



**Owouche & another v Oketch (Civil Application 117 of 2019)
[2022] KECA 1111 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1111 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 117 OF 2019
PO KIAGE, JA
OCTOBER 7, 2022**

BETWEEN

GEORGE ORONDO OWUCHE 1ST APPLICANT

HELIDA AOKO OKUMU 2ND APPLICANT

AND

JEMIMA JUMA OKETCH RESPONDENT

(An application for extension of time to Appeal against the Judgment of the High Court at Kisumu (E.N. Maina, J) dated 3rd July, 2018 in Succession Cause No. 682 of 2013)

RULING

1. The applicants, George Orondo Owouche and Helida Aoko Okumu, have filed a Notice of Motion dated 24th September 2019 seeking the following orders, in the main;
 4. That the proposed Appellants/Applicants be granted leave to appeal out of time against the whole judgment of the Lady Justice Hon. E.N Maina, delivered on 3rd July 2013.
 4. That the Notice of Appeal annexed hereto be deemed as duly filed and served upon the Respondent.
2. The application is based on 12 grounds and is supported by an affidavit deposed to by the 1st applicant. The impugned judgment delivered on 3rd July 2018 dismissed the applicant's protests to the mode of distribution of the late Samuel Opwapo's (the deceased) estate which comprised LR. No. East Gem/Ulamba/392 (suit property). Further, the learned Judge declared the respondent the sole beneficiary of the suit property as well as the deceased's share in L.R No. East Gem/Ulamba/360 and ordered a certificate of confirmation to issue.



3. Aggrieved, the applicants sought to file an appeal. However, the court file went missing for a period of one year thus hindering their efforts to lodge the appeal. As they pursued the appeal, the applicants decided to engage the respondent and other family members in talks with a view of arriving at an amicable solution to the dispute. However, the respondent started selling off the suit property which was their ancestral home and housed dozens of other families.
4. In a bid to safeguard the only home they knew and had, the applicants filed an omnibus application for stay of execution and for extension of time. Before a three-judge bench comprising of Sichale, JA, Mohammed JA and myself, we granted the order for stay on 4th December 2020. What is left before me is the application under Rule 4.
5. The respondent urged this Court to dismiss the application, terming the delay as inordinate and the reasons proffered not sufficient. The respondent claimed that the application is afterthought since the applicants made it more than a year after the delivery of the judgment.
6. Enlargement of time lies in my discretion to be exercised judicially in accordance with sound principle, not out of whim, caprice or sympathy. It is also an equitable relief which attaches relevance to the general conduct of a pleader including their candour or lack of it. See Joseph Kaberia Arimba Speaker County Assembly of Meru & 3 others vs. Douglas Bundi Kirimi [2020] eKLR. More importantly, my considerations are to be guided by the laid down parameters as espoused in the oft-cited case of Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi (1999) 2 EA 231 as follows;

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the respondent if the application is granted.”
7. In the ruling rendered by myself and my sisters Sichale & Mohammed, JJA. We were persuaded to granted the stay order in the interest of justice, as follows;

“What is clear to us is that the applicants’ assertion that the 1st respondent intends to sell or has started selling off the suit property has not been denied or otherwise answered on oath. This averment is therefore uncontroverted. The possibility of dozens of family homes being destroyed and family members being evicted from their homes is not a matter lightly to be taken and to avoid such an eventuality, we think that the injunctive orders sought should be granted to avoid irreparable damage and to preserve the integrity of the appellate process so as not to render any eventual success a worthless victory.”
8. Being part of that bench, I am still persuaded that in the interest of justice, the applicants are deserving of this relief to afford them a chance to be heard on appeal on this weighty, matter without which has potentially devastating effects not only on them but on many other families as well. Furthermore, I find that the delay under the circumstances was not inordinate, and the reasons proffered are plausible and satisfactory.
9. I thus find that this application is meritorious and accordingly grant it. The notice of appeal dated 26th September 2019 is hereby deemed as filed within time. The applicants shall also file and serve the memorandum and record of appeal within thirty (30) days of this order if they have not done so already.
10. Costs of this application shall be in the appeal.



DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

