



**In re Estate of Peninah Njeri Muthiora (Deceased) (Succession Cause  
588 of 1996) [2025] KEHC 6961 (KLR) (Family) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6961 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
SUCCESSION CAUSE 588 OF 1996  
SN RIECHI, J  
MAY 22, 2025  
IN THE MATTER OF THE ESTATE OF PENINAH NJERI MUTHIORA (DECEASED)**

**BETWEEN**

**JANE WANJIKU MUCHENE ..... APPLICANT**

**AND**

**ELIZABETH WANJIKU MUTHIORA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of two applications. The first application is dated 30<sup>th</sup> March 2022 filed by Objector Jane Wanjiku Muchene and the second application is dated 28<sup>th</sup> February 2023 filed by the Administrator Elizabeth Wanjiku Muthiora.
2. This matter relates to the estate of Peninah Njeri Muthiora (Deceased hereinafter) who died intestate on 15<sup>th</sup> June 1994. From the evidence on record the only asset the deceased left behind was one parcel of land known as L.R. Dagoretti/Riruta/1837 (Suit land hereinafter). The deceased also left behind several beneficiaries.
3. Following demise of the Deceased, Dishon Muchene Muthiora (now Deceased) and Samuel Kahara Gage (now Deceased) who were children of deceased filed a petition for a grant of letters of administration to the deceased's estate. The same was issued to Dishon Muchene Muthiora and Samuel Kahara Gage on 23.3.1999 as the administrators of the estate.
4. On the 16<sup>th</sup> November, 1999 a summons to confirm the grant dated 13<sup>th</sup> October 1999 was filed. The court issued a certificate of confirmation of grant to Dishon Muchene Muthiora and Samuel Kahara Gage on 14.7.2003 in which the honourable court allocated the suit property to the Administrator Elizabeth Wanjiku Muthiora absolutely. While the estate was pending distribution, several applications



were filed by some of the beneficiaries to revoke the said grant but the same were dismissed. None of the parties filed an appeal at this stage.

5. Before the conclusion of the administration process the appointed administrators Dishon Muchene Muthiora(Deceased) and Samuel Kahara Gage(Deceased) passed away. Following the demise of Dishon Muchene Muthiora(Deceased) and Samuel Kahara Gage(Deceased) one Elizabeth Wanjiku Muthiora who is a daughter of the deceased filed application for the revocation of grant through a summons dated 2.3.2021 on grounds that the Grant had become useless on account of demise of the two administrators.
6. Upon hearing of the summons on 1<sup>st</sup> October 2021 the honorable court through a ruling delivered by Justice Thande revoked the grant issued to Dishon Muchene Muthiora(Deceased) and Samuel Kahara Gage(Deceased) and afresh grant of letters of administration was issued to one Elizabeth Wanjiku Muthiora through letters of administration dated 22<sup>nd</sup> October 2022. The Grant was confirmed and the new administrator Elizabeth Wanjiku Muthiora was issued with a Certificate of Confirmation of Grant dated 22<sup>nd</sup> October,2021 in which land parcel known as Title No.Dagoretti/1837 was allocated to Elizabeth Wanjiku Muthiora absolutely.
7. Consequently, the administrator filed an exparte application dated 5<sup>th</sup> January 2021 seeking orders that;
  - i. The Honourable Court be pleased to order the cancellation of title L.R. Dagoretti/Riruta/1837 and revert the title to the name of the deceased to enable the Administrator to transmit ownership in accordance with the orders of the court given on 14/7/2003.
  - ii. The Honourable Court be pleased to order the Land Registrar Nairobi to register the Administratrix Elizabeth Wanjiku Muthiora Alias Elizabeth Wanjiku Njuguna as the proprietor of the land parcel L.R. Dagoretti/Riruta/1837 consequent to the orders of the court given on 14/7/2003.
  - iii. The Honourable Court be pleased to give any other orders that the court may deem just and expedient to have the Administratrix registered as the proprietor of L.R. Dagoretti/Riruta/1837.
8. The application was premised on the grounds that Dishon Muchene Muthiora, a brother of the Applicant, who was the Administrator in 1997 irregularly caused the said parcel of land to be registered in both his name and that of the Applicant. The applicant deposed that on 9/09/1997 Dishon Muchene Muthiora irregularly caused a title of the parcel to be issued to both himself and the Applicant. The applicant deposed further that on 14/07/2003 the Honourable Justice H.P. Waweru delivered a ruling in which the learned Judge found only the Applicant was entitled to inherit the whole parcel exclusively, and there was no appeal. The applicant stated that after the ruling of the Honourable Justice M. Thande on 01/10/2021, she has since been unable to register her ownership of the parcel of land because records at the Nairobi Lands Registry show the land belongs Dishon Muchene Muthiora and the Applicant and not in the name of deceased. The applicant stated the Nairobi Land Registry has stated they cannot cancel the irregular title without an order of the Honourable Court to revert the title to the name of the deceased. The application was also supported by the applicant's affidavit sworn on even date in which she reiterated the averment in the applicant's grounds in support.
9. Following hearing of the application, the honourable court delivered a ruling on 29<sup>th</sup> March,2022 by Honourable Justice Thande in which the following orders were issued;



