



REPUBLIC OF KENYA



**In re Estate of the Late Kaga Kimaru Gathua (Deceased) (Succession Cause 42 of 2015) [2024] KEHC 12176 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12176 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE 42 OF 2015  
SM MOHOCHI, J  
OCTOBER 11, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE KAGA KIMARU GATHUA (DECEASED)**

**BETWEEN**

**FLORENCE NJOKI KAGA ..... APPLICANT**

**AND**

**JOSHUA KARIUKI KAGA ..... RESPONDENT**

**RULING**

1. The Applicant's Notice of Motion Application dated 31<sup>st</sup> May, 2024 brought under Section 7 of the *Appellate Jurisdiction Act* seeks: -
  - i. Spent
  - ii. Spent
  - iii. That the Honourable Court be pleased to extend time for filing Notice of Appeal against the Ruling delivered on 13<sup>th</sup> March, 2024
  - iv. That pending the hearing and determination of the intended appeal to the Court of Appeal or further orders of the Court, there be a stay of execution of judgment delivered on 13<sup>th</sup> March 2024
  - v. That costs of this Application be provided for.
2. The Application is supported by the sworn Affidavit of Nderitu Komu advocate, of even date wherein he deposed that after delivery of judgment on 13<sup>th</sup> March, 2024 he lodged a Notice of Appeal and paid for it on 27<sup>th</sup> March, 2024. That it was on 11<sup>th</sup> April, 2024. That it was signed by the Deputy Registrar. That copies of the signed Notices of Appeal were availed to him on 23<sup>rd</sup> April, 2024 which is when the



Court file was availed and he proceeded to serve the Respondent on the same date. He stated that he had already applied for certified copies of proceedings on 4<sup>th</sup> April, 2024.

3. It was the counsel's contention that while in the process of preparing the Record of Appeal, he came to learn of the mistakes on the dates on the Notice of Appeal as he all along assumed the Notices would be dated the same day they are lodged at the registry that is 27<sup>th</sup> March 2024.
4. He argued that, the estate is the substratum of the appeal and it would be in the interest of justice that it be preserved pending determination of the appeal. Further that the execution initiated by the Respondent for distribution purposes would render the appeal nugatory. That no prejudice would befall the Respondent if period of filing appeal is extended as the status quo has been prevailing since prior to demise of the deceased.
5. The Application was opposed by the Replying Affidavit of Joshua Kariuki Kaga sworn on 18<sup>th</sup> June, 2024. It was his case that it was not until the transfer documents were received by the Applicant on 28<sup>th</sup> May, 2024 than the Applicant filed the instant application on 31<sup>st</sup> May, 2024. That the undated Notice of Appeal was filed 3 weeks after delivery of judgment instead of the seven days as directed by Court.
6. He contended further that, proof of payment for the request of proceedings has been attached and the letter dated 4<sup>th</sup> April, 2024 is not received by Court. It was his case further that the Applicant has failed to demonstrate that she stands to suffer irreparable loss, or that she was keen on filing the Memorandum of Appeal and has also failed to furnish security of any type.

#### **Applicant's Submissions**

7. The Applicant in the submissions dated 21<sup>st</sup> June, 2024 submitted in terms of prayer No's 3, 4 and 5 and relied on the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR and *Mutiso v Mwangi* [1997] KLR where the Courts expressed themselves on the principles applicable and considerations employed in exercising discretion on enlargement of time to file Appeal out of time.
8. It was argued that, the failure of the advocate to notice the anomaly of the dates on the Notice of Appeal was an excusable mistake. The Court's attention was drawn to the decision in *Belinda Muras & 6 Other vs Amos Wainaina* [1987] KLR where the Court stated inter alia "a blinder on a point of law can be a mistake, the door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better..."
9. It was also submitted that, although there was short delay the same was explained satisfactorily. That the Applicant was a deserving party and approached Court with clean hand and full disclosure. The intended appeal is challenging the mode of distribution and if the Respondent proceeds with execution there might be nothing to litigate on in the appeal.
10. The Applicant further relied on the following decisions to submit on Substantial loss *Fast Lane Developer Limited v Peter Gitau Njuguna* [2021] eKLR, *Job Mark Wandolo v Paul Ng'anga Nage* [2021] eKLR, and *Mugambi Wang'ombe & Another v Biashara Sacco Society Limited & 3 Others* [2022] eKLR and in the decision in *re Estate of the Late Gitonga Inaga Emogi (decease)* [2020] eKLR to submit that maintaining the status quo poses no challenge or prejudice to any party or the estate as there was no likelihood of conflict since the two houses were living in different parcels .

#### **Respondent's Submissions**

11. The Respondent filed submissions on 24<sup>th</sup> June, 2024, it was submitted that no plausible reasons were given as to why the Notice of Appeal was not filed within the stipulated time neither did the Applicant



demonstrate the nature of circumstances that were beyond counsel's ability. It was also submitted that the Notice of Appeal was not served on time Reliance was placed in *Mistry Premji Ganji (Investments) Limited v Kenya National Highways Authority* [2019] eKLR and *Bookpoint Limited v Gurdian Bank Limited & Another* [2021] eKLR.

12. It was further submitted that the Applicant has not met the conditions precedent for grant of orders of stay of execution as was espoused in *Re Estate Atanasio Karanu* [2018] eKLR relied on. That the instant Application was prompted upon service of transfer of documents by the Respondent. The Notice of Appeal was filed out of time and the Applicant is therefore guilty of laches.
13. It was further argued that substantial loss has not been demonstrated or security for due performance furnished to warrant the orders sought. The Respondent contended that he was entitled to enjoy fruits of her judgment and relied on *Machira T/A Machira & Co Advocates vs East African Standard* (No. 2) of [2002] eKLR.

### **Analysis and Determination**

14. The Court has now considered the Applicant's application, the affidavit in support of the application thereof and Affidavit is in opposition the submissions and the only issue this Court needs to determine is whether the prayers sought should be granted.
15. This Court is persuaded of the soundness of the Judgment dated 13<sup>th</sup> March 2024 and is unpersuaded of an intended Appeal that seeks to reopen a consent and consequently there is nothing to be rendered nugatory under the circumstances.
16. This Court is inclined towards rendering substantive justice over technical quick wins, the delay in moving Court by the Applicants would be a delay parties should be willing to live with in light of the nine years it took to arrive at judgment. I find the Applicants to have reasonably moved this Court.
17. In Succession proceedings beneficiaries to the estate acquire substantive proprietorship rights after confirmation of grant and registration of transmission(s) therefore this Court is unpersuaded of any substantial loss that may be occasioned prior to a bequeath.
18. While this Court is unpersuaded of the arguability or success of the intended Appeal by the Applicants this Court in affording them the Right to Appeal shall extend the time to file an appeal and partially allow Notice of Motion Application dated 31<sup>st</sup> May, 2024 on the following terms:
  - i. The Applicants shall file the intended Appeal within the next 15 days from today.
  - ii. There shall be no stay of proceedings in this succession Court and the Applicants if so inclined are urged to seek stay of these proceedings before the Court of Appeal.
19. Parties shall bear their own costs.

It is So Ordered.

**SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 11<sup>TH</sup> OCTOBER 2024**

.....

**MOHOCHI S.M**

**JUDGE**

