



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**SUCCESSION CAUSE NUMBER 81 OF 2002**

**IN THE MATTER OF ESTATE OF TERESIA WANJIRU WANG'ERA**  
**(DECEASED)**

**ELIZABETH WAIRIMU THIMBA**

**KENNETH MAITAMEI THIMBA**

**TERESIA WANJIRU THIMBA .....APPELLANTS/PETITIONERS**

**VERSUS**

**WILFRED NJOGU MBUTHIA.....OBJECTOR**

**AND**

**JAMES MUNENE THIMBA & ANOTHER.....DEPENDANTS**

**RULING**

1. Before this court are two applications for determination.
2. The Defendants application dated 16<sup>th</sup> February 2015 was filed on the 23<sup>rd</sup> February 2015. It seek an order that the Deputy Registrar be directed to execute all the documents necessary for the transfer of the properties herein in the names of the beneficiaries/Dependants in terms of the Ruling of the court delivered on the 5<sup>th</sup> December 2014 by Justice Anyara Emukule. It is premised on the grounds that the Administrators have failed to execute the transfer forms by transmission to have the properties vested in the dependants in compliance with the court ruling referred to above. The application is opposed by a Replying Affidavit sworn by Elizabeth Wairimu Thimba, one of the Petitioners on the 15<sup>th</sup> March 2015 and filed on even date.
3. The second application is dated 26<sup>th</sup> February 2015 and filed by the petitioners on even date. It is premised on the provisions of Section 7 of the Appellate Jurisdiction Act, Chapter 9 Laws of Kenya and Rules 12 and 42 of the Court of Appeal Rules and Section 3A of the Civil Procedure Act.

The applicants'/Petitioners seek an order for enlargement of time to lodge a Notice of Appeal, and an order of stay of implementation of the directions emanating from the subject ruling delivered on the 5<sup>th</sup> December 2014 pending interpartes hearing of this application.

It is supported by an affidavit sworn on the 26<sup>th</sup> February 2015 by Mr. Mukite Musangi, Advocate for the Petitioners where he purports to explain the delay in filing the Notice of Appeal from the 5<sup>th</sup> December 2014. He blames the delay to his associate advocate who had the conduct of the matter and who failed to inform the petitioners and to file the Notice of Appeal, within the stipulated time despite getting instructions from the petitioners on the 15<sup>th</sup> January 2015. The associate advocate has since left his firm. The application is opposed and a Replying affidavit by Mr. Githui, Advocate for the Defendants sworn on 3<sup>rd</sup> March 2015 and filed on the 4<sup>th</sup> March 2015.

Parties have filed written submissions on both applications.

4. The court will address itself to the application dated the 26<sup>th</sup> February 2015 by administrators of the estate first.

In my view two issues arise from the said application. Whether this court has jurisdiction to entertain the application to grant the orders sought, and second, whether the application meets the threshold upon which the court may grant the prayers.

**Section 7 of the Appellate Jurisdiction Act Chapter 9** Laws of Kenya provides:

*“... the High Court may extend the time for giving Notice of Intention to Appeal from a Judgment of the High Court or for making an application or for a certificate that the case is fit for appeal notwithstanding that the time giving such notice or making such appeal may have already expired...”*

The Administrators urge the court that, pursuant to the above provision, the court is seized with jurisdiction and rely on the case **Kinyotta Holdings Ltd -vs- Kenya Shell Ltd – Nakuru HCCC No. 624 of 2007** where the court (Justice Mabeya) held that the only power donated to the superior court by Section 7 above is for extension of time for giving Notice of Intention to Appeal from the Judgment of the High Court, and followed in **Kudheha -vs- Namli Club in Industrial dispute case No. 77(d) of 2009**.

I fully agree with my fellow Judges that this court has power to extend time to file the Intended Notice of Appeal. I however add that, that power is not absolute. It is discretionary and upon the applicant giving sufficient reasons for the delay, the length of the delay and the chances of success of the Intended Appeal if the extension is granted, and also the degree of prejudice to the Respondent if the application is granted – as held in the case of **Leo Sila Mutiso -vs- Rose Hellen Wangari Civil Application No. Nairobi 255 of 1997**.

