

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT FAMILY CIVIL APPEAL CASE NO. E3 OF 2020

VIRGINIA WANJIKU GITHOGORI.....APPLICANT

-VERSUS-

MARGARET NYAGUTHII KAMAU.....RESPONDENT

RULING

1. Before this Court for determination is the Summons dated **16th September 2024** by which the Applicant **VIRGINIA WANJIKU GITHOGORI** seeks the following orders;-

“1. SPENT

2. SPENT

3. SPENT

4. THAT the Respondent/Applicant be granted leave to appeal out of time to the Court of Appeal the judgment delivered by this Honourable court on 26th October 2022.

5. THAT costs of this application be provided for.”

2. The application was premised upon **Articles 48, 50, 159, 164 of the Constitution of Kenya, Section 47 of the Law of Succession Act, Rules 49 and 73 of the Probate and Administration Rules** and all other enabling provisions of the law and was supported by the affidavit of even date sworn by the Applicant.
3. The Respondent **MARGARET NYAGUTHII KAMAU** opposed the application through her replying Affidavit dated **15th June 2025**. The application was canvassed by way of written submissions. The Applicant filed the written submissions dated **2nd November 2024** whilst the Respondent relied on her written submissions dated **7th August 2025**.

BACKGROUND

4. This matter concerns the estate of **KAMAU KAMITI** who disappeared from his home without trace and was later presumed dead vide an order of the court issued on **14th June 2018** in **Karatina Misc. Application No. 5 of 2018**.
5. The Deceased was survived by a daughter (Applicant) and a daughter in law (the Respondent). His estate consisted of a

parcel of land being **LR No. Kirimukuyu/Ngandu/313** measuring **five (5) acres**.

6. Following the declaration of Death the Applicant filed a Succession Cause at the **Karatina Law Courts**. The Applicant thereafter filed a Summons for Confirmation of Grant in which she proposed that the land be divided equally between herself and the Respondent.
7. The Respondent then filed a Protest in which she proposed that she be allocated **four (4) acres** of the land and the Appellant be allocated **one (1) acre**.
8. The Protest was heard by way of oral evidence. The trial magistrate agreed with the Respondent and directed that the estate be divided as she had proposed being **four (4) acres** to the Respondent and **one (1) acre** to the Applicant.
9. Being aggrieved by the decision of the trial court, the Applicant filed an appeal in the High Court being **Succession Appeal No. 3 of 2020**. That appeal was heard by **Hon. Justice J. N. NJAGI**. In the judgement delivered on **26th October 2022**, the learned judge allowed the appeal, set aside the decision of the trial court and directed that the

estate be divided **equally** between the Applicant and the Respondent.

10. The Applicant then filed this present application seeking leave to file appeal out of time.

ANALYSIS AND DETERMINATION

11. I have carefully considered the application before this court, the reply filed thereto as well as the written submissions filed by the parties.
12. The only issue for determination is whether the prayer to file appeal out of time ought to be allowed.
13. **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 form 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]

14. 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.
15. 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 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.”

16. 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.”

17. 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.
18. 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 **26th October 2022**. This application seeking leave was filed on **16th September 2024** which was **two (2)** full years **after** the judgment had been delivered.
19. In explaining the delay the Applicant stated that she was not aware of the delivery of the said judgment as her Advocate on record did not inform her of the same. The Applicant stated that she only became aware of the judgement on **27th August 2024** when she was served with a letter from the

County Surveyor Nyeri informing her that partitioning of the suit land would take place on **17th September 2024**.

20. A perusal of the proceeding in this matter show that the Applicant participated actively in this matter from its inception and that she was at all times represented by an Advocate.
21. The judgment in question was delivered in **October 2022**. Is the Applicant trying to suggest that from **October 2022** until **August 2024** when she received the letter from the County Surveyor she had no contact with her lawyer? This is not believable.
22. A case belongs to the litigant and as such the litigant and not the Advocate is under an obligation to follow-up on the status of his/her case. In **HABO AGENCIES LTD -VS- WILFRED ODHIAMBO MUSINGO [2015] eKLR** the Court stated

“It is not enough for a party in litigation to simply blame the Advocate on record for all manner of transgressions in the conduct of the litigation. Courts have always emphasized that

parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel” [Own emphasis]

23. Similarly in **BI-MACH ENGINEERS LIMITED -VS- JAMES KAHORO MWANGI [2011] eKLR** the Court reiterated the duty of an applicant to follow up on instructions given to an advocate as follows;-

“The applicant has a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow upon the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction that is not an excusable mistake which the court may consider with some sympathy.”

[Own emphasis]

24. The applicant has not demonstrated what steps if any she herself took to follow up on her case. How many times did

she visit her advocate's office. Did she write any letter [s] to her advocate seeking to find out the decision of the court. Did she make any visit to the court to check on the status of her case?

25. The delay of **two (2) years** in failing to file a Notice appeal is in my view inordinate and inexcusable. The Applicant clearly had no intention to file an appeal and was only galvanized into action when she received the letter from the County Surveyor.

26. Finally this is a succession matter in which the decision of the High Court is final. **Section 50(1)** of the **Law of Succession Act** provides as follows:-

“50(1) An Appeal shall lie to the High Court in respect of any order or decree made by a Resident magistrate in respect of any estate and the decision of the High Court therein shall be final.”

In the case of **RHODA WAIRIMU KARANJA -VS- MARY WANGUI KARANJA**..... the Court of Appeal stated as follows:-

“We reiterate that Section 50 of the Law of Succession Act is clear that decisions from the Magistrates’ courts are appealable to the High Court and the decisions of the High Court is final. Decisions of the Kadhi’s Court on the other hand are appealable first to the High Court and only with leave and in respect of points of Muslim Law to the Court of Appeal.”

27. In conclusion I find no merit in this application for leave. The summons dated **16th September 2024** is dismissed in its entirety. Costs will be met by the Applicant.

Dated in Nyeri this 28th day of November 2025

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MAUREEN A. ODERO
JUDGE