



Chesang & 5 others v Koech & 2 others (Civil Appeal (Application) E054 of 2024) [2025] KECA 550 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KECA 550 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL (APPLICATION) E054 OF 2024
GV ODUNGA, JA
MARCH 27, 2025**

BETWEEN

**JANE CHESANG 1ST APPLICANT
EUNICE CHEROTICH 2ND APPLICANT
LEAH CHEPKEMOI 3RD APPLICANT
RECHO KOECH 4TH APPLICANT
ESTHER LANGAT 5TH APPLICANT
ALICE BIRIR KOECH 6TH APPLICANT**

AND

**CALIPH KIPTANUI KOECH.....1ST RESPONDENT CHARLES
KIPROTICH KOECH 1ST RESPONDENT
BERNARD KOECH 2ND RESPONDENT
CHARLES KIPROTICH KOECH 3RD RESPONDENT**

(Being an application for leave to file an appeal out of time from the Judgement of the High Court of Kenya, Kericho (Sergon, J.) delivered on 14th December 2023 in Succession Cause No 86 of 2024)

RULING

1. Before Court is the applicants’ Notice of Motion dated 11th April, 2024 brought under sections 3A and 3B of the Appellate Jurisdiction Act and rule 4 of this Court’s Rules. It is a home-made application drawn by the applicants in person. What I can distil from it is that the applicants are seeking extension of time to appeal against the Judgement of 14th December 2023 delivered by the High Court Kericho by Sergon, J.



2. According to the applicants, they came to learn of the decision on 4th March 2024 upon which, on 13th March 2024 they requested for the High Court of Kericho to issue them with the certificate of delay and court proceedings. According to the applicants, they intend to appeal against the said decision so that all the family beneficiaries of the late Stanley Kesusu Kimwei are included in the succession proceedings. It was their case that the appeal relates to the estate of the deceased comprising of movable and immovable properties. The applicants lamented that the judgement did not consider the right procedures to be followed in confirmation of Grant. In their application, they were seeking to be allowed time to prepare all the supporting evidence and file a new succession process in order include all the beneficiaries from the late Stanley Kesusu Kimwei.
3. The application was opposed by the respondents who averred: that the application is undated and incomplete; that the application is fundamentally defective, limping, and incurable in law, and has not been brought with clean hands; that none of the appellants was a party to the initial suit in High Court Succession No. 86 of 2014 that gave rise to the appeal before this Court; that the protestor in the succession cause, Weldon Koech is omitted; that the applicants have never been interested in setting down the appeal down for hearing since 14th December 2023 and no sufficient grounds have been adduced to explain the delay or accounted for and/or demonstrated by the parties herein; and the application should be dismissed with costs.
4. In their submissions in support of the submissions in respect of the applicants' lack of locus, the respondents cited the case of *Rono and 3 Others vs Kigen* (Civil Application No. E007 of 2024) 2024 KECA 1521 (KLR) and further cited the Supreme Court decision of case *Nicholas Kiptoo Arap Salat vs The IEBC & Others* Supreme Court Application No. 16 of 2014 in support of the submission that no satisfactory reasons have been demonstrated in the supporting affidavit why the prayers sought should be granted. And urged that this application be dismissed and that the Notice of Appeal dated 22nd May 2024 and the Memorandum of Appeal dated 28th April 2024 be struck out with costs.
5. I have considered the application, affidavit in support of and in opposition to the application, the submissions and authorities relied upon. The respondents have raised issues regarding the manner in which the application is drafted. In this age and error such technical objections should not be upheld in order to drive a party from the seat of justice. It is however contended that the applicants have no locus in the application and the appeal since they were not parties in the High Court. This position is based on the decision by a single Judge of this Court in the case of *Rono and 3 Others vs Kigen* (supra) in which the decision of the Supreme Court in the case of *Jennifer Koinate Kitarpai vs Alice Wahito Ndegwa & Another* Supreme Court Petition No 32 of 2014 was cited. However, rule 77 (1) of the Rules of this Court provides that:

A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.

6. It is clear that the above rule permits a "person" desiring to appeal. It does not talk of a "party". This rule is worded in similar terms as rule 79 of the Rules which provides that:
 1. An intended appellant shall, before or within seven days after lodging notice of appeal under rule 77, serve copies of the notice on all persons directly affected by the appeal:

Provided that the Court may, on application which may be made ex parte, within seven days after the lodging of the notice of appeal, direct that service need not be effected on any person who did not take part in the proceedings in the superior court.



2. Where any person who is required to be served with a copy of a notice of appeal gave any address for service in or in connection with the proceedings in the superior court, and has not subsequently given any other address for service, the copy of the notice of appeal may be served on that person at that address, notwithstanding that it may be that of an advocate who has not been retained for the purpose of an appeal.

7. In my view the use of the word “person” as opposed to “party” is deliberate. It is meant to allow persons aggrieved by the decision of the lower court and who may find an avenue of review unsuitable to challenge the decision notwithstanding the fact that they may have been omitted from the proceedings before the trial court and may not even have been made aware of the same.

Of course, such a person must be an aggrieved person which has been defined by the Supreme Court of Uganda as one who has suffered a legal grievance, and a person suffers a legal grievance if the judgement given is against him or affects his interest. See *Mohamed Allibhai vs Bukonya and Another* SCCA NO. 56 OF 1996 as cited in *City Council of Kampala Makindye Division LC III Council vs The Village Council Pepsi Cola Zone Kansanga* [2008] 2 EA 71.

8. The Supreme Court’s procedures are guided by the Supreme Court Rules while this Court’s procedures are guided by the [Court of Appeal Rules](#). This Court’s Rules do not necessarily apply to matters before the Supreme Court and vice versa.

9. Coming to the merits of the application, the principles to be applied by the court when considering an application brought under rule 4 of the Court of Appeal Rules are now well settled. The starting point is that the Court has unfettered discretion when considering such an application. However, like all judicial discretions, the Court has to exercise the same discretion upon reasons and not upon the whims of the Court. To guide the Court on what to consider when exercising the same discretion, the case law has established certain matters that the Court would look into. These are first the period of the delay; secondly, the reasons for such a delay; thirdly, whether the appeal, or intended appeal from which extension is required is arguable, that is that it is not frivolous appeal; and fourthly, whether the respondent will be unduly prejudiced if the application were to be granted. Those are the main principles to be considered but the list is not exhaustive and can never be exhaustive as the exercise of discretion by itself demands that the Court should not be restricted in its operations.

10. Those principles were restated by Waki, JA in [Fakir Mohamed vs Joseph Mugambi & 2 Others](#) [2005] eKLR as follows:

“The exercise of this Court’s discretion under Rule 4... is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance-are all relevant but not exhaustive factors: See *Mutiso vs. Mwangi* Civil Appl. NAI. 255 of 1997 (UR), *Mwangi vs. Kenya Airways Ltd* [2003] KLR 486, *Major Joseph Mwereri Igweta vs. Murika M’Ethare & Attorney General* Civil Appl. NAI. 8/2000 (UR) and *Murai v Wainaina* (No 4) [1982] KLR 38.”

11. On its part, the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others*, Supreme Court Application No. 16 of 2014[2014] eKLR while expressing itself on the matter opined that extension of time is not a right of a party but an equitable remedy available to a deserving party at the discretion of the court; that the party seeking extension of time has the burden to lay a basis to



the satisfaction of the court; that extension of time is a consideration on a case to case basis; that delay should be explained to the satisfaction of the court; whether there will be prejudice suffered by the respondents if the extension is granted; whether the application is brought without undue delay; and whether public interest should be a consideration.

12. In *Leo Sila Mutiso v Helen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231 this Court set out the factors to be considered in deciding whether or not to grant such an application and these are first, the length of the delay; secondly the reason for the explanation if any for the delay;

thirdly, (possibly), the chances of the appeal succeeding if the application is granted i.e. the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; and fourthly, the degree of prejudice to the respondent if the application is granted and whether or not the Respondents can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

13. In this case, the applicants state that they are beneficiaries of the estate of the deceased. They came to learn of the judgement on delivered on 14th December 2023 on 4th March 2024 upon which, on 13th March 2024. They have not disclosed why they were not parties before the High Court. Why they omitted from the proceedings or their interests were taken care of one of the parties. Although it is not clear, it would seem that there is an appeal in place. If that is the position, I do not see why the applicants seek to appeal out of time when they may seek to be joined to the existing appeal.
14. In my view the applicants have failed to place before me all the necessary material that would enable me exercise my discretion in their favour.
15. I accordingly dismiss the application but with no order as to costs, this being a succession matter involving the family
16. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF MARCH 2025.

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR.

