



In re Estate of Wanjiku Njoroge Gichere (Deceased) (Succession Cause 96 of 2017) [2024] KEHC 245 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
SUCCESSION CAUSE 96 OF 2017
CM KARIUKI, J
JANUARY 25, 2024
IN THE MATTER OF THE ESTATE OF WANJIKU NJOROGE GICHERE
(DECEASED)**

BETWEEN

NAOMI WAITHIRA NJOROGE APPLICANT

AND

MARGARET WANGARI KAGUKU RESPONDENT

RULING

1. By Application dated 8/3/2023, the Applicant seeks Advocate's Murimi Ndumia be put on record, the extension of time to Petitioner to lodge a notice of Appeal and Stay of execution of the decree in the matter pending intended Appeal.
2. The Application is supported by an affidavit, which Vide a replying affidavit filed on 3 April 2023, the Objector/Respondent opposed the Application seeking its dismissal. In response, the Petitioner/Applicant filed a supplementary affidavit dated 5 May 2023; the parties in their affidavits support their cases.
3. The Court directed them to canvass the Application via submission.

Petitioner/applicant's Submission

4. The Applicant on the following issues;
 - I. Whether the Petitioner/Applicant has demonstrated sufficient cause for grant of Stay of execution.
 - II. Whether this Honourable Court should grant leave to the firm of M/s. Murimi Ndumi, Mbago & Muchela Advocates



III. Whether the Petitioner/Applicant ought to be granted an extension of time to lodge a Notice of Appeal

Whether The Petitioner/applicant Has Demonstrated Sufficient Cause For Grant Of Stay Of Execution

5. The principles governing exercising the Court's jurisdiction are now well settled. Firstly, the intended Appeal should not be frivolous or put another way; the applicants must show that they have an arguable appeal; and second, this Court should ensure that the Appeal, if successful, should not be rendered nugatory. Reliance is made on the cases of Reliance Bank Ltd (In Liquidation) vs. Norlake Investments Ltd – Civil Appeal No. Nai 93/02 (UR), and Kiu & another v Khaemba & 3 others (Civil Appeal (Application) E270 of [2021] [2021] KECA 318 (KLR) (17 December 2021).
6. The Petitioner submits that she intends to appeal the Judgment dated 28 July 2022 in its entirety, as the Court was not provided with the complete set of facts and evidence for it to make a fair decision. The Court inclined to the Objector's position—a party that misled the Court regarding the case's material facts. The Court was not well-informed, and the Judgment was erroneous and based on deception. The intended Appeal, as seen from the draft notice, is arguable with appreciable chances of success. The same would warrant a proper re-evaluation and interrogation by the appellate Court. Reliance is made on the cases of Michael Ntouthi Mitheu v Abraham Kivondo Musau [2021] eKLR, Butt vs Rent Restriction Tribunal [1979].
7. Regarding delay, it is submitted that there is no maximum or minimum period of delay set out under the law. All that it required was that any delay should be satisfactorily explained reliance is made on Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR .
8. It is submitted that, the Petitioner is over 95 years old. Her advanced age and frailty has compromised her perception of time and understanding of things. She is well into her sunset years and is dependent on her grandchildren for support. The delay has been occasioned by her old age and failing health which have severely hampered and derailed the process. The delay, while unfortunate, is not inordinate or unreasonable and the same has been sufficiently explained. The Petitioner seeks this Honourable Court's flow of discretionary favour to enable her reclaim her property.
9. On the issue of security, the Petitioner has in her Application as well as the Supplementary affidavit stated that the 5-acre parcel awarded to her ought to stand as security. The same sufficiently covers the requirement for security for due performance.
10. On the issue of substantial loss, the Petitioner has clearly demonstrated in her Application and supplementary affidavit of the threat that she is facing. She has annexed photographs of permanent buildings and structures comprising of her home and the homes of her children and grandchildren. These are homes she had formidably worked to built for decades and the same are on the verge of demolition unless stay orders are granted. Reliance is made on Bungoma High Court Misc Application No 42 of 2011 - James Wangalwa & Another vs. Agnes Naliaka .
11. It is submitted that, substantially loss is imminent and it is up to this Court to ensure status quo is maintained through a stay order pending the hearing and determination of the Appeal. The purpose of Stay of, execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. Reliance is made on RWW vs. EKW (2019) eKLR , Mukuma vs Abuoga (1988) KLR 645 , Charles Kariuki Njuri v Francis Kimaru Rwaru (suing as Administrator of Estate of Rwaru Kimaru alias Benson Rwaru Kimaru (Deceased) [2020] eKLR , Cotton U in Wilson vs Church No.2) ,(1879) 12 ChD 454.