1. That following the revocation of grant issued to Dishon Muchene Muthiora and Samuel Kahara Gage, all transactions done in respect of title No Dagoretti/Riruta/1837 are void and titles issued are hereby cancelled.
  2. That the said titles Dagoretti/Riruta /1837 hereby reverts to the estate of the deceased. That the applicant Elizabeth Wanjiku Muthiora is the sole beneficiary of Title Dagoretti/Riruta/1837.
10. Following the above ex parte orders been issued on 29<sup>th</sup> March 2022, Jane Wanjiku Muchene(Objector hereinafter) being an Administrator of the estate of her late husband late Dishon Muchene Muthiora filed the first application dated 30<sup>th</sup> March 2022. The application is filed pursuant to Article 48 of the Constitution of Kenya,Section 1,1A, 3 and 3A of the Civil Procedure Act,2010,the Rules of Natural Justice and all other enabling provisions of the law. The applicant in the application is seeking the following orders;
- i. Spent
  - ii. That pending the hearing and determination of this Application,this Honourable Court be pleased to issue Stay of Execution of the Ex Parte Orders issued on 29<sup>th</sup> March,2022 allowing application dated 5<sup>th</sup> January,2022 as prayed.
  - iii. That this Honourable Court be pleased to set aside and/or vacate the orders issued on 29<sup>th</sup> March,2022 allowing the application dated 5<sup>th</sup> January 2022 as prayed.
  - iv. That this Honourable Court be pleased to grant leave to the objector to appeal the decision of the Hon. Justice H.P Waweru entered on 14<sup>th</sup> July,2003 out of time.
  - v. That the costs of this Application be in the cause.
11. The application is premised on the following grounds that;
- i. The Objector's Advocate on record has been critically ill and admitted at the Meridian Equator Hospital and was scheduled for an operation on/about 2<sup>nd</sup> April, 2022. The said advocate has been ailing for quite a while now. His failing health has taken a toll on him and his ability to execute his duties optimally as an advocate.
  - ii. Due to his failing health, the Objector's advocate was unable to respond to the Petitioner's Application dated 5<sup>th</sup> January 2022 in good time. He was intending on explaining his predicament to the court and seeking more time within which to file his responses but as fate would have it, he was already admitted on the said fateful day when this matter came up for Hearing on Tuesday, 29<sup>th</sup> March, 2022.
  - iii. On the said Tuesday, 29<sup>th</sup> March, 2022, there was another counsel logged in with instructions to hold brief for the Objector's advocate but he had technical challenge could not log in time to address the court. This matter was listed as No. I on the cause list. Little could be done to salvage the situation at that moment since they only managed log in way after the exparte Orders had been issued.
  - iv. The Objectors had every intention to file their responses in opposition to the said Application. They had given their instructions as much but the failing health of their said advocate who has personal conduct of the matter and best placed to handle it stalled the preparation and filing of the said responses.



- v. The Objectors have a plausible case which is only challenged by procedural technicalities. They are intending on challenging the decision of the Hon. Justice H.P Waweru at the Court of Appeal and they have now moved court accordingly, seeking leave to do so.
12. The application is supported by an affidavit sworn on even date by Advocate Orlando M. Briton who briefly deponed that he has conduct over this matter. Mr.Orlando deponed he was hospitalized at the Meridian Equator Hospital undergoing treatment for medical condition but which worsened in the last couple of months.He deponed further that his failing health took a toll on him and inhibited his ability to execute his duties optimally as an advocate.
  13. Mr.Orlando in support relied on attached and marked BO- I a copy of his Medical Record. Mr. Orlando stated that due to his failing health, he was unable to respond to the Petitioner's Application dated 5<sup>th</sup> January 2022 in good time. Mr.Orlando stated the Objectors had every intent to file their response in opposition to the said Petitioner's Application. They had given their instructions as much but his failing health inhibited him. He stated he had made arrangements for further assistance in preparing and filing the responses. This was to be addressed in court on the fateful day unfortunately there was a technical hitch as earlier explained. Mr.Orlando stated that the Objectors raise very serious issues of concern worth this courts attention and consideration by the Court of Appeal. They have a plausible case which is only challenged by procedural technicalities. Mr.Orlando stated the objector stand to suffer great loss unless this Honourable Court intervenes and grants the Orders as sought herein.
  14. The application is further supported by the an affidavit sworn by Jane Wanjiku Muchene (Objector) on 30<sup>th</sup> March 2022. The objector stated that there was misrepresentation of facts, conflict of interest and fraudulent dealings presented to court in the proceedings leading up to the decision by the said Hon. Justice H.P Waweru on 14<sup>th</sup> July, 2003. The applicant referred to attached and marked JWM-1 a copy of the Ruling.
  15. The objector averred that they have solid reasons worth challenging the said decision on Appeal. The objector referred to attached and marked JWM- 2 a copy of the Draft Memorandum of Appeal.
  16. In response the application was opposed by the respondent(Administrator) who filed a replying affidavit sworn on 18<sup>th</sup> August 2022 by Elizabeth Wanjiku Muthiora. The respondent briefly deposed that the applicant only way to challenge the decision was by way of appeal but has never sought leave to do so. The respondent deposed that the leave to appeal out of time against the 14.7.2003 decision of Hon.Justice Waweru has not been supported in the grounds in support of the motion.
  17. The respondent also filed an application dated 28<sup>th</sup> February 2023 seeking orders that the application dated 30<sup>th</sup> March,2022 be dismissed for want of prosecution. The application is premised on the grounds that the advocates have failed to prosecute the application and it would seem the intention was merely to delay implementation of the orders already given by the Honourable court.
  18. The application is further supported by an affidavit sworn by the respondent on even date. The respondent briefly deponed that the objector, through his lawyers Orlando & Co. Advocates filed an application dated 30<sup>th</sup> march, 2022 seeking to set aside orders made by the Hon. Thande on 29<sup>th</sup> March, 2023. The respondent deponed the objector has not taken any action towards prosecution of the motion.
  19. The respondent stated that one of the prayers in the application dated 30<sup>th</sup> March, 2022 is for leave to appeal the ruling of Hon. Justice Waweru delivered on 14/7/2003. The respondent urgent this court to disallow the objector application dated 30<sup>th</sup> March 2022.



20. By consent of parties, this court directed the application dated 30.3.2022 and application dated 28.2.2023 be determined together. The applications were canvassed by way of written submission.
21. The objector filed written submissions dated 8<sup>th</sup> January 2024 through the firm of MAK and Partners Advocates and the Administrator filed written submissions dated 27<sup>th</sup> January 2025 through the firm of E.N. Mugu & Co. Advocates. I have carefully analyzed and considered the written submissions and authorities relied on by the parties.
22. The objector submitted on whether applicant's mistake was inadvertent and excusable. The objector submitted that her Advocate was unable to respond to the Petitioner's Application dated 5<sup>th</sup> January, 2022 in good time due to his failing health as explained in the supporting affidavit.
23. The objector submitted that her former Advocate intended to explain predicament to court on 29.3.2022 when the matter came up for hearing. It was objector's submission that there was another counsel logged in virtually with instructions to hold brief for objector's advocate but he had technical channel.
24. The objector submitted that upon realizing the said error the advocate promptly filed this instant application to set aside the ex parte proceedings. The objector submitted the mistake was inadvertent and excusable. The objector relied on the decision in Commissioner of Income Tax v Kencell Communications Limited [2013] Eklr at Page 6.
25. The objector's submitted on whether the respondent is likely to suffer prejudice. She submitted that the respondent will not suffer as the application has been brought without delay and in case of prejudice the respondent can be compensated by way of costs.
26. The objector submitted on whether objector has an arguable appeal. The objector submitted her draft Memorandum on raises 16 grounds that disclose arguable appeal. The objector submitted that the delay in filing of the appeal has been occasioned by several applications filed in court.
27. The objector urged this court to grant the orders sought and dismiss the respondent's application seeking to dismiss the application for want of prosecution.
28. The respondent submitted that the reasons given for delay in prosecuting the application dated 30<sup>th</sup> March, 2022 that Mr. Orlando was unwell are inadequate. The respondent submitted that the objector has not demonstrated his intention to appeal on the judgement.
29. From the applications, affidavits and the submissions filed by the respective parties the main issues for determination are as follows;
  - i. Whether or not this court should allow application dated 28.2.2023 for seeking dismissal of objector's application dated 30.3.2022 for failure to prosecute the application by the objector.
  - ii. Whether or not this court should set aside or vacate orders issued on 29<sup>th</sup> March, 2022 allowing application dated 5<sup>th</sup> January, 2022 as prayed.
  - iii. Whether or not this court grant leave to the objector to file appeal out of time
  - iv. Whether or not this court should Stay of Execution of the Ex Parte Orders issued on 29<sup>th</sup> March, 2022 allowing application dated 5<sup>th</sup> January, 2022 as prayed.
30. On the first issue the applicant/administrator filed an application dated 28.2.2023 is seeking orders that this court dismiss application dated 30<sup>th</sup> March 2022 for want of prosecution. The administrator averred that the objector's advocates have failed to prosecute the application and it would seem the intention was merely to delay implementation of the orders already given by the Honourable court.



31. From the record the objector filed application dated 30<sup>th</sup> March 2022 after orders were issued on 29<sup>th</sup> March 2022 seeking orders to stay orders issued on 29<sup>th</sup> March 2022, secondly that this court do set aside or vacate orders issued on 29<sup>th</sup> March 2022 and leave to appeal decision of Hon. Justice H.P Waweru out of time.
32. After filing the application, the objector did not proceed to prosecute the application. The administrator then filed an application dated 28<sup>th</sup> February 2023 to have the application dated 30<sup>th</sup> March 2022 for review be dismissed for want of prosecution.
33. The *Law of Succession Act* at section 47 provides for jurisdiction of High Court in respect of matters falling under that Act as follows:
- “The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:
34. Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.
35. Rule 73 of the *Probate and Administration Rules* clothes this court with powers to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court. The Rule provides as follows:
- “Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
36. Article 159 of the *Constitution of Kenya 2010* enjoins courts to administer substantive justice, which requires them to overlook procedural technicalities, which may hinder the path of resolving the core dispute between the parties before it. The Court is alive to its mandate to strive towards substantive justice. The Court also finds that no prejudice will be suffered by the Respondent if the application dated 30.3.2023 is heard by this court. Consequently, the Court exercises its discretion in favour of the Applicant/objector and grant her opportunity to prosecute her application dated 30.3.2023.
37. On the 2<sup>nd</sup> issue whether or not this court should grant an order to set aside or vacate the orders issued on 29<sup>th</sup> March, 2022 allowing application dated 5<sup>th</sup> January, 2022 as prayed. From the record the impugned orders issued on 29<sup>th</sup> March, 2022 by Honourable Justice Thande orders as follows;
- “ 1. That following the revocation of grant issued to Dishon Muchene Muthiora and Samuel Kahara Gage, all transactions done in respect of title No Dagoretti/Riruta/1837 are void and titles issued are hereby cancelled.
2. That the said titles Dagoretti/Riruta /1837 hereby reverts to the estate of the deceased. That the applicant Elizabeth Wanjiku Muthiora is the sole beneficiary of Title Dagoretti/Riruta/1837.”
38. The objector is now seeking to set aside or vacate the above orders issued on 29<sup>th</sup> March, 2022 allowing application dated 5<sup>th</sup> January, 2022 as prayed.
39. From court record the administrator herein filed an application dated 5<sup>th</sup> January 2022 seeking orders that this court order the cancellation of title L.R. Dagoretti/Riruta/1837 and revert the title to the name of the deceased to enable the Administrator to transmit ownership in accordance with the orders



- of the court given on 14/7/2003. Secondly, that this court order the Land Registrar Nairobi to register the Administratrix Elizabeth Wanjiku Muthiora Alias Elizabeth Wanjiku Njuguna as the proprietor of the land parcel L.R. Dagoretti/Riruta/1837 consequent to the orders of the court given on 14/7/2003.
40. From the record the objector herein did not file a response to the application dated 5<sup>th</sup> January 2022 through her Advocates on record. Consequently, the court proceed to hear the application and delivered a ruling on 29<sup>th</sup> March,2022. The objector has submitted on failure to respond to the 5<sup>th</sup> January 2022 and attend court on hearing date.
  41. The objector submitted that her Advocate was unable to respond to the Petitioner's Application dated 5<sup>th</sup> January,2022 in good time due to his failing health as explained in the supporting affidavit. The objector submitted that her former Advocate intended to explain predicament to court on 29.3.2022 when the matter came up for hearing. It was objector's submission that there was another counsel logged in virtually with instructions to hold brief for objector's advocate but he had technical channel.
  42. Also the objector's Advocate Mr. Orlando M. Briton who has conduct over this matter swore an affidavit . Mr.Orlando deponed he was hospitalized at the Meridian Equator Hospital undergoing treatment for medical condition but which worsened in the last couple of months .He deponed further that his failing health took a toll on him and inhibited his ability to execute his duties optimally as an advocate. Mr.Orlando in support relied on attached and marked BO- I a copy of his Medical Record. Mr. Orlando stated that due to his failing health, he was unable to respond to the Petitioner's Application dated 5<sup>th</sup> January 2022 in good time. Mr. Orlando stated objector had given their instructions as much but his failing health inhibited him. He stated he had made arrangements for further assistance in preparing and filing the responses. This was to be addressed in court on the fateful day unfortunately there was a technical hitch. The objector also submitted that upon realizing the said error the advocate promptly filed this instant application to set aside the ex parte proceedings.
  43. The Court of Appeal for *East Africa in Mbogo v. Shab* (1968) EA 93 approved the test for exercise of discretion to set aside a judgment or order made ex parte propounded by Harris J. in *Kimani v. McConnell* (1966) EA 547, 555G that –

