



**Nyidha v Nyidha & another (Succession Appeal E012 of 2023)
[2024] KEHC 2715 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2715 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
SUCCESSION APPEAL E012 OF 2023
RE ABURILI, J
MARCH 19, 2024**

BETWEEN

DICKENS OLUOCH NYIDHA APPELLANT

AND

JOHNSTONE JAGOLA NYIDHA 1ST RESPONDENT

PAUL ODERO NYIDHA 2ND RESPONDENT

(Being an appeal from the Ruling of the Honourable Baraza delivered on the 2nd October 2023 in the Chief Magistrates Court at Kisumu in Succession Cause No. 188 of 2020)

RULING

1. The Applicant herein Dickens Oluoch Nyidha, by his Notice of Motion Application dated November 8, 2023 seeks the following orders:
 - a. That the honourable court do grant the applicant leave to appeal out of time against the ruling of the Hon. Baraza in Kisumu Chief Magistrate Succession Case No. 188 of 2020 delivered on the 2/10/2023.
 - b. That upon the said leave being granted the applicants appeal filed on the 8/11/2023 (that is 7 days out of time) be deemed to have been filed within the prescribed time.
 - c. That the honourable court do issue an order staying the proceedings in the said Kisumu Chief Magistrates Succession Case No. 188 of 2020 pending the hearing and determination of the appeal.
 - d. That costs of this application be provided for.
2. The application is predicated on four grounds on the face thereof, materially, that the appeal has good chances of success and that the seven-day delay in filing the appeal was not inordinate and that the



- ruling appealed against was delivered in the absence of the parties and their counsel through no fault of theirs and is partly the reason for the delay in filing the appeal within time.
3. The application is further supported by an affidavit sworn by the applicant wherein he reiterates the grounds in support emphasizing that the impugned ruling of the lower court was delivered in the absence of both parties and that he only became aware of it through his advocate on record in the last week of October and that as a result, he was not in a position to adequately instruct his advocate within the duration required.
 4. The applicant's advocate reiterated that he only learnt about the impugned ruling two weeks after it had been delivered, from the respondents' advocate.
 5. It is the applicant's case that the parties herein had agreed on certain parts of the estate and only two people were in disagreement and thus, the respondents would in no way be prejudiced if the appeal was allowed.
 6. Opposing the application, the respondent filed a replying affidavit sworn on the 5.2.2024 in which they contended that although the ruling was read in their absence, they sought leave to file summons for confirmation of grant dated 9.11.2023 and served on the 13.10.2023 before the lapse of the time for filing an appeal.
 7. The respondents deposed that they would be prejudiced because the matter has been ongoing since 2020 because of objections by the applicant and further that as all the parties in the matter were elderly. It was their contention that the proposed mode of distribution benefitted everyone and that therefore, the instant application ought to be dismissed so that the parties can finalise the distribution of the estate.
 8. The application was argued orally with the respective parties' counsel reiterating what their clients had deposed.

Analysis and Determination

9. I have considered the application as presented, the grounds, supporting affidavit, replying affidavit and oral submissions for and against the application. In my view, the main issue for determination is whether the application has any merit and therefore whether the orders sought should be granted.
10. The *Law of Succession Act* does not provide specific timelines for filing of appeals from decisions of the lower Court to the High Court. However, as Succession Appeals are considered to be Civil Appeals, the provisions of section 79G of the *Civil Procedure Act* is applicable.
11. Under Section 79G of the *Civil Procedure Act*, time for filing an appeal from judgment or decree of the subordinate court to the High court is thirty days.
12. In this case, the ruling sought to be challenged was rendered on 2.10.2023. It follows that any appeal challenging that decision ought to have been filed on or before 2.11.2023. Instead, the applicant's counsel filed the instant application and a memorandum of appeal on 8.11.2023 which was six days late and has come before this court seeking to have the time extended and the appeal as filed out of time validated and be deemed to be duly filed within the time so enlarged.
13. The Respondents oppose the application contending in deposition and in their counsel's submissions that the matter has lagged in court for a long time, since 2020 and that as the parties therein are elderly and the proposed mode of distribution benefits everyone, the instant application ought to be dismissed so that the parties can finalise the distribution of the estate.