Whether This Honourable Court Should Grant Leave To The Firm Of M/smurimi Ndumia Mbago & Muchela Advocates.

12. It is submitted that, in its interpretation of the above provisions, the Court in the case of Stephen Mwandware Ndighila v Steel Makers Limited [2022] eKLR held that the provisions of Order 9 do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be complied with when a party wants to change counsel. Thus, a party wishing to change counsel after Judgment can only do so with the approval of the Court.
13. The Petitioner has filed the instant Application seeking, among other orders, leave for the firm of M/s. Murimi, Ndumia, Mbago & Muchela Advocates to come on record on her behalf in place of the firm Njuguna Kamanga & Co. Advocates. Order 9 Rule 9 of the Civil Procedure Rules provides that the outgoing counsel ought to be served with the Application. The Petitioner/Applicant has duly done so.
14. An affidavit of service dated 24 March 2023 is on record as well as a forwarding email which shows service to the Objector's advocates, M/s Waichungo Martin & Co. Advocates (via address martogit@yahoo.com) well as the former advocates for the Petitioner, M/S Njuguna Kamanga & Co. Advocates (via address: kama813@gmail.com). The Petitioner/Applicant has therefore duly complied with Order 9 Rule 9 of the Civil

Procedure Rules and prays for leave to be granted.

Whether The Petitioner/applicant Ought To Be Granted Extension Of Time To Lodge A Notice Of Appeal.

15. As is explained above the instant matter is a rather sad turn of events where the Objector, together with her family, have ganged up to disinherit the 95-year-old Petitioner of her rightful inheritance from her husband's estate. It has been traumatic for the Petitioner who now seek an opportunity to give the appellate Court a full picture of the matter at hand and errors made by the trial court on account of being blindsided by the Objector.
16. It is true that there was a delay in lodging a notice of Appeal. However, we reiterate that there is no maximum or minimum period of delay set out under the law. All that it required was that any delay should be satisfactorily explained as was held in Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet [2018] eKLR. Further reiterate that the advanced age of the Petitioner, her failing health, the procedure for change of advocates and her fortunate ineptitude in matters of law and procedure have all led to the late lodging of the Notice of Appeal.
17. This Honourable Court finds these reasons satisfactory in exercising its discretion to extend the time for lodging the notice and admit the annexed notice of Appeal as duly filed. Reliance is made on This Court's attention to the cases of Karny Zaharya & Another vrs. Shalom Levi. C. Appl. No. 80 of 2018, Athuman Nusura Juma vs. Afwa Mohamed Ramadhan, CA No. 227 of 2015, Charles Karanja Kiiru vs. Charles Githinji Muigwa [2017] eKLR and Kamlesh Mansuklal Damji Pattni vs Director of public Prosecution & 3 Others [1995] eKLR.
18. Also falling for consideration by this Honourable Court is the right to be heard on the appellate process which in law is to be weighed against the prejudice to the Petitioner herein who stands to suffer should the relief sought not be granted. According to the current jurisprudential trend the right to appellate justice is now constitutionally entrenched. The parameters for according this right to a deserving party have also been crystallized by case law. We take it from the case of Richard Nchapi Leiyagu vs. IEBC & 2 Others [2013] eKLR; Mbaki & Others vs. Macharia & Another [2005] 2EA 206; and the Tanzania case of Abbas Sherally & Another Vs. Abdul Fazaiboy, Civil Application No. 33 of 2003: in which it



was variously held, inter alia that the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law. As such, the right to be heard is valued, the violation of which is considered to be a breach of natural justice.

19. On the authority of *Muchungi Kiragu v James Muchungi Kiragu and another* [1998] eKLR we submit that allowing time for the Petitioner to pursue her desire to pursue the intended Appeal would not unduly prejudice the Respondents. In *Muchungi's* case. The Court had this to say:

“This Court has on several occasions granted extension of time on the basis that an intended appeal is an arguable one and that it would thereof be wrong to shut an applicant out of court and deny him the right of appeal unless it can fairly be id that his action was, in the circumstances, inexcusable and that his opponent-was prejudiced by it.”

