



REPUBLIC OF KENYA



**Kiarri & 8 others v Mburu (Succession Cause E001 of 2023)  
[2024] KEHC 7173 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 7173 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE E001 OF 2023  
CM KARIUKI, J  
APRIL 24, 2024**

**BETWEEN**

**ABEL GUCHU KIARII ..... 1<sup>ST</sup> APPELLANT  
JOHN NGANGA ..... 2<sup>ND</sup> APPELLANT  
PETER KAGURU ..... 3<sup>RD</sup> APPELLANT  
SAMUEL MBURU ..... 4<sup>TH</sup> APPELLANT  
JACOB KINYANJUI ..... 5<sup>TH</sup> APPELLANT  
CATHERINE WANJIKU ..... 6<sup>TH</sup> APPELLANT  
MONICA WAIRIMU ..... 7<sup>TH</sup> APPELLANT  
MARY WAMBUI ..... 8<sup>TH</sup> APPELLANT  
PAUL MACHARIA KAMAU ..... 9<sup>TH</sup> APPELLANT**

**AND**

**BEATRICE WANJIKU MBURU ..... RESPONDENT**

**RULING**

1. The respondent filed a preliminary objection dated 10<sup>th</sup> January 2024 against the notice of motion and memorandum of application dated 6<sup>th</sup> December 2023 filed by the appellants/applicants who were dissatisfied with the ruling/orders of the Chief Magistrate’s Court at Nyahururu in Nyahururu CMCSUCC. Cause No. 217 of 1995 was given on the 27<sup>th</sup> of September 2022. The respondent in her preliminary objection states that the appeal was filed out of time and that leave ought to have been sought. They also averred that the firm of Messrs. Ngotho Waweru & Company Advocates is not properly on record by the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. The appellants



- filed their grounds of opposition on 23<sup>rd</sup> January 2024 arguing that the time for filing an appeal set out under the [Civil Procedure Rules](#) does not apply to probate and succession matters.
2. The Appellants/Applicants Written Submissions Issues to determine: -Does Rule 63 of the [Probate and Administration Rules](#) adopt Section 75g of the [Civil Procedure Act](#)? Does Rule 63 of the [Probate and Administration Rules](#) adopt Order 9 of the [Civil Procedure Code](#)?
  3. The appellants contended that in determining the issue of whether the advocate for the appellant is properly on record and whether the appeal is out of time, the court ought to determine whether the [Succession Act](#) Cap 160 is an independent statute within its provisions on procedure or whether it is exclusively borrowed from the [Civil Procedure Code](#). That Rule 63 by providing for the application of certain provisions of the Civil Procedure Code limits the application of the Civil Procedure Rules to proceedings commenced under the [Law of Succession Act](#) and that since the preliminary objection is brought under Order 9, it is incompetent and should be struck out with costs.
  4. It was submitted that Rule 63 does not include and in fact, does not mention Section 75G or Order 9. The [Civil Procedure Act](#) has to be used to do what is lawful only and to apply order IX of the [Civil Procedure Rules](#) in Probate and Administration matters when Rule 63 of the [Probate and Administration Rules](#) has excluded order IX from the provisions of the [Civil Procedure Act](#) permitted to be applied in Probate and Administration matters, that the [Law of Succession Act](#) has its own rules and regulations. Reliance was placed on In *re Estate of Sarantino M'chabari M'ukabi (deceased)* [2029] eKLR & *Agnes Wairimu Mwaniki vs. Mary Wairimu Mwaniki & Another* [2019] eKLR
  5. Therefore, the appellants urged the court to strike out the respondent's preliminary objection with costs.
  6. Respondent's Submissions
  7. On the definition of preliminary objection, the respondent relied on *J.N. & 5 Others v Board of Management St G. School Nairobi & Another* [2017] eKLR & *Kathiaka V Muraguri* (Civil Appeal 7b of 2019) [2022] KEHC 506 (KLR)
  8. Whether the firm of Messrs. Ngotho Waweru & Company Advocates is properly on record?
  9. The respondent submitted that during the trial and proceedings before the lower court, the appellants were represented by the firm of Messrs. Gakuhi Chege & Associates Advocates who conducted the matter to its conclusion. That a perusal of the appeal and the application accompanying it and documents including the typed proceedings filed by the firm of Messrs. Ngotho Waweru & Company Advocates there is no consent filed between the two firms to the effect that the aforementioned firm intends to come on record on behalf of the appellant.
  10. The only thing filed is a notice of change of advocates which has not even been served and addressed to be served upon the outgoing firm being Messrs. Gakuhi Chege & Associates Advocates which contravenes the provisions of Order 9 Rule 5 and 6 of the [Civil Procedure Rules](#).
  11. Further reliance was placed on Orders 9 & 10, Order 9 rule 10 of the [Civil Procedure Act](#)
  12. Moreover, the respondent argued that that is beside the point as in this case in point there is already a judgment on record that has now been appealed against. In compliance with Order 9 Rule 10 of the [Civil Procedure Code](#), there is no prayer seeking to address the issue of change of advocates for this court to address. The requirement is expressly provided for by the law and as such the defect is incurable and the same cannot even be salvaged by the provisions of Article 159 of [the Constitution](#).



