



REPUBLIC OF KENYA



**Kimetto v Chepkwony & another (Civil Application E058 of 2025)
[2025] KECA 1805 (KLR) (31 October 2025) (Ruling)**

Neutral citation: [2025] KECA 1805 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E058 OF 2025
MA WARSAME, JA
OCTOBER 31, 2025**

BETWEEN

EUNICE CHELANGAT KIMETTO APPLICANT

AND

ISHMAEL CHEPKWONY 1ST RESPONDENT

ALICE CHEPKWONY 2ND RESPONDENT

(Application for extension of time to seek leave to appeal against the judgment of the High Court at Kericho (Hon. Justice Joseph K. Sergon) delivered on 1st August 2024 in Succession Cause Number 7 of 2018)

RULING

1. The applicant has filed the instant application dated 28th May 2025 seeking extension of time to file an application for leave to appeal under Rule 4 of the Court of Appeal Rules. The applicant seeks to challenge the judgment delivered on 1st August 2024 by Sergon J., wherein the court adopted the respondents' mode of distribution and dismissed the applicant's proposed distribution.
2. The applicant consequently instructed her former advocates to appeal against the judgment. However, succession matters being subject to leave requirements, an application for leave to appeal dated 2nd August 2024 was prepared and filed. On 7th November 2024, Sergon J. delivered a ruling dismissing the application for leave to appeal and noted that the applicant had not filed a Notice of Appeal before seeking leave, which was a fatal procedural defect.
3. Upon discovering this procedural omission, the applicant's former advocates filed a Notice of Appeal dated 11th November 2024 outside the statutory period prescribed by the Court of Appeal Rules. The applicant then instructed new advocates, Mitei Kirui & Company Advocates, who filed an application



for extension of time to file and serve the Notice of Appeal in this Court being Civil Application No. E106 of 2024.

4. Vide this Court's ruling dated 15th May 2025, Odunga J.A allowed the application for extension of time to file the Notice of Appeal was allowed. The Notice of Appeal dated 11th November 2024 was deemed properly filed and on record.
5. This ruling regularized the foundational jurisdictional document necessary for the appeal process to proceed. The current application, filed on 28th May 2025, now seeks extension of time to file an application for leave to appeal, which must ordinarily be filed within fourteen days of the High Court's refusal of leave pursuant to Rule 41(1)(b)(ii) of the Court of Appeal Rules.
6. The reasons for delay as stated on the face of the application and in the supporting affidavit are that the fourteen-day period prescribed by Rule 41(1)(b)(ii) of the Court of Appeal Rules lapsed during the pendency of Civil Application No. E106 of 2024. The applicant deposes that she was required first to regularize the Notice of Appeal before she could meaningfully seek leave to appeal. The applicant states that once the ruling in E106 of 2024 was delivered on 15th May 2025, she instructed her advocates to proceed with filing the present application, which was filed on 28th May 2025, representing a delay of thirteen days from the date of that ruling.
7. Vide a replying affidavit dated 18th November 2024, the respondent opposes the application and avers that the present application is an afterthought, designed solely to delay the final resolution of Succession Cause No. 7 of 2018, a matter that has lingered for over seven years. The respondent further contends that the applicant previously sought leave to appeal in the same matter through Civil Application No. E104 of 2024 at this Court, which application was voluntarily withdrawn without justification, and that the current application amounts to a duplication and abuse of the court process.
8. The respondent further emphasizes that the High Court ruling refusing leave to appeal was delivered on 7th November 2024, and under Rule 41(1)(b)(ii) of the Court of Appeal Rules 2022, the applicant had fourteen days to file the application for leave to this Court. The respondent argues that this represents a hard deadline and that the applicant's former advocates inadvertently failed to file the Notice of Appeal within the prescribed period, then failed to file the application for leave within fourteen days of the High Court's ruling. The respondent contends that mistakes of an advocate are not a blanket excuse for procedural non-compliance, and that the application should be struck out in its entirety for being frivolous, vexatious, and an abuse of the court process.
9. The principles governing applications for extension of time brought under Rule 4 of the Court of Appeal Rules are well settled. This Court has unfettered discretion to extend the time prescribed for taking any action permitted under the Rules. However, like all judicial discretions, the Court must exercise this discretion judicially, that is to say, upon sound reasons and not upon the whims of the Court. To guide the Court in exercising this discretion, case law has established certain considerations that must be examined. As stated in *Leo Sila Mutiso v Helen Wangari Mwangi*, Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231, these considerations are: first, the period of the delay; secondly, the reasons for such delay; thirdly, whether the proceedings for which time is sought to be extended are frivolous; and fourthly, whether the respondent will be unduly prejudiced if the application is granted.
10. I have carefully considered this application, the submissions of both parties, and the authorities cited. Applying the established legal principles to the facts of this case, I must examine whether the applicant has provided a satisfactory explanation for the delay. The applicant avers that the fourteen day period for seeking leave to appeal lapsed while she was diligently prosecuting Civil Application No. E106 of 2024 to regularize the Notice of Appeal dated 11th November 2024.



11. It is necessary to situate this application within its proper procedural context. Rule 61(4) of this Court's Rules stipulates that where an appeal lies only with leave, it shall not be necessary to obtain such leave before lodging the notice of appeal. The natural reading of this provision is clear: the Notice of Appeal must be filed first, and thereafter leave may be sought. However, the record reveals that the applicant's former advocates initially sought leave from the High Court before filing the Notice of Appeal. When that application was dismissed on 7th November 2024, they belatedly filed the Notice of Appeal on 11th November 2024 outside the prescribed period.
12. In his ruling of 15th May 2025 in Civil Application No. E106 of 2024, my brother Odunga, JA, having examined the same set of facts, found that "the need to obtain leave to appeal in succession matters has until recently been unsettled," and concluded that "the failure by an advocate to appreciate that the notice of appeal may be filed notwithstanding the fact that leave has not been sought and granted is... excusable." I agree with the sentiments expressed by my brother.
13. I must pause to consider the practical consequence of denying this application. My brother Odunga, JA, in his ruling of 15th May 2025, validated the Notice of Appeal after finding the delay excusable. If I were now to refuse this application, what would be the point of that earlier ruling? The Notice of Appeal would sit on record, deemed properly filed by this Court, yet entirely useless, incapable of advancing the appeal because leave has not been sought within time. This Court would have opened a door with one hand only to close it with the other. Such an outcome would be paradoxical and would render the earlier ruling nugatory.
14. The logic is inescapable: if the delay in filing the Notice of Appeal was excusable (as my brother Odunga found), and if the consequent delay in seeking leave arose from the time necessarily spent regularizing that Notice of Appeal, then both delays spring from the same root cause and must be treated consistently. To do otherwise would be to elevate technicality over substance and to frustrate the very purpose for which the earlier extension was granted.
15. Consequently, I find that the explanation for the delay which resulted from first seeking to regularize this foundational document through Civil Application No. E106 of 2024 acceptable in the circumstance.
16. I am mindful of the respondent's argument that mistakes of advocates should not be a blanket excuse for procedural non-compliance. This is a valid principle, and the Court must be vigilant against attempts to use advocate errors as a convenient shield for negligence or deliberate delay. However, each case must be assessed on its own facts. In this case, the applicant has not simply blamed her advocates and left matters there. Rather, she has taken active steps to rectify the procedural defects by changing advocates and pursuing the necessary applications to regularize the appeal process. The applicant has demonstrated throughout this process that she is genuinely desirous of prosecuting her appeal and has not simply abandoned her case after the initial setback.
17. Regarding the arguability of the intended appeal, while this is merely one factor for possible consideration and not determinative in itself, I note that the applicant has annexed a draft Memorandum of Appeal setting out the intended grounds of appeal. The grounds appear to raise substantive issues regarding the distribution of the estate. The draft memorandum suggests that the intended appeal is not frivolous or vexatious but raises genuine issues for determination.
18. On the respondent's allegation that the applicant previously withdrew Civil Application No. E104 of 2024 and that the present application is a duplication, I have considered this issue carefully. The applicant has explained in her supplementary affidavit that Application No. E104 of 2024 was withdrawn after the three judge bench raised a concern that without a proper Notice of Appeal, there



was no legal foundation upon which that application could be heard. The applicant was then advised to await the determination of Civil Application No. E106 of 2024, which sought to regularize the Notice of Appeal. Once that application was allowed on 15th May 2025, the applicant then filed the present application. This sequence of events does not amount to an abuse of process, but rather procedural sequence dictated by the circumstances and the guidance of the Court. I am satisfied that the present application is not a duplication of the withdrawn application. The two applications, while related, serve different purposes.

19. Weighing all these considerations together, I am satisfied that the applicant has demonstrated sufficient cause for the extension of time sought. As was stated in *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR, extension of time is an equitable remedy available to a deserving party at the discretion of the court. The applicant in this case has demonstrated that she is a deserving party. She has carried the burden of laying a basis to the satisfaction of this Court for the extension sought. The delay has been adequately explained, the period is not inordinate when viewed in context, and the interests of justice favor allowing the application.
20. In the end, this application is hereby allowed with costs to the respondent. The applicant is granted fourteen (14) days from the date of this ruling to file an application for leave to appeal against the judgment and orders of the High Court at Kericho delivered on 1st August 2024 in Succession Cause No. 7 of 2018.

DATED AND DELIVERED AT NAKURU THIS 31ST DAY OF OCTOBER, 2025.

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

