



REPUBLIC OF KENYA



**In re Estate of Susan Nyawira Peter Mithamo alias Susan Nyawira Mithamo (Family Miscellaneous Application E010 of 2025) [2025] KEHC 17637 (KLR) (28 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
FAMILY MISCELLANEOUS APPLICATION E010 OF 2025  
EM MURIITHI, J  
NOVEMBER 28, 2025  
IN THE MATTER OF THE ESTATE OF SUSAN NYAWIRA  
PETER MITHAMO ALIAS SUSAN NYAWIRA MITHAMO**

**BETWEEN**

**JOHN MITHAMO WASUSANA ..... APPLICANT**

**AND**

**MARGARET KIBUCHI MITHAMO ..... RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion dated 11<sup>th</sup> June, 2025 seeking the following orders:
  1. Spent.
  2. Spent.
  3. Spent.
  4. That this Honourable Court be pleased to grant a stay the execution of the judgment entered on 20<sup>th</sup> May, 2025 in Kerugoya Cm Succ Cause No. E418 OF 2022, the resultant decree and all consequential orders pending the hearing and final determination of the intended Appeal.
  5. That this Application be served and heard inter partes at a hearing date to be granted by this Honourable Court.
  6. That the costs of this application be provided for.
2. The application is based on the grounds set out in the application and the supporting affidavit of the applicant. The applicant's case is that judgment in Kerugoya Cm Succ Cause No. E148 OF 2022 was delivered on 26<sup>th</sup> September, 2024 and a certificate for confirmation of grant was issued on 31<sup>st</sup> October, 2024. Upon delivery of the said judgment, an application for review of the certificate of confirmation



of grant issued on 31<sup>st</sup> October, 2024 was then filed by the Respondent. The application was allowed and a rectified certificate of confirmation of grant issued on 20<sup>th</sup> May, 2025. The Respondent is now desirous of commencing the transmission of the estate and has since served us with a letter dated 30<sup>th</sup> May, 2025 requesting to be supplied with the requisite documents to effect execution.

3. However, the applicant avers that the delay in filing this application has neither been inordinate nor deliberate and it is only just that the applicant is granted an opportunity to Appeal. That stay of execution and leave to file appeal out of time be granted pending hearing of this application and the intended appeal. The applicant risks suffering substantial loss if such leave and stay of execution are not granted as prayed.
4. Lastly, the Respondent will not suffer any prejudice whatsoever if leave is granted.
5. By a Replying Affidavit sworn on 23<sup>rd</sup> June, 2025, the respondent avers that the said judgment had an error apparent on the record and she filed an application dated 31<sup>st</sup> October, 2024 seeking an order for review and or rectification of grant. The Applicant was duly served with the application dated 31<sup>st</sup> October, 2024. The Applicant through his advocate attended Court on 20<sup>th</sup> May, 2025 where he consents to the rectification and a rectified certificate of confirmation of grant was issued.
6. Further, the respondent has not sought to set aside the consent for the rectification of grant.
7. Lastly, the applicant sole intention is the delay of transmission of the estate to the rightful beneficiaries.
8. The applicant filed a further affidavit and avers that the said application filed by the Respondent was one seeking to review the grant on grounds of an error apparent on the record. The error having been apparent on the record had to be rectified and hence the reason why the consent was given.
9. Further, consenting to the said Application for review did not necessarily mean that the Applicant herein was satisfied with the rest of the judgment but it was the prudent thing to do in the circumstances. The delay in filing this application was not inordinate as the Respondent herein filed the application for review on 19<sup>th</sup> November, 2024 while the grant had been issued on 31<sup>st</sup> October, 2024. There having been an application pending before the trial court, it was only prudent that they await the outcome being filing the Appeal.
10. Lastly, upon issuance of the rectified grant on 30<sup>th</sup> May, 2025, the Applicant filed this application on 11<sup>th</sup> June, 2025 which was reasonable and without delay.

### **Applicant submissions**

11. On delay, the applicant submitted that the Applicant having consented to the judgment being reviewed, it did not necessarily mean that the Applicant was equally contented with the rest of the Judgment as the error was on the face of the record and required to be rectified after all. The delay in filing the present application was not inordinate at all.
12. On success of the appeal, the lower court having taken into consideration the wishes of the deceased while its final judgment and the same forming the background of the intended appeal, the issues raised in the appeal are arguable.
13. On degree of prejudice, should the court fail to grant the orders for stay of execution as sought, the Respondent will proceed to execute the grant and the intended appeal will be rendered nugatory. On the same and this being a succession cause, the Respondent will not suffer any prejudice as this is an estate of a deceased which none of the parties has demonstrated to be utilizing or benefiting from at the moment.



## Respondent submissions

### Effect of filing an application for review

14. The respondent submit that a party dissatisfied with a decision of a Court of Law has an option of filing an appeal or seeking an order for review. The Respondent herein filed an application for review which was allowed by the consent of the Applicant. Courts have applied overriding principles for the expeditious hearing and determination of matters by striking appeals after hearing of an application for review, citing *Gerald Kithu Muchanje v. Catherine Muthoni Ngare & Another* (2020) eKLR and *Serephen Nyasani Menge v. Rispah Onsase* (2018) eKLR.
15. Delay. They submit that there is no sufficient reason for failing to file an appeal within 30 days of the judgment. The Applicant has not explained the delay of 8 months.
16. On arguable appeal. The respondent submit that the Draft Memorandum of appeal does not disclose an arguable appeal. A close perusal of the Grounds in the Memorandum of Appeal prayers therein do not demonstrate an arguable appeal.
17. On suffering prejudice, the Respondent will suffer prejudice if the application is allowed. The judgment in the matter was delivered 8 months ago. The Applicant is intermeddling and wasting the estate.

