



**In re Estate of Bare Adan Mohamed (Deceased) (Civil Appeal
E013 of 2023) [2024] KEHC 3416 (KLR) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3416 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CIVIL APPEAL E013 OF 2023
JN ONYIEGO, J
MARCH 15, 2024**

**IN THE MATTER OF THE ESTATE OF BARE ADAN MOHAMED (DECEASED)
BALUGO ADAN MUHUMED (SUING AS THE ADMINISTRATOR
OF THE ESTATE OF BARE ADAN MOHAMED).....APPLICANT**

V

**ABDIRAHMAN ADAN MOHAMED....1ST RESPONDENT
MADOW DAKAT TAKOY.....2ND RESPONDENT
BALUGHO ADAN MUHUMED.....3RD RESPONDENT**

RULING

1. Before this court is the notice of motion dated 30.10.2023 brought under Order 37 Rule 6 of the [Civil Procedure Rules](#), Section 27 and 28 of the Limitation Actions Act, section 1A,1B,3,3A of the [Civil Procedure Act](#) and all other enabling provisions of the Law seeking orders that:
 - i. Spent.
 - ii. The applicant be granted leave to file suit against the respondents out of time.
 - iii. That the Court be pleased to grant stay orders issued by Hon. Mohammednoor H. Isaack, Principal Kadhi Bute Law Courts, delivered on 31.05.2023 to avoid the intended appeal being rendered nugatory and/or an exercise in futility.
 - iv. That the intended application and suit annexed herein be deemed to have been filed within the time specified.
 - v. That the draft plaint be deemed as duly filed within time and be admitted as a plaint for the purposes of this intended suit.
 - vi. That the costs of this application be provided for.



2. The application is premised on the grounds set out on its face and further supported by the affidavit sworn by the applicant herein on 30.10.2023. The applicant's case is that the impugned judgment was delivered on 31.05.2023 wherein the 1st respondent was included as entitled to benefit from the estate of the deceased much against the Muslim law on inheritance. That the 1st respondent was further granted orders to buy her alleged shares in a plot she (applicant) has been in occupation of for more than 30 years, a move which was inconsiderate and inhumane and a contravention of her right of ownership.
3. She averred that due to her ill health, she was in a position to proffer an appeal against the said judgment. She further stated that the impugned judgment had disenfranchised one Maryam Bare Adan Mohamed as she stood to be totally disinherited if the Islamic Law of Inheritance was to be implemented to the letter. She conceded that there was inordinate delay in filing the appeal as she was supplied with the copies of certified judgment late in the day. She further averred that being a lay person, she was ignorant of the provisions of the law and the time lines. That lack of funds to prefer the appeal contributed to the delay herein which was excusable.
4. She further deposed that the application was brought in good faith and that no prejudice will be occasioned on any party if the prayers sought are granted.
5. Ali Abdullahi Adan, the 1st respondent herein, opposed the application via a replying affidavit sworn on 23.11.2023. He deposed that the applicant did not place any evidence before the court to support her claim that she had been sick and had to seek for treatment in Ethiopia. That no evidence was presented to support the fact that the minor by the name of Maryam was either alive or was sired by the deceased. It was contended that the deceased in his lifetime neither married nor was he capable of siring an offspring and that that was a fact known by all family members.
6. The 1st respondent argued that there was no evidence to show that the applicant sought for certified copies of the proceedings before the Kadhi to enable her file the appeal herein. That no sufficient reasons have been offered by the applicant for the delay hence the same denotes that the application herein is simply an afterthought.
7. He further argued that the memorandum of appeal did not raise triable issues and that it had no chance of success. He urged this court to decline the prayers sought as the same were akin to denying them the fruits of their judgment. Further, it was averred that if the court were to grant the orders sought, then the other beneficiaries would be highly prejudiced.
8. Directions were given that the application be canvassed by way of written submissions.

Applicant's Submissions.

9. The applicant submitted that the court supplied her with the court judgment and proceedings late thus exacerbating the delay in filing the instant application. That there was evidence in the record that the judgment was not availed immediately according to the statutory timelines to enable the applicant/appellant herein file her application in time. The applicant relied on the case of *Canvas Manufacturers Ltd v Sr Karunditu*, Nairobi Civil Application Number 382 of 1996 where Gicheru J observed that it is not appropriate to look at the merits of appeal in an application for extension of time.
10. It was further submitted that the applicant being a lay person with no legal representation before the lower court, could not have known the strict required timelines to file an appeal hence should not suffer for that failure. Reliance was placed on the case of *Michael Njoroge B and Others v Vincent Kimani Chege* [1971] where Shah J observed that: rules of procedure are good servants but bad masters but should not be flouted with impunity as all Rules have specific purposes but should not drive a litigant out of judgment seat if all other Rules allow such a litigant to come back to the Court.



11. The applicant urged that the respondents did not disclose any prejudice to be suffered by them should this application be allowed. In that regard, reliance was placed on the case of *Njogu Gathiani v Mbugua Kiria* [1997]. Finally, the applicant urged this court to grant the prayers as sought.

Respondents' submissions

12. The 1st respondent in his submissions dated 24.01.2024 urged in regard to two issues to wit: whether the applicant established a ground for extension of time to file the appeal and whether the applicant met the threshold for grant of an order of stay of execution.
13. In reference to the 1st issue, counsel urged that the impugned judgment was delivered in the open court and in the presence of all the parties. That the learned Kadhi further proceeded to inform the parties as envisaged in terms of proffering an appeal and therefore it remains unknown why the applicant took unnecessary long period of time before preferring an appeal against the said judgment.
14. That no evidence was adduced to support the averment that certified copies of the proceedings at the Kadhi's court was ever made and when. While arguing that the delay herein was not sufficiently explained, the 1st respondent relied on the cases of *Charles Karathe & 2 Others v Administrators of the Estate of John Wallace Mathare (deceased) & 2 Others* [2019] eKLR where a delay of 27 days was found inexcusable; while in the case of *Abdul Aziz Ngoma v Mungai Mathayo* [1976] Kenya LR 61,62, the court was of the view that the court's discretion to extend time under Rule 4 only comes into existence after 'sufficient reason' for extending time has been established.
15. On the 2nd issue, it was urged that the memorandum of appeal annexed to the application did not raise triable issues and as such, the same was not meritorious. The respondent relied on the case of *Gatirau Peter Munya v Dickson Mwenda Kitinji and 2 Others* [2014] eKLR where principles for grant of stay were discussed. That the said memorandum of appeal sought to raise new issues that were not canvassed during the trial. That as a consequence of that, the same negated any merit accruing from the intended appeal.
16. Additionally, it was argued that for the reason that the intended appeal was frivolous, it therefore followed that the same stood no chance of success. To that end, reliance was placed on the case of *Hassan Guyo Wakalo v Starwman EA Ltd* (2013) eKLR where the court was of the view that the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the intended appeal shall have been rendered nugatory.
17. On the limb that the applicant is likely to suffer irreparable and substantial loss which cannot be compensated in damages, the respondent urged that the applicant did not rise to the occasion. That it was not established what irreparable or substantial loss the applicant stood to suffer should the orders herein be declined. To buttress that position, the court was referred to the case of *Kenya Red Cross Society v Mbondo Katheke Mwanja* (2019) KLR where the court reached a determination that a court will not consider mere assertions of substantial loss on the face value. That the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss. Lastly, the respondent urged this court to disallow the prayers sought herein.

Analysis and Determination

18. I have considered the application herein, the response thereof and submissions by both parties. Issues which arise for determination are; whether the applicant has met the threshold for extension of time to appeal out of time and; whether, the applicant has met the threshold for grant of stay of execution.



