



REPUBLIC OF KENYA



**KENYA LAW**  
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**Takwa v Shiundu & another (Miscellaneous Civil Application  
E025 of 2023) [2023] KEHC 22563 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION E025 OF 2023**

**G MUTAI, J**

**SEPTEMBER 22, 2023**

**BETWEEN**

**ESTHER SAYO TAKWA ..... APPLICANT**

**AND**

**AZIZA LEYA SHIUNDU ..... 1<sup>ST</sup> RESPONDENT**

**KENYA PORTS AUTHORITY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion application dated June 2, 2023. The same is expressed to have been brought under Orders 51 Rule 1, 42 Rule 1, 22 Rule 22 and 25 of the Civil Procedure Rules and sections 3A, 63(e) and 95 of the Civil Procedure Act. The Applicant seeks the following orders: -
  - a. Spent;
  - b. That the honourable court be pleased to enlarge time of filing this appeal upon terms and conditions it may deem fit;
  - c. That upon granting prayer 2 above the honourable court be pleased to deem the attached appeal as duly filed within time;
  - d. That the honourable court be pleased to issue an order for stay of the proceedings in Succession Cause No E039 of 2020 upon terms and conditions it may deem fit pending the hearing and determination of the appeal; and
  - e. Costs of this application be provided for.
2. The application is premised on the grounds stated therein and the Supporting Affidavit of the Applicant sworn on June 2, 2023. The Applicant averred that she filed an application dated August 30, 2021 *vide* which she sought the revocation of grant. The said application was allowed on December



- 8, 2021. She then filed another application seeking to have the succession file investigated by the police officers from the Central Police Station on the grounds that her signature was forged and that she didn't sign the consent filed in Court. This latter application was dismissed on December 22, 2022. Being aggrieved by the said decision she sought to have the same reviewed. The review application was also dismissed. In the meantime, the time within which she could file the appeal lapsed.
3. The Applicant stated that her appeal is highly merited. She urged that the trial court proceeded without taking into consideration the best interests of the estate of Josephat Muliro Okwapubi. She deposed that the direction taken by the court was injurious to her as the widow of the deceased. She therefore beseeched the court to allow the application.
  4. In response the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn on August 1, 2023. She stated therein that the application is incompetent, unmeritorious, an abuse of court process and solely aimed at derailing the conclusion of the succession cause before the court below. It was urged that the appeal is time barred and that no reasons have been brought for the inordinate delay and that the suit before the court below, to wit Succession Cause No E039 of 2020, is ongoing. The Respondent therefore urged this court to dismiss the instant application with costs.
  5. This matter came before for hearing interpartes on the June 28, 2023. I directed that the application be canvassed by way of written submissions. Subsequently the Applicant filed written submissions dated July 20, 2023 *vide* which she reiterated the contents of her supporting affidavit and urged the court to allow the application. She further filed supplementary submissions dated September 6, 2023. In the latter submissions she argued that the proceedings of the trial court were marred with irregularities.
  6. The Respondent, on the other hand, through her advocate, Ochieng Eddie Vincent & Co Advocates, filed written submissions dated 1<sup>st</sup> August 2023. Counsel submitted on three issues for determination namely; whether a substantial loss may result to the Applicant unless the order is made; whether the application has been made without undue delay and whether the appeal has high chances of succeeding.
  7. On the first issue counsel relied on the case of *James Wangalwa & Another versus Agnes Naliaka Cheseto* [2012]eKLR and submitted that the applicant has not set forth the substantial loss she is likely to suffer if the primary suit proceeds.
  8. On the second issue counsel for the 1<sup>st</sup> Respondent submitted that the instant application was filed on June 21, 2023, more than 7 (sic!) months after the delivery of the impugned ruling. Delay for such a period, it was urged, amounts to inordinate delay. The Court was thus urged to dismiss the application. In support of the said proposition Counsel for the 1<sup>st</sup> Respondent relied on the case of *Jabber Mohsen Ali & Another versus Priscillah Boit & Another* [2014]eKLR. Counsel submitted that there are no exceptional circumstances in this case as the parties have been proceeding with the suit before the Subordinate Court. It was submitted that only the case of the Respondent (The Applicant herein) was pending before the Court below.
  9. On the third issue counsel submitted that the appeal is unlikely to succeed. He submitted that the grounds raised in the Memorandum of Appeal filed on June 21, 2023 do not raise any arguable appeal with high chances of success.
  10. In conclusion counsel urged the court to dismiss the application with costs.
  11. The 2<sup>nd</sup> Respondent did not actively take part in these proceedings. No submissions were thus filed on its behalf.



