



Weru v Ngororo & 4 others; Chege & 4 others (Interested Parties) (Civil Application 90 of 2021) [2023] KECA 1598 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KECA 1598 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION 90 OF 2021
AO MUCHELULE, JA
JUNE 21, 2023**

BETWEEN

HARISON KAMAU WERU APPLICANT

AND

WAKAHORA NGORORO 1ST RESPONDENT

CECILIA MUMBI 2ND RESPONDENT

TARCISIO KARIUKI WAMBUGU 3RD RESPONDENT

THOMAS KARIUKI WAMBUGU 4TH RESPONDENT

CECILIA THONGORI WANJERU 5TH RESPONDENT

AND

CHARLES KARIUKI CHEGE INTERESTED PARTY

REOSEMARY WARUGURU INTERESTED PARTY

NDERITU CHRISTOPHER KAMAU INTERESTED PARTY

MACHARIA GRANCIS MUKOMA KAIYA INTERESTED PARTY

MARY MWENDE MWANGI INTERESTED PARTY

(Being an application for extension of time to file and serve a Record of Appeal out of time against the judgment of the High Court of Kenya at Nyeri (N.J. Ngaah, J) dated 29th November 2019.) in Succession Cause No. 142 of 1992)



RULING

1. The deceased Wambugu Ngera died intestate sometimes in 1967. He was the registered owner of land parcel Othaya/Kihugiri/398 measuring about 8.2 acres. A petition for the grant of letters of administration intestate was filed in 1992 in the High Court at Nyeri. On 26th May 2003 a grant was issued to four joint administrators who were Tarcisio Kariuki Wambugu (3rd respondent), Cecilia Ngari, Wakahora Ngororo (1st respondent) and Samwel Chege. The 1st respondent filed summons to confirm the grant. Several protests were filed, and the dispute heard by the learned Ngaah Jairus, J. who on 29th November 2019 distributed the estate. The judge found that the deceased had left four houses, and gave each house an equal share of 2.05 acres from the parcel of land.
2. Various people had entered into agreement with the children of the deceased in which they were each buying a portion of the parcel. This had happened after the deceased death and before any grant had been issued or confirmed. They are the people who had filed protests to the summons for confirmation. The learned Judge dismissed the protests on the basis that the alleged purchases were illegal, and amounted to intermeddling under section 45 of the *Law of Succession Act* (Cap. 160). The applicant Harison Kamau Weru was one of such purchasers.
3. The applicant was aggrieved by the decision to lock him out of the estate of the deceased and came to this Court by notice of motion dated 22nd September 2020 seeking extension of time against the judgment that was delivered on 29th November 2019. In the grounds and his sworn affidavit in support of the application, he stated that he had not appealed on time because the advocate who was on record for him did not advise him of his next judicial step to seek justice in the matter. He only came to learn later that he needed to appeal, but that by the time COVID – 19 had set in and court operations had been scaled down. These were the reasons why he failed to file an appeal on time. He is now requesting the court –

“to be pleased to enlarge time for filing and serving the record of appeal.”

He deponed that he would suffer probable prejudice if the application is not allowed. And that he had an arguable appeal. He annexed a draft Memorandum of Appeal “HKW2” whose grounds were that:-

- “1. The learned trial judge erred in law and facts by delivering a judgment that was against the weight of evidence.
 2. The learned trial judge erred in law in failing to apply the relevant legal principles in respect of the material at hand.
 3. The learned Judge erred in law and facts in failing to consider any evidence.”
4. The application was served on the respondents but did not elicit any response.
 5. An application under Rule 4 of the Court of Appeal Rules, 2022 is a request to a single judge of this Court to exercise a discretion to grant the relief of extension of time to do a particular act. The Rule states as follows: -

“The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a



reference in these Rules to any such time shall be construed as a reference to that time as extended”.

6. This discretion has been defined to be wide and unfettered, the only interest being to do justice to the parties given the facts of each case. It is a judicial discretion which is based upon the now well-established principles that the courts have distilled.

For instance, in *Nicholas Kiptoo Arap Korir Salat -v- IEBC and 7 Others* [2015]eKLR the Supreme Court ruled that:-

“It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.”

7. In *Leo Sila Mutiso -v- Rose Hellen Wangari Mwangi* [1999]2 EA 231, this Court held that some of the matters to be considered are the length of the delay, the reasons for the delay, the possible chances of the appeal succeeding, and the degree of prejudice, if any, that the respondent may suffer if extension of time is granted. In *Athuman Nusura Juma -v- Afwa Mohamed Ramadhan, CA. No. 227 of 2015* (Unrepealed) it was observed by this court as follows:-

“This court has been careful to ensure that whether the intended appeal has merits or not is not an issue determined with finality by the single judge, that is why in virtually all its decisions on the considerations upon which discretion to extend time is exercised, the Court has prefixed the consideration whether the intended appeal has chances of success with the word “possibly”.

8. The application seeks extension of time to file and serve a record of appeal out of time. A record of appeal is under Rule 84(1) of the Court of Appeal Rules required to be filed within sixty days after the date when the notice of appeal was lodged. It is clear that the applicant did not file a notice of appeal following the judgment that aggrieved him. Without the notice of appeal on record, there would be no basis upon which a record of appeal could be filed. There was no request to extend time to lodge a notice of appeal, and therefore the present application was misconceived and incompetent.
9. Assuming that the application was competent, the application was brought after about 10 months. That is not a short time for a person who claimed to have been keen to appeal the decision. In any case, on the authority of *Andrew Kiplagat Chemarigo -v- Paul Kipkor Kibet* [2018]eKLR, any length of delay has to be reasonably and plausibly explained.
10. It is acknowledged that the COVID – 19 pandemic disrupted court operations in a substantial way. But the applicant is not telling the court when it is that he received advice that he needed to appeal the decision, and what efforts he made to approach the Court to appeal even during the pandemic period. It is my considered view that the applicant took long to bring the application, and that his explanation for the delay was neither reasonable nor plausible in the circumstances.
11. On the possible merits of the intended appeal, I appreciate that the issue can only be properly dealt with by the Court consisting of three judges, if and when it will be constituted. However, my tentative impression is that when a person buys a parcel of land belonging to a deceased, in respect of whom no grant has been issued and confirmed, he cannot derive benefit from the estate at the time of distribution. In this case, the applicant purported to buy land from the deceased’s beneficiary who had no capacity to sell as there was no grant. The applicant would appear to have a frivolous appeal.
12. In conclusion, I find no merit in the application. The same is dismissed.



DATED AND DELIVERED AT NYERI THIS 21ST DAY OF JUNE, 2023.

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

