



**Okoth & another v Simon Harold Shiels (Civil Application
E013 of 2022) [2022] KECA 1408 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1408 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPLICATION E013 OF 2022
P NYAMWEYA, JA
DECEMBER 16, 2022**

BETWEEN

MARY AKINYI OKOTH 1ST APPLICANT

ANTONY OTIENO OKOTH 2ND APPLICANT

AND

SIMON HAROLD SHIELS RESPONDENT

(An application for extension of time to file appeal against the Ruling and Decree emanating from High Court of Kenya at Malindi (Nyakundi J.) delivered on 15th July 2021 in Malindi Succession Cause No. 9 of 2018 (In the Matter of the Estate of Jecinter Njoki Okoth (Deceased))

RULING

1. The issue that presents for determination in this ruling, is whether Mary Akinyi Okoth, the 1st applicant herein, and Antony Otieno Okoth, the 2nd applicant herein, should be granted extension of time to file an appeal out of time against a ruling delivered on given on July 15, 2021 by the High Court at Malindi (Nyakundi J) in Malindi High Court Succession Cause No 9 of 2018. The applicants in this respect filed an application by way of a notice of motion dated June 9, 2022, in which they sought various prayers including leave to appeal out of time against the said ruling; stay of execution of the orders and decrees arising out of Malindi High Court Succession Cause No 9 of 2018 pending the lodging and hearing of the intended appeal; and injunctions against Simon Harold Shiels, the respondent herein, restraining him from dealing with the estate of the deceased that is the subject of the said cause, and compelling him to deposit the title documents of the assets forming part of the estate in court.
2. When the said application dated June 9, 2022 initially came up for hearing before a full bench of this court on July 27, 2022, the court directed that the prayer for leave to file an appeal out of time be heard first before a single judge of the court. I accordingly heard the prayer for extension of time during a virtual hearing held on September 21, 2022, in which learned counsel Mr Julius Ireri appeared



for the applicants, while learned counsel Mr Mwadilu appeared for the respondent. The two counsel highlighted their respective cases, and Mr Ileri also submitted that he was abandoning prayers 3, 4 and 5 of the application dated June 9, 2022 and would only seek prayer 2 on extension of time.

3. The application is supported by two affidavits both sworn on June 9, 2022 by the 1st applicant and 2nd applicant respectively, and submissions dated July 25, 2022 filed by the applicants' advocates. The applicants' case is that the impugned ruling delivered on July 15, 2021 pronounced itself on the issue of beneficiaries and the mode of distribution of the estate of the deceased, and that they were not able to file their appeal on time due to lack of legal representation. That after securing their current advocates on record, he had to file various applications in the High Court to come on record and arrest the applicants' eviction from their residential home, which they are still desirous of pursuing. In addition, that the mistakes of the advocate should not be visited on the applicants.
4. The applicants are apprehensive that the respondent will misappropriate the property of the deceased and flee the country as he is currently "a tourist with no known source of income or work permit". Additionally, that he is an accused person in Malindi High Court Criminal Case No E008 of 2022 Republic vs Simon Harold Shiels, where he is accused of murdering the late Jecinter Njoki Okoth in which plea was taken on May 25, 2022. Lastly, that the respondent is unlikely to suffer any prejudice, the delay was not inordinate or so great as to be inexcusable, and it was in the interest of justice to allow the instant application. The applicants attached a copy of an email forwarding the ruling delivered on July 15, 2021, the charge sheet in Criminal Case No E008 of 2022 Republic vs Simo Harold Shields, and a draft memorandum of appeal.
5. The respondent opposed the application in a replying affidavit he swore on July 25, 2022, and in submissions of the same date filed by his advocates.

The respondent's case is that the applicants had not satisfactorily explained the delay in filing the appeal of over one year, and the delay was therefore clearly inordinate and inexcusable. Further, that the judgment in the said succession matter was issued on March 10, 2021 and the ruling of July 15, 2021 appealed against was issued pursuant to the said judgment; the judgment has not been appealed to date; and that the respondent was appointed as an administrator to the estate of the deceased in the judgment and not the ruling. Thus appealing against the ruling without appeal against the judgment showed that the applicants were not serious, and were in abuse of the process of the court.

6. The respondent therefore urged that the instant application offends the principle of finality in litigation and was to his detriment, and also annexed a copy of a constitutional petition challenging the legality of the murder charge brought against him.
7. Under rule 75 (1) and (2) of the [Court of Appeal Rules](#) of 2010, a person desirous of appealing to this court was required to give a notice in writing, and to lodge two copies of the said notice with the Deputy Registrar of the High Court whose decision is intended to be appealed from within fourteen days of the decision. The same requirement is now found in rule 77 (2) of the [Court of Appeal Rules](#) of 2022. It is not in dispute in this respect that the applicants did not file a notice of appeal against the impugned ruling delivered on July 15, 2021 within the required timelines.
8. The principles governing the exercise of the discretion to extend time under rule 4 of the [Court of Appeal Rules](#) are in this regard well stated in the case of *Leo Sila Mutiso v Rose Hellen Wangare Mwangi* Civil Application No Nai 255 of 1997 (ur) as follows:

"It is now well stated 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”

9. The relevant period of delay that therefore requires to be explained by the applicants is the one between the date of delivery of the impugned ruling on July 15, 2021, and the date of their application for extension of time on June 9, 2022. The applicants have explained that the delay of about one year arose from the time taken to engage a new advocate, and the applications filed in the High Court seeking among other prayers, stay of the execution of the impugned ruling. These facts have not been disputed by the respondent save to state that some of the applications were filed by the previous advocate on record for the applicants. In addition, the applicants have specifically indicated that they wish to appeal the ruling of July 15, 2021, and I cannot speculate as to the prudence or otherwise of an appeal against the judgment rendered by the High Court of March 10, 2021. I therefore find that in the circumstances of this application, the reason given of the intervening and consequent actions taken by the applicants and their advocates after delivery of the ruling of July 15, 2021 to be sufficient and adequate, and renders the delay excusable and not inordinate.
10. On the chances of the intended appeal succeeding, all that I need to be persuaded at this stage is that the applicants have demonstrated the existence of plausible grounds of appeal, and not their merit. It is not in dispute that the applicants are the biological children of the deceased, and they availed a draft memorandum of appeal in which they fault the learned trial judge for finding that the respondent was legally married to the deceased, and for recognizing the respondent, and the step-children, nieces and nephews of the deceased as dependants of the deceased. These are grounds in my view that require further argument and consideration.
11. I therefore find that the applicants merit the exercise of this court’s discretion for the above stated reasons. I accordingly allow the prayer in the applicants’ notice of motion application dated June 9, 2022 for leave to appeal out of time, on the terms that the applicants are granted leave to file and serve a notice of appeal against the ruling delivered on July 15, 2021 in Malindi High Court Succession Cause No 9 of 2018 (In the Matter of the Estate of Jecinter Njoki Okoth (Deceased) within thirty days of today’s date. There shall be no order as to the costs of the application.
12. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER, 2022.

P NYAMWEYA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

