

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MOMBASA  
(FAMILY DIVISION)  
HCCA NO. E027 OF 2025**

**NEEMA MBEYU**

**MWANAIKI SHABAN & 2 OTHERS .....**

**APPELLANTS**

**VERSUS**

**RAWIYA HAMISI**

**ALI HAMISI & 2 OTHERS .....**

**RESPONDENTS**

**RULING**

1. Before the court is a notice of motion dated **23<sup>rd</sup> April 2025** through which the proposed appellants/applicants seek to file an appeal out of time and for a stay of execution of the judgment of the court below, delivered by the Hon Kadhi on 9<sup>th</sup> October 2025, stayed pending the hearing and determination of the appeal.
2. The proposed appellants/applicants aver that due to conflict between them and the previous advocates, they were unaware of the impugned ruling until they instructed the firm of **Sharia Nyange & Njuguna Advocates**, whereafter they filed the instant application. It was averred that unless the orders sought are granted, the proposed appellants will have been removed from the seat of justice.
3. They also averred that the proposed appeal raises many triable issues which have a high probability of success.

4. The application was opposed. The respondents filed a replying affidavit, sworn by **Rajab Hamisi**, on 7th July 2025, vide which it was averred that the delay on the part of the application was long and inordinate and that it hadn't been explained.
5. Mr Rajab Hamisi deposed that the applicants were in court during the delivery of the ruling and that they chose not to appeal within the timelines set out by law. He deposed that the application was an afterthought, was without merit, and meant to frustrate the distribution of the estate. He deposed that the distribution of the estate was almost complete.
6. The application was canvassed by way of written submissions.
7. The submissions of the proposed appellants/applicants are dated 27<sup>th</sup> July 2025. In the said submissions, it was urged that the application was unopposed. This is, however, incorrect as the respondents filed a replying affidavit as indicated above.
8. It was submitted that a court could extend the time within which an appeal could be filed. In support of the said contention, reliance was placed on the decision of the court in the case of **Sayers v Clarke Walker (a firm) (2002) EWCA Civil 645**, as well as that of **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**.

9. Counsel blamed the delay on confusion resulting from the change of the proposed appellants' previous advocates and a mistake on the part of their current counsel. It was urged that the error was excusable. Counsel relied on the laconic words of Madam J A, as he then was, in **Murai v Wainaina (No 4) (1982) KLR 38**, in particular the observation that:-

**“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by Senior Counsel. Though in the case of Junior Counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of Justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that Courts of Justice themselves make mistakes which are politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.”**

10. It was therefore prayed that the application be allowed.

11. The respondents' counsel filed written submissions dated **7<sup>th</sup> June 2025**, vide which it was urged that the application be dismissed.

12. Counsel for the respondents deposed that the issues for determination herein were whether the time within which the appeal

could be filed could be extended and if there should be a stay pending appeal.

**13.** Mr Mutisya submitted that the proper test in respect of extension of time was settled in the case of **Leo Sila Mutiso V Rose Hellen Wangari Mwangi, Civil Application No. Nai. 255 of 1997.** Counsel submitted that there had been a long unexplained delay in applying, considering the fact that the ruling was delivered on 9th October 2024, while the current application was filed on 23<sup>rd</sup> April 2025.

**14.** Counsel submitted that the application for stay pending appeal should not be granted as it was made in what may be called an omnibus application. In support of this contention, reliance was placed on the decision of the court of appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] KECA 202 (KLR).**

**15.** I have considered the application and the response thereto, as well as the submission of the parties. In my view, the issues in this matter are the following: -

- a. Whether the time within which the appeal should be filed ought to be extended;
- b. If so, whether there should be a stay pending appeal.

**16.** On the first issue, I note that the applicants have stated that they were absent during the delivery of the ruling, and upon becoming aware of the same, they filed an incompetent appeal,

which was struck out. Thereafter, they filed the application, the subject of this ruling, seeking to appeal out of time.

- 17.** In the case of **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)**, the Supreme Court settled the appropriate test to be applied by a Court considering an application for extension of time as being:-

**“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a court should consider in exercise of such discretion:**

**Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and whether, in certain cases, like election petitions, public interest should be a consideration for extending time.**

- 18.** I have considered the explanation given by the applicants. The same are cogent and plausible. I say so as the applicants did not

sleep upon the delivery of the impugned ruling but rather filed an incompetent appeal, which was struck out. Clearly, they desired to prosecute the appeal.

**19.** I agree with the counsel that there was a mistake on the part of their counsel which shouldn't be visited on them. The words of Madan, JA, as he then was, still ring true now, as they did in 1982; mistakes do happen, even in very unexpected places.

**20.** If this court does not extend time, the applicants will have been driven off the seat of justice, and their appeal, whatever the merits, will not be determined on the merits.

**21.** I therefore allow the prayer for extension of time.

**22.** What of the prayer for stay of execution? This court has just allowed the application for leave to file an appeal out of time; there is as yet no appeal. The said prayer is therefore without merit.

**23.** I am guided by the decision of the court of appeal in **Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] KECA 202 (KLR)**, where it was held that:-

**“31. The prayer for stay of execution could only be canvassed after the appeal had been filed pursuant to the leave granted by the court. The two prayers should not have been lumped together in one application. We are satisfied from the grounds on the face of the application**

and the appellant's depositions in the supporting affidavit dated 2<sup>nd</sup> March, 2018 that leave ought to have been granted."

24. Flowing from the foregoing, the orders that commend themselves are the following: -
- a. I allow the prayer for leave to appeal out of time;
  - b. The prayer for stay of execution pending appeal is denied;
25. I order that the parties bear their own costs.
26. Orders accordingly.

**Dated and signed at Mombasa, the 13<sup>th</sup> day of October, 2025. Delivered virtually through Microsoft TEAMS.**

**Gregory Mutai**  
**JUDGE**

In the presence of:-

Ms Mwanzia, for the Respondents;

No appearance for the proposed Appellants/Applicants; and

Arthur - Court Assistant.