



Kibetu v Kibetu (Environment and Land Miscellaneous Application E011 of 2024) [2024] KEELC 7105 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7105 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E011 OF 2024
CK YANO, J
OCTOBER 30, 2024

BETWEEN

ERIC GICHANGI KIBETU APPLICANT

AND

MARGARET KANG'ARIA KIBETU RESPONDENT

RULING

1. Before me is a Notice of Motion dated 10th July, 2024 brought under Section 1, 1A, 3A and 79G of the Civil Procedure Act and all other enabling provisions of the Law. The motion seeks for orders that:
 1. Spent.
 2. That the Honourable Court be pleased to grant leave and extend the applicant to file an appeal against the judgment of the lower Marimanti PM ELC E011 of 2020.
 3. That pending the hearing of the intended appeal, there be an order of stay of the decree and judgment of the court in Marimanti PM ELC E011 of 2022.
 4. Costs of this application be costs in the intended appeal.
2. The motion is premised on the grounds on its face and a supporting affidavit sworn by ERICK GICHANGI KIBETU on 10th July, 2023 wherein the applicant avers that the respondent is his step-mother. That he was the plaintiff in Marimanti ELC E011 of 2020 in which judgment was delivered against him on 30th November, 2023 by Honourable PM. Mbayaki Wafula. The applicant attached a copy of the judgment & proceedings marked “EGK1.”
3. The Applicant states that the court ordered that the respondent was not holding land parcel Kathwana/1781 and its subdivisions in trust for him and his family. That he was not satisfied with the judgment of the trial court and he made up his mind to appeal against the same.



4. The Applicant avers that he consulted his previous advocate so that he could go ahead to prosecute his appeal but only to find out that the request to apply for a copy of the judgment and proceedings was made way later after the days to lodge the appeal had lapsed. The Applicant has annexed a copy of the request letter and receipt for payment marked “EGK2.”
5. The Applicant states that the judgment and the copy of the proceedings also took time to be ready before he received them in March 2024. That after he got the judgment, he consulted another advocate so that they could handle his appeal only to be explained that he could not afford the legal fees.
6. The applicant avers that he has been looking for money so that he can prosecute his appeal which he is interested in doing. That he was not able to file an appeal in time because of financial constraints he has been encountering.
7. The applicant states that his claim is that the respondent was holding the parcel of land Kathwana/1781 which has since been subdivided in trust for him and his siblings. That if the appeal succeeds, then the land parcel in question automatically forms part of the estate of the deceased person whose estate he has filed a Succession Cause that is pending in Chuka Court Succession No. E034 of 2024. The Applicant urged the court to grant him leave to file an appeal out of time.
8. In opposing the application, the respondent filed her replying affidavit wherein she deposes that the application is an afterthought, an abuse of the court process and only meant to delay and deny her the fruits of the judgment delivered on 30th November, 2023. That the applicant is guilty of laches having filed the instant application 3 months after he received the proceedings and judgment and having delayed to file the appeal 6 months after the judgment was delivered. That a delay of six months is inordinate and inexcusable.
9. The respondent states that no good reason has been advanced by the applicant to explain the delay. That the reasons advanced for delay do not hold any water because the proceedings were ready in March, 2024 but still the applicant took another 3 months before filing the instant application.
10. The respondent states that the applicant is not a pauper as he alleged because he collects and or received rent from two properties belonging to his deceased father JOHN KIBETU who is also her husband and has refused anyone access to the said rental income. That in December, 2022, the applicant wrote to her a demand letter asking her to stay away from the said rentals yet she is also entitled to benefit from the same being the widow of the late John Kibetu. That the letter is evidence that he receives rent from the said property and can therefore not state that he is a poor man with no means of income. The respondent has annexed a copy of the said letter and document from the County Government of Tharaka Nithi showing that the properties are in her late husband’s name.
11. The respondent avers that the applicant has come to court with unclean hands and is not deserving of the court’s discretion being exercised in his favour. That the applicant has also not met the requirements for the orders sought and she urged the court to dismiss the same with costs.
12. The respondent states that the suit land was supposed to be transferred to her late son and brother to the applicant James Muthomi. That the late James Muthomi left behind a son who is ten years old and whom she takes care of and who is supposed to benefit from the suit lands.
13. The respondent avers that there is nothing to stay since the property is in her name and she intends to hold it in trust for the said minor.



14. The respondent contends that the applicant has not demonstrated what loss he will suffer if stay is not granted because he was already given his share which he sold and does not want the respondent to enjoy her share.
15. The respondent states that in 2023, she was forced to file a citation at Marimanti Court being Miscellaneous Succession Cause No. E011 of 2023 summoning the applicant to explain why he did not want a Succession Cause filed in respect to the estate of John Kibetu, her late husband and the applicant's father. That it was not until the citation was filed that the applicant filed the Succession Cause he is alluding to in his supporting affidavit. That the applicant is a selfish man who does not want anybody to benefit from the estate of his father who was also her husband.
16. The respondent contends that the appeal has no chances of success and urged the court to dismiss the application with costs.

Analysis and Determination

17. I have considered the application, the response and the submissions made. My mandate to intervene has been invoked substantively under Section 79G of the *Civil Procedure Act* which provides:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order; Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

18. The principles that guide the court in the exercise of its mandate under the said section are set out in the case of Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR where the Supreme Court stated:

“...it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant...”

“...we derive the following as the underlying principles that a court should consider in exercising such discretion:

- a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- c. Whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis.
- d. Whether there is reasonable reason for the delay, the delay should be explained to the satisfaction of the court.
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted.”



19. Therefore, the factors to consider in exercising discretion are the length of the delay, reason for the delay, possibly the arguability of the intended appeal and any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted.
20. Starting with the period of delay, the impugned judgment was delivered on 30th November, 2023. The application under consideration which seeks the court's intervention was filed on 10th July, 2024, being a period of slightly over seven months.
21. The applicant attributed his reason for the delay for failing to file the appeal timeously to the failure by his previous advocate who the applicant stated made the request for proceedings and judgment after the days to lodge the appeal had lapsed. I find that the delay was inordinate and the reason given not plausible. The suit belonged to the applicant, and not his advocate, and therefore he ought to have followed it up himself.
22. The other reason that the applicant has proffered for the failure to file the appeal timeously is attributed to financial constraints. However, this was dispelled by the respondent in her response and which the applicant did not challenge, especially the respondent's averment that the applicant collects rental income from some of the suit premises.
23. On the chances of the appeal succeeding, no draft Memorandum of Appeal has been exhibited. All that the applicant states is that the court ordered that the respondent was not holding land parcel LR. Kathwana/1781 and its subdivisions in trust for him and his family. In law, an arguable appeal/intended appeal is one that need not succeed but one that is not frivolous and warrants the court's interrogation on the one hand and the court's intervention to the opposite party to respond to. In my view, in the absence of a draft Memorandum of Appeal, the court is not in a position to decide whether the intended appeal is not frivolous.
24. Looking at the material on record and on the totality of the above assessment and reasoning, I am not satisfied that the applicant has met the prerequisites for granting of a relief under Section 79G of the Civil Procedure Act. And since prayer 3 of the application is anchored on the leave to appeal out of time which has been declined, it follows that the prayer for orders of stay of execution must also fail.
25. In the result, I find that the Notice of Motion dated July 10, 2024 is devoid of merit and the same is hereby dismissed with costs to the respondent.
26. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH OCTOBER, 2024

In the presence of:

Court Assistant – Kiruja

Ms. Kijaru for Applicant

Ms. Nelima for Respondent

C.K YANO,

JUDGE

