



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Wanjiku Njoroge Gichere (Deceased) (Succession Cause 96 of 2017) [2024] KEHC 8743 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8743 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 96 OF 2017  
CM KARIUKI, J  
JULY 18, 2024  
IN RE ESTATE OF WANJIKU NJOROGE GICHERE (DECEASED)**

**BETWEEN**

**NAOMI WAITHIRA NJOROGE ..... APPLICANT**

**AND**

**MARGARET WANGARI WAGUKU ..... RESPONDENT**

**RULING**

1. The Applicant herein approached this Court vide the application dated 3<sup>rd</sup> April 2024 seeking the following orders:-
  - I. Spent.
  - II. This application should be heard, and the stay of execution of the honorable Court's judgment/decreed dated 28th July 2022 should be granted exparte in the first instance pending the inter-party hearing and determination of this application.
  - III. Thus, the Court is pleased to extend the time for seeking leave to appeal against the Court's judgment/decreed dated 28<sup>th</sup> July 2022.
  - IV. The honorable Court will be pleased to grant an extension of time for the Petitioner/Applicant to lodge a notice of appeal.
  - V. That there be a stay of execution of the judgment mentioned above/Decree pending the hearing and determination of the intended appeal preferred against this honorable Court's judgment/decreed dated 28<sup>th</sup> July 2022.
  - VI. The application costs will be provided.



2. The application was supported by the grounds on the face of the application and the supporting affidavit sworn by Naomi Waithira Njoroge on 3<sup>rd</sup> April 2024 and the annexures thereof.
3. On the other hand, the application was opposed vide the replying affidavit sworn on 19<sup>th</sup> April 2024.
4. The Petitioner/Applicant's Written Submissions
5. The Applicant submitted that the issues that arise for determination are:-
6. Whether the Petitioner/Applicant has demonstrated sufficient cause for grant of stay of execution
7. Whether the Petitioner/Applicant ought to be granted leave to appeal and an extension of time to lodge a notice of appeal
8. On the first issue, the Applicant submitted that they intended to appeal the judgment dated 28<sup>th</sup> July 2022 as the Court was not provided with the complete set of facts and evidence for it to make a fair decision and that the Objector misled the Court. The Applicant stated that the intended appeal, as seen from the draft notice, is arguable and has appreciable chances of success. Reliance was placed on *Reliance Bank Ltd (in liquidation) v Noriaka Investments Ltd* Civil Appl No. Nai 93/02 (UR), *Kiu & Another v Khaemba & 3 Others* (Civil Appeal (Application) E270 of 2021) [2021] KECA 318 (KLR), *Michael Ntouthi Mitheu v Abraham Kivondo Musau* [2021] eKLR, Order 42 Rule 6(2) of the *Civil Procedure Rules*
9. The Applicant asserted that the Petitioner's old age and frailty compromised her perception of time and understanding of things that occasioned the delay. They asserted that the delay had been sufficiently explained and not inordinate or unreasonable and the same has been sufficiently explained. On the issue of security, the Petitioner offered the 5-acre parcel awarded to her to stand as security. On substantial loss, the Applicant stated that she stands to lose homes that she had formidably worked to build for decades and that was on the verge of demolition unless stay orders are granted. Reliance was placed on *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR, *RWW v EKW* [2019] eKLR, *Mukuma v Abuoga* [1988] KLR 645 etc.
10. On the second issue, the Applicant reiterated that the Petitioner's advanced age, her failing health, the procedure for change of advocates, and her unfortunate ineptitude in matters of law and procedure led to the late lodging of the notice of appeal. It was prayed that the Court finds these reasons satisfactory in exercising its discretion to extend the time for lodging the notice and admit the annexed notice of appeal as duly filed. Reliance was placed on *Karny Zabarya & Another v Shalom Levi* C. Appl No. 20 of 2018, *Charles Karanja Kiiru v Charles Gitinji Mulgwa* [2017] eKLR & *Kamlesh Mansukal Damji Pattni v Director of Public Prosecutions & 3 Others* etc.
11. It was also stated that the right to be heard on the appellate process is to be weighed against the prejudice to the Petitioner, who stands to suffer should the relief sought not be granted. Reliance was placed on the case of *Richard Nchapi Leiyagu v IEBC & 2 Others* [2013] eKLR, *Mbaki & Others V Macharia & Another* [2005] 2EA 206 & *Muchungi Kiragu v James Muchungi Kiragu & Another* [1998] eKLR
12. Objector's/Respondent's Written Submissions
13. On whether the application is *res judicata*, the Objector submitted that this Court ruled on 25<sup>th</sup> January 2024, dismissing the application for lack of leave. Interestingly, the Applicant metamorphosized the application by sneaking in prayer for leave under prayer 3 in their application after it was indicated that leave to appeal ought to be sought within 14 days after a decision has been rendered. Reliance was placed on *Beatrice Nyaguthii Nderitu v Edward Wacira Nderitu*, Succession Cause No. 252 of 2013 (unreported), Rule 41 (a) (ii) of the *Court of Appeal Rules*, 2022



14. It was stated that this Court is being moved to sit as an appeal on its own decision and that the Applicant ought to have sought leave to appeal the decision of this honorable Court but not to bring the current application. Further, it was argued that the Court is functus officio and cannot grant an extension to seek leave at this juncture. Considering that the application was dismissed by this Court after concluding that it would serve no purpose to grant the orders sought due to lack of leave, it was submitted to the extent that this application is res judicata within the meaning of the doctrine.
15. On whether the leave to appeal and file notice of appeal should be granted, it was contended that the Applicant had sought an extension of time 21 months after this Court delivered its judgment. The reason for this is the change of advocates. The previous advocate was competent and attended to judgment when delivering the same; therefore, the application is an afterthought. In any event, this application was a causal effect of the ruling delivered by this Court on 25<sup>th</sup> January 2025. It was stated that a case belongs to the litigant and not an advocate; thus, the explanation adduced is not plausible.
16. In regards to stay of execution, the Respondent relied on the case of *Re Estate of the Late Kaburachi Peter (deceased)* [2021] eKLR
17. The Respondent argued that the Applicant deponed that she and her adult children have allegedly been residing on 15 acres of the suit land where she has built, which argument beats logic because there is no survey report or cogent evidence that the houses occupy the 15 acres and that the photos annexed are wanting as they cannot serve as a clear depiction of the issue on the ground without a surveyor's report. The photos do not comply with Section 106b of the Evidence Act and thus have no probative value.
18. It was asserted that there is no evidence tabled before this Court that the Respondent will demolish the houses depicted in the picture or has any such intention or has been issued with any orders of eviction. It was stated that the Applicant has been utilizing 5 acres of the land, which no cogent evidence has rebutted; thus, the Applicant has not tabled adequate evidence supporting substantial loss. Reliance was placed on *James Wangalwa & Another v Agnes Nalliaka Cheseto* [2012] eKLR, *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCC No. 795 of 1997, which was quoted with approval by the case of *Murage Njeru v Linus Mbogo Njeru* [2020] eKLR
19. The Respondent stated that the delay occasioned was not sufficiently explained. Further, despite the Applicant being willing to offer security, the mere failure to prove substantial loss renders the application defective and disentitles the Applicant from the exercise of discretion of the Court in her favor. Reliance was placed on *Eunice Mugure Muchori & 2 Others v Peter Macharia* [2021] eKLR
20. In conclusion, they submitted that the application fails on all fours, the application is a candidate for dismissal, and the Respondent enjoys the fruits of her successful litigation. Further, the Respondent has been utilizing and peacefully occupying 27.6 acres and allowing this application will allow the Applicant to interfere and encroach on his portion of land. They also prayed for costs per Rule 69 of the *Probate and Administration Rules*.

### **Analysis and Determination**

21. I have considered the application, grounds of opposition, and written submissions. The issues that arise for determination are whether the Applicant ought to be granted leave to appeal, extension of time to lodge a notice of appeal and whether the Applicant has demonstrated sufficient cause for the grant of stay of execution.
22. First and foremost, the Objector raised the issue of *res judicata*. They stated that this Court made its ruling on 25<sup>th</sup> January 2024 dismissing the application for lack of leave, and the Applicant metamorphosed the application by sneaking in a prayer for leave under prayer 3 in their application



after it was indicated seeking leave to appeal ought to be sought within 14 days after a decision has been rendered. They asserted that the Court is being moved to sit as an appeal on its own decision and that the Applicant ought to have sought leave to appeal the decision of this honorable Court but not to bring the current application. Further, it was argued that the Court is *functus officio* and cannot grant an extension to seek leave at this juncture.

23. Section 7 of the [Civil Procedure Act](#) Cap 21 provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

*The Black’s Law Dictionary 10<sup>th</sup> Edition* defines “*res judicata*” as

“An issue that has been settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits, and (3) the involvement of same parties, or parties in privity with the original parties...”

24. Accordingly, in order to decide on whether an issue in a subsequent application is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire application and the instant application to ascertain: -

25. What issues were determined in the previous application;

- a. Whether they are the same in the subsequent application and were covered by the decision.
- b. Whether the parties are the same or are litigating under the same title, and whether a court of competent jurisdiction determined the previous application.

26. In that respect, the Court of Appeal held in [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR that:-

For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

27. The Court went on to state on the role of the doctrine: -

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the specter of being vexed, haunted, and hounded by issues and suits already determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain, at last, outcomes favorable to themselves. Without



it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure justice.

28. In the application dated 8/3/2023, the Applicant sought for Advocates Murimi Ndumia to be put on record, the extension of time for the Petitioner to lodge a notice of appeal and stay of execution of the Decree in the matter pending appeal. This Court deliberated on the application in the ruling dated 25<sup>th</sup> January 2024 and established that the issues that arise for determination are:-

“Whether the Applicant ought to have sought leave to appeal against the decision of this Court? If aforesaid in negative, is the application for an extension of time to lodge a notice of appeal merited? If aforesaid in affirmative, whether the stay of execution of the trial court decision and the order of costs are merited.”

29. The Court considered the above issues extensively, and the Applicant was dismissed because the Applicant failed to seek leave of the Court to file an appeal. Consequently, the Applicant filed the instant application seeking similar orders, except this time they added that they were seeking leave to appeal against the Court’s judgment/decree dated 28<sup>th</sup> July 2022.

30. In *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, the Court stated that: -

Article 159(2)(b) of the *Constitution* commands that justice should not be delayed. Turning a successful litigant into a circular frolic expedition when sufficient concessions have been made to the Applicant to settle the Decree would turn the legal process into a theatrical absurdity.

31. Accordingly, I agree with the Respondent that this Court is being moved to sit as an appeal on its own decision because by comparing the two applications, the issues raised herein are directly and substantially in issue in the former application; the former application was between the same parties, litigating under the same title and the issues were heard and determined by the Court in the former suit. The Applicant, by bringing the instant application on the same issue and sneaking the issue of leave to appeal, is, in my considered, *res judicata* and an abuse of court process.

32. For the foregoing reasons, I find that this application lacks merit, and thus, the Court makes the orders;
- i. The application is hereby dismissed with costs to the Respondent.

**RULING DATED AND SIGNED AT NYANDARUA THIS 18<sup>TH</sup> DAY OF JULY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

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**CHARLES KARIUKI**

**JUDGE**

