



REPUBLIC OF KENYA



**Njogu & another v Munyi & 2 others (Miscellaneous Application
E002 of 2025) [2025] KEHC 12398 (KLR) (3 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS APPLICATION E002 OF 2025
EM MURIITHI, J
SEPTEMBER 3, 2025**

BETWEEN

DANIEL GITHINJI NJOGU 1ST APPLICANT

JOHAN KAMAU NJOGU 2ND APPLICANT

AND

MARY MUTHONI MUNYI 1ST RESPONDENT

FREDRICK MURIUKI KABITA 2ND RESPONDENT

JOHN MAINA KIBARA 3RD RESPONDENT

RULING

1. The applicant filed a notice of motion dated 13th January, 2025 seeking the following orders:
 1. That the Honourable court be pleased to admit an appeal out of time against the ruling of the Honourable A.K. Ithiku Chief Magistrate delivered on 7/2/2023 at Kerugoya Chief Magistrate court in Succession Cause No. 16 of 2007; In the matter of the estate of the late Andrea Njogu Munyi (Deceased).
 2. That the Honourable Court be pleased to order that the memorandum of appeal be filed within thirty (30) days upon the making of the orders in No. 1 above.
 3. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of the 1st applicant. The applicant case is that he is a son of the late Andrea Njogu Munyi (hereinafter 'his father') who passed away on 2/1/1979. His father was survived by eight (8) children together with our late mother Alice Wanjiku Njogu namely; Jessi Wanjiru Gacheru (deceased), Jacob Munyi



Njogu (deceased), Loise Wambui Luka (deceased), Jonah Kamami Njogu, Tabitha Mweru Mugo, Leah Muthoni Kabata, Francis Andrew Njogu (deceased) Daniel Githinji Njogu.

3. He avers that upon the demise of their father in the year 1979, he filed succession cause No. 48 of 1988 at Kerugoya resident magistrate court in the year 1988. The same was advertised in the Kenya gazette dated 23/12/1988. With the agreement of all the siblings, he only listed the four sons who were to inherit the only estate asset known as_ title number MUTIRA/KIRIMUNGE/582 (hereinafter ‘the suit property’). He did not pursue the conclusion of Kerugoya succession cause No. 48 of 1988 as he was working in Nairobi and he was confident that nothing unusual would happen as every member of the family was aware of the agreement that the suit property would be inherited by the four sons namely Jacob Munyi Njogu, Johan Kamami Njogu, Francis Andrew Njogu and himself.
4. Nevertheless, he avers that without our knowledge, their elder brother, the late Jacon Munyi Njogu (Hereinafter ‘Jacob’) filed Succession Cause No. 16 of 2007 and fraudulently obtained letters of administration and a confirmation of the same whereby he named himself as the sole beneficiary of the estate of their father.
5. Further, he avers that upon discovery of the fraudulent transaction by Jacob, his two brothers and himself lodged a dispute with the land disputes tribunal, Kirinyaga central where they sued Jacob for the illegal acquisition of their father’s land. The tribunal ruled in their favour and the suit property was to be sub-divided as follows; Jacob Munyi - 5 acres, Baniel Githinji Njogu - 1.5 acres, Francis Andrew Njogu — 15 acres, Jonnah Kamamia Njogu - 15 acres and Common area - 0.133 acres.
6. Moreover, on 22/9/2016, his late brother Francis Andrew Njogu and myself sold their respective portions i.e. title numbers Mutira/Kirimunge/2077 & 2078 to Henry Mwaniki and his wife Bernadette Wanjiru Muriuki (Mr. & Mrs. Mwaniki). In the year 2021, he was shocked to hear that the land he had sold to Mr. & Mrs. Mwaniki had been invaded. Upon investigations he discovered that there was a court order issued in Kerugoya Judicial Review No.3 of 2016: R v Kirinyaga Central Division Land Disputes tribunal (‘the judicial review case’) cancelling their titles on 8/12/2017.
7. The applicant avers that a ruling delivered on 7/2/2023, the chief magistrate dismissed their application for revocation on among other grounds that there was time lapse Another ground was that the grant had been executed.
8. Lastly, they immediately instructed their advocates to lodge an appeal against the ruling delivered in the succession cause. However, they recently discovered that no appeal was filed. The mistake to file the appeal was not on their part but by the counsel and the same should not be visited upon them.
9. The 1st respondent filed a Replying Affidavit averring that the applicants were untruthful for the following reasons: a) The applicant herein claims to have learnt of the matter herein sometime in 7th February 2023 whereas the advocate handling the matter was present when the Ruling was being delivered and still had instructions to proceed with the same. b) That a perusal of the annexed pleadings reveals that they were always represented and aware of the proceedings of the matter herein. c) That it is clear that the Applicants are out to mislead the Honourable Court in an effort to admit the appeal out of time since 7th February 2023.
10. The respondent avers that the Applicants cannot then come here and seek to admit the appeal out of time after 2 good years of their inaction since the matter was heard and determined.
11. Lastly, the respondent avers that the proposed appeal does not have any Memorandum of Appeal annexed to the application dated 13th January, 2025 to disclose an arguable appeal and can be admitted out of time and so the applicants had a legal duty to take all reasonable steps necessary if indeed they had



an interest in following up with matter after judgment to file the appeal within the statutory timelines and the applicants are put to strictest proof thereof.

12. The 2nd respondent filed a Replying Affidavit urging that the Applicants have slept on their rights and their indolence should not be entertained by this Honourable Court. Their lack of action against the Ruling by Hon. A. K. ITHUKU on 07/02/2023 has not been sufficiently explained and no sound reasons have been adduced as to justify the delay since 2023, more than 2 years past ruling.

Applicant's submissions

13. The Applicants submit that they should not be punished for the mistake of their counsel. As a first step, the Applicants have appointed a different counsel to pursue justice for them.
14. The applicants had expressed their intention to lodge an appeal by instructing their counsel. However, they were failed in their desires by the mistake of their advocate. They deserve an opponent to pursue their right of appeal.
15. On delay in filing motion, it is correct that the motion herein was filed many months down the line. However, there is no minimum time for the period of delay as held in the case of Andrew Kiplagat Chemarin o v Paul Kipkorir Kibet [2018] KECA 701 KLR, where the court stated that the law does not set out any minimum or maximum period of delay. The court stated that each case is to be considered on merits.

1st Respondent submissions

16. The respondent submits that the Appellant herein didn't give a sufficient cause which would satisfy the court for filing the appeal in time. The Appellant only stated in verbatim that the reason for not lodging the appeal in time was due to the advocate's failure to lodge the said appeal. The Appellant has not proven to this court that he instructed the said Advocate to appeal against the decision or stay execution of the courts orders.
17. The Applicant has not stated any reason for delay except that the mistake was on part of counsel and that no appeal was lodged. The Applicant has not proved that he communicated and instructed his advocate to lodge the Appeal. The Applicant has not demonstrated to this court that this appeal has a chance of success. At paragraph 4 of his supporting affidavit, he states that his father passed on in 1979, he filed a Succession Cause No 48 of 1988 at Kerugoya Resident Magistrate in 1988. Why wasn't the Grant confirmed" is it pending before the court, or was it dismissed? What happened to the estate of his father?
18. The respondent submit that the intended appeal is not arguable, the Applicant has not attached a copy of the Memorandum of Appeal thus he has not taken any steps to show interest in the appeal. The application lacks merit and ought to be dismissed with costs.
19. In Paul Wanjohi Mathenge v Duncan Gichane Mathenge [2013] eKLR the Court of Appeal, while referring to other authorities, observed (at paragraph 12):

“The discretion under Rule 4 is unfettered, but it has to be exercised judicially, not on whim, sympathy or caprice. I take note that in exercising my discretion I ought to be guided by consideration of the factors stated in 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 and interested parties if the application is granted...”



2nd Respondent submissions

20. The respondent submits that the Applicants must have a good and sufficient cause for filing an Appeal out of time. This principle was enunciated in *Diplack Kenya Ltd v William Muthama Kitonyi* (2011) eKLR where an Applicant must prove to court that they have a good cause for doing so. Looking at paragraph (c) and (d) on the grounds indicates that the Applicants lay blame on their Advocates for failure to lodge an Appeal within time. This reason is untenable since more than 2 years lapsed and this delay is unconscionable. Moreover, the respondent submits that it is clear that the estate of the deceased was already wound up upon the confirmation of grant that was issued on 11/10/2007 and the estate of the deceased devolved to the beneficiary who was registered on 04/12/2007 as per the Greencard entry No. 3 therein. This further indicates undue delay and prejudice that would be occasioned upon the 2nd Respondent.

Issue

21. Whether leave to appeal out of time should be granted.

Analysis

22. The applicants in their motion seek to be granted leave to lodge an appeal out of time against the judgement delivered on 7/2/2023 at Kerugoya Chief Magistrate court in Succession Cause No. 16 of 2007
23. The respondent filed Replying Affidavits and objected to the grounds raised by the applicants. They deposed that the application is incompetent, an afterthought and an abuse of the court process.
24. The applicant depose that the intended appeal is arguable, has high chances of success and this court has unfettered discretion in granting leave to file an appeal out of time.
25. Section 79G of the *Civil Procedure Act* provides that:
- Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
26. The applicant depose that they instructed their advocates to lodge an appeal against the ruling delivered in the succession cause. However, they recently discovered that no appeal was filed. The mistake to file the appeal was not on their part but by the counsel and the same should not be visited upon them.
27. The 1st respondent submits that the applicant has not stated any reason for delay except that the mistake was on part of counsel and that no appeal was lodged. The Applicant has not proved that he communicated and instructed his advocate to lodge the appeal.
28. The Court of Appeal in the case of *Dick Ouma Ochieng & 10 others v Muthithi Investments Limited* [2014] eKLR held that the decision whether or not to extend the time for appealing is essentially discretionary. The court stated that the factors that are to be considered include reason for delay and the degree of prejudice to the respondent. Further the court held that the court's primary concern in exercising discretion is to do justice or to serve the interest of justice. See also *Nicholas Kiptoo Arap Korir Salat v. IEBC & 7 Others* (2014) eKLR.



29. The 2nd respondent avers that the Applicants have slept on their rights and their indolence should not be entertained by this Honourable Court.
30. Further, the respondent avers that the Applicants cannot then come here and seek to admit the appeal out of time after 2 good years of their inaction since the matter was heard and determined.
31. However, as pointed out in Andrew Kiplagat Chemarin o v Paul Kipkorir Kibet [2018] KECA 701 KLR, the law does not set out any minimum or maximum period of delay and each case is to be considered on merits.
32. The explanation as to the delay on the part of the applicants to file the appeal is reasonable based as it is on mistake of counsel and the applicant has an arguable case, which need not be one that succeeds upon hearing of the appeal. The Court notes the family succession nature of the dispute which calls for a final determination by a higher court in accordance with the law.

ORDERS

33. Accordingly, for the reasons set out above, the application for extension of time to lodge appeal dated 13/1/2025 is allowed.
34. The Memorandum of Appeal and Record of Appeal shall be filed within seven (7) and 14 days, respectively.
35. In accordance with Order 50 Rule 6 of the Civil Procedure Rules, the applicant shall pay the costs of the application to the Respondents.

Order accordingly.

DATED AND DELIVERED THIS 3RD DAY OF SEPTEMBER 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Wanjiru for the Applicant.

Ms. Wachira for the 1st Respondent

Ms. Maina for the 2nd Respondent.