13. The respondent stated that the pleadings filed by the firm of Messrs Ngotho Waweru & Company Advocates are improper as the said firm has no legal standing to move the court and as such the court has no powers to entertain or determine any issues as raised before it by the appellants. Reliance was placed on In *re Estate of Rose Akuku Aoko (deceased)* (Succession Cause 126 of 2014) [2022] KEHC 10082 (Klr)
14. Whether the appeal is properly filed before this honorable court?
15. It was stated that according to Section 50 of the *Law of Succession Act*, the applicants have a right to appeal without seeking leave. Leave is not however automatic. What is to be noted in this case is that the decision was made on 27<sup>th</sup> September 2022 whereas the appeal was dated 6<sup>th</sup> December 2023 which is about 15 months from the date the ruling was delivered.
16. It was contended that the reasons given for the delay were that the advocates previously on record acting on behalf of the appellants were not aware that the ruling was delivered. They only became aware after a demand letter was issued to them on 15<sup>th</sup> September 2023. By the time a demand letter was issued, this would only have happened if they had refused to cooperate earlier thus they were aware that a decision had already been made as they admit even a surveyor visited the ground. Since the issuance of the demand letter, it took another 4 months for them to move to court. Justice aids the vigilant and not the indolent.
17. Reliance was placed on Section 79G of the *Civil Procedure Act, In re estate of Edward Rayori Ochar (deceased)* (Succession Appeal E007 of 2022) [2023] KEHC 25405 (KLR) (14 November 2023), *Josephine Wambui Mwangi vs. Michael Mukundi Ngugi* [2021] eKLR, *PS vs. Republic* [2021] eKLR
18. The respondent stated that there was no order seeking to enlarge time to file the appeal out of time and neither does the application dated 6<sup>th</sup> December 2023 seek leave to enlarge time to lodge the appeal looking at the timelines where the same is being lodged 15 months after the date from which the ruling was delivered. It was averred that failure to obtain leave to file out of time was fatally defective and the appeal cannot stand. If there is no appeal to be dealt with then the application equally stands to be fatally defective and the same cannot be dealt with.
19. Whether the court have jurisdiction to entertain the application and appeal before it?
20. The respondent averred that the appeal is not proper and thus the court has no jurisdiction. All it can do is down its tools. An appellate court would have no jurisdiction to entertain an appeal that is incompetent on account of having been filed outside the time allowed in law and without leave of court. They therefore prayed that the application be dismissed and that the appeal be struck out with costs awarded to them.
21. Issues, Analysis, and Determination
22. Having considered the preliminary objection herein and the rival submissions thereto, it is my considered view that the issues that arise for determination is whether the notice of motion and memorandum of appeal dated 6<sup>th</sup> December 2023 should be struck out.
23. The respondent in her preliminary objection stated that the appeal was filed out of time and that leave ought to have been sought. They also averred that the firm of Messrs. Ngotho Waweru & Company Advocates is not properly on record by the provisions of Order 9 Rule 9 of the Civil Procedure Rules. The appellants filed their grounds of opposition on 23<sup>rd</sup> January 2024 arguing that the time for filing an appeal set out under the Civil Procedure Rules does not apply to probate and succession matters.



24. Having looked at the requirements of Order 9 of the *Civil Procedure Rules*, I agree with the respondents that the counsel for the appellant i.e. Messrs. Ngotho Waweru & Company Advocates has not properly come on record. By the same, I strike out the memorandum of appeal and the application dated 6<sup>th</sup> December 2023 for being incompetent for want of advocates being improperly on record.
25. Even if the appeal could have been saved by dint of provisions of Article 159 on substantive justice element, the same was filed out of time by dint of section 79 G of the *Civil Procedure Act* cap 21 LOK. The provisions of Section 79(G) state that; Every appeal from a subordinate court to the High Court shall be filed within 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:
26. Thus, the court makes the orders that;
  - i. The memorandum of appeal and application thereof filed by the firm of Messrs. Ngotho Waweru & Company Advocates are struck out with no orders as to costs.

**DATED AND DELIVERED AT HIGH COURT AT NYANDARUA THIS 24<sup>TH</sup> DAY OF APRIL 2024**

**CHARLES KARIUKI**

**JUDGE**

