



REPUBLIC OF KENYA



**Wangari v Kimuhu (Miscellaneous Application E013 of 2023)
[2024] KEHC 5710 (KLR) (17 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5710 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS APPLICATION E013 OF 2023**

A MSHILA, J

MAY 17, 2024

BETWEEN

ANNE WANGARI APPLICANT

AND

SUSAN WANJIRU KIMUHU RESPONDENT

RULING

Background

1. The Summons General dated 10th August, 2023 was brought pursuant to Rule 49, 67 and 73 of the *Probate and Administration Rules*; Section 3(2) of the *Judicature Act*; High Court (Practice and Procedure Rules 3(1)(2); Section 10 of the *High Court (Organization and Administration) Act*; as well as Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Article 159 of *the Constitution* of Kenya and all enabling provisions of the law; the Applicant seeks for the following orders;
 - a. Spent
 - b. The Applicant be granted leave to file an appeal against the Ruling delivered by Hon. L. Nyabando (RM) on the 3rd May, 2023 at Kikuyu Law Courts in Succ. Cause No. 217 of 2016 In the Matter of Estate of Njoroge Wamiri (Deceased) and/or the said appeal be admitted out of time.
 - c. The Honourable Court grants as Order for Stay of Proceedings and any subsequent orders emanating from the Ruling delivered by Hon. L. Nyabando (RM) on the 3rd May, 2023 at Kikuyu Law Courts in Succ. Cause No. 217 of 2016 In the Matter of Estate of Njoroge Wamiri (Deceased) pending the hearing and determination of this Application.
 - d. The Honourable Court grants as Order for Stay of Proceedings and any subsequent orders emanating from the Ruling delivered by Hon. L. Nyabando (RM) on the 3rd May, 2023 at



Kikuyu Law Courts in Succ. Cause No. 217 of 2016 In the Matter of Estate of Njoroge Wamiri (Deceased) pending the hearing and determination of the Appeal.

- e. Stay of execution of the Ruling and Decree in Limuru CMCC No.36 of 2015 be granted pending the hearing and determination of this application.
 - f. The costs of this application be in the cause.
2. The Application was supported by the grounds on the face of the application and on the sworn Affidavit of Brandon Chebiego who stated that the intended Appellant was dissatisfied with the Ruling delivered on 3rd May, 2023 at Kikuyu Law Courts in Succ. Cause No. 217 of 2016 In the Matter of Estate of Njoroge Wamiri (Deceased) revoking the Grant issued and confirmed on 10th June, 2021 and directed the inclusion of a stranger or individual not recognized under Section 29 of the [Law of Succession Act](#).
 3. The parties were directed to canvass the application by way of written submissions; hereunder is a summary of the parties rival submissions;

Applicant's Case

4. It was the Applicant's case that it has raised both matters of law and of fact in its annexed Memorandum of Appeal which raises triable issues that should be heard and determined by the court.
5. The Applicant submitted that the Application was timely and there was no inordinate delay as it was brought only five days after the lapse of the 30 days statutory period.
6. the application was brought at the earliest previously represented by another advocate who failed to provide details of the date of judgment and of records of the pleadings as well as other documents of the subordinate court wherefore it took the Appellant time to secure the records and the judgment.

Respondent's Case

7. The Respondent argued that the Application as drawn is misleading, defective, frivolous and the same is an abuse of the court process as the application before the court is filed by an advocate without the leave of the court.
8. The Application dated 29th October 2021 was heard and determined by the Hon. Chief Magistrate S.A Opande and the ruling was delivered on 17th May 2022. The Applicant's Application was replied vide the Replying Affidavit sworn on 14th July 2022. As per the Order of the Court the firm of Nyauke & Company was allowed to come on record on 17th May 2022 hence by filing the Application dated 29th October 2021 the firm of Nyauke did not have authority or leave to come on record, hence the Application is an abuse of the court process. The Applicant should have appealed against the Orders instead of the present Application.
9. The Applicant filed a similar application with the one filed in lower court, the said application was heard and determined, yet the Applicant is again bringing an application of the same nature in this court.
10. From the fore-going the Judgment Debtor continues to buy time and deny the decree holder from enjoying the fruits of the judgment considering that this is a matter which was determined hence continues filing unnecessary applications to continue delaying the matter.



11. The Judgment Debtor/ Applicant's intended appeal to be filed has no basis and has no chances of survival hence is an abuse of the court, more so the Applicant has not applied for typed proceedings and judgment for this appeal and/or annexed any receipt to prove the same
12. The Applicant has also not attached the any receipts to confirm whether they have paid for the Decree, hence in the absence of any attachment of receipt, it is clear that the Applicant is not serious with this matter, hence the Application is an afterthought and the court cannot entertain the same as justice delayed is justice.

Issues for Determination

13. Having considered the Application and the written submissions the court frames the following issue for determination;
 - a. Whether the Applicant should be granted leave to file appeal out of time;

Analysis

14. The applicable law is found under Section 79G of the *Civil Procedure Act* which grants the court powers to enlarge time in which to file an appeal. Section 79G of the *Civil Procedure Act* provides as follows that:

“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.’”

15. The principles that aid Courts in exercising the discretion as to 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 argue-ability of the appeal;
 - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;

Period Of Delay

16. The Applicant submitted that the Ruling was delivered on 3rd May, 2023 whereas the instant application and the Memorandum of Appeal were filed on the 10th August, 2023 which translates to three (3) months. However, it is notable that the Applicant did not attach a copy of the impugned Ruling and or the Memorandum of Appeal therefore without the said Ruling the period of delay cannot be ascertained with certainty.

Reasons For Delay

17. The reason for delay given by the Applicant was that the delay in filing the appeal was an inadvertent omission and excusable due to the fact that the Applicants previous advocate on record had failed to



inform the Applicant about the Ruling until after the time to appeal had lapsed which was three (3) months after its delivery; which delay it was submitted was not inordinate;

18. The court record reflects that the Applicant filed the instant application before this Court on 10th August, 2023 and the length of the delay translates to a period of approximately three (3) months. In considering the reasons for the delay given by the Applicant being that the delay having been occasioned by the Applicants advocates and also considering the legions of authorities that the litigants should not be made to shoulder the consequences of the acts of omission of their advocates; the explanation is found to be reasonable and satisfactory but falls short as it needed to be bolstered or supported by the certainty of the period of delay.

Arguability Of The Appeal

19. On the arguability of the Appeal the Applicant avers that the trial court erred in revoking the Grant and allowing a stranger to be enjoined to the proceedings. However, this court notes that the Applicant failed to annex a copy of the Ruling to the instant application neither was the Memorandum of Appeal annexed; This Court can only make a determination on the arguability of the appeal and its chances of success after perusal of the Ruling as against the Memorandum of Appeal. Without the said Ruling the court's hands are tied on whether the intended appeal is arguable or has a high probability of success.
20. From the material placed before this court the Applicant has not established that she would suffer substantial loss if the orders sought are not granted; This court finds that this is not a suitable case to exercise its discretion.

Findings And Determination

21. For those reasons this court makes the following findings and determination;
- i. The application is found to be devoid of merit and it is hereby disallowed
 - ii. Each party to bear their own costs
- Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 17TH DAY OF MAY, 2024

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Maina h/b for Chebiegon -for the Applicant

Ayoi for the respondent

