



REPUBLIC OF KENYA



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In re Estate of the Late Mbungu Karumberi (Deceased) (Miscellaneous Application Probate & Administration E022 of 2024) [2025] KEHC 12016 (KLR) (14 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12016 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

MISCELLANEOUS APPLICATION PROBATE & ADMINISTRATION E022 OF 2024

EM MURIITHI, J

AUGUST 14, 2025

BETWEEN

JOSPHINE MBUNGU APPELLANT

AND

ROSEMARY WAMARWA KABUITI RESPONDENT

RULING

1. This is a ruling on an application dated 16/12/2024 seeking the leave of court to file an appeal from judgment of the Kerugoya Chief Magistrate’s Court in Succession Cause No. E377 of 2022 and the implementation of the Certificate of Confirmation of Grant issued therefor.
2. The application is opposed. The 1st Respondent filed a Replying Affidavit sworn on 9/1/2025 objecting to the grant of extension of time principally on the grounds that there had not been an explanation for the four months delay in filing an appeal and the appeal was unmeritorious and only driven by selfishness and greed, at paragraphs 8-13 as follows:
 - “ 8. That I have been advised by my Advocates on record which advise I verily believe to be true that the Applicant ought to have filed an appeal if any within a period of 30 days from the date of the judgment/ruling on 7th August, 2024.
 9. That there has been inordinate delay in filing the appeal of more than 4 months without sufficient reasons yet the Applicant was properly represented by an Advocate - in the subordinate court,
 10. That the reasons advanced by the Applicant for leave to appeal out of time are not Plausible, not satisfactory and not sufficient hence the delay is not excusable.



11. That the Applicant is not entitled to the orders sought as the Honourable Court cannot exercise its discretion on non-satisfactory reasons.
 12. That the Memorandum of Appeal has no chances of success as the same is only meant to frustrate the beneficiaries who are desirous to have the estate wind up.
 13. That the Applicant is selfish, greed and not considerate of the beneficiaries of the estate hence the application ought to be dismissed with costs.”
3. The parties filed submissions. Citing provisions for filing of appeals under section 79 G of the *Civil Procedure Act*, Article 48 of *the Constitution* on access for justice and case law authorities of Edith Gichungu Koine v. Stephen Njagi Thoithi (2014) eKLR, Kamlesh Mansukhlal Damki Pattni v DPP & 3 Others [2015] eKLR and Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR, on extension of time file appeal, namely, the applicant’s submission dated 18/1/2025 urged that she had been prevented by ill health and admission to hospital from pursuing the filing of the appeal with her Counsel in the 3 months following delivery of judgment because of “the medical state and condition of the said applicant, did affect and precluded the applicant from being in a proper and mentally sound state to issue instructions of taking action over the appeal, and it was best placed that the applicant be accorded time to recover fully, since indeed being fir and steady is a crucial factor for consideration, [and that] the respondent does not stand to be prejudiced at all, since all parties will definitely have their share of the estate, save that the challenge is premised on distribution which is being challenged on fair practise and distribution which the court will determine appropriately on merit in the appeal.”
 4. By submissions dated 14/1/2025, the 1st Respondent pointed out that the trail court had ordered equitable distribution of the estate to the three households and urged that the intended appeal had no chances of success, and he application was meant to frustrate the beneficiaries from enjoying the fruits of their judgment. The case law authorities of Kerugoya ELC Court Misc Application No. E016 of 2013 William Kariuki Kinuthia v. Zipporah Muthoni Kinyanjui and Mombasa Civil Appeal Civil Application No. 52 of 2008 Charles Nzau Ndeto Administrator of Estate of the late Reuben Mutua v. Eurobank Ltd., it was contended that the delay was not plausible and the party at default had not placed the necessary relevant material for the court to exercise its discretion in their favour.
 5. The 2nd and 3rd respondents by submissions dated 15/5/2025 relied on Edith Gichugu Koine v. Stephen Njage Murithi (2014) eKLR on principles for grant of extension of time including period of delay, reason for the delay, prejudice to the respondent if application is not granted and whether the matter raises issue of public importance. It was urged that “the application had not advanced any sufficient grounds upon which the court orders may be made.”
 6. Ruling was reserved.

Determination

7. In considering the issue whether the application for extension of time to file an appeal should be granted, the Court takes the guidance of the Court of Appeal Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR that -
 - “20. Whenever an application for extension of time is before a court, the court ought to take into account several factors as observed by Odek, JJ.A in Edith Gichugu Koine vs. Stephen Njagi Thoithi [2014] eKLR, thus

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this Court including, but not



limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent if the application is granted, and whether the matter raises issues of public importance, amongst others....”

There is also a duty now imposed on courts to ensure that the factors considered are consonant with the overriding objective of civil litigation, that is to say, the just, expeditious, proportionate and affordable resolution of disputes before the court.”

8. The Court has considered that in this application, the delay of three months after the expiry of 30 days period allowed for filing of appeal is in the circumstances of this case explained by the ill-health of the applicant, which kept her in and out of hospital. The Court has noted the Medical treatment/discharge chits indicating the applicant was hospitalised between 10/8/2024 – 23/8/2024 and 16/10/2024 - 30/10/2024 within the four months period after the delivery of the Judgment on 7/8/2024.
9. From the grounds of the Draft Memorandum of Appeal the appeal cannot be said to be frivolous. The Draft Memorandum of Appeal appears to raise issues on the Judgment of the trial court for consideration by the appellate court with regard to section 41 of the Law of Succession Act as regards the grand-children of the deceased whose parents predeceased him, if that be the case on the evidence herein, and to section 42 of the Act in relation to a child of the deceased who was the registered proprietor of a parcel of land, and whether it was a gift inter vivos and subject to be taken into account for the share accruing to his house or held upon trust for his family.
10. There are clear arguable cases in respect to the grounds of relations of the 1st wife’s family with the deceased during his life; objection as to the degree of consanguinity of some of the protestors to the application for confirmation of Grant and the trial court’s answer in reliance to section 41 of the Law of Succession Act; the alternative provision for the 1st wife’s family by a six-acre parcel of land elsewhere; and the alleged disregard of the wishes of the deceased as to the sharing of his estate. The determination of these issues must await the full hearing of the intended appeal.
11. No multiplicity of arguable cases is necessary, and an arguable case is not one that must succeed at the trial or appeal. See Supreme Court decision Misc. Application No. 7 (e011) Of 2021 - Between - George Boniface Mbugua Alias George Boniface Nyanja V Mohammed Jawayd Iqbal (Personal representative of the Estate of the late Ghulam Rasool Jammohamed) that

“(15) It must be remembered that the question whether an appeal is arguable, does not call for the interrogation of the merit of the appeal, and the Court, at this stage must not make any definitive findings of either fact or law. An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully by the Court.”
12. In considering the degree of prejudice on the respondent, which in this case is the delayed enjoyment of the fruits of the judgment in their favour, the court balances this factor with the constitutional right to access to justice under Article 48, pursuant to the fair trial right to appeal to a higher court, and in the circumstances of this case where the appellant was prevented from filing the appeal in time, the Court is minded to allow the extension of time to file an appeal.



13. The prejudice in the delayed enjoyment of the fruits of judgment may in this case be remedied by an award of costs, which Order 50 Rule 6 of Civil Procedure Rules requires for application for extension of time as follows:

“Power to enlarge time [Order 50, rule 6]

- (6) Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Orders

14. Accordingly, for the reasons set out above, the Court finds merit in the application dated 16/12/2024 and it is allowed upon terms that:
1. The appellant/applicant shall file the Memorandum of Appeal within seven (7) days.
 2. The Appellant/Applicant shall file the Record of Appeal within 30 days.
 3. As a necessary corollary, there shall be a stay of implementation of the Judgment of the trial court pending the hearing and determination of the intended appeal.
 4. In default of the Orders in Nos. 1 and 2 above, the order for stay of execution herein shall lapse and be of no effect.
15. The costs of the application shall be paid by the appellant/applicant to the respondents.

Order accordingly.

DATED AND DELIVERED THIS 14TH DAY OF AUGUST 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. N. Mwaura for the Applicant.

Mr. Ombachi for the 1st Respondent.

Ms. A. Thungu for the 2nd and 3rd Respondents.

