



In re Estate of Kamukii Mwethi (Deceased) (Civil Application E114 of 2023) [2024] KECA 1610 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1610 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E114 OF 2023**

F SICHALE, JA

NOVEMBER 8, 2024

**IN THE MATTER OF THE ESTATE OF KAMUKII MWETHI-
(DECEASED)**

BETWEEN

EMK APPLICANT

AND

JOHN KINYANJUI MWAURA 1ST RESPONDENT

PETER KINYANJUI MWAURA 2ND RESPONDENT

(Being an Application for Extension of Time to file an Appeal against the judgment of the High Court of Kenya at Kiambu (Kasango J), dated 22nd September 2022 in (Kiambu High Court Succession Cause No. 94 of 2017 FORMARELY Nairobi High Court Succession Cause No. 2825 of 1999)

RULING

1. The Notice of Motion before me is an omnibus application dated 23rd March 2023, brought pursuant to the provisions of Order 5 Rule 6 of the Civil Procedure Rules, Rule 4, 39, 42, 43 and 47 of the Court of Appeal Rules 2010, Article 10, 48, 50 and 159 of *the Constitution* of Kenya 2010 in which EMK (the applicant herein), has invoked the jurisdiction of this Court sitting as a Single Judge seeking the following orders:
 - i. Spent.
 - ii. That the Honourable Court be pleased to grant the applicant leave to appeal out of time against the judgment delivered on the 22/9/2022 by the Hon. Lady Justice Mary Kasango in Kiambu.



- iii. That the Honourable Court be pleased to grant an order for stay of execution of all that judgment entered on the 22/9/2022 delivered by Honourable Lady Justice Mary Kasango, the decree thereto and all consequential proceedings thereto pending hearing and determination of this application and the intended appeal.
- iv. That costs of this application be provided for.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that he was a beneficiary of a share of L.R Kiambaa/kihara/680 in the 4th homestead of the deceased.
3. He further deposed that judgment in this matter was rendered on 22nd September 2022, but he was not satisfied with the apportionment made by the Court.
4. That, prior to and immediately after the judgment, he suffered some temporal dementia, depression and other diabetic diseases that affected him a lot as he was in and out of hospital and that further, he suffered mental stress, agony and anguish as a result of the death of his wife and as such, his advocate did not hear from him and neither could he receive instructions from him due to his health status.
5. He thus deposed that the time for filing the intended appeal had lapsed and that further the delay in filling the same was not deliberate but rather was due to overriding circumstances beyond his control and that the intended appeal was arguable with meritorious chances of success.
6. There was no response on part of the respondents despite having been served with a copy of the hearing notice on 4th September 2024 at 4:05PM. Equally, the applicant did file written submissions pursuant to the directions in the hearing notice that was served on 4th September 2024 by the Court.
7. I have carefully considered the motion, the grounds thereof, the supporting affidavit and the law.
8. The principles upon which this Court exercises its discretion pursuant to Rule 4 to extend time or not are now old hat. The Court has wide and unfettered discretion in deciding whether to extend time or not. However, in exercising its discretion the Court should do so judiciously.
9. See *Mwangi vs. Kenya Airways Limited* (2003) KLR 486 where this Court stated thus:

“Over the years, the Court has set out guidelines on what a single Judge Should consider when dealing with an application for extension of time under Rule 4 of the Rules. For instance, in *Leo Sila Mutiso V Rose Hellen Wangari Mwangi* (Civil Application No. Nai 255 of 1997 (unreported), the Court expressed itself thus; “It is now well settled that the decision whether or not to extend 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.””
10. In the instant case and as regards the length of the delay, it is not in dispute that the impugned judgment was delivered on 22nd September 2022, whereas the instant motion is dated 23rd March 2023. There has therefore been a delay of about 6 months.
11. Turning to reasons for the delay, the applicant contended that the same was not intentional nor deliberate as he was suffering health wise and was mentally incapacitated hampering his ability to issue instructions to his advocates and that further he suffered mental stress, agony and anguish having lost his wife.



12. I have looked at the documents that have been annexed in support of the motion from Kiambu Doctors Plaza and Nairobi Metropolitan Hospital and indeed note that the applicant has been ailing and has on several occasions been admitted to hospital prior and after delivery of the judgment.
13. Matters were made worse when he lost his wife sometimes in the month of April 2022.
14. In view of the foregoing, I find the reasons given for the delay to be reasonable/ plausible and I am satisfied that the delay in filing the intended appeal is not deliberate nor inordinate.
15. With regard to the possibility of the intended appeal succeeding, I am alive to the fact that I cannot make such a determination sitting as a Single Judge and I will therefore make no further comment regarding this issue.
16. As regards prejudice, I am satisfied that the degree of prejudice to be suffered by the applicant in the event that this motion is not allowed is higher as opposed to the respondent as he will have been driven out of the seat of justice. The respondents on the other hand will have a chance to ventilate their case in Court.
17. Given the circumstances, I find that the applicant has demonstrated and satisfied the existence of the principles for consideration in the exercise of my unfettered discretion pursuant to Rule 4 of this Court to extend time within which to file the intended appeal.
18. Regarding prayer 3 of the motion, the applicant is seeking a stay of execution of the impugned judgment. I note that this Court sitting as a Single Judge has no powers/ jurisdiction to entertain such a prayer and consequently I will make no further comment regarding the same.
19. Accordingly, the applicant's motion dated 23rd March 2023, is merited and the same is allowed partially in terms of prayer 2 thereof.
20. The applicant shall proceed to file the intended appeal within 60 days from the date of this ruling failure to which this orders shall stand vacated.
21. The costs of this motion shall abide the outcome of the intended appeal.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS DAY OF NOVEMBER 2024.

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.

