Ntemel v Nayioma & another (Succession Cause E003 of 2021)
[2025] KEHC 5846 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5846 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

SUCCESSION CAUSE E003 OF 2021

CM KARIUKI, J

MAY 8, 2025

BETWEEN

PARAKUO NAIYOMA NTEMEL ..... APPLICANT

AND

NAMARISHO NAYIOMA ..... 1ST RESPONDENT

KINANGARE NAYIOMA ..... 2ND RESPONDENT

RULING

1. The Applicant vide notice of motion dated 21/01/2025, sought orders.
    a. Spent.
    b. That the honourable court do extend the time for filing notice of intention to appeal to the court of appeal from the high court judgment dated 4th November 2024.
    c. That cost of the application be in the cause.
2. The application is premised on section 7 of the *Appellate Jurisdiction Act*, sections 1A, 1B, and 3A of the *Civil Procedure Act*.
3. The application is based on the grounds set out on the face of the application and the affidavit in support of the amended application sworn by Parakuo Naiyoma Ntemelon 21/01/2025.

The background.

4. The judgment was delivered on 04/11/2024.
5. The advocate who was on record in the succession informed the applicant about 10 days after the delivery of the judgment.

6. At the time the applicant was informed of the delivery of the judgment, she was sick and could not comprehend the orders which were issued in the said judgment.

7. Due to the applicant's sickness, she was unable to give instructions to her then advocate to file a notice of appeal and the appeal to the court of appeal in respect to her dissatisfaction with the judgment of the honourable court.

8. The time for giving notice of intention to appeal and filing the appeal to the court of appeal had lapsed.

9. The applicant requests court to extend the time for filing the notice of intention to appeal to the Court of Appeal and filing the appeal.

The response.

10. The respondents opposed the application vide replying affidavit sworn by Namarisho Nayioma And Kinangare Nayiomaon 30/01/2025.

11. The respondents contend that judgment in this matter was entered on 04/11/2024 in the presence of all the respective parties' advocates on record.

12. The respondents contend that the applicant's advocates, the firm M/S R. MIRUKA &Company advocates are strangers in this case as they have not sought leave from this court to come on record for the applicant in place of the applicant's former counsels nor have they sought consent from the former advocates to represent the applicant herein and as such this application is incompetent and bad in law.

13. The respondents contend that the notice of appointment filed on 21/01/2025 is irregular and should be struck off.

14. Since 04/11/2024, when judgment was delivered, 2 months and 17 days have already elapsed when the applicant herein now intends to seek for enlargement of time for filing a notice of intention to appeal to the Court of Appeal.

15. The applicant's reason for her failure to file a notice of intention to appeal to the court of appeal on time is unsatisfactory to the required standards as she claims to have been sick, and the only evidence on record shows that she was unwell on 15/01/2025 when she visited Trans Mara West Sub-County Hospital.

16. The applicant's assertions that she was sick and admitted on 11/11/2024 are false, as these claims have not been corroborated by any evidence from Magita Transmara Community Hospital, as Trans Mara West Sub-County Hospital could not possibly ascertain this claim, as indicated in their medical notes of 15/01/2025.

17. The applicant's assertions that her former advocates informed her after about 10 days of the delivery of the judgment on 04/11/2024 are total lies as she was fully aware of the set judgment date as they all left their homes on the said date and headed to Kilgoris town to their respective advocates offices in full anticipation of the case outcome.

18. The respondents contend this case belongs to the applicant and not her advocates.

19. The respondents contend that this application is an afterthought.

20. The respondents contend that the applicant has no chance of any success in the appeal.

21. The respondents contend that the applicant has not furnished this court with any draft notice of appeal to persuade this court she has any prima facie case with high chance of success. Therefore, this court has nothing to consider.

Further affidavit

22. The applicant filed a further affidavit sworn by Parakuo Naiyoma Ntemel on 26/02/2025.

23. The applicant contends that the applicant herein could not file a notice to appeal and a memorandum of appeal before leave is granted by this court.

24. The applicant contends that the whole process was manipulative because they were taken through the process well, hence the distribution was done unfairly without the consent of others.

Directions of the court.

25. The application was canvassed by way of written submissions.

The Applicant's Submissions

26. The applicant submitted that the *Law of Succession Act* does not provide specific timelines for the filing of appeals. The applicant relied on Kamlesh Mansukhalal Damki Pattni V Director of Public Prosecution & 3 Others [2015] eKLR, and article 48, 50(1) of *the Constitution*.

27. The applicant submitted that once a judgment is entered, an appeal against the judgment cannot be said to be a continuation of the lower court proceedings, but the commencement of new proceedings in another court. As such, parties are free to retain or engage new counsel without the requirement for notice of change or leave from the previous advocate. The applicant relied on Thuo v. Thuo & Another (Environment and Land Appeal E016 of 20211t2023l KEELC 17255 (KLR) (4 May 20231(Judgment), Stanley Mugambi v Anthony Mugambi [20051 eKLR

Respondents' submissions.

