Otande & 3 others v Akhonya (Civil Application E159 of 2025) [2026] KECA 762 (KLR) (24 April 2026) (Ruling)

Neutral citation: [2026] KECA 762 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E159 OF 2025

HA OMONDI, JA

APRIL 24, 2026

BETWEEN

BENSON BWAKALI OTANDE .... 1ST APPLICANT

OSEPH OTANDE ONYOLO .... 2ND APPLICANT

PETER SHISIA OTANDE .... 3RD APPLICANT

SHADRACK ANGARA OTANDE .... 4TH APPLICANT

AND

MARGARET ANYONJE AKHONYA .... RESPONDENT

(Being an application for extension of time to file an application for leave to file and lodge an appeal against the judgement of the High Court of Kenya at Kakamega (Musyoka, J.) dated 10th April 2019 in Cause No.3 of 2007)

RULING

1. Josephat Otande Okuku, the deceased died on 3rd May 1988, and was survived by three widows and several children from each house. The applicants were from the 3rd house, whilst the respondent was a daughter from the 1st house. A proposal regarding distribution of the estate provoked a protest in Kakamega High Court Succession Cause No. 3 of 2007, filed by the 2nd applicant, leading to the matter being heard on how the estate ought to be distributed- the applicants claimed that the deceased had left a will, while the respondent maintained that he died intestate.

2. The High Court, in its judgment, held that the deceased died intestate as there was no proof of a will. The said statutory provisions to distribute the estate equally among all beneficiaries (spouses and children) as required by law, where the deceased was in a polygamous setting, following the principle that all children are dependants by law and should be provided for equally in the absence of a valid will.

3. The applicants herein were aggrieved by the judgment and thus instructed their counsel to file an appeal against the same; and indeed, an appeal was duly filed as Kisumu Court of Appeal Civil Appeal No. 65 of 2020. The said appeal was scheduled for hearing on 3rd November 2025 but it then transpired that counsel for the appellant had not sought leave before filing the appeal, resulting in the withdrawal of the same with intent to regularize the position.

4. The applicants in a supporting affidavit sworn on their behalf by Joseph Otande Anyolo, the 2nd applicant appreciate that they are terribly out of time within which to file the intended appeal owing to having first filed an appeal vide Kisumu Civil Appeal 65 of 2020 without leave whereupon the same was withdrawn on 3rd November 2025; that the failure to seek leave then was not deliberate but an oversight by their advocate Ms. R. Omar.

5. The applicants maintain that intended appeal by the applicants' is arguable and meritorious as it contests the distribution of the estate of the deceased; and is core to the administration of the deceased's estate. Further, that the decision sought to be appealed against was in contravention of express statutory provisions allocating shares to dependants who, expressly on oath, renounced their entitlement hence wrongful; and was also based on wrong principles failing to equitably share out the net estate to the interested dependants thereby being unfair and unlawful.

6. To ameliorate the situation, the applicants have by a Notice of Motion dated 24th November 2025 sought leave to appeal as well as an order to enlarge time within which to lodge an appeal against the judgement. They reiterate that the unfortunate occurrences where an appeal was filed as required albeit without leave was an omission not of their own doing of the applicant but that of their legal counsel and that to err is human. They urge this Court not to visit the mistake of counsel on the innocent litigants who had no way to understand the legal requirements of filing an appeal at the court of appeal and relied on their counsel for that. It is also argued that this application has been brought expeditiously after the withdrawal of the appeal.

7. The applicants point out that this is a family matter and the Court ought to grant them a chance to be heard to foster closure for the applicants who may forever live in bitterness against the other party living with a decision they feel aggrieved with. It is also contended that the respondent and other beneficiaries will suffer no prejudice whatsoever as they are well in possession and use of part of the estate, are aware of the issues raised as had been in the impugned appeal and since both parties had gone as far as filing submissions, the said appeal once allowed to be filed out of time, shall be expedited of course with the court's indulgence. Their parting shot is that even though litigation should come to an end, it should end on merit.

8. In opposing the application, the respondent by a replying affidavit dated 29th November 2025, sworn by Margaret Anyonje Akhonya describes the application as misconceived, incompetent, fatally defective and amounts to a gross abuse of the Court process. It is argued that an application for leave to file an appeal in civil matters before this Court should be made within fourteen (14) days after the decision which it is desired to appeal has been made; that the impugned judgment was delivered on 4th April 2019, and the applicants were required seek leave by to appeal yet they failed to do.

9. The respondent contends that it was well within the knowledge of counsel that the purported appeal was withdrawn due to failure to obtain leave to appeal; yet the present application for leave to appeal and extension of time has been brought six (6) years after the date of the original judgment, constituting an inordinate and inexcusable delay. It is also argued that the purported reason for this egregious delay, as "ignorance of the law" and an “"error" on their counsel's part, is not a valid or tenable defence in

law and does not constitute "good and sufficient cause" for the exercise of this Honourable Court's discretion.

10. While acknowledging that the discretion to extend time is not a right for a party but an equitable remedy available only to a deserving party who is not at fault for the time lapse, it is submitted that granting this application would occasion irreversible prejudice to the respondent and disturb the finality of the High Court judgment, upon thereby upsetting the status of affairs enjoyed by the respondent and the other beneficiaries since the year 2019. Further, that public policy dictates that litigation must come to an end (interest rei publicae ut sit finis litium), and condoning such an inordinate delay would encourage indeterminate and stale litigation, particularly in sensitive succession matters.

11. The respondent maintains that the interest of justice demands the timely resolution of disputes, and this application should be dismissed in limine as an abuse of the court process.

