



**Kiptui & 2 others v Kiptui (Civil Application E005 of 2023)
[2024] KECA 491 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KECA 491 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E005 OF 2023**

LA ACHODE, JA

MAY 9, 2024

BETWEEN

JOSEPH KIMUTAI KIPTUI 1ST APPLICANT

SOPHIA JEBIWOTT KIPTUI 2ND APPLICANT

ALICE JEROTICH KIPTUI 3RD APPLICANT

AND

NICHOLAS KIPNGETICH KIPTUI RESPONDENT

(An application for extension of time for the applicant to file a Notice of Appeal from the decision of the High Court at Eldoret (Hon. Olga Sewe J), delivered on 3rd May 2021 in Eld HC Succ Cause No. 313 of 2006)

RULING

1. In the Notice of Motion dated and filed on 10th February 2023, expressed to be brought under Rule 4 of the Court of Appeal Rules of 2022, the applicants seek an order for extension of time within which to file a Notice of Appeal and pursue an appeal from the decision of Sewe J made on 3rd May 2021 in Eld HC Succ Cause No. 313 of 2006. Additionally, that the costs of the application be in the intended appeal. Nicholas Kipngetch Kiptui is the respondent.
2. The three applicants herein had previously filed a petition in Succession Cause No. 319 of 2004 for letters of administration in the estate of their deceased father, Kiptui Cheboi/Kiptui Maluei who died on 25th September 1973. The respondent who is their uncle was a step-brother to their deceased father. He filed an objection to the petition. The father of these two brothers (Kiptui Cheboi/Kiptui Maluei and the respondent) was called Cheboi Kiptui. He died on 28th September 1988.





3. While the matter was ongoing, the respondent filed a separate petition in Succession Cause No. 313 of 2006 for letters of administration in the same estate and it was granted. He then proceeded to transmit one of the properties of the deceased step-brother being land ref No Kaptagat/Kaptagat Block 2 (Mosop) 46 into his own name. The applicants filed an objection to the grant. Upon consideration, the court held that the property belonged to the applicants' deceased father and revoked the grant. The applicants then went back for the hearing of Succ Cause No. 319 of 2004.
4. The application now before me arises out of Succ Cause No. 313 of 2006. In the judgement delivered on 3rd May 2021 the learned judge made a finding that Kiptui Cheboi and Kiptui Maluei were not the same person and were instead, father and son respectively. That the deceased's name was Kiptui Cheboi son of Kiptui Maluei, rather than Kiptui Cheboi alias Kiptui Maluei. The applicants aver that this was an erroneous finding that the lower court made, which will have great negative impact and they wish to challenge it through an appeal, because they cannot raise it in the pending matter, Succ Cause No. 319 of 2004. Further, that the erroneous finding must be rectified lest the respondent takes advantage of it to claim that the property belongs to his father.





5. The application is hinged on the grounds on the face thereof and is supported by an affidavit sworn by Mr. Joseph Kimutai Kiptui on 10th February 2023. The applicants state in these grounds that in the judgement delivered on 3rd May 2021 in Eld HC Succ Cause No 313 of 2006, a decision was made in relation to the name of the applicants' deceased father which grieved the applicants, hence the intended appeal.
6. Rule 4 of the rules of this Court gives the Court unfettered discretion to extend the time limited by the Rules, or by any decision of the Court, or of a superior court. The factors that the Court is required to consider in an application under rule 4 are well settled. The Supreme Court set out the principles that guide the exercise of discretion to extend time in the case of *Nicholas Kiptoo Korir Arap Salat vs IEBC* [2014] e KLR as follows:
- ... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
- “... we derive the following as the underlying principles that a Court should consider in exercising such discretion:
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 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. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
 5. whether there will be any prejudice suffered by the respondents, if 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.”
8. The applicants aver in the written submissions dated 17th July 2023 filed through their advocate Annasi Momanyi and Co. Advocates, that the delay in filing the appeal is excusable, that there are valid reasons attendant to the delay and that there is no prejudice the respondent stands to suffer if this application is granted. In rebuttal the respondent filed written submissions through M/S Kiboi Tuwai and Co. Advocates, emphasizing on the law on extension of time to file appeal. He urges that the delay is undue and that the appeal is not arguable. I will delve further into the submissions of each side in my analysis.
9. In relation to whether the delay is reasonable or excusable, the applicants aver that they were not aware that the court had in





