



**Waweru v Mutambei & another (Civil Application
E030 of 2021) [2023] KECA 610 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KECA 610 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E030 OF 2021
FA OCHIENG, JA
JUNE 2, 2023**

BETWEEN

JANE WAMBUI WAWERU APPLICANT

AND

STEPHEN MUTAMBEI 1ST RESPONDENT

PETER MWANGI WAWERU 2ND RESPONDENT

(An application for extension of time to file a record of appeal out of time in an intended appeal from the ruling and order of the High Court of Kenya at Nyahururu (R. P. V. Wendoh, J.) dated 7th October, 2020 in Succession Cause No. 130 of 2017)

RULING

1. The application before me is for leave to file and serve the record of appeal out of time.
2. The intended appeal arises from a decision which was rendered by the trial court on October 7, 2020.
3. Although the applicant filed a Notice of Appeal and an application bespeaking the proceedings from the court whose decision she intends to appeal from, the applicant inadvertently failed to serve those documents upon the respondent.
4. According to the applicant, it is only when she received the certified copies of the proceedings, on May 4, 2021, that she realised that she had defaulted in service of the notice of appeal and of the application for the proceedings.
5. Meanwhile, the applicant holds the view that she has a good and meritorious appeal, which has high chances of success.



6. The 1st respondent, Stephen Mutembei Waweru, swore a replying affidavit, in opposition to the application. He expressed doubts about the filing of the Notice of Appeal. He pointed out that the said notice of appeal did appear to have been dated or sealed by the Court's Nyeri Sub-registry.
7. He also pointed out that the applicant had not attached a Power of Attorney to the application. Therefore, in understanding of the respondent, the deponent, Charles Mwaniki Waweru lacked locus to swear the affidavit on behalf of the applicant.
8. The further issue raised by the respondent was that the applicant had failed to exhibit the certificate from the Registrar of the High Court, certifying the period which had been required to prepare and deliver the impugned Ruling, to the applicant.
9. In any event, as far as the respondent was concerned, the failure by the applicant to serve the notice of appeal was due to inaction; and the respondent was of the view that such inaction was not the same as a mistake.
10. The respondent did not file any submissions in respect to this application. Therefore, there was no amplification on the contention that inaction was different from a mistake.
11. In my considered view, there are more than one categories of mistakes. There are mistakes arising from commission; and then there are mistakes that stem from inaction or from omission. When a person takes the wrong step, that would be a mistake by commission. On the other hand, when a person fails to take such action as he ought to have done, the said failure would also constitute a mistake.
12. As regards an affidavit which had been sworn by a person other than a party to the proceedings, I hold the view that there is no legal requirement imposed upon a witness, to first obtain a Power of Attorney before the witness can give evidence.
13. By giving evidence in a case in which he was not a party, the witness was not acquiring the status of a party in the said proceedings. A witness need not be a party to the proceedings in which he is giving evidence.
14. I find that there is no merit in the contention that the witness herein lacked locus to swear the affidavit in support of the application.
15. As regards the question about whether or not the notice of appeal was actually filed in court, I hold the view that the doubts expressed by the respondent cannot be an answer to the applicant's positive deposition.
16. If the respondent had any doubts, he could have verified the factual position by perusing the court file, or by seeking clarification from the learned Deputy Registrar of the Court.
17. In the absence of evidence which would negate the deposition, this Court had no reason to disbelieve the applicant.
18. As regards the intended appeal, I note that the applicant hoped to challenge the court's decision because it effectively set aside the terms of a consent that had been signed by the parties. I hold the considered opinion that the intended appeal was arguable.
19. Furthermore, the subject matter is property which is supposed to be shared between the beneficiaries. The parties are the widows and the children of the late Waweru Mwaniki Gathua.
20. I take judicial notice of the sensitivity of land in Kenya. It is doubtlessly a very emotive issue. In my considered opinion, the matter would be best settled or determined through a substantive hearing.



Each of the parties would have an opportunity to canvass his or her case. None of the parties would be prejudiced if the court gave them an opportunity to put forward their respective cases.

21. Accordingly, I find merit in the application. The applicant is directed to file and serve the Record of Appeal within the next Ten (10) Days.
22. Meanwhile, as the application was necessitated by the applicant's own failure to act in a timeous manner, I order that each party would meet his or her own costs. There would be no justification in awarding costs to the applicant, in the circumstances of this case.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF JUNE, 2023.

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

