



**PGB v MCM (Sued as the personal representative of the Estate of DCB) (Miscellaneous Application E032 of 2024) [2025] KEHC 10106 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 10106 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E032 OF 2024**

**G MUTAI, J  
MAY 30, 2025**

**BETWEEN**

**PGB ..... APPLICANT**

**AND**

**MCM (SUED AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF DCB) ..... RESPONDENT**

**RULING**

1. Before this court are two applications dated 10<sup>th</sup> September 2024 and 13<sup>th</sup> February 2025, respectively.
2. The first application seeks the following orders: -
  - a. spent
  - b. spent
  - c. that this honourable court grants leave to file a matrimonial property cause out of time against the respondent;
  - d. Upon granting leave, the court be pleased to issue and order restraining the respondent, his servant and/or agent from selling, charging, alienating, transferring, subdividing, giving in exchange or encumbering, or in any other way disposing the said properties Title Number Kilifi/Pingilikani/XXX, measuring 5.60 hectares, Title Number Kilifi/Pingilikani/XXX, measuring 0.87 hectares, Title Number Kilifi/Pingilikani/XXX, measuring 3.02 hectares all situated in Kilifi, pending the hearing and determination of the application for declaration of right over the subject properties in accordance with rules 5 and 7 of the Matrimonial Property Rules, 2022;
  - e. The timelines for filing such application for declaration of right over the subject properties in accordance with rules 5 and 7 of the application be provided for;



- f. In the alternative, an order of inhibition do issue restricting any further dealings with the parcels of land known as Kilifi/Pingilikani/XXX, Kilifi/Pingilikani/XXX, and Kilifi/Pingilikani/XXX, pending the hearing and determination of this application; and
- g. Costs.
3. The application is premised on the grounds stated therein and the supporting affidavit of the applicant, sworn on 10th September 2024.
  4. In the said affidavit, the applicant stated that she is a former spouse of the late DCB, who died on 6<sup>th</sup> April 2021, and a grant of probate was issued and confirmed on 4<sup>th</sup> April 2024. Therefore, she is entitled to matrimonial property under Rule 7 of the Matrimonial Property Rules.
  5. She stated that she got married to the deceased on 5<sup>th</sup> June, 1968, and was blessed with three children. Their marriage was dissolved on 12<sup>th</sup> March 2010, vide Divorce Cause No 43 of 2009, and a decree absolute was issued on 30th December 2010. She stated that she only learnt of the divorce proceedings in 2023 during the succession proceedings in Succession Cause No E010 of 2023.
  6. She averred that during the subsistence of their marriage, they acquired the subject suit properties and a house in Ziani, Kilifi, which are registered in the name of the late DB. However, they were acquired, developed, improved, and maintained through their joint efforts during the subsistence of their marriage.
  7. She stated that there was a need to protect the suit properties and urged the court to allow the application as prayed.
  8. In response, the respondent filed a replying affidavit sworn on 4<sup>th</sup> November 2024. He stated that the applicant was aware of the divorce proceedings as she was served through her advocates, Messrs Cootow & Associates, who entered an appearance on her behalf on 17<sup>th</sup> August 2009. However, she did not file a response and therefore cannot claim ignorance of the same. The respondent stated that the delay of over thirteen years is an attempt to frustrate the lawful distribution of the deceased's estate and should not be entertained.
  9. Further, her exclusion by the deceased in his will was a deliberate move taken by the deceased in the exercise of his testamentary freedom. Therefore, the application is frivolous and vexatious and was intended to disrupt the administration of the deceased's estate to the detriment of the rightful beneficiaries. He urged the court to dismiss the application.
  10. The applicant, through his counsel, filed written submissions dated 16<sup>th</sup> January 2025. Counsel submitted on seven issues namely; whether the applicant and the deceased acquired matrimonial property during subsistence of marriage; and whether the applicant has substantial interest in the property so acquired; whether the applicant's delay to file the matrimonial property cause and the instant application was excusable and had been explained; whether the alleged delay is reasonable unreasonable; whether the respondent will suffer any prejudice if leave is granted to the applicant; whether the applicant was paid her matrimonial investment in winding cause number 5; and, whether there is a need to protect the suit properties.
  11. On the first issue, counsel relied on sections 6, 2 and 7 of the *Matrimonial Property Act* and submitted that the applicant has established her statutory right to claim the matrimonial property under rule 7 of the *Matrimonial Property Rules*.
  12. On the second issue, counsel submitted that the suit properties are matrimonial property and, therefore, the applicant has a valid claim over them.



