



**In re Estate of Kariuki Mathu (Deceased) (Succession Cause 554 of 2010)
[2024] KEHC 12545 (KLR) (Family) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

SUCCESSION CAUSE 554 OF 2010

CJ KENDAGOR, J

OCTOBER 11, 2024

IN THE MATTER OF THE ESTATE OF KARIUKI MATHU (DECEASED)

BETWEEN

REGINA NJAMBI KARIUKI APPLICANT

AND

MARY SEKUNDA WANGUI KARIUKI RESPONDENT

AND

LUCY WAIRIMU NDIGU INTERESTED PARTY

RULING

1. The Court revoked the Grant of Letters of Administration intestate that had been issued to John Njoroge Kariuki, who passed away, and a new Grant was issued to the Respondent (Mary) and Harriet Wangui, who are the daughters-in-law of the deceased (Kariuki Mathu). The Applicant is Harriet's daughter (Harriet passed away) and the deceased's granddaughter. The interested party is the daughter of the deceased (Kariuki Mathu).
2. The Applicant and the interested party filed applications for revocation of the Grant, dated 12th October, 2012 and 03rd October, 2012 respectively. The Court consolidated the two applications and determined them through a Judgment that was delivered on 23rd May, 2019. The court held that the applications were not merited and dismissed them. Subsequently, there were proceedings where the interested party sought to be enjoined in the Applicant's application dated 26th June, 2019 and for leave for her counsel to come on record after the delivery of the judgment. The Court granted the orders sought by the interested party.



3. The application dated 26th June, 2019, filed by the Applicant, is the one currently under consideration by the Court. The interested party supports the application, whereas the Respondent opposes it. The application seeks the following orders:-
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of the intended appeal, the Honourable Court be pleased to order that the estate be preserved and that the administrators be stopped from disposing off, alienating and/or distributing the estate.
 - iv. That the Court be pleased to grant the Applicant leave to appeal against the judgement dated and delivered on 23rd May, 2019.
 - v. That the Court be pleased to extend the period for filing Notice of Appeal against the judgement dated and delivered on 23rd May, 2019
 - vi. That this Honourable Court do grant any other or further orders as may be deemed fit in the circumstances.
4. The Respondent filed a replying affidavit sworn on 26th July, 2029 and grounds of opposition dated 12th July, 2019. The interested party filed a replying affidavit sworn on 27th June, 2024. The parties also filed submissions.
5. The Applicant asserts that her advocate, who was then officially handling the case, failed to obtain leave to appeal and consequently failed to submit a notice of appeal within time despite her grievance with the judgment. Her contention with the judgment is that the distribution of the estate is inequitable, and the consent to the mode of distribution given by Harriet, who was a co-administrator (deceased), was invalid for reasons that she suffered from mental illness. The Applicant deponed that the anticipated appeal had prospects of success and would be rendered nugatory if preservation orders were not issued
6. The interested party's case is that she was not aware that the Court dismissed her Summons Application for Revocation of Grant dated 12th October, 2012. She stated that she wished to lodge an appeal and supported the prayers sought in the application now before the court. The interested party contends that the administrators unjustly omitted her as a beneficiary of her deceased father's estate. She also stated that her former advocates failed to act in her interest and hence the orders being sought for leave to appeal and extension of time to file the notice of appeal.
7. The Respondent asserts that the application is improperly before the court as the Applicant did not seek an extension of time to file the application and further that the application is not merited as no viable and sufficient reasons had been given by the Applicant for the grant of orders sought. The Respondent also stated that the grant of leave would add more anxiety to the beneficiaries of the estate and further delay the enjoyment of the judgment and distribution of the estate among the beneficiaries.
8. I have considered the application, the responses on record, and the written submissions filed by the respective parties. I find the following issues necessary for determination:-
 - i. Whether the court should grant leave to the applicant and the interested party to appeal against the judgment delivered on 23rd May, 2019 and consequently extend the period of filing of Notice of Appeal, and
 - ii. Whether the court should grant any orders on estate preservation of the estate.



