



REPUBLIC OF KENYA



**In re Estate of Kamau Mwosa Thumbu (Deceased) (Succession Cause  
588 of 2011) [2022] KEHC 3234 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 3234 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
SUCCESSION CAUSE 588 OF 2011**

**MW MUIGAI, J**

**JUNE 20, 2022**

**IN THE MATTER OF THE ESTATE OF KAMAU MWOSA THUMBU (DECEASED)**

**BETWEEN**

**PHYLLIS KAETI KABETE ..... APPLICANT**

**AND**

**SHADRACK MBITHI MUTISYA ..... RESPONDENT**

**RULING**

1. The deceased herein, Kamau Mwosa Thumbu died on 21<sup>st</sup> November, 2002.
2. The Applicants/administrators Pius Kilonzi Kamau & John Kamau filed petition on 14/7/2011 and disclosed property Plot at Katheka Kai as comprising of the deceased's estate.
3. The Chief's letter of 12/2/2010 outlined children of the deceased as;
  - a) Syoweu Kamau
  - b) Kaeti Kamau
  - c) Mbaavi Kamau
  - d) Musyawa Kamau
  - e) Kilonzi Kamau
  - f) John Kamau
  - g) Teresia Kamau
  - h) Musyoka Kamau.

The beneficiaries signed Consent to the Making of Grant annexed to the Petition.



4. The Grant of letters of administration Intestate was issued jointly to Pius Kilonzi Kamau and John Kamau on October 11, 2011.
5. Upon the demise of the two administrators, by consent of the Applicant and the Interested Parties therein, the Applicant was appointed as the new administrator vide her application dated June 13, 2019 and Ruling by Hon. D.K. Kemei of 11/2/2021.
6. In the said application, the Applicant had further sought an order that upon the grant being made to her, the same was to be confirmed as per the schedule of distribution annexed to her supporting affidavit of the application. The Respondent Shadrack Mbithi Mutisya opposed confirmation of the Grant based on the said Schedule of distribution on the basis that he had bought a portion of the land measuring 5 ¼ acres from the deceased at a price of Kshs 7,000/- in 1999 but the size of the parcel of land had not been transferred to him by the deceased.
7. In opposition to the Respondent's assertions, the Applicant denied the Respondent's claim on the size of acreage and asserted that the correct acreage was 0.05 Ha an equivalent of 0.12 acres. According to the Applicant, the Respondent had falsely altered the agreement to read 5 ¼ acres instead of 0.05 Ha.
8. On February 11, 2021 Hon. Justice D.K Kemei in a Ruling delivered on the same date, on the said Applicant's application granted orders as follows:
  - (a) 5 acres out of the land parcel No.10 Kitanga Settlement Scheme shall be excised and registered in the name of the 5<sup>th</sup> Interested Party Shadrack Mbithi Mutisya.
  - (b) The rest of the Interested Parties to be allocated their respective shares as proposed by the Petitioner.
  - (c) The remaining portion be registered in the name of the Petitioner Phyllis Kaeti Kabetefor herself and in trust for all the beneficiaries of the state of the deceased.
  - (d) There will be no orders as to costs.
9. The Petitioner thereafter filed application of 1/3/2021 and sought that the Trial Court reviews the orders granted on 11/2/2021. The Court heard the parties through their Counsel on the said application and by Ruling of 28/9/2021 delivered by this Court on October 25, 2021 the said application for review was dismissed.
10. The Applicant is now aggrieved by Hon. Justice D.K Kemei orders.

#### **Notice of Motion Dated 27/10/2021**

11. The Applicant has sought the following orders:-
  1. That the application be certified as urgent and be heard *ex parte* in the first instance.
  2. That this Hon. Court be pleased to grant a stay of execution of the orders made on 11/2/2021 pending the hearing and determination of this application.
  3. That this Hon. Court be pleased to grant the applicant extension of time to give issues and serve notice of appeal against the ruling of the court dated and delivered on 11/2/2021 by D.K Kemei and the annexed notice of appeal be deemed as properly filed and served.
  4. That the cost of this application be provided for.



12. The Applicant's Motion is based inter alia on the ground that she is dissatisfied with Hon. Justice D.K Kemei ruling of February 11, 2021. The Applicant intends to appeal against the Ruling but by the time the Learned Judge delivered his Ruling in the Applicant's application dated 1<sup>st</sup> March, 2021 seeking review of the orders of February 11, 2021, the prescribed time to file a Notice of Appeal had lapsed hence the Applicant was precluded from filing a Notice of Appeal without leave of the court.
13. In support of the Motion, the Applicant swore a supporting affidavit on even date wherein and averred that unless the Court extends the time and grants leave to file a Notice of Appeal out of time, The Applicant will be driven out of the seat of justice and will suffer irreparably. The Applicant averred that the intended appeal raises arguable issues which the Learned Judge had failed to consider in the impugned Ruling of 11<sup>th</sup> February, 2021.
14. According to the Applicant, other the rightful beneficiaries are bound to loose their share of the estate if prevented from prosecuting the intended appeal. The beneficiaries are prejudiced by the Learned Judge's orders since the Respondent will unlawfully benefit by acquiring 5 acres instead of ¼ acre that was bought out of the land parcel No.10 Kitanga Settlement Scheme.
15. The Applicant brought this application in good faith and without inordinate delay and asserted that it is in the interest of justice and all fairness that this application be allowed.

#### **Replying Affidavit Sworn 14/02/2022**

16. In opposition to the Motion, the Respondent averred that the Motion is misconceived, an afterthought, an abuse of the court process and must fail. On the advice of his advocate, the Respondent averred that the fact that the Learned Judge pointed out that any remedy available to the Applicant lay in an appeal did not mean that the Applicant could proceed to appeal after the review failed. According to the Respondent, the import of the Ruling was that the Applicant's application had failed to meet the threshold for review.
17. On the advice of his advocate, the Respondent asserted that where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order he/she sought to review. According to the Respondent the option to review and/or appeal are not simultaneously available to an aggrieved party.
18. The Respondent asserted that no good reason has been offered by the Applicant why the appeal was not lodged within time and the delay of almost 1 year is inordinate.
19. According to the Respondent, he is yet to enjoy the fruits of the impugned ruling hence extremely prejudicial to him since he bought the land from the deceased in 1999 and has not yet received his rightful share. The Respondent averred that the application is bereft of merit and is a waste of precious judicial time and resources and must be dismissed with costs.

#### **Further Affidavit Sworn on 3/03/2022**

20. In response, the Applicant averred that the application is based on the interest of justice so that other rightful beneficiaries to the deceased estate do not lose their share of the estate. According to the Applicant, the Court failed to consider the evidence of the criminal proceedings in Machakos Criminal Case No. 4073 of 1999 where the Respondent was charged, convicted and sentenced for the offence of altering a document without authority contrary to Section 347(1) as read with Section 349 of the *Penal Code*.



21. The Applicant has averred that the Respondent will not suffer any prejudice since the appeal will be heard on merit.

### **Applicant's Submissions**

22. On behalf of the Applicant, it is submitted that the issue for determination is whether the Applicant should be granted leave to file a notice of appeal out of time. Reliance was placed on Section 7 of the [Appellate Jurisdiction Act](#) on powers of the High Court to extend time of appeal out of time.
23. The Applicant took the view that the court would address her grievances in the her application seeking review of the impugned ruling of February 11, 2021 but the court failed to consider the criminal proceedings evidence hence an appeal would sufficiently address the issues as a litigant right of appeal is guaranteed under the law.
24. It is submitted that the Application is premised on the interest of justice and all fairness for the beneficiaries lest they be disinherited should the Respondent remain to acquire 5 acres when he is legally required to acquire on ¼ acre of the parcel of land.
25. Regarding the conditions for extension of time for appealing, reliance was placed on the case of *Clemensia Nyanchuka Kinaro v Joyce Nyansiaboka Onchomba* [2021] eKLR which reiterated the case of *Leo Sila Mutua v Rose Hellen Wangari Mwangi* (Civil Application No 255 of 1997 (Unreported)).
26. According to the Applicant, she lodged this application without unreasonable delay immediately after Justice D.K Kemei delivered the ruling in respect of the application seeking review. It is submitted that the Respondent will not suffer any prejudice since the appeal will be heard on merit. It is submitted that the application has merit.

### **Respondent's Submissions**

27. On behalf of the Respondent, it is submitted that the issues for determination are two, that:-
1. Whether the Applicant ought to be granted extension of time to give, issue and serve a Notice of Appeal and whether the annexed Notice of Appeal ought to be deemed as properly filed and served.
  2. Whether the Applicant ought to be granted an order of stay of execution of the orders made on February 11, 2021.
28. On the first issue, a question has been raised, can a party enjoy both avenues of review and appeal of the same orders simultaneously? It is submitted in the negative.
29. Reliance was placed on a 3 Judge bench Court of Appeal decision of *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR on the proposition that it is not open for the Appellant to pursue an appeal and at the same time a review of the same orders. The Court of Appeal held that:
- “ .....The appeal could only lie on the outcome of the application for review.”
30. Further reliance was placed on the cases of [Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another](#) [2020] eKLR, [Margaret Kanyua Gituma & another v Gideon Mworio & another](#) [2021] eKLR and [Serephen Nyasani Menge v Rispah Onsase](#) [2018] eKLR.
31. According to the Respondent, extension of time to file an appeal out of time herein would amount to issuing orders in vain and a waste of judicial time.



