



REPUBLIC OF KENYA



KENYA LAW
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**Keya v Keya & another (Civil Application E122 of 2023)
[2024] KECA 471 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KECA 471 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E122 OF 2023
JM NGUGI, JA
APRIL 26, 2024**

BETWEEN

PHINIAS ILATSIA KEYA APPLICANT

AND

SAMUEL JAMHURI KEYA 1ST RESPONDENT

JOHANA KEYA KIKUYU 2ND RESPONDENT

(Being an Application for Extension of time for purposes of filing Memorandum of Appeal against the Judgment of the High Court of Kenya at Vihiga, (Musyoka, J.) dated 28th April, 2023 in HC. SUCC. Cause No. 109 of 2021 Formerly KAK. SUCC. Cause No. 412 of 2012)

RULING

1. In the application dated September 20, 2023, the applicant seeks the following prayers:
 1. That the Honourable Court be pleased to extend time to the applicant for purposes of filing of his Memorandum of Appeal against the judgment in Vihiga High Court Succ. Cause No. 109 of 2021 (Formerly Kakamega Succ. Cause No. 412 of 2012) which judgment was delivered on the 24/04/2023.
 2. That costs of this application do abide by the intended appeal.
2. The application is supported by the Supporting Affidavit of Phinias Ilatsia Keya sworn on September 20, 2023. The grounds upon which the applicant seeks the extension of time as gleaned from the application and supporting affidavit as follows:
 1. First, he says that the judgment was delivered on April 28, 2023 but that he was unaware of the delivery and that he “was at the time down with depression after the judgment that took



away [his] ancestral land which [he] had already developed the same way back in the year 1990 by putting up permanent houses”.

2. Second, that he was able to file a Notice of Appeal through his counsel but was not able to raise professional fees to instruct the lawyer to file a Memorandum of Appeal.
3. Based on these two, somewhat incongruous grounds, the applicant seeks to invoke Rule 4 of the [Court of Appeal Rules](#) to extend time for him to file his Memorandum of Appeal against the impugned judgment.
4. No replying affidavit by the respondents was filed. The 2nd respondent, however, filed written submissions dated February 19, 2024. The applicant did not file any written submissions. The hearing notice supplied by the registry indicates that both parties were served. I, therefore, will determine the application based on the material on record.
5. In his submissions, the 2nd respondent sees four problems with the application. First, he points out that the applicant was not a party to the succession cause at the High Court but was only a witness. Second, he says that the named 1st respondent in the instant application is the deceased with respect to which the succession cause related and cannot, therefore, be a party to the appeal! Third, the 2nd respondent says that he was not a party to the succession cause and that, therefore, he cannot be brought in at the appeal stage. Fourth, the 2nd respondent says that the applicant was actually granted leave to appeal out of time in the ruling by Musyoka J. dated April 28, 2023 – and that this application is, therefore, either superfluous or, worse, *res judicata*.
6. I do think that some of these objections by the 2nd respondent are misconceived. As Musyoka J. acknowledged in his ruling dated April 28, 2023, the applicant herein is a survivor to the Estate of the Deceased (Johana Keya Kikuyu). As such, he has a right to appeal if dissatisfied with the distribution decisions of the High Court. It also appears to be inaccurate to say that Musyoka J. granted leave to the applicant to file an appeal out of time. What Musyoka J., in fact did was to grant stay of execution to his judgment dated July 3, 2020 for a period of six months to enable the applicant to file an appeal.
7. This Court is empowered to grant extension of time under Rule 4 of the [Court of Appeal Rules](#) which provides that:

“The Court may, on such terms as it thinks just, by order extend the time limited by these [Rules](#), or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these [Rules](#), whether before or after the doing of the act, and a reference in these [Rules](#) to any such time shall be construed as a reference to that time as extended.”

8. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

“It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to account in deciding whether to grant an extension of time are, first the length of the delay, secondly the reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted.”

9. In the present case, the applicant says he wishes to appeal against the “judgment” in Vihiga HC Succession Cause No. 109 of 2021 (formerly Kakamega Succ. Cause No. 421 of 2012). The applicant



says that the “judgment” was delivered on April 28, 2023; and that it “apportioned land on two title numbers i.e. LR North Maragoli/Mudete/1467 and 1468 which titles had been revoked by a court order and which were therefore non-existent and not open to distribution.”

10. I have looked at the decision delivered by Musyoka J. on April 28, 2023. It is attached to the applicant’s supporting affidavit. First of all, the decision dated April 28, 2023 is not a judgment. It is a ruling respecting an application by the applicant dated August 13, 2020 seeking stay of execution of the judgment in the succession cause. Second, and related, the decision of Musyoka J. delivered on April 28, 2023 does none of the things the applicant herein claims it does. For one, it does not apportion any parcels of land to anyone.
11. Suffice to say that the application dated September 20, 2023 appears misconceived. It is couched in a language targeted at the judgment in the succession cause which was delivered way back on July 3, 2020 but it seemingly seeks extension of time to appeal against the ruling (not judgment) delivered on April 28, 2023.
12. That is not the only problem with the application. The ostensible reasons upon which it is grounded are, as I said before, incongruous and unsatisfactory to meet the threshold in Rule 4 of the *Court of Appeal Rules*. In the first place, the applicant claims that the delay in filing his Memorandum of Appeal was because he was unaware of the “judgment”. He then changes course, quite literally, in the same sentence and says that he suffered “depression” as a result of the judgment hence occasioning the delay. Needless to say, it seems transparently disingenuous to claim, on the one hand, that he was unaware of the judgment; and, on the other that the judgment caused him so much distress that he went into a depression!
13. That is not all. In the very next paragraph, the applicant introduces a new reason for the delay: it is neither that he was unaware of the judgment nor that he was depressed – but that he did not have sufficient funds to pay his lawyer! Indeed, we learn, for the first time, that he timeously filed a Notice of Appeal (which means that he was, after all, aware of the “judgment” or ruling and was not too depressed to do something about it), but that he lacked funds to pay for professional fees to perfect the appeal by timeously filing the Memorandum of Appeal, and, presumably, the Record of Appeal.
14. I have said enough to paint a picture why the application herein cannot be granted. First, it is unclear whether the extension needed is to file an appeal against the ruling which was delivered by Musyoka J. on April 28, 2023 or the judgment which was delivered by Musyoka J. on July 3, 2020. Second, the reasons advanced for the delay simply do not add up. They are not only incongruous but they appear demonstrably false on their own terms.
15. The upshot is that the application dated September 20, 2023 is hereby dismissed with costs to the 1st respondent. There was no response to the application so there shall be no order as to costs.
16. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