9. Section 75 of the *Civil Procedure* (CAP 21 of the Laws of Kenya), provides for instances where appeal is as of right. In matters of succession, an appeal against decisions requires leave of the Court. Order 43 (3) of the *Civil Procedure Rules* states the following regarding leave to appeal;

“An application for leave to appeal under Section 75 of the *Act* shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”
10. On the submission by the Respondent that the Applicant ought to have sought an extension of time to file an application for leave, in my view, the Applicant, by asking the court for leave to appeal and extension of the period for filing of Notice of Appeal in the present application, already covers the issue that the application for leave was presented after the lapse of the required timeframe of 14 days. I decline to strike out the application on this technical ground and determine the same on merit.
11. In the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....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.”
12. The application was filed on 26th June, 2019, approximately a month after the Judgment was delivered. The Applicant and the interested party stated that they had difficulty securing the file after the judgment, which thereafter prompted the securement of the file as a strong room file. The Court record has a letter dated 20th June, 2019 addressed to the Deputy Registrar in which counsel complained of the unavailability of the file and their desire to lodge an appeal against the judgment. The request for proceedings was made on 26th June, 2019 vide the letter dated 19th June, 2019.
13. The delay is attributed to the failure of the advocates on record to seek leave. The Applicant filed a notice of change of advocates on 26th June, 2019. I have read the authority relied on in *Edney Adaki Ismail v Equity Bank Limited* (2014) eKLR, which outlines a measure of exercise of diligence by a client who asserts that the advocate failed to act within the required time.
14. Based on the correspondence in the file and the actions taken by the applicant, it is evident that she has diligently pursued the necessary steps to exercise her right to appeal the judgment. Furthermore, the application was filed without undue delay; the delay has been explained to the satisfaction of the Court.
15. The Applicant and the interested party have both annexed Draft Memorandum of Appeals, dated 26th June, 2019 and 10th February, 2020. The subject matter is the only property of the deceased. The interested party is the daughter of the deceased, and the Applicant is claiming beneficiary interest, as explained in the court judgment. Among the grounds of appeal is a question of the capacity of the deceased co-administrator (Harriet) to give consent to distribution and the question of consent by other beneficiaries and daughters’ inheritance under Kikuyu customary law. The issues raised in the draft memorandums of appeal raise pertinent issues of law worth interrogation and are not frivolous.



There is no prejudice that the Respondent and any other beneficiary will suffer if the Applicant and the interested party are given an opportunity to pursue the appeal.

16. This Court has unfettered discretion to grant leave and extend the time for filing of the appeal. The discretion must be exercised judiciously. The overriding objective is to ensure justice in the circumstances of the case. In this case, letting the Applicant and interested party pursue their grievances on appeal is fair.
17. Regarding prayer 3 on preservation of the estate, I note that the deceased died in 1966. The evidence tendered in Court during the hearing shows that the occupancy/settlement on the parcel, which is the only property of the deceased, was over 46 years from the time the Applicant and the interested party approached the court. Issuing orders that could disrupt the status quo pending the intended appeal is not justified. The parties will have an opportunity to finally resolve the distribution of the deceased's estate with the determination by the Court of Appeal.
18. In light of the foregoing, I grant the following orders regarding the application dated July 26, 2019;
 - i. Leave is granted to the Applicant and the interested party to appeal against the Judgment delivered on May 23, 2019.
 - ii. The period for filing the Notice of Appeal is extended.
 - iii. The Applicant and the interested party shall file and serve the Notice of Appeal within 30 days from the date of this Ruling.
 - iv. Failure to abide by the timelines will invalidate the leave granted.
 - v. Each party shall bear its own costs of the application.

It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 11TH DAY OF OCTOBER, 2024.

C. KENDAGOR

JUDGE

In the presence of:-

Court Assistant: Beryl

Ms. Mwangi: Advocate for Respondent

Mr. Kariuki: Advocate for Interested Party

No attendance by the Applicant

