



**Wambigo v Munyiri (Family Miscellaneous Application 26 of 2022)  
[2024] KEHC 13583 (KLR) (4 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13583 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
FAMILY MISCELLANEOUS APPLICATION 26 OF 2022  
MA ODERO, J  
NOVEMBER 4, 2024**

**BETWEEN**

**KARUE MUNYIRI WAMBIGO ..... APPLICANT**

**AND**

**GITHINJI STEPHEN MUNYIRI ..... RESPONDENT**

**RULING**

1. The Applicant herein Karue Munyiri Wambigo has filed the Notice of Motion dated 21<sup>st</sup> December 2022 seeking the following orders:-
  - “(1) That the Honourable court be pleased to extend time to the Applicant to file Appeal out of time.
  - (2) That the costs of this application be in the cause.”
2. The application which was premised upon Section 5 and 50 *Law of Succession Act*, Section 1A and 1B *Civil Procedure Act*, Rules 63 and 73 of the Probate and Administrative Rules, Order 50 Rule 6 of the Civil Procedure Rules, 2010 was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Githinji Stephen Munyiri filed a Replying Affidavit dated 14<sup>th</sup> February 2023 opposing the application. The matter was canvassed by way of written submissions. The Applicant submissions dated 9<sup>th</sup> July 2024, whilst the Respondent did not file any submissions.

**Background**

4. This application arises from the decision of the learned Principal Magistrate in Karatina Succession Cause No. 383 of 2018: Estate of Stephen Muriuki Karue (Deceased), which ruling was delivered on 25<sup>th</sup> October 2022.



5. The Applicant avers that the ruling was delivered in his absence and in the absence of his Advocates. That as soon as he became aware that a ruling had been delivered, the Applicant applied to be supplied with certified copies of the same. That it was not until 23<sup>rd</sup> November 2022, when certified copies of the ruling was supplied to the Advocate.
6. This was after the statutory thirty (30) day period for appeal provided for in law had expired. The Applicant pleads that he wishes to appeal against the said ruling and has annexed a Draft Memorandum of Appeal (Annexure 'KWM4' to the Supporting Affidavit dated 21<sup>st</sup> December 2022)
7. The Applicant now prays that this court grant him leave to file the appeal out of time.
8. The Respondent avers that this current application has been filed after inordinate delay. The Respondents also challenge the Applicants claim that he was unaware of the delivery of the judgment and point out that vide their letter dated 25<sup>th</sup> October 2022 written to the court Registry where the Applicants indicated that they required the certified copy of the ruling for purposes of lodging an appeal – a clear indication that the Applicant was fully aware of the contents of said Ruling.

### **Analysis and Determination**

9. I have carefully considered the Application before this court, the reply filed thereto as well as the written submissions on record.

Section 79G of the [Civil procedure Act](#) provides as follows;-

“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 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 sufficient cause for not filing the appeal in time.” [own emphasis]

10. The courts have the discretion on whether or not to grant leave to file an appeal out of time. The factors to be considered in determining whether or not to grant such leave were set out in the case of *Thuita Mwangi -vs- Kenya Airways Ltd* [2003] eKLR as follows;-
  - (i) The period of the delay
  - (ii) The reason for the delay
  - (iii) The arguability of the appeal
  - (iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted.
  - (v) The importance of compliance with time limits to the particular litigation or issue;- and
  - (vi) The effect if any on the administration of justice or public interest if any is involved.
11. Similarly in *Nicholas Kiptoo Arap Kori Salatt -vs- IEBC & 7 others* [2013] the Supreme Court of Kenya set out the considerations to be made by a court exercising the discretion to grant leave to file appeal out of time as follows;-

“(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.



- (2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
- (3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- (4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.
- (5) Whether there will be any prejudice suffered by the respondent of the extensions is granted.
- (6) Whether the application has been brought without undue delay; and
- (7) Whether in certain cases, like election petition, public interests should be a consideration for extending time.”

12. The impugned ruling was delivered on 25<sup>th</sup> October 2022. The present application was filed on 22<sup>nd</sup> December 2022 approximately two (2) months after the ruling had been delivered. In my view a delay of thirty days after expiry of the statutory period for appeal cannot be said to amount to inordinate delay. I find that the application was filed in a timely manner.
13. The Applicant has given a plausible reason for the delay. Neither her nor his advocate were in court when the ruling was delivered. The Applicant has also annexed copies of a letter dated 25<sup>th</sup> October 2022 which his Advocate wrote to the court Registry seeking to be supplied with a certified copy of the ruling. (Annexure KMW 1). That copy was not supplied until 23<sup>rd</sup> November 2022 (Annexure KMW3’)
14. The applicant clearly had no control over how long the Registry took to supply his advocate with a copy of the ruling.
15. On the question of whether there exists an arguable appeal it is not the duty of the court at this stage to comment on the merits or otherwise of the intended appeal. Suffice to say I have perused the Draft Memorandum of Appeal (Annexure KMW ‘4’) and in my view it raises triable issues.
16. I do not find that the Respondent stands to suffer any prejudice if this application is allowed. The Respondent will be granted ample opportunity to oppose the appeal. In conclusion I allow the Notice of Motion dated 21<sup>st</sup> December 2022 and make the following orders.
  - (1) The Applicant is granted an extension of thirty (30) days within which to file and serve the Memorandum of Appeal.
  - (2) Costs of this application will be met by the Applicant.

**DATED IN NYERI THIS 4<sup>TH</sup> DAY OF NOVEMBER 2024.**

**MAUREEN A. ODERO**

**JUDGE**