14. In *Charles Karanja Kiiru v Charles Githinji Muigwa* [2017] eKLR where the Respondent had delayed for 41 days before filing an appeal and where the High court enlarged time to enable the respondent file an appeal out of time, the appellant was aggrieved by the order enlarging time claiming that the learned Judge erred in law and fact by exercising his discretion and extending time for filing an appeal out of time yet no sufficient reason had been offered to justify the same. In dismissing the appeal, the Court of Appeal cited this court's (Aburili J) decision in *Wanjiru Mwangi & Another* [2015] eKLR and *APA Insurance Co. Ltd v Michael Kinyanjui Muturi* [2016] eKLR.
15. I will therefore entirely rely on the above binding Court of Appeal decision in determining the merits of this application which is two pronged namely: whether the prayer for extension of time is merited and whether this court can validate an appeal which was filed out of time.
16. Under Section 79G of the *Civil Procedure Act*-

“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 a good and sufficient cause for not filing the appeal in time.” [Emphasis added].
17. The Court of Appeal in the above cited Case guided that whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek JJA in *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision 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.”
18. The Court of Appeal further guided that there is also a duty imposed on courts to ensure that the factors considered are in consonance with the overriding objective of civil proceedings litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.
19. As earlier stated, it is obvious that this Appeal No. E012/2023 was filed six days out of the thirty days stipulated in Section 79G of the *Civil Procedure Act*.
20. The reason given for the delay hence this application to validate the appeal is that both the applicant and his advocate were not aware that the ruling had been rendered as they were not served with the requisite notice for the same and that the applicant's advocate became aware of the same, twenty days after the ruling had been rendered at which point, he undertook the process of seeking instructions from the applicant.
21. In *Kamlesh Mansukhalal Damki Pattni v Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal pronounced that:

“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." (emphasis added).

22. The Court of Appeal in the above case agreed with the pronouncement by the learned Judge of the High Court that:

“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. So far the applicant did not have a chance to file a defence. He sought to set aside that default judgment and that application was dismissed on a date he contents the same was not due for hearing and when he had no notice...”

23. Article 48 of the Constitution guarantees every person access to justice. In addition, under Article 50(1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
24. The ultimate goal and purpose of the justice system is to hear and determine disputes fully. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances fully should be locked out. In the instant case, the applicant filed the appeal six days late and has approached this court for extension of time as stipulated in Section 79G of the Civil Procedure Act, the proviso thereof. Reasons or no reasons for that delay, the applicant is before the court seeking to be granted a chance to agitate his appeal challenging the ruling of the Magistrate's Court the distribution of the state of the deceased Sylvanus Nyidha Oroma.
25. There is no evidence that the application is an afterthought or that it is intended to abuse court process. Further, it is not uncommon for clients to instruct their counsel who procrastinate on filing court proceedings and only wake up when time for such filing has lapsed. Courts have over time excused parties where such delay is not inordinate as is in this case and even in cases where there is inordinate delay, depending on the circumstances of each case and reasons for the delay, courts have accorded parties an opportunity to be heard on appeal. Furthermore, there is no evidence to demonstrate what prejudice the Respondent will suffer if the applicant is granted extension of time.
26. The discretion of this Court to enlarge time for filing of a late appeal is unfettered. However, that discretion must be exercised judiciously and not capriciously. On the material placed before me and supported by the above decisions, I am satisfied that the six-days delay is not inordinate or unreasonable.
27. For all the above reasons, I find and hold that the application for enlargement of time to file an appeal out of the thirty days challenging the ruling in Kisumu Chief Magistrate's Court Succession Cause No. 188 of 2020 is merited. The same is hereby allowed.



28. The second limb of this application is whether the applicant's appeal, being a Succession Appeal No. E012/2023 having been filed out of time on 8.11.2023 instead of 2.11.2023 before seeking leave herein, can be validated with leave and therefore deemed to be duly filed.
29. The commencement point is that this court having enlarged the time for filing an appeal out of time, it matters not that the appeal is already filed and that the applicant seeks validation of the said appeal as duly filed. This is so because even if the appeal filed out of time would be found to be incompetently filed, the enlargement granted would enable the applicant to file an appeal in a separate appeal file and therefore it would be pointless to belabor of whether or not the applicant should have first sought leave enlarging time and obtained it before filing of the appeal.
30. A similar situation arose in the Court of Appeal Case in CA 71/2016 between *Charles Karanja Kuru v Charles Githinji Muigwa* (*supra*), The Court of Appeal posed the following question:

“Having expressed ourselves as herein above the other issues that falls for considered is whether the appeal filed out of time on October 24, 2014 could be deemed as being properly on record. There is a plethora of authorities from the High court which interpret the proviso to Section 79G of the *Civil Procedure Act* to mean that an appeal filed out of time can be admitted as being properly on record once extension of time is granted. Emukule J. in the *Gerald M'Limbine v Joseph Kangangi* [2009]eKLR stated that:

“my understanding of the proviso to Section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal and at the same time seek leave of court to have an appeal admitted out of the statutory period of time. The provision does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the stipulated period to do so would actually be an abuse of the court's process under Section 79B.”

31. The Court of Appeal in the above stated case cited with approval Aburili J in *Martha Wambui Vs Irene Wanjiru Mwangi & Another* [2014] eKLR where this I stated as follows:

“In my view, the use of the term “admitted” connotes both the act of allowing an appeal to be filed out of time and also the act of allowing or permitting an appeal already filed to be admitted out of time...” see also *APA Insurance Ltd Vs Michael Kinyanjui Muturi* (*supra*).

32. The Court of Appeal went on to state that:

“This is the position this court has taken when dealing with applications for extension of time. We have always, and we believe lawfully so, deemed as fully filed applications without leave where leave is sought and subsequently granted. Learned counsel for the appellant submitted that this position as found to be untenable by the Supreme Court which pronounced itself as follows in the *Nicholas Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR (Salat case):

“.....counsel for the applicant acknowledged having already filed his appeal. He now prays for extension of time and urges that once so granted, the Petition of appeal already filed be deemed to have been duly filed.

What we hear the applicant telling the court is that he is acknowledging having file a ‘document’ he calls ‘an appeal’ out of time without leave of the court. Pursuant



to Rule 33(1) of the Court's Rules, it is mandatory that an appeal can only be filed within 30 days of filing the Notice of Appeal. Under Rule 53 of the Court's Rules, this court can indeed extend time. However, it cannot be gainsaid that where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before he can proceed to do that which the law requires.

By filing an appeal out of time before seeking extension of time, and subsequently seeking the court to extend time and recognize such 'an appeal', is tantamount to moving the court to remedy an illegality. This, court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. no appeal can be filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. Consequently, this court will not accept a document filed out of time without leave of the court." (Emphasis added).

26. In our view however, the Salat case was in respect of Rule 53 of the Supreme Court Rules which simply provides as follows:

"The court may extend the time limited by these Rules or by any decision of the court."

That Rule only applies to applications before the Supreme Court and not before any other court. Conversely, Rule 4 of the Court of Appeal Rules provides as follows on extension of time:

"The court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the court, or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and any reference in these Rules to any such time shall be construed as a reference to that time as extended." (Emphasis added).

"We find it necessary to cite the above Rule in entirety because even assuming the learned Judge was wrong in deeming the appeal as having been deemed to have been duly filed, this court would still have jurisdiction to validate the said leave if it deemed it appropriate to do so, moreover, in our view under Order 50 Rule 6 of the Civil Procedure Rules on which the learned Judge relied, the court has power to enlarge time—"Upon such time as the justice of the case may require." If therefore the learned Judge finds it in the interest of justice to deem an already filed document as having been duly filed then his discretion in that respect should not be fettered.

