



**In re Estate of Kibue Njau (Deceased) (Succession Cause 1175 of 2006)
[2025] KEHC 13076 (KLR) (Family) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13076 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1175 OF 2006
PM NYAUNDI, J
SEPTEMBER 19, 2025
IN THE MATTER OF THE ESTATE OF KIBUE NJAU - (DECEASED)**

BETWEEN

ANNAH WANJIKU GITAU APPLICANT

AND

FRANCIS NJAU RESPONDENT

RULING

Background

1. By Application dated 22nd August 2023, presented under Article 159 of the *Constitution* of Kenya, Section 3, 3A, & 3B of the *Appellate Jurisdiction Act*, Rule 73 of the Probate and Administration Rules, the Applicant herein, ANNAH WANJIKU seeks extension of time to lodge appeal against Judgment delivered herein on 21st September 2017.
2. She contends that she was not aware of this decision. That despite several inquiries to Counsel previously on record for the original Objector, her mother (who died in 2020) she was not appropriately advised. She presents this Petition in her capacity as a child and personal representative of the Objector.
3. She states she only came to learn of the judgment in March 2023 and she followed up with a firm of advocates, Kiangati & Kamotho Advocates who informed her of the progress in the matter, including that the previous firm of advocates of record had requested typed proceedings and paid for them. It is submitted that the delay in filing the appeal was occasioned by the mistake of the Counsel previously on record and that mistake should not be visited on the applicant. It is submitted that the Appellant has an arguable appeal and it is in the interests of Justice that she be granted leave to appeal out of time.



4. The applicant is apprehensive that she and other members of the family may be evicted from their ancestral home, if the impugned judgement is executed.
5. She avers that the Respondent will not suffer any prejudice if the orders sought are granted.
6. The Respondent has sworn an affidavit in opposition on 5th March 2025. Essentially it is submitted on behalf of the respondent that there is a valid judgment on record. The applicant has not shown herself to be deserving of the orders of stay pending appeal. The delay in distribution is to the detriment of the interest of the rightful beneficiaries.
7. The Applicant has presented further affidavit and supplementary affidavits and avers that no prejudice will be occasioned as the subject parcel of land is yet to be subdivided.
8. Having directed that the application be canvassed via written submissions, the applicant relies on the submissions on record dated 24th October 2023. At the time I retired to write the ruling, the respondent had not filed submissions. It is submitted that the Court should exercise its discretion to grant leave to appeal as determined in the decisions of Rhoda Wairimu Karanja & Another Vs Mary Wangui & Another [2014] eKLR and John Mwita Murimi & 2 Others v Mwikabe Chacha Mwita & Another [2019] eKLR , in which the Court of Appeal reiterated that an appeal does not automatically lie and a party is obligated to seek leave.
9. It is submitted that leave should be granted as the applicant has demonstrated that she has an arguable appeal and reliance placed on the decision in Re Estate of Joel Thaara Ruria (Deceased) [2022] eKLR.
10. On whether time should be enlarged, reference is made to the decision in Patriotic Guards Limited v James Kipchirchir Sambu [2018] eKLR on the principles to guide the Court in exercise of its discretionary power. Further the applicant also submits that she fits within the boundaries as was delineated in the Supreme Court decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR.
11. It is further submitted that the Applicant has demonstrated that there is sufficient cause to grant her the orders sought as the delay was occasioned by the mistake of Counsel and it is well settled that a party should not bear the brunt of the mistake of Counsel. For this assertion reference is made to the decision in Gold Lida Limited v Nic Bank Limited & 2 others [2018] KEELC 4535 (KLR) in which the Court cited with approval the approach by Hon. Apaloo JA in Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103
12. It is submitted that the delay is not inordinate and that it is in the interest of justice given the circumstances of the current case, especially since the reason for delay is plausible, that time for filing appeal be extended. Reference is made to the decision in Utalii Transport Company Limited & 3 Others vs NIC Bank Limited Another [2014] eKLR and Andrew Kiplagat Chemaringo v Paul Kipkoriri Kibet [2018] eKLR.
13. It is submitted that the respondent will not suffer any prejudice and the applicant has an arguable appeal and as was determined in Tabro Transporters Ltd V Absalom Dova Lumbasi [2012] eKLR and Guardians Kenya Limited & Another v Bisco Investment Limited [2021] eKLR stay of execution ought to be granted. It is emphasized that in succession proceedings, the party seeking stay should demonstrate that they will suffer irreparable loss if the stay of execution is not granted and the appeal will therefore be rendered nugatory (See Estate of Siwanyang Ngilotich [2022]; KEHC 9917 (KLR) (13th July 2022) (Ruling).



