



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KWALE COUNTY

COURT NAME: KWALE HIGH COURT

CASE NUMBER: HCCCMISC/E084/2025

ALI SUDI GASARE AND MWANYARA MOHAMED GASSARE AND 2 OTHERS VS MOHAMADI
RAMADHANI MWAGASAMBI AND SUDDI GASSARE SUDDI AND 1 OTHERS

RULING

1. The applicants herein, have filed before this court a Notice of Motion dated 21st November 2025 seeking two orders that is:
 - a. Leave to appeal out of time against the judgment of the Kadhi's court delivered on 20th March 2025 in Kwale KUSCC/E039/2025.
 - b. stay of execution of the judgment in (a) above pending the hearing and determination of the applicant's intended appeal to this court.
2. The provisions of the law under which the application is filed are not indicated on the face thereof as required under Order 51 Rule 10 CPR. However, as provided for under the rule, that would not stop this court from considering the application.
3. The grounds in support of the application are laid on the face therefore. They are expounded in three affidavits. The first is the supporting affidavit sworn on 21st November 2025 by Keith Ian Wanyangu, counsel for the applicants. The second and third are the further and supplementary affidavits sworn by Mwanyara Mohamed Gassare, the 3rd applicant. The further affidavit is sworn on a date that is not indicated thereon while the supplementary affidavit is sworn on 11th February 2026.
4. In summary, the grounds are that the applicants were prevented from filing the appeal in time due to lack of financial resources and they have been forced to seek loan facilities to sustain the cases. Further that following the Kadhi's court judgment, the applicant's stand to suffer irreparable harm that cannot be remedied at the conclusion of the appeal for reasons that they risk losing 24 acres of land out of the 48 acres of land comprised in land parcel No. Kwale/Golini/463 which is lawfully registered in their names and they are in occupation of. That they had been served with a notice of intention to act upon the Kadhi's Court order for the intended excision of the 24 acres from the 48 acres. That in entering the said judgment, the Kadhi's court entertained a review of its orders issued in 2016 in Succession Cause No. 8 of 2016. Further that if stay of execution is not granted, the Registrar of Lands Kwale may proceed to register or transfer the said parcel of land which will



result in irreversible loss of the ancestral parcel of land. Further that the 1st respondent has previously attempted to procure a forged title for the subject parcel of land which attempts were thwarted by the Lands Registrar who subsequently revoked the title. Further that the 1st respondent had attempted to procure forged transfer documents for the subject parcel of land. It is therefore likely that following the Kadhi's court order the respondents will dispose of the subject land.

5. The application is opposed by the respondents through a replying affidavit sworn on 2nd December 2025 and a supplementary affidavit sworn on 3rd December 2025 by Suddi Gessare Suddi, the 2nd respondent for himself and on behalf of the other respondents.

6. He deposes that the applicants have not provided any credible proof that they were prevented from filing the appeal within the stipulated time due to lack of financial resources and as such they have failed to demonstrate good cause for extension of time to appeal.

7. Further that the allegation of the 1st respondent attempting to transfer the subject parcel of land using a forged title is irrelevant to the application for extension of time and stay pending appeal. Further that the judgment delivered by the Kadhi's court is enforceable and the respondents are entitled to act upon it. That, the application herein is an attempt to delay the execution process.

8. Further that the application for stay will prejudice the respondents.

9. In the supplementary affidavit the respondents have set out the chronology of the proceedings before the Kadhi's court leading to the judgment delivered on 20th March 2025. It is their position that if anything the applicant's should have filed appeal against the ruling of the Kadhi's court delivered on 2nd September 2024 arising from Miscellaneous Application No. E010 of 2024. In that ruling, the Kadhi's court reviewed its earlier orders issued in Kadhi's Court Succession Petition No. 8 of 2016 which had granted the applicants herein the whole of the estate of the late Gesare Mwayonge (deceased) on misrepresentation to the court by the applicants that they were the only children of the deceased from his second wife and left out the respondents herein who were the children of the deceased's first wife.

10. Upon review of the earlier orders, the family of the first wife filed succession cause No. E039 of 2025 whereupon the Kadhi's court delivered its judgment on 20th March 2025.

11. According to the respondents therefore, the intended appeal herein ought to arise from the ruling delivered on 2nd September 2024 in Misc. Application No. E010 of 2024, otherwise, this court may end up issuing the wrong court order thereby causing prejudice to the respondents and undermining the ends of justice.

12. Further that the applicants have rushed to court after the property of the deceased was subdivided in November 2025 with each family receiving 24 acres out of land parcel No. Kwale/Golini/463 in accordance with Islamic laws.

13. The application was heard by way of written submissions filed by learned counsels for the parties. Learned counsels also provided authorities to back up their arguments.

