



REPUBLIC OF KENYA



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**Kimaiyo v Chelimo & 3 others (Civil Appeal 83 of 2019)
[2024] KEHC 6222 (KLR) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 83 OF 2019
JRA WANANDA, J
MAY 31, 2024**

BETWEEN

JOSEPH KIPRUTO KIMAIYO APPELLANT

AND

FLORA CHELIMO 1ST RESPONDENT

FRED CHELIMO 2ND RESPONDENT

SYLVESTER CHELIMO 3RD RESPONDENT

AMBROSE CHELIMO 4TH RESPONDENT

RULING

1. This Appeal was concluded vide the Judgment by H. Omondi J (as she then was) apparently delivered herein on her behalf by Sewe J on 8/09/2021
2. The Appeal arose from the Judgment delivered on 3/06/2019 in Iten Senior Principal Magistrate's Court Succession Cause No. 3 of 2016 in which it was declared that the parcel of land known as Irong/ Kapkonga/36 belonged to the deceased the subject of these proceedings - the late Chelimo Bartore Kaptoge - and was available for distribution as comprising his estate. The Magistrate then ordered that the property be divided between the Appellant (Objector and a son of the deceased) on one part, and the Respondent (Petitioner and widow of another son of the deceased) and her sons (2nd, 3rd and 4th Respondents) on the second part.
3. The Appellants have now filed the present Application brought by way of the Notice of Motion dated 30/05/2023. The same is filed through Messrs Martim & Co. Advocates and seeks the following orders:
 - a. [.....] Spent



- b. That the proposed appellant be granted leave to file an appeal out of time against the whole judgment of Honourable Lady Justice H.O. Omondi delivered on 8th September, 2021 at Eldoret.
 - c. That this Honourable Court be pleased to grant leave to the applicant to extend time for lodging and serving the notice of appeal by the applicant against the decision made on 8th September, 2021.
 - d. That the Notice of Appeal annexed hereto be deemed to be duly filed upon payment of the requisite fee.
 - e. That pending the hearing and determination of this application inter partes status quo be maintained with regard to the assets of the Estate of Chelimo Bartore Kaptoge
 - f. That the implementation and or enforcement of the judgment delivered on 8th September, 2021 be stayed pending the hearing and determination of an intended appeal against the said judgment
 - g. Costs be provided for.
4. The Application is expressed to be brought under Order 51 Rule 1 of the *Civil Procedure Act*, Order 22 Rule 52 of the *Civil Procedure Act* and “all other enabling provisions of the law”. The grounds of the Application are as set out on the face thereof and it is supported by the Affidavit sworn by the Appellant, Joseph Kipruto Kimaiyo.
 5. In the Affidavit, the Appellant deponed that he is the Objector and a beneficiary to the estate herein, that Judgment was delivered without notice given to him and he only came to know of the same when the Respondents started implementation of the judgment by commencing distribution of the subject parcel of land herein, that aggrieved by the judgment, by his letter dated 8/05/2023 through his Advocates, he applied for typed copies of proceedings for purposes of lodging an appeal, that leave of Court is necessary to enable him pursue the appeal, that in view of the above, it was impossible for him to apply orally for leave to make the present application within the prescribed time limit of 14 days, that the intended appeal raises fundamental issues of law which require conclusive determination by the Court of Appeal, is not frivolous and has high prospects of success, that by reason of the matters set forth above, he is apprehensive that if orders of stay of execution and status quo is not granted, the intended appeal if successful, will be rendered nugatory if the Respondents proceed and distribute the estate.

Respondents’ Preliminary Objection & Replying Affidavit

6. The Respondent opposed the Application vide the Notice of Preliminary Objection dated 9/07/2023 and the Replying Affidavit sworn on 19/07/2023. Both were filed on 19/07/2023 through Messrs Chebii & Co. Advocates.
7. In the Preliminary Objection, it is stated that the intended Appeal offends Section 72 of the *Civil Procedure Act* as it raises pure questions of fact, that the intended appeal is inordinately late and the Appellant is guilty of delay that has not been explained and that the intended appeal is a second appeal and leave ought to have been sought at the time of delivery of the judgment.
8. In the Replying Affidavit sworn by the 4th Respondent, Ambrose Kiptoo Chelimo, it was deponed that the matter has already been executed to its logical conclusion and nothing remains to be done, and that the relevant law is based on Order 42 Rule 6 of the Civil Procedure Rules which the Appellant has cleverly avoided so as not to meet the conditions stated therein. It was further deponed that the



Appellant, through his then Advocates, Messrs Kiplagat & Co. was all along aware of the judgment, that indeed on 27/07/2022, the Appellant's Lawyer, Mr. Kiplagat allowed by consent an order for equal sharing of the said land and that in default, the Principal Magistrate to execute the transfer forms, that an appeal is not allowed on a decree passed with the consent of the parties and that indeed, the subsequent consent of the parties adopted the said consent and that therefore the chances of the appeal succeeding are zero. It was deponed further that the Court is functus officio, that the alleged appeal raises pure questions of fact, and not law, yet this this is a second appeal upon which only law should be canvassed. Regarding the prayer for stay of execution, the deponent stated that he is already in possession of his portion having been placed by a team of law enforcement agents including the police and the County Surveyor and that any stay of execution will amount to evicting him.

Hearing of the Application

9. It was agreed, and I directed, that the Application and the Preliminary Objection be canvassed together and by way of written Submissions. Pursuant thereto, the Respondent filed its Submissions on 29/11/2023. However, regarding the Appellant, up to the time of concluding this Ruling, I had not come across any Submissions filed by or on his behalf.

Respondents' Submissions

10. Counsel for the Respondents reiterated matters already stated hereinabove and added that the Respondents have attached an Affidavit of Service confirming that the Appellant was served with the decree and compliance order. He therefore contended that it is not true that the Appellant only learnt of the Judgment upon execution. On the principals applicable, he cited the case of *Kiwinja Rurinja & Co. Ltd versus Kuwinda Holdings Ltd*, Nairobi Civil Application No. 243 of 1998 and also the case of *Omar Trans Motors Limited & Another versus Assa Okwemba Onyango*, Nairobi Civil Appeal Application No. 62 of 2002.

Determination

11. The issue for determination is "whether the Appellant should be granted leave to file a second appeal out of time and whether therefore, an order for stay of execution pending the intended appeal should therefore issue".
12. Regarding the prayer for leave to Appeal, the Court of Appeal in the case of *Rhoda Wairimu Karanja & Another -Vs- Mary Wangui Karanja & Another* [2014 eKLR made the following observations as regards filing of appeals in Succession matters against the decisions of the High Court:

"We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."
13. Needless to state, such leave will only be granted where justifiable circumstances are demonstrated such as where it is shown that there are weighty issues requiring further serious judicial interrogation by the Court of Appeal.



14. The procedure with respect to filing an appeal from the High Court to the Court of Appeal is found in the *Court of Appeal Rules*, 2010. Rule 75(2) thereof provides that a Notice of Appeal shall be lodged within 14 days from the date of the decision against which it is desired to appeal and Rule 82(1)(a) provides that a Record of Appeal should thereafter be filed within 60 days after filing the Notice of Appeal.
15. Regarding extension of time to file Appeal out of time, the Court of Appeal in the case of *Edith Gichungu Koine Vs Stephen Njagi Thoitbi* [2014] eKLR, guided that in such application, the Court ought to take into account several factors as observed by Odek JJA as follows:
- “Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions 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.”
16. It is therefore the position that where the delay by a litigant is well explained and the matter sought to be heard out of time raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, I am guided by the decision in *Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others* [2015] eKLR, where the Court of Appeal, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:
- “40. 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.”
17. Similarly, in the case of *Charles Karanja Kiiru - versus- Charles Githinji Muigwa* [2017] eKLR, the Court of Appeal upheld the following statements made by the trial Judge (P.J. Otieno J) in the suit brought before it on appeal:
- “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”
18. The question now is whether the delay herein has been well explained and whether there is an arguable appeal with chances of success.



19. In this case, the Judgment sought to be appealed against was delivered herein on 8/09/2021. In explaining the delay, the Appellant states that he was not notified of the delivery of the Judgment and only became aware when the Respondents commenced implementing the same. The Appellant does not however disclose when he became aware of the Judgment pursuant to commencement of the implementation of the Order as he alleges. This omission is a curious one and appears to be deliberate and a clever tactic to conceal material information. If that is so then it falls flat on its face. This is because it denies the Court the benefit of assessing whether the instant Application was brought within a reasonable time of the Appellant learning of the Judgment, if at all. The Appellant has therefore denied this Court the relevant material to enable it exercise its discretion in his favour. That alone is a sufficient reason for the Application to be dismissed.
20. Be that as it may, I have perused the Court file and confirmed that indeed, the Judgment was delivered in the absence of the Appellant or his Counsel. Counsel for the Respondents was however present. I also observe that the Judgment was initially to be delivered on 29/03/2021 but was not so delivered until 8/09/2021, 6 months later.
21. I also note that after delivering the Judgment, Sewe J who apparently delivered the same on behalf of Omondi J (as she then was), directed the Respondents' Counsel to notify the Appellant's Counsel of the delivery.
22. In their response, the Respondents have exhibited an Affidavit of Service sworn by one Margaret Nambala Wafula who described herself as a Senior Court Bailiff. In the Affidavit, the Bailiff (quoted verbatim) deponed under oath as follows:
 1. That on 6th October, 2022 I received a Court Order from M/s Chebii & Co. Adv with instructions to serve the Objector.
 2. That on the same day, 4th Petitioner hired a motor bike from Iten Law Court to Kapkonga sub/Loc and instructed him to go and point out the Objector, on arrival he pointed out the Objector, I introduced myself to him and told him the purpose of my visit, I then served him with Court Order he accepted service but declined to sign on my copy I return the said duly served.