32. Regarding an order for stay of execution, it is submitted that the prayer must fail since the prayer for extension of time to file appeal out of time failed.
33. According to the Respondent, for a court of law to entertain an application for stay of execution, there ought to be a pending or intended appeal. Reliance was placed on the case of *Teachers Service Commission v Kenya National Union of Teachers & 3 others* [2015] eKLR before the Supreme Court of Kenya.
34. It is submitted that the Applicant has not demonstrated that he will suffer substantial loss if stay of execution of the ruling is not granted. According to the Respondent, he has produced a sale agreement to show the interest he has in the estate. According to the Respondent, it has taken the Applicant 1 year and 4 months before the application herein was filed hence an unreasonable delay which has not been explained.
35. Regarding security for the due performance of the order, it is submitted that the Applicant has not even attempted or intimated to offer the security in the event that the appeal is not successful hence the threshold of grant of the prayer for stay of execution has not been fulfilled.
36. According to the Respondent, the lack of security can be seen as meant to deny him the fruits of judgment. Reliance was placed on the case of *Foncin Motorcycles Co. Limited v Ann Wambui Wangui & another* [2018]eKLR .
37. The Respondent urged the Court to find that the Motion is bereft of merit and as a waste of precious judicial time. It is urged that the same be dismissed with costs.

#### **Determination**

38. I have considered the Motion, affidavit in support and in opposition as well as the submissions and cases relied upon.
39. The issues for determination are;
  - a. Whether the Applicant will or will not be granted leave to appeal out of time.
  - b. Whether stay of execution pending appeal ought to be granted.

#### **Leave To File Appeal Out of Time**

40. Section 72 *Civil Procedure Act* provides for a 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.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

41. The Supreme Court of Kenya in *County Executive of Kisumu v County Government of Kisumu and 8 others* [2017] eKLR held:-

“[23] It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat’s case to which all the parties herein have relied upon. The Court delineated the following as:

“the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

42. In *Mbukoni Services Limited & another v Mutinda Reuben Nzili & 2 others* [2021] eKLR, Hon. G.V. Odunga J. stated that:-

“27. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contemptuous. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline.”

43. The above- stated legal provision and case law provide for right to appeal and the requirements for granting leave to file appeal in the Court of Appeal out of time.



44. In the instant case, the issue is whether the Trial Court erred in rejecting the Applicant's application for review that culminated with the Ruling of 28/9/2021 delivered by this Court on October 25, 2021.
45. The Trial Court did not find any new & important matter or error apparent on record that was disclosed or any sufficient reason that was disclosed as required under Order 45 of *Civil Procedure Rules 2010* and hence the application for review was dismissed.
46. The Respondent submitted that the Applicant is not entitled in law to file and apply for review and appeal simultaneously. In the instant case, the application for review was filed first heard and determined. thereafter, leave is sought to file appeal out of time
47. On the other hand, the Applicant stated that the Court orders of 11/02/2021 were prejudicial as the suit property No 10 Kitanga Settlement is part of the deceased's estate and if 5 acres and not the ¼ acre that the Respondent bought is/are allocated to the interested party the beneficiaries will be deprived of the beneficial interest from the Deceased's estate.
48. More importantly, the Applicant took the view that the Trial Court did not consider Machakos Criminal Case No. 4073 of 1999 where the Respondent was charged, convicted and sentenced for the offence of altering a document without authority contrary to Section 347(1) as read with Section 349 of the Penal Code. During the hearing of the matter, the Petitioner was not able to obtain the proceedings of the criminal case but was able to avail the same during the review application which confirmed that the Respondent was sentenced to 1year imprisonment for the offence. The Applicant asserted Respondent is only entitled to ¼ acre and not 5 acres as claimed.
49. The Respondent stated that the matter ought to have been an appeal and not review. Secondly, once a review is applied it does condone an appeal to be filed thereafter and referred to the case of *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR.
50. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, the Court of Appeal Kwach Akiwumi Pall JJA stated of review and appeal as follows;
 

A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter.

.....The matters were fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised discretion in favour of the Respondent. If he had reached a wrong conclusion of law it could be a good ground for appeal but not review. Otherwise the learned judge would be sitting on appeal on his own judgment which is not permissible in law."
51. This Court finds from the Ruling of 28<sup>th</sup> September 2021, the Trial Court considered proceedings availed in the review application but could not amount to discovery of new and important information or error apparent on the record as the Court granted the impugned orders vide Ruling of February 11, 2021.
52. The copies of criminal proceedings were produced after the Ruling of February 11, 2021 during the review application and the Trial Court found that 'without calling the person who witnessed the Sale Agreement or secured an Affidavit from him, the Court would have arrived at the same decision.' The Trial Court found the matter not for review and stated the remedy is in an appeal.