28. The respondents submitted that the firm of R. Miruka & Company advocates is not properly on record for the applicant, as they did not obtain leave of the court after judgment was entered. The respondents relied on Order 9, Rule 9 and 10 of the Civil Procedure Rules, Violet Wanjiru Kanyiri v Kuku Foods Limited [2017], Elrs Cause No. 2344 Of 2017, John Langat v Kipkemoi Terer & 2 Others, Civil Appeal. No. 21 Of 2023, S.K. Tarwadi v Veronica Muehlemanna [2019] eKLR, Misc. Civil Application No. 6 Of 2018.

29. The respondents submitted that the applicant has not supported the claim of being unwell with sufficient medical documents. The case belongs to the appellant and not her former advocates; thus, it is her full responsibility to be aware of her case. Finally, the applicant has not provided a draft copy of the notice of appeal to persuade the court that she has any prima facie case with high chances of success. The respondents relied on section 7 of the *Appellate Jurisdiction Act*, Nicholas Kiptoo Arap Korir Salat V Independent Electoral & Boundaries Commission & 7 others sc (app) no. 16 of 2014; [2014] eKLR, Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR

Analysis And Determination.

30. This court considered the application, the supporting affidavit, the replying affidavit, the further affidavit, and the respective parties' submissions.

Issues

31. The main issues for determination: -Whether the firm of R. Miruka & Co advocates are properly on record.

i. Whether the Applicant should be granted leave to appeal out of time.

32. The applicant herein has filed this application through her new advocates, M/S R. Miruka & Company advocates who filed a notice of appointment dated 21/01/2025.

33. Order 9 Rule 5 of the Civil Procedure Rules states as follows:

> " A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

34. Order 9 Rule 9 of the Civil Procedure Rules states that when there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by the court

    (a) upon an application with notice to all the parties; or

    (b) Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person, as the case may be.

35. In the present Application, it is clear that the firm of R. Miruka & Company advocates came on record after Judgment had been delivered. The said firm did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules by either filing a consent between themselves and the firm of Netaya Pion& Co. Advocates, or they could as well sought leave to come on record from this court. This court finds that the firm of R. Miruka & Company advocates is not properly on record, as they did not follow the right procedure as required by law.

ii. Whether the Applicant should be granted leave to appeal out of time.

36. The governing provision for leave to appeal out of time is

37. Section 79G, which states as follows: -

> " 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 good and Sufficient cause for not filing the appeal in time.

38. The court has a wide discretion to grant leave to appeal out of time on certain conditions.

39. Order 50 Rule 6 of the Civil Procedure Rules provides as follows:

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such an application, unless the court orders otherwise.

40. in Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi, Civil Application No. NAI 255 of 1997 (unreported), it was held that:

> "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 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."

In the case of Andrew Kiplagat Chemaringo –v- Paul Kipkorir Kibet [2018] eKLR, the court held that: -

> "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 the 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 favorably exercisable."

41. The Supreme Court stated the principles for extension of time in the case of Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others, Sup. Ct Application No. 16 of 2014 as follows.

> "In an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. The underlying principles that a Court should consider in exercise of the discretion to extend time are:
>
> i. 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.
>
> ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
>
> iii. The Court's exercise of its discretion to extend time, is a consideration to be made on a case-to-case basis
>
> iv. Where there is a sensible reason for the delay, the delay should be explained to the satisfaction of the Court.
>
> v. Whether there will be any prejudice suffered by the respondents if the extension is granted.
>
> vi. Whether the application has been brought without undue delay; and

vii. Whether in certain cases, like election petitions, public interest should be considered for extending time.

42. The judgment sought to be appealed against was delivered on 04/11/2024. The application was filed on 22/01/2025. The application was filed about 75 days after delivery of the judgment.

43. The judgment was delivered virtually in the presence of both counsels for the parties herein.

44. The applicant claims the reason for the delay was caused by her then advocates, who informed her 10 days after delivery of the judgment. The applicant has not tendered any evidence to support this assertion.

45. The applicant also claims that she was taken ill and could not comprehend the judgment on record. The applicant has relied on a medical treatment note from Trans Mara West Sub-County Hospital. A perusal of the said treatment note can be deduced that the applicant visited the said hospital on 15/01/2025. The treatment notes do not support the applicant's assertion that she was admitted to the said hospital.

46. The court has to exercise discretionary powers while granting orders for the enlargement of time. Based on the above case laws, this court finds that the applicant has not explained the reasons for the delay to its satisfaction and that its advocates are not properly on record as they failed to follow the laid down procedures.

i. In the upshot, this application is hereby dismissed with costs.

ii. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH TEAMS APPLICATION, THIS 8TH DAY OF MAY,2025

CHARLES KARIUKI

JUDGE

In The Presence Of:

Court Assistant: Mr.nyangaresi