



In re Estate of Kileopa Okute Aburuli alias Kileopa Ambululi (Deceased) (Miscellaneous Succession Application E011 of 2025) [2025] KEHC 17486 (KLR) (26 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17486 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS SUCCESSION APPLICATION E011 OF 2025**

S MBUNGI, J

NOVEMBER 26, 2025

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE AN APPEAL OUT OF TIME

AND

**IN THE MATTER OF THE ESTATE OF KILEOPA OKUTE
ABURULI ALIAS KILEOPA AMBULULI(DECEASED)**

BETWEEN

**LEONIDA AKHAVERE OLUYALI 1ST APPLICANT
MARY NYAKOA TOM 2ND APPLICANT
EMILY EBOKA MUSITIA 3RD APPLICANT**

AND

**ISAYA AMBULULI AMBUNDO 1ST RESPONDENT
MILDRED MUKHANYI OKETCH 2ND RESPONDENT**

RULING

1. Vide an application dated 23rd May 2025, the applicants herein sought leave to file an appeal out of time against the ruling delivered in Kakamega succession No. 494 of 2017 on 19th December 2024 by Hon. J.R. Ndururi (senior principal Magistrate).
2. The Application is premised on the grounds set out on its face and on the supporting affidavit sworn on the same day by the 1st applicant, who avers that the ruling was delivered on 19/12/2024 in succession Cause 494 of 2017 by Hon. J.R. Ndururi at the same time they had filed the appeal at the High Court Succession Appeal No. E20 of 2024



3. According to the appellant, they had planned to raise issues when the respondent had filed their appeal; however, the respondent withdrew their succession appeal.
4. According to the appellant, their interest had not yet been addressed, and they approached their former advocates to file their appeal, which they failed to hence they approached their current advocates to appeal the ruling of the lower court.
5. The appellant states that their appeal had a high chance of success as the trial magistrate erred in law and fact by giving the respondent a larger share of the deceased estate, even though they had already sold some of the portion, claiming that they were not entitled to any other share.
6. In the interest of justice, they pray that the application be allowed.
7. The 2nd respondent opposed the application through a replying affidavit dated 30th June 2025, where she avers that the application is defective as the applicant had not joined or notified the interested party who were part of the proceedings before the lower court, whose rights will be affected directly.
8. They aver that the applicants failed to indicate to the court that the ruling appealed against had ordered the portion sold to the third party be set aside and excluded from distribution, and the remainder be distributed among the beneficiaries, a process pending at the lower court.
9. He opposed the application that the respondents had been allocated more than the actual beneficiaries and further that the application has failed to offer any reasonable explanation for delay in filing the appeal and therefore it is premature and incompetent since the ruling dated 19th December 2024 directed the mode of distribution not its implementation which is pending before the lower court to be heard on 21st August 2025.
10. They assert that the applicant failed to demonstrate sufficient cause for the court to exercise its discretion to grant leave to file an appeal out of time and thus the application lacks merit as it is an abuse of the court's process. They pray that the application be dismissed to allow the lower court to proceed with the distribution of the estate without delay.
11. The application was canvassed by way of written submissions.
12. In their submission dated 30th July 2025, the respondent raised three issues for determination. On the first ground, whether the application is defective as it failed to notify the parties at the lower court, they aver that the applicant failed to notify the interested parties who were part of the proceedings at the lower court and whose interests are directly affected, and they failed to enjoin them. They aver that the interested party lawfully purchased the estate.
13. They state that the issue raised by the applicant was not in the implementation and the mode of distribution, and that no final orders will prejudice his rights, and hence the intended appeal is premature, incompetent.
14. He avers that the application concealed that the interested parties were part of the estate and further that granting the applicants' prayers will prejudice them, as there will be a delay in the ongoing distribution process at the lower court.
15. The 1st and 3rd applicants in their submissions aver that they seek to appeal the reviewed ruling by Hon. Ndururi, who had allowed the interested party part of the deceased estate, and despite the respondent having withdrawn their appeal, there were still some issues that they had to address at the appellant court.



16. They quoted section 79 G of the *Civil Procedure Act* and pray that the court allow the leave to file the appeal out of time. As there is a good and sufficient cause. They quoted the case of Edith Gichungu Koine vs. Stephen Njagi Thoithi (2014) eKLR. He avers that the application was brought on 23rd May 2025 and that they had instituted a good reason for instituting the appeal out of time and stated that their delay was excusable as the appellant had withdrawn their appeal from Kakamega High court succession Appeal E020 of 2024 on 26th February 2025 and the previous advocates were on record hence they were not aware hence the current application.
17. In conclusion, they pray that the application be allowed as prayed.

Analysis and determination

18. Having considered the application, affidavits and parties' submissions, this court finds the following issues for determination;
 - a. Whether the application is defective for failure to join interested parties.
 - b. Whether the applicants have demonstrated sufficient cause to warrant extension of time under Section 79G of the *Civil Procedure Act*.
 - c. Whether the intended appeal is arguable and whether any prejudice will be suffered.
 - d. Whether the Court should allow the application
19. On the first issue, the respondents argue that the applicants failed to enjoin the interested parties, whom they claim were parties in the lower court, and they had an interest in the estate of the deceased since they had purchased part of the estate. Non-joinder or misjoinder, however, does not defeat a cause, as provided under Order 1 Rule 9 CPR. The remedy lies in the court's power to add parties at any stage under Order 1 Rule 10(2) if necessary.
20. In *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others* [2014] eKLR, the Court held that non-joinder cannot bar the Court from reaching the substantive justice of a matter.
21. The application is merely for leave to file an appeal; it does not invite the Court to conclusively determine the rights of third parties. Any necessary party can be joined in the intended appeal, where their interests would properly be canvassed.
22. The respondent's claim of non-joinder thus fails in this case.
23. The second issue for determination is whether the applicant has met the threshold to be granted leave to appeal out of time.
24. Section 79G of the *Civil Procedure Act* states that;

“ Every appeal from a subordinate court to the High Court shall be filed within thirty days...
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.”
25. On the issue of the delay in filing the appeal, I note that the ruling by Hon. Ndururi was delivered on 19 December 2024. The application was filed on 23 May 2025, a delay of approximately five months.
26. The applicants attribute the delay to the 1st respondent's withdrawal on 26th February, 2025, which caused them to be dormant, coupled with their former advocates not informing them about the withdrawal of the appeal and their transition to new counsel.



27. In *Belinda Murai & Others v Amos Wainaina* [1978] eKLR, the Court held that a litigator should not be punished for the sins of counsel when the mistake is excusable.
28. Similarly, in *Rajesh Rughani v Fifty Investment Ltd & Another* [2016] eKLR, the Court of Appeal held that inadvertence by counsel may constitute sufficient cause where the litigant moved swiftly to remedy the situation.
29. The applicants' explanation is coherent. This delay, though not negligible, is not inordinate. I am persuaded that sufficient cause has been demonstrated.
30. The intended appeal challenges the distribution of the estate, alleging that the magistrate allocated a larger share to a respondent who had already disposed of portions of the estate. to challenge to the distribution of an estate raises important questions of law under Sections 35, 38 and 40 of the [*Law of Succession Act*](#).
31. The Court in *Re Estate of George M'Ngarithi M'Miriti (Deceased)* [2017] eKLR emphasised that distribution must be equitable and anchored in evidence.
32. Without making definitive findings at this stage, I find that the grounds intended to be raised are not frivolous. They merit consideration.
33. The respondents argue that allowing the application will delay the ongoing distribution scheduled for 21 August 2025. Delay in the administration of estates is undesirable. However, the Court of Appeal in *Kiole v Kiole* [2018] eKLR held that the right of appeal is constitutional and should not be curtailed merely because distribution may be delayed, unless actual demonstrable prejudice is shown.
34. Here, distribution has not been completed; it is still at the implementation stage. No irreversible steps have been taken. The prejudice, if any, is minimal and manageable.
35. Article 50(1) of [*the Constitution*](#) guarantees a fair hearing. The discretion to extend time must, as held in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 Others* [2015] eKLR, lean in favour of substantive justice where no grave prejudice is caused.
36. The applicants acted once they discovered the withdrawal of the earlier appeal and engaged new counsel. Their conduct does not suggest indolence or bad faith.
37. I am therefore satisfied that the interests of justice tilt in favour of granting the orders sought.
38. From the above analysis, I am persuaded that the applicants have met the threshold for extension of time.
39. Accordingly, I make the following orders:
 - a. Leave is hereby granted to the applicants to file an appeal out of time against the ruling delivered on 19 December 2024 in Kakamega Succession Cause No. 494 of 2017.
 - b. The applicants shall file and serve the Record of Appeal within 21 days from the date hereof.
 - c. Costs of the application shall be in the intended appeal
 - d. Right of Appeal 30 days.
 - e. Mention 1.4.2026 for directions on the main Appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 26th DAY OF NOVEMBER, 2025.



S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr. Marola holding brief for Ms Mukolwe for the Applicant present online.

Samba holding brief for the 1st and 2nd Respondent present online.

