



In re Estate of the Late Chemjor Chepyegon (Deceased) (Succession Cause E002 of 2024) [2025] KEHC 1267 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
SUCCESSION CAUSE E002 OF 2024
RB NGETICH, J
FEBRUARY 27, 2025**

IN THE MATTER OF THE ESTATE OF THE LATE CHEMJOR CHEPYEGON (DECEASED)

BETWEEN

ZEPHANIA KIPKOSGEI CHERUTICH APPLICANT

AND

MILCAH KABON CHEPYEGON 1ST RESPONDENT

ZACHARIAH KIPROTICH CHEPYEGON 2ND RESPONDENT

RULING

1. The Applicant filed application dated 8th July, 2024 brought under the provisions of Article 159(20) of the *Constitution*, Section 47, 48, 50(1) and 70 of the *Law of Succession Act* and Rules 59,67 and 73 of the Probate and Administration Rules seeking for orders:-
 - i. Spent.
 - ii. That this honourable court be pleased to grant leave to the applicant to appeal out of time against the ruling of the Honourable Magistrate Hon. N. M. Idagwa – Senior Resident Magistrate dated 9th March 2022 in Kabarnet Succession Cause No. 16 of 2015 in the Estate of the Late Chepyegon Chemjor.
 - iii. That this honourable court be pleased to grant a temporary order of stay of the proceedings in Kabarnet ELC No. 26 of 2022, Zachariah Kiprotich Chepyegon –vs- Zephaniah Kipkosgei Cherutich and 4 others pending the hearing and determination of this application.
 - iv. That the cost of this application be in the cause.
2. Grounds of the application are that the applicant is the first son of the deceased the late Chepyegon Chemjor from his first wife Kabon Tamining hence a dependent and/or a beneficiary of the estate



- of the deceased but the 1st respondent who is the 2nd wife filed a succession cause of the estate of the deceased vide Kabarnet Succession Cause No.16 of 2015 and excluded the applicant herein prompting the applicant to lodge an objection against the exclusion from the estate and issuance of grant of Letters of Administration to the 1st respondent. The objection was heard orally and the applicant called a total of 5 witnesses in support of his objection most of them being elderly cousins and stepsister of the deceased who confirmed that the applicant was a son of the deceased from the 1st wife and therefore a dependent and/or beneficiary of the deceased estate.
3. That the 2nd respondent has since sued the applicant and other third parties who had purchased land from the applicant vide Kabarnet ELC No. 26 of 2022 seeking orders of eviction hence it is in the interest of justice that a stay order be granted staying the proceedings in the aforesaid suit.
 4. That immediately upon delivery of the ruling the applicant applied to be supplied with certified copies of the proceedings and ruling through his former Advocate but the typing of the proceedings took time and was completed on 26th January, 2023 after the lapse of the time within which an appeal ought to have been lodged.
 5. The applicant further aver that upon receipt of the proceedings and ruling, the applicant instructed his then advocate to seek leave and appeal out of time but the Advocate insisted on being paid his fees before he could take any action and since the applicant did not have money, no action was taken and when the applicant requested proceedings from his former Advocate, he took time to release them thereby leading to further delay; he further states that when he got the proceedings, he approached another Advocate who requested for time to peruse the proceedings and ruling before filing appeal thus causing further delay; further that the new Advocate took long before advising the applicant on way forward prompting him to ask for proceedings from the Advocate which took several months before they were released to him as the advocate kept telling him that he had forgotten them at his Nairobi office and/or they were in his house hence further delay.
 6. The applicant avers that he got frustrated, depressed and coupled with the stress of seeking legal assistance to defend the suit in Kabarnet ELC No. 26 of 2022, he retreated to his mother's home at Eldama Ravine causing more loss of time and it took the efforts of the family and clan elders to convince him to take up the appeal and challenge the issue of paternity and/or dependency.
 7. That the delay in bringing this application is excusable owing to financial issues encountered by the applicant and the time taken to type the proceedings; that applicant has a very good appeal with a high probability of success on the ground that there is no doubt whatsoever that the applicant is a son of the deceased hence entitled to benefit from the estate of the deceased and he will not only lose his entitlement in the estate of the deceased but also suffer a lifelong dehumanizing effect of being declared a stranger and/or not a son of the deceased but the respondents will not suffer any prejudice if the orders sought are granted.

Response

8. In response to the application, the Respondents filed a replying affidavit sworn by the 2nd Respondent on the 8th day of October, 2024. He avers that the contents of paragraph 2-4 of the Supporting affidavit dated 8th July, 2024 is heavily contested with strict proof thereof to the relationship. He further avers that the Applicant is alien to him and his family at large aligning with the ruling delivered on 9th of March, 2022 by the trial court in Succession Cause No. I6 of 2015.
9. That on the competency or otherwise the application, reference is made to the ruling of the Court in the Succession Cause No.16 of 2015 dated 9th March, 2022. The Respondent avers that the proceedings



are incapable of being stayed. That even assuming that the order for stay could issue, the appeal does not challenge the degree satisfactorily that the Applicant has locus to move this court.

10. The Respondent avers that the application is fatally defective by failure to specify the Orders the Applicant is challenging and in any case, the issues are raised in the current ELC No.26 of 2022 and unless the Applicant can foresee frustrations in the said matter, the Applicant can be advised to await the outcome of the matter.
11. The Respondent avers that this application raises the same fundamental and substantial issues in their amended defence and counter claim dated 23rd November, 2023 and there is no plausible reason given by the Applicant for inordinate delay and aver that the principle “ignorantia juris non excusat” is applicable and pointed out that Ms. M.K Chebii & Company Advocates have been on record for the Applicant and should have filed application.
12. Further, the Respondent avers that counsel has brought this Application when the proceedings in the trial court in ELC Case No. E026 of 2024 have progressed to almost conclusion and avers that this can only be delaying tactics played by counsel on record and this Application should be dismissed with consequences.
13. The Respondent avers that on the issue of substantial loss, the court should not exercise its discretion only in the governing rules of stay of proceedings and leave to appeal out of time but also chance of success of appeal.
14. The Respondent further argue that the issues raised in this Application are being explored with a fine-tooth comb in the trial court, in ELC Case No. 26 of 2022 and question the hidden objectives of this Application and prays for the dismissal of the Application with costs to the Respondents.
15. The application was canvassed by way of written submissions.

Applicant’s Submissions

16. On whether this court can exercise discretion to allow applicant to appeal out of time, the applicant quoted Section 79G of the *Civil Procedure Act* provides that:-

“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 a good and sufficient cause for not filing the appeal in time”
17. They relied on the case of *Thuita Mwangi v Kenya Airways Limited* [20031 eKLR, where the Court of Appeal then held 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’.



18. They submit that they have demonstrated herein above that the applicant is the son of the late Chepyegon Chemjor from the 1st wife. That the 1st respondent did not dispute the fact that the deceased had two wives being the 1st wife and herself. That it's also apparent that the 1st cousins and step sister to the deceased did confirm that the applicant was the son of the deceased and wish to challenge ruling by trial court that the applicant did not establish paternity and thereby disinherited him yet there were cogent evidence to the contrary.
19. The applicant restated grounds of the application and submit that he has arguable appeal with tremendous chances of success as exhibited in the draft Memorandum of Appeal .and urged this court to exercise its discretion in his favor going by the hurdles he has encountered and relied on the case of Stecol Corporation Limited v Susan Awuor Mudembi [2021] eKLR; and concluded that the applicant deserves a chance to ventilates his case on appeal as the respondents will not suffer any prejudice if this court exercises its discretion in favour of the applicant in that the estate asset has already been devolved to the 2nd respondent who is in possession and the converse is the truth in that the applicant and his children have lost identity and/or lineage as a result of the ruling of the trial court.

Analysis and Determination

20. I have considered the application as presented, the grounds, supporting affidavit, replying affidavit and the written submissions by the Applicant and wish to consider whether the applicant has met threshold for grant of prayers sought. The *Law of Succession Act* does not provide specific timelines for filing of appeals from decisions of the lower Court to the High Court. However, as Succession Appeals are considered to be Civil Appeals, the provisions of Section 79G of the *Civil Procedure Act* is applicable. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment or decree of the subordinate court to the High court is thirty days.
21. In this case, the ruling sought to be challenged was delivered on 9th March, 2022. It therefore follows that any appeal challenging that decision ought to have been filed on or before 9th May, 2023. Record show that, the applicant's counsel filed the instant application and a Memorandum of Appeal after a period of one year 2 months. They now seek extension of time their ground being delay in supply of proceedings by court and indolence on part of Advocates on record. The Respondents oppose the application on ground that the delay is long and they ought to allow the distribution of the deceased's estate to proceed.
22. In Charles Karanja Kiiru –v- Charles Githinji Muigwa [2017]eKLR where the Respondent had delayed for 41 days before filing an appeal and where the High court enlarged time to enable the respondent file an appeal out of time, the appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same. In dismissing the appeal, the Court of Appeal cited the decision in Wanjiru Mwangi & Another [2015] eKLR and APA Insurance Co. Ltd –v- Michael Kinyanjui Muturi [2016] eKLR.
23. Section 79G of the *Civil Procedure Act* provide as follows:-

“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 a good and sufficient cause for not filing the appeal in time.”