Objector/respondent's Submissions

20. Respondent submits on the following issues: -
- a) Whether the instant Application is incompetent.
 - b. Whether the Applicant is entitled to the orders sort.
 - c. Who should bear cost of this Application?
21. Submit in the affirmative.
22. In answering the above question, it is worth reproducing the provisions of Order 9 Rules 9 and 10 of the Civil Procedure Rules, which provide as follows:-
- “9. Where there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the Court-
- a) Upon an application with notice to all parties; or
 - b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
23. Order 9 Rule 10 of the Civil Procedure Rules on the other hand provides as follows:
- “An application under 9 may be combined with other prayers provided the question of advocate or party intending to act in person shall be determined first.”
24. According to the cited provisions above, the prayer for leave to come on record must be applied for and determined first before prayer in the present case; there is no proof that the leave was granted by this honourable Court.
25. Secondly, as of right, the outgoing advocate must be notified of such an application. A cursory perusal of the two affidavits by the Applicant affirms that there is no evidence on record that the outgoing advocate was ever served with the Application. It is noted that in the Applicant's submissions, she has argued that there is an affidavit of service on record dated 24 March, 2023 indicating that they served the outgoing advocate. This raised more questions than answers. In our reply affidavit dated 1 April



2023, paragraph 15, the respondent raised the service issue. Carefully, the Supplementary Affidavit of the Petitioner/Applicant did not address this issue and/or attach the affidavit of service alleged to be in the court file. Was there any attached electronic mail service delivery receipt confirming service in the affidavit of service as stipulated under Order 5 Rule 22B of the Civil Procedure Rules?

26. Article 159(2d) of *the Constitution* cannot salvage the situation for failure to comply with the mandatory requirements of the law. Additionally, Order 9 Rule 9 of the Civil Procedure Rules does not impede the representation of the Applicant/Petitioner but sets out the mandatory procedure to be adhered to in such representation. reliance is made on the case of *stephen mwangi kimote-vs-murata sacco society*[2018] eklr, where he held as follows:

“ 12. Article 50(2) (b) of *the Constitution* protects an accused person's right to choose and be represented by an Advocate. Order 9 does not impede a party's right to be represented by an Advocate of his choice. It only provides rules to impose orderliness in civil proceedings. Any change of advocates should comply with the rules. ”

27. Given the foregoing, we submit that the firm of murimi, muchela advocates, does not have the locus to move this court on behalf of the applicant, and the Application stands incompetent and ripe for dismissal.

28. Upon extension of time to lodge notice appeal and address the issue of Stay of execution, it is submitted as hereunder.

Extension Of Time To Lodge A Notice Of Appeal.

29. Firstly, this Honourable Court has the power to grant an extension of time to lodge a Notice of Appeal under Section 7 of the *Appellate Jurisdiction Act*. However, the discretion to extend time should be exercised judiciously and not sparingly, and the onus is on the Applicant to explain the lapse and the reason for the delay, if any, in lodging a Notice of Appeal.

30. In the present case, the Applicant sought an extension of eight months after this Honourable Court delivered its Judgment. The delay, as per the argument advanced by the Applicant, is due to the change of advocates from her previous advocates.

31. It is without doubt that the Applicant's previous advocate was present when the Judgment was delivered. It is not enough for the Applicant to state that the delay was occasioned due to the change of advocates as she never instructed the previous advocates to appeal at the very first instance, and the Application is an afterthought.

32. Carefully, the Applicant has failed to address why she took so long to instruct another advocate, yet she had a competent advocate representing her in the trial and who even attended Court during the Judgment. It is trite law that a case belongs to a litigant, not the advocate. The Court is urged to find that the explanation adduced is not plausible.

33. Secondly, there is no automatic right of Appeal to the Court of Appeal in succession matters heard and determined before the high court. a cursory read of the applicant's prayers clearly shows that there is no prayer for leave of this court to appeal to the court of appeal. on the cases of *rhoda wairimu karanja & another -vs-mary wangui karanja & another* [2014] eklr, *john mwita murimi & 2 others – vs- mwikabe chacha mwita & another* [2019] eklr, *mwitu -vs-muthamia* (succession cause 619 of 2015)[2022] kehc 12564 (klr) 17 june 2022) and *1n re matter of peter nderitu gatumbo(deceased)* [2020] eklr.



34. Given the foregoing, it is submitted that failure to seek leave to appeal by the Applicant militated against her Application and made it fatal. Further, despite raising it in our replying affidavit, the Applicant did not deem it fit to explain why such a prayer was omitted and/or why they have never sought such leave.
35. Under Rule 41 a ii of the Court of Appeal Rules, 2022 leave to appeal ought to have been sought within 14 days of the Judgment, which period has since lapsed. Thus, I submit that this Application is fatally defective and should be dismissed. Therefore, the Court is urged to be guided and persuaded by the above decisions and dismiss the Application.

On Stay of execution, it was submitted;

36. On reliance of the cases of r estate of the late kaburachi peter (deceased) [2021] eklr, james wangelwa & another vs. agnes nalliaka cheseto [2012]eklr,
37. samvir trustee limited-vs-guardian bank limited nairobi (milimani) hcc no. 795 of 1997, murage njeru-vs-linus mbogo njeru [2020] eklr and eunice mugure muchori & 2 others vs-peter macharia (2021) eklr, it is submitted that the threshold of the grant of stay pending appeal has not been established.
38. this court is urged to find and hold as much.

