



**In re Estate of Nzemi Musila (Deceased) (Succession Cause
798 of 2008) [2024] KEHC 6572 (KLR) (21 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6572 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
SUCCESSION CAUSE 798 OF 2008**

MW MUIGAI, J

MAY 21, 2024

**IN THE MATTER OF THE ESTATE OF NZEMBI
MUSILA(DECEASED)**

BETWEEN

THOMAS MUSILA MUTAVA 1ST ADMINISTRATOR

AGNES MUTHINI MUSILA 2ND ADMINISTRATOR

AND

MACHARIA CHEGE 1ST PROTESTOR

SUSAN NDUNGE KIOKO 2ND PROTESTOR

AND

JOHN MIGWI MWANGI INTERESTED PARTY

RULING

1. This Honorable Court in its Ruling dated and delivered on 24th July, 2023 found that the totality of the evidence on record particularly rulings by various courts confirm the Objector/ 1st Protestor's claim, Macharia Chege of 3 HA. The court grants and uphold the Application of 13/10/2022 as follows:
 - a. The Administrators are hereby ordered to execute all necessary transfer documents to effectuate the registration of 3 Hectares out of Land Parcel No. Donyo Sabuk/komarock Block 1/18554 to the Applicant within 30 days hereof.
 - b. In default the Deputy Registrar of Machakos High Court to execute all necessary transfer documents to effectuate the registration of 3 Hectares out of Land Parcel No. Donyo Sabuk/komarock Block 1/18554 to the Applicant.



- c. KBC Police Station within Komarock Location within Matungulu Division to provide security to the Applicant and his team, and surveyor to be appointed to excise of 3 Hectares out of Land Parcel No. Donyo Sabuk/komarock Block 1/18554 and to preserve the peace during such enforcement and enforce the Certificate of Confirmation of Grant of 28/7/2022.
- d. The Revocation of Grant Applications of 3/11/2022 & 15/12/2022 are dismissed.
- e. The outlined/listed Rulings of the Court remain legal valid and regular orders of this court until otherwise legally set aside, reviewed or appealed against.
- f. This is a family matter each party to bear own cost.

Notice of Motion dated 23rd August,2023

2. Dissatisfied with the aforementioned ruling the Administrator/Applicant herein made a Notice of Motion Application under Certificate of Urgency dated and filed in court on 25th August,2023, brought under Rule 3 of the High Court (Practice and Procedure) Rules and Section 3A the [Civil Procedure Act](#) Cap 21 Laws of Kenya. The Applicant sought ORDERS that:
 1. This application be certified as urgent.
 2. The application by the Appellant/Applicant herein dated 21st August,2023 be heard during this Honorable Court's current vacation.
 3. Costs of this application be provided for.
3. The grounds upon which this application is made are on the body of the said application.

Supporting Affidavit

4. The aforementioned application was supported by an affidavit dated 23rd August,2023 and filed in court on 25th August,2023, sworn by Danson Kisini Muema, the advocate for the Applicant herein, wherein, he deposed that the application dated 23rd August,2023 is of extreme urgency on the ground that the 1st Protestor/Respondent has started the process of executing the ruling delivered by this court by forwarding to the Administrator/Applicant transfer by transmission forms for execution pursuant to the orders of the court contained in the ruling delivered on the 24th July,2023 (annexed and marked copy of the forwarding letter). Deposing that unless orders of stay of execution of the said ruling are granted the 1st Protestor/Respondent will proceed to execute the said ruling whose effect will be eviction of thousands of families from the suit land and the intended appeal by the Appellant/Applicant rendered nugatory. Lamenting that the Appellant/Applicant has an arguable appeal with high chances of success.

The application for leave to the Court of Appeal against the ruling of the High Court.

