



In re Estate of Fatuma Ahmed Sheikh Makame (Deceased) (Miscellaneous Application E021 of 2023) [2023] KEHC 23596 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E021 OF 2023
G MUTAI, J
OCTOBER 13, 2023**

BETWEEN

YUNUS OMAR BASHIR APPLICANT

AND

LATIFA OMAR YUNUS BASHIR 1ST RESPONDENT

AMINA RASHID ABDULRAHMAN 2ND RESPONDENT

RULING

1. Before this court is a notice of motion application dated May 29, 2023. The application seeks the following orders:-
 - a. Spent;
 - b. That leave be granted to the applicant to file an appeal to this court out of time; and
 - c. That costs of the application be provided for.
2. The application is supported by the annexed affidavit of the applicant and also by the grounds set out in the body of the said motion.
3. The applicant stated that he is a beneficiary of the estate of Fatuma Sheikh Makame (deceased), who died on March 12, 2008. The applicant currently resides in Germany, undergoing treatment for a terminal illness. However, his wife and children reside in Mombasa.
4. Further, after the death of their mother (the deceased herein), the 1st respondent filed Succession Cause No.209 of 2015 before the Kadhi at Mombasa (KCSC No.209 of 2015-Mombasa). A ruling on the same was delivered on January 21, 2016. In his ruling, the Kadhi determined the estate as consisting of 1/2 share in Plot Number Mombasa/Block XL1/138; 1/2 share in Plot Number Mombasa/Block XXXV11/48 and Kes.300,000/- being proceeds of the sale of a mud house in Miritini. The estate was



distributed as follows; each daughter, 1/6 amounting to 16.66%; each of the sons, 2/6 amounting to 33.33%.

5. The applicant said he left for Germany before the ruling was delivered. After the delivery of the same, he instructed his advocate Mr. Yusuf Aboubakar to appeal against the said ruling. However, there arose a dispute surrounding the implementation of the orders of the court. When he called his advocate to intervene on the same, they disagreed and he immediately instructed Mr. Asige, advocate, to take over the case and to appeal.
6. He further stated that the proceedings after the ruling in Kadhi's court were finalised on November 5, 2021 and on January 26, 2022, whereby several orders were made against him. When he inquired about the appeal there was no response from his advocate. He then followed up with the court only to discover no appeal had ever been filed and that Kadhi's Court file went missing after the delivery of the ruling on October 13, 2016. The said discoveries led to his disagreement with his advocate causing him to appoint the current advocate.
7. He averred that his proposed appeal is not frivolous for the following reasons; that he tendered evidence to show that the estate of the deceased consisted of the ground floor of plot Mombasa/Block XXXVII/48. The first floor, second floor and third floor belonged to him and not the estate; that ½ share in Mombasa /Block XLI/138 was given to the sons and that the proceeds of the Miritini house were used for medication Abdul, one of the beneficiaries, and his wedding ceremony. He was thus seeking an extension of time to file and serve a memorandum of appeal out of time. He urged the court to allow the application as prayed.
8. In response, the 2nd respondent filed a replying affidavit sworn on July 17, 2023. She stated that the applicant had the capacity to give instructions to lodge the appeal on time. He ought to have followed up with his advocate to ensure that the appeal is filed. It was submitted that the applicant is guilty of laches.
9. She further stated that the intended appeal does not raise any arguable point to be determined by the court. That the judgement has already been executed. Therefore, an appeal therein shall be nugatory. She thus urged the court to dismiss the application with costs.
10. This honourable court on July 18, 2023, ordered that the application be canvassed by way of written submissions. Consequently, the applicant, through his advocates Muniyithya, Mutugi, Umara & Muzna Co. Advocates, filed his written submissions dated August 2, 2023. Counsel submitted on three issues, namely; whether the delay in filing the appeal was unreasonable; whether the applicant has an arguable appeal; and whether allowing the filing of the appeal will not be prejudicial to the respondents.
11. On the first issue, counsel submitted that the applicant, in his supporting affidavit, had elaborated conclusively on the circumstances leading to the delay. He urged that the law does not set the exact period of delay that it would lock out a litigant from seeking an extension of time. It was submitted that notwithstanding the delay, the applicant was keen to prosecute the appeal. Thus it would be unfair and unjust to punish the applicant for the mistakes of his previous advocates. Counsel relied on the case of *Edith Gichungu Koine v Stephen Njagi Thoithi* (2014)eKLR on the factors to consider in an application for an extension of time and submitted that the applicant had demonstrated reasons for the delay and grounds upon which he wishes to prefer an appeal.
12. On the second issue, counsel submitted that the applicant had demonstrated that the grounds in the application were compelling enough for this court to allow the application. Counsel relied on the case of *Housing Finance Company of Kenya v Sharok Kher Mohamed Ali Hirji & another* [2015] eKLR



and submitted that an arguable appeal is known to be a matter which has at least one issue that the court needs to pronounce itself on.

13. On the third issue, counsel submitted that there is no evidence tendered to show that if the application herein is allowed, the other parties will be prejudiced. To support this position, counsel relied on the case of *Stecol Corporation v Susan Awuor Mudemb* (2021) eKLR.
14. In conclusion, counsel urged the court to allow the application as prayed.
15. On the other hand, the 2nd respondent, through her advocates Khatib & Company Advocates, filed her written submission dated August 24, 2023. Counsel relied on section 79G of the *Civil Procedure Act* and submitted that time can be enlarged for an appeal to be filed out of time on condition that the delay in filing has to be convincingly explained. Conversely, the applicant has to grant security for the due performance of such decree or order that may ultimately be binding on him. It was submitted that the applicant had not fulfilled the said requirements. It was further submitted that the applicant did not tender any evidence regarding the allegation that he instructed his advocates to file his appeal, who assured him of the filing of the same. There is no evidence of any follow-ups or actions the applicant took after that. In the circumstances, the applicant had not convincingly explained or demonstrated the reasons for the delay in filing the appeal. To support his submissions, counsel relied on the cases of *Gichana Gathuku v David Komu & 3 others* [2007] eKLR and *Rajesh Rughani v Fifty Investments Ltd & another* (2005) eKLR as quoted in *Directline Assurance Company Ltd v Salima Salim Hassan* [2014] eKLR.
16. Counsel further submitted that the applicant has not deposited any security and urged the court to dismiss the application as it does not meet the threshold for extension of time.
17. I have considered the application, the response therein and the rival submission by both counsels.
18. Extension of time is provided for under section 79G of the *Civil Procedure Act* and order 50 rule 6 of the *Civil Procedure Rules 2010* which provides:-

“Section 79G :-

Time for filing appeals from subordinate courts.

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.”

Order 50 rule 6

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.”



19. It is trite law that the power of extension of time to file an appeal is discretionary and unfettered. Further, the Supreme Court, in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR laid down principles that a court should consider in exercising such discretion when it stated that:-

“From the above case law, it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for the delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a Court should consider in the exercise of such discretion:-

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.”
20. In this case, the applicant has blamed the delay in filing his appeal on his previous advocates who he alleges failed in effecting his instructions to file the same.
21. The question that arises is whether the mistakes of an advocate can be visited on the client. The court in the case of Rupa Savings & Credit Cooperative Society v Violet Shidogo [2022] eKLR stated:-

“It is trite that mistakes of counsel should not be visited on his/her client. However, be that as it may be, to exercise discretion under this domain, it is the duty of the aggrieved party to place before the court prima facie evidence to tilt the scale of discretion squarely on this guiding principle. Am of the considered view that the applicant did not discharge that burden of proof concerning this remedy on extension of time. In *Harod Miller and Ocean Breeze Hotel Limited v Carlene Miller*(2016) JMCA App1 the court observed inter alia that “If it is counsel's fault that results in litigant’s failures to comply with rules and timelines, it will generally be open to those litigants to pursue appropriate reliefs in the appropriate fora, as against those attorneys. Such fault or failures on the part of counsel, cannot, other than in the rarest of circumstances, properly be utilised as a good excuse for the failure to comply with requisite court timelines and schedules. If it were otherwise, one could simply avoid complying with the applicable timelines and schedules, by blaming one's neglect to do so, on one's attorney(s)-at-law.



Nothing could be more undesirable for a court of equity to permit litigants to place reliance on the mistake of counsel to agitate for their rights in our legal system. The age-long maxim on ignorance of the law is no defence being a presumption of law recognised in our jurisprudence can be contextualized in the circumstances of this application. It is legally unacceptable for the mistake of an advocate to be allowed as an excuse for the violation of express provisions of a statute. The defence of mistake of counsel, unless proved by cogent and credible evidence, should not be used as a tool to influence the judicial discretion of the court.”

22. The applicant blamed his two previous advocates on record for his failure to file the appeal. He, however, did not place sufficient evidence before this court in support of the said allegation. Thus, it’s my view that he has not established a case that would warrant this court to form an opinion that the delay was caused by the mistake of the advocates. I must also note that the delay herein is seven years which in my view is a very long time.

23. Accordingly, it is my view that the application herein lacks merit. I therefore dismiss the same. Each party shall bear own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 13TH DAY OF OCTOBER 2023 VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Mkomba for the Applicant;

Ms. Mohamed holding brief for Mr. Khatib for the Respondent;

