

**IN THE COURT OF
APPEAL AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, JA (IN
CHAMBERS) CIVIL APPLICATION NO. 071 OF**

2025

BETWEEN

TOBIAS OGWANG.....APPLICANT

AND

MOSES OTIENO OGWANG.....RESPONDENT

(Being an application for extension of time and stay of execution of judgment and decree from the Judgment of the High Court of Kenya at Kisumu, (Shariff, J.) dated 7th February, 2025

in

HC Succession Cause No. 181 of 1990)

******* RULING**

[1] By way of a Notice of Motion dated 7th May, 2025, **Tobias Ogwang, “the applicant”**, moved this Court seeking Orders that there be stay of execution of the judgment and decree delivered on 7th February, 2025, in Kisumu Succession Cause No.181 of 1990 regarding the Estate of **Leonard Ogwang (Deceased)** and leave to file an appeal out of time. As it is apparent, I as a single judge of this Court has only jurisdiction to deal with the second prayer in the application. I have no jurisdiction to deal with the prayer for stay of

execution as that is a preserve for a full bench of this Court.

[2]The application is based on the grounds on its face and the applicant's supporting affidavit which can be summed up thus, that the applicant was misled by the High Court registry as to when the judgment in the succession cause was to be delivered. That according to the Court Tracking System "**CTS**", the judgment was delayed on the occasion when it was meant to be delivered on the account of the presiding judge being transferred to Bungoma High Court. On the updated CTS, judgment was indicated that it would be delivered on the 31st of March, 2025 at 10am. The applicant was not aware that judgment had in fact been delivered on the 7th of February, 2025 and hence could not act accordingly. That, upon finding out this information from his advocates, he immediately instructed them to write to the Deputy Registrar, of the trial court complaining that due to the mistake of the registry in not updating the records in time, he was by a fault not of his own, locked out from appealing the said decision within time.

[3]That justice must not only be done, but must manifestly be seen to be done and if given leave to file the Appeal, the applicant has given assurance that he will prosecute the appeal expeditiously.

[4]The application was opposed by the all the respondents respectively through their replying affidavits. The 1st respondent swore his own replying affidavit whereas the second to the fourth

swore a joint replying affidavit. Those affidavits did not entirely deal with the issue at hand,

which is extension of time. Rather they dwelt with why stay of execution should not be granted. However, it is only in their written submissions that they attempt to address the issue of extension of time by submitting that, the applicant is less than candid in his assertions. That the judgment and decree of the trial court was fair with regard to the distribution of the deceased's estate and therefore the appeal stands no chance of success. That the reason for the delay advanced by the applicant was a blatant lie as he was represented all the way by counsel and finally, that the applicant wants to drag the dispute in court as he continues to enjoy full possession of the family property to the detriment of the other beneficiaries.

[5]The application was canvassed by way of written submissions only and without appearance of counsel or parties.

[6] Having studied the application, the grounds thereof, the supporting and replying affidavits, respective written submissions and the law, this is my take on the application!

In the case of **Nicholas Kiptoo Korir arap Salat vs IEBC and 7 Others [2014] eKLR**, the Supreme Court of Kenya enunciated the principles applicable in applications of this nature. The Court stated inter alia that:

“The underlying principles a court should consider in exercise of such discretion should include:

a. 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;

- b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;**
- c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case by case basis;**
- d. Whether there is a reasonable reason for the delay, the delay should be explained to the satisfaction of the court;**
- e. Whether there will be any prejudice suffered by the respondent if the extension is granted; and**
- f. Whether the application has been brought without undue delay.”**

[7] From the record, it would appear that the applicant has moved this Court within the shortest time possible. I note that the delay is for about three months and cannot therefore pass as inordinate as claimed by the respondents. It is also not lost on me that the applicant has a constitutional and undoubted right to exhaust the appellate process. In particular this being a family dispute on inheritance it is fair that the applicant has his day in this court.

[8] I accordingly allow the application and grant the applicant **forty-five**

(45) days from the date of this ruling to initiate his intended appeal.

Costs shall be in the appeal.

Dated and delivered at Kisumu this 18th day of November, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR