



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kemboi v Kangogo & another (Civil Appeal E010 of 2023)
[2024] KEHC 1801 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL E010 OF 2023
RB NGETICH, J
FEBRUARY 22, 2024**

BETWEEN

SILAS KITAI KEMBOI APPELLANT

AND

ENID JEPCHUMBA KANGOGO 1ST RESPONDENT

BRIAN KANGOGO 2ND RESPONDENT

RULING

1. Before me for determination is the Appellant's Notice of Motion application dated 5th June, 2023 brought under Section 50 of the Law of Succession Act, Cap 160 Laws of Kenya, Rules 63, 67 and 73 of the Probate and Administration Rules and all other enabling provisions of the law, seeking the following orders:-
 - i. Spent.
 - ii. This Honorable court be pleased to grant the Appellant/Applicant leave to appeal and/or leave to appeal out of time against the Ruling delivered on 16th January, 2023 at Eldama Ravine Magistrate's court.
 - iii. The costs of this application be in cause.
2. The application is premised on the grounds that the Ruling was delivered on 16th January, 2023 by the Honourable Trial Magistrate and this being a Succession matter, there is need to seek leave to appeal and/or file appeal.
3. That the time for filing such appeal has lapsed, hence the need for leave to appeal out of time and it is in the interest of justice that this application be allowed. That this application has been brought to court in good faith and the same will not prejudice any party if the same is allowed.



4. The application is supported by affidavit sworn by the Applicant Silas Kitai Kemboi on the 5th June, 2023 and a further affidavit sworn on the 22nd January, 2024. He avers that he is the Appellant/Applicant herein, hence competent enough to swear this Affidavit.
5. The Appellant/applicant avers that the Honourable Trial Magistrate Hon. A. Towett delivered her ruling at Eldama Ravine Law Courts in respects of his objection to making of grant dated 27th July, 2020.
6. That having been aggrieved by the court ruling, he instructed his Advocates now on record to lodge an appeal against the said Ruling and his Advocates in line with preparation to appeal wrote a letter to the trial court to be supplied with certified typed proceedings to enable them process appeal.
7. The Applicant proceeds to state that it took a while for the proceedings to be typed and for his Advocates to be supplied with certified copy of the Ruling to enable them prepare the relevant documents for appeal.
8. That this being a Succession matter, it does not have an automatic right of appeal, and there is need to seek leave, thus the present application.
9. That the delay occasioned by the delayed typing of proceedings has necessitated them to also seek leave to appeal out of time and the delay of bringing this application has been occasioned by the factors beyond his control. The appellant avers that his appeal raises pertinent issues and he beliefs has very high chances of success and it is only fair and just that the application be allowed as prayed.
10. In response, the respondent filed replying affidavit sworn by the 1st Respondent Enid Jepchumba Kangogo who avers that the application by the appellant/Applicant is incompetent, bad in law and the grounds in support thereof are bereft of merit.
11. She avers that the applicant has not filed and served a Certificate of delay that is obtainable by the applicant's counsel upon application and therefore without the Certificate of delay, the prolonged delay herein cannot be explained and has not been explained.
12. That the applicant cannot now seek exercise of discretion for extension of time within which to file an Appeal herein because he has been indolent, was guilty of inexcusable and inordinate delay thereby disentiing himself this Court's exercise of its discretion. That extension of time to file an Appeal is an exercise of discretion and is not a right to a party.
13. That the reason proffered by the applicant for his failure to file an Appeal in compliance with the rules is devoid of any merit whatsoever as it is plainly obvious and a matter of fact the applicant did not exercise due diligence.
14. That their position is that, the grant of orders sought in the said application would greatly prejudice the respondents and at any rate the applicant has not attached a full ruling and therefore one cannot even vouch for the grounds advanced so as to form the view that his intended Appeal has high chances of success. She proceeds to state that the applicant had slept on his rights and now seeks to prolong this matter and delay the enjoyment of the fruits of the court order in our favour.
15. That in the circumstances and based on the foregoing reasons, the orders sought in the said application supported by the said affidavit annexed thereto ought in the interests of justice and fairness to be refused and the said application dismissed with costs.
16. The Application was canvassed by way of written submissions,



Applicant's Submissions

17. The applicant filed their submissions on the 23rd January, 2024. In his submissions, the applicant contends that he should be granted leave to file his Appeal out of time relying on Section 79G of the [Civil Procedure Act](#) 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 applicant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

18. The Applicant submits that he is desirous of pursuing justice on his behalf and on behalf of the grandchildren to the Late Job Sasita. That he is championing for their rights as they have been left out of the Estate despite being beneficiaries and dependents. However, the delay requires them to request for the leave to file their appeal out of time and the Applicant understands that this is a discretionary decision and seeks the Courts indulgence on the same.
19. That however, as [In Re Estate of Paul Mwangi Kimamo \(Deceased\)](#) [2020] eKLR where the Court was of the view.

“From a consideration of the above Rules, this court has wide powers to grant such orders of extension of time as are necessary to meet the ends of justice (R.73 P & A). The discretion must be exercised judiciously with the court considering the special circumstances of each case, for example, the period for the delay, the reasons given for the delay in filing the objection and the prejudice that may result, if any.”

20. The Appellant/Applicant further refer to the Court in [Leo Sila Mutiso v Rose Hellen Wangari Mwangi](#)- Civil Application No Nai. 255 of 1997 (unreported), where it expressed itself thus:

“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 the time are: first; the length of delay; secondly the reason for 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.”

21. That they believe that the discretion should be judiciously exercised to meet the ends of Justice and urged this court to take cognizance of the fact that he had no capacity to fast track the provision of the certified copy of typed proceedings and ruling; that he followed through correspondence and calls by his Advocates but his efforts were thwarted and inadvertently this brought a delay; that he has attached copy of the correspondence as evidence and a copy of the typed ruling and proceedings on record.
22. That he stands to suffer irreparable loss as him and the grandchildren to the Late Job Sasita will be locked out of the Estate despite being rightful beneficiaries; that the land was held by the Late Rael Kimoi Kangogo in trust and the children to Rael who have been adequately considered as part of the Estate were not sired by the Late Job Sasita. That the Respondent will suffer no prejudice as the only claim is for the consideration of the parties left out of the Estate.



23. The Appellant argues that the intended appeal is arguable and would be rendered nugatory if not heard and as earlier stated not only the applicant's interest are to be thwarted but also those of the grandchildren to the Late Job Sasita, the husband to the Late Rael Kimoi Kangogo.
24. In response, the Respondent submits that that the applicant has not advanced grounds upon which the courts should exercise of judicial discretion. That the application can best be described as that of "flogging a dead horse" and urged this court to dismiss with costs.
25. The Respondents further submit that in considering for extension of time to appeal, four aspects has to be satisfied;
- a. The length of the delay.
 - b. Reasons for the delay.
 - c. The chances of the appeal succeeding, if the appeal is granted.
 - d. The degree of prejudice to the respondent if the application is granted.
26. And submit that the matter before court has been brought after 139 days from delivery of e ruling on the 16th January, 2023. That the reasons for the delay have not been sufficiently explained to warrant for the extension of the time to file the appeal. The respondent submits that the other issues e.g the chances of the success of the Appeal is moot from the material before court. As for the degree of prejudice, Respondents submit this was a family matter of the estate of Rael Kimoi Kangogo and that issue was resolved judicially and fairly by the trial court and the attendant objection by the applicant was found to be without merit and was dismissed and ruling was rendered in the presence of the parties through counsels on record.
27. The Respondents cite the case of *Karny Zaliarya & another v Shalom Levi*. C. Appl. No 80 of 2018. Where the court stated as follows:-

“.....Some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reason(s) for the delay, the possible prejudice, if any, that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its dispute, against the need to ensure timely resolution of disputes; the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity. In taking into account the last consideration, it must be born in mind that it is not the role of a single judge to determine definitively the merits of the intended appeal. That is for the full Court if and when it is ultimately presented with the appeal.”

28. That the principles to be considered in exercising the court's discretion on whether or not to enlarge time to file appeal were set out in the case of *Leo Sila Mutiso v Rose Mellen Wangeri Mwangi* Civil Appeal 255/1997, the court, in considering the exercise of discretion to extend time, 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.....”

