



REPUBLIC OF KENYA



**Mari & 3 others v Mbuthia (Miscellaneous Succession Cause  
E011 of 2023) [2025] KEHC 1833 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1833 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
MISCELLANEOUS SUCCESSION CAUSE E011 OF 2023**

**EM MURIITHI, J  
FEBRUARY 20, 2025**

**BETWEEN**

**ESTHER WAMBUI MARI ..... 1<sup>ST</sup> APPLICANT  
ELIZABETH WANJA MUCHIRA ..... 2<sup>ND</sup> APPLICANT  
ANTONY NDEGWA NJERU ..... 3<sup>RD</sup> APPLICANT  
JOSEPH NYAGA NJERU ..... 4<sup>TH</sup> APPLICANT**

**AND**

**MAGDALINA NYAMBURA MBUTHIA ..... RESPONDENT**

**RULING**

1. The applicants filed a Notice of Motion dated 7<sup>th</sup> December 2023 seeking the following orders:
  1. That this honourable court be pleased to grant the applicants leave to appeal against the Ruling of Kerugoya CM'S Succession Cause No.15 of 2005.
  2. That the costs of this application be provided for.
2. The application based on the supporting affidavit of the applicants herein sworn on 7<sup>th</sup> December, 2023. The applicants case is that they wish to appeal against the ruling in in Kerugoya CM'S Succession Cause No.15 of 2005 delivered on 1<sup>st</sup> November, 2023, but the permitted time has lapsed. The delay in filing the appeal was not intentional but was caused by the fact that during delivery of the Ruling, they would not clearly hear the what the Magistrate was saying. That after knowing the outcome of the Ruling, they became dissatisfied and decided to appeal against the same. Further, they have applied for copies of the proceedings and the ruling.
3. The respondent filed a Relying Affidavit dated 14<sup>th</sup> December, 2023 setting out her reply that the grant was confirmed in Kerugoya CM's Succession Cause No.15 of 2005 on 28<sup>th</sup> March 2008; that she is the



administratrix of the deceased's estate in that matter; and that since the time the grant was issued, the Applicants have never appealed against the mode of distribution or reviewed the said ruling.

4. She said that she filed summons dated 8.6.2023 for the Executive officer to sign documents on their behalf and for an order of dispensing with the production of the original title deed so as to pave way for execution of the confirmed grant which had been issued on 3.4.2008 and the court delivered its ruling on 14/8/2023 where it allowed her application; that later on 17.8.2023, the Applicants filed an application seeking to stay orders of 14.8.2023 which application was filed on 21.8.2023; That their application dated 17.8.2023 was dismissed by a ruling delivered on 1/11/2023; and that the Applicants have not given valid reasons as to why they delayed in lodging an appeal. Further, the Applicants have not attached a draft memorandum of appeal to show that their intended appeal has merits. Finally, she urged that execution has commenced and she has since registered the grant.
5. The applicants and the Respondent did not file any submissions.
6. The Issue for determination is whether leave to appeal out of time should be allowed.

### **Analysis**

7. The Application before this Honourable Court is seeking leave to allow the Applicants to file an appeal out of time. The main issue which arises for determination in the instant application is whether the applicants deserve to be granted leave to file their appeal out of time. Under Section 79G of the [Civil Procedure Act](#) CAP 21 the law on filing of appeals to the High Court is as hereunder:

“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.”

8. In *Asma Ali Mohamed v Fatime Mwinyi Juma* CA75/2014 the court observed that “When a party wishes to obtain leave to file an appeal out of time, such a party must file the appeal and as provided in the proviso 79G, then must seek leave to admit that appeal out of time.”
9. However, the applicant has not attached a draft memorandum of appeal for the court to peruse. It is therefore clear that the Application is not properly before court and the Honourable Court is invited to take into consideration Order 19 Rule 7 thereof, in any case.

Whether the reason given by the Applicants is sufficient for the court to admit the appeal being that the applicant applied for an appeal out of time.

10. The applicants deposed that the delay in filing the appeal was not intentional but was caused by the fact that during delivery of the Ruling, they would not clearly hear the what the Magistrate was saying. After establishing the outcome of the Ruling, they became dissatisfied and decided to appeal against the same out of time.



11. The general principles for consideration on an application for extension of time were considered in *Muringa Company Limited vs Archdiocese of Nairobi Registered Trustees*, Civil Application 190 of 2019 where it was held that –

“some of the considerations which are by no means exhaustive, in an application for extension of time include the length of the delay involved, reasons for the delay, possible prejudice, if any, that each party stands to suffer, conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interests of a party who has a constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate the dispute against the need to ensure timely resolution of disputes: the public interest issues implicated in the appeal or intended appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.”

### **Whether the delay was inordinate**

12. In the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, the Court (J. Mohamed, JA) stated:

“The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

13. The trial court delivered its ruling on 1<sup>st</sup> November, 2023. The applicant filed this application on 7<sup>th</sup> December, 2023. The respondent deposed that the applicants have not given valid reasons for the delay in lodging the appeal. It has taken the applicants a month and 7 days between the date of judgment delivered in the trial court and the time when they filed the instant application. There is no unreasonable delay.

The degree of prejudice to the respondent if the application is granted.

14. I respectfully agree with the decision of the Court in *James Wangalwa & another Vagnes Naliaka Cheseto* [2012] eKLR:

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. The applicant deposed that she would suffer prejudice. However, the same has not been elaborated. On the contrary, if leave to appeal out of time is allowed the respondent will be greatly prejudiced, by reopening the matter which was closed upon determination by the confirmation of grant on 3<sup>rd</sup> April 2008, some fifteen (15) years before the applicant's application herein. If the alleged forgery for the investigation of which stay of execution was sought in the application leading to the ruling subject of the intended appeal is established, the Court is not powerless to deal with the culprits in accordance with the law, including setting aside any transmissions to the guilty parties. At present, there is nothing before the Court to persuade me to exercise discretion in favour of the applicants.



16. There is merit in the Respondent's submission that the application be dismissed as its main aim is to delay justice as the execution of the grant has commenced upon her application of 8/6/2023 to dispense with production of original title deed to allow execution of the confirmed grant.

**Arguable appeal**

17. The applicant has not attached a draft memorandum of appeal for the court to peruse. The Court is not able to determine that the applicant has serious question(s) to be put before the appellate court to justify the order sought.

**Orders**

18. Accordingly, for the reasons set out above, the application dated 7/12/2023 is be dismissed.
19. However, being a family succession cause, the court in discretion does not make any order as to costs.  
Order accordingly.

**DATED AND DELIVERED THIS 20<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Parties in person.

