



**In re Estate of Wilfred Gitau Kaburunje (Deceased) (Succession Cause 5 of 2022) [2024] KEHC 8264 (KLR) (28 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8264 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 5 OF 2022**

**A MSHILA, J  
JUNE 28, 2024**

**IN THE MATTER OF THE ESTATE OF WILFRED GITAU KABURUNJE (DECEASED)**

**BETWEEN**

**KENNEDY GITAU KABURUNJE ..... 1<sup>ST</sup> APPLICANT  
ALICE WAMBUI MUKIRI ..... 2<sup>ND</sup> APPLICANT  
ROBINSON KARIUKI GITAU ..... 3<sup>RD</sup> APPLICANT**

**AND**

**MARGARET WAIRIMU KABURUNJE ..... RESPONDENT**

**RULING**

**Background**

1. The Notice of Motion dated 15<sup>th</sup> May, 2023 and 7<sup>th</sup> June, 2023 which are brought pursuant to, Order 42 Rule 6, Order 51 Rule 1 of the [Civil Procedure Rules](#) as well as Sections 1A, 3A, 78, 79G and 95 of the [Civil Procedure Act](#), Article 29, 40, 47 and 159(2)(c) the [Constitution](#) of Kenya and all enabling provisions of the law; the Applicants seek for the following orders;
  - a. Spent
  - b. Spent
  - c. Pending hearing and determination of the application and the intended appeal the court be pleased to suspend the contempt proceedings in Kiambu Succession Cause No.261 of 2015 and specifically the imposition of any fines or sentencing of the Applicants for contempt.
  - d. Time be expanded to file and serve Notice of Appeal, Memorandum of Appeal and Record of Appeal and Leave be granted to the Applicants to file an appeal out of time against the Orders of the learned trial Magistrate Hon. W. Rading in Kiambu Succession Cause No.261 of 2015.



- e. The costs of this application be borne by the Respondent.
2. The Application was supported by the grounds on the face of the application and on the sworn Affidavit of Robinson Kariuki Gitau who stated that the intended Appellants were dissatisfied with the contempt proceedings in Kiambu Succession Cause No.261 OF 2015 and were seeking suspension of the contempt proceedings and specifically on the imposition of any fines or sentencing of the Applicants for contempt.
3. The Applicants being dissatisfied with the whole ruling of Hon.W. Rading intend to file an appeal against the Ruling as it has occasioned great injustice to them and also seek a temporary stay of the judgment and orders so granted pending hearing of the application and intended appeal.
4. The parties were directed to canvass the application by way of written submissions;

### **Applicant's Case**

5. The Applicant submitted that the delay was occasioned by the trial court which was in transition and the Registry had informed them that the Ruling would be delivered on Notice. None was ever given and that they were not present neither were they aware when the Ruling was delivered; That the delay was not inordinate as it was brought at the earliest time as was practicably possible. It was the Applicant's case that if the court did not intervene they stood the risk of losing money and their personal liberty and that without the orders sought their appeal would be rendered nugatory.
6. The Applicants urged the court to find that it was only in the best interests of justice that the orders sought be granted to allow the appellate court to make a determination of the issues on merit.

### **Respondent's Case**

7. The application was opposed and argued that the application is fatally defective as it does not constitute an appeal as envisaged by the *Civil Procedure Rules*; The correct procedure would have been that the Applicants file a Memorandum of Appeal so that the Appellate jurisdiction is properly invoked; This instant file and Kiambu Succession Cause No.261 of 2015 are before courts of first instance and are both running concurrently and therefore this court cannot exercise appellate jurisdiction over Kiambu Succession Cause No.261 of 2015;
8. The conduct of the Applicants is a clear abuse of the court process; The Applicants are clearly attempting to avoid being held accountable for failing to comply with court orders that have been in place since March;
9. The Respondent urged this court to dismiss the application with cost to the Respondent and to vacate the stay of execution orders that had been granted.

### **Issues For Determination**

10. Having considered the Application, Replying Affidavit and the written submissions the court frames the following issue for determination;
  - a. Whether the Applicants should be granted leave to file appeal out of time;



## Analysis

11. The applicable law is found under Section 79G of the *Civil Procedure Act* which grants the court powers to enlarge time in which to file an appeal. Section 79G of the *Civil Procedure Act* provides as follows 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.”
12. The principles that aid Courts in exercising the discretion as to whether to extend time to file an appeal out of time were suggested by the Court of Appeal in *Tbuita Mwangi V Kenya Airways Ltd* [2003] eKLR. They include the following:-
  - (i) The period of delay;
  - ii) The reason for the delay;
  - iii) The argue-ability of the appeal;
  - iv) The degree of prejudice which could be suffered by the if Respondent the extension is granted;
13. On the issue of period of delay it is noted that the Ruling by Hon. W. Rading was delivered on 30/03/2023; Being aggrieved with the decision the Applicants filed the instant application seeking leave to appeal on 15/07/2023 and submitted that the application was made without unreasonable delay; it is noted that the period of delay translates to a period of three and a half (3 ½) months. There are legions of notable authorities that have found that a period of four (4) months not to be inordinate; herein the period of delay translates to three and a half (3 ½) months which period this court is satisfied cannot be deemed to be as inordinate.
14. The reason for the delay advanced by the Applicants was the trial court was in transition and the Registry had informed them that the Ruling would be delivered on Notice. None was ever given and that they were not present neither were they aware when the Ruling was delivered; that the application was filed immediately after the Applicants became aware of the Ruling; this court is satisfied that the Applicants have given a reasonable and satisfactory explanation given for the delay.
15. On the arguability of the Appeal the Applicants attached a copy of the impugned Ruling dated 30/03/2023 and a copy of the Draft Memorandum of Appeal to the application. Upon perusal of the impugned Ruling as against the Draft Memorandum of Appeal this court notes that the main issue relates to contempt proceedings and finds no arguable grounds of appeal and is satisfied that there are no good grounds to warrant the enlargement of time within which to file an appeal.

## Findings And Detrmination

16. For those reasons this court makes the following findings and determination;
  - i. The application is found to be devoid of merit and it is hereby disallowed.
  - ii. The Applicants shall bear the costs of this application.



Orders Accordingly.

**DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 28<sup>TH</sup> DAY OF JUNE, 2024**

**A. MSHILA**

**JUDGE**

In the presence of;

Mourice – Court Assistant

Gwaro – for the Respondent

N/A - by the Applicants

