



REPUBLIC OF KENYA



**Karuma v Warui (Civil Application E109 of 2023)
[2024] KECA 760 (KLR) (21 June 2024) (Ruling)**

Neutral citation: [2024] KECA 760 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E109 OF 2023
W KARANJA, JA
JUNE 21, 2024**

BETWEEN

DAVID MAINA KARUMA APPLICANT

AND

ESTHER WANJIRU WARUI RESPONDENT

*(Being an appeal from the judgment and grant of the High Court at Murang'a
(K. Kimondo, J.) dated 24th April 2023 in Succession Cause No. 926 of 2014)*

RULING

1. By a notice of motion dated 7th December 2023, expressed to be brought under Rules, 4, 41, 53, 44, 45, 49 and 77 of the *Court of Appeal Rules*, David Maina Karuma (the applicant) seeks one main order from the Court. That he be allowed leave to appeal out of time and that time be extended to file and serve the notice of appeal and the memorandum of appeal as per his annexed drafts.
2. I observe, however, that the only leave that is necessary at this stage is the leave to file the notice of appeal out of time because if that is granted, the other timelines provided for under the Court of Appeal Rules will fall into place.
3. The application is supported by the affidavit of the applicant sworn on 7th December 2023.
4. The pith and substance of these grounds and the depositions in the affidavit are as follows. The applicant is the executor of the Will in the estate of George Warui Kiriri (deceased). The succession matter was heard at the High Court in Murang'a (Kanyi Kimondo, J.) who rendered judgment on 24th April 2013. According to the applicant, after reading the judgment, they realized that there was a mix up in the title numbers in regard to some parcels of land. He thought that the mix up was an innocuous mistake which could be resolved through an application for rectification of the grant. He, therefore, moved back to the same court seeking rectification of the Grant but Judge Wakiaga who was the Judge seized of the matter then, suggested to the parties that the issue could not be resolved



through rectification of the grant but by way of appeal. By this time, however, the time to appeal had already expired, hence the application now before me.

5. According to the applicant, the sentiments of Wakiaga, J. were expressed on 29th March 2023, and by 8th December, he had filed this application. He entreats the Court to find that the delay was not inordinate and that the same has been sufficiently explained. He states that the respondents will not be prejudiced if time is extended and further, that his intended appeal has high chances of success.
6. The application is opposed by Esther Wanjiru Warui (the respondent) through her affidavit sworn on 19th December 2023. According to the respondent, the applicant is misleading the Court because the application for rectification is still pending before the High court and this application is an abuse of the process of the Court. According to the applicant, however, he has written a letter to the High Court requesting for the withdrawal of the said application. The respondent depones that the delay has not been sufficiently explained, and further, that the appeal itself has no merit.
7. Both parties filed submissions and lists of authorities. I have considered the same along with the rival affidavits and the applicable law.
8. Granting extension of time is at the discretion of the Court. The discretion though unfettered is nonetheless not exercised on a whim, and the Court is guided by several time honoured principles. See: *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.
9. The first issue for consideration is whether in the circumstances of the case, the delay involved is inordinate. It is not disputed that the applicant decided to file an application for rectification in first instance and that is why he delayed in filing the notice of appeal.
10. The claim by the applicant that the learned Judge suggested that the parties pursue the appeal instead of the rectification is contested. I do not wish to delve into that arena for purposes of this ruling. If, however, time is extended the applicant may consider the futility of proceeding with the application for rectification in view of his appeal.
11. That said, considering the circumstances surrounding this matter, I feel that the applicant should be accorded an opportunity to pursue his appeal, so that any other contested issues can be brought to the fore. I am persuaded that if the application is allowed the respondent will not be prejudiced in any way.
12. For these reasons I allow the application and extend time for the applicant to file a notice of appeal within 14 days from the date hereof.
13. The other timelines as to service and filing of the record of appeal will be as provided for in the Court of Appeal Rules.
14. Costs of the application will abide the outcome of the intended appeal.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE 2024

W. KARANJA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