5. There is yet another Notice of Motion dated 23rd August,2023 and filed in court on 25th August,2023 under Certificate of Urgency brought under Article 159 (d) of [the Constitution](#) of Kenya 2010, Section 3A & 3B, 7 & 41 of the [Appellate Jurisdiction Act](#). the Applicant sought the following ORDERS that:
 1. This matter be certified urgent and the same be heard ex parte in the first instance.
 2. Pending hearing and determination of this application there be stay of execution of the ruling of this court delivered on the 24th July,2023



3. Pending hearing and determination of the Intended Appeal there be stay of execution of the ruling of this Honorable Court delivered on 24th July,2023.
 4. The court be pleased to grant leave to the Applicant to appeal against the ruling delivered by this Honorable Court on 24th July,2023
 5. Upon grant of the leave, the Notice of Appeal be and is hereby deemed as duly filed.
 6. The costs of this application be provided for.
6. The ground upon which this application is base are on the body of the said application.

Supporting Affidavit

7. The aforementioned application was supported by an affidavit dated 23rd August,2023, sworn by Agnes Muthini Masila, the Applicant herein, wherein she deposed that the ruling sought to be appealed against was delivered by this Honorable and the Learned Court on 24th July,2023. (annexed and marked copy of the ruling). Depositing that being aggrieved by the said ruling she intend to appeal the same at the Court of Appeal. Lamenting that the ruling directed her to sign transfer forms for the Protestor/Applicant herein to transfer to him a portion of all that land registered as Donyo Sabuk Komarock Block 1/18554 measuring 3 Hectares within 30 days failure to which the Deputy Registrar do execute the transfer documents. She deposed that the Protestor/Respondent herein has never taken possession of his alleged portion of Donyo Sabuk Komarock Block 1/18554 measuring 3 Hectares and the same is not available on the ground and enforcement of the ruling delivered on the 24th July,2023 will lead to eviction and displacement of numerous families with her being amongst them. It was the deposition of the Applicant that unless orders of stay are issued staying the ruling delivered on the 24th July,2023 the intended appeal will be rendered nugatory. Further that her advocate on record has prepared a draft Notice of Appeal but she Is advised that the same cannot be filed as at this time since leave to appeal is required from this Honorable Court of the first instance (annexed and marked copy of the draft Notice of Appeal). Lamenting that it is imperative to note that under the *Law of succession Act*, there is no express automatic right of appeal to the Court of Appeal. An appeal will lie to the Court of Appeal from the decision of the High Court. deposing that the Applicant has weighty grounds of appeal which merit serious judicial consideration and/or interrogation by the Appellate Court and which interrogation can only be achieved once leave of this Honorable Court is granted (annexed and marked copy of the draft Memorandum of Appeal)

The Notice of Withdrawal

8. Vide a Notice of Withdrawal dated 23rd August,2023 and filed in court on 25th August,2023, Agnes Muthini Musila, the Administrator/Applicant herein withdrew the Notice of Appeal dated 25th July,2023 and Notice of Motion dated 31st July,2023 filed on 25th July,2023 and 31st July,2023 respectively with no orders as to costs.

Notice of Motion dated 4th September,2023

9. Vide a Notice of Motion under Certificate of Urgency dated 4th September,2023 and filed in court on 5th September,2023, brought under Order 42 Rule 6 of the Civil Procedure Rule, Article 163 of *the Constitution* and Section 3A of the *Civil Procedure Act*. The Applicant sought orders that:
 1. This application be certified as urgent and be heard ex parte in the first instance.



2. The Honorable Court be pleased to grant the firm of Roba & Associates to come on record for the 2nd Administrator/Applicant.
 3. This application be heard expeditiously and on a priority basis with such period as the Honorable Court may direct.
 4. The Applicant be granted leave to appeal the ruling of the Court in the matter hereof dated the 24th of July,2023.
 5. The Honorable Court be pleased to extend time within which to file a fresh Notice of Appeal, out of time.
 6. Upon the grant of leave to appeal the draft fresh notice of appeal filed herewith be and is hereby deemed as duly filed and served.
 7. Pending the inter- parities hearing and determination of the instant application, the Honorable Court be pleased to grant stay of execution of the ruling dated the 24th July,2023 and all consequential orders emanating therefrom.
 8. Pending the hearing and determination of the intended appeal the Honorable Court be pleased to grant stay of execution of the ruling.
 9. This Honorable Court be pleased to grant any other orders that it may deem necessary and fit to grant.
 10. Costs of this application be provided and the same be borne by the Respondents herein.
10. The grounds upon which the application was based are on the body of the said application.

Supporting Affidavit

11. The aforementioned application was supported by an affidavit dated 5th September 2023, sworn by Agnes Muthini Masila, the Applicant herein, wherein she deposed that she is aware this Honorable Court delivered a ruling in this matter on 24th July,2023 in which it issued orders, inter-alia, that the 1st Protestor/Respondent herein be granted security by the O.C.S KBC Police Station to survey the parcel of land known as Donyo Sabuk/komarock Block 1/18554 for the purpose of excising 3 hectares therefrom (annexed and marked copy of the said ruling). Depositing that in the said ruling, the Honorable Court also ordered the administrators of the deceased's estate, of which she is one, to execute all the necessary transfer documents to facilitate and effectuate the registration of 3 hectares of land parcel No. Donyo Sabuk/komarock Block 1/18554 to the 1st Respondent herein. It was deponed that she also knew that in pursuance of the said orders, the 1st Respondent herein has already begun the process of surveying the said land and has indicated that once he is done with the said survey, he will proceed to evict the persons occupying the said 3 Hectares. Lamenting that being dissatisfied with and aggrieved by the impugned ruling/decision, she filed a notice of appeal dated 25th July,2023 indicating her intention to challenge the same at the Court of Appeal (annexed and marked copy of the said notice of appeal). Depositing further that without first seeking her instructions and/or informing her, the Advocates previously on record for her, D. K. Muema & Company Advocates, filed a notice of withdrawal of the said notice of appeal, dated 23rd August,2023, (annexed and marked copy of the said withdrawal). She lamented that she is advised by her new Advocates on record for her Roba & Associates, that the timeline within which she is statutorily required to file and serve a notice of appeal has lapsed, hence the need to seek an order of extension of the same first before filing a fresh notice of appeal. Lamenting her Advocates have now drafted a new notice of appeal and she is now seeking the



leave of this Honorable Court to allow her to file the same outside the statutory period of fourteen (14) days following the delivery of the ruling on 24th July,2023. (annexed and marked copy of the fresh notice of appeal). She deponed that she is apprehensive that unless the Honorable Court grants her an order staying its impugned decision, her appeal will be rendered nugatory and an academic exercise if the 1st Respondent effects the order of this Court. further that it would be in the interest of justice that this court grants he stay orders pending the hearing and determination of the intended appeal to obviate a possibility of the appeal being rendered nugatory, and to sustain the efficacy of the right of appeal as enshrined in the constitution. Depositing that she has presented an arguable appeal with high chances, likelihood and/or probability of access. (annexed and marked copy of the draft Memorandum of Appeal).

Replying Affidavits

Replying affidavit dated 2nd October,2023, opposing the application dated 23rd August,2023

12. Vide a replying affidavit dated 2nd October,2023 and filed in court on 6th October,2023, sworn by Macharia Chege, the 1st Protestor herein, wherein, he deposed inter alia that in this case he believes that the Application herein is deliberately misleading this Honorable Court, is an abuse of the court process, fatally defective and a mere afterthought for the following reasons that:
 - a. The Hon. Lady Justice M.W Muigai on delivering her ruling on 24th July,2023 inter alia upheld Honorable Justice Makhandia orders issued on 29th February,2012 revoking the grant of Letters of Administration issued on 29th February,2010.
 - b. The Hon. Lady Justice M.W Muigai on delivering her ruling on 24th July,2023 inter alia upheld Honorable Justice L.N Mutende orders issued on 28th April 2015 dismissing the Administrators application to set aside the orders issued on 29th February,2023 (see paragraph 14 of the ruling).
 - c. The Hon. Lady Justice M.W Muigai on delivering her ruling on 24th July,2023 inter alia upheld Honorable Justice G. V Odunga judgment delivered on 10th November,2021 to the extent that the administrators do propose another mode of distribution of the deceased estate within 30 days taking into account the protestor's interest and in default 3 Hectares to be carved out and transferred to the protestor out of land parcel No. Donyo Sabuk/Komarock Block 1/4189 (sic) (The parcel of land has since been amended to read Donyo Sabuk Komarock 1/18554).
 - d. None of the orders mentioned hereinabove have been, set aside and/or appealed against and thus remains valid court orders. For analysis of the orders therein see paragraph 65 (1-4) of the ruling (annexed and marked copy of the said ruling)
13. Depositing that the Certificate of Confirmation of Grant Intestate was issued by this Honorable Court on 20th July,2022, wherein the court directed that 3 Hectares out of land parcel No. Donyo Sabuk/Komarock Block 1/18554 be registered in his name and the remainder to be distributed amongst the beneficiaries of the deceased (annexed and marked copy of the said ruling). It was deposed that he bought 3 Ha from Nzembi Musila (deceased) vide a sale agreement dated 19th January,2000 and which was duly executed by the vendor and himself and witnessed by five witnesses, three of them being the children of the deceased and led by Agnes Muthini Musila, the Applicant herein (annexed and marked copy of the said sale agreement). Lamenting that during the time of purchase, he carried out a due diligence search at Machakos Land Office and found that the land was vacant in possession free from any encumbrances inhibitions, caveats, restrictions e.t.c and was therefore good and free land for sale



(annexed and marked copies of official land searches dated 13/1/2000 and 22/12/2012). Lamenting that since her interest as daughter of the deceased have been catered for by the ruling of this Honorable Court he submitted that the Applicant has no locus standi in law to seek the intervention of this court on behalf of ghost purchasers who she has failed to name for more than 15 years this case has been in progress. That the Applicant is in effect trying to enjoin this Honorable Court to defend the interests of ghost “3rd parties” who acquired their land through illegal and fraudulent means.

14. Lamenting that this is clearly an abuse of the court process and waste of precious judicial time. He deposed that it remains his contention that when the deceased died, the Administrators herein occupied his land, uprooted the fence and started subdividing the same amongst themselves. Deposing that he stands to suffer prejudice should the orders sought be granted.
15. The Administrators of the deceased estate have failed to obey the court orders issued on the 10th November,2021and therefore the application before the court is unmerited. Attempt by the Administrators to bring application after application in this court are kicks of a dying horse only meant to delay the fruits of the judgment. He deposed that the continued proceedings are not detrimental to the estate but to him as he continues to incur costs in fighting for what is legally and rightfully his.

Replying Affidavit in opposition to Supporting Affidavit by Abdirizak Roba, opposing the application dated 4/9/2023

16. Vide a Replying Affidavit dated 28th November,2023 and filed in court on 6th December,2023, sworn by Macharia Chege, the 1st Protestor herein, wherein, he deposed inter alia that the Applicant has at all material time been represented by the firm of D.K MUEMA and Company Advocates and the same firm has not served them with a “Notice of Withdrawal” of an Advocate. Deposing that the said firm of ROBA and Associates Advocates has never served him with “Notice of appointment of an Advocate” nor “Notice of Leave to appeal out of time”.
17. Lamenting that the said firm of D.K MUEMA Advocates had filed an Application dated 23/8/2023 seeking “leaving to appeal” the Ruling dated 24/7/2023. He deposed this application had progressed in the court process and learned judge had already given them orders to file their submissions. On 8/11/2023, he came to court to confirm compliance with the said court orders and that is when Mr. Roba ambushed him with this application. Opining that this application to seek “leave to appeal out of time was stealthily placed before this court under certificate of urgency and when the court was in vacation seeking to be heard ex-parte. That the same was meant to hoodwink the court to give the said orders behind his back and by means of fraud.
18. The matter was canvassed by oral and written submissions.

Submissions

Oral submissions by Mr. Abdirizak

19. In oral submissions to court on 8th November,2023 by Mr. Abdirizak. He submitted that they have been served with 1st Respondent’s Replying Affidavit and written submissions. Opining that they were seeking to come on record. Contending that Mr. Muema has confirmed/consented to cease on with consent of counsel he told court that they are seeking to file Notice of Appeal out of time and that the advocate on record filed the Notice of Appeal on 25th July,2023, however he withdrew the same on 23rd August,2023 on the erroneous belief he first needed leave before filing the Notice of Appeal. It was submitted that the court clarified the Notice of appeal is jurisdictional issue and where one needs leave to appeal one can file Notice of Appeal before such leave is granted. Court of Appeal Rules 76



(4)- file Notice of Appeal before leave is granted Counsel relied on the Supreme Court decision of Civil Application No. 16 of 2014- Nicholas Salat Vs I.E.B.C. Opining that the Advocate was mistaken and decided to pursue leave. They asked the court not to rely on the mistake of the Advocate on the client. Counsel placed further reliance on the case of HCC 266 of 2009 Nairobi – Catherine Kinoya Vs Commercial Bank of Africa, where reason for filing Notice of Appeal out of time is/was explained. Submitting that inordinate delay 30 days not yet. Reference was made on C.A 55 of 2020- Vishwa Store Ltd Vs R. S. R Store Ltd. Opining that no prejudice is occasioned to be given leave to appeal. Arguability of appeal annexed Memorandum Substantial ground an issue of jurisdiction of this court. The unsigned sale agreement in 3 (3) of law of Contract. It was submitted that leave to appeal is expounded right in 2010 Constitution of Kenya case law states right to of appeal is automatic. Reference was made to the case of Peter Wahome Kinuthia Vs Josephine Mwani. Contending that they seek leave out of time. Counsel quoted the case of Rhoda Wairimu Karanja Vs Mary Karanja & Another, and opined that leave to appeal be granted

20. It was submitted that stay of execution pending appeal under Order 42 Rule 6:
- a. Substantial loss- many families on the property.
 - b. Appeal will be nugatory- nothing to appeal.
 - c. Unreasonable delay.
 - d. The application of 1/9/2023 be allowed as prayed

Oral submissions by Mr. Macharia appearing in person

21. While appearing in person on 8/11/2023, Mr. Macharia opposed the Application and opined that the court granted 14 days to file written submissions and he filed. Submitting that he is highly prejudiced for leave to file an appeal. Submitting that 3rd parties who occupy the land who bought the land from the Applicant are intermeddlers and they are parties to the suit. Averring that the Appeal has referred same parties and they are ghost parties with no good title. Contending that the appeal is duplex. He opined that he is a person with disability and he cannot hear well and he is usually confused/overworked with documents.
22. He submitted that he was/is not aware that the advocate left and new advocate came on record. Contending that he was not served with Notice of Appeal and at the same time served with documents/submissions. Opining that came to court and was not served with any application. He referred to the application of 25/8/2023, and filed written submissions and replying affidavit. He averred that he had seen the application of 5/9/2023 for the first time and that he was not served with this application and that he was/is seeing the new advocate Mr. Abdirizak for the first time as he was not served with the Notice of Change.
23. Submitting that he wants the court to take into account that this case has dragged for 15 years and the same has been in this court severally with various applications as the court has heard three applications now.

Written submissions.

The applicant's submissions

24. The Applicant in her submissions dated and filed in court on 2nd November,2023, wherein her counsel raised the following issue for determination.



1. Whether this court should grant the firm of Roba & Associates leave to come on record?
 2. Whether the court should exercise its discretion to extend the time for the Applicant to file its Notice of Appeal out of time?
 3. Whether the Applicant be granted leave to appeal the ruling of this Honorable Court dated 24th July,2023?
 4. Whether the Applicant should be granted stay of execution of the ruling pending hearing and determination of the appeal?
25. On whether this court should grant the firm of Roba & Associates leave to come on record, counsel relied on Civil Procedure Rules 2010, Order 9 Rule 9 and submitted that the firm of Roba & Associates complied with the foregoing provisions of the law by filing the instant application seeking this court's concurrence and gave the all the parties involved sufficient notice. Contending that having properly complied with the provisions of the law, they prayed that the court grants the said firm leave to come on record as the former firm on record have not expressed any reservations.
 26. Regarding whether the court should exercise its discretion to extend the time for the Applicant to file its Notice of Appeal out of time, counsel in order to bolster his position on this limb placed credence in the cases of Thuita Mwangi Vs Kenya Airways Ltd [2003] eKLR and Nicholas Kiptoo Salat Vs Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, and submitted that the Applicant, immediately this court rendered its judgment, instructed its erstwhile advocate to file a notice of appeal. Averting that the advocate obliged by filing a notice of appeal on the 25th of July,2023. Submitting that the advocate without seeking her express instructions, inexplicably decided to withdraw the notice of appeal vide a notice of withdrawal dated the 23rd August,2023.
 27. It was the case of the Applicant that immediately the Applicant realized that the Advocate had withdrawn the Notice of Appeal, she instructed the firm of Roba & Associates to file the instant application and sought to have time extended within which to file a fresh Notice of Appeal. Contending that whereas the mistake of withdrawing the Notice of Appeal was her Advocate's she was constantly monitoring the going on in her case, and immediately she realized what the advocate had done, she took remedial steps without any hesitation.
 28. It was submitted that the period of delay is not inordinate by any stretch of imagination. Opining that the period for filing the Notice of Appeal expired on the 8th of August,2023. Contending that the instant application was filed on the 4th of September,2023, therefore, the delay was for a period of less than 30 days. This is further mitigated by the fact that actually there was Notice of Appeal filed. Arguing that it is just not clear why the advocate withdrew the said Notice of Appeal.
 29. On whether the Applicant should be granted leave to appeal the ruling of this Honorable Court dated 24th July,2023, on this issue, Counsel relied on the case of In the Matter of Estate of the Late Wanga Ole Oiyie Succession Cause 31 of 2017, and submitted that it would be unconscionable to deny anyone the right to appeal and maintain that the decision of one judge is final. Contending that it is incumbent upon the court to sustain this right of appeal instead stifling it. To buttress his position counsel relied on the case of Rhoda Karanja & Another Vs Mary Wangui Karanja & Another [2014] eKLR, and prayed that they be given leave to appeal the ruling dated 24th July,2023 so as to afford the Applicant the opportunity to ventilate his dispute to the highest court possible and to sustain her constitutional right to appeal as enshrined in [the Constitution](#) 2010.



30. As regards to whether the Applicant should be granted stay of execution pending appeal, counsel submitted that under Order 42 Rule 6 (2) of the Civil Procedure Rules, an Applicant should satisfy the court that:
 1. Substantial loss may result unless the order is made;
 2. The application has been made without unreasonable delay; and
 3. The Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
31. On substantial loss, it was the submission of the Applicant by her counsel that the 1st Respondent is allowed to proceed to evict, bulldoze the suit property before the intended appeal is heard and determined, the Applicant will suffer huge and substantial loss that cannot be compensated by monetary compensation. Opining that this will further destroy the substratum of the appeal and render the appeal a nugatory appeal. To bolster this limb counsel relied on the case of James Wangalwa & Another Vs Agnes Naliaka Cheseto [2012] eKLR.
32. As to the application being made without unreasonable delay, it was contended that the ruling herein was delivered on 24th July,2023. The wrongly withdrawn notice of appeals were dated 23/8/2023 and that when the client found out that the Advocate is not carrying out her instructions and immediately instructed the firm of Roba & Associates to file the current Application on the 4th September,2023. Opining that this is the conduct of a diligent litigator who has brought the Application without delay whatsoever.
33. It was submitted that the Applicant has satisfied the principles for grant of stay pending the hearing of an appeal. The Applicant has clearly demonstrated the substantial loss that will be visited on her should the stay order not be granted, and that the intended appeal would be merely an academic exercise, averring that the Applicant has also evinced to the court that the Application was filed promptly without delay notwithstanding the inaction and indolence of the former advocates of record.
34. Finally, counsel opined that the Applicant is ready and willing to comply with any orders that the court may issue in respect to stay. This includes the timelines in filling their record of appeal, orders not to deal with the property in a manner that may compromise the Respondent's right should he be successful in the intended appeal or any other order that this court will deem fit to grant, to facilitate the hearing and determination of the intended appeal.

1st Protestor's submissions

35. The 1st Protestor in his submissions dated 28th November,2023 and filed in court on 6th December,2023, wherein he raised the following issues which he submitted on sequentially.
36. On whether to allow the firm of Roba & Associates to come on record on behalf of the 2nd Administrator, it was submitted that the Applicant at all material time during the life of this case being represented by the firm of D.K Muema & Company Advocates. Contending that the said firm has never served him with a Notice of Withdrawal of an advocate nor a Notice of Appointment of an advocate.
37. He averred that the said firm of D.K Muema Advocates has a similar application for leave to appeal to the court dated 23/8/2023 and that he has already filed his submissions in opposition to the same. He argued that presently before this court are two contemporaneous applications by two different legal firms from the same Applicant and seeking similar orders being leave to appeal to the court of appeal



by D.K Muema dated 23/8/2023 and leave to appeal to the court of appeal out of statutory time limit by Abdirizak Roba dated 4/9/2023.

38. As to whether the Applicant should be given more time file a fresh Notice of Appeal out of time, the Respondent opined that leave for appeal to the court of appeal should be filed not later than 14 days from the date of the ruling to be appealed against. Arguing that there is a delay of 72 working days since the date of this ruling hence this delay of 72 days should not be seen in isolation but against the background of more than 15 years this matter has been in this court.
39. He submitted further that this long drawn out matter has caused him great physical, psychological and financial suffering taking into consideration that he is a family man with school going children and leaving with a hearing disability. Contending that the ravages of time has not spared the family either, for, four administrators of this matter i. e (Mr. Mutava Musila, Nzuki Musila, Thomas Musila and John Migwi) are all dead and long buried, opining that a senior Advocate of one of the Administrators herein has since gone mad. Contending that they all harbored lofty dreams about this land which were never realized. It was his position that such are the negative social consequences of this land drawn out matter that it has left behind broken bones and sour dreams.
40. On whether the Applicant should be granted leave to appeal the ruling of this Honorable Court dated 24th July,2023, the Respondent submitted that there are two applications filed contemporaneously by the Applicant herein, in this court. submitting that one application is seeking leave to appeal to the court of appeal dated 23/8/2023 and the other is seeking leave to appeal out of time dated 4/9/2023. He averred that both applications had been filed out of the legally stipulated time period and without respect to statutory requirements of effecting notice of service to the parties.
41. It was his contention that the same applications are frivolous and an abuse of the court process for they have not established a prima facie case with arguable grounds which see the light of the day in the court of appeal.
42. Regarding whether the Applicant should be granted stay of execution pending appeal, he opined that Applicant has not presented an arguable case with substantial grounds which can see the light of the day in the court of appeal. Averring that she has failed to comply with the court order to sign transfer documents in to the Respondent's name. submitting that the Applicant has become a judge in her own case when she feigns to determine the jurisdiction of this Honorable Court.
43. As to whether this application has been made with reasonable delay, he submitted that there are two contemporaneous applications filed before this court by the Applicant and both are seeking similar but contradictory orders one seeking leave to appeal and the other is seeking leave to appeal out of time. He submitted that the same applications are incurably defective because they have been made by only one Administrator while there are two Administrators on record. Opining that no consent to make unilateral decision is on record and despite these anomalies, none of the two Applications have established a Prima Facie case worth any serious judicial considerations. Submitting that this unreasonable and unwarranted delay in filling these Applications should not be seen in isolation but against the background of more than 15 years this case has been live in this court
44. To bolster his case, the Respondent relied on the following cases:
 1. In re Estate of Wanga Ole Oiyie [2022] eklr
 2. In re Estate of Siwanyang Ngilotich (Succession Cause 14 of 2016) (2022) KEHC 9917 (KLR) July 2022) (Ruling).
 3. Rhoda Wairimu Karanja & Another Vs Mary Wangui Karanja & Another (2014) eklr



45. He beseeched this Honorable Court to declare the Administrators herein, the 2nd Protestor and the Interested Party (IP) as vexatious litigants out to abuse the court process and sabotage the cause of justice. he prayed that this court in all its grace and magnanimity, to shield him from further litigations as far as his entitlement in this matter is concerned.

Determination/analysis

46. I have considered the parties pleadings and written submissions and the issues that arise for determination are whether the firm of Roba & Associates are properly on record and whether leave to file the notice of appeal should be granted

47. On the 1st issue of whether the firm of Roba & Associates are properly on record, the applicant submitted that the firm of Roba & Associates complied with the foregoing provisions of the law by filing the instant application seeking this court's concurrence and gave the al the parties involved sufficient notice. Contending that having properly complied with the provisions of the law, they prayed that the court grants the said firm leave to come on record as the former firm on record have not expressed any reservations. Submitting that the advocate without seeking her express instructions, inexplicably decided to withdraw the notice of appeal vide a notice of withdrawal dated the 23rd August,2023.

