



In re Estate of Ahmed Mohammed Kabocho (Deceased) (Family Appeal E001 of 2023) [2024] KEHC 8026 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 8026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E001 OF 2023
FN MUCHEMI, J
JUNE 27, 2024**

IN THE MATTER OF THE ESTATE OF AHMED MOHAMMED KABOCHO (DECEASED)

BETWEEN

ESHA AHMED KABOCHO APPLICANT

AND

ZUBEIDA AHMED KABOCHO RESPONDENT

RULING

Brief Facts

1. The application dated 4th September 2023 seeks for orders of leave to file an appeal out of time against the judgment in Murang'a Kadhi Court Succession Cause No. 2 of 2014 delivered on 24th November 2015 pending the hearing and determination of the intended appeal.
2. The respondent opposed the application through a Replying Affidavit dated 18th March 2024.

Applicant's Case

3. The applicant states that judgment in Murang'a Kadhi Court Succession Cause No. 2 of 2014 was delivered on 25th November 2015 which distributed the estate of the deceased. The respondent thereafter requested the court in Thika vide Succession Cause No. 8 of 2020 to grant orders to execute the judgment whereas the orders were issued in a decree dated 24th November 2022. The applicant further states that the respondent also requested the court to grant her leave to serve her through Postal address P.O. Box 359 Murang'a which was not functional.
4. The appellant argues that the succession cause was not filed procedurally as she and the other beneficiaries were not invited to respond to the application nor did they register or sign any consent to the filing of any succession proceedings for the deceased's estate. The appellant further states that



she was never served with a copy of the decree dated 24th November 2022 and only came to know of it upon going to the court registry on 29th August 2023.

5. The appellant states that the mode of distribution was unjust as the court failed to take into consideration the status of the two matrimonial homes belonging to the two wives of the deceased which the respondent and her siblings are likely to encroach on the matrimonial house of the appellant's mother which is contrary to any rules on inheritance. The appellant further argues that the land where her mother's house stands was donated to her mother by her own father. The mother who then constructed the home using her own money without any contribution from the deceased.
6. The appellant states that the deceased was more educated than her mother and therefore she allowed the said land to be registered in his name, which is a well-known fact by all the beneficiaries. The appellant therefore argues that the court in issuing a decree to the respondent yet she concealed such material facts was unjust and against the rules of natural justice. The applicant states that she is aggrieved with the said judgment and is desirous to lodge an appeal against the said judgment but the statutory period within which to file an appeal already lapsed.

The Respondent's Case

7. The respondent opposes the application on the premise that it is misconceived, vexatious, an afterthought and an abuse of the court process. Further, the respondent argues that the application is ambiguous and its not clear on what cause of action the applicant is pursuing. One wonders whether it is for leave to appeal out of time or other orders. In any event, the respondent states that the applicant has not demonstrated to the court why she could not file an appeal within time.
8. The respondent argues that the judgment in the Kadhi's court was issued on 24th November 2015 which is a period of over 8 years since the judgment was delivered and the applicant has not given plausible reasons for the delay.
9. The respondent further states that a Petition No. 378 of 1994 was filed in Nairobi to ascertain the administrators of the estate of the deceased and upon conclusion of the said petition, Omar Ahmed Kabocho and Siraji Ahmed Kabocho were appointed as administrators of their late father representing the two families or widows of the deceased. The respondent states that the applicant was aware of the succession proceedings and executed the consent as required in law.
10. Upon issuance of the grant of representation, the distribution of the deceased's assets was done in accordance with the Islamic Law and the reasons why the matter was referred to the Kadhi's Court for distribution is well known to the applicant. The respondent further states that the applicant was present and/or represented by either her physical appearance or their family representative at the hearing that led to the Kadhi's Court to visit the property and make a decision on the mode of distribution of the deceased's estate upon which the applicant consented that the respondent be an administrator to represent her mother's house.
11. The respondent states that some of the beneficiaries objected to the valuation and were given ample time to supply the court with their valuation report which they failed to deliver prompting the court to enter judgment on the distribution of the estate. Furthermore, the respondent states that each person obtained equal shares as per the judgment.
12. The respondent avers that the two properties whereby the widows were occupying belonged to the deceased. However the beneficiaries could not come up with an understanding on how to distribute the estate and thus the matter proceeded to the Kadhi's Court.



The Applicant's Submissions

13. The applicant submits that the decree by the Kadhi's Court at Thika dated 24th November 2022 and the judgment in Murang'a dated 25th November 2015 are res subjudice and res judicata as the estate of the deceased was filed in Nairobi vide High Court Succession Cause No. 378 of 1994 whereby letters of administration were issued to Omar Ahmed Kabocho and Siraj Ahmed Kabocho. Thus, the applicant states that the Kadhi's Court lacked the necessary jurisdiction to issue any judgment on the matter.
14. The applicant further submits that the mode of distribution ordered in the decree and judgment of the said Kadhi's Courts are unlawful, unfair and against any known principal of both Shariah law and the [Law of Succession Act](#) as it purports to disinherit and dispossess her family of their mother's matrimonial home, where they were brought up. Further, the applicant argues that they did not sign any consents in respect of the succession proceedings hence making the judgment dated 25th November 2015 and subsequent decree unlawful.

The Respondent's Submissions

15. The respondent submits that judgment was delivered on 25th November 2015 which is more than 9 years ago and yet the applicant has not demonstrated why she delayed to file an appeal within the stipulated time for doing so. Relying on the case of HCCC No. 5 of 2004 [Edmond Jilani Sadi v Kenya Ports Authority](#), the respondent argues that a delay of 9 years is extremely inordinate and inexcusable.
16. The respondent relies on the case of *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] EA and submits that the applicant has not demonstrated why the court should grant an interlocutory injunction in her favour. The respondent further relies on the case of [Mrao v First American Bank of Kenya Limited & 2 Others](#) [2003] eKLR and argues that the applicant has not demonstrated that she has a *prima facie* case with the probabilities of success as the property complained of was registered in the name of the deceased and the applicant has not produced any evidence to the contrary.
17. Relying on the case of [Nguruman Limited v Jan Bonde Nielsen & 2 Others](#) (2014) eKLR, the respondent submits that the distribution of the estate was done equally to all the beneficiaries and none of them have approached the court to challenge the same save for the applicant. Furthermore, the applicant has not demonstrated the loss and damage she stands to suffer. The respondent relies on the case of [Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others](#) (2016) eKLR and submits that the balance of convenience does not tilt in favour of the applicant as she has no *prima facie* case and she does not stand to suffer irreparably.
18. The main issue for determination is whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time.

The Law

Whether the court should exercise its discretion to grant the applicant leave to file her appeal out of time;

19. Section 79G of the [Civil Procedure Act](#) states:-

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 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.

20. It is clear from the wording of section 79G of the *Civil Procedure Act* that before the court considers extension of time, the applicant must satisfy the court that that she has good and sufficient cause for filing the appeal out of time. This principle was enunciated in the case of *Diplack Kenya Limited v William Muthama Kitonyi* [2018]eKLR an applicant seeking enlargement of time to file an appeal or admission of an already filed appeal must show that he has a good cause for doing so.
21. The Supreme Court in the case of *Nicholas Kiptoo Korir arap Salat v IEBC and 7 Others* [2014] eKLR enunciated the principles applicable in an application for leave to appeal out of time. The court stated *inter alia* that:-

“The underlying principles a court should consider in exercise of such discretion should include:-

- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;
- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
- f. Whether the application has been brought without undue delay.”

22. Similarly, in the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“... it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

23. In my view, the foregoing cases set out the principles applicable in an application of this nature. The judgment in Murang’a Kadhi’s Court Succession Cause No. 2 of 2014 was delivered on 24th November 2015. The applicant herein filed herein filed this application on 11th October 2023 which is approximately eight (8) years outside the time prescribed for filing an appeal. The applicant has not offered any reasons for the delay in filing the application but she only stated that she came to learn of the decree when she visited Thika courts on 29th August 2023. The applicant is obligated to explain the delay to the satisfaction of the court. He was aware that the succession cause was pending in court.



How then could he stay for 8 years without finding out the outcome. It has been said that the applicant participated or was at times represented in the succession proceedings. I am not convinced that the applicant was unaware of the judgment. It is my considered view that the applicant has not given any plausible reasons for the delay in filing the appeal.

24. I have perused the intended Memorandum of Appeal and the judgment of the trial court and evidently, the appeal does not raise pertinent issues of law. The appeal cannot be said to have chances of success, in my view. As such, I find that the applicant has not established to the satisfaction of the court that he has sufficient cause for enlargement of time to file the appeal out of time.
25. In the event that the orders sought are granted, there is no doubt that the respondent and other beneficiaries will suffer prejudice. For the past eight years, the beneficiaries have moved on and probably developed their shares. Reversing the process is likely to cause great injustice to them, yet no sufficient cause has been shown.
26. Consequently, I find that the applicant has not convinced this court should exercise its discretion to file the intended appeal out of time can be exercised judicially.
27. This application lacks merit and it is hereby dismissed.
28. Being a family matter, there will be no order as to costs.
29. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF JUNE 2024.

F. MUCHEMI

JUDGE

