this application inter-partes for purposes of preservation.
 - e. That an injunction be issued restraining the Respondents their agents, servants and/ or anybody else acting on their instructions from transferring, alienating, selling, charging, leasing and/ or dealing in any manner whatsoever with Land Parcel Number Ruiru/Ruiru East Block 2/2255 and/ or its subdivisions pending the hearing of the appeal for purposes of preservation.
 - f. That leave be granted to the Applicants to have the Memorandum of Appeal filed be admitted out of time.
2. The application is premised on the grounds that judgment was delivered on 29/6/2022 in the absence of both counsels and a copy of the said judgment was only availed on 5/8/2022 after numerous attempts. The Respondents have already moved to execute as such there is need to preserve the estate.
 3. Lucy Njeri Njuna swore the supporting affidavit on her own behalf and on behalf of her co-applicants. She stated that she is the only surviving daughter of the deceased and her co-applicants are her nieces and nephews. That on 29/6/2022, judgment was delivered in Succession Cause No. 145 of 2008 - Thika in the matter of the estate of the late in the absence of both counsels and the Respondents have since moved to execute the said judgment rendering the appeal herein nugatory in the event it succeeds and such stay should be ordered to preserve the estate. That attempts to get a copy of the judgment were futile until 5/8/2022 when the same was availed. That on 11/8/22 together with her co-applicants they visited the advocate's office for perusal whereby they instructed their advocate to file an appeal and the same was filed on 16/08/2022; but the time within which to file an appeal had already lapsed hence the need for this application. The appeal raises serious issues and the delay in filing the appeal was unintentional and beyond the Applicants control.
 4. Lucy Njeri Njuna filed a further affidavit. She reiterated that together with the other applicants, she was in court on 29/6/2022. That she visited the registry severally in pursuit of the judgment but the same was not available. That together with her co-applicants they have been disinherited. She reiterated that the delay to file the appeal was not intentional. She urged the court to allow the application as no prejudice will be suffered by the Respondents.
 5. The court was urged to grant leave to file the appeal as the same has high chances of success.
 6. James Ngige Kariuki the 2nd Respondent filed a Replying Affidavit sworn on 4th October, 2022 on his own behalf and on behalf of the 1st Respondent. He deposed that the instant application should be dismissed as it is a waste of judicial time and that the same is filled with untrue allegations. He stated that the Applicants' advocate was aware that judgment was to be delivered on 29/6/2022 but failed to wait for the same to be delivered. That his advocate was able to receive the said judgment as soon as it was delivered as such the Applicants were said to have abdicated their duty in following up and only contacted the court on 2/8/2022. The intended appeal was said to be an afterthought. The lack of proof that judgment was not available at the registry amounts to imputing improper motive to the court. In any case, the Applicants failed to provide proof that they sought for the judgment during the month of July. The Respondents aver that if the application is allowed the same will be prejudicial to them.



7. The parties were directed to canvas the application by way of written submissions.

Applicants Submissions

8. The Applicants submitted that they had sufficiently explained why they failed to file the appeal in time. Reliance was placed on the case of *Tbuita Mwangi v Kenya Airways* (2003) eKLR. The length of delay was said to be excusable as the appeal was filed less than thirty days upon receipt of the judgment which judgment was unavailable for perusal despite several attempts being made to obtain it. The Applicants submit that the Memorandum of Appeal as filed has overwhelming chances of success as such the application should be allowed. Further, the Applicants submit that there is need to preserve the deceased's estate to avoid the appeal from being rendered nugatory. Reliance was placed in the case of *Shell Limited v Kibiru & another* (1986) KLR 410. The Applicants submit that they will suffer substantial loss as they stand to be disinherited by intermeddlers. The application was said to have been filed without undue delay as it was filed as soon as the Applicants learnt of the contents of the judgment. Lastly, the Applicants submit that they are willing to abide by any condition as to the security which the court may deem fit to impose.

Respondents Submissions

9. The Respondents submitted that the delay of two months has not been satisfactorily explained as no explanation has been given for failure to request for a copy of the judgment in the month of July as such the applicants should not be indulged. Reliance was placed in the case of *Edith Gichungu Koine v Stephen Njagi Thoitithi* (2014) eKLR. With regard to the granting of the order for stay of execution, the Respondents submit that execution of the judgment herein shall cause no substantial loss to the Applicants as they are aware that the Respondents have been residents on the suit land since 2008. It was further submitted that the application herein was not filed timeously as such the delay was inordinate and the same has not been explained.

