

**IN THE COURT OF
APPEAL AT ELDORET**

((CORAM: OCHIENG, JA. (IN

CHAMBERS)) CIVIL APPLICATION NO.

E007 OF 2024 BETWEEN

**SAMSON RONO.....1ST
APPLICANT
KENNETH KIPYEGO.....2ND
APPLICANT SYLVESTER KIMAIYO.....
3RD APPLICANT ISAAC KIMAIYO.....4TH
APPLICANT**

AND

SANIEKO KIGEN.....RESPONDENT

(An application for extension of time and leave to file an appeal out of time from the Ruling of the High Court of Kenya at Eldoret (R. Nyakundi, J.) delivered on 2nd May 2023

in

Succession Cause No. 141 of 1991)

R U L I N G

1. The application before me is dated 21st February 2024. The applicants have sought an extension of time to enable them lodge an appeal out of time.
2. The applicants have described themselves as beneficiaries of the estate of the late **Kigen Cheboi Kipchorsoi**.
3. It is the applicants' case that the reason for the delay in

lodging an appeal to challenge the ruling delivered on 2nd May
2023 was

that they had not been made aware of the ruling until December 2023 when surveyors visited the land for purposes of surveying the portions of land which are occupied by the applicants.

4. The application was supported by the affidavit sworn by 1st applicant on his behalf, and on behalf of the other applicants. In his affidavit, he stated that the applicants were among the beneficiaries in the Will of the late Kigen Cheboi Kipchorsoi, which was executed on 7th August 1990.
5. The said Will was revoked by the impugned ruling, hence the applicants' intention to lodge an appeal.
6. At paragraph 8 of his affidavit, he stated as follows;

“THAT the nine months’ delay in filing the record of appeal and memorandum of appeal was occasioned by the fact that the petitioners never informed us of the ruling after it was delivered by the court and we only got wind of it in December 2023 when surveyors visited our parcel of land with the intention of surveying and redistributing the piece/share we had been earlier allocated.”

7. Later, at paragraph 12 of his affidavit, he deponed thus;

“THAT we are advised by our advocates on record, which information we verily believe to be true, that the action not to communicate to us about the ruling by the petitioners and objectors was unfair and unjust considering the fact that we are beneficiaries of the estate of the deceased

and had already been

allocated property in the accounts on the estate was distributed."

8. Given those circumstances, the applicants asserted that the delay in filing the notice of appeal was not deliberate. They said that the delay was unavoidable, owing to the lack of communication from the petitioners to the applicants.
9. The respondent, filed a replying affidavit, in answer to the application. By the said affidavit, the respondent explained that the ruling in contention was delivered based on an amicable settlement that had been arrived at by the beneficiaries.
10. The respondent further told the court that the applicants were all children of the 1st petitioner, who was one of the administrators of the estate of the deceased. It was therefore the understanding of the respondent that the interests of the applicants were represented by the 1st petitioner, **Christopher Kipyego A. Kigen.**
11. According to the respondent, the applicants lacked the requisite *locus standi* to bring the current application, as they were not parties in the case from which they now wished to appeal.
12. When the applicants were canvassing the application, the

court sought to know the capacity in which they took part
in the
proceedings, so as to be deemed to have been parties.

13. In the first instance, Mr. Kigen, the learned advocate for the applicants, informed this Court that his clients had been objectors.
14. Mr. Kibii, the learned advocate for the respondent, drew the Court's attention to the fact it was only the respondent herein who was the objector.
15. Faced with that assertion, the applicants said that they were beneficiaries. Therefore, the applicants described themselves as the petitioners.
16. But a look at the petition reveals that the petitioners were only two persons, namely **Christopher Kipyegon Kigen** and **Alfred Kimutai Kigen** (also known as **Michael Kigen**).
17. Ultimately, the applicants concluded that they were parties in these proceedings, by virtue of being beneficiaries.
18. If the applicants were parties by dint of their assertion that they are beneficiaries, I would have expected them to demonstrate to this Court that they took part in the proceedings before the High Court.
19. And if they had taken part in the said proceedings, (which has not been demonstrated), I hold the view that the applicants

should have been aware of the impugned decision. Yet in this matter, the applicants are busy blaming the objectors and the respondents for failure to inform them about the impugned ruling.

20. I find that it is more probable than not, that the applicants were not parties in the proceedings before the High Court.

21. In the case of **Jennifer Koinante Kitarpai vs Alice Wahito Ndegwa & Another**, **Supreme Court Petition No. 32 of 2014**, the Supreme Court pronounced itself thus;

“It is not, in our opinion, plausible that the jurisdiction of this Court, as enshrined in Article 163(4)(a) contemplated that a person who was not a party to the proceedings at the trial Court, will file an appeal.”

22. In this case the application was filed under a certificate of urgency. The affidavit in support of the urgency was sworn by Advocate Joseph Kaptich Songok. In paragraph 7 of the said affidavit, Advocate Songok said;

“THAT I am informed that the applicants have never been informed, involved, or participated in the trial court cause, as the matter was only handled by the petitioners who were the executors appointed by the grant of probate issued on the 28th February 1992.”

23. Nothing could be clearer than that: the applicants were never

involved in the cause nor did they participate in the trial court

cause. Accordingly, I find that they lack the requisite *locus standi*

to file an appeal to challenge the impugned ruling.

24. It is also noteworthy that the applicants only cited one respondent in the application. The applicants did not make the original petitioners, parties to the application. In the circumstances, the applicants sought to obtain orders which would have had a direct bearing on some persons whom they excluded from this application. It would have been prejudicial to the original petitioners, to grant orders against them, without having accorded them an opportunity to be heard.

25. In the result, the application lacks merit and is dismissed, with costs to the respondent.

Dated and delivered at Nairobi this 25th day of October, 2024.

F. OCHIENG

**.....
JUDGE OF APPEAL**

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

Signed _

DEPUTY

REGISTRAR