13. On the third issue counsel relied on rule 5 (1), read together with sub rule 2 of the *Matrimonial Property Rules* and submitted that it limits time for filing a matrimonial cause to twelve months from the date of decree nisi however, rule 5(3) gives the court discretion to extend time upon hearing the applicant and any other person interested in the property that is likely to be affected by the orders. The delay was due to factors beyond the applicant's knowledge.
14. On the fourth issue, counsel submitted that it took the applicant six months to trace the will of the deceased, complete the divorce proceedings, and ultimately file these proceedings. That the delay was inadvertent and the application for leave was made within a reasonable time, practically possible in the circumstances.
15. On the fifth issue, counsel submitted that the respondent will not suffer any prejudice if leave is granted extending time to file the matrimonial cause, as he will have an opportunity to respond/oppose the same.
16. On the sixth issue, counsel submitted that the court in its judgment of 26<sup>th</sup> February 2009 declared the applicant an equal shareholder and that the sale of the said property was conducted by consent entered into on 29<sup>th</sup> March 2024. The property was sold by way of private treaty, and the proceeds were distributed in accordance with the consent; therefore, the issue cannot be relitigated.
17. On the seventh issue, counsel submitted that the applicant has demonstrated the need to protect the suit properties and urged the court to grant the prayers sought.
18. On the other hand, the respondent, through his advocates, Gitonga & Tollo Advocates LLP, filed written submissions dated 20<sup>th</sup> December 2024. Counsel submitted that the application is fundamentally flawed in both law and fact, and should be dismissed in its entirety, as it seeks to reopen issues that have long been settled. It was also submitted that the applicant's claims are an abuse of the court process. Further, the applicant is guilty of laches. Counsel urged the court to dismiss the application with costs.
19. The second application, dated 13<sup>th</sup> February 2025, seeks the following orders: -
  - a. That the application dated the 10<sup>th</sup> September 2024 be struck out with costs.
  - b. That in the alternative to the grant of prayer 1, there be an order that this cause shall always run along the Mombasa High Court Succession Cause No E010 of 2024 In the matter of the estate of the late Bandari Chengo Duncan;
  - c. That in the alternative to the grant of prayer 1, there be an order staying the proceedings in this matter being Mombasa High Court Miscellaneous Application No E032 of 2024, Philomena Gertrude Bandari v Mwarabu Chigiri Muye pending the determination of Succession Cause No E010 of 2024; In the Matter of the Estate of the late Bandari Chengo Duncan;
  - d. That this honourable court do issue such further and other orders as it may deem just and expedient in the circumstances.
20. The applicant, in his supporting affidavit sworn on 13<sup>th</sup> February 2025, stated that the respondent, Philomena, participated in the succession proceedings, was aware of the distribution, and received her rightful share as ordered by the court; therefore, her application is an abuse of court process. The concurrent existence of these proceedings presents the risk of contradictory court rulings, thereby undermining judicial consistency and legal certainty, and the respondent's application should be struck out or stayed pending resolution of the succession matter.



21. In response, the respondent filed a replying affidavit sworn on 26<sup>th</sup> February 2024 in which she stated that the only share she has received is in Winding Up Cause No 5 of 2006 and that matrimonial interest cannot be disposed of through a will. She averred that these proceedings are separate from the succession one. She contended that her application does not affect the grant, nor does the grant take away her right to claim before distribution. She urged the court to dismiss the application herein.
22. Rule 5 of the Matrimonial Property Rules provides that: -
1. A spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with rule 7-
    - a. at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the *Marriage Act* (Cap. 150);
    - b. as part of the relief sought in a matrimonial cause under section 17 of the *Marriage Act* (Cap. 150), where the applicant is seeking a declaration of rights to any property that is contested between the applicant and the applicant's spouse or former spouse; or
    - c. with respect to the persons specified in rule 4(b) and (c), during the subsistence of a marriage.
  2. An application under paragraph (1)(a) shall be filed within twelve months from the date on which the decree absolute is given.
  3. Without prejudice to the generality of paragraph (2), a court may, for good cause, extend the time for making an application under paragraph (1)(a) after hearing —
    - a. the applicant; and
    - b. any other person interested in the property who is likely to be affected by the order sought and who the Court considers as having a right to be heard.
  4. An application made in a matrimonial cause under section 17 of the *Marriage Act* (Cap. 150) as contemplated in paragraph 1(b), shall be in accordance with the Matrimonial Proceedings Rules (sub. leg).
23. Further, Rule 18 provides that:-
1. No party may file any pleading or other process out of time except with leave of the court on application for extension of time for that purpose, and on such terms as the court may think just
  2. An application for leave to file pleadings or other process out of time may be made by way of notice of motion supported by affidavit, or orally at any stage in the proceedings.
24. The court in the case of *GGN v BOO* (Miscellaneous Application E002 of 2023) [2024] KEHC 469 (KLR) (25 January 2024) (Ruling) stated,

“From the above provisions and the material before this Court, the main issue for determination is whether time should be extended to allow the Applicant to file the Matrimonial Properties proceedings. To allow such an application or not is within the discretion of this Court and that discretion has to be exercised with certain parameters and principles as outlined by the Supreme Court of Kenya in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* (2014) eKLR where the



Court held :-“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

...What is clear is that to deny the Applicant herein the leave sought is tantamount to denying the Applicant a chance to pursue her constitutional right to present her claim to a share of matrimonial property whether such claim will succeed or not. Curtailing that right at this stage would be highly prejudicial to the Applicant. On the contrary, this Court finds that no prejudice would be caused to the Respondent at all if leave is granted. The Respondent will have a chance to state his case once the proceedings are filed before the appropriate Court.”

25. I have considered the application for extension of time as well as the averments made in support thereof. The applicant has given a plausible explanation for her failure to file the claim on time. Based on the arguments by the parties herein and the findings in the case above, it is my view that denying the applicant a chance to pursue her claim for a share of matrimonial property would be highly prejudicial to her. In my view, it would be in the interest of justice to allow the application.

26. In dealing with striking out of a suit, the court in the case of Zainab Abdalla Nooman & another v Public Trustee [2016] KEHC 7384 (KLR) stated:-

“It is trite law that the striking out of any suit is a drastic and draconian measure which Courts are loath to apply unless a suit is found to be so hopelessly incompetent that no life can be breathed into it. The Court of Appeal in the case of *DT Dobie & Company (Kenya) Ltd v Muchina* [1980] eKLR, while considering the principles of striking out cases, rendered itself thus-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.”



Madan JA (as he then was) adopted the following finding of Danckwerts, L. J. in *Nagle v Fielden* (1966) 2 Q.B.D. 633 at p. 646.

“The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.”

In the same case at p. 651 Salmon, L.J., delivered himself thus

“It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly, it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal.”

... Although no Grant of Letters of Administration has been produced before this Court, the entries in the copy of title raise sufficient questions. These questions can only be answered at a full hearing of the Originating Summons at which point the trial Court shall determine whether or not a reasonable cause of action has been disclosed. It is the view of this Court that there are issues herein which are fit to go for trial and the Plaintiffs should not be driven from the judgement seat thereby depriving them of their right to have their suit determined in a full trial. Consequently, the Application herein is dismissed. Costs shall be in the cause.”

27. I do not think that the case being made by the applicant herein is one that is so hopeless that no life can be breathed into it. Rather, the applicant appears to have an arguable case that deserves examination on its merits. That being the case, the respondent has not, in his application, established grounds for striking out the applicant’s application; therefore, the application must fail.
28. The upshot of the foregoing is that the application dated 10th September 2024 has merit and is hereby allowed, while the application dated 13<sup>th</sup> February 2025 is dismissed.
29. Due to the nature of the matter, I make no orders as to costs.
30. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 30<sup>TH</sup> DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr Kongere, holding brief for Mr Karina, for the Applicant;

Ms Kariuki, holding brief for Mr Gitonga, for the Respondent; and

Arthur – Court Assistant.