19. The law governing appeals from subordinate courts to the High Court is provided under, Section 79G of the *Civil Procedure Act* which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown.
20. Section 95 of the *Act* further bestows this court with discretion to enlarge time. The said section provides as thus; -
- “95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”
21. The principles upon which the court should exercise discretion and grant leave to appeal out of time are now settled thus; the court should take into-account the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondent if the application is granted. See *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* - Civil Application No. NAI 255 of 1997 (unreported) and *Thuaita Mwangi v Kenya Airways Limited* [2003] eKLR.
22. There is no doubt that extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that she has a good cause for doing so.
23. The question therefore is whether the applicant has satisfied the above conditions.
24. As for the length of the delay, it is not disputed that the judgment of the trial court was delivered on 31.05.2023 while the application herein was filed on 30.10.2023 which is almost five (5) months from the date of the said judgment. In the case of *Jaber Mohsen Ali & Another v Priscillah Boit & Another* E & L No. 200 of 2012 {2014} eKLR the Court stated that what is unreasonable delay is dependent on the circumstances of each case. That even one day after Judgment/Ruling could be unreasonable delay depending on the Judgment/Ruling of the Court and any order given thereafter.
25. In the circumstances of the instant case, the applicant gave reasons for the delay which she relied on to urge this court to have in mind when considering the application. The applicant deponed that the inordinate delay inter alia was as a result of being supplied with copies of certified judgment late However. no date was quoted. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the court was of the view that:
- “The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
26. In putting her case forward, the applicant submitted that besides the late supply of court proceedings, she was sick and had gone to Ethiopia to seek medication. She attached medical evidence including ultra sound x-rays dated 27th July 2023 marked annexure BAM2 as proof of her poor health hence the reason for the delay. From this medical evidence am persuaded to believe that the delay herein was not deliberate but excusable.



27. As to lack of legal representation and being a lay person, the same is not a cogent ground for the delay. Having found that the ground of poor health is persuasive, it is my finding that the applicant is entitled to exhaust her right of legal redress. See *Visbva Stone Suppliers Company Limited v RSR Stone [2006] Limited* [2020] eKLR where Nambuye J.A while quoting with approval the case of *Richard Nchapi Leiyagu v IEBC & 2 Others* [2014] eKLR; *Mbaki & Others vs. Macharia & Another* [2005] 2EA 206 and the Tanzanian case of *Abbas Sherally & Another v Abdul Fazatboy*, Civil Application No. 33 of 2003, held that the right to be heard is not only constitutionally entrenched but it is also the corner stone of the Rule of law; a valued right; and is so basic that a decision which is arrived at, in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.
28. As for the chances of the intended appeal succeeding, I have perused the draft memorandum of appeal. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for determination by the Court. For the intended appeal to be termed as arguable, all that is needed in Law is that there be even one arguable point and that will suffice [See *Commissioner of Customs v Anil Doshi*, {2017} eKLR ; *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008].
29. I have perused the grounds on the draft memorandum of appeal. It is clear that the intended appeal arises from a succession cause. The applicant therefore urged this court to consider the fact that the impugned judgment purported to disinherit Maryam Bare Adan, an adopted daughter of the deceased contra to the provisions of the *constitution*.
30. Further, that the learned Kadhi erred in failing to put into consideration the contribution by the applicant to the development of the disputed house and thereby subjecting the same as part of the estate of the deceased due for distribution. In my view, the issues raised by the applicant are arguable; However, it is essential to note that an arguable appeal does not necessarily mean an appeal that will or must succeed.
31. As for the prejudice which the respondent stands to suffer should leave be granted for the applicant to file an appeal out of time. I did not come across any credible evidence to indicate the prejudice that would befall them that cannot be compensated by way of costs and especially considering the averments by the applicant in his supporting affidavit that the said Maryam stands to be disinherited while she is rightfully entitled to the estate herein. It should be noted that the right to be heard is provided for in our constitution. The applicant having expressed her intentions to be heard on appeal, it is paramount that she be granted the said opportunity.
32. As I have already stated, extension of time to file an appeal is a matter of exercise of judicial discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in the applicant's favour and especially where the delay in filing the appeal has been satisfactorily explained. Discretion of the court must always be exercised judiciously and that the applicant having expressed her intentions to be heard by this court on appeal and in the given circumstances, it is my considered view that an opportunity should be availed to her to ventilate her issues.
33. In the end, it is my considered view that in the interest of justice, the application should be allowed with the following orders;
 - i. That leave be and is hereby granted to the applicant to file intended appeal out of time.
 - ii. That the annexed memorandum of appeal be and is hereby admitted as properly filed.



- iii. That the applicant files and serve the Record of Appeal within 30 days from the date of this Ruling.
- iv. No order as to cost.

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 15TH MARCH 2024

J.N.ONYIEGO

JUDGE

