



**In re Estate of the Late Juma Matayo Murere (Deceased) (Succession Cause 137 of 2005) [2023] KEHC 2131 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2131 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
SUCCESSION CAUSE 137 OF 2005**

**DK KEMEL, J**

**MARCH 20, 2023**

**IN THE MATTER OF THE ESTATE OF THE LATE JUMA MATAYO MURERE (DECEASED)**

**BETWEEN**

**FRANCIS TINDI NYONGESA ..... PETITIONER**

**AND**

**JOSEPH WANJALA MURERE ..... OBJECTOR**

*(Being application for leave to file appeal against the judgment delivered on September 29, 2022 in Bungoma Succession Cause No 137 of 2005.)*

**RULING**

1. The applicant has moved this Court by way of the application dated October 27, 2022, pursuant to Articles 159(2) (d) & 164 (3) (a) of the [Constitution of Kenya, 2010](#), Section 7 of the [Appellate jurisdiction Act](#), rule 41(a) of the [Court of Appeal Rules 2022](#), Section 47 of the [Law of Succession Act](#), Rules 49, 63, 67, 73 of the [Probate and Administration Rules](#), Order 50 Rule 6 of the [Civil Procedure Rules](#) and all other enabling provisions of the law seeking leave to file appeal against the judgment delivered on September 29, 2022 in Bungoma Succession Cause No 137 of 2005; for stay of execution of the Judgment delivered on September 29, 2022 in Bungoma Succession Cause No 137 of 2005 until the appeal is heard and determined; and that the costs of the application be provided for.
2. The application is premised on the grounds on the face of the application and supported by the affidavits sworn by Joseph Wanjala Murere on his own behalf and on behalf of one Moses Juma sworn on October 27, 2022.
3. It was averred that there is no automatic right of appeal from the decisions of the High Court to the Court of Appeal on Probate and Administration matters and hence leave is mandatory before appeal is filed. The Objector/Applicant alleged that the delay in lodging the appeal was occasioned by failure by his counsel to seek leave of Court to appeal against the decision when judgement was delivered and that



he proceeded to file a notice of appeal which was subsequently withdrawn vide notice dated October 26, 2022. He prayed that this Court ought not to visit the mistake of his Counsel upon him and other beneficiaries to the estate of the deceased dissatisfied with the judgement.

4. He averred that the contentious judgement disinherited Moses Juma who has no other home other than the land apportioned to him by the deceased on Ndivisi/Makuselwa/106 and should execution proceed he would be rendered homeless. He further averred that he stands to suffer substantial loss should distribution of the estate proceed as per the contentious judgement as the deceased did not give him land anywhere else thus he is entitled to more land on Ndivisi/Makuselwa/106 than apportioned in the contentious judgement of this Honourable Court.
5. In response, the Petitioner/Respondent filed a replying affidavit sworn on 7<sup>th</sup> November 2022 wherein he averred that the application before this Court is misconceived, bad in law and an abuse of due process. He further averred that the Objector/Applicant has not explained why he was not able to file an appeal within the statutory timelines or the irreparable loss he is set to suffer should this Court fail to grant the stay.
6. The application was canvassed by way of written submissions. Only the Objector/Applicant filed his submissions.
7. The Objector/Applicant submitted that there was no express automatic right of appeal to the Court of Appeal and that an appeal will lie to the Court of Appeal with leave of the High Court. The failure of his Counsel to seek leave to appeal against the decision rendered was a mistake on the part of the Counsel which he prayed not to be visited upon him. He relied on Rule 41(1) (a) of the Court of Appeal Rules 2022; Section 67 of the Probate and Administration Rules and the case of In re Estate of Erastus Muriungi Ngarithi (deceased) (2018) eKLR. It was submitted that judgement was delivered in September 29, 2022 and his Counsel proceeded to file the defective notice of appeal on October 14, 2022 but the same was withdrawn on October 26, 2022 thus there is no appeal lying at the Court of Appeal. Counsel referred to Rule 98 of the Court of Appeal Rules, Section 7 of the Appellate Jurisdiction Act and the case of Peter Munjunga GATHERU vs Harun OSORO NYAMBOKI & another (2021) eKLR. it was submitted that the application was properly before this Court.
8. On stay of execution, it was submitted that the application was brought forth within the requisite 30 days of the Judgement of the Court and that the delay was occasioned by the Applicant's Counsel's error. This not being a money decree the issue of security for costs does not apply and the aggrieved parties will suffer substantial loss in the event the stay orders are not granted.
9. The issues for determination herein are whether the Objector/Applicant has:
  - a. established justification for delay in lodging appeal?
  - b. If above in affirmative, is stay of execution of trial Court order pending appeal merited? and
  - c. what is the order as to costs?
10. Before I delve into the questions, I should point out that the Objector/Applicant did not seek leave of the Court to file the Appeal out of time in the first place. Although the issue has become contested post-2010, at least part of the jurisprudence from the Court of Appeal suggests that a party requires leave of the High Court to file an Appeal in the Court of Appeal in succession matters since the right of appeal is not automatically given in the statute. See, for example, Rhoda Wairimu Kioi & John Kioi



Karanja v Mary Wangui Karanja and Salome Njeri Karanja, CA Civil App. NAI 69 of 2004 where it was held:

“We think we have said enough to demonstrate that under the Law of Succession Act, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this court.

Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes. So, what is our determination in this application? We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court.”

A perusal of prayer No 3 of the application indicates that indeed the applicant has sought leave to lodge appeal to the Court of Appeal. Even though the applicant did not make the request at the time of delivery of the judgement, he is not barred from approaching the court at a later stage for the same.

11. I shall now turn to the test to be applied to determine whether to grant extension of time. The parties are in agreement about the factors that should be looked at. It is worth noting that the factors which the Court of Appeal looks at in exercising its discretion under Rule 4 of the Court of Appeal Rules are the self-same factors that this Court considers in entertaining an Application under section 7 of the Appellate Jurisdiction Act. The test is also the same one this Court applies in extending time to file an appeal from the subordinate Courts under section 79G of the Civil Procedure Act. The Court of Appeal in Fakir Mohammed V Joseph Mugambi & 2 Others, Civil Appln No NAI 332 of 2004 (unreported) stated the test thus:

“The exercise of this Court’s discretion under Rule 4 has followed a well-beaten path since the structure of “sufficient reason” was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors.”

12. These are the same factors this Honourable Court considers in deciding the merits of applications under section 7 of the Appellate Jurisdiction Act and Section 79G of the Civil Procedure Act. Indeed, various case laws have now provided guidelines on what will be considered “good cause” for purposes of permitting a party who is aggrieved by a judgment or ruling to file an appeal out of time. The most important consideration is for the Court to advert its mind to the fact that the power to grant leave extending the period of filing an appeal out of the statutory period is discretionary and must be exercised judicially and on a case by case basis. While not a right, it must be exercised judiciously and only after a party seeking the exercise of the discretion places before the Court sufficient material to persuade the Court that the discretion should be exercised on its behalf and in their favour.



13. Case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd* [2003] KLR. They include the following:
- a. The period of delay;
  - b. The reason for the delay;
  - c. The arguability of the appeal;
  - d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
  - e. The importance of compliance with time limits to the particular litigation or issue; and
  - f. The effect if any on the administration of justice or public interest if any is involved.
14. I will now consider the Applicants' application for extension of time against these factors. The Objector/Applicant has deposed that the delay to seek leave to appeal to the Court of Appeal was occasioned when his Counsel proceeded in error to file a notice of appeal without leave and at the withdrawal of the same notice the requisite 14 days had already lapsed.
15. The Petitioner/Respondent argued that he was aware that the Counsel of the Objector/Applicant was in Court during the delivery of the Judgement and that the Objector/Applicant has not explained why he was not able to file an appeal within the statutory period as provided under the law.
16. I wish to restate that enlargement of time is a matter of judicial discretion which is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. To this end, Courts have repeatedly emphasized that mistakes of counsel not amounting to bona fide mistakes are punishable as professional negligence.
17. This plea that the mistakes of counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client. In the case of *Belinda Muras & 6 Others -vs- Amos Wainaina* [1978] KLR in which Hon Madan JIA (as he then was) defined what constitutes a mistake as follows:
- “A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.” [own emphasis].
18. The question as to whether an appeal lies to the Court of Appeal as a matter of right in succession causes against the decisions of the High Court exercising its original jurisdiction has been moot. One school of thought espouses that leave is required to file an appeal to the Court of Appeal. The Court of Appeal in the case of *Francis Gachoki Murage v Juliana Waindi Kinyua & another* Civil Appeal No 139 of 2009 held thus:
- “We have considered this issue of whether this appeal lies with considerable anxiety. First, leave was never sought in the High Court. The practice has always been where there is no automatic right of appeal, an aggrieved party wishing to appeal is enjoined to seek leave.



Granting of leave is within the discretion of a judge. In this case, the appellant is appealing against an order of distribution of the deceased estate. That order is capable of execution as a decree of the court; thus following the dicta in the *Makhangu v Kibwana* (1996-1998) 1 E.A 168 case, the appellant can be said to have an automatic right of appeal.”

19. The second school of thought is that leave to appeal to the Court of Appeal on matters of succession is required. In the case of *Rboda Wairimu Kioi & ANo Vs Mary Wangui Karanja & ano* (2014) eKLR, the Court of Appeal stated:

“We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising its original jurisdiction with the leave of the High Court or where the application for leave is refused, leave with this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious judicial consideration. We think this is a good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes....that leave of the High Court in succession matters is necessary in the former’s exercise of its original jurisdiction and that where that application for leave has been rejected by the High Court, it can be made to this Court.”

20. Nevertheless, Courts have scrutinized the above and applied the same and the unanimous conclusion is that, there is need and indeed legal requirement that appeals from the High Court to the Court of Appeal in succession causes lie with the leave of the High Court. Such leave, is desirable for purposes of expeditious disposal of succession causes in order to bring disputes to an end and allow families to settle.
21. The Objector/Applicant has deponed that the delay to seek leave to appeal to the Court of Appeal was occasioned when his Counsel proceeded in error to file a notice of appeal without leave and at the withdrawal of the same notice the requisite 14 days had already lapsed. The contentious judgement was delivered on September 29, 2022, Counsel for the Objector/Applicant proceeded to file the Notice of withdrawal of appeal on October 27, 2022 and filed this application on October 31, 2022. I do not find the time it took the Objector/Applicant to file the Application – 30 days – since Counsel became aware of the legal requirement that appeals from the High Court to the Court of Appeal in succession causes lie with the leave of the High Court, to be inordinate in any reasonable sense.
22. Secondly, I am unable to say that the intended appeal is in-arguable, as I will briefly analyze below. Of course, all the Applicants have to show at this stage its arguability – not high probability of success. Thirdly, I am acutely aware that the underlying issue in this controversy is the emotive issue of land distribution out of succession. It is in this area where our decisional law is particularly sensitive in applying its policy preference to have matters determined on their merits whenever possible.
23. Fourthly, I am unable to see any substantial adverse effects granting this order will have on the Administrators other than permitting the Respondent to exercise a precious cherished right of appeal. Lastly, while the statutory timelines are certainly important to ensure the due and efficient administration of justice, they are not, in themselves a core substantive value in the same sense, for example, that the *Constitution* and the *Elections Act* place on the timelines for filing Elections Petitions.
24. Consequently, I shall grant the Objector/Applicant leave to Appeal against the judgement of this Court dated September 29, 2022 as well as leave to file that Appeal out of time.



25. I shall now turn to the Objector/Applicants' prayer for a stay of execution. On the issue of stay of execution Order 42 Rule 6(2) of the *Civil Procedure Rules* provides:
- “(2) No order for stay of execution shall be made under sub rule (1) unless—
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
26. The Objector/Applicant has strenuously argued that if a stay is not granted, then his intended appeal will be rendered nugatory. He has also endeavoured to demonstrate that he has met the other three requirements for the grant of stay namely that:
- a. The appeal she intends to file is arguable;
- b. The application was made without unreasonable delay; and
- c. She willing to give such security as the court may order for the due performance of the decree which may ultimately be binding on her.
27. Counsel for the Objector/Applicant tried to demonstrate to this Court that the intended appeal has high chances of success. It was argued that one of the beneficiaries to the estate of the deceased, Moses Juma, will be evicted from the land since this Court made no provision for him on Ndivisi/Makuselwa/106 and that the surveyor's report dated 9<sup>th</sup> March 2022 confirmed that he is on the land. He further argued that the estate of the deceased be shared according to number of units in each house.
28. Counsel for the Petitioner/Respondent argued that the Objector/Applicant failed to demonstrate the loss he will incur if the stay was not granted and that the application before this Court lacked merit.
29. Suffice to say that in my view, it does not require laborious analysis to conclude that the proposed appeal is arguable: the proposed appeal aims to persuade the Court of Appeal that the High Court sitting as a succession Court failed to consider one of the beneficiaries of the estate of the deceased and its contentious judgement made no provisions for him on the Ndivisi/Makuselwa/106 and that the estate of the deceased ought to have been shared according to the number of units in each house. I cannot imagine any objective standard which would find that question to be in-arguable or not fit to merit serious judicial consideration by the Court of Appeal. Consequently, I have already held above that the intended appeal is arguable and deserving of leave to appeal to the Court of Appeal.
30. Applicant herein stands to lose irreparably if the Respondent is allowed to proceed, sub-divide the suit parcel and transfer it to himself where of he may proceed to dispose of and the substratum of the appeal will have been lost and the appeal would be rendered nugatory.
31. From the foregoing, the Objector/Applicant and the alleged beneficiary, Moses Juma, may unjustly lose their portions of land subject herein. This Court notes that, with the issuance of a fresh grant and a certificate of confirmation of grant to the Administrators of the Estate of the deceased is subject to distribution as per the direction of the Court in the judgement delivered on 29<sup>th</sup> September 2022. The Objector/Applicant and the other beneficiary, Moses Juma, may unjustly lose their allocations on the subject parcel but the Objector/Applicant has failed to offer any security in the event the appeal fails.



In the persuasive decision of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Co. Ltd* [2019] eKLR the Court observed: -

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal falls.

Further Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgment involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal...

Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree.”

32. I am of the view that security is necessary as a commitment by the applicants to fast track the appeal and prevent prolonged delay in the execution of the judgment in the event that the appeal is not successful. Be that as it may, this being a succession matter involving members of the same family, I will proceed to allow the stay of execution of the judgement of this Court dated September 29, 2022 pending hearing and determination of the appeal without security. In my considered view, I find that the Objector/Applicant have shown sufficient cause for grant of orders for stay of execution.
33. In the result, it is my finding that the application dated October 27, 2022 has merit. The same is allowed in the following terms:
  - a. The Objector/Applicant is hereby granted leave to appeal against the Judgement delivered by this Court on September 29, 2022.
  - b. The Objector/Applicant is hereby granted leave to appeal out of time against the against the Judgement delivered by this Court on September 29, 2022. He shall file the Notice of Appeal within Fourteen (14) days of today.
  - c. As to the costs, since this is a succession cause involving family members, each party shall bear his/ her own costs.

**DATED AND DELIVERED AT BUNGOMA THIS 20<sup>TH</sup> DAY OF MARCH 2023**

**D. KEMEI,  
JUDGE.**

In the presence of:

Mwanga for Petitioner/Respondent



Miss Wanyama for Lunani for Objector/Applicant