12. In the written submissions filed by the firm of Nechesa, Maina and Associates on behalf of the respondents, it is argued that seeking refuge under what she refers to as ‘the oft-invoked but frequently misunderstood concept that mistakes of counsel should not be visited upon innocent litigants’, is not an absolute principle; that the advocate in question was not a lay person navigating unfamiliar terrain but a qualified advocate, fully seized of the law governing appeals from the High Court exercising succession jurisdiction; and the requirement for leave is neither novel nor obscure, and is elementary.

13. Secondly. that, the applicants consciously retained a professional, clothed her with instructions, and entrusted her with conduct of their case; and the advocate owed them a duty of care, skill and diligence, including the duty to conduct proper legal research and comply with mandatory procedural requirements. That her failure to do so amounts not to an excusable slip, but to professional negligence, and ignorance of the law, whether by counsel or client, is not a defence in law.

14. I have carefully perused the record, submissions by counsel and considered the applicable law. The application before this Court is brought pursuant to, inter alia, rule 4 (1), 44 and 45 of the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules provides as follows:

    The Court may, on such terms as may be just, by order, extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

15. Evidently, under Rule 4, this Court has unfettered discretion to extend time for any step intended to be done within the period stipulated by the Rules. This was aptly set out in Paul Wanjohi Mathane vs. Duncan Gichare Mathenge [2013] eKLR where this Court held thus:

    > “The discretion under Rule 4 is unfettered, but it has to be exercised judiciously, not on whim, sympathy or caprice. I take not that in exercising my discretion I ought to be guided by consideration of the factors stated in previous decisions of this Court including, but not limited to, the period of delay, the reasons for the delay, the degree of prejudice to the respondent and interested parties if the application is granted, and whether the matter raises issues of public importance.”

16. In this instance, the period of delay is 5 years from the date the decision was delivered. What was the reason for the delay? The applicant says it was inadvertence on the part of counsel.

17. For a long time, courts held the view that in succession matters, there is no automatic right of appeal to this Court without leave. See Rhoda Wairimu Karanja & Another vs. Mary Wangui Karanja & Another [2014] eKLR which held that:

> " ...under the *law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused with leave of this Court ".

See also John Mwita Murimi & 2 Others vs. Mwikabe Chacha Mwita & Another [2019] eKLR.

18. The issue in contention by the parties is whether the applicant sought leave to appeal at all or within the stipulated timeline. The provisions of rule 41 of the Court of Appeal rules contemplate the filing of the application for leave within 14 days of the impugned ruling as follows:

In a Civil matter-

a. where an appeal lies with the leave of the superior court, application for such leave may be made:

   i. informally at the time when the decision which it is desired to appeal is given; or

   ii. by a motion..., within 14 days of such decision

b. Where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal.

19. There have been recent developments following the pronouncements by the Supreme Court Eliud Mwendia Wanvdi vs. Kevin Wanjohi Muchira in Petition No E029 of 2024, [2026] KESC 29 (KLR) where this Court (differently constituted) had held that an appeal to the Court of Appeal from decisions of the High Court rendered in exercise of its original jurisdiction in succession matters lies only with the leave of the court. As no leave had been sought or obtained, the court found the appeal to be incompetent and accordingly struck it out. On appeal to the Supreme Court, challenging the interpretation whether an appeal lies to this court (Court of Appeal) in succession matters emanating from the High Court in its original jurisdiction as of right and without leave. The Supreme Court burst the bubble with the following statement:

> " We therefore come to the inevitable conclusion that there is no legal basis for imposing a requirement of leave as a prerequisite for lodging an appeal to the Court of Appeal against a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter. Such a requirement, not being anchored in either *the Constitution* or statute, cannot properly be sustained.
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> ....
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> This finding inevitably leads us to the closely related question of whether a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter is appealable as of right to the Court of Appeal. It is notable that Section 50(1) of the *Law of Succession Act* provides for an automatic right of appeal to the High Court from decisions of Resident Magistrates' Courts. The question that arises is whether, in matters originating before the High Court, a litigant should be placed in a less favourable

position. To countenance such a distinction would raise concerns under Article 27(1) of *the Constitution*, which guarantees equality before the law and the equal protection and benefit of the law. It would be incongruous for litigants in succession matters to enjoy a right of appeal where proceedings originate in subordinate courts, but to be denied a corresponding avenue where the High Court is the court of first instance.

....

Accordingly, and in the absence of any express statutory limitation, we hold that a decision of the High Court rendered in the exercise of its original jurisdiction in a succession matter is appealable to the Court of Appeal as of right. Any contrary position would be inconsistent with *the Constitution*'s transformative vision of a fair, accessible, and non-discriminatory system of justice.

......"

20. Rule 4 of the Court of Appeal Rules does not provide for factors the court ought to consider in an application for extension of time but courts have devised appropriate principles to be applied in achieving a 'just' decision in the circumstances of each case. The case of Leo Sila Mutiso vs. Hellen Wangari Mwangi [1999] 2 EA 231 which is the locus classicus, laid down the parameters to be taken into account in deciding whether to grant an extension of time to include the length of the delay, the reason for the delay; the chances of the appeal succeeding if the application is granted; and, the degree of prejudice to the respondent if the application is granted.

21. In this instance, the applicants had duly timeously filed an appeal, but was strangled in the process by what has been the prevailing jurisprudence. I need not say more, the applicants need not seek leave to appeal, and all they need is to approach the Court, and seek setting aside of the earlier direction (misdirection?) and set their appeal for hearing.

    I need not say more.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF APRIL, 2026.

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR