



REPUBLIC OF KENYA



KENYA LAW
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**Salah & 2 others v Salah & 3 others (Civil Appeal E002 of 2022)
[2025] KEHC 2658 (KLR) (6 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2658 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL APPEAL E002 OF 2022**

JN NJAGI, J

MARCH 6, 2025

BETWEEN

**MOHAMED OMAR SALAH & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2
OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS APPLICANT**

AND

**SALIM OMAR SALAH & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3 OTHERS
& 3 OTHERS & 3 OTHERS & 3 OTHERS RESPONDENT**

RULING

1. The Applicants herein have filed an application dated 30th August 2024 seeking for orders that:
 1. Spent
 2. That this Honourable court be pleased to grant leave for the notice of appeal dated 12th August and lodged on 20th August be filed out of time.
 3. Spent
 4. That the court be pleased to issue an order of stay of execution of the decree /judgment dated 18th March 2022 of Moyale Principal Kadhi's Court in Succession cause No. 5 of 2020 for a period of 90 days to allow the applicant lodge the relevant application at the Court of Appeal.
 5. That this Honourable court be pleased to grant leave to the applicant herein to appeal to the Court of Appeal against the judgment of this Honourable court delivered on 31st July 2024.
 6. That costs of this application be in the cause.
2. The application is supported by grounds stated on the face of the application and the affidavit of Abdikadir Omar Salah, the 2nd applicant sworn on 30th August 2024. The grounds thereof are that this court dismissed the applicants' appeal vide a judgment delivered on 31st July 2024 and the applicants



intend to challenge the judgment at the Court of Appeal on the interpretation of the concept of hiba (gift) under Islamic law and also on the jurisdiction of the Kadhi's court to handle land matters where the estate is not registered to the deceased whose estate is the subject matter of succession. That the applicant requires the estate to be preserved as they seek to pursue a similar application before the Court of Appeal pending the hearing and determination of the appeal. That the intended memorandum of appeal raises substantial questions of Muslim law hence the application is merited.

3. It was further averred that counsel for the applicants had duly prepared and submitted the Notice of Appeal on 12th August 2024 physically at the High Court registry but did not secure the signature of the Deputy Registrar until the 20th August 2024 when the same was duly signed and stamped.
4. It was the contention of the applicants that this court has jurisdiction under section 95 of the Civil Procedure Act to enlarge time provided under the law to meet the ends of justice. More so that considering that the judgment of this Honourable Court is in the negative, stay orders can only be sought against the judgment and decree of the subordinate court. That if the stay order is not granted, the judgment appeal shall be rendered nugatory and a mere academic exercise. Further that orders for stay pending the hearing and determination of the appeal before this court can persist for the period sort unless alternative orders are issued by the Court of Appeal.
5. The application was opposed by the respondent vide the replying affidavit of Mariam Omar Salah, the 3rd respondent sworn on the 13th September 2024 wherein she averred that the matter is a succession cause that originated from the Kadhi's court, Moyale. That section 50(2) of the Law of Succession Act provides in mandatory terms that an appeal to the Court of Appeal in a second appeal from the Kadhi's Court is not a matter of right but has to be with leave of the High Court on grounds of Islamic law only. That the allegation that the applicants intend to challenge jurisdiction of the Kadhi's court to deal with land matters is moot as that is not an Islamic law issue that may be allowed under section 50(2) of the Law of Succession Act. That there is no substantive issue of Islamic law raised to warrant granting of leave sought as the applicants are conflating issues of facts elevating them to law issues which is not the province of the intended appeal to the Court of Appeal.
6. The 3rd respondent averred that the law requires a Notice of Appeal to be filed with the High Court within 14 days and serve the same within 7 days of service. That the applicants did not comply with this. That the delay in failing to file the notice in time has not been explained.
7. It was further averred that the applicants have not complied with conditions attendant to grant of stay of execution which are: demonstrating that the applicants will suffer substantial loss if the orders sought are not granted; proving that the application is made without delay and offering security for costs for due performance of the decree.
8. It was averred that all the estate properties are fixed assets and cannot be disposed or decree of court executed without first the Kadhi's court ordering valuations and/or giving further directions which may take months and thus there is no urgency in the instant application.
9. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions filed by counsels for the respective parties.
10. The application is made pursuant to the following provisions of the law: order 42 rule 6 of the Civil Procedure Rules, section 50(2) of the Law of Succession Act, sections 3, 3A, 63(E) of Civil Procedure Act, Appellate Jurisdiction Act Court of Appeal Rules, 2022 and Article 159(2) of the Constitution of Kenya 2010. The issues for determination are:



1. Whether application for leave for the Notice of Appeal dated 12th August 2024 be filed out of time is merited.
2. Whether the application for leave to appeal to the Court of Appeal is merited.
3. Whether application for stay of execution of the judgment of the Kadhi's court is merited.

Whether application for leave for the Notice of Appeal dated 12th August 2024 be filed out of time is merited

11. The judgment of this court was delivered on the 31st July 2024. The applicants were required under section 77 of the Court of Appeal Rules, 2022 to file a Notice of Appeal with the High Court within 14 days of the delivery of the judgment. The Rule provides as follows:

77. Notice of appeal

1. A person who desires to appeal to the Court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court.
2. Each notice under subrule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.
3.
4. When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.

12. The applicants did not file the Notice of Appeal with the High Court within the stipulated time and they are now seeking for leave of this court to file the same out of time.

13. This court has wide discretion in extending time under section 95 of the *Civil Procedure Act* section 95 of the *Civil Procedure Act* that provides that:

95. Enlargement of time

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

14. Some of the factors to take into consideration is determining whether to allow or disallow an application for extension of time were stated by the Court of Appeal in *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR. They include the following:

1. The period of delay;
2. The reason for the delay;
3. The arguability of the appeal;
4. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
5. The importance of compliance with time limits to the particular litigation or issue; and
6. The effect if any on the administration of justice or public interest if any is involved.



15. The Supreme Court in the case of *Nicholas Kiptoo Korir Arap Salat vs. IEBC and 7 others* [2014] eKLR, laid down the following principles for extension of time:
1. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made a case- to-case basis
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 5. Whether there will be any prejudice suffered by the Respondent if the extension is granted
 6. Whether the application has been brought without undue delay
 7.”
16. The judgment of this court was delivered on 31st July 2024 while the application seeking enlargement of time was filed on 30th August 2024, roughly 2 weeks after the lapse of the 14 days in which the Applicants were required to file the Notice of Appeal with the High Court. The Applicant avers that the delay in filing the Notice was occasioned by failure by the Deputy Registrar of this court to sign the Notice in time after he had filed it with the court. That the same was not signed until 20th August 2024 which was after the 14 days period had lapsed.
17. I do not think that there is any requirement for the Deputy Registrar to sign a Notice of Appeal when it is duly filed with the court. In the premises, the explanation for the delay is not plausible.
18. That notwithstanding the question is whether there was inordinate delay in filing the application for extension of time.
19. In considering what amounts to inordinate delay, the court in *Utalii Transport Company Limited & 3 others vs. NIC Bank Limited & another* [2014] eKLR held thus;
- Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court’s mind on the delay, caution is advised for Courts not to take the word ‘inordinate’ in its dictionary meaning, but in the sense of excessive as compared to normality.”
20. In the case of *Charles N. Ngugi v ASL Credit Limited* [2022] eKLR the court held that a delay of two months was not inordinate. Similarly, in the case of *Safaricom Limited v Josenga Company Limited & 4 others* [2021] eKLR, a delay of three months was held not inordinate. In the instant case, I consider a delay of two weeks not to be inordinate. The respondents have not shown that they will suffer any prejudice if the prayer is granted. I find the prayer for leave to file the Notice of Appeal out of time to be merited and the same is granted.



Whether the application for leave to appeal to the Court of Appeal is merited

21. Section 50(2) of the [Law of Succession Act](#) provides that: -
- “(2) An appeal shall lie to the High Court in respect of any order or decree made by a Kadhis' Court in respect of the estate of a deceased Muslim and, with the prior leave thereof in respect of any point of Muslim law, to the Court of Appeal.”
22. The above position was emphasized in [Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another](#) [2014] eKLR where it was held that:
- “....Decisions of the Kadhis Court.....are appealable first to the High Court and only with leave and in respect of point(s) of Muslim law, to the Court of Appeal..”
23. The Applicants state that they intend to challenge the decision of this court on the interpretation of the concept of hiba under Islamic law and the jurisdiction of the Kadhi's court to handle land matters where the estate is not registered to the deceased whose estate is the subject matter of succession. It was submitted that the intended memorandum of appeal raises substantial questions of muslim law.
24. Though the applicants state that the intended memorandum of appeal was annexed to the application, there was none available in the court file and in the court's CTS portal. The same was therefore not annexed. It is however clear from the application that the applicants seek to challenge this court's interpretation of what amounts to hiba (gift) under muslim law. I find that to be a substantial question of muslim law that may need to be interrogated by the Court of Appeal.
25. On question of the jurisdiction of the Kadhi's court, that is not, in my view a pure point of muslim law in the absence of an intended memorandum of appeal to show the arguments being advanced. However, going by the submissions of the applicants, the issue being raised hinges on hiba - that the subject land was not available to be considered as hiba (gift) because it was not registered in the name of the deceased whose estate was under consideration. The issue therefore boils down to hiba. In the premises, I do find the application for leave to file appeal to the Court of Appeal to be merited on the question of hiba. I do accordingly grant leave to file appeal to the Court of Appeal on interpretation as to what amounts to hiba under muslim law.

Whether application for stay of execution of the judgment of the Kadhi's court is merited

26. The applicants are seeking for stay of execution of the judgment of the Kadhi's court so as to maintain the status quo as to enable them file a similar application before the Court of Appeal.
27. The application was opposed by the respondents on grounds that the application has not met the conditions for granting orders for stay of execution pending appeal as provided under order 42 rule 6 of the [Civil Procedure Rules, 2010](#), which are that: substantial loss may result to the applicant unless the order is made; that the application has been made without undue delay and that he applicant has given such security for due performance of such decree or order as may be ultimately binding on the applicant.
28. It was further argued by the respondents that the applicants are in control of the estate assets to the exclusion of the respondents. Therefore, that there is no ground to suggest that they will suffer substantial loss if stay orders are not granted. More so that the applicants have failed to offer security for due performance of the decree.



29. Though there was no inordinate delay in filing the application, the applicants have not shown what loss they will suffer if the application for stay of execution is not granted. They are in control of the estate to the exclusion of the Respondents. They have not offered any security. I find no merit in the application for stay of execution pending the filing of the intended appeal.
30. In the end, I do find the application dated 30th August 2024 to be partially merited and do hereby make the following orders:
1. Leave to file out of time the Notice of Appeal dated 12th August 2024 and lodged with this court on 20th August 2024, is granted as prayed.
 2. Leave to appeal against this court's judgment of 31st July 2024 is granted as prayed.
 3. Orders for stay of execution of the decree/judgment of the Kadhi's Court dated 18th March 2022 are hereby declined.
 4. The applicants to file their fresh Notice of Appeal within 14 days from the date hereof.
31. Orders accordingly. The respondents to have the costs of the application.

DELIVERED VIRTUALLY, DATED AND SIGNED AT MALINDI THIS 6TH DAY OF MARCH 2025

J. N. NJAGI

JUDGE

In the presence of:

Mr. Behailu for Applicants

Miss Wagemu HB for Mr. Yusuf for Respondents

Court Assistant - Jarso

