



**In re Estate of Owino Ondiegi (Deceased) (Miscellaneous Succession Cause E072 of 2024) [2024] KEHC 13809 (KLR) (4 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13809 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS SUCCESSION CAUSE E072 OF 2024  
RE ABURILI, J  
NOVEMBER 4, 2024  
IN THE MATTER OF THE ESTATE OF OWINO ONDIEGI - (DECEASED)**

**BETWEEN**

**JOHN WANDAYE OYACH ..... APPLICANT**

**AND**

**ROSE OWINO ..... RESPONDENT**

**RULING**

1. The Applicant John Wandaye Oyach by his application dated 19<sup>th</sup> September 2024 seeks orders for leave to appeal out of time from the Ruling in Nyando SPM Citation Cause No 211 of 2019 delivered on 20<sup>th</sup> June 2021.
2. Prior to the filing of this application, the applicant had filed Kisumu HC Succession Appeal No E005 of 2024 on 14<sup>th</sup> August 2024 challenging the said Ruling of the Magistrate's Court rendered on 20<sup>th</sup> June 2021.
3. Vide a Ruling of 11<sup>th</sup> September 2024, this court struck out the above appeal for being incompetent as the same had been filed out of time without leave of the court extending the time.
4. It was upon the striking out of the appeal that the Applicant filed this application dated 19<sup>th</sup> September 2024 seeking extension of time to file an appeal out of time from the Ruling of 20<sup>th</sup> June 2021 in Nyando SPM Citation Cause No 211 of 2019.
5. The Respondent was served with the application as directed by this court on 23<sup>rd</sup> September 2024 but she did not file any response.
6. The applicant argued his application orally on 7<sup>th</sup> October 2024 claiming that he had been staying on a plot which he bought in 1979 but that he was being evicted therefrom hence the citation that he filed before Nyando SPM's court to cite the Respondent to take out letters of administration. That he



- operates business from the said land. He submitted that the Respondent was destroying his property hence the suit.
7. In the application, he seeks leave to appeal out of time from the Ruling on 20<sup>th</sup> June 2021 mentioned above and claims that he has arguable grounds of appeal.
  8. That he stands to suffer serious and substantial pecuniary loss should he not be allowed to appeal and the decree is executed.
  9. That he is ready to abide by the terms that this court may impose, that the orders sought will meet the ends of justice and that the application is filed without undue delay.
  10. In the supporting affidavit, the applicant deposes in reiteration of the grounds on the face of the application and adds that he bought a plot at Katito shopping centre from Owino Ondiegi (deceased) and that the Respondent is the beneficiary of the said estate but she refused to take out letters of administration for purposes of transferring the plot to him hence he filed the citation in Nyando Law Courts.
  11. I have considered the application and the submissions in support thereof.
  12. First, is that from the trial court record, the applicant's citation was dismissed on 1<sup>st</sup> April 2021 by Hon. S. Temu. The Applicant applied for review of that Ruling of 1<sup>st</sup> April 2021 and vide the Ruling of 20<sup>th</sup> June 2024, Hon. Kiniale dismissed the application for review.
  13. The Applicant went to slumber and awoke on 14<sup>th</sup> August 2024 when he filed appeal No E005 of 2024 out of time which was struck out on 11<sup>th</sup> September 2024.
  14. It is therefore not true that the application was filed without undue delay. The appeal which was struck out was filed after 3 years of the impugned review ruling.
  15. Similarly, this application for extension of time was filed after 3 years had elapsed. Not a single reason has been advanced for the inordinate delay.
  16. In the lower court ruling which is sought to be impugned, it was established that the applicant herein had already filed a land case against the respondent being Nyando ELC Case No 38 of 2022 and this was after the lower court dismissed his citation against the respondent herein. The applicant's claim is over land parcel No Kisumu/Agoro West/219.
  17. In the said impugned Ruling, the trial court found that the review application had no merit as it alleged that the ruling dismissing the citation was made *ex parte* which was not true as both parties filed affidavits and submissions and a preliminary objection was taken up by the respondent and upheld dismissing the citation. The court also observed that the application for review was filed after a year which was inordinate delay, besides there being no merit in the application.
  18. The power to extend time for filing an appeal whose timelines have expired is a discretionary power. The applicant must bring the application timeously and where there is delay, the length of that delay and reasons for the delay must be provided.
  19. The applicant cannot get away without satisfactory explanation for the inordinate delay which, in this case, is over three years.
  20. Article 159 of the *Constitution* abhors delay. Furthermore, delay defeats equity.
  21. It has also not been demonstrated that the intended appeal is arguable at all. The applicant merely states in his deposition that the Respondent is the beneficiary of the estate of the person he bought a



plot from. The applicant does not demonstrate that the Respondent falls in the category of persons who are entitled to petition for a grant of letters of administration of the deceased's estate as stipulated in Section 29 and 39 of the *Law of Succession Act*.

22. It is not enough to allege that the Respondent is a beneficiary of that estate. Being a beneficiary does not necessarily entitle one to have priority rights to petition.
23. From the lower court record and ruling dismissing the citation, there is no contrary evidence that the land which the applicant herein wanted the respondent to be compelled to take out letters of administration was, in fact, not land belonging to the deceased at all and it did not even exist. It was therefore to be in vain if the orders sought were granted as there was no estate to be administered. That material has not been displaced.
24. I find the application by the applicant dated 19<sup>th</sup> September 2024 to be devoid of any merit. It is misguided. It is hereby dismissed with no orders as to costs.
25. This file is closed.
26. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 4<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R. E. ABURILI**

**JUDGE**