29. That a clear look at the instant application becomes very clear that the inordinate delay in filing the appeal has not been explained. That further the certificate of delay was neither filed nor obtained and therefore the long delay has not been explained.

30. That they associate themselves with decision in the case of *AO Menya v Mcreas Ltd* [1978] eKLR where the Court held that:

“Doing the best I can in the circumstances, I find it difficult to say that sufficient reason has been shown to justify extension of time. In the words of Windham JA, "there was a lack of diligence" on the part of the advocates and their clerk in taking steps to see that the notice of appeal was filed in time. I express my sympathy to the applicant who indicated his desire to appeal at the earliest moment given him, but if a mistake of clear law or of fact without more on the part of the advocate or his clerk will not constitute sufficient reason, I fail to see how inadvertence on the part of the either or both as in this case, can. Furthermore, there is no element of blame on the part of the court as in some of the cases referred to in this ruling. The application is refused, with costs”

31. The Respondents further rely in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinii & 2 others* [2014] eKLR. The 1st and 2nd respondents submit that the applicant has not adduced at the outset, cogent reasons why the court should extend time.

32. That similarly in the case of *Rufus Muriithi Nyaga v Juliet Wania Ireri* [2018] eKLR Justice Muchemi held thus:

“When a court is considering delay, the length of delay is a relevant factor. The applicant was required to act within 21 days but he took a whole one (1) year in slumber. It is not too harsh to refer the applicant as an indolent litigant. The limited time of filing the record was not fixed in vain but to serve the purpose of expeditious disposal of cases. Litigation must come to an end. The discretion of the court to extent time MUST be exercised judiciously. I find one (1) year delay inexcusable and contrary to the overriding objective in regards to expeditious disposal of cases and in regard to economic use of judicial resource”

33. In conclusion, the Respondents submit that there comes a time when litigation ought to cease and/or comes to an end and quoted saying in the bible that, "there is time for everything under the sun...a time to sow and a time to reap." That the applicant herein should accept the ruling of the lower court and move on. On matters litigation, there is time to litigate and a time to cease litigating.

Analysis and Determination

34. I have considered the application together with the rival submissions by the parties and wish to consider whether the applicant has demonstrated reason to enlarge time for filing appeal.

35. Section 79G of the *Civil Procedure Act* is the operative part in answering the question whether the prayer to enlarge time to file the appeal is merited. 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 good and sufficient cause for not filing the appeal in time”.

36. From the provision above, it is noteworthy that the phrase used is “an appeal may be admitted out of time”. This therefore means the court has discretion to allow admission of appeal out of time. However, the intended appeal ought to have already been filed before or together with an application seeking leave to extend time for filing an appeal. In *Mugo & others v Wanjiru & another* [1970] EA 482 the court stated as follows:-

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularized before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

37. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion by court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following:

- i. The period of delay;
- ii. The reason for the delay;
- iii. The arguability of the appeal;
- iv. The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v. The importance of compliance with time limits to the particular litigation or issue; and
- vi. The effect if any on the administration of justice or public interest if any is involved.

38. The Ruling of the court in which the Appellant wishes to appeal on was delivered on 16th January,2023 while the present application was filed on 5th June,2023, a period close to four (4) months after the lapse of the 30 days required by the law on appeals. The appellant argue that the delay was occasioned by delay in obtaining court proceedings and ruling and has place on record copy of correspondence.

39. The applicant in my view has given satisfactory explanation for delay in filing appeal within the prescribed period. Correspondence for follow up of proceedings has been attached. Further, I have considered the issues being raised for appeal are captured from averments herein and I am of the view that it will be in the interest of justice to allow the applicant file appeal out of time. In my view, no prejudice will be occasioned to the Respondents, this being a Succession matter. I see merit in the application.

40. The application is merited and is hereby allowed.

41. Final Orders: -

1. Application to appeal and appeal out of time is hereby allowed.
2. Costs of the application to abide by the outcome of the appeal.

RULING DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 22ND DAY OF FEBRUARY 2024.



.....

RACHEL NGETICH

JUDGE

In the presence of:

- Njoroge - Court Assistant.
- Mr Tarigo for Appellant.
- Ms Korir holding brief for Arusei for 1st & 2nd Respondent.

