



**In re Estate of Kamau Kungu (Deceased) (Succession Cause
67 of 2021) [2022] KEHC 12625 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
SUCCESSION CAUSE 67 OF 2021
RB NGETICH, J
JULY 28, 2022**

BETWEEN

JOSEPH MAGANJO KAMAU APPLICANT

AND

BETH WANJIRU NJUGUNA RESPONDENT

RULING

1. The court is called upon to determine two applications filed herein, the first application is dated July 28, 2020, seeking to appeal out of time, while the 2nd application dated April 15, 2021, seeks for rectification of a grant issued on February 6, 2020.
2. I will deal with both applications simultaneously. The application dated July 28, 2020 is filed by Joseph Manganjo Kamau seeking the following orders:
 - a. Spent.
 - b. The court does extend the time within which to seek leave to appeal against the judgment/decisions of this court delivered on February 6, 2020.
 - c. If part (b) is granted, leave be granted to the applicant to file the appeal out of time against the judgment of the court.
 - d. The time for filing a notice of appeal be extended.
3. The application is premised on the grounds that he is aggrieved by the decision of the court delivered on February 6, 2022; the court declared itself functus official vide the ruling of March 10, 2020. On an application dated 5th March 2020 seeking conservatory orders of the judgement and partial revocation of grant. Counsel received instructions to file the appeal on March 16, 2020 but due to the Covid 19 Pandemic and scaling down of the court operations, the applicant could not be able to file the same in time; that delay is not inordinate and is excusable.



4. The applicant contend that the intended appeal raises triable issues. The application is supported by the annexed affidavit of Joseph Mango Kamau in which he averred that plot No. 1160 Kiganjo Ranching Company Limited does not form part of the deceased estate; the same belonged to Joyce Wanja Kamau who later transferred to David Mbugua Chege and Daniel Kabui Shege, the court erred in allocating the same to the children of the 1st family, disregarding the fact that the property did form part of the deceased estate.
5. The second application is the summons for rectification of grant dated April 15, 2021 brought by Joyce Wanja Kamau alias Wanja Chege, seeking the following orders:
 - a. The court be pleased to review and set aside the orders issued on 6th February 2020, concerning the distribution of Plot No. 1160- Kiganjo location Ranching Company Ltd (Thika Municipality block 30/1160) on account of some mistake and error apparent in the law.
 - b. The certificate for the confirmation of the grant issued on February 6, 2020 be amended by removing the property known as Plot No. 1160- Kiganjo location Ranching Company (Thika Municipality block 30/1160).
 - c. The application is supported by the affidavit of Joyce Wanja Kamau a widow of the deceased who contends that Plot No. 1160- Kiganjo location Ranching Company Ltd (Thika Municipality block 30/1160) was originally hers and should not form part of the deceased estate. She acquired the said property vide a share certificate no. 415 issued on December 16, 1971 and in 2003 she transferred her shares to her children and a title deed was issued on June 5, 2020 to Daniel Kabui and David Mbugua. She confirms the suit property has never been owned by the Deceased.
6. Both applications are unopposed, counsel took directions to file submissions with respect to both application.

Submissions by Joseph Maganjo

7. Counsel submitted the application as filed invokes the jurisdiction of this court under Rule 7 of the [Appellate Rules](#). The applicant was aggrieved by the decision of Justice Meoli delivered on February 6, 2020 and wishes to appeal against the same. The distribution of 1160- Kiganjo Location Ranching Company Ltd (Thika Municipality block 30/1160) to the 1st house will pave way for execution and eviction yet the 2nd house has been in occupation of the property for over 30 years. The execution will prejudice the applicant if the court fails to grant an extension of time to appeal.
8. Counsel submits the delay is not inordinate, the appeal is arguable and has a high chance of success

Submissions by Joyce Wanja

9. Counsel submitted the applicant Joyce Wanja acquired by virtue of being a shareholder of Kiganjo location Ranching Company Limited. A certificate was issued on December 16, 1971. There is therefore an error apparent on the record; the property has never been owned by the deceased.
10. Further counsel submitted that Parcel No. 1160- Kiganjo location Ranching Company Ltd (Thika Municipality block 30/1160) did not form part of the deceased free property and the deceased was not legally competent to dispose of it during his lifetime.
11. The court was urged to allow the application and review/amend the grant issued herein.



