

**IN THE COURT OF
APPEAL AT
NAKURU**

(CORAM: WARSAME J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. E055 OF 2024

BETWEEN

PHYLIS WANGUI OIYIE.....APPLICANT

AND

MARY WANGUI OIYIE.....RESPONDENT

(An application for leave to amend memorandum of appeal and for extension of time filed out of time against the ruling of the High Court at Narok (Bwononga, J.) delivered on 11th February 2021

in

Succession Cause No. 14 of 2017)

R U L I N G

1. The applicant has filed the instant application dated 14th February 2024 seeking leave to amend her memorandum of appeal filed on 15th July 2021 and for extension of time to file written submissions under Rule 46(1)(a)(b) and (2) of the Court of Appeal Rules 2022, and Article 159(2)(d) of the Constitution of Kenya 2010.

2. The applicant seeks to amend the grounds of appeal to address not only the ruling delivered on 11th February 2021 by Hon. Justice Bwononga but also the underlying judgment delivered on 5th October 2020 in Succession Cause No. 14 of 2017.

3. The backdrop of this application is that the parties are engaged in a succession dispute concerning the estate of Isaac Marima Ole Oiyie (Deceased). The respondent herein is the widow of the deceased, while the applicant is a family member claiming an interest in the estate. On 5th October 2020, Justice Bwononga delivered judgment in Succession Cause No. 14 of 2017 distributing certain properties of the estate. Significantly, the learned judge distributed to the respondent two properties which the applicant contests: Plot number 160 block 2 Narok and Plot number 226 block 6 Lenana. The applicant's case is that these properties never formed part of the net intestate estate and were therefore not available for distribution to the widow. The applicant further contends that the learned judge erred in finding that Plot 131 block 1 was the same as Plot 160 block 2 Narok, and that Plot

462 block 6 was the same as Plot 226 block 6 Lenana.

4. Being aggrieved by the judgment of 5th October 2020, the applicant brought an application before Justice Bwononga seeking to review and correct what she contended were errors apparent on the face of the record. On 11th February 2021, the learned judge delivered his ruling on the said application, declining to review or vary his earlier judgment.
5. Being dissatisfied, the applicant, filed of a notice of appeal which was lodged at the High Court of Kenya at Narok on 19th February 2021. A memorandum of appeal together with the record of appeal were subsequently filed in this Court on 15th July 2021, approximately five months after the ruling sought to be challenged. However, that memorandum of appeal limited its grounds to challenging only the ruling of 11th February 2021 and did not expressly address the findings and orders made in the judgment of 5th October 2020 which had distributed the contested properties to parties in the dispute.
6. The applicant has since that time changed legal representation on at least two occasions, first moving from Githui & Company Advocates to Lelei & Associates Advocates, and subsequently to

her current advocates, Kubwa & Co Advocates. It is through this latest firm that the present application has been brought, some two and a half years after the memorandum of appeal was originally filed, and approximately three years after the ruling in question.

7. The applicant contends that she was informed by her newly appointed advocates that as they were preparing submissions, it became apparent that the appeal did not address the findings of the Court in the judgment delivered on 5th October 2020 vis- à-vis the ruling delivered on 11th February 2021. The applicant also contends that unless the memorandum of appeal is amended, she would not be able to address in her submissions all the key issues that ought to be raised in the hearing and determination of her appeal, particularly the erroneous distribution of Plot 160 block 2 Narok and Plot 226 block 6 Lenana to the respondent.
8. The applicant submits that she has faced difficulties dealing with previous legal representatives, necessitating the changes in counsel. She further states that the mistakes in the

memorandum of appeal should not be attributed to her as a party, especially one with little education, who became aware of the deficiency, when her current advocates began preparing submissions for the appeal.

9. The respondent has filed a replying affidavit dated 11th December 2025 vigorously opposing the application on several grounds. First, the respondent argues that the appeal was filed out of time and before the applicant sought a certificate of delay as required by law. Second, the respondent notes that this is not the first time the applicant has made such an application, pointing to yet another application dated 24th May 2024 seeking similar reliefs. Third, the respondent argues that it is clear from the record that the appeal having been lodged on 15th July 2021 without compliance with the Rules as provided by law should be struck out and costs awarded to the respondent. The respondent emphasizes that the application lacks merit and should be dismissed with costs as it is vexatious, frivolous, and an abuse of the court process.

10. The principles governing applications for extension of time are well settled. As stated in **Abdul Aziz Ngoma vs. Mungai Mathayo [1976] eKLR**, this Court's discretion to extend time under rule 4 only comes into existence after 'sufficient reason' for extending time has been established and it is only then that other considerations such as the absence of any prejudice and the prospects or otherwise of success in the appeal can be considered. As further elaborated in **Fakir Mohamed vs. Joseph Mugambi & two others, Civil Application No. Nai. 332/04**, the exercise of this Court's discretion under rule 4 is unfettered, and there is no limit to the number of factors the court would consider so long as they are relevant. The period of 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, the effect of the delay on public administration, the importance of compliance with time limits, and the resources of the parties are all relevant factors to be considered.

11. I have carefully considered the application, the affidavit

evidence filed by both parties, and submissions advanced.

However, having reviewed the chronology of events and the nature of the relief sought, I am satisfied that this application must fail. The reason is as follows:

12. Following the delivery of the judgment on 5th October 2020, the applicant had available to her two distinct remedies. First, she could have filed a notice of appeal to this Court challenging the judgment within the time prescribed by the Court of Appeal Rules. Second, she could apply to the trial judge himself to review the judgment on the basis of errors apparent on the face of the record. These are alternative remedies, to pursue.

13. In **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi, Civil Application No. 277 of 2005** this Court held:

"The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However, upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other."

14. The applicant made her election. Rather than appeal the judgment of 5th October 2020 to this Court, she chose to pursue review and have the learned judge review and correct what she alleged were errors in his judgment. That application was heard on its merits and was dismissed
15. Having pursued the remedy of review to its conclusion and having failed in that endeavour, the applicant's proper recourse was to appeal the ruling refusing review, which is precisely what she did by filing her notice of appeal on 19th February 2021 and her memorandum of appeal on 15th July 2021. That appeal, properly framed, challenges the ruling of 11th February 2021. The applicant cannot through the back door resurrect an appeal against certain findings in the Judgment of 5th October 2020 by amending her memorandum of Appeal.
16. Even if the Applicant's intention was not to appeal through the back door, this court cannot ascertain this fact. Rule 46(1) of the Court of Appeal Rules provides that whenever a formal application is made to the Court for leave to amend a document, the amendment for which leave is sought shall

be

set out in writing and, if practicable, lodged with the Registrar and served on the respondent before the hearing of the application.

17. In the present case, no draft amended memorandum of appeal has been lodged with this Court or served upon the respondent. The application merely makes general assertions about the need to amend the memorandum to include grounds challenging the judgment of 5th October 2020, without setting out the specific amendments sought. The notice of motion and supporting affidavit speak in general terms about wanting to address the findings in the judgment, but nowhere do they set out in writing the precise amendments, the specific new grounds of appeal, or the exact wording of the proposed amended memorandum.

18. This failure to comply with the mandatory requirements of Rule 46(1) is not a mere technicality. The requirement that amendments be set out in writing serves important purposes. It ensures that the respondent knows precisely what case they must meet and can properly respond to the proposed

amendments. It enables the Court to assess whether the amendments sought are appropriate, whether they raise arguable grounds of appeal, whether they fall within the jurisdiction of this Court, and whether granting leave would result in prejudice to the other party.

19. For the forgoing reasons the application is fundamentally misconceived and must fail.

20. I make no orders to cost.

Dated and delivered at Nakuru this 16th day of January, 2026.

M. WARSAME

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JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR