



REPUBLIC OF KENYA



KENYA LAW
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Njoroge & 14 others v Njoroge & another; Njoroge (Objector) (Civil Application 26 of 2016) [2023] KECA 1 (KLR) (17 January 2023) (Ruling)

Neutral citation: [2023] KECA 1 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 26 OF 2016
LK KIMARU, JA
JANUARY 17, 2023**

BETWEEN

JOSEPH MUNDIA NJOROGE 1ST APPLICANT
CRIPUS MUGAMBI NJOROGE 2ND APPLICANT
DAVID MAINA NJOROGE 3RD APPLICANT
JOSEPH MWANGI NJOROGE 4TH APPLICANT
DAVID HUNJA NJOROGE 5TH APPLICANT
PETER MUCHEMI NJOROGE 6TH APPLICANT
**RICHARD NJOROGE MAKUNYI (AS LEGAL REPRESENTATIVE OF
NAFTALY MAKUNYI NJOROGE) 7TH APPLICANT**
ISAAC MUHIU NJOROGE 8TH APPLICANT
ESTATE OF ROSE WANJIRU 9TH APPLICANT
TERESIAH NYAGUTHI 10TH APPLICANT
ESTATE OF JAMES HUNJA 11TH APPLICANT
JENIFFER WARIGIA 12TH APPLICANT
LYDIAH WANJIKU 13TH APPLICANT
GRACE WACHUKA NJOROGE 14TH APPLICANT
EDWARD GICHOHI NJOROGE 15TH APPLICANT

AND

JOHN NGARI NJOROGE 1ST RESPONDENT
CECILIA MUTHONI NJOROGE 2ND RESPONDENT



AND

GRACE WACUKA NJOROGE OBJECTOR

(Being an application for extension of time to file a Notice of Appeal against the Judgment of the High Court of Kenya at Nyeri, (Okwengu, J.), dated 5th October, 2004 in Succession Cause No. 127 of 1999)

RULING

- 1 Once in a very long while, this court comes across cases or applications which seek to invoke the jurisdiction of this court that are not only flabbergasting but also challenge the very concepts of administration of justice and the interest of justice. This is one of such applications. The judgment that is the subject of this application for extension of time to file appeal out of time under rule 4 of the [Court of Appeal Rules](#) was delivered on October 5, 2004, (Okwengu, J. – as she then was), twelve (12) years before the present application was filed.
- 2 Being a succession case that substantially related to the way the properties that comprise the estate of the deceased were to be distributed among the beneficiaries, one would have expected the parties to be diligent in the prosecution of their respective cases.
- 3 In the application, the applicants explain the reason for the delay in lodging the notice of appeal in time to ignorance of the effect of the judgment which they only became aware of in the course of the actual distribution of the properties that comprise the estate of the deceased to the beneficiaries. To quote verbatim the affidavit of John Mundia Njoroge which was sworn in support of the application:
 12. That the widows of the late Richard Njoroge Njogu, (who are largely illiterate), seem not to have been properly advised by their counsel as to the true effect of the judgment and the need to appeal and the timelines for doing so and this should not be held against the applicants.
 13. That I verily believe that the failure of the wives of the late Richard Njogu to appeal in time should not be held against the children who are the true and proper heirs considering the wives only hold life interest in the net estate.
 13. That I am advised by my counsel, (which I verily believe to be true) that the rights of the children of a deceased are distinct and separate from those of their mothers and their failures should not prejudice the children’s rights”.
- 4 The applicants further stated that the majority of the beneficiaries did not participate in the previous succession proceedings and only became recently aware of the “*existence and true effect of the judgment*”.
- 5 In the circumstances therefore, the applicants plead with the court to exercise its unfettered discretion in their favour and grant them leave to appeal out of time.
- 6 The application is opposed. The respondents filed an affidavit in opposition to the application. In summary, they deponed that the application was filed specifically to derail the distribution of the properties that comprise the estate of deceased to the beneficiaries. They denied the applicants’ assertion that they were not involved in the proceedings that resulted in the judgment that is sought to be appealed. They pointed out there were ongoing proceedings before the High Court where the applicants have fully participated and had even agreed on how each individual beneficiary would get his or her respective inheritance or share. Specifically, the respondents deponed as follows:



14. That indeed in that application, the applicants were in agreement as to the shares of each house as determined by the succession cause only taking issue as to the place or places where the respective portions of parcels of land was to be situated whether in blocks or to be spread according to the productivity of the land taking regard to existing developments by the respective beneficiaries.
15. That with the concurrence of the respondents, the applicants through their present counsel have pursued this line of argument leading to the court's order dated July 25, 2018, since when according to information availed to us by our counsel, our counsel and the applicants' counsel have engaged extensively with a view to implementing the order and with the realization that there might be challenges in implementation counsel are in consensus that it should be more elaborate, specific and clearer and have been working on a revised draft to be presented to the High Court at the a mention of the succession cause on December 6, 2022".
- 7 The respondents were, therefore, of the firm view that there was no merit with the present application to warrant this court's exercise of its discretion in favour of the applicants. They urged the court to dismiss the application.
- 8 The court has considered the facts of this application including the submission of the parties herein.
- 9 This court's discretion under rule 4 of the *Court of Appeal Rules, 2022*, is unfettered. As was held by this court, (R. N Nambuye, J.A), in *Kibunja v Kariuki & another* [2021] KECA 354 (KLR):
14. The principles that guide the court in the exercise of its mandate under said rule are set out in the very case law that the applicant has relied upon...
15. From the above, the factors I am supposed to take into consideration in the determination of an application of this nature are first, the length of the delay, secondly, reason(s) of the delay. Thirdly, possible arguability of the intended appeal and fourthly, any prejudice to be suffered by the opposite party should the relief sought by the applicant be granted. Fourthly (sic), any public interest that may be involved in the matter".
- 10 In the present application, it is clear to this court that the application is for dismissal. Why? There was inordinate delay between the time the judgment that is intended to be appealed from to the time the applicants filed the present application. The period of 12 years delay is not only inexcusable but also unconscionable. This court cannot exercise its discretion in favour of the applicants who clearly slept on their rights and only sought to come to this court when the said decision of the High Court is being implemented. The reason given by the applicants for the delay in filing the present application is incredible. It was clear from the judgment and subsequent proceedings after the judgment that the applicants were fully aware of the import of the said judgment and are indeed participating towards its implementation. The applicants cannot therefore feign ignorance of the judgment after 12 years of its existence. As regards the arguability of the intended appeal, the court cannot comment only to say that the judgment that is sought to be appealed fairly distributed the properties that comprised the estate of the deceased to the beneficiaries.
- 11 And lastly, it is apparent that if the application is allowed, it will prejudice the respondents who are about to benefit from the inheritance due to them. To grant the application in the circumstances of this case will unnecessarily prolong litigation in a succession dispute without any just cause. The beneficiaries have waited a long time for the resolution of this succession case.
- 12 The upshot of the above reasons is that the application lacks merit and is hereby dismissed with costs to the respondents.



Dated at Nyeri this 17th day of January, 2023.

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

