



**Cheriro v Kimeto (Miscellaneous Civil Application E002 of 2024)
[2024] KEHC 15502 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
MISCELLANEOUS CIVIL APPLICATION E002 OF 2024
JK SERGON, J
DECEMBER 5, 2024**

BETWEEN

RUSI CHEPNGETICH CHERIRO APPLICANT

AND

AUGUSTINE KIPRONO KIMETO RESPONDENT

(Being an application for leave to appeal out of time against the ruling of Hon. F.M Nyakundi, Principal Magistrate in Kericho CM Succession Cause No. 142 of 2017)

RULING

1. The application combining up for hearing is a notice of motion dated 26th March, 2024 seeking the following orders;
 - (i) Spent
 - (ii) That the applicant be granted leave to lodge an appeal against the ruling of P.M. Nyakundi, Principal Magistrate, Kericho CM Succession Cause No. 142 of 2017 Rusi Chepngetich Cheriro v Augustine Kiprono Kimeto.
 - (iii) Spent
 - (iv) Spent
 - (v) That the costs of this application be provided for.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Rusi Chepngetich Cheriro the Applicant herein.
3. She avers that she was avers she was made aware of the delivery of the ruling of the lower court in respect to *Kericho CM Succession Cause No. 142 of 2017* dismissing the application to revoke the grant



- issued to the Respondent on 15th March, 2024 when the Respondent brought surveyors purportedly to demarcate the estate land as per the confirmed grant based on the aforementioned ruling.
4. She avers that her former advocates the firm of M/s Koech Chepkirui & Associates did not inform her when the ruling of the lower court was delivered on 14th December, 2023.
 5. She avers that she was aggrieved by the said ruling since the estate of the deceased was inequitably distributed and the Respondent deliberately left out estate land namely Kericho/Kipchorian/Lelu/Chepkechei/Block7/308 undistributed and left out the liability and/or creditor of the estate
 6. She avers that the delay in filing the intended appeal against the said ruling was occasioned by her advocates on record who failed to inform her when the lower court rendered its decision.
 7. She avers that she is desirous of appealing against the lower court's ruling delivered on 14th December, 2023 and that she has arguable grounds of appeal with chances of success, she annexed a draft memorandum of appeal.
 8. She avers that the delay to file the appeal within the prescribed time was not inordinate and therefore excusable, she therefore urged this Court to grant leave to file an appeal out of time.
 9. Augustine Kiprono Kimeto the Respondent herein filed a replying affidavit in response to the application.
 10. He avers that a certificate of confirmation of grant was issued on 17th March, 2023 where the properties of the deceased were distributed equitably in accordance to section 40 of the [Law of Succession Act](#).
 11. He avers that he set in motion steps to execute the said certificate of confirmation of grant and the Applicant filed an application for the revocation of grant, upon hearing all the parties, the said application was dismissed on 14th December, 2023 and thereafter he proceeded to execute the certificate.
 12. He avers that the trial court's certificate of confirmation has since been implemented and the beneficiaries took possession of their respective parcels of land. He therefore maintained that in the event the Applicant is not satisfied, she ought to approach the appropriate forum being the ELC Court for a determination as to whether the Respondent was in occupation of her portion of the estate property and if so, then apply for an eviction order.
 13. He avers that the probate court having pronounced the certificate of confirmation of grant in compliance with section 40 of the [Law of Succession Act](#) and the said certificate having been implemented the chances of success of any appeal were extremely low.
 14. He avers that the attempt by the Applicant to sneak in new property to wit, Kericho/Kipchorian/Lelu/Chepkechei/Block7/308, were futile, the Applicant did not furnish the trial court with an Official Search or Green Card to enable the court establish ownership and whether it does form part of the estate of the deceased.
 15. He avers that the Applicant has not offered a plausible explanation for the inordinate delay in lodging the appeal save for blaming her previous advocates.
 16. This court directed the parties to exchange and file their written submissions. At the time of writing this ruling the Applicant had not uploaded her submissions in the Case Tracking System.
 17. The Respondent complied with the directions of this Court and filed submissions and reiterated that the Applicant was undeserving of this court's discretion to enlarge time for lodging the appeal out of time, she did not offer any plausible explanation for inordinate delay in lodging the appeal. The



Respondent cited the case of *Paul Musili Wambua v Attorney General & 2 others* [2015] eKLR where the court of appeal in declining an application for leave to lodge an appeal out of time stated that; “... it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

18. The Respondent faulted the Applicant failing to furnish proof of the exercise of proper diligence in pursuit of her case in the trial court. The Respondent cited the case of *Bi-Mach Engineers Limited v James Kahoro Mwangi* [2011] eKLR where the court of appeal in declining to grant leave to file an appeal out of time stated that; “The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy.”
19. The Respondent contended that the Applicant’s attempt to introduce new properties forming the estate of the deceased on appeal was abuse of the court process, yet the said issue ought to have been canvassed before the trial court, vide an application for review.
20. The Respondent contended that failure by the Applicant to attach the order or ruling or decree she sought to appeal against is fatal to her application.
21. I have considered the application, replying affidavit and submissions by the parties and I find that the sole issue for determination is whether to grant leave to appeal from the ruling of Hon. F.M Nyakundi, Principal Magistrate in Kericho CM Succession Cause No. 142 of 2017, out of time. The *Law of Succession Act* does not provide specific timelines for filing of appeals from decisions of the lower Court to the High Court. However, as Succession Appeals are considered to be Civil Appeals, the provisions of section 79G of the *Civil Procedure Act* is applicable. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment or decree of the subordinate court to the High court is thirty (30) days. In this case, the ruling sought to be challenged was rendered on 14.12.2023.
22. Section 79G of the *Civil Procedure Act* provides that;

“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.”
23. In the Court of Appeal case of *Edith Gichungu Koine v Stephen Njagi Thoitithi* [2014] eKLR Odek JJA (as he then was) stated that whenever an application for extension of time is before a court, the court ought to take into account several factors; “...Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.” The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are



in consonance with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

24. Article 48 of the Constitution guarantees every person access to justice. In addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
25. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. In the instant case, the applicant has approached this court for extension of time as stipulated in Section 79G of the Civil Procedure Act, the proviso thereof, and offered a plausible explanation for delay which this court has considered and is of the view that the applicant should be granted a chance to agitate her appeal challenging the ruling of the Magistrate's Court on the distribution of the estate of the deceased.
26. Consequently, the notice of motion dated 26th March, 2024 is allowed. The Applicant is granted leave of 15 days to file an Appeal out of time against the decision of Hon. P.M. Nyakundi in Kericho CM Succession Cause No.142 of 2017.
27. Each party to bear their own costs.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 5TH DAY OF DECEMBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Langat

Mwita for the Respondent

No Appearance for the Applicant