27. From the record before us, we are satisfied that the learned Judge addressed himself to all the facts and evidence placed before him arriving at the conclusion that..."

33. In the instant case, the applicant filed the instant application together with Succession Appeal E012/2023 six days after out of the thirty days stipulated in Section 79G of Civil Procedure Act. Considering all the matters discussed in the Charles Karanja (supra) case, where the Court of Appeal agreed with the two different decisions cited, that an appeal filed out of time could still be validated



with leave sought thereafter to enlarge this time, I find no reason to depart from the wise decisions of the superior court which adopted my own unchallenged reasoning.

34. Accordingly, I find and hold that the Kisumu Succession Appeal No. E012/2023 filed out of time is deemed to be duly and properly filed with leave of this court herein being granted enlarging the period within which the said appeal should have been filed.

35. Finally, as to whether this court should stay the proceedings in Kisumu Chief Magistrate's Succession Cause No. 188 of 2020, a decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from Order 42 rule 6 (1) of the Civil Procedure Rules as interpreted by the Courts.

36. In the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 Ringera, J (as he then was) held that:

“...As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously...”

37. For this court to grant stay of proceedings, the Applicant ought to have shown that he has an arguable Appeal with high chances of success such that if stay of proceedings is not granted, the Appeal will be rendered nugatory. This aspect of the appeal being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.

38. As was held in the case of *Co-operative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya)* [2015] eKLR, this court was cognisant of the fact that an arguable appeal only needed to raise a single *bona fide* point worthy of consideration and need not be one that must necessarily succeed.

39. Additionally, as was stated in the case of *UAP Insurance Company Ltd v Michael John Beckett* [2004] eKLR, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.

40. In the case of *David Morton Silverstein v Atsango Chesoni* [2002 eKLR, the Court of Appeal citing *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another* [1998] eKLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.

41. Further in the case of *Niazsons (K) Ltd. v China Road & Bridge Corporation (Kenya)* [2001] eKLR, Onyango-Otieno, J (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”



42. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.
43. I note that the Ruling the applicant/appellant herein has sought to impugn was delivered on 2.10.2023. The Memorandum of Appeal was filed on 8.11.2023 together with the present application. One month and six days could not be said to have been inordinate. This court is thus satisfied that the present application was filed without inordinate delay.
44. A perusal of the aforesaid Memorandum of Appeal leads this Court to the conclusion that the appeal as intended was indeed arguable and not frivolous as the question before this Court for determination is mainly, whether or not the lower court exercised its discretion correctly in dismissing the applicant's objection.
45. Having considered the affidavit evidence and the case law by the respective parties, I conclude that this is a suitable case for the court to exercise discretion and grant an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being academic exercises. As was held by the Court of Appeal in the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others* [2009] eKLR:
- “Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”
46. For the foregoing reasons, I find and hold that the Applicant's Notice of Motion application dated November 8, 2023 is merited and the same be and is hereby allowed in terms of Prayers 1,2 and 3, enlarging time for filing an appeal out of time; validating the appeal herein as filed out of time as duly filed and served upon the respondents; and staying proceedings in Kisumu Chief Magistrate's Court Succession Cause No. 188 of 2020 until this appeal is heard and determined on merit.
47. An in order to avoid a situation where the appellant obtains orders of stay and goes to slumber, I direct that the appellant shall prepare, file and serve upon the respondents a complete record of appeal within the next twenty-one days of today together with written submissions to canvass the appeal, upon which the respondents shall have 14 days of the date of service to file and serve written submissions.
48. As regards costs, since this is a family matter, both parties to bear their own costs.
49. Mention on April 17, 2024 to fix a judgment date.
50. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 19TH DAY OF MARCH, 2024

R.E. ABURILI

JUDGE