Issues For Determination

10. Having considered the Applicants' application, the Replying Affidavit by the Respondents in opposition, the further affidavit and the rival submissions, the main issues arising for determination are;
- i. whether the court should grant leave to the Applicants to file the appeal out of time;
 - ii. whether an order for stay of execution should be granted.

Analysis

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

11. 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.”



12. 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.
1. 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.
 2. The judgment of the lower court was delivered on 29th June, 2022, while the current application was filed on 31st August, 2022. The appeal was expected to have been filed within 30 days. However, there is a delay of about two months from the date of delivery of the judgment by the lower court. The reason adduced by counsel for the Applicants as to the delay is the fact that the Applicants were not aware of the contents of the judgment as their efforts to obtain a copy of the judgment remained fruitless until 5th August, 2022 when a copy of the same was availed to them.
 3. The Respondents claims that the Applicants abdicated on their duty and only woke up on 2nd and 4th August, 2022 when they requested for a copy of the judgment. the Respondents aver that the Applicants failed to explain why they never requested for a copy of the judgment in the month of July.
 4. The Applicants aver that they were aware that the trial court was scheduled to deliver the judgment in question on 29th June, 2022 when the same was delivered. That they were in court and the said judgment was delivered virtually but they missed the session and only learnt that the judgment was delivered when the visiting judge was being taken round the court premises. The Applicants indicate that they pursued the said judgment but the same was not available at the registry. They have attached an email and a letter alleging their frustrations in trying to acquire a copy of the judgment.
 5. This court has considered the explanation for failing to file the intended appeal as submitted by the Applicants through their advocate. Having also perused the annexures by the Applicant this court is satisfied that the delay of two months by the Applicants has been well explained and the same is found to be reasonable and excusable. The Applicants have shown that indeed they were pursuing for a copy of the judgment and the same was not available at the registry which failure was beyond their control.
 6. In the circumstances, this court finds that the delay was not inordinate as to deny the Applicants an opportunity to ventilate their grievances by way of an appeal to this Court.
 7. 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 before the appellate court.
 8. In the upshot, this court is satisfied that the Applicants' application for leave to file an appeal out of time is found to have merit.

Whether an order for stay of execution should be granted.

21. With respect of the prayer to stay execution of the judgment issued in favour of the Respondents herein, the Applicants argue that there is need to preserve the deceased's estate as the same has been handed



over to intermeddlers who are in the process of executing the judgment and in the event the appeal succeeds the same will be rendered nugatory.

22. Order 42 rule 6(2) of the [Civil Procedure Rules](#) 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.

21. 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:-

- i. 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.
- ii. 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.
- iii. 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.
- iv. 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.
- v. 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.”

23. This court enjoys discretion to grant stay of execution of decree pending appeal. Refer to the case of [JMM v PM](#) [2018] eKLR 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.”

24. 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. Subsequently, from a perusal of the draft Memorandum of Appeal, this court can safely conclude that the appeal is arguable as the appellate court is being called upon to find out whether the trial court disinherited the rightful



beneficiaries and rewarded intermeddlers. Indeed the Applicants have demonstrated that they will suffer substantial loss if the Respondents carry on with the execution of the judgment with regard to the only asset belonging to the deceased herein. In any case, the Applicants have also demonstrated that they are willing to provide security as the court may deem fit.

25. In the end, this court is satisfied that the prayer for stay of execution is merited.

Findings And Determination

26. In the light of the foregoing this court makes the following findings and determinations;

- i. The application for the enlargement of time is found to have merit and it is hereby allowed; the Applicants are hereby granted an order for enlargement of time to file the intended appeal within forty-five (45) days from the date hereof;
- ii. There shall be an unconditional stay of execution of the judgment issued in favour of the Respondents herein comprised in this Cause pending the hearing and determination of the Appeal herein.
- iii. The Applicants to bear the costs of application.

Orders Accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 22ND DAY OF SEPTEMBER, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Tumu – for Applicants

Wambugu – for Respondents

