



REPUBLIC OF KENYA



**Aboge v Aboge & 2 others (Civil Application E169 of 2024)  
[2025] KECA 612 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KECA 612 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E169 OF 2024  
LK KIMARU, JA  
MARCH 28, 2025**

**BETWEEN**

**LUCY WAMBUI ABOGE ..... APPLICANT**

**AND**

**BEATRICE WAMUYU ABOGE ..... 1<sup>ST</sup> RESPONDENT**

**ORPHA ADONGO ABOGE ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE ABICH OWALO ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for leave to appeal from the Judgment of the High Court of Kenya at Migori (R. Wendoh, J) dated 20th October, 2023 in HC. Succ. Cause No. 405 of 2014)*

**RULING**

1. The Application is what may be referred to as an “omnibus” application. The applicant, Lucy Wambui Aboge moved this Court by notice of motion made, inter alia, under Rules 5(2)(b), 41(1)(b), 45(3) and (4) and 55(2)(b) of the Court of Appeal Rules, 2022; and Rule 73 of the Probate and Administration Rules seeking the following Orders from the Court:
  - “2. Leave be and is hereby granted to the applicant to file Appeal to the Court of Appeal against the judgment of the Hon. Lady Justice R. Wendoh dated and delivered on 20<sup>th</sup> October, 2023 in Migori HCC Succ. Cause No. 405 of 2014;
  3. There be a stay of execution of the judgment of the Hon. Lady Justice R. Wendoh dated and delivered on 20<sup>th</sup> October, 2023 in Migori HCC Succ. Cause No. 405 of 2014 pending the hearing of the appeal to the Court of Appeal.”



2. The application is supported by the grounds stated on the face of the motion and the annexed affidavit of the applicant. In summary, the applicant states that she was aggrieved by the mode of distribution adopted by the trial court in distributing the assets that comprise the estate of the deceased to the beneficiaries. She complains that the mode of distribution adopted by the court was unfair, unsatisfactory and discriminatory against her, as one of the beneficiaries of the estate of the deceased.
3. The applicant had sought the leave of the trial Court to appeal against the said decision as required under section 50(1) of the *Law of Succession Act* but leave was denied by the High court on 31<sup>st</sup> October, 2023. It is on this basis that the applicant is seeking the leave of this Court to lodge an appeal to this Court. She craves for the leave of this Court so that the issues, which she contends are arguable, may be ventilated before this Court on appeal.
4. The respondents were served with the application. They were also notified by Court of the date the application was scheduled for hearing before this court. They did not file a response to the application. Neither did they file written submissions as required by rules of this Court. The application is therefore unopposed.
5. As stated earlier in this Ruling, the applicant presented to the Court an “omnibus” application. An omnibus application is an application where an applicant has sought two prayers, one of which cannot be granted by the Court sitting as a single Judge. In the present application, in prayer (3) of the application, the application sought to be granted an order of stay of execution of the judgment and decree of the trial court. That prayer cannot be granted by a single Judge of the Court. It can only be granted by a full bench of this Court as provided by