Analysis and Determination

14. I discern the following to be the issues for determination, whether
 - a. This Court should enlarge time for filing appeal
 - b. Whether if (a) above is answered in the affirmative, the Court should grant leave to appeal
 - c. Whether, if (a) and (b) is answered in the affirmative, the applicant has met the threshold for stay of execution pending appeal.
15. On the 1st issue, the applicant herein relies on Article 159 of the *Constitution* Sections 3, 3A & 3B of the *Civil Procedure Act* and Rule 73 of the Probate and Administration Rules, colloquially referred to as the Oxygen rules. Justice as has been stated is a double-edged sword and the Court is obligated to weigh the interests of the opposing parties.
16. The circumstances herein are that judgment herein was delivered on 21st September 2017, 6 years post judgment the applicant wishes to appeal. The reason given is that the Advocate failed to communicate to her (or her deceased mother, the original objector) the outcome and developments in the case.
17. I have looked at the court record. The applicant herein participated in the trial as a witness. Hearing was concluded on 8th February 2017 and judgment reserved for 13th July 2017. The Judgment was not ready on 13th July 2017 and further notice issued for delivery on 7th September 2017. On that date it was not ready and therefore notice was issued for judgment on 21st September 2017.
18. The Judgment was delivered on 21st September 2017 in the absence of the Objector and her Counsel. Subsequent to the entry of judgment the administrators filed Summons dated 25th January 2019, contending that the 3rd Administrator had failed to execute documents of transmission and seeking orders compelling her to execute the same or in the alternative the Deputy registrar to execute the documents.
19. This application was served on her Counsel then on record, there being no challenge to that application orders were granted on 13th March 2019. There is a letter on record dated 13th March 2019 in which M/S J M Waiganjo & Co Advocates (Counsel then on record for the Objector) seek proceedings so as to appeal against the orders of 13th March 2019. On 21st July 2020, the Counsel is notified by the Court that the proceedings are ready for collection. There is also a certificate of Delay issued dated 2nd March 2023, in relation to the intended appeal against the ruling on 13th March 2019. The next movement on the file is the filing of this application dated 22nd August 2023.
20. The Supreme Court was faced with an almost similar situation in *Mohamed v Diamond Trust Bank Kenya Limited & another* [2025] KESC 17 (KLR), then as in the current case, the Appellant sought to rely on mistake of Counsel so as to enlarge time. The Court stated as follows-

[16 (vi)] Whereas mistakes of counsel ought not to be visited upon a litigant as we held in *George Kang'ethe Waruhiu v Munene & another* (Civil Application 18 of 2020) [2021] KESC 42 (KLR); and *Karinga Gaciani & 11 others v Kimanga & another* (Application E004 of 2023) [2023] KESC 23 (KLR) (*Karinga Gaciani case*) there must be cogent and credible evidence that the applicant made concerted efforts or due diligence, through evidence or correspondence of the follow up with the advocates to pursue his rights. It is not enough for a party to simply blame the advocates on record for all manner of transgressions. As we held in *Karinga Gaciani Case*, "Courts have always emphasized that parties have a responsibility to show interest in and to follow up on their cases even when they are represented by counsel, and it does not matter whether the party is literate or not. (Emphasis mine)



21. One of the almost sacrosanct tenets of our judicial system, is that there must be an end to litigation. Which means parties do have a legitimate expectation, that as part of their right to access to justice as encapsulated under Article 48 and their right to a Fair Hearing as articulated under Article 50 (1) a judgment by a Court constitutes a final pronouncement of the rights and entitlements of the litigants and parties can proceed to adjust their lives in accordance with that decision, except that due process is followed to overturn the decision.
22. When therefore a party arrives at the Court house 6 years post judgment and initiates the process of overturning a judgment they must in the words of the Supreme Court, have 'cogent and credible' evidence. The applicant herein merely asserts that the advocate fell short, but does not substantiate that claim. As was stated by the Court of Appeal in the decision of Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR,:-

.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general, the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.
23. It is my considered view that the applicant herein has fallen short and is not deserving of the exercise of the discretion of the Court in her favour. Having found that the prayer to extend time is not merited, there is no need to examine the merits of the other issues raised, save to say the applicant is faced with an almost insurmountable challenge to explain the 6-year delay in presenting this application.
24. The Application is dismissed in its entirety, paving the way for the administrator herein to transmit the estate in accordance with judgment of 21st September 2017.
25. There shall be no order as to costs.
26. Any party intending to exercise their right to appeal will do so within 30 days.

DATED, SIGNED AND DELIVERED ON THE VIRTUAL PLATFORM, AT NAIROBI THIS 19th DAY OF SEPTMBER, 2025.

P.MNYAUNDI

JUDGE

In presence of: -

Fardosa Court Assistant

Chebet holding brief for Kinyanjui for Respondent

Mutisya holding brief for Kanjama Senior Counsel for Applicant