48. It was the case of the Applicant that immediately the Applicant realized that the Advocate had withdrawn the Notice of Appeal, she instructed the firm of Roba & Associates to file the instant application and sought to have time extended within which to file a fresh Notice of Appeal. Contending that whereas the mistake of withdrawing the Notice of Appeal was her Advocate's she was constantly monitoring the going on in her case, and immediately she realized what the advocate had done, she took remedial steps without any hesitation.

49. Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -

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 without an order of 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.

50. The reasoning behind the provision was well articulated in the case of S. K. Tarwadi v Veronica Muehlmann (Supra) where the judge observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

51. I take no issue with the firm of Roba and Associates as he filed an application as required under Order 9 Rule 9. There is a notice of withdrawal of the notice of appeal by the firm of D.K.Muema & Company dated 23rd August 2023 and thus I find that they are properly on record as the applicant has a right to seek for another representation.

52. On the issue of grant of leave to file notice of appeal out of time, the case of Mombasa County Government —vs- Kenya Ferry Services & Anor (2019) eKLR, where at paragraph 25 the Supreme Court held that;



(25) Concerning extension of time, this Court has already set the guiding principles in the Nick Salat Case as follows:

“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.

“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:

1. 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;
2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;
3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;
4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;
5. whether there will be any prejudice suffered by the respondents, if extension is granted;
6. whether the application has been filed without undue delay

53. The decision whether or not to grant leave to appeal out of time or to admit an appeal out of time is an exercise of discretion just like any other exercise of discretion by the court. Some of the factors that aid Courts in exercising the discretion whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Thuita Mwangi V Kenya Airways Ltd* [2003] eKLR. They include the following:

- i) The period of delay;
- ii) The reason for the delay;
- iii) The arguability of the appeal;
- iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
- v) The importance of compliance with time limits to the particular litigation or issue; and
- vi) The effect if any on the administration of justice or public interest if any is involved.

54. The period of delay is not inordinate as the period for filing the Notice of Appeal expired on the 8th of August,2023. the instant application was filed on the 4th of September,2023, therefore, the delay was for a period of less than 30 days. This is further mitigated by the fact that actually there was Notice of Appeal filed only that it is just not clear why the advocate withdrew the said Notice of Appeal.

55. An application for stay invokes the discretionary powers of this court under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 that empowers the court to stay execution, either of its judgement or that of a court whose decision is being appealed from, pending appeal. The conditions to be met before stay is granted are provided for under Rule 6(2) of Order 42 and states as follows:

“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.”

56. The Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise discretion and held that:-

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

57. The applicant in his submissions sufficiently demonstrated that he will suffer substantial loss if stay is not granted, the application had been made without unreasonable delay and was willing to comply with any conditions that the court may issue in respect of granting stay.

Disposition

1. This Court takes into account the matter has been in Courts since 2008; 17 years now, The Respondent who is hearing- impaired disabled person has moved to all Courts to defend his claim as Creditor to the estate of the deceased and obtained 4 decisions in his favour; Ruling of 29/12/2021 by Makhandia J; 28/4/2015 By L Mutende LJ; 10/11/202 & 20/7/202 by G.V. Odunga J and now the impugned Ruling of this Court of 24/7/2023.
2. By the time the intended appeal is filed, the estate may be distributed and/or sold to 3rd parties and the Respondent stands to suffer irreparable damage/loss
3. Therefore, this Court grants the following orders;
4. Leave to appeal is granted to the Applicant to file appeal out of time against the ruling delivered on 24th July 2023.



5. Stay of execution is hereby granted pending the hearing and determination of the intended appeal to be filed within requisite period on condition Ksh 300,000/- is deposited in a joint account of the Applicant/Appellant or advocate and Respondent or his advocate within 90 days.
6. In default the right to appeal vacates forthwith.

RULING DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 21/5/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