.....”
23. The said Affidavit of Service, although clearly not so well drafted, has not been challenged or controverted in any way. The Appellant did not seek leave of the Court to file a Further or Supplementary Affidavit to respond to the contents thereof. In the circumstances, I find that the Respondents' Counsel complied with the directions of Sewe J requiring him to notify the Appellant of delivery of the Judgment. I find that while the Judgment was delivered on 8/09/2022, the Appellant was formally notified when he was served with the Decree on 6/10/2022. The Appellant has totally failed to explain why even after being served with the Court Order, he still did not act immediately and waited until May 2023, 7 months later to file the present Application.
24. In the Respondents' said Replying Affidavit, it was also deponed that the the Appellant, through his then Advocates, Messrs Kiplagat & Co. was all along aware of the judgment, that indeed on 27/07/2022, the Appellant's Lawyer, Mr. Kiplagat allowed by consent an order for equal sharing of the said land and that in default, the Principal Magistrate to execute the transfer forms. Once again, these statements have not been challenged or controverted by the Appellant. The presumption is that they are correct.



25. In the Respondents' said Replying Affidavit, it was also deponed that the matter has already been executed to its logical conclusion and that nothing therefore remains to be done.
26. In view of the matters aforesaid, I am constrained to agree with the Respondents that the instant Application has been brought after an inordinate delay that has not been explained.
27. In any event, considering that as aforesaid, the Judgment was initially fixed for 29/03/2021, it is inconceivable that the Appellant who is the one who instituted in the first place, made no effort whatsoever to find out the fate of the Judgment in his own Appeal and that, as he states, only came to learn of the Judgment delivered on 8/09/2021, again not from his own efforts or due diligence, but purely by chance when execution of the Decree was commenced. This is shocking lethargy which paints the Appellant as disinterested in his own Appeal and shows a clear lack of vigilance on his part. A party conducting himself in this manner cannot seek to benefit from the Court's exercise of discretion.
28. It is also clear that the intended Appeal is a second Appeal which by law, is confined on matters of law. Indeed, Section 72(1) of the Civil Procedure Act provides as follows:
- “72. Second appeal from the High Court
- (1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court, on any of the following grounds, namely—
- (a) the decision being contrary to law or to some usage having the force of law;
- (b) the decision having failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
29. The Appeal cannot therefore challenge findings of fact by the lower Courts. What this means is basically that the Court of Appeal, while handling the appeal, will not substitute the decision of the Magistrates Court or even that of the High Court on findings of fact with its own conclusions. Unless in very exceptional circumstances, the Court of Appeal will not therefore engage into its own fresh analysis or appreciation of the facts.
30. My perusal of the grounds of Appeal listed in the Memorandum of Appeal reveals that the same, as framed, lacks specificity. The same would fit well in ordinary first appeals where the appellate Court is obligated to re-evaluate the evidence afresh and reach its own independent findings. The same cannot be said where, as herein, the law has expressly limited the right to appeal to only points of law. Drafting of grounds of appeal in such appeals requires a little bit more finesse, care and caution. While grounds of appeal contained in a Memorandum of Appeal should not include or consist of arguments, in Appeals of this nature, where the right to appeal is limited to only matters of law, the Memorandum ought to some extent contain a clear statement in summary form of the exact matter of law that is being appealed against. By presenting the grounds of appeal in the too generalized manner in which it has been done here, the Appellant has shot himself in the foot. By presenting such generalized grounds, the Appellant has denied this Court the relevant material that would have enabled it to verify whether the intended appeal, being a second appeal, is indeed based only on matters permitted by law.



31. In my view therefore, even if leave to appeal out of time were to be granted, the chances of success of the Appeal would be minimal.
32. Commenting on the similar concern, D. Kizito Magare J, in the case of *Mwangi v Kibiu (Civil Appeal 16 of 2023)* [2023] KEHC 18643 (KLR) (28 April 2023) (Judgment) when handling an Appeal emanating from the Small Claims Court, stated as follows:
- “ Even on the normal legal lingua, a point of law must clearly arise out of the pleadings. In case of appeal, it should arise out of the memorandum of appeal vis-à-vis the pleadings in the court below”
33. In the end , the Notice of Motion dated 30/05/2023 filed by the Appellant fails and the same is accordingly dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31TH DAY OF MAY 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Kipngetch h/b for Martim for Appellant

N/A for Respondent

