



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Eliud Macharia Muriu alias Eliud Macharia (Civil Application  
1 of 2017) [2022] KECA 995 (KLR) (23 September 2022) (Ruling)**

Neutral citation: [2022] KECA 995 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPLICATION 1 OF 2017  
HA OMONDI, JA  
SEPTEMBER 23, 2022**

**BETWEEN**

**MARY NYAGUTHII ..... APPLICANT**

**AND**

**KENNEDY KAGUNDA ..... RESPONDENT**

*(An application for extension of time to file a record of appeal out of  
time from the Judgement of the High Court of Kenya at Nyeri (Sergon  
J.) dated 23rd August, 2013 in Succession Cause No. 563 of 2008)*

**RULING**

1. The applicant by a motion dated January 10, 2017; seeks that to be granted leave to file notice of appeal and record of appeal out of time from the judgement of the High Court of Kenya at Nyeri, (Sergon, J.) delivered on the 23<sup>rd</sup> day of August, 2013; and the costs of and incidental to this application be provided for.
2. The application is supported by the affidavit sworn by Mary Nyaguthii, premised on grounds that delay in filing the appeal was occasioned by the High Court, not giving leave to file an appeal; on March 11, 2016; the applicant requested to be supplied with proceedings and judgment but these were not supplied until the 31<sup>st</sup> August, 2016. The applicant's intended appeal is described as predisposed a great chance of success.
3. The applicant explains that immediately upon delivery of the judgment, she immediately instructed her counsel on record Maina Karingithii & Co. Advocates to file an appeal, and she also applied for proceedings for purposes of pursuing an appeal at the Court of Appeal but these were not supplied. Unfortunately soon thereafter the applicant became seriously ill and was hospitalised from 24<sup>th</sup> August 2013 to 2<sup>nd</sup> December 2013; so she was unable to follow up with her counsel on record and determine whether her instructions of filing an appeal had been acted upon, until sometime in early January



2014, when she visited her counsel's office and discovered that no notice of appeal had been filed. She then changed and instructed the firm of Waihura & Co. Advocates who by an application dated 22<sup>nd</sup> January, 2016; before the High Court sought enlargement of time within which to file appeal, but this was dismissed on the 26<sup>th</sup> February, 2016. Once again, she changed counsel to the firm of Kariithi & Co. Advocates who filed a Notice of appeal dated 10<sup>th</sup> March, 2016; the Record of Appeal therein and this Notice of Motion dated 10<sup>th</sup> January, 2017. She is apprehensive that if the application is not allowed the other beneficiaries will be denied the right to an equal share of the deceased's estate, thus unjustly benefitting the responded to a large share, and contends that that she never went to slumber.

4. The respondent has opposed the application by a detailed affidavit sworn on 27<sup>th</sup> April, 2017; and his submissions pointing out that the appellant did file a notice of appeal on 11<sup>th</sup> March, 2016; (albeit out of time) but it is still on record, so she cannot seek to file another notice unless the first one is either withdrawn or is struck out by this Court. Further, that the appellant was served with proceedings and judgment on 10<sup>th</sup> January, 2017; when she filed the current application. That in any event, the applicant has no right of appeal against the judgment dated 23<sup>rd</sup> August, 2013; as she did not seek and obtain leave of the court to file an appeal against the said judgment, and litigation needs to come to a logical conclusion. This Court is urged to note that the Succession Cause has been dragging in court since the year 2008 and allowing the appellant to re-open the litigation by way of an appeal will only lead to further delay.
5. It is noteworthy that the applicant has filed a notice to act in person dated 15<sup>th</sup> June, 2022; but there is no competent notice of appeal and the only documents on the court record relating to this instant application is the judgment dated 23<sup>rd</sup> August, 2013; although she obtained copies of the proceedings from the High Court. I also take note that between 23<sup>rd</sup> August, 2013; (when the High Court judgment was delivered) and 26<sup>th</sup> February, 2016; (when the ruling dismissing the prayers for enlargement of time and leave to file appeal was delivered) to 10<sup>th</sup> January, 2017; when this application was filed, there is a loud period of unexplained inaction.
6. The applicant claims to have been hospitalised, but offers no documentation in support, and in any event, she was out of hospital in 2014. Although this Court has unfettered discretion on whether to extend time or not, that discretion must be exercised judiciously as was set out in *Leo Sila Mutiso vs Rose Hellen Wangari* Civil Application No. 251 of 1997 (unreported).
7. There has been inordinate and inexcusable delay by the applicant and this is indeed an old Succession Cause which was initially filed in court in the year 2008, as Nyeri Succ. Cause No. 563 of 2008, and I am in agreement that all litigation ought to eventually come to an end. The applicant has not demonstrated sufficient reasons to warrant the orders sought, and I hold that the application lacks merit and is dismissed. I shall make no orders on costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