14. I have considered the Notice of Motion application dated 21st November 2025, the grounds in support thereof and the supporting affidavits as well as replying affidavits and the submissions by learned counsels. The issues for determination are whether the applicants have satisfied the requirements for extension of time to file an appeal and stay of execution pending appeal, what orders the court should issue and who bears the costs.

15. The first prayer is for extension of time to file an appeal and a draft memorandum of appeal is annexed to the supporting of affidavit. The respondents have argued strenuously that the proper appeal should be against the Kadhi's court's order dated 2nd September 2024 that revoked the earlier grant and not the judgment delivered on 20th March 2025 on the fresh petition for succession. The applicants chose to appeal against the later judgment and not the order of revocation and this court can only determine what is before it.

16. Section 79G of the Civil Procedure Act (Cap. 21) Laws of Kenya (CPA) under which the prayer for



extension of time is based provides that:

“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.”

17. The applicants filed the present application on 21st November 2025 which is a period of about eight months after the due date when the appeal ought to have been filed on or before 20th April 2025, the judgment sought to be challenged having been delivered on 20th March 2025. Under the proviso to section 79G CPA, the appeal may still 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. In applying this section, courts have held that the court has a wide discretion to extend time to file an appeal but the discretion must not be exercised capriciously but judiciously and based on sound judgment and consideration of the totality of the facts and law. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] KECA 201 (KLR) the Court of Appeal held setting out the principles that the Court of Appeal takes into account in considering an application for extension of time under the Court of Appeal rules as follows: -

“It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay: secondly, the reason for the delay: thirdly (possibly) the chances of the appeal succeeding if the application is granted: and, fourthly, the degree of prejudice to the respondent if the application is granted.”

18. Although these principles are for consideration by the Court of Appeal under its rules, I think they are broad enough to be a good guide for the High Court too while considering what is a good and sufficient cause for not filing the appeal in time since they are expressed to be “in general.” Further the Court of Appeal stated further that the list was not exhaustive.

19. Further, the Supreme Court in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] KESC 12 (KLR) laid down the following principles the court ought to in exercising the discretion to extend time for filing an appeal:

- a. Extension of time was not a right of a party. It was an equitable remedy that was only available to a deserving party at the discretion of the court;
- b. A party who sought extension of time had the burden of laying a basis for it to the satisfaction of the court;
- c. Whether the court ought to exercise the discretion to extend time, was a consideration to be made on a case to case basis;
- d. Whether there was a reasonable reason for the delay, which ought to be explained to the satisfaction of the court;
- e. Whether there would be any prejudice suffered by the respondents if the extension was granted;
- f. Whether the application had been brought without undue delay; and;
- g. Whether in certain cases, like election petitions, public interest ought to be a consideration for extending time.

20. It follows from these authorities that a party seeking extension of time must first lay a basis for the delay and the reason(s) offered must be to the satisfaction of the court. This is what constitutes good and sufficient cause as required by the law. In the present application, the applicant’s reason for the delay is that they did not have funds to pursue an appeal.

21. The applicants have argued that the Kadhi’s court entertained an application by the respondents to review its orders in the initial succession cause some eight years after the grant had been issued.



The issue of the Kadhi's court entertaining an application for revocation of grant after eight years has no relevance to this application. Application for revocation of grant can be made at any time as it has no limitation of time.

22. The issue is whether the applicants have shown sufficient cause for the delay of eight months in seeking the application for stay. As stated by the Court of Appeal in the Mwangi Thuita case, there are varied factors that constitute what is sufficient cause and therefore the facts of each case must be considered separately.

23. In considering a similar issue seeking extension of time to file/lodge and serve a notice and the record of appeal brought pursuant to rule 4 of the Court of Appeal Rules, sections 3A and 3B of the Appellate Jurisdiction Act (Cap. 9) of the Laws of Kenya and article 159 of the Constitution 2010 in the case of Said v Shume [2023] KECA 292 (KLR) the Court of Appeal, Odunga, J.A. opined as follows:

"The broad approach in these matters is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. The question for the purposes of this kind of application is whether is merely that the order will inevitably lead to some delay but it is my view that the delay that is likely to be occasioned thereby must be weighed against the denial of an opportunity to the applicant to put forward its case on merits. In considering the exercise of discretion, the court must consider the risk of injustice if the court found in favour of the respondent, than if it determined this application in favour of the applicant and having considered that to opt for the lower rather than the higher risk of injustice. This is the principle of proportionality under the overriding objective. That delay, may be compensated by an award of costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd v Ramji Punjabhai Bugerere Tea Estates Ltd* [1971] EA 188.

Having considered the issues raised in this application, I find no serious prejudice that is likely to be occasioned to the respondent by allowing this application."

24. Considering the principles set out in the above decision, I am satisfied that, in the unique circumstances of this case where there is an issue of inheritance rights, there was revocation of grant and there are issues of fraud in alleged attempts to transfer and dispose of land being raised, there is good and sufficient explanation for the delay in filing the appeal upon which the court can and hereby exercises its discretion to extend time to file the appeal.

25. The next issue is whether or not the court should grant a stay of execution.

26. Stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules 2010 as follows;

"(1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may



ultimately be binding on him has been given by the applicant.”

27. From the foregoing provision of the law, the conditions to be fulfilled by an applicant for an order of stay pending appeal to issue are;

- a. establishment of sufficient cause.
- b. substantial loss may result to the applicant unless the order is made.
- c. the applicant has given security as the court orders for the due performance of any ensuing decree or order binding upon the applicant.
- d. the application has been made without undue delay.

(See the case of Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365).

28. These principles are further expounded in the case of Butt v Rent Restriction Tribunal [1979] KECA 22 (KLR) where the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. They can be summarized as follows: -

- a. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. As a general rule the court ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.
- b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.
- c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
- d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2)(b) (now Order 42 Rule 6(2)(b)) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security as ordered will cause the order for stay of execution to lapse.

29. It has also been held that the court, in exercising its discretion, will also consider the overriding objective as stipulated in sections 1A and 1B of the Civil Procedure Act (Cap. 21) Laws of Kenya, which the courts are enjoined to give effect to. In expounding on the principle of giving effect to the overriding objective of the rules of procedure for handling civil cases, the High Court, Kuloba, J. in Machira t/a Machira & Co Advocates v East African Standard [2002] KEHC 1167 (KLR) stated as follows:

“This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness.”

30. This court has found that the applicants are entitled to extension of time to file the intended appeal out of time. The applicant's intended memorandum of appeal was filed on 21st November 2025, together with the present application and is now on record contrary to the deposition by the respondent that no draft memorandum of appeal was filed. I have found above that there is good



reason to extent the time for filing the appeal and therefore no unreasonable delay in seeking the order of stay.



31. On the issue of substantial loss, since there is no precise definition of what amounts to substantial loss, I believe it is for this court to determine on the facts placed before it. The applicants depose that they stand to suffer substantial loss and prejudice if execution of the Kadhi's court order proceeds because they will lose half of their ancestral land on which they reside yet the respondents do not reside there. The respondents on their part depose that they are entitled to enjoy the fruits of their judgment and decree and execution has been carried out and the land subdivided into two equal portions for each family. However, they did not tender evidence of such subdivision but the applicants have acknowledged in the supplementary affidavit that indeed such subdivision has been effected.

32. This court is aware that the respondents have a decree in their favour and they are entitled to enjoy the fruit thereof. But the applicants also have their right to appeal. Balancing the two competing interests in this case, I find that the loss that would be suffered by the applicants would be substantial if the stay order is not granted.

33. However, this issue is evened out by the next requirement under Order 42 Rule 6(2)(b) to be satisfied for stay of execution to issue that, "such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant." The applicants herein have not offered any security. However, it is upon the court to ensure that it is offered before the stay order is granted. Therefore, the order of stay of execution can be granted on condition that sufficient security for the due performance of the decree is taken by the court.

34. Consequently, I find that the application herein has merit and in order not to render the intended appeal nugatory, the application is granted in the following terms:

- a. The applicants are granted leave to file appeal out of time and to do so within the next 30 days.
- b. Stay of execution of the judgment dated 20th March 2025 and ensuing decree in Kwale Kadhis Court Succession Cause No. e039 of 2025, In The Estate of Mwayogwe Sudi Gasare is granted pending hearing and determination of the intended appeal herein on condition that the applicants shall provide a guarantee signed before the Deputy Registrar of this court by each of them jointly and severally that they or any person acting through them shall not interfere with the subject land in any way that may be prejudicial to the intended appeal and that the status quo obtaining as of today shall be maintained for that period of the appeal.
- c. If the condition in (b) above is breached, the order of stay shall stand vacated immediately.
- d. Costs of the application will abide the appeal
- e. Mention on 6th May 2026 for further directions.

35. Orders accordingly.

36. Delivered, dated and signed at Kwale on the Virtual Platform, Microsoft Teams this 1st day of April 2026.

ANDAYI W. F.

JUDGE

In the presence of:

Wanyangu for applicant.

Mtai Ms for the respondent.

Ummu: Court Assistant.

SIGNED BY/FOR:
HON. JUSTICE ANDAYI W.F.





★ THE JUDICIARY OF KENYA ★

HON. JUSTICE ANDAYI

W.F.

Kwale High Court

High Court Div Date: 2026-04-02

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