5. This court has considered the applicants reasons for the delay, that the advocate seized of the matter failed to inform the applicants of the Ruling of the court upto the 9<sup>th</sup> January 2015 when time had already lapsed by four(4) days. Upon being informed, the applicants in their letter dated 15<sup>th</sup> January 2015 replied:

*“----- We need to meet and agree on the best way forward possibly even consider an appeal once the above is determined. We would also request your legal opinion on the same. Kindly advice and a suitable date and time.”*

My understanding of the above is that the applicants were not decided whether to appeal or not, and sought legal advice from their Advocates. The advocates did not intimate to the court what advice they gave, if any, except that after another 18 days delay, this application was filed, making a total delay of 22 days, after the initial 30 days allowed under the law.

**In the matter of the Estate of Waringa Gitau (deceased),**

Judge Kimaru held that, a case is not owned by the Advocate but by the litigant and that it is its duty to pursue the progress of the case. The response by the applicant hereof vide its letter dated 15<sup>th</sup> January 2015 is a case in point. The applicant, notwithstanding the delay then, did not give full instructions to the Advocates whether to file an appeal or not.

It is not indicated whether the Applicants were informed that the time was of essence

6. I have looked at the Replying Affidavit by one Elizabeth Wairimu Thimba sworn on the 4<sup>th</sup> March 2015 in response to the Defendants application dated 16<sup>th</sup> February 2015.

In her affidavit Paragraph 4, she depones that the application to have the Registrar of the High Court execute the transfer documents was premature, that there was a six month period and that, that was only in early March 2015 hence, no urgency occasioning the rush into the application. Reading of this deposition does not show a party who had intentions of appealing against the court's ruling issued on the 5<sup>th</sup> December 2014.

7. In opposing the application for leave to extend time to file the Notice of Appeal, the defendants submit that the administrators have not demonstrated that the delay of 22 days is not inordinate and have not sufficiently explained reasons for the delay, and whether the appeal is arguable and its chances of success and the prejudice that may be occasioned should the application be disallowed. It is further submitted for the Respondent that an application for enlargement of time does not lie if the appeal does not lie as of right or if leave to appeal has not been granted.

8. The matter arises out of a ruling in a Succession Cause where the court distributed the deceased's estate pursuant to Sections 26, 29, and 35 of the Laws of Succession Act and Rule 73 of the Probate and Administration Rules. Does an appeal lie as of right from the Ruling of the Court on distribution of a deceased estate?

There are no records to show that leave to file an appeal was ever applied for or granted.

9. **Under Section 47 of the Laws of Succession Act**, the High Court has jurisdiction upon hearing of any application to pronounce an order, and any order made is appealable under **Section 66 of the Civil Procedure Act**- that states:

*“Except where otherwise expressly provided in this Act and subject to such provision as to furnishing of security as may be prescribed, an appeal shall lie from the decrees of any part of the decrees and from the orders of the High Court to the Court of Appeal.”*

The court notes that Appeals from Succession Cause orders are not provided for under **Section 75 of the Civil Procedure Act**, meaning, leave to appeal must be obtained. As stated above, no leave to appeal against the ruling/order under review was ever obtained. In **Makhangu -vs- Kibwana E.A.L.R. (1995 – 1988) I EA**, the Judges of Appeal held that an order issued under Section 47 of the Law of Succession Act is not covered by Section 75 of the Civil Procedure Act.

The Applicants having not obtained leave to appeal, it follows that the application is incompetent and ought to be struck out, as granting an extension to file the Notice of Appeal without leave to appeal would be an exercise in futility. I have considered numerous authorities in this aspect. I am persuaded that unless the applicants had obtained leave to file the appeal, then, granting an extension to file the Notice of Appeal would not cure the procedural defect and would be in vain.

10. For the applicant to succeed, he has to demonstrate that the Intended Appeal has chances of success. The applicant has not by way of affidavit or otherwise exhibited the grounds from which the court may consider chances of success or not. No draft Memorandum of Appeal has been annexed. The Intended Notice of Appeal is but a notice. Further, the applicants have deponed that if the orders sought are not granted, they they would be in real danger of facing implementation of

the subject ruling's directions and stand to suffer irreparable loss. There is nothing on record to show what danger or apparent suffering that denial of the orders may be occasioned to the applicants. It is not enough to allege. At least a semblance of loss and suffering ought to be provided.

This cause has been in the courts since 2002. The Ruling of this court dated 5<sup>th</sup> December 2014 somewhat concluded the cause. As stated in the said ruling, the court relied largely on the proposed distribution of the estate from the proposals by the parties in their letter dated 25<sup>th</sup> April 2013. This fact is indeed acknowledged by the applicants in their letter to their advocates dated 15<sup>th</sup> January 2015 and annexed to supporting affidavit.

11. The attack on the distribution of the estate vide the Ruling under attack in my view is not genuine, but a further way of seeking to prolong the conclusion of the cause, to the disadvantage and prejudice of the Dependants.

For an order to issue for stay of execution of the order referred to herein as “**stay of implementation of directions,**” the applicants must satisfy the requirements as provided under **Order 41 of the Civil Procedure Rules** – that they stand to suffer substantial loss unless the stay is granted, that they are ready to provide security for the due performance of the decree/order, that there will be no prejudice occasioned to the respondent and that the application has been brought without inordinate delay.

12. An order for stay of execution is at the Court's discretion that ought to be based upon such terms as may be just so as to do justice to the parties and to avoid injustice and hardship, but not designed to assist a party who deliberately is out to obstruct or delay the course of Justice-

See **Shah -vs- Mbogo (1967) E A 116.**

Reading the history of this cause resting with the ruling dated 5<sup>th</sup> December 2014, it is apparent that this has been a very protracted cause, from the year 2002. As stated above, the applicants have not satisfied any of the principles upon which an order of stay of execution or performance may be granted. I have stated that the applicants have not demonstrated any suffering or prejudice that they may suffer should the court denial all the orders sought. On the converse, the Respondents who are the beneficiaries and dependants, and who have been waiting for the distribution of the Estate so as for each one of them to enjoy their shares would have to wait longer if the orders are granted.

In its totality, and for reasons above, this court is not persuaded that the applicants application dated 26<sup>th</sup> February 2015 has any merit, and is a deliberate attempt to delay the course of justice to the beneficiaries.

13. The delay in filing the intended Notice of Appeal was not sufficiently explained for the reasons given. Further, it is the courts finding that there being no leave to appeal against the ruling of the court dated 5<sup>th</sup> February 2014, the application for extension of time to file the Notice of Appeal is incompetent. It therefore follows that an order of stay of what the applicant refers to as

**“a stay of implementation of directions emanating from the ruling dated 5<sup>th</sup> December 2014”** cannot issue.

14. The court having expressed itself as above, it follows that the Defendants' application dated 16<sup>th</sup> February 2015 is allowed. The said ruling had given the Administrators a window of six months to ensure that the entire distribution process including the transfer of the properties to the beneficiaries is completed within six(6) months from the 5<sup>th</sup> December 2014, and that an account of the completed distribution to be filed in court within two(2) weeks when the six months expire.

As I stated above in paragraph – of this ruling, the Administrator in her affidavit sworn on the 4<sup>th</sup> March 2015, deponed that there was still time to comply with the court's ruling. Time has now lapsed, and no compliance has been achieved. It therefore behoves this court to do justice to all the parties by granting prayers sought by the Respondents/Defendants in their application dated the 16<sup>th</sup> February 2015, and make an order that the Deputy Registrar of this court to directed to execute all the documents necessary for the transfer of the properties therein in the names of the beneficiaries/dependents in accordance to this courts ruling dated 5<sup>th</sup> December 2014.

15. The Administrators of the Estate of Late Teresiah Wanjiru Wang'era(deceased) shall pay the costs of this application.

**Delivered, Dated and Signed and in open court this 9<sup>th</sup> day of July 2015**

**JANET MULWA**

**JUDGE**

**In the presence of:**

Alwala holding brief for Githui for the Defendants

No appearance for Applicants

Court clerk – Linah.