its judgment, determined that Kiptui Maluei, the applicant's father, was not the same person as Kiptui Cheboi. They submit that when the High court delivered its judgment on 3rd May 2021, it granted the applicants the prayers sought, specifically revoking the letters of administration granted to the respondent. That they did not notice the holding of the High court that Kiptui Cheboi and Kiptui Maluei were father and son respectively, until the 8th of February 2023 when they were preparing for the hearing in Eld HC Succ Cause No.319 of 2004.

10. The applicants aver that the names refer to one and the same person, who is their deceased father. That the applicants were born and are settled on land ref No. Mosop/Chepkorio/75 which belonged to their father Kiptui Cheboi alias Kiptui Maluei who died in 1973. That the deceased also owned land ref No Kaptagat/Kaptagat/Block 2 (Mosop) 46 and land ref No Mosop/Chepkorio/75. They submit that the holding of the court has the potential of disinheriting them of their interest in land ref No Kaptagat/Kaptagat Block 2 (Mosop)/46, which the respondent had unsuccessfully tried to inherit, through Eld HC Succ Cause No.313 of 2006.
11. The applicants have relied on the case of *Belinda Murugi & Others v. Amos Wainaina* [1978] eKLR, in which the Court of Appeal - Law JA, cited *Hamam Siegh & Others v. Mistri* (1971 IEA 122), and held that in applications to this Court for leave to appeal out of time, the mistakes of a legal advisor may amount to sufficient cause but not inordinate delay on his part.





12. The respondent submits in relation to the delay, that two important factors militate against the applicants' application being: the inordinate delay in making the instant application and the lack of arguability in the intended appeal. The respondent argues that the reason advanced for the inordinate delay is patently unsatisfactory. That the explanation that the applicants only became aware of the finding of the court on 8th February 2023, almost 21 months after the judgment was delivered on 3rd May 2021 seems implausible. He urges that the delay is inordinate, poorly explained, and unjustified.
13. The respondent cites the case of County Executive of Kisumu vs County Government of Kisumu and 8 others Civil Application No. 3 of 2016, where the Supreme Court held that each case had to be determined on its own merit and all relevant circumstances considered and that there must be a satisfactory explanation for any delay. He also relies on the case of Nginyaga Kavole vs Mailu Gideon (Misc Application No.401 of 2018), where the High court, dismissed a similar application, stating that five months' delay was clearly an afterthought and required a satisfactory explanation. He also referenced the cases of Union Insurance Co. Of Kenya Ltd vs Ramzan Abdul Dhanji Civil Application No.179 of 1998, Daphne Parry vs. Murray Alexander Carson [1963] EA 546, Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR and Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] Eklr.





14. The factors to be considered when determining an application for extension of time are found in various judicial pronouncements of the Court. In *Paul Wanjohi Mathenge v Duncan Gichane Mathenge* [2013] eKLR the Court of Appeal discussed those factors as follows:

“The discretion under rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance...”

15. In the case at hand, the applicants submit that the reason for the delay is that they did not know that in the judgment, the learned judge had made a finding that Kiptui Cheboi and Kiptui Maluei were two different persons until their advocate perused the judgment while preparing for the other pending matter in January 2023. That they stand the risk of potentially losing their claim to a property in the estate of their late father and being disinherited if they are not granted the extension of time to file an appeal. This matter is, according to them, in relation to a specific finding in the judgement that could entirely invalidate the purpose of the revocation of the grant in Succ Cause No. 313 of 2006.





16. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable. See- Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR. In Bernard Kibor Kitur v Alfred Kiptoo Keter & anor [2018] eKLR, the Supreme Court expressed that when considering an application for extension of time, the court considers whether there are any extenuating circumstances that would allow it to exercise its unfettered jurisdiction to extend time.
18. In considering an application for extension of time, the Court weighs various factors, including the length of the delay and the reasons behind it. While the applicant herein asserts that the delay was due to an oversight by their advocate, it is crucial to recognize that parties have a responsibility to actively pursue their matters. This Court in Rajesh Rughani v Fifty Investments Limited & another [2016] eKLR pronounced itself on mistakes allegedly arising out of the inaction of a party's advocate as follows:
- “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 excusable mistake which the Court may consider with some sympathy”.
18. The delay in the matter before me spans approximately twenty one, (21) months. The applicants wish to convince this Court





that their advocate stumbled, as it were, on the holding of the court while perusing the judgment in preparation for the other matter, almost two years after the judgment was delivered. It is absurd for this court to accept such a reason for the delay, because it is expected that the applicants who presented their arguments before the superior court, would have been eager to read the ruling when it was finally rendered. In any case they must have read it, for them to know that their objection had succeeded.

18. On whether the respondent will be prejudiced by the granting of this application, the applicants submit that the clarity of the name of the deceased is at the very core of the succession cause, with serious ramifications. That the determination of the High court that one Kiptui Cheboi was the father of Kiptui Maluei and hence in different estates, has the potential of disinheriting the applicants and it is a finding they wish to contest. They argue that whereas if the application is declined they stand to lose their right to inherit from the estate of their deceased father, Kiptui Maluei alias Kiptui Cheboi, the respondent will suffer no prejudice if it is granted.
19. The respondent did not submit on whether the granting of this application would prejudice him or not. Non the less, it is the duty of the Court to balance the competing interests of the parties that is, the injustice to the applicant in denying the extension, against the prejudice to the respondent in granting it. In this application however, it has not been demonstrated that granting the extension of time for the appeal to be filed would result in any prejudice to the respondent.





23. On whether the intended appeal is arguable the applicant does not advance any argument in relation to this issue. The respondent on the other hand submits that the appeal is not arguable and refers to the case of LIMITED vs KARIUKI WAITHAKA [2004] eKLR, to state that it is not enough to merely allege that an appeal is arguable, it must also be demonstrated.
24. In the case appealed from I note that officers from the Directorate of Criminal Investigations investigated the matter and found that the individuals named Kiptui Cheboi and Cheboi Maluei arap Kiptui (Kiptui Maluei) were two different persons. That report was not unchallenged and was adopted by the court. However, this Court treads carefully in the knowledge that in assessing whether an intended appeal has merits or not, is not an issue to be determined with finality by a single judge.
25. However, even if the intended appeal was found to be arguable, this does not diminish the fact that it must be filed within the prescribed time. In *Odongo & another v Housing Finance Co. Ltd & 3 others (Civil Application E083 of 2023)* [2024] KECA 375 (KLR) the Court stated that:
- “... The fact that an appeal is arguable cannot supersede the onus placed on an applicant to give plausible reasons for the delay. Without a satisfactory explanation for the delay, an arguable appeal does not result in perfunctory extension of time. To this end, the words in *Reliance Bank Ltd (In Liquidation) v. Grandways Ventures Ltd & 2 others (supra)* rings a bell thus:
- ‘It may well be that the Applicant has a good appeal but even good appeals must be filed within the prescribed periods and when that is not done, some explanation must be given in explanation of the delay.’”
23. Having sifted through the rival arguments in the Notice of Motion dated 10th February 2023, I am not convinced that the applicants have provided valid reasons for the delay in filing the appeal, to move this Court in the exercise of discretion in their favour. Accordingly, the application is dismissed.



Costs are awarded to the respondent. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

L. ACHODE

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JUDGE OF APPEAL

I certify that this is
a true copy of the original

Signed

DEPUTY REGISTRAR