“... in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment, if necessary, upon terms imposed.”
  44. The jurisdiction of the court in setting aside is granted to avoid injustice and to correct errors arising out of accidents, inadvertence or excusable mistake.
  45. I have perused the court record and I note this order were issued to protect the estate of the deceased. It is my finding that in the event orders sought is granted, this court will be overruling the orders of this court issued in respect of the suit property. In that regard I find that the balance of convenience tilts in favour of the respondent in that the order which commends itself to me is that the order of setting aside or vacating orders issued on 29<sup>th</sup> March,2022 ought to be declined.
  46. On the third issue whether this court grant leave to the objector to file appeal out of time. The objector herein is seeking leave to appeal out of time. From court record a judgement in this matter was entered by Hon. Justice H.P Waweru on 14<sup>th</sup> July, 2003. However, no appeal was filed in respect of the said decision. The parties filed several applications in the matter but no appeal was filed in respect of the decision made on 14<sup>th</sup> July,2003. The objector is now seeking to appeal the said decision out of time.
  47. Extension of time to file an appeal is a matter of exercise of judicial discretion.Article 50 of the [Constitution](#) of Kenya, 2010 provides that. "every person has the right to have any dispute that can



be resolved by the application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.”

48. The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights... it would seem that the main purpose of litigation namely the hearing and determination of disputes, should be fostered rather than hindered. See the case of *Branco Arabe Espanol Vs Bank of Uganda* (1999) 2 EA 22 (SCU). The same sentiments were echoed in the case of *Bamanya Vs Zaver* (2002) 2EA 329 (CAU) where the Judge observed: -

“The other principle governing the application .... is that administration of justice requires that all substances of disputes should be heard and decided on merits and for the aforesaid reasons, errors or faults of the counsel should not necessary debar a litigant from enforcing his rights.”

49. The court went on to say, the right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. The objector in this case contend he has an arguable appeal with regard to the subject property
50. I allow him to file the appeal out of time as disallowing the same would go against the spirit of the overriding objectives and also the provisions of Article 159 of the Constitution. As for the prejudice which the respondent stands to suffer should leave be granted for the applicant to file an appeal out of time. I did not come across any credible evidence to indicate the prejudice that would befall the administrator cannot be compensated by way of costs. It should be noted that the right to be heard is provided for in our constitution. The objector having expressed her intentions to be heard on appeal, it is paramount that she be granted the said opportunity. I have perused the memorandum of appeal and it is my considered view that an opportunity should be availed to her to ventilate her issues raised in the draft appeal.
51. On 4<sup>th</sup> issue whether this court should grant an order of stay of execution pending appeal.
52. It is trite law that for application seeking stay pending appeal the Applicant must meet the statutory requirements set out in Order 42 Rule 6 which states: - (2) No order for stay of execution shall be made under sub rule (1) unless-
- 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.
53. With regard to substantial loss, the applicant has submitted that she will suffer substantial loss if the ordered-on 29<sup>th</sup> March 2022 are executed. I note that the order issued were for cancellation of title deed to revert the property back to the deceased name. It is my considered view that the applicant failed to prove that if stay was not granted, she would suffer substantial loss, the order issued on 29<sup>th</sup> March 2022 reverts property back to the name of the deceased, the property will be secure until the court decides on the appeal.
54. In conclusion I grant the following orders;
1. The application dated 28<sup>th</sup> February 2023 is hereby dismissed.
  2. The prayer seeking to set aside and or vacate orders issued on 29<sup>th</sup> March 2022 is hereby decline.



3. The order for stay of execution of orders issued on 29<sup>th</sup> March,2022 is hereby declined.
4. The Objector is granted leave to file an appeal out of time. The applicant to file appeal within 30 days from today.
5. Each party to bear own costs.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF MAY 2025.**

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**S. N. RIECHI**

**JUDGE**

