



In re Estate of the Late Henry Waturu Gitundu (Deceased) (Civil Appeal E007 of 2024) [2024] KEHC 13706 (KLR) (7 November 2024) (Ruling)

Neutral citation: [2024] KEHC 13706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E007 OF 2024
JK SERGON, J
NOVEMBER 7, 2024
IN THE MATTER OF THE ESTATE OF THE LATE HENRY
WATURU GITUNDU (DECEASED)**

BETWEEN

JAMES MWANGI JOSEPH APPELLANT

AND

JOHN KURIA GITUNDU RESPONDENT

RULING

1. The application coming up for determination is a chamber summons dated 12th March, 2024 seeking the following orders;
 - i. Spent
 - ii. That the firm of Mitei Kirui & Company Advocates be granted leave to immediately come on record for the Appellant/Applicant.
 - iii. That the court be pleased to grant leave to the applicant to appeal out of time against a ruling by Hon. Japhet Bii Senior Resident Magistrate that was delivered on the 24th day of January, 2024.
 - iv. That upon granting of prayer (iii) herein above the annexed memorandum of appeal be deemed as duly filed and served on time.
 - v. That the costs of and others incidental to this appeal; be costs in the intended appeal.
2. The application is supported by grounds on the face of it and the supporting affidavit of James Mwangi Joseph the appellant/applicant herein.



3. The applicant avers that he petitioned for letters of administration intestate in the estate of the deceased, he was issued with the grant on 22nd August, 2016 and that the same was confirmed on 9th May, 2017.
4. The applicant avers that respondent filed summons for revocation on 26th October, 2021 which were heard and determined and that on 24th January, 2024 the trial court rendered its ruling revoking the confirmed grant.
5. The applicant avers that he is aware that the thirty (30) days for appeal have lapsed and that he therefore ought to seek leave to file the appeal out of time.
6. The applicant cited several reason (s) for filing the appeal out of time;
 - i That on 20th September, 2023 the ruling was scheduled to be delivered on 22nd November, 2023 however the same was not delivered.
 - ii That upon perusal of the court file, it was indicated that the ruling was delivered on 24th January, 2024 with no notice to him or his advocate on record.
 - iii That his advocate on record was appointed to the bench as a Resident Magistrate and being a lay person he did not know the timelines involved in an appeal.
 - iv That being a resident and working for gain in Taita Taveta County posed difficulties in trying to follow up on the status of the file on the registry.
7. The applicant further avers that failure to file the appeal in time was not deliberate rather it was an excusable mistake. The applicant urged this Court to invoke article 159 of *the Constitution* and exercise its discretion to enlarge time and allow him to file the appeal, timelines notwithstanding.
8. The applicant avers that the appeal is meritorious and raises serious issues that need to be heard and determined by this court otherwise he will be rendered homeless.
9. The applicant avers that the respondent will not be prejudiced in any way by the grant of the orders sought in the application and that the same is in the interest of justice to the estate of the deceased.
10. The respondent filed a replying affidavit in response to the application.
11. The respondent avers that the applicant fraudulently and by concealment of material facts obtained a grant of letters of administration in the estate of the deceased and the said grant confirmed on 9th May, 2017.
12. The respondent avers that the applicant subsequently filed Kigumo ELC Suit No. 3 of 2021 to evict the respondent and other dependants of the estate from land parcel no Loc 2/Kinyona/899 which was obtained by the applicant fraudulently from his grandfather who owned Loc2/Kinyona/566.
13. The respondent avers that it was as a result of the said suit that he learnt that the applicant had fraudulently and by concealment of material facts obtained a grant in Kericho and he filed for summons for revocation of the said grant in Kericho Succession Cause No. 35 of 2016, the summons were heard via viva voce evidence and a ruling delivered on 24th January, 2024 in which the said grant was revoked.
14. The respondent avers that the applicant was aware of the ruling of the court and whether or not notice was issued is immaterial as the applicants advocate was aware of the said date therefore there is no plausible explanation for the failure to file the appeal in time and therefore the extension of time to file the appeal is not merited.



15. The respondent avers that he and the other beneficiaries will suffer great prejudice if the applicant is allowed to file the appeal out of time as some of the beneficiaries of the estate are very old and that there is a high likelihood that some may pass on before the appeal is heard and determined.
16. The respondent avers that the appeal has no chances of success and the grounds of appeal adduced in the memorandum of appeal are a mere sham.
17. I have considered the application and the replying affidavit and I find that the issue(s) for determination is whether this court should allow the firm of Mitey Kirui & Company Advocates to come on record for the appellant and whether the appellant should be allowed to file the appeal out of time.
18. On the issue as to whether to allow the firm of Mitey Kirui & Company Advocates to come on record for the appellant, this court finds that the applicant deposed that his previous advocate was appointed to the bench and as a result of which, he has now instructed the firm of Mitey Kirui & Company to represent him in the instant application and in the intended appeal. Order 9 Rule 9 of the Civil Procedure Rules 2010 provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court;

 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.” This Court holds the view that change of advocates by a party to proceedings does not in any way prejudice the other party in the proceedings so as to warrant a court to deny the party leave to effect the said change, bearing in mind that the previous advocate has a right to raise a client - advocate bill of costs for work done or services rendered if the same has not been paid for.
19. On the issue as to whether the appellant should be allowed to file the appeal out of time, it is not in dispute that the decision which the applicant seeks leave to appeal against was delivered by the lower court. When it comes to appeals from the subordinate court to the High Court, the applicable provision is Section 79G of the Civil Procedure Act which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so. As for the reasons for the said delay, the applicant’s case is that the ruling date was rescheduled to 24th January, 2024 without notice to his advocate on record who was subsequently appointed to the bench and consequently failed to file the appeal within time hence necessitating the instant application.
20. The extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. The discretion of the court must always be exercised judiciously. The applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal to ventilate his grievances.
21. Consequently, the chamber summons dated 12th March, 2024 is hereby allowed.



DELIVERED, SIGNED AND DATED AT KERICHO THIS 7TH DAY OF NOVEMBER, 2024.

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J.K. SERGON

JUDGE

In the presence of:-

C/Assistant – Rutoh

Ngure for the Respondent

No Appearance for Kirubi Mwangi

