

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT FAMILY MISCELLANEOUS CASE NO. E007 OF

2021

JEDIDA WAMBUI NDIRITU.....

APPLICANT

-VERSUS-

JOSEPH NDUMIA NDIRITU.....

RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated **16th June 2021** by which the Applicant **JEDIDA WAMBUI NDIRITU** seeks the following orders:-

“(a) THAT the court be pleased to grant leave to the applicant to file appeal against the Respondent out of time.

(b) THAT the cost of this application be in the cause.”

2. The application was premised upon **Sections 1A, 1B, 3A and 3B** of the **Civil Procedure Act** and all other enabling provisions of law and was supported by the affidavit of even date sworn by the Applicant.
3. The application was opposed by the Respondent **JOSEPH NDUMIA NDIRITU** through the Replying Affidavit dated **15th September 2021** sworn by **FKM WACHIRA** an Advocate of the High Court of Kenya.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated **27th June 2022** whilst the Respondent relied upon their written submissions dated **27th July 2022**.

BACKGROUND

5. This succession cause relates to the estate of the late **PETER NDIRITU WAMATHAI** (hereinafter 'the Deceased'). Letters of Administration in respect to the estate of the Deceased was made to the Applicant who was the widow of the Deceased.
6. The Respondent who was the son of both the Deceased and the Applicant filed an Affidavit of Protest dated **7th June**

2019, opposing the mode of distribution of the estate as proposed by the Applicant in her Supporting Affidavit dated **10th April 2019**.

7. The Protest was heard in the Lower Court and vide the judgment delivered on **29th June 2020**, **Hon. W. KAGENDO Chief Magistrate** (as she then was) allowed the Protest and directed that the estate be distributed as per the Affidavit of Protest.
8. Being aggrieved by this judgment the Applicant purposed to appeal. She now seeks leave to file her appeal out of time.

ANALYSIS AND DETERMINATION

9. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by the parties. At the outset the court wishes to apologise to the parties for the delay in rendering this decision. This matter was previously being handled by **Hon. Justice Muya** who gave directions of filing of submissions. Unfortunately due to intervening factors and the eventual transfer of the trial judge to **Nairobi**, the file was allocated to this court to write the ruling.

10. I have carefully considered the application before this court, as well as the written submissions filed by both parties. The only issue for determination is whether the prayer to file appeal out of time ought to be allowed.

11. **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 or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery 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 and sufficient cause for not filing the appeal in time.” [Own emphasis]

12. Therefore the statutory period allowed within which one is required to file an appeal is **thirty (30) days**. However with the leave of the court this statutory period may be extended.

13. In the case of **NICHOLAS KIPTOO ARAP SALAT -VS- IEBC & 7 Others [2014] eKLR**, the **Supreme Court of Kenya** enunciated the principles applicable in considering an application for leave to file appeal out of time as follows:-

“(a) Extension of time is not a right of any party.

It is an equitable remedy that is only available to a deserving party at the discretion of the court.

(b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

(c) Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis.

(d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

(e) Whether there will be any prejudice suffered by the respondent if the extension is granted.

(f) Whether the application has been brought without undue delay.”

14. Likewise in the case of **PAUL MUSILI WAMBUA -VS- ATTORNEY GENERAL & 2 Others [2015] eKLR** the **Court of Appeal** in considering an application for leave to file appeal out of time stated as follows:-

“.....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 the 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.”

15. The law and authorities are clear that the decision of whether or not to enlarge the time for filing an appeal is a matter that lies exclusively within the discretion of the trial court. That being said such leave ought only be granted when sufficient cause is shown.
16. In this case the Applicant has readily conceded that she did not file her appeal within the statutory time limit. The judgment in question was delivered on **29th June 2020**. This application seeking leave was filed on **16th June 2021** which was **one (1)** full year **after** the judgment had been delivered.
17. The Applicant has explained that the delay was occasioned by the delay by the Court Registry in availing the typed certified copies of the proceedings.
18. The Advocate on record made an application for proceedings on **23rd July 2020** as evidenced by their letter marked '**G MW2**' annexed to the Supporting Affidavit dated **16th June 2020**. It was averred that the typed proceedings were however not availed by the court Registry until **25th February 2021**. Thus the Applicant applied for typed

proceedings within one month of delivery of the judgment. However the typed proceedings were only supplied **seven (7)** months after the request had been made.

19. Unfortunately this is not an unusual or unique occurrence. The shortage of typists in the judiciary is well known and this often leads to delays in availing typed proceedings. Blame for this delay cannot in any way be laid at the feet of the Applicant or her advocate.
20. In the case of **CECILIA WANJA WAMWIRA -VS- JACKSON WAINAINA MUIRURI & Another [2018] eKLR**, the Court stated as follows:-

“There is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case. We are of the considered view that the learned judge in considering the application, should have looked at the appellant’s conduct from the time the appeal was filed up to the date the application for reinstatement was filed.....we have to

ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or delay in filing the application for reinstatement constitute an excusable mistake or was it meant to deliberately delay the cause of justice.”

21. I find that in this matter the Applicant has given a satisfactory explanation for the delay.

22. The next question would be whether the appeal is arguable.

It must

be remembered that it is not the mandate of this court to comment

on the merit or otherwise of the appeal. However I have perused the draft Memorandum of Appeal (Annexure ‘**GMW-4**’) and in my view it raises triable issues.

23. Finally I am of the view that no real prejudice will be suffered by the

Respondent if this application is allowed. The Respondent will be at liberty to file his reply to the Appeal and will be granted an opportunity to oppose the appeal at the hearing.

24. In conclusion I do find that this application has merit and I allow the

same. The Applicant is directed to file and serve the appeal within **fourteen (14)** days of today's date. In the event of failure to comply the leave so granted will lapse automatically with no further reference to the Applicant. This being a family matter each party will meet their own costs.

Dated in Nyeri this 14th day of November 2025.

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MAUREEN A. ODERO
JUDGE