Analysis and Determination

12. I will first deal with the application dated July 28, 2020 seeking an extension of time to appeal out of time. The powers of the court in deciding an application for an extension of time to file an appeal are discretionary and unfettered. The power to enlarge time to appeal is anchored on Section 95 of the *Civil Procedure Act* which states as follows:
- “Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion from time to time, enlarge such period, even though the period originally fixed or granted may have expired. “
13. The applicant submitted there is a likelihood of success in the appeal. Judgment was delivered on 6th February 2020 and the applicant is aggrieved by the decision of the court and seeks to partially revoke the grant, in which the court pronounced itself as *functus officio*. Counsel for the applicant thereafter received instructions to file an appeal on 16th March 2020, and owing to the Covid -19 Pandemic and the scaling down of court operations the same was not filed within the requisite time.
14. Section 7 of the *Appellate Jurisdiction Act*, Cap 9 provides as follows:-
- “The High Court may extend the 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.
15. In the case of *Mwangi v Kenya Airways Ltd* [2003] eKLR, the Court of Appeal expressed itself thus:-
- “It is now well settled that the decision whether or not to extend the 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 or not 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.”
16. At this point, the court will not ventilate on the merit of the appeal. I have considered the reasons for the delay and in my view delay has been explained satisfactorily. In the interest of justice, I do allow the application seeking an extension of time to file the appeal out of time.
17. I will now embark on the second application dated April 15, 2021 seeking a review of the orders confirming the grant. A review is sought on three principal grounds as follows:
1. discovery of a very important matter of evidence that was unavailable at the time the decision was being made,
 2. error on the face of the record and
 3. any other sufficient reason.
18. The applicant alleges an error on the face of the record, she stated that Parcel No. 1160- Kiganjo location Ranching Company Ltd (Thika Municipality Block 30/1160 was not supposed to form part of the deceased estate. She confirmed she owned the property and adduced evidence of the share certificate. This evidence was not adduced during the trial of the matter. The applicant and his children actively participate in the trial proceedings.



19. An application for review is submitted where parties do not intend to appeal. In the instant case, the applicant intends to appeal against the decision of the court delivered on February 6, 2020.
20. There is nothing to review. The case presented does not qualify for review. The applicant should have appealed against the impugned order if he was dissatisfied with it. Further, an order for setting aside is issued where the parties were not involved in the proceedings or where the court was on an error of the sort. In the instant case, the applicant was present, actively participated in the succession proceedings and was present during the confirmation of the grant.
21. The applicant has not demonstrated that the confirmation application was determined in a process that did not afford her a chance to present her case. In the circumstances, the order is, for those reasons, not available for setting aside.
22. I do appreciate there is always an end to litigation. The court did pronounce itself functus official, upon confirmation of the grant. The applicant can move the Court of Appeal for an appeal. By the applicant calling this court to review or amend the confirmed grant will be inviting the court to sit as an Appeal Court in its own decision.
23. In the circumstances, I find the application for review is unmerited and the same dismissed.
24. Final Orders:-
 1. The application dated July 28, 2022 is hereby granted an extension of time. The applicant to lodge his appeal within 21 days.
 2. The application dated April 15, 2021 is hereby dismissed.
 3. No orders as to costs.

RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 28TH DAY OF JULY, 2022.

RACHEL NGETICH

JUDGE

In the Presence of:

Kinyua – Court Clerk

Mr. Macharia holding brief for Kariuki for Applicant