### Issue

18. Whether leave to appeal out of time should be granted.

### Analysis

#### Appeal after review

19. In the decision relied on by the Respondent, *Gerald Kithu Muchanje v. Catherine Muthoni Ngare & Another* [2020] eKLR, the Court of Appeal held as follows:

“...Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the court stated that “From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review...It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”



20. At the outset, there is distinguishing factors in this case that the application for review was made by the Respondent, and the appeal sought to be filed in this case is against the order on review, as shown on the Draft Memorandum of Appeal which states that it is “an appeal from the judgment of Claire Wanyama the Hon. Principal Magistrate Kerugoya delivered on 20<sup>th</sup> May 2025 in Kerugoya CM Succession Cause no. E418 of 2022.”
21. There is no contest that an order on review under Order 45 of the Civil procedure Rules is one of the orders against which appeal lies as of right. See Order 43 rule 1 paragraph (x) of the Civil Procedure Rules, which provides as relevant that:
- “ 1. Appeals from Orders [Order 43, rule 1]
- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
- ...
- (x) Order 45, rule 3 (application for review).
22. I respectfully note the decision of the Court (H. Nyaga J.) in *Mputhia v M’Miriti* [2025] KEHC 756 (KLR), affirming the provision of Order 43 Rule 1 of the civil procedure Rules on right of appeal from an order on review granting or rejecting an application for review under Order 45, rule 3.
23. The applicant has a right of appeal from the decision of the trial court on review.

### **Extension of time**

24. The power to extend time for filing an appeal is granted under Section 79G of the *Civil Procedure Act*, which provides that an appeal must be filed within 30 days, “provided that the court may, for good cause, admit an appeal out of time.”
25. The principles governing extension of time were enunciated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR, where the Supreme Court set out the guiding considerations:
- i. Extension of time is discretionary.
  - ii. The Applicant must explain the delay.
  - iii. The delay must not be inordinate.
  - iv. The Court must consider prejudice to the other party.
  - v. The application should be brought without undue delay.
  - vi. Public interest may be considered where relevant.

### **Length of Delay**

26. The original judgment was delivered on 26<sup>th</sup> September 2024, while the rectified certificate was issued on 20<sup>th</sup> May, 2025 following the Respondent’s review application. The present application was filed on 11<sup>th</sup> June, 2025. From the date of the rectified grant, the delay is approximately three weeks. From the date of the judgment, the delay is about eight months.
27. In this case, the rectification directly impacted the certificate of confirmation of grant. Thus, the operative order for purposes of appeal is the rectified grant issued in May 2025.



28. The delay of three weeks is neither excessive nor unreasonable.

### **Reasons for Delay**

29. The Applicant avers that he awaited the outcome of the review application filed by the Respondent. The Applicant states that consenting to rectification did not signify approval of the entire judgment but was only a pragmatic response to an obvious error.

30. Courts have accepted as sufficient cause delays occasioned by pending review applications, particularly where the outcome of such applications may alter the substantive orders intended to be appealed.

31. The explanation offered is reasonable.

### **Arguability of the intended Appeal**

32. An arguable appeal does not mean one that must succeed. The court need not be convinced that the appeal will succeed, only that it is not frivolous, and that there are serious questions to be presented before the appellate court.

33. The Applicant contends that key issues relating to the trial court's consideration of the wishes of the deceased, manner of distribution, and weight accorded to relevant evidence warrant appellate scrutiny.

34. The Respondent insists that the Memorandum of Appeal discloses no arguable grounds.

35. Having considered the draft Memorandum of Appeal, the court is satisfied that the intended appeal triable issues on the distribution of the estate. Significantly, an arguable appeal need not be one that must succeed at the hearing.

### **Prejudice to the Respondent**

36. The Respondent argues that further delay in transmission of the estate will prejudice beneficiaries. However, the estate remains undistributed, and no evidence has been tendered to show active utilization that would be impaired.

37. In *Butt v Rent Restriction Tribunal* [1982] KLR 417, the court observed that where the subject matter is capable of preservation, minimal prejudice is likely to occur.

38. On the other hand, failure to extend time would permanently bar the Applicant from appealing, a far more severe prejudice in the circumstances.

39. The balance therefore tilts in favour of granting leave to appeal out of time. There shall be a stay of execution of the order on distribution of the Estate pending hearing and determination of the appeal. There is no need for provision of security as the distribution of the deceased's estate will accord to the final determination of the court on appeal. To that end there shall be an order for status quo to be maintained.

### **Orders**

40. Accordingly, for the reasons set out above, the application dated is allowed as prayed.

41. The status quo shall be maintained on the estate property pending hearing and determination of the appeal.

42. The applicant shall file the Memorandum of Appeal within 14 days and the Record of Appeal within thirty (30) days.



43. In default, the order for stay of execution pending appeal shall lapse and be of no effect.
44. Directions on hearing of the Appeal on 27/1/2026.
45. The costs of the application shall be costs in the appeal.

Order accordingly.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. Nyangati Gichahi for the Applicant.

Mr. Mwangi Kennedy for the Respondent.

