



REPUBLIC OF KENYA



**In re Estate of the Late Jorl Cheruiyot Korir (Deceased) (Civil Application
154 of 2020) [2022] KECA 157 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 157 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION 154 OF 2020
MSA MAKHANDIA, JA
FEBRUARY 18, 2022**

IN THE MATTER OF THE ESTATE OF THE LATE JORL CHERUIYOT KORIR (DECEASED)

BETWEEN

JOSHUA KIPRONO CHERUIYOT APPLICANT

AND

RACHAEL CHERUYOT KORIR RESPONDENT

(Being an application for leave for extension of time to file Notice of Appeal and Record of Appeal out of time in an intended appeal from the Ruling & Order of the High Court of Kenya at Kericho (Mumbi Ngugi, J.) dated 24th July 2017 in Succession Cause No. 297 of 2015)

RULING

1. Before me is a notice of motion dated 20th December 2018 brought under no provisions of the law but from the prayers, the same seems to be brought under Rule 4 of the *Court of Appeal Rules* by the applicant, Joshua Kiprono Cheruiyot. The applicant seeks leave to file the Notice of Appeal as well as record of appeal out of time against the judgment and decree of Mumbi Ngugi, J. delivered in Kericho succession cause No. 297 of 2015 which was a contest between the applicant and the respondent, Rachael Cheruiyot Korir.
2. The application is premised on the grounds that the counsel who was on record for the applicant did not communicate to him when the judgment was to be delivered until the time for lodging of a notice of appeal and the substantive appeal had lapsed; and that the intended appeal raises weighty issues of law which ought to be determined on merit in this appeal.
3. The application is further supported by the affidavit of the applicant who deposes that he was represented in the trial court by an advocate who upon delivery of the judgment failed to advise him on the next cause of action to take. That he only became aware of what he should have done when he went to file an application for stay of execution of the judgment and decree. The application was not



accepted by the court registry for the reason that the time for filing the notice of appeal had lapsed. That has necessitated the filing of the instant application. That the failure by his counsel to take steps towards prosecuting the appeal should not be visited on him.

4. The application is opposed by the respondent through a replying affidavit sworn on the 10th July 2018. She deposes that the applicant instituted an application for confirmation of grant and forged her signature that she had consented to the said confirmation of grant with the sole aim of disinheriting her and her siblings. That the applicant had not served her with any notice of appeal as required by this Court rules pursuant to the judgment and decree. The delay of more than one year in bringing this application has not been explained satisfactorily. The applicant's allegation against his counsel is not truthful as even during the delivery of the judgment the counsel was present in court. That there was no evidence showing that ideally, he was concerned with the outcome of the dispute. That the intended appeal has been overtaken by events as the parcel of land in question has been subdivided among the beneficiaries in terms of the judgment and decree who have since obtained their titles. That therefore the application is made in bad faith. The applicant has a remedy against his counsel if it's true that he failed to inform him of the judgment. The appeal is not arguable and has little chances of success as allowing the application will lead to the abuse of the principle of finality in civil proceedings. That in any event the application is incompetent, incurably defective, untenable in law and devoid of any substance while the supporting affidavit is full of falsehoods and misrepresentation of facts aimed at hoodwinking the court. Finally, it was the respondent's case that the applicant had not demonstrated how he will suffer prejudice if the application is disallowed as the estate was distributed properly and fairly. In the penultimate the respondent prayed that the application be dismissed with costs.
5. Parties filed written submissions in support of and in opposition to the application in which they merely reiterated the foregoing save for citing authorities in support of and in opposition to their positions.
6. I have considered the application, grounds in support thereof, the applicant's supporting affidavit as well as the respondent's replying affidavit, the submissions by both counsel and the law applicable. Rule 4 of the Court of Appeal Rules does not provide the factors that I should consider in an application for extension of time. However, this Court in a long line of cases has devised appropriate principles underpinning the grant or refusal of application for extension of time. See for instance the cases of *Lee Sila Mutiso Vs. Hellen Wangari Mwangi* [1999] 2 EA 231 & *Muringa Company Ltd. Vs. Archdiocese of Nairobi Registered Trustees* [2020] eKLR. In the latter case this Court expressed itself thus:

“Some of the considerations, which are by no means exhaustive, in an application for extension of time include the length of the delay involved, the reason or reasons for the delay, the possible prejudice, if any, that each party stands to suffer, the conduct of the parties the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of dispute, the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”
7. Further to the above, it should be noted that there is no maximum or minimum period of delay set out under the law; only that the reason(s) for delay must be reasonable and plausible. This was so stated in the case of *Andrew Kiplagat Chemaringo Vs. Paul Kipokorir Kibet* [2018] eKLR thus: -

“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.”

8. The delay in filing the notice of appeal is approximately 18 months. The explanation given for the delay is that when the judgment was delivered, his counsel failed to inform him of the next cause of action. However I note that the applicant did not follow-up on the said counsel in time to find out whether there was any step that was to be taken or not until when he claims he went to court to seek for stay of execution of the judgment. I do not believe the applicant when he claims that for over 18 months he had not contacted his counsel to find out the status of his case. Indeed it is the duty of a client to pursue his case with his counsel. He cannot instruct counsel and sit on his laurels leaving it to counsel to keep him posted on the progress of his case whenever he feels like. Further the applicant appears not to be candid as he does say how he came to know about the judgment so the he could draft and file the application for stay of execution.
9. The respondent stated that counsel for the applicant was present in court when judgment was delivered and I believe the applicant knew the essence of the judgment otherwise he would not have approached the court to seek for stay of execution for a matter he did not know the outcome.
10. In the case of *Bains Construction Co. Ltd Vs. John Mzare Ogowe*[2011] eKLR this Court observed as follows:

“It is to some extent true to say mistakes of Counsel as is the present case should not be visited upon a party but it is equally true when Counsel as agent is vested with authority to perform some duties and does not perform it, surely such principal should bear the consequences.”
11. Similarly, in *Eliud Buku Thuku Vs. Beatrice Wambui Mwangi* [2013] eKLR, the Court stated thus:

“The applicant was represented by Counsel at the High Court when judgment was delivered on 23rd September, 2011. As was stated by Tunoi, JA. (as he then was) in *Njoka Muriu & Another Vs. Evan Githinji Muriu & Another*, Civil App. No. NAI. 356 of 2003), a notice of appeal is a simply one page formal piece of paper whose lodgement is a matter of course. A careful advocate would lodge a notice of appeal to safeguard his client's interest.”
12. I am persuaded by the reasoning in the above decisions and take it to be applicable in the current application. I find the reason for delay not convincing at all. In any event, even if the applicants reason for the delay was genuine, I think that and as correctly postulated by the respondent, the applicant has a remedy elsewhere against the counsel. Without deciding the point, the appeal appears to me on the face of it to be not arguable. This being a succession cause, leave has to be sought and obtained in the trial court before a party can contemplate an appeal to this court. There is no evidence that indeed the applicant has sought and obtained such leave. Without such leave, the intended appeal shall be dead on arrival.
- 13.. For these reasons, I decline the prayer for extension of time within which to file the notice and record of appeal. Costs of the application are awarded to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

