



**Odhiambo v Odinge (Miscellaneous Civil Application
E194 of 2023) [2024] KEHC 943 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 943 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CIVIL APPLICATION E194 OF 2023
RE ABURILI, J
JANUARY 30, 2024**

BETWEEN

ROSE AUMA ODHIAMBO APPLICANT

AND

EDWARD OKIRO ODINDE RESPONDENT

RULING

1. This ruling determines the application dated 10/11/2023 seeking for leave of court to appeal out of time from the ruling delivered on 5/10/2023 by Hon L.N. Kiniale, SPM in Nyando Senior Principal Magistrate's Court Succession Cause NO. E316 of 2022.
2. The application is supported by grounds and an affidavit sworn in support thereof to the effect that the applicant was acting in person and that when counsel was instructed, he traced the file which was held at the typing pool after which he had to read the proceedings and ruling and make a decision on the intended appeal and advise the client.
3. In opposition, the respondent filed a replying affidavit sworn on 18th December, 2023 contending that the applicant was in court when the ruling was delivered on 5/10/2023 and that by 23rd October, 2023, she had received the order from the court below hence she should have filed a memorandum of appeal in time. It was also deposed that to allow the appeal in succession cause will delay the matter and that the draft memorandum of appeal does not show any merit.
4. The respondent urged the court to dismiss the application and let the grant issued in the lower court to be confirmed.
5. The parties' respective advocates argued the application orally reiterating the grounds and affidavits in support and against the application.



Determination

6. I have considered the application for leave to appeal out of time dated 10th November, 2023. The impugned ruling was read and delivered on 5/10/2023. It follows that the delay in filing the appeal was only five days. This is because section 79G of the *Civil Procedure Act* which is applicable in this instance provides that an appeal to the High Court from the magistrate's court shall be filed within thirty days of the date of judgment or order appealed from.
7. However, the proviso to the said section gives this court discretion to extent time within which an appeal ought to have been filed, where the failure to file the appeal in time and the delay thereof is not inordinate or even if inordinate, the delay is sufficiently explained to the satisfaction of the court. The time for filing of an appeal is also subject to availability of court certified court proceedings and the decision appealed from. It follows that the decision of whether or not to grant leave extending time for filing of an appeal is an exercise of judicial discretion, which discretion must be exercised judiciously and not whimsically.
8. In this case, the delay in filing the appeal was only five days which delay has been explained to the satisfaction of this court and is not inordinate, noting that the applicant herein was actin pro se and that indeed, she deserves to be accorded the opportunity to ventilate her grievances in a succession matter.
9. AS to whether the intended appeal has any chances of success is not for this court to determine but examining the draft memorandum of appeal, I find that the same is not frivolous.
10. For the above reasons, I find that this is a matter which warrants this court to exercise discretion in favour of the applicant in the interest of justice, to enable her file the intended appeal.
11. Accordingly, I allow the application dated 10/11/2023 and grant leave to the applicant herein Rose Auma Odhiambo to file and serve an appeal out of time challenging the ruling of Hon. L.N.Kiniale, SPM in Nyando SPM Succession Cause No. E316 OF 2022.
12. The appeal shall be filed and served upon the respondent within fifteen (15) days of today. Each party shall bear their own costs of the application.
13. The order be extracted.
14. This file is closed.
15. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

