

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
FAMILY APPEAL NO. E011 OF 2024

IN THE MATTER OF THE ESTATE OF LAZARO
MALIMBA KHAUKA - DECEASED

VINCENT WEKESA LAZARO
.....PETITIONER/APPLICANT

VERSUS

BERNARD KIMACHOS
MOSES CHESARMAT KINGO
MAURICE MASORIO NGEYWO
JOSEPH TENGA KINGO
ZABLON MUKURUMA MANYU
GABRIEL MWANJANGEYWO
HENRY MUNANDA SURUNGAI
MOSES CHEMIRINGWA MAKWA....RESPONDENTS

RULING

1. In a motion dated 27th October 2025 brought under section 79 (G) of the Civil Procedure Act and Order 3, 3A of the Civil Procedure Rules 2010 and Article 159 of the Constitution 2010 the applicant is seeking the following orders:

- i. I. THAT the court be pleased to grant the applicant leave to appeal out of time against the judgment delivered by Hon. R.K Langat, PM, on the 25th September 2024.

- ii. ii) THAT the appeal filed on 31st October 2024 be deemed as properly filed.
- iii. iii) THAT the costs of the application be provided for.
2. The application is supported by the affidavit of Vincent Wekesa Lazaro, the Petitioner/applicant. He avers as follows: he wishes to appeal against the judgment/decreed of Hon. R.K. Langat, PM, delivered on 25th September 2024 in Sirisia PMCC Succession Cause No. 72 of 2018, the permitted time having lapsed by one day. The delay in filing the appeal was unintentional, as he had to obtain relevant documents from the lower court and was issued a certificate of delay. He obtained the necessary documents in the late hours of 30/10/2024 and filed the appeal on 31/10/2024. The delay is not inordinate; the intended appeal is arguable and meritorious. There are good and sufficient reasons for the court to exercise its discretion and grant leave to appeal out of time. The respondent will not suffer any prejudice if the application is allowed. In a further affidavit dated 27/10/2025, the applicant deposes that the appeal herein was filed within time, excluding the period he was waiting for the documents from the lower court.
3. The application was opposed. The 1st respondent filed a replying affidavit dated 24/11/2025. He deposes as follows: the applicant's application is frivolous, vexatious and scandalous of the court process; no

sufficient reason has been given for the delay in filing the appeal within time. The application has been filed to delay the application dated 28/8/2025, and no leave can be issued over an incompetent appeal. They stand to suffer prejudice if the application is allowed, given that the decree of the trial magistrate has been fully implemented and titles have been issued to all of them at huge expense, as there was no appeal in stay of execution for the same. The appeal, as drafted, has no chance of success.

4. At the hearing of the application, the applicant relied on their supporting affidavit and further affidavits, urging the court to allow the application.
5. The respondents also relied on their reply affidavit dated 24 November 2025. They argued that the appeal was filed out of time, is a nullity, and that the best option is for the applicant to withdraw the appeal and start afresh. They have demonstrated that the decree from the lower court has been implemented and that there is currently no stay over the 9 titles for which it has been issued. The application is an afterthought. They relied on a Court of Appeal decision in Geoffrey Kiema Kyuma and Marietta Kiema, Civil Appeal No. 16 of 1998, in which the court addressed Section 79(G) of the Civil Procedure Act. The respondent argued that the applicant has misinterpreted the provisions of Section 79(G).

DETERMINATION

6. I have considered the rival affidavits and oral submissions, and the issue for determination is whether the orders sought by the applicant should be granted.
7. It is not in dispute that the trial magistrate delivered the judgment on the 25/9/2024. The appeal ought to have been filed by 25/10/2024. The memorandum of appeal is dated 31/10/2025. There is also an amended memorandum of appeal dated 22nd July 2025. It is obvious that the appeal was filed after the 30-day period requisite for filing an appeal. It is also evident that the appeal was filed without the court's leave.
8. The appellant argues that the delay in filing the appeal is not inordinate and that they had to obtain the relevant documents from the lower court. He was issued with a certificate of delay, attached to the supporting affidavit of 31/10/2024, which states as follows:

CERTIFICATE OF DELAY

“This is to certify that Vincent Wekesa Lazaro, the Petitioner, applied for typed and certified copies of proceedings and judgment in this cause on 2/10/2024, and the same were supplied to him on 30/10/2024.

The period between 2/10/2024 and 30/10/2024 was required for the preparation and delivery of the certified copies of proceedings and judgment.

Dated Sirisia this 30th day of October 2024.”

9. The respondent argues that the applicant cannot rely on the provisions of section 79(G).

10. Section 79(G) of the Civil Procedure Act governs the filing of appeals and provides as follows:

***“Every appeal from a subordinate court to the high court shall be filed within a period of 30 days from the date of the decree or order applied against it, excluding such period anytime which the lower court may certify as having been requisite for the preparation and delivery to the applicant a copy of the decree or order.*”**

11. This section allows the 30 days to be extended by such period as was required to make a copy of the decree or order of the court. The appeal was filed after the 30-day period. Section 79 (G) has a proviso that states as follows;

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

12. I have considered the reasons given by the applicant, the delay was for a day. There was no inordinate delay. In the case cited by the Respondent of Gregory Kiema Kyuma vs Marietta Syokau Kiema (supra) the Court of Appeal noted that the judge had a discretion conferred by the proviso to section 79 (G) to admit the appeal out of time for good and sufficient cause. The applicant has

explained that the delay was not inordinate. The judgment was delivered on the 25th September 2024, the memorandum of appeal was filed on the 31st October 2024, the delay in my view was not inordinate, and the reason given for the delay is persuasive. No prejudice will be caused to the respondent. In the interest of justice, I will allow the appellant to prosecute his appeal.

13. In conclusion, the appellant is granted leave to appeal out of time against the judgment delivered by Hon. R.K. Langat, PM, on 25 September 2024. The appeal filed herein on 30 October is deemed properly filed. Costs shall be in the cause.

**Dated, signed and delivered virtually on the 30th
Day of April 2026.**

R.E.OUGO

JUDGE

In the presence of:

Applicant - Absent

Miss Wanyama - For the Respondent

Wilkister - C/A