Issues, Analysis, And Determination

39. After going through the pleadings, proceedings on record, and parties' submissions, I find the issue is whether the applicant advocate is properly on record. Whether the Applicant ought to have sought leave to appeal against the decision of this Court? If aforesaid in negative, Is the Application for an extension of time to lodge a notice of Appeal merited? If aforesaid in affirmative, whether the Stay of execution of the trial court decision and the order as to costs are merited.
40. (i)whether the applicant advocate is properly on record? The provisions of the Order 9 Rules 9 and 10 of the Civil Procedure Rules are as follows: -
 - “9. . Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after Judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court-
 - a) Upon an application with notice to all parties; or
 - b) Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
41. Order 9 Rule 10 of the Civil Procedure Rules, on the other hand, provides as follows:

“An application under order 9 may be combined with other prayers provided the question of advocate or party intending to act in person shall be determined first.”
42. In its interpretation of the above provisions, the Court, in the case of Stephen Mwandware Ndighila v Steel Makers Limited [2022] eKLR, held that the provisions of Order 9 do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be complied with when a party wants to change counsel. Thus, a party wishing to change counsel after Judgment can only do so with the approval of the Court.



43. The Petitioner has filed the instant Application seeking, among other orders, leave for the firm of M/s. Murimi, Ndumia, Mbago & Muchela Advocates to come on record on her behalf in place of the firm Njuguna Kamanga & Co. Advocates. Order 9 Rule 9 of the Civil Procedure Rules provides that the outgoing counsel ought to be served with the Application. The Petitioner/Applicant has duly done so.
44. The Court has established from the record that, vide An affidavit of service dated 24 March 2023 on record as well as a forwarding email which shows service to the Objector's advocates, M/s Waichungo Martin & Co. Advocates (via address martogit@yahoo.com) well as the former advocates for the Petitioner, M/S Njuguna Kamanga & Co. Advocates (via address: kama813@gmail.com). The Petitioner/Applicant has, therefore, duly complied with Order 9 Rule 9 of the Civil Procedure Rules; thus, the sought leave to put the firm of Murimi Ndumia on record is hereby granted.
- 45.
- (ii) Should the Applicant have sought leave to appeal against the decision of this Court? The Court of appeal in the case of rhoda wairimu karanja & another -vs-mary wangui karanja & another [2014] eKLR the learned judges observes as follows: -
- “ We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of Appeal to the Court of Appeal: that an appeal will lie to the Court of Appeal from the decision of the High Court, exercising original jurisdiction with leave of the High Court or where the Application for leave is refused with leave to this Court. Leave to appeal will normally be granted where prima facie it appears that there are grounds which merit serious consideration. We think this good practice ought to be retained to promote finality and expedition in determining probate and administration disputes.”
46. ..66. Still on leave, while analyzing the issue of no automatic right of Appeal in Succession matters, the Court in in the case Mwituu -vs-Muthamia (succession Cause 619 of 2015)[2022] KEHC 12564 (KLR) 17 June 2022) Ruling held as follows:
- This Court, while cognizant of the provisions of section 47 of the *Law of Succession Act*, vests it Court with. Wide powers to hear any application and grant such orders as they deem fit are equally bound by the principles of stare decisis and hold that the unfettered powers do not include grant of extension of time to appeal before leave to appeal is granted.
- Despite the wide powers given to this Court by virtue of section 63 of the *Law of Succession Act* and rule 76 of the Probate & Administration Rules, those must be considered general provisions to serve where there be no specific provision. On matters of Appeal on probate matters, it is clear that there is a right of Appeal from the subordinate Court to this Court but no equivalent provision for appeals to the Court of Appeal. I find that there is no right of Appeal and that the Applicant needs leave to appeal before seeking an extension of time.”
47. Thus, it is this Court's holding that the Applicant, dissatisfied with the High Court's decision and desirous to approach the Court of Appeal, needed to seek the leave of the Court to file an appeal. Thus, the orders sought by the Applicant would not serve any meaningful purpose in law and the administration of justice. It would be an exercise in futility to extend the time and grant stay orders when there is no right of Appeal and leave to appeal was not sought.
48. Accordingly, and for the reasons set out above, this Court makes the orders;
- i. The Application has no merit and is thus dismissed with no orders as to costs.



DATED, SIGNED, AND DELIVERED AT NYANDARUA THIS 25TH DAY OF JANUARY 2024

C KARIUKI

JUDGE

