



REPUBLIC OF KENYA



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**In re Estate of Francis Thiaka Njagi - (Deceased) (Miscellaneous Succession Application E012 of 2022) [2024] KEHC 14257 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14257 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KERUGOYA**

**MISCELLANEOUS SUCCESSION APPLICATION E012 OF 2022**

**RM MWONGO, J**

**NOVEMBER 13, 2024**

**IN THE MATTER OF THE ESTATE OF FRANCIS THIAKA NJAGI - (DECEASED)**

**BETWEEN**

**JUSTIN NGUGI THIAKA ..... APPLICANT**

**AND**

**STEPHENSON GIKUNJU THIAKA ..... 1<sup>ST</sup> RESPONDENT**

**HELLEN MUMBI THIAKA ..... 2<sup>ND</sup> RESPONDENT**

**FRANCIS THIAKA MULWA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This application seeks the following orders:

1. That this Honourable Court be pleased to grant leave to the Appellant to file his appeal against the judgment and findings of the Resident Magistrate Honourable A. Lorot on 19<sup>th</sup> August, 2022 at Wang'uru Court in Succession Cause No.322 of 2016 out of time.
2. That this Appeal be allowed and the judgment of the Learned Principal Magistrate dated 1<sup>st</sup> March 2022, distributing the Estate of Francis Njagi Thiaka in the manner therein be quashed.
3. That this Honourable court does issue an order providing for the inclusion of the Land Parcel Mwea/Tebere/B3 as the Estate of Francis Niagi Thiaka.
4. That the Memorandum of Appeal hereto attached be deemed as duly filed.
5. That cost of this Application be provided for.

2. The application is supported by the grounds on the face of the application and the annexed Affidavit sworn by the applicant deposing:



1. That the applicant filed a notice of appeal dated 5<sup>th</sup> September, 2022 and served the same upon the Respondents on the same date.
  2. That the applicant wrote a letter to the Executive Officer Wang'uru Law Court dated 25<sup>th</sup> August, 2022 requesting to be furnished with a copy of the certified Judgment and proceedings, which at the time of drafting this application, is yet to be done.
  3. That the applicant was ready to file and litigate an appeal against the whole judgment delivered on 19<sup>th</sup> August, 2022 and is not at any delay.
  4. That the applicant seeks stay of execution of the judgment which was delivered on 19<sup>th</sup> August, 2022 and also seeks to file an appeal out of time.
  5. That if the execution of judgment is not stayed and if the applicant is not allowed to file an appeal, he will suffer substantial loss and damage.
3. The Respondents filed a Replying Affidavit with the following major averments:
1. That the applicant filed an application for review dated 10<sup>th</sup> March, 2022 and a ruling was delivered on 19<sup>th</sup> August, 2022.
  2. That the trial court directed the applicant to file an appeal within 45 days if aggrieved by the ruling.
  3. That the applicant filed a notice of appeal on 5<sup>th</sup> September, 2022 and served the respondents on the same date.
  4. That the applicant has not given any good or sufficient cause for delaying in filling the appeal within the time provided under section 79(G) of the *Civil Procedure Act*.
  5. That the application is an afterthought an abuse and misuse of the judicial process.
  6. That the respondents shall suffer great prejudice if an extension of filling of the appeal is granted and the applicant should not hide behind Article 50(1) of the *Constitution* since Section 79(G) of the *Civil Procedure Act* is clear on filling appeals from subordinate courts.
  7. That the appeal was filed with the sole purpose of delaying execution proceedings in the lower court.
4. Parties filed written submission as directed by the Court.

### **Applicant's Submissions**

5. As to whether the applicant should be allowed to file the appeal. The applicant submits that the Court should rely on the principles laid out in *Giella v Cassman Brown & Co. Ltd* [1973] EA,358 which are that: An applicant must show a prima facie case with a probability of success; that, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and that, if the Court is in doubt, it will decide an application on the balance of convenience.
6. On the first principle the Applicant submits that he has come with clean hands to this Court having filed a Notice of Appeal and served it upon the Respondents. That he subsequently wrote to the Court requesting to be supplied with certified copies of the Judgment and proceedings to enable him file the appeal and the delay has been solely on the part of the Lower Court.



7. On the second principle as to substantial loss, the applicant relies on *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
8. As to whether there has been inordinate delay the applicant relies on the Court of Appeal case of *Vishva Stone Suppliers Company Limited v Stone (2006) Limited*, where it was stated:
 

“The Law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. Plausible and satisfactory explanation for the delay is the key that unlocks the Court’s flow of discretionary power with the only caveat being that there has to be a valid and clear reason upon which the discretion can be favourably exercised.”
9. The applicant asserts that only 13 days elapsed between the lapse of the time when the Right of Appeal accrued and the filing of the Application. The Applicant being dissatisfied with the outcome of the ruling delivered by Hon. Mutiso, filed a review dated 10<sup>th</sup> March, 2022 which was heard by Hon. Lorot and took the better part of the year to be concluded. The said review was concluded on 19<sup>th</sup> August 2022 vide a ruling where the Hon. Magistrate ruled that the Applicant was allowed to appeal within 45 days.
10. The Applicant immediately filed a Notice of Appeal dated 5<sup>th</sup> September 2022, following which he also wrote to Wangu’ru Court on 25<sup>th</sup> August, 2022 requesting for a copy of certified proceedings and Judgment dated 17<sup>th</sup> September, 2022 which were given to him on 21<sup>st</sup> November, 2022.
11. That the applicant then filed this application by which time he had not yet been supplied with the certified copies of the proceedings and judgment. Thus, he argues that if the orders sought are not granted the Applicant’s appeal will be rendered nugatory and his chance of fighting for his sibling's inheritance that he was holding in trust shall be lost thus leaving them homeless as the suit Land in question is their fair share of the inheritance.

### **Respondents’ submissions**

12. The main contention in this matter is whether the court should grant the applicants leave to file their appeal out of time. In the case of *Omar Shurie v Marian Rashe Yatar* (Civil Application No.107/2020) the discretion of the court ought to be exercised in accordance with the following considerations.
  1. Length of delay
  2. Reason for the delay
  3. The chances of the appeal succeeding if the orders are granted.
  4. The degree of prejudice to the respondent if the application is allowed.
13. As to the length of delay, the applicant has been deliberately delaying this matter, for instance, after the judgement was rendered on the 19<sup>th</sup> August, 2022, it took them four months to file a notice of appeal which is not tenable under the law. The applicant also took four months to lodge his application for leave whereas his counsel was aware of what the law provides. Rules are there to be followed and are not for cosmetic purposes. The length of the delay does not warrant the applicant to be granted the orders sought.



14. As to the reason for the delay, the applicant states that he wrote to the registry requesting for copies of certified proceedings and judgment dated 17<sup>th</sup> September, 2022 which occasioned the delay. The applicant also states that review took the better part of the year. The reason for the delay does not hold water as the law clearly stipulates the time lines of filing of appeals. The reason goes to show the imprudence on the part of the counsel for the applicants, and falls short of the threshold of a sufficient and good reason.
15. With regard to the chances of the appeal succeeding, the respondent submits that they are slim. The Memorandum of Appeal dated 25<sup>th</sup> November, 2022 outlines that the judgement on the learned Hon. P. M. Mutiso was purely pegged on the evidence given by the applicant's witness. The appeal is a non-starter and will waste precious judicial time and the same should not be allowed to see the light of day.
16. Finally, the respondents submit that no prejudice will be suffered by the applicant. On the contrary, if leave to appeal out of time is allowed the respondents will be greatly prejudiced, as they have not enjoyed the fruits of the judgment and have been subjected to multiplicity of applications.
17. The issue for determination is whether leave to appeal out of time should be allowed.

### **Analysis and Determination**

18. The Applicant filed the application seeking a leave to appeal out of time, and that the Memorandum of Appeal attached thereto be deemed as filed. The application arises from a judgment rendered by Hon. A. Lorot on the 19<sup>th</sup> August, 2022 at Wang'uru court in Succession Cause No. 322 of 2016. The applicant filed a notice of appeal on 8<sup>th</sup> September, 2022 and later filed the present application.
19. Section 79G of the *Civil Procedure Act* CAP 21 provides the law on filing of appeals to the High Court 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 a good and sufficient cause for not filing the appeal in time.”
20. In determining whether the applicants have satisfied the conditions to be granted leave to appeal out of time, the court ought to take into account several factors. These are set out in the case of *Leo Sila Mutiso v Hellen Wangari Mwangi* [1999] 2 EA 231 the locus classicus on the point, which laid down the parameters 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.”
21. As to whether the delay was inordinate, it is clear that the trial court delivered the judgement on 19<sup>th</sup> August, 2022. The applicant filed a Notice of Appeal dated 5<sup>th</sup> September 2022, and he also wrote to



Wangu'ru Court on 25<sup>th</sup> August, 2022 requesting for a copy of certified proceedings and judgment dated 17<sup>th</sup> September, 2022 which were given to us on 21<sup>st</sup> November, 2022.

22. That the applicant seeing that the time period of 45 days as stipulated by the law was about to lapse, he did file this application by which time he had not yet been supplied with the certified copies of the proceedings and judgment.
23. The respondent submits that the reason for the delay does not hold water as the law clearly stipulates the time line of filling of appeals. The respondent urges that this was imprudent on the part of the counsel for the applicants and that the said reason falls short of the threshold of a sufficient and good reason.
24. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, this Court stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
25. The length of the delay in this case is reasonable given the clear explanation provided by the applicant.

#### **The degree of prejudice to the respondent if the application is granted**

26. The applicant submits that he will suffer prejudice if the orders sought are not granted, as the Applicants’ appeal will be rendered nugatory, and his chances of fighting for his sibling’s inheritance that he was holding in trust shall be forfeited. This would leave them homeless since that suit Land in question is their fair share of the inheritance.
27. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR it was held:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
28. In this court’s view, the applicant’s argument that the land held in trust by him is at risk of being lost if execution proceeds, is reason enough to stay execution.
29. As to whether there is an arguable appeal, a perusal of the memorandum of appeal shows that the applicant has an arguable appeal and that it raises triable issues with a fair chance of success. These merit interrogation on appeal. In *Kiu & another v Khaemba & 3 others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR) (17 December 2021) (Ruling) it was held:

“In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the courts invitation to the opposite party to respond thereto.”

#### **Conclusion and Disposition**

30. In light of the foregoing discussion, I am satisfied that the applicant has met the threshold for appealing out of time and that the memorandum of appeal discloses triable issues and should be deemed to be duly filed.



31. Accordingly, leave is granted to the Applicant file the appeal out of time. Similarly, the court allows the draft Memorandum of Appeal to be deemed as duly filed.
32. The Record of Appeal be filed and served within 45 days of the date hereof failing which the appeal will stand dismissed.
33. Orders accordingly.

**DATED AT KERUGOYA THIS 13<sup>TH</sup> DAY OF NOVEMBER 2024**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:

1. Muthoni for Applicant
2. Nzuki holding brief for Nyaga for Respondents
3. Mr. Murage, Court Assistant