53. The Applicant was/is granted right of appeal by the Trial Court. The Ruling of 28/9/2021 delivered by this Court on October 25, 2021.
54. The Respondent objected to the review on the basis it ought to have been an appeal. Now, that an appeal is preferred as guided and granted by the Trial Court, the Respondent is averse to the appeal. The case of *Martha Wambui v Irene Wanjiru Mwangi & another* [2015] eKLR indicates an appeal was heard and determined on the dismissal of the review application before the Trial Court.
55. Secondly, Order 45 Rule 1 CPR 2010, refers to a decree where a party is aggrieved and has not preferred an appeal may apply for review on the stated grounds. However, it is silent on what happens thereafter, whether an aggrieved party may or may not file an appeal after the review is not granted nor is a party expressly restrained from preferring an appeal thereafter.
56. In this case, the Trial Court preferred parties to lodge an appeal.
57. The instant application for leave to appeal out of time was lodged on January 27, 2022 which is about/ within 2 months, November and in December where Courts shut down for recess. Therefore, there was no inordinate delay.
58. By Section 7 of *Appellate Jurisdiction Act* Cap 9 provides that the High Court may extend time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.
59. The Court finds that since right to appeal was granted by the Trial Court and the right is fortified by law, the Court grants extension of time 30 days from the date of Ruling to file Memorandum of Appeal in the Court of Appeal.

### Stay of Execution

60. In *Victory Construction v BM* [2019] eKLR the Court summarized that the principles guiding the grant of a stay of execution pending Appeal are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:
  - a. The Court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
  - b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
61. In the case of *Visbram Ravji Halai v Thornton & Turpin* – Civil Application No Nai 15 of 1990 [1990] KLR 365, ..the Court of Appeal held that;
 

“whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 42 rule 6 is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.”



## Substantial Loss

62. The Applicant is contesting the Respondent's claim of 5 acres as opposed to ¼ acre which if the Court orders are not stayed and the apportionment is executed, the Applicant and other beneficiaries shall be deprived of their beneficial interest from the Deceased's estate. The appeal shall be rendered nugatory.

## Arguable Appeal

63. This Court is not seized of the matter its merits or demerits save from gleaning through the Court record. Suffice is that the Trial Court found the application for review lacked merit and was stated to be appropriate for appeal.

## Security

64. Orders 26 & 45 & Section 80 of *Civil Procedure Rules* & Act respectively speak to security of Costs as a condition precedent to granting stay of execution pending appeal.
65. In *Keary Development v Tarmac Construction* [1995] 3 All ER relied on in *Oceanview Beach Hotel Ltd v Salim Sultan Molloo & 5 others* [2012] eKLR laid down principles of exercising the Court's discretion in provision of costs.

- “1. The Court has a complete discretion whether to order security, and accordingly it will act in the light of all the relevant circumstances.
2. The possibility or probability that the Plaintiff Company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security.
3. The Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the Plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the Plaintiff's claim fails and the defendant finds himself unable to recover from the Plaintiff the costs which have been incurred by him in his defence of the claim.
4. In considering all the circumstances, the Court will have regard to the Plaintiff company's prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure.
5. The Court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount; it is not bound to make an order of a substantial amount.
6. Before the Court refuses to order security on the ground that it would unfairly stifle a valid claim, the Court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled.
7. The lateness of the application for security is a circumstance which can properly be taken into account.”



66. These principles are applicable in determining the issue of security of Costs pending appeal in the instant matter.
67. The Applicant did not allude to proposals on security pending appeal if granted in the instant application.
68. The Court shall consider security in terms of the circumstances of the case where a liquidated amount is not in issue but whether there is a beneficial or proprietary interest in the suit property No 10 Kitanga Settlement.
69. Therefore, taking account the circumstances of the case, without the benefit of proposals on security and ensuring that the amount of security does not stifle the claim [right of appeal]. The Court orders security of Ksh 100,000/- to be deposited by the Applicant in joint interest earning account between the advocates on record of both parties on record to be deposited within 30 days.
70. Alternatively, the title document of the subject property be lodged with Deputy Registrar of Machakos High Court or Court of Appeal pending filing hearing and determination of the Appeal.

### **Disposition**

1. The leave to appeal out of time is granted within 30 days.
2. The Stay of execution of the Court Ruling/Order of February 11, 2021 is granted on condition;
3. The Applicant deposits Ksh 100,000/- within 30 days or deposits title document of No 10 Kitanga Settlement with DR MHC within 30 days.

It is so ordered

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT MACHAKOS THIS 20TH DAY OF JUNE, 2022 (VIRTUAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

