



REPUBLIC OF KENYA



**Gichanga v Gichanga & another (Civil Application E303 of 2022)
[2023] KECA 327 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 327 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E303 OF 2022
AK MURGOR, JA
MARCH 17, 2023**

BETWEEN

RISPER WAMAITHA GICHANGA APPLICANT

AND

ALEXANDER KIMANI GICHANGA 1ST RESPONDENT

**YVONNE ASAMBE (SUBSTITUTE OF DANIEL MBURU GICHANGA
(DECEASED) 2ND RESPONDENT**

*(Being an application for leave to file an appeal and to extend time against
the Ruling and Order of the High Court Milimani Family Division (A. O.
Muchelule, J.) delivered on 15th June 2020 in Succession Cause No 1088 of 2005)*

RULING

- 1 By a Notice of Motion dated August 19, 2022 brought pursuant to order 50 rule 6, order 42 rule 6 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and Article 159(d) of the Constitution, the applicant, Risper Wamaitha Gichanga, seeks orders for;
 - i. leave to file and serve a notice of appeal against the whole ruling of the High Court delivered on the June 15, 2020 in Nairobi Succession Cause No 1088 of 2005;
 - ii. for time to be extended to serve the Notice of appeal dated June 15, 2020 on the respondents and
 - iii. that the Notice of appeal dated June 15, 2020 and Nairobi Civil Appeal No 275 of 2021 be deemed as properly filed and served upon the respondents.
- 2 The motion is brought pursuant to the grounds on its face and an affidavit in support sworn by the applicant, who contended that she instructed her then lawyers Messrs Waweru Munyi & Co Advocates



to lodge an appeal against the decision of the High Court delivered on June 15, 2020 in Nairobi Succession Cause No 1088 of 2005; that on June 22, 2020, the firm of Messrs Waweru Munyi & Co Advocates, filed a Notice of appeal dated June 15, 2020 whereafter, she replaced the advocates with the firm of Ogetto Otachi & Co Advocates who filed Civil Application No E 232 of 2021 and Civil Appeal No 275 of 2021 which appeal is pending hearing before this Court.

- 3 That unbeknown to her, at the time of filing of the notice, her former lawyers had failed to obtain the mandatory leave to lodge an appeal from the ruling in the succession matter pursuant to section 50 of the Law of Succession Act; that this Court in its decision of July 29, 2022 dismissed her application for stay of execution against the judgment for the reason that leave to file the appeal arising out of a succession cause was not obtained before the appeal was filed; that being a lay person she was not aware that leave to appeal in a succession cause was a necessary requirement.
- 4 She further contended that the failure to obtain leave to appeal was a mistake on the part of her advocates whom she had fully trusted and believed; that the omission if not corrected would render her appeal incompetent. It was also contended that the appeal raises serious triable issues on points of law and fact with overwhelming chances of success, in that, it challenges the High Court's decision to disregard the deceased's testamentary freedom to dispose of his estate by way of a will; that the High Court in the distribution of the estate failed to consider that the 1st house had already received their share of the estate during the deceased's lifetime and it was therefore unconscionable for them to benefit in equal measure with the 2nd house after the deceased's demise; that the respondents would not suffer any prejudice because the appeal has already been filed, and she should be afforded the opportunity to pursue the appeal on its merits without it being rendered incompetent on a mere technicality.
- 5 The 1st respondent, Alexander Kimani Gichanga opposed the application in a replying affidavit sworn on September 12, 2022, and deponed that the applicant has not sought for time to be enlarged to lodge an appeal out of time; that the application therefore offends the provisions of rule 41 (b) (i) of the Court of Appeal rules, 2022 and as such the Notice of motion dated August 19, 2022 is fatally defective. The 1st respondent further deponed that the applicant's application was incompetent as she had not annexed the trial court's ruling to the motion in compliance with the requirements of rule 45 (3)(a) of the Court's rules which provision is couched in mandatory terms.
- 6 On her part, the 2nd respondent, Yvonne Asambe (Substitute of Daniel Mburu Gichanga (Deceased)) filed grounds of opposition and contended that there was no automatic right of appeal to this Court from a decision of the High Court in succession matters; that the applicant ought to have sought for leave of the High Court or this Court to appeal against the decision of 15th of June 2020; that since leave was never sought and obtained to appeal against the decision on succession, the instant application is improperly before this Court and should be dismissed with costs.
- 7 In their submissions, counsel for the applicant, Messrs Bikundo Associates & Co Advocates submitted that the omission to seek leave before filing the Notice of appeal and the appeal itself was a mistake on the part of her former advocates that should not be visited on the applicant; that the appeal had overwhelming chances of success which should be expeditiously heard and determined in the interests of justice, and that no prejudice would be suffered by the respondents.
- 8 Messrs. Damaris W. Gitonga & Co. Advocates, acting for the 2nd respondent submitted that in the current application, the applicant is merely seeking extension of time to lodge and serve the Notice of appeal in accordance with rule 75 (1) and (2) of this Court's rules; that she has not sought for leave to extend time to lodge an appeal against the impugned ruling in Succession Cause No 1088 of 2005; that since leave to appeal has not been sought or obtained, this Court lacks jurisdiction to determine the application.



