



**Kaingati & another v Mbaki & others (Civil Application
E094 of 2022) [2023] KECA 1624 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KECA 1624 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E094 OF 2022
AO MUCHELULE, JA
MAY 31, 2023**

BETWEEN

GRACE NDUTA KAINGATI & ANOTHER APPELLANT

AND

JOYCE NYAMBURA MBAKI & OTHERS RESPONDENT

(An application for extension of time to file and serve the Memorandum of Appeal and the Record of Appeal out of time in an intended appeal against the Judgment of the High Court of Kenya at Murang'a (J. Wakiaga, J.) dated 20th September 2022 In Succession Cause No. 108 of 2016)

RULING

1. The deceased Kaingati Kigaya died intestate in 1977. His estate was the subject of a long and protracted dispute, but, finally, in a judgment delivered on 20th September 2022 by the learned J. Wakiaga, J. it was held that the deceased had left two houses: the house of the late Gladys Mwihiaki and the house of the 1st applicant Grace Nduta Kaingati. The house of Gladys Mwihiaki had children who include the 1st respondent Joyce Nyambura Mbaki, and Nancy Wangari Mbaki. The house of the 1st applicant had three children (the applicants). The dispute related to the distribution of Parcels Loc. 9/Kanyenyaini/1280 and Loc. 9/Kanyenyaini/1001 to the deceased's beneficiaries. Loc. 9/Kanyenyaini/1280 was registered in the name of the respondents' late mother, and Loc. 9/Kanyenyaini/1001 was registered in the name of the deceased. The Court found that Loc. 9/Kanyenyaini/1280 did not belong to the estate of the deceased, and was left to the respondent's late mother. It was found that the deceased's Loc. 9/Kanyenyaini/1001 should be shared equally between his two houses.
2. The 1st applicant was aggrieved by the decision of the learned Judge, and on 3rd October 2022 filed a notice of appeal in person. On the same day she requested for typed copies of proceedings. On 17th October 2022 she instructed M/s Maingi Kamau & Co. Advocates to act for her for the purposes of



the intended appeal. Leave was granted by the High Court on 18th October 2022 for the firm to come on record. She was also granted leave to appeal the decision to the Court of Appeal.

3. By application dated 18th November 2022 the 1st applicant came before this Court seeking extension of –

“time granted by the High Court of Kenya at Muranga.....to file an Appeal before this Court out of time from the Judgement delivered on 20th September 2022.”

In the grounds and supporting affidavit, her case was that although the High Court had granted her leave to appeal, it had not indicated to her the timelines within which to appeal. Time had, hence, caught up with her. She swore that she had an arguable appeal, and that she was going to be disinherited if the judgement by the High Court was going to be allowed to stay.

4. Nancy Wangari Mbaki filed a replying affidavit to oppose the application. She deponed that the delay in filing the appeal on time was a fault of the 1st applicant’s making, and a deliberate one to keep the matter dragging in Court. She denied the 1st applicant’s claim that she was the sole beneficiary of Loc. 9/Kanyenyaini/1001, and supported the High court’s decision. She denied that the applicants would suffer irreparable damage if they were not allowed to appeal. Lastly, she stated that the applicants have not come to court with clean hands as they had evicted them from the suit land, which had caused them to complain to police.
5. Neither party filed written submissions, despite directions having been given.
6. The notice of appeal that was filed on 3rd October 2022 was within time, but was without leave given that under Rule 41 of the Court of Appeal Rules, 2022 such leave was required. The applicants, realizing that they had appealed without leave, went back to the High Court and on 18th October 2022 obtained leave. Assuming that they were then required to file a fresh notice within 14 days, they were, by the time they filed the present application, late by under one month. I appreciate that under Rule 4 of the Court of Appeal Rules, 2022, and considering the various decisions of this Court, including Andrew Kiplagat Chemarigo –v- Paul Kipkorir Kibet [2018]eKLR, even that short period of delay had to be reasonably explained. I have looked at all the actions that the applicants took from the time the High court rendered its judgment up to the time of the present application. I am satisfied that there was demonstrated desire to appeal the decision at the earliest opportunity.
7. Secondly, looking at the history of the dispute and the grounds of appeal as shown in the annexed Draft Memorandum of Appeal and the sworn supporting affidavit, the issues that are sought to be raised in the intended appeal by the applicants are not frivolous.
8. Consequently, I allow the application, and order that the applicants do file and serve a notice of appeal within 10 days from the date of this ruling.
9. This is a family dispute. I make no order as to costs.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF MAY 2023

A.O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

