



REPUBLIC OF KENYA



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**In re Estate of Joash Amendi Lusaka (Deceased) (Miscellaneous Civil Application
E001 of 2023) [2024] KEHC 719 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
MISCELLANEOUS CIVIL APPLICATION E001 OF 2023**

JN KAMAU, J

JANUARY 31, 2024

**IN THE MATTER OF THE ESTATE OF JOASH AMENDI LUSAKA
(DECEASED)**

BETWEEN

LINNET MIREHANE APPLICANT

AND

JOHN AMENDI 1ST RESPONDENT

NELSON MBAJAH AMENDI 2ND RESPONDENT

RULING

Introduction

1. In his Notice of Motion dated and filed on 30th August 2022, the Applicant herein sought that the firm of M/S E.K. Owinyi Co Advocates come on record in place of the firm of M/S Ngala Awino & Co Advocates. She also prayed for leave to appeal against the Ruling that was delivered by Hon R. Ndombi (PM) in Vihiga CM Succession No 89 of 2016 on 17th June 2022 out of time and that her Memorandum of Appeal herein that had already been filed together with the said application be deemed to have been properly and duly filed.
2. She swore her Affidavit in support of her application on 10th May 2023. She pointed out that failure to file an appeal against the said decision within time was not intentional but that she got to know of the said Ruling late and instructed a new counsel to act.
3. It was her assertion that her draft Memorandum of Appeal had raised meritorious and arguable issues and consequently, together with other beneficiaries, they would suffer huge losses and prejudice if the said application was not allowed.



4. She averred that she filed the present application in good faith and with speed, in less than two (2) weeks after the decision was given and thus urged this court to be lenient and to allow the same.
5. In opposition to the said application, on 13th July 2023, the 1st Respondent herein filed Grounds of Opposition dated 12th July 2023. He also filed a Replying Affidavit that she swore on 13th July 2023 on even date.
6. He asserted that the Applicant was not being truthful as she did not disclose that her counsel was present when the said Ruling was read virtually and had therefore failed to disclose the reason for the delay in filing the appeal herein.
7. He added that there was no order that was issued directing that rent be paid into the deceased's account at Equity Bank. It was his further averment that the draft Memorandum of Appeal did not have any chance of success as she had never reported about intermeddling of the deceased's estate. He pointed out that her allegations about intermeddling were selective, discriminatory and deceptive.
8. He reiterated the aforesaid assertions in his Replying Affidavit and added the firm of M/S E,K, Owinyi & Co Advocates filed the present application without filing a Notice of Change of Advocates yet the matter in the lower court was concluded by the firm of M/S Odhiambo & Odhiambo Advocates.
9. He asserted that if the mistake was by her counsel, then she had recourse against him as he was appropriately insured.
10. He was emphatic that granting the orders she had sought would delay the distribution of the deceased's estate to the detriment of the deceased's three (3) widows, one of whom was ninety two (92) years old while the other two (2) were in their eighties (80s) and thus urged this court not to grant the orders the Applicant had sought.
11. In opposition to the said application, on 10th July 2023, George Anyumba advocate swore a Replying Affidavit on behalf of the 2nd Respondent herein. The same was filed on 11th July 2023.
12. The 2nd Respondent averred that the present application was full of falsehoods because the Ruling the Applicant wished to appeal against was delivered in the presence of counsel of all parties. He asserted that she did not advance any sufficient reason to demonstrate why she did not file an appeal within time.
13. It was his contention that she did not stand to be prejudiced if her application was not allowed but that it was he and other beneficiaries who stood to suffer prejudice if the same was allowed.
14. The Applicant's Written Submissions were dated 9th October 2023 and filed on 17th October 2023. The 2nd Respondent's Written Submissions were undated but were filed on 6th October 2023. The 1st Respondent did not file any Written Submissions herein. This Ruling is therefore based on the aforesaid Written Submissions which the parties relied upon in their entirety.

Legal Analysis

15. As the Applicant had sought two (2) different orders, this court deemed it prudent to address her application under separate and distinct heads shown hereinbelow.



I. Representation of the Applicant

16. Order 9 rule 9 of the [Civil Procedure Rules](#), 2010 provides as follows:-

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed (emphasis court), such change or intention to act in person shall not be effected without an order of the court:-

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

17. The word “judgment” has not been defined in the [Civil Procedure Act](#) Cap 21 (Laws of Kenya). However, “judgment-debtor” means any person against whom a decree has been passed or an order capable of execution has been made.”

18. A Certificate of Confirmation of Grant could not therefore be deemed to be a judgment within the meaning of order 9 rule 9 of the [Civil Procedure Rules](#) as no decree or order would be issued that was capable of execution. The Certificate of Confirmation of Grant was extracted from an order of judgment of the court. It was negative in nature and could not be executed.

19. It therefore followed that the Applicant’s prayer seeking that the firm of M/S E.K. Owinyi & Co Advocates come record on her behalf was thus superfluous. The court did not therefore deem it necessary to delve further into this issue save to state that it would have sufficed for the said firm to have filed a Notice of Change of Advocates.

20. However, assuming that this court would have arrived an erroneous conclusion and the firm of M/ S E.K. Owinyi & Co Advocates was actually required to have sought and obtained leave to come on record on behalf of the Applicant herein, this court could not still have granted the said order because there was no evidence that the said firm served that of M/S Ngala Awino & Co Advocates who were representing the Applicant herein with the said application and/or that they had entered into a consent for the said firm to come on record in place of that of M/S Ngala Awino & Associates as contemplated in order 9 rule 9 (a) and (b) of the [Civil Procedure Rules](#).

21. Whichever way one looked at the Applicant’s prayer No (1) therein, the same was not one that could be granted.

II. Leave to file an Appeal out of Time

22. In the absence of a Notice of Change of Advocates by the firm of M/S E.K. Owinyi & Co Advocates, the second limb of the present application seeking leave to file an appeal out of time could not be sustained. Indeed, the application had been filed by an advocate who was not properly on record rendering the said application incompetent and null and void ab initio.

23. Bearing in mind that courts are mandated to administer justice without undue regard to procedural technicalities, this court found it prudent not to consider the merits or otherwise of the prayer seeking leave to appeal against the decision of Hon R. Ndombi (PM) in Vihiga CM Succession No 89 of 2016 that was delivered on 17th June 2022 out of time with a view to giving the Applicant an opportunity to regularise her representation and enable her prosecute her application in the appropriate manner.

24. Indeed, Article 159(2)9d) of [the Constitution](#) of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities.



Disposition

25. For the foregoing reasons, the upshot of this court's decision was that the Applicants' Notice of Motion application dated and filed on 30th August 2022 be and is hereby struck out for want of proper representation by the advocate who filed the same on her behalf. Costs of the application will be in the cause.
26. The Applicant be and is hereby at liberty to file a fresh application seeking leave to appeal the decision of Hon R. Ndombi (PM) in Vihiga CM Succession No 89 of 2016 that was delivered on 17th June 2022 out of time by 15th February 2024.
27. Matter to be mentioned on 4th March 2024 to confirm compliance and/or for further orders and/or directions.
28. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 31ST DAY OF JANUARY 2024

J. KAMAU

JUDGE

