



REPUBLIC OF KENYA



KENYA LAW
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**Gathu v Kamau (Miscellaneous Civil Application E006 of 2024)
[2025] KEHC 12455 (KLR) (3 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPLICATION E006 OF 2024
EM MURIITHI, J
SEPTEMBER 3, 2025**

BETWEEN

JACKSON MURIUKI GATHU APPLICANT

AND

GRACE WANJIKU KAMAU RESPONDENT

(Being an appeal against the judgment and order of the Hon. Principal Magistrate E.O Wambo dated 18th August 2023 in Kerugoya CMC Succession Cause NO. 115 of 2010)

RULING

1. By a Notice of Motion dated 30/1/2024, the applicant seeks leave to appeal out of time and extension of time to file an appeal from the decision of the trial court of 18/8/2023, and for stay of execution pending appeal as follows:

- “1. That this Honourable court be pleased to allow the Applicant to appeal the judgment in Kerugoya C.M Succession Cause No. 115 of 2010 delivered on 18th day of August 2023 out of time.
2. That this Honourable court be pleased to enlarge time for filing the appeal.
3. That this Honourable court be pleased to order stay of execution of the judgment delivered on 18th day of August 2023 in C.M Succession cause No'. 115of 2010 at Kerugoya pending the hearing and determination of the intended appeal herein.
4. That the costs of this application be in the cause.”

It is apparent from the record that the application did not proceed to hearing earlier as the court awaited the trial court file record to be availed.



2. The application is support by an affidavit of the applicant sworn on 30/1/2024 detailing the facts relied on as follows:

- “ 1. That I am the Applicant herein and therefore competent to swear this affidavit.
 2. That the judgment of C.M Succession cause No. 115 of 2010 Kerugoya was read by the trial Magistrate on 18th day of August 2023 {annexed hereto and marked "J.M.G. 1" is the copy of the said judgment.}
 3. That the said judgment was read in the absence of the Applicant/ Administrator and his advocate.
 4. That there was no notice which was sent to the parties to notify them when the said judgment will be delivered.
 5. That the court had given parties several dates when the judgment will be delivered but it kept on adjourning the same.
 6. That the trial Magistrate had been transferred to a new station and moved with the said file thus the Applicant lost track of the said file.
 7. That the said judgment had been pending since 28th day of March 2023.
 8. That I was notified about the said judgment on 16th day of January 2024 when the chief Mukure location summoned me to his office.
 9. That I was dissatisfied with the said judgment and I instructed my advocate to lodge an appeal.
 10. That I have already requested for typed proceedings. {annexed hereto and marked "J.M.G.2" is the copy of the letter.}
 11. That the delay herein was not intentional and inordinate.
 12. That I am informed by my advocates on record which information I belief to be true that my appeal has overwhelming chances of success {annexed hereto and marked 11 J.M.G.3" is the copy of the memorandum of appeal.
 13. That the Respondent has threatened to commence execution herein which will affect my livelihood since the said land contains my coffee stems.”
- [Emphasis added]

3. The Supporting Affidavit attached a Draft Memorandum of Appeal setting out the grounds of the proposed appeal as follows:

“Memorandum of appeal

The Appellant Jackson Muriuki Gathu being dissatisfied and aggrieved by the Judgment and orders of Honourable Principal Magistrate E.O Wambo dated 18th day of August 2023 appeals to the High Court against the said Judgment and puts forth the following grounds of appeal:

1. That the learned trial Magistrate erred in law and fact by showing the property of the deceased to non- beneficiaries and leaving out the beneficiaries. A miscarriage of justice was thereby occasioned.



2. That the learned trial Magistrate erred in law and fact by giving out the property of the deceased to the daughters only and leaving out the sons which is discriminatory and against the spirit of the constitution. A miscarriage of Justice was thereby occasioned.
3. That the learned trial Magistrate erred in law and fact by purporting to overturn the judgment of another Magistrate thus assuming the jurisdiction of the appellate court. A miscarriage of Justice was thereby occasioned.
4. That the learned trial Magistrate erred in law and fact by misinterpreting the Law of Succession Act and particularly the section dealing with the distribution of the estate of the deceased and gift inter vivos. A miscarriage of justice was thereby occasioned.
5. That the decision and judgment of the learned trial Magistrate is not only flawed by error on the record but total misunderstanding of the legal principal involves in Law of Succession Act which deals with the distribution of the estate of the deceased. A miscarriage of justice was thereby occasioned.

Reasons wherefore the Appellant prays that the Judgment of the subordinate court be set aside and the appeal herein be allowed confirming the Letters of Administration as per the Petitioner' application for the confirmation dated 14th day of July 2021 with costs.”

[emphasis added]

4. The Respondent has opposed the application by a Replying Affidavit sworn on 12/2/2024 raising the issue of truthfulness and merit of the application as follows:

“Replying affidavit

I, Grace Wanjiku Kimani of P.O. Box 283, Kerugoya within the Republic of Kenya do hereby make oath and state as follows:-

1. That I am the Respondent herein hence competent to swear this affidavit.
2. That I have read and understood the application dated 30th January, 2024, the supporting affidavit and the annexures thereto.
3. That the said application is a gross .abuse of the court's process, It's bad in law and without merits.
4. That the orders sought are discretionary in nature and the Applicant has to demonstrate good faith and be truthful before he can enjoy such discretionary orders.
5. That this case was heard by Hon. E.O Wambo, Principal Magistrate, and he was transferred before he delivered several rulings and judgments. The dates for the same were to be communicated to Counsel on the official L.S.K Kirinyaga Chapter Whatsapp Wall, since all legal practitioners based in Kirinyaga County have access to the said whatsapp wall. Counsel for the applicant and for the Respondent are based in Kerugoya Town, and are members/participants of that wall.



6. That the judgment of Kerugoya Principal Magistrate's Court Succession Cause No. 115 of 2010 was to be delivered virtually on 18th August 2023. A notice for delivery of judgment was posted on the whatsapp wall. Annexed and marked GWK-1 is a copy of the said notice.
7. That my advocate on record informed me about the date of the delivery of judgment, and we later obtained the certificate of confirmation of grant.
8. That failure by the Applicant to log in despite knowledge about the date of delivery of the judgment is his own fault. He can't blame anyone.
9. That even the intended appeal is an abuse of the courts process. The deceased herein was my father. He had nine children, 4 sons and 5 daughters namely:-
 - a. John Mwai Wakathu - Deceased son
 - b. James Mugo - son
 - c. Joseph Ndegwa - Deceased son.
 - d. Judith Nyawira Ngigi - Daughter
 - e. Faith Wakini Deceased - daughter
 - f. Rose Wangari Deceased - daughter
 - g. Mary wakariti Deceased - daughter
 - h. Grace Wanjiku Kimani - Daughter
 - i. Jackson Muriuki - Son
10. That during his lifetime, he sub-divided his land parcel number Mwerua/Kanyokora/363 into 5 portions. 4 portions were meant for the 4 sons and the fifth portion was meant for the daughter. Consequently, the said land was sub-divided into parcel numbers Mwerua/Kanyokora/721,722,723,724 and 725.
11. That land parcel number Mwerua/Kanyokora/721 remained in the deceased's name. It's the subject matter in the succession proceedings.
12. That land parcel number Mwerua/Kanyokora/722 was meant for my brother Joseph Ndegwa, but he died before obtaining that land. My brothers, John Mwai, Jackson Muriuki and James Mugo shared the land, and sold part of it to one Beatrice Muthoni. Annexed and marked GWK-2 is a copy of the green card for L.RNO. Mwerua/Kanyokora/722.
13. That land parcel numbers Mwerua/Kanyokora/723, 724 and 725 went to my brothers James Mugo Gathu, John Mwai Gathu and Jackson Muriuki Gathu. Annexed and marked GWK-3A, 3B and 3C are green cards for the said three parcels of land.
14. That I'm advised by my advocate on record, which advice I verily believe to be true that under section 42 of the *Law of Succession Act*, the parcels of land given to my brothers as gift inter vivos ought to be considered while deciding the share of each child of the deceased.



15. That it's in the interests of justice that this matter comes to and end by dismissing this application with costs.”

[Emphasis added]

5. There was no supplementary affidavit filed by the Applicant.
6. The application is canvassed by written submissions and ruling was reserved.

Submissions

7. By Submissions dated 12/3/2025 urged that the application was merited as follows:

“Applicant's Written Submissions

The Applicant filed an Application dated 30th January 2024 seeking orders [set out].

The Applicant has stated the grounds on the face of the application and supporting affidavit sworn by the Applicant.

The Respondent filed Replying Affidavit sworn on 12th day of February 2024 opposing the said Application.

The Judgment herein was read on 18th day of August 2023 in the absence of the counsel. The trial magistrate E.O. Wambo had been transferred from Kerugoya law court and had gone with the said file. The magistrate had set the date for delivering the judgment on several occasions from 28th March 2023 and on those dates he did not read the judgment. The Applicant together with counsel were not notified on this date when the Judgment was read and the record can bear witness to that.

The Applicant was notified of the said Judgment by the area chief of Mukure on 16th day of 2024 and he immediately filed this application since he was dissatisfied with the outcome. The Applicant did not intentionally delay in filing the appeal.

The Applicant's appeal has got overwhelming chances of success and therefore pray that the court do exercise its discretion in his favour.

In the case of Miriam Muthoni Mahlhu & 5 Others - Vs - African Safari Club Limited - Court of Appeal At Nairobi Civil App No. Nai 239 of 2012 the learned judges states as follows:-

"----- an arguable appeal is not one that mu-st necessarily succeed, it is simply one that is deserving of the courts consideration-----"

The Applicants intended appeal herein is arguable and we humbly submit that the honourable do allow him to file his appeal. The delay herein was not inordinate and intentional. The status quo should also be ordered to be maintained until the appeal is heard and determined.

We do humbly submit he Applicant's application has merit and urge the court to allow the same.”



8. The Respondent's Submissions dated 26/3/2025 opposed the application as untruthful and frivolous as follows:

“Respondent's Written Submissions

1. The applicant is a brother to the Respondent. They are children of the late Simon Wakathu Kararo who died on 10/2/1997. In a judgment delivered on 18/8/2023, the court made a finding that the deceased had land parcel number Mwerua/Kanyokora/367 which he sub-divided during his life time into land parcel numbers Mwerua/Kanyokora/721 to 725. He had four sons and 5 daughters. Land parcel numbers Mwerua/Kanyokora/722 to 725 were given to the four sons as gift inter vivos, each son receiving a portion, while parcel number Mwerua/Kanyokora/721 remained in the name of the deceased. It's the subject matter in the case.
2. The daughters did not get anything. The applicant herein had during the confirmation stage proposed that land parcel number Mwerua/Kanyokora/721, measuring 0.75 hectare, be shared equally by two sons and two daughters, while the Respondent had proposed that the said land be shared equally by the 5 daughters. In view of section 42 of the [Law of Succession Act](#), the trial court made a finding that the land should go to the daughters, as the sons received their portions as gift inter vivos, and therefore not entitled to share the land.
3. The applicant has filed the notice of motion application dated 30th January 2024 seeking for extension of time to file the appeal, and for stay of execution of the judgment.
4. That application was opposed. The Respondent filed the replying affidavit sworn on 12th February 2024. Two issues have been raised in that replying affidavit. While responding to the applicant's averment in paragraph 4 of the supporting affidavit that judgment notice was not sent to the parties, the respondent has attached a judgment notice indicating that two rulings and one judgment was to be delivered on 18/8/2023 at 2.00 p.m. The said notice was posted on the Kerugoya L.S.K whatsapp group, which the applicant's advocate is a member. The said averments are in paragraphs 5,6 and 7 of the respondent's replying affidavit. No supplementary affidavit was filed to deny that fact. The orders sought are in the discretion of the court, and the party seeking for exercise of discretion in it's favour must be truthful and candid.
5. It's therefore untrue for the applicant to depone, on paragraph 8 of the supporting affidavit, that he was notified by the chief Mukure location on 16th January 2024 when he was summoned to the chief's office. A copy of the said summons has not been annexed to the supporting affidavit and therefore there were no such summons. It therefore means that there are no reasons advanced at all for failure to file the appeal in time.
6. The second issue raised by the Respondent is the merit or otherwise of the intended appeal. In the replying affidavit, the Respondent has attached several green cards as proof that all the sons received land from the deceased as gift inter vivos. Again, this fact has not been denied. It would therefore be selfish



for the applicant to seek another portion from the suit property together with one brother and 2 sisters, and leave out the other siblings more so the other sisters who had not received anything from their father, the deceased herein.

7. It's our humble submission that the application has no merits, and should be dismissed with costs, so that the property can be registered in the names of the intended beneficiaries as per the judgment, and for the estate to be wound up."

Principles

9. The application for extension of time to file appeal and stay of execution pending appeal falls to be considered on the tests of the length of delay and explanation, and prejudice to the Respondent [see Supreme Court decision of *Nicholas Kiptoo Korir Arap Salat v. IEBC & 7 Others* (2014) eKLR; and existence of an arguable case, substantial loss and provision of security for the due performance of the decree as may become binding on the applicant on appeal as required under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.
10. By section 79 G of the *Civil Procedure Act*, the applicant had 30 days from 18/8/2023 expiring on 18/9/2023. By the time the application was filed on 31/1/2024 the applicant was four (4) months out of time. The delay is not inordinate.

Delay

11. The applicant explained the delay was occasioned by failure of trial court which was on transfer to give notice of delivery of Judgment only for the applicant to learn of its existence upon summons from the area chief on 16/1/2024. Being dissatisfied with the Judgment, he then instructed Counsel to file an appeal.
12. Despite want of a further affidavit to rebut the issue of notice of delivery of judgment through Whatsapp message, as urged in the Respondent's submission, the Respondent agrees that the trial magistrate had been transferred before delivery of his Judgments and had gone with the files and subsequently gave notices for delivery which were published in the stations practitioners WhatsApp wall, and blames the Counsel for the applicant for failing to attend the delivery of the judgment.
13. On the concession by the Respondent of the state of affairs alleged in the applicants affidavit as to the circumstances of the delay, the Court gives the applicant the benefit of doubt as to the applicant's truthfulness that he had lost track of the matter when the trial court moved with the file on transfer even though his Counsel may not have failed to attend the ruling after the Whatsapp notice. The Court accepts the explanation for delay as reasonable.

Arguability of appeal

14. The Memorandum of Appeal raises a curious issue of apparent overruling of the previous magistrate decision which is a clear arguable case. In the Judgment the trial Court provoked this ground of appeal by a finding as follows:

"This Court has considered the submission and before it goes further there is an issue whether or not the court has dealt with who are the beneficiaries of the estate, there from the proceeding herein in Court. Hon Ndegwa, did so on 26th August 2011, and confirmed on 26th August 2011 was revoked. The Judgment more or less ceased to exist, as the finding had been set aside, hence this court will consider whether or not the sons were given gift inter vivos and from the green cards annexed."



15. In addition, the Respondent's case rests on the application of the section 42 principle of gift inter vivos under the *Law of Succession Act*, the applicant seeking to challenge the interpretation of the trial Court thereon.
16. While the Respondent urges that the appeal is frivolous based on the evidence before the Court, the applicant urges that the trial court misapplied the principle and urges in the Memorandum of Appeal that "the learned trial magistrate erred in law and fact by misinterpreting the *Law of Succession Act* and particularly the section dealing with the distribution of the estate of the deceased and gift inter vivos [and a] miscarriage of justice was thereby occasioned."
17. An arguable appeal need not be one that eventually succeeds, and the existence of only one arguable point is sufficient to support an application for leave to appeal and or stay of execution pending appeal. See decision of the Miriam Muthoni Mahihu and 5 Others vs. African Safari Club Limited Court of Appeal at Nairobi Civil Application No. Nai 239 of 2012 – cited by the applicant, and see Stanley Kang'ethe Kinyanjui v. Tony Keter and 5 Others, (2013) eKLR.
18. The Supreme Court's ruling in Petition No. 17 (E024) of 2021, Kenya Electricity Transmission Co. Limited (KETRACO) V. Instalaciones Inabensa S.A. guided that the court need not go to the validity of the arguable point at this stage as follows:

“(13) To determine the question whether or not an appeal is arguable, the Court must not interrogate the merit of the appeal or make definitive findings of either fact or law at this stage as doing so may embarrass the Court when finally called upon to determine the appeal itself. An arguable appeal is, therefore not one which must necessarily succeed, but one which ought to be argued fully on its merits before the court.”

See also 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).

19. The Court must, therefore, leave the issue of the applicability and impact of the principle of gift inter vivos in this case to the hearing of the appeal.

Substantial loss and prejudice to the Respondent

20. The matter of succession will move to transmission upon the judgment and the applicant indicates that "the respondent has threatened to commence execution herein which will affect my livelihood since the said land contains my coffee stems."
21. Although execution of lawful decree of court cannot be wrongful the loss of his coffee plantation is such loss as a basis for a finding of significant risk of loss as to support an order for stay of execution pending appeal, so that the appeal, if successful, shall not be rendered nugatory by a disposal of the coffee farm in the meantime.
22. The Respondent's prejudice in delayed implementation of the trial court Judgment must be considered against the loss to be suffered by the applicant upon the prospects of his appeal being rendered nugatory.



Balance of convenience

23. Balancing the interests of the decreeholder to the fruits of the judgment and the appellant's right of appeal, the Court in this family succession cause finds it to be in the interests of justice to grant the leave to appeal out of time for the final settlement by the appellate court of the dispute between the family members. In the interests of expeditions disposal of the appeal, the court will give appropriate directions for priority hearing.

Security

24. As this is a succession matter and the final distribution of suit land will accord to the determination of the Court with power of the Deputy Registrar of the Court to execute transfer documents if necessary, there is no need for the Court to call for any further security under Order 42 Rule 6 (2) of the Civil Procedure Rules.

Orders

25. Accordingly, for the reasons set out above, the Court finds merit in the application for extension of time to file appeal and for stay of execution pending appeal, which is granted upon terms that:
1. The Court extends the time for filing an appeal on condition that the Memorandum of Appeal is filed within the next seven (7) days and the Record of Appeal within the next thirty (30) days.
 2. The Court grants an order of stay of execution pending hearing and determination of the appeal.
 3. There shall be no order as to costs of application, despite Order 50 Rule 6 of the Civil Procedure Rules, as this is a family succession dispute.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S J. Ndana & Co. for the Applicant.

M/S Maina Kagio & Co. for the Respondent.