- 9 Under rule 4 of this *Court's rules*, it is settled that, the court has unfettered discretion on whether to extend time or not. In so doing, the discretion should be exercised judiciously, and not frivolously having regard to the guiding principles, including the length of the delay, the reason for the delay, the chances of success of the appeal, and whether or not the respondent will suffer prejudice if extension of time was granted. See the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No Nai 251 of 1997.
- 10 In her motion, the applicant seeks for; i) time to file and serve a notice of appeal against the ruling of June 15, 2020; ii) time to be extended to serve the notice of appeal on the respondents; and iii) that the Notice of appeal dated June 15, 2020 and Nairobi Civil Appeal No 275 of 2021 be deemed as properly filed and served upon the respondents.
- 11 With respect to the prayer to file and serve the notice of appeal, the trial court's ruling was rendered on June 15, 2020, and a notice of appeal dated June 15, 2020 was lodged on June 21, 2020 which was within the period of 14 days prescribed by the rules.
- 12 Regarding service of the notice on the respondents? It would seem that after the Notice of appeal was filed, it was not served upon any of the respondents as required by the rules of this Court. So that the period of delay in serving the respondents when computed from the date the notice was filed until the date this motion was filed on August 19, 2022, would amount to 20 months. In explaining this delay, the applicant stated that after her former advocates lodged the notice of appeal, she changed her legal representation to the firm of Ogetto Otachi & Co Advocates. It seems that in the course of the change, service of the notice on the respondents was inadvertently overlooked.
- 13 As to whether the delay in serving the respondents was explained, a consideration of the applicant's pleadings does not disclose that either the former counsel or the current counsel have taken responsibility for that omission as, neither firm filed an affidavit conceding to the allegation. The result is that the reason specified is lacking in substance and cannot therefore be relied upon to extend time to serve the Notice of appeal.
- 14 Having so found, at this juncture, the respondents have asserted, and the applicant concedes that she has not sought for or obtained leave to lodge an appeal to this Court against the decision of the High Court which arose from Succession Cause No 1088 of 2005.
- 15 Rule 39 (b) of the *Court of Appeal rules 2010* states:
- In civil matters—
- (a) ...
- (b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal....”
- 16 Without having taken the necessary steps to obtain leave to appeal against the High Court's ruling, I find that the prayer to deem the Nairobi Civil Appeal No 275 of 2021 as filed and served upon the respondents is without basis, and is improperly before this Court.
- 17 In effect, the position as it now stands is that, the applicant has no right of appeal before this Court, and, therefore, the application to deem the appeal as filed is a nullity, and is accordingly dismissed with costs to the respondents.



It is so ordered.

Dated and delivered at Nairobi this 17th day of March, 2023

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR

