



**Kaburi & 2 others v Njuguna & 2 others (Civil Appeal (Application)
E677 of 2023) [2024] KECA 969 (KLR) (2 August 2024) (Ruling)**

Neutral citation: [2024] KECA 969 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E677 OF 2023
DK MUSINGA, MSA MAKHANDIA & M NGUGI, JJA
AUGUST 2, 2024**

BETWEEN

**MOSES NJOROGI KABURI 1ST APPELLANT
GEORGE MURIMI KABURI 2ND APPELLANT
JAMES NDUNGU KABURI 3RD APPELLANT**

AND

**LUCY WANGUI NJUGUNA 1ST RESPONDENT
BARCLAYS BANK OF KENYA LIMITED 2ND RESPONDENT
JOSEPH M GIKONYO T/A GARAM INVESTMENTS 3RD RESPONDENT**

(Being an application to have the Notice of Appeal (if any) in relation to the intended appeal between the parties be marked as withdrawn, and being an application for the dismissal of the appeal (if any) for want of prosecution arising from the Ruling of the High Court of Kenya at Nairobi – Commercial Division (Tuiyott, J.) delivered on 28th April 2020 in H.C.C.C. No. 245 of 2010)

RULING

1. Before this Court is a Notice of Motion dated 7th November 2023, which is brought under the provisions of rule 83 of the *Rules* of this Court. The applicant seeks orders that the notice of appeal (if any) in relation to the intended appeal between the parties be and is hereby marked as withdrawn; that this Court be pleased to dismiss the appeal (if any was filed) for want of prosecution and lift the Injunction/Stay order over the parcel of land known as Naivasha/Mwichiringiri Block 1/32; and that costs of this application be provided for.
2. A brief background to this application is that the applicant, Lucy Wangui Njuguna, bought the parcel of land known as Naivasha/Mwichiringiri Block 1/32 (hereinafter referred to as “the suit property”)



through public auction by the chargee, Barclays Bank of Kenya, which was exercising its statutory power of sale. The suit property was initially registered in the name of Kaburi Njoroge (deceased). Moses Njoroge Kaburi, George Murimi Kaburi and James Ndungu Kaburi (hereinafter collectively referred to as “the legal personal representatives of the estate of the deceased”) were substituted for the deceased in these proceedings. The suit property is currently registered in the name of the applicant.

3. In the suit before the High Court, to wit, Milimani HCCC No. 245 of 2010, the personal representatives of the estate of the deceased had, on 19th May 2014, been granted leave to substitute the deceased, who passed away on 4th April 2013. They did not substitute the deceased within the stipulated time frame under the *Civil Procedure Rules*, and as a result, the suit abated. That was the finding by the High Court (Tuiyott, J.) (as he then was) vide a ruling dated 28th April 2020.
4. The grounds in support of this application as borne out of the face thereof and in the affidavit in support sworn by Lucy Wangui Njuguna, the applicant, is that after delivery of the impugned ruling by the High Court, the personal representatives of the estate of the deceased obtained from this Court orders of stay of execution of the ruling of the High Court and indicated their intention to lodge an appeal. Two years thereafter, no step has been taken towards the filing of the appeal. In this regard, it is contended, the orders of stay granted by this Court hinders any activity over the suit property to the detriment of the applicant.
5. It is further contended that there is no proof of the filing and service of the record of appeal, and that if it has at all been filed, then there has not been any attempt at prosecuting the appeal.
6. The applicant avers that on this basis, the notice of appeal (if any) filed by the personal representatives of the estate of the deceased should be marked as withdrawn and the stay orders issued by this Court be lifted so as to allow her to enjoy her rights to ownership of the suit property.
7. The application is opposed through a replying affidavit sworn by Moses Njoroge Kaburi, one of the personal representatives of the estate of the deceased. He avers that indeed, orders of stay of execution of the ruling of the High Court were sought and granted by this Court. He further avers that other than seeking orders of stay of execution, the personal representatives of the estate of the deceased also applied for a review of the decision of the High Court dated 28th April 2020, and that their a review application was denied by the High Court vide a ruling delivered on 26th October 2020. Being dissatisfied with the ruling, the personal representatives of the estate of the deceased sought to appeal against it as evinced by a notice of appeal dated 28th October 2020 and lodged before the High Court on 29th October 2020.
8. While acceding to the delay in filing the appeal, it is averred that the personal representatives of the estate of the deceased has, through their advocate on record, written to the Deputy Registrar of the High Court on numerous occasions requesting for certified copies of the ruling and orders issued by the High Court on 28th April 2020 and 26th October 2020 respectively, as well as the proceedings, to no avail, and that at one point, they were informed by the High Court registry that the court file had gone missing. The delay in filing the appeal is therefore attributed to the casual approach in which the Deputy Registrar and the registry staff of the High Court have handled the request for a copy of the ruling and order. In other words, that the said delay cannot be attributed to the intended appellants, but on the inefficiencies on the part of the registry staff of the High Court.
9. It is therefore averred that should this Court grant the orders sought in this application, the estate of the deceased stands to suffer prejudice, and that the interests of justice tilts in favour of dismissing the notice of motion dated 7th November 2023.



10. At the hearing of this application, learned counsel Mr. Kimani appeared for the applicant, whereas learned counsel, Mr. King'ori, was present on behalf of the personal representatives of the estate of the deceased.
11. Highlighting his client's written submissions dated 15th December 2023, Mr. Kimani reiterated the argument that two years from the date the notice of appeal was filed, there has not been any 'due diligence' in pursuing typed proceedings to ensure the filing of the appeal. He further contended that his client was being held at ransom by the estate of the deceased despite having purchased the suit property through a public auction. He urged this Court to lift the said orders of stay and mark the notice of appeal filed herein as withdrawn.
12. On his part, Mr. King'ori submitted that there was no sufficient basis to strike out the notice of appeal and vacating the stay orders. He submitted that as per the decision of this Court in *Pkiech Chesimaya v Limakorwai Achipa* [2020] eKLR, the guiding principle in determining if the delay in prosecuting an appeal was justifiable included whether the delay was inordinate, whether the delay can be excused, and lastly, whether either party stood to be prejudiced as a result of the delay.
13. While conceding delay in prosecuting the appeal, counsel contended that the delay was excusable as it was not the fault of his clients but that of the High Court registry staff who have neglected to provide certified copies of the ruling, order and proceedings, despite numerous reminders to that effect. It was submitted that all the letters bespeaking proceedings were copied to the applicant and therefore she has, at all times, been kept aware of the developments.
14. As regards the prejudice to be suffered by the applicant, counsel contended that as per the decision of this Court in *Julius Kamau Mbugua v Republic* [2010] eKLR, the onus lay on the applicant to demonstrate the prejudice he was suffered as a result of the delay. As none was shown, we were urged to dismiss the application with costs.
15. We have considered the application, the record, the rival affidavits and submissions by the learned counsel, and the law. It is not in dispute that the personal representatives of the estate of the deceased have not filed the appeal more than two years from the date of filing of the notice of appeal on 29th October 2020. Even after obtaining from this Court orders staying the execution of the ruling of the High Court, the intended appeal from the said ruling is yet to be filed. The personal representatives of the estate of the deceased readily accede to the fact that there has been delay in filing the appeal, but aver that the delay is attributable to the inefficiencies of the High Court registry which has not availed certified copies of the ruling, order and proceedings despite several requests and/or reminders. We have seen a copy of a letter dated 28th October 2020 which was authored by the firm of Wahome & Akedi Advocates who are on record for the personal representatives of the estate of the deceased, and which was addressed to the Deputy Registrar of the High Court, requesting for certified copies of the subject ruling and order, proceedings and a certified copy of the order of 28th April 2020 to enable the filing of an intended appeal. The said firm wrote three reminders to the Deputy Registrar on 15th March 2023, 5th September 2023 and 13th September 2023, which, from the available evidence, have never been responded to and/or positively acted upon.
16. The documents requested for from the High Court registry are necessary for the filing of an appeal before this Court. While we appreciate that the personal representatives of the estate of the deceased, through their advocate on record, have a duty to follow up on the issuance of the requested documents, we are aware that the duty to prepare the said documents and to supply them to the parties remains with the Deputy Registrar and/or the registry of the High Court. The personal representatives of the estate of the deceased have demonstrated through their letters the efforts made to obtain the said documents



without any success. In the circumstances, it would be unfair to punish them for the delay in filing the appeal.

17. In *Rodgers Abisai T/A Abisai & Company Advocates v Wachira Waruru & Another*, Civil Application No. 26 of 2009, this Court held as follows:

“In the case before us, the Deputy Registrar has not replied to the request of the respondents and has not indicated at all whether any of the documents, certified or not are available. Further, Mr. Ogutu does not know whether these documents are available or not. He has none of them himself.

In the absence of any reply from the Deputy Registrar as to whether certified or uncertified copies of proceedings and judgment are available or not, it would be the height of injustice to condemn the respondents, who have been ably represented by Mr. Echessa, for failing to take an essential step to lodge the requisite record of appeal.” [Emphasis added]

18. Therefore, although there is inordinate delay in filing the appeal, the registry of the High Court is squarely to blame for the said delay by not availing the very necessary documents requested for by the personal representatives of the estate of the deceased to enable the filing of the intended appeal. In order to avoid any further delay, we direct the High Court to supply the personal representatives of the estate of the deceased with certified copies of the ruling dated 26th October 2020, the proceedings and a certified copy of the order dated 28th April 2020 within the next 30 days from the date hereof. The personal representatives of the estate of the deceased shall have 21 days from the date of receipt of the documents from the High Court to file and serve their record of appeal.

19. In the interests of justice, we dismiss this application with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

