

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
HCCA NO. E061 OF 2025

JAMES W. KAZURA APPELLANT/APPLICANT

-VERSUS-

JACOB OTIENO ODADA (Sued as the administrator of the estate
of the late **PETER ODADA SUMBA RESPONDENT**

R U L I N G

1. By a Motion on Notice dated **11/4/2025**, brought under *section 79G of the Civil Procedure Act and Orders 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules*, the applicant applied for leave to appeal out of time and for the Memorandum of Appeal dated **12/3/2025** to be deemed to have been duly filed and served.
2. The Motion was supported by the affidavit of **Agnes Akinyi** sworn on **11/4/2025**. She deposed that a ruling was delivered in **KSM CMCC No. 224 of 2024** on **15/1/2025** without notice. The ruling had been set to be delivered on notice which was never given. That her Advocate only came to know about it on **12/3/2025** through the public kiosk, way after time for appealing had lapsed.

3. That in the premises, the Memorandum of Appeal dated **12/3/2025** was filed out of time. That the delay was excusable and the intended appeal had high chances of succeeding. She exhibited the impugned Ruling and Memorandum of Appeal dated **12/3/2025**. She therefore urged that the application be allowed.
4. The Motion was opposed vide the replying affidavit of **Jacob Ochieng Otieno** sworn on **25/4/2025**. He deposed that the Motion was an abuse of the Court process as the applicant was guilty of gross misrepresentation of facts. That the trial court had given directions that the ruling will be delivered on Notice and uploaded through the Court Tracking System (CTS) which was duly done on **15/1/2025**.
5. That the Court upheld a preliminary objection and dismissed the suit for being res-judicata, since the issue of ownership had been determined **in Succession Cause No. 137 of 2019**. That the trial court had indicated to the applicant's advocate on **16/1/2025**, that it had already delivered the ruling and uploaded it on the CTS. That it was therefore untrue that they discovered the delivery of the ruling on **12/3/2025** as contended.
6. That in any event, even after the alleged discovery of the ruling on **12/3/2025**, the applicant took another month to lodge this application on **11/4/2025**.

7. The parties filed their submissions dated 20/5/2025 and 17/6/2025 respectively which I have carefully considered. I need not reiterate them here.
8. This is an application for leave to file an appeal out of time and for the Memorandum of Appeal dated 12/3/2025 to be deemed duly filed and served.
9. **Section 79G of the Civil Procedure Act** provides: -

“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.”

10. The exercise of leave under the above provision is in the discretion of the Court. But as in all other discretion, the same must be exercised judiciously and not capriciously. The known principles under which such discretion is to be exercised are; the length of the delay, the reason for the delay, the likelihood of the appeal succeeding and the prejudice, if any, which the

opposite party is likely to suffer. See Stanley Kaiyongi Mwenda vs Cyprian Kubai (2001) eKLR.

11. On the length of the delay, the ruling was delivered on **15/1/2025**, the Memorandum was filed on **12/3/2025** the same day the advocate for the applicant discovered that it had been delivered. That was timeous. No Court should deliver any decision without Notice to the parties. That is what ***Order 21 of the Civil Procedure Rules*** commands. To the extent that there was no notice issued to the parties for delivery of the ruling, that was an error on the part of the Court and the applicant cannot be punished for that. The delay between 15/1/2025 and 12/3/2025 was fully explained.

12. However, there seems to be no explanation for the delay from **12/3/2025** and **11/4/2025** when the present Motion was lodged. The delay was exactly 30 days which is the exact period required to lodge an appeal from the Subordinate Court to this Court. I will excuse that delay.

13. As to the reason for the delay, I have already found that the Court erred in delivering the ruling and publishing the same in the CTS without notice to the parties. The reason for the delay is therefore plausible.

14. The 3rd ground is the chances of the appeal succeeding. I have seen the ruling and the Memorandum of Appeal. It is clear that there is a firm finding, and not disputed, that the family court has already pronounced itself

on the ownership of the subject matter of that applicant's suit in the lower court.

15. It is trite that, matters of succession are to be dealt with by the family Court and no other Court. Even this Court, when exercising its commercial or civil jurisdiction, it cannot extend to matters succession. It can only deal with such an eventuality when it is exercising its jurisdiction as a Family Court.

16. Rather than chase a matter which has no chance of succeeding, as the matter has been dealt with by another Court of competent jurisdiction, the route taken by the applicant is misguided. She should go back to the Family Court to either set aside the order she is aggrieved with as per the law provided, if she did not properly participate in those proceedings, or appeal to the High Court and invoke its jurisdiction as a Family Court.

17. Being of the foregoing view, I think allowing the matter to go forward would be an exercise in futility.

18. Accordingly, I find the Motion to be without basis and I dismiss the same.

In view of the circumstances of this case, I will make no order as to costs.

It is so ordered.

DATED and **DELIVERED** at Kisumu this 31st day of **October, 2025**.

A. MABEYA, FCI Arb

JUDGE