



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 78 of 2007

MARY WANJIRU KIARIE APPLICANT

AND

MARY WANJIKU KIARIERESPONDENT

*(An application for leave to file a notice and record of appeal out
of time against the order of the High Court of Kenya*

Nairobi

(Lady Justice M. Koome) dated 26th March, 2004

in

H.C. SUCCESSION CAUSE NO. 82 OF 2002)

R U L I N G

This is an application dated 30th March 2007 by *Mary Wanjiru Kiarie* (hereinafter “*Wanjiru*”) under *rule 4* of the Court of Appeal Rules for extension of time to file a fresh Notice and Record of Appeal against the judgment and order of Martha Koome J. dated 26th March 2004 in Succession Cause No.82 of 2002 in the High Court of Kenya at Nairobi to replace both the original Notice of Appeal and the original Record of Appeal in Civil Appeal No. 178 of 2004 both of which had been struck out on the application of *Mary Wanjiku Kiarie* (hereinafter “*Wanjiku*”) due to the existence of an incurable defect in the Record of Appeal.

The defect was in the order issued by the Deputy Registrar of the High Court which defect was not noticed by either the Deputy Registrar or the intended appellant **Wanjiru** or her advisors. The defect was the reference, in the order issued by the High Court Deputy Registrar on 21st July 2004, to **Wanjiru** as being the objector to the petition in Succession Cause No. 82 of 2002 whereas in fact **Wanjiru** was the **Petitioner** in the Succession Cause and the Objector was **Wanjiku**.

The defective order was later replaced by a corrected order issued by the Deputy Registrar on 6th March 2007.

Succession Cause No 82 of 2002 related to the estate of the deceased **Mr. Francis Kiarie Ndirangu** who died on 7th December 2001 survived by an undisputed widow of 50 years old being **Wanjiru** and four surviving sons in their twenties and thirties and one daughter. There was also the applicant **Wanjiku** who claimed also to be a widow of the deceased having been the second wife of the deceased a claim which was hotly contested by the first wife, **Wanjiru**, who is the respondent to the application.

In the Succession Cause **Wanjiru** was the petitioner and **Wanjiku** was the objector.

Koome J. stated in her judgment that the following issues were agreed upon as the issues to be determined by way of oral evidence:-

- 1) **Whether the objector was a lawful wife of the deceased;**
- 2) **Who are the beneficiaries of the deceased's estate?**
- 3) **How should the deceased's estate be distributed?**

The learned Judge summed up her conclusions, after hearing lengthy evidence, as follows:-

"I find that the objector was a wife of the deceased and her children are the deceased's children. I find that the deceased was married under the Kikuyu Customary law to the petitioner and to the objector. The Letters of Administration herein should be issued jointly to Mary Wanjiru Kiarie and Mary Wanjiku Kiarie both of whom with their children are survivors and beneficiaries of the deceased estate. Since this is a family dispute each party shall bear their own costs to (sic) this litigation. Judgment read and signed on 26th March 2004."

Wanjiru was dissatisfied with that part of the judgment which found that **Wanjiku** was married to the deceased and that she and her children were beneficiaries of the estate.

The extension of time now sought in the application by **Wanjiru** dated 30th March 2007 is for leave to file a fresh Notice and Record of Appeal. The length of delay sought to be excused is about **two and three quarter years** from 17th June 2004 to 30th March 2007 when the current application was filed.

The reason for the delay was, firstly, the error of the High Court Deputy Registrar, referred to above, as to the names of the objector and the petitioner when drawing the formal order arising from the judgment of Koome J dated 26th March 2004 and secondly, the failure by the applicant's counsel to notice the error immediately.

I have taken into consideration the confusingly similar names of the applicant and the respondent and the fact that the respondent is not opposing the application for extension and I have come to the conclusion, in the exercise of my unfettered discretion as a single judge which discretion is to be exercised judiciously, that this is a proper case in which to grant the extension of time sought by the applicant.

I therefore hereby order:-

1. **THAT** leave is hereby granted to the applicant to file and serve a fresh **Notice of Appeal** against the Judgment of Martha Koome J. dated 26th March 2004 in Succession Cause No 82 of 2002 within **fourteen** days after the delivery of this Ruling.
2. **THAT** leave is hereby granted to the applicant to file and serve a fresh **Record of Appeal** within **fourteen** days after the delivery of this ruling.
3. **THAT** the costs of this application shall be in the intended Appeal.

Dated and delivered this 15th day of February, 2008.

W. S. DEVERELL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR