



**Muriuki v Njaramba (Miscellaneous Application E002 of 2024)
[2024] KEHC 15053 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15053 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS APPLICATION E002 OF 2024
AK NDUNG’U, J
NOVEMBER 21, 2024**

BETWEEN

CHARLES GITONGA MURIUKI APPLICANT

AND

NAOMI WAIRIMU NJARAMBA RESPONDENT

RULING

1. Charles Gitonga Muriuki, the Applicant, moved this court vide a summons dated 22nd February premised under Sections 47 and 49 of the [Law of Succession Act](#) Cap 160, Rules 49 and 73 of the Probate and Administration Rules, Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and all the enabling Provisions of the Law seeking the following orders;
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the intended appeal there be a stay of execution of the judgment delivered on 23rd January, 2023 in Nyahururu CMC Succession Cause No. E15 of 2020 and all the consequential orders issued pursuant thereto.
 4. That the honourable court be pleased to grant leave and/or extend/enlarge the time within which and/or to enable the Applicant herein to lodge and file a Memorandum of Appeal and a Record of Appeal against the judgment delivered on 23/01/2023 in Nyahururu CMC Succession Cause No. E15 of 2020.
 5. That pursuant to prayer 2 above being granted, the annexed memorandum of appeal filed herewith be deemed as properly and duly filed and subsequently served upon the Respondent herein and/or their advocate on record upon payment of due requisite court fees.
 6. That the costs of this application be provided for.



2. The application is based on grounds that;
 1. That the Applicant herein was a Petitioner in Nyahururu CMC Succession Cause No. E15 of 2020 where judgment was entered against him.
 2. That the Applicant being dissatisfied with the judgment delivered on 23rd January, 2023 preferred an appeal and applied for typed proceedings.
 3. That the Applicant/Intended Appellant is elderly and has been sickly thus he was not in a position to give proper instructions to his advocates on record on lodging an appeal.
 4. That the delay in filing an appeal was neither intentional, deliberate nor inordinate but as result of factors beyond the Applicant's control.
 5. That this court is vest (sic) with wide discretion and powers to extend/enlarge time within which to lodge an appeal however since the delay is not inordinate, is excusable and shall not in any way prejudice the Respondent in any way.
 6. That this application is made with utmost good faith and to the best interest of justice and further that the Respondent would not suffer any irreparable loss or injury if the same is allowed.
3. The application is supported by the applicant's affidavit sworn on 22nd February 2024 which reiterates the grounds aforesaid in addition to introducing exhibits by way of annexures.
4. The application is opposed and in a replying affidavit dated 3rd June, 2024 the Respondent depones that the Applicant has not met the main requirement for grant of stay of execution as provided for by statute as there is no active appeal in place to warrant the granting of a stay.
5. That the Applicant has not met the conditions for grant of stay of execution, which are;
 - i. The Applicant has not demonstrated what substantial loss he stands to suffer unless the order is made.
 - ii. The application was not made without unreasonable delay, having been made more than one year after the ruling sought to be appealed from was delivered.
 - iii. The Applicant has not proposed any security to demonstrate his seriousness.
6. Further, that the Applicant has not met the principles for extension of time to file an appeal and while he may indeed have been unwell, his physical presence was not necessary for the filing of a memorandum of appeal as he already had a counsel on retainer.
7. That neither the Applicant nor his counsel have explained why a memorandum of appeal was not filed in time and the reason given for delay is not satisfactory.
8. That contrary to the Applicant's assertion in his affidavit, the Respondent will undoubtedly suffer prejudice should the instant application be allowed as it would reinstate the Applicant to the position of an Administrator and heir of the estate of Francis Mukundi Gitonga.
9. The application was canvassed by way of written submissions.
10. The Applicant filed his submissions dated 25th September, 2024 and filed in court on 26th September, 2024 raising two issues for determination;



- a. Whether the honourable court should stay execution of the judgment delivered on 23rd January, 2023 in Nyahururu CMC Succession Cause No. E15 of 2020.
 - b. Whether the honourable court should grant leave and/or extend/enlarge the time within which and/or to enable the Applicant herein to lodge and file a memorandum of appeal and record of appeal against the judgment delivered on 23rd January, 2023 in Nyahururu CMC Succession Cause No. E15 of 2020.
11. It is the applicant's case that the principles guiding the grant of a stay of execution pending appeal are well settled. Order 42 Rule 6(2) of the Civil Procedure Rules provides;
- “No order for stay of execution shall be made under subrule (1) unless-
- The court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
- Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
12. Counsel relies on the decision of the High Court of Kenya at Siaya in *Nicholas Stephen Okaka & Another v Alfred Waga Wesonga* [2022] eKLR where the court had the following to say with regards to stay of execution pending appeal;
- “Therefore, an Applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned; namely (a) that substantial loss may result to the Applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the Applicant has been given. See *Antoine Ndiaye vs African Virtual University* [2015] eKLR.”
13. As to what amounts to substantial loss, the court in *Nicholas Stephen Okaka & Another* (Supra) relied on the case of *James Wangalwa & Another vs Agnes Naliaka Chesoto* [2012] eKLR where the court stated thus;
- “No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. 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.”
14. In the instant case, it is submitted that the Applicant/Intended Applicant stand to suffer substantial loss if the grant issued to the Applicant/Intended Applicant dated 2nd November, 2020 is revoked and if stay of execution is not granted.
15. That the delay in filing the instant application was not intentional, deliberate nor inordinate but as a result of factors beyond the Applicant's control, due to his illness.



16. The Applicant/Intended Applicant is ready and willing to offer such security as the court may deem fit, proper and just in the circumstances so as to protect the interests of the Respondent.
17. The provisions of Section 79G of the *Civil Procedure Act* are cited thus;
- “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.”
18. That in *Mugo & Others vs Wanjiru & Another* [1970] EA 482 the court stated as follows;
- “Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”
19. Counsel urges that 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. The court in *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR stated thus;
- “I have perused the file and noted that the Applicant did file his notice of appeal together with the present application dated 10th September, 2021. 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 vs Kenya Airways Ltd* [2003] eKLR. They include the following;
- The period of delay;
- The reason for the delay;
- The arguability of the appeal;
- The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- The importance of compliance with time limits to the particular litigation or issue; and
- The effect if any on the administration of justice or public interest if any is involved.”
20. It is the Applicant’s/Intended Appellant’s submission that he has satisfied the court that he had good and sufficient cause for not filing the appeal in time.
21. I have applied my mind to the application, the affidavit evidence and learned submissions on record. The issues for determination crystallize into;
- a. Whether the honourable court should stay execution of the judgment delivered on 23rd January, 2023 in Nyahururu CMC Succession Cause No. E15 of 2020.



- b. Whether the honourable court should grant leave and/or extend/enlarge the time within which and/or to enable the Applicant herein to lodge an appeal
22. Though this application is under the *law of succession Act*, the conditions to be met in an application for stay of execution and extension of time would in my view apply with necessary modification to the application before court.
23. As regards the grant of a stay of execution, application must be filed timeously. The court must consider whether the applicant would suffer substantial loss and whether the appeal would be rendered nugatory. Given the nature of succession proceedings, the requirement for security may not apply as neither party would be liable to pay any damages or compensation to the other should they eventually loose in the appeal save for costs incurred which in any case follow the event.
24. On enlargement of time the principles were succinctly put by the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR where the court laid down the principles that govern the exercise of discretion in applications for extension of time 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.”
25. Starting with the application for a stay of execution, I hasten to note that there is really nothing to stay as the orders in the impugned judgement revoked the grant that had been issued to the applicant. The order of the trial court was to the effect that the grant of letters of administration shall be taken out depending on the outcome of the murder charges in Kiambu High Court CR. Case No. 29 of 2018-R vs Naomi Wairimu Njaramba.
26. There is no evidence that the said trial is concluded or the process of administration of the subject estate is on -going. I decline the prayer for stay.
27. As regards the extension of time, I note that the delay herein is long and not satisfactorily explained. I note however that succession proceedings are unique in that a succession cause is not necessarily an individual suit for the benefit of an applicant only. Being an administrator is, so to speak, a managerial role to ensure proper administration and eventual winding up of an estate. The court cannot lose sight of the fact that other beneficiaries may be affected adversely. The court would in those circumstances be inclined to allow an appeal out of time in the wider interests of the estate and beneficiaries especially where, like in this case, the intended appeal is arguable.



- 28. Secondly, I see no prejudice that would be visited on the Respondent should extension to file appeal be granted.
- 29. In light of the principles that guide this court in the exercise of its discretionary jurisdiction when determining an application for extension of time, am persuaded that the interests of justice would be served by acceding to this prayer.
- 30. With the result that the application succeeds to the extent that the time within which to file the appeal is enlarged. The Applicant shall file such appeal within 30 days hereof.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF NOVEMBER 2024.

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A.K. NDUNG’U
JUDGE

