



REPUBLIC OF KENYA



KENYA LAW
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**Otana v Mwangi (Civil Application E358 of 2021)
[2023] KECA 329 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 329 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E358 OF 2021
AK MURGOR, JA
MARCH 17, 2023**

BETWEEN

BANCY AWINO OTANA APPLICANT

AND

CATHERINE NJURA MWANGI RESPONDENT

(Being an application for extension of time to file Notice of Appeal against the Ruling and Orders of the High Court at Nairobi (M. Thande, J.) delivered on 9th July, 2021 in Nairobi High Court Succession Cause No. 866 of 2015)

RULING

1. By a Notice of motion dated October 15, 2021, brought pursuant to section 3A and 3B of the [Appellate Jurisdiction Act](#), Cap 9, rules 4, 5 (2) (b), 41, 42 and 82 of the [Court of Appeal Rules 2010](#), the applicant, Bancy Awino Otana, seeks;
 - (i). For time to be extended to lodge and serve a Notice of appeal out of time;
 - (ii). To extend time to request for certified copies of the proceedings and
 - iii. For an order of stay of execution of the ruling and order delivered on July 9, 2021 by the High Court, at Nairobi in High Court Succession Cause No 866 of 2015, In the Estate of James Mwangi Njuguna (the deceased).
2. In the affidavit in support of the motion and sworn by the applicant, and in written submissions, it was contended that the judgment was delivered on July 9, 2021 and that the period for filing a Notice of appeal and request for typed proceedings had since lapsed; that she is impecunious and has been relying on the assistance of Legal Resource Foundation Trust, a non- governmental organization under whose program she obtained assistance by way of legal representation from the firm of Andego, Gachagua & Associates Advocates; that the delay in filing Notice of appeal and request for typed proceedings was



- occasioned by her failure to secure further assistance of legal representation for the appeal; that though she had filed an application for extension of time dated August 25, 2021, it was later discovered that there were material defects in it forcing her to withdraw it; that the withdrawal order was not issued until October 12, 2021 which had occasioned further delay in filing the appeal.
3. It was further contended that, the appeal had a high chance of success, as the applicant has faulted the trial court for finding that her son was not a beneficiary of the estate and the order for redistribution of the estate had improperly omitted him; that it was in the interest of justice that the extension of time be granted, and no prejudice will be suffered by the respondent.
 4. In a replying affidavit sworn on November 15, 2021 by the respondent, Catherine Njura Mwangi, and in written submissions, the respondent opposed the application contending that the motion was an afterthought, and was brought in bad faith; that the applicant had filed a similar Notice of motion dated August 25, 2021 that is, Civil Application No E299 Of 2021 and sought similar orders as those sought in the instant application, only to withdraw it three days before filing this application.
 5. The respondent further asserted that the applicant's reasons for delay were fabricated and bereft of legitimacy; that there was undue delay in filing the instant application and no explanation was proffered for the 3 months and 8 days delay; that the appeal is not arguable and there is no justification for granting of the stay of execution orders sought.
 6. In a supplementary affidavit sworn on January 28, 2022, the applicant contended that her application was not an abuse of the court process as her advocates had acted within the law in withdrawing Civil Application E299 of 2021 and filing the present application; that she was not guilty of laches as the delay was occasioned by the late approval for assistance for legal representation that had culminated in instructions to counsel to act on her behalf.
 7. Under rule 4 of this Court's rules, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi – Civil Application No Nai 251 of 1997*.
 8. At the outset, before I determine the application for extension of time which is rightly before this Court, it is observed that the applicants' application also includes a prayer seeking a stay of execution of the ruling of the trial court. As this is not a matter that a single judge can entertain, I decline the invitation to deal with the prayer seeking to stay the orders of the trial court.
 9. Turning to the application for extension of time, the ruling was delivered on July 9, 2021, and this application is dated October 15, 2021, which has occasioned a delay of 3 months and 8 days. The applicant seeks for time to be extended to file a Notice of appeal, and a request for the certified proceedings and judgment. According to the rules of this Court, the Notice of appeal ought to have been filed 14 days after the ruling or judgment, and the request for proceedings should have been lodged within 30 days of the date of the ruling or judgment and a copy of that request served upon the respondent.
 10. The applicant explained that the delay in filing the Notice of appeal was occasioned by her inability to secure legal representation, and that the application that was filed after her counsel was instructed, was defective and had to be withdrawn four days later.
 11. A consideration of the applicant's supplementary affidavit discloses that by a letter dated April 16, 2021, the applicant's sponsor, Legal Resource Foundation Trust wrote to the applicant confirming



that they would be taking up the cost of the applicant's legal representation; that the applicant stated that she did not receive the letter until August 21, 2021; that immediately thereafter the applicant's advocate filed Civil Application Nai No E299 of 2021 dated August 25, 2021; but it was defective and had to be withdrawn. This was evidenced by an email dated October 12, 2021, from the deputy registrar of this Court confirming that the application was duly withdrawn under rule 52 of the Court's rules, which then paved way for the applicant to file this application on October 15, 2021. So that between the July 9, 2021 and October 15, 2021, I am satisfied that the period of delay has been explained. And with regard to the success of the intended appeal, given the nature of the applicant's grievance against the trial court's judgment, I am also satisfied that the appeal has a fair chance of success.

12. Finally, on whether the respondent will be prejudiced were time extended to file the appeal, no doubt the subject matter of the dispute concerns redistribution of the deceased's properties. My view is that it would be mutually beneficial to all parties for the dispute to be settled once and for all by the applicant's appeal being heard and determined with finality.
13. In sum, the applicant having satisfied the requirements of rule 4, I exercise my discretion to extend time to lodge the notice of appeal and the request for proceedings in the following terms;
 - i. That time be and is hereby extended to lodge and serve a Notice of appeal out of time;
 - ii. That time be and is hereby extended to request for certified copies of the proceedings;
 - iii. That thereafter the applicant to lodge and serve the memorandum and record of appeal in accordance with rule 84 of the Court of Appeal rules 2022.
 - iv. Costs in the appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