12. I have considered the application, the response therein and the rival submissions by both counsels. The issues that arise for determination are; whether orders to enlarge time of filing an appeal should issue and whether I should stay proceedings in Succession Cause No E039 of 2020.
13. The provisions of law that clothes this court with discretionary jurisdiction to grant leave to file an appeal out of time lies with Sections 79G and 95 of the Civil Procedure Act and in order for a party to succeed in such a motion, an appellant must satisfy the court that he/she has a good and sufficient cause for not filing the appeal in time.
14. The court in the case of Charles N Ngugi versus ASL Credit Limited [2022] eKLR stated:-
- “The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in Thuita Mwangi Versus Kenya Airways Ltd [2003] eKLR. They include the following:-
- a. The period of delay;
  - b. The reason for the delay;
  - c. The arguability of the appeal;
  - d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
  - e. The importance of compliance with time limits to the particular litigation or issue; and
  - f. The effect if any on the administration of justice or public interest if any is involved.
15. Further in the case of MFI Document Solutions Ltd versus Paretto Printing Works Limited [2021] eKLR the court stated:-
- “The applicant’s request to file appeal out of time may only be accepted if it satisfies the court that it had good and sufficient cause for not filing the appeal in time. The supreme court of Kenya sitting at Kisumu in the case of County Executive of Kisumu versus County Government of Kisumu & others [2017] eKLR while relying to its decision in the case of Nicholas Kiptoo Arap Korir Salat versus IEBC & 7 others Application No 16 of 2014 [2014] eKLR the Hon Judges reiterated the considerations to be made in such a case to be 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.”
16. In the case of *Annah Mwihaki Wairuru versus Hannah Wanja Wairuru* [2017]eKLR, the Court, quoting with approval the holding in *Leo Sila Mutiso versus Rose Hellen Wangari Mwangi* (Civil Application No Nai 255 of 1997) (UR) the court delivered itself as follows: -
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly), the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted”.
17. In this case the Applicant’s argument is that the delay in filing the appeal was caused by her review application dated January 9, 2023. On the length of the delay the ruling being appealed against was delivered on December 22, 2022. The Applicant argued that her appeal is highly merited. On the other hand, the 1<sup>st</sup> Respondent argued that no reason was advanced for the inordinate delay.
18. The ruling the applicant is intending to appeal against was delivered on December 22, 2022 whereas the application herein was filed on June 21, 2023 six months later. The reason advanced for the delay is that the applicant filed a review application dated 9<sup>th</sup> January 2023. It is not clear when the same was determined nor what determination was made as the Applicant has not attached appropriate documents. The 1<sup>st</sup> Respondent has not, however, disputed the existence of the same.
19. On the appeal being arguable with chances of success the Applicant annexed a Memorandum of Appeal filed on June 21, 2023 raising ten grounds of appeal.
20. I have considered the reasons advanced for the delay, the period of delay and the arguability of the appeal. It is my view that the delay is not inordinate. Further the Applicant has an arguable appeal. In my view the Respondent will suffer no prejudice if the order for extension of time to file an appeal is allowed.
21. On the stay of proceedings in Succession Cause No E039 of 2020, the court in the case of *Port Florence Community Health Care versus Crown Health Care Limited* [2022] eKLR in discussing stay of proceedings stated: -
- “Notably, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified...The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.”
22. It is not in dispute that the said matter is yet to be concluded as it is still at the defence hearing stage. Thus, it is my view that it is in the interest of justice that the same be stayed pending appeal.



23. The upshot of the above is that the application herein has merit. The same is hereby allowed. This being a family matter each party shall bear own costs.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2023 VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

**In the presence of:-**

Mr. Ochieng for the 1<sup>st</sup> Respondent;

No appearance for the Applicant;

No appearance for the 2<sup>nd</sup> Respondent; and

Mr. Arthur Odalo – Court Assistant.