24. Further, in the case of Edith Gichungu Koine v Stephen Njagi Thoithi [2014] eKLR Odek JJA, stated as follows:-

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

25. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are in consonance with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.

26. In Kamlesh Mansukhalal Damki Pattni –v- Director of Public Prosecution & 3 Others [2015] eKLR, the Court of Appeal pronounced that:

“It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of the Constitution which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of the Constitution to adhere to national values and principles of governance which require them whenever applying or interpreting the Constitution or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity, are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties’ interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.” (emphasis added).

27. The Court of Appeal in the above case agreed with the pronouncement by the learned Judge of the High Court that:

“It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice...”

28. Article 48 of the Constitution guarantees every person access to justice. In addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

29. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. In the instant case, the applicant filed the appeal many months late and has approached this court for extension of time as stipulated in Section 79G of the Civil Procedure Act. The



applicant is before the court seeking to be granted a chance to challenge the ruling of the Magistrate's Court in respect to the distribution of the state of the deceased Chepyegon Chemjor.

30. In the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J* (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

31. As was held in the case of *Co-operative Bank of Kenya Ltd –v- Banking Insurance of Finance Union (Kenya) [2015] eKLR*, this court was cognizant of the fact that an arguable appeal only needed to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed. Additionally, as was stated in the case of *UAP Insurance Company Ltd v Michael John Beckett [2004] eKLR*, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

32. From the applicant's averments, he wants an opportunity to demonstrate that he is a beneficiary in the succession cause *Kabarnet Chief Magistrate's Court Succession Cause No. 16 of 2016*. He has explained his delay which is prolonged and may cause inconvenience to the other parties who have taken other steps after the trial court ruling. I do agree that ignorance of the law is no defence and parties should play a role in ensuring their matters proceed even if they have counsel in situation where counsels are slow. However, I am of the view that this being a succession matter, it would be in the interest of justice allow the applicant to challenge the trial court's decision so as to have the issue between him and the persons declared as beneficiaries of the deceased's estate determined in its entirety.

33. From the foregoing I do enlarge time for the applicant to file appeal against ruling delivered in *Kabarnet ELC Case No.26 of 2022*.

34. In respect to prayer for stay of proceedings in the trial court, in the case of *David Morton Silverstein – v- Atsango Chesoni [2002 eKLR*, the Court of Appeal citing *Kenya Commercial Bank Ltd –v- Benjoh Amalgamated Ltd & Another [1998] eKLR* held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.

35. Further in the case of *Niazsons (K) Ltd. –v- China Road & Bridge Corporation (Kenya) [2001] eKLR*, *Onyango-Otieno, J* (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

36. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.



37. Having found that the applicant ought to be given opportunity to be heard on appeal, I am of the view that there is need to stay further proceedings to allow the appellate court to consider the interests of the applicant in the matter and arrest a situation that may result in wastage of judicial time and resources as was held by Court of Appeal in the case of Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR where the court stated as follows:-

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

38. From the foregoing, I am inclined to allow the Applicant’s Notice of Motion application dated 8th July, 2024 in terms of Prayers 2 and 3 thereby enlarging time for filing an appeal out of time and staying proceedings in Kabarnet ELC Case No.26 of 2022 pending hearing and determination of the intended appeal. The appeal to be filed within 14 days from the date of this ruling.

Final Orders:-

39.

1. The applicant is allowed to file appeal out of time.
2. The appeal to be filed within 14 days from the date of this ruling.
3. Pending hearing and determination of appeal, proceedings in Kabarnet ELC Case No.26 of 2022 to be stayed.
4. Costs of this application to abide by the outcome of this appeal.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27TH DAY OF FEBRUARY 2025.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Chebii counsel for the Applicant.

No appearance for Respondent.

Elvis/Momanyi – Court Assistants.

