



**In re Estate of Nyaga Karuma (Deceased) (Succession Cause
423 of 2002) [2024] KEHC 4803 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
SUCCESSION CAUSE 423 OF 2002**

LM NJUGUNA, J

MAY 8, 2024

**FORMERLY EMBU SPM'S SUCCESSION CAUSE NO. 202 OF 1996)
IN THE MATTER OF THE ESTATE OF NYAGA KARUMA (DECEASED)**

BETWEEN

DANSON KARIUKI NYAGA APPLICANT

AND

SIMON MBOGO GAKENGE 1ST RESPONDENT

NJIRU GAKENGE 2ND RESPONDENT

RULING

1. Before the court is a notice of motion dated 20th November 2023 through which the applicant seeks the following orders:
 1. This honourable court be pleased to grant the applicant herein leave to appeal out of time against the whole judgment delivered by Hon. V.W Wandera RM on 09th July 1999 in Embu SPM's Succession Cause No. 202 of 1996;
 2. Pending interpartes hearing of this application and the subsequent appeal, the honourable court be pleased to order maintenance of the status quo with regards to the deceased's property Ngandori/Kirigi/6608 now subdivided into parcel numbers 17421, 17422, 17423, 17424 and 17425 and Ngandori/Kirigi/6609;
 3. Any other order that the honourable court may deem fit to grant; and
 4. Costs of this application be provided for.
2. The application is supported by grounds on its face and in the supporting affidavit thereof.



3. It was the applicant's case that since the impugned judgment was delivered, it triggered division and animosity amongst the children of the deceased. That the applicant is greatly aggrieved with the mode of distribution of the estate which apportions a larger portion of the estate of the deceased to the respondents, unjustifiably so. He stated that the memorandum of appeal raises an arguable case which is worthy of consideration and that if the court does not intervene in this matter, the existing dispute between the parties herein will spill over to the next generation unnecessarily.
4. The applicant deposed that the deceased herein died intestate and was survived by 2 wives and, the first house having 5 children while the second house had 7 children. That a grant of letters of administration was issued to the second wife of the deceased and when she filed summons for confirmation, the applicant herein filed a protest, contesting the proposed mode of distribution of the estate. That the protest was heard and the court distributed the estate in the manner indicated in the certificate of confirmation of grant.
5. He stated that he filed summons for revocation of the grant but the same was dismissed and the administrator commenced the process of distributing the estate accordingly even though none of the properties have been transmitted to the beneficiaries yet. That the 1st respondent is seeking to evict him from his parcel of land on which he has lived for many years so that the property is distributed according to the mode of distribution. That he has a problem with how the estate was distributed in a skewed manner and would like a chance to challenge the same on appeal, considering that his efforts to have the grant revoked have failed.
6. The 1st respondent filed a replying affidavit stating that the applicant is challenging a decision that was delivered more than 24 years ago and he was made aware of his right to appeal against the said decision within 30 days. That the applicant filed an application for revocation of grant but he same was dismissed and the judge stated that the applicant should contest the mode of distribution on appeal and not through the revocation application. That the applicant has been filing a series of applications in a bid to hamper implementation of the grant. That the application is an abuse of the court process and the same should be dismissed given the amount of time that has lapsed since the impugned judgment. It was also his argument that the decision was rendered by a Resident Magistrate and so the same cannot be appealed to the Court of Appeal. That the High Court is the one that has been handling the matter.
7. In this application, the court directed the parties to file their written submissions but only the respondents complied.
8. It was the respondents' submission that the applicant has failed to explain the 24-year delay in appealing against the said decision. They urged the court to dismiss the application as the applicant does not deserve to be granted the orders sought. That the applicant's series of applications have always been dismissed and that even this one is targeted at delaying the beneficiaries of the estate from taking up their portions of the estate. They also argued that the decision of a Resident Magistrate cannot be appealed against to the Court of Appeal.
9. The issue for determination is whether the applicant ought to be granted leave to appeal out of time and status quo be maintained for this purpose.
10. The learned Hon. V.W Wandera RM rendered himself in a ruling delivered on 09th July 1999 in Embu SPM's Succession Cause No. 202 of 1996 through which he determined the protest and proceeded to distribute the estate of the deceased. It followed that a certificate of confirmation of grant was issued. After the ruling was delivered in open court and in the presence of the protestors (among whom was the applicant), the learned magistrate informed the parties of their right of appeal against the decision within 30 days.



11. The timelines for filing of appeals are set under Section 79G of the *Civil Procedure Act* 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 a good and sufficient cause for not filing the appeal in time.”

12. In the present circumstances, it was imperative that the applicant demonstrates that the 24-year delay was inadvertent and that he deserves the orders sought. 24 years is indeed a long time to leave a matter pending without providing plausible explanation for the delay. In the application and the supporting affidavit thereof, the applicant simply deposed that it would be just and fair for this court to grant the orders so that the next generation wouldn't have to suffer due to the unfairness of the mode of distribution. I do note that in the course of this 24-year delay, the applicant has filed 2 applications seeking revocation of the grant and both of them were dismissed through rulings delivered on 16th May 2013 and 17th January 2019.

13. This goes to show that the applicant was alive to the fact that the decision of the Resident Magistrate delivered on 09th July 1999 remained unsettled and in fact the estate is being distributed. Having been unsuccessful in all his other bids, the applicant now turns to his option of appeal which is usually time-bound and, in this case, time lapsed 24 years ago. As it is, no good or sufficient cause has been provided for the delay in appealing, thus, it is difficult for this court to exercise its discretion in that regard. In the case of *Edith Gichungu Koine v Stephen Njagi Thoitih* (2014) eKLR the court held thus:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decision of this court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

14. Having stated thus, the estate of the deceased was distributed in 1999 and 24 years later, the properties of the various beneficiaries have not been transmitted to them. Since there is no sufficient cause to grant leave to appeal out of time, this court will not grant an order to maintain status quo since the estate has been distributed and is to be transmitted to the beneficiaries accordingly.

15. Lastly, the respondents raised the issue of whether the Court of Appeal would be the correct court to entertain the applicant's intended appeal, given that the impugned ruling arose from a Resident Magistrate. Section 18 of the *Civil Procedure Act* empowers the High Court to transfer, at any stage, any suit instituted in a subordinate court. In this case, the succession cause was transferred to the High Court after the impugned ruling had been delivered, rightly so. Transfer of a suit does not raise an issue of jurisdiction of a court as it is an administrative process to enable dispensation of justice. (see the case of *Harun Kiptarus Tanui v East African Portland Cement Plc* [2022] eKLR). If the application herein would have been determined otherwise, the respondents' issue to that regard should have been expected to arise before the appellate court that the applicant would have chosen to approach. Therefore, the same is premature at this stage.

16. In the end, I find that the application lacks merit and it is hereby dismissed in its entirety, with costs to the respondents.

17. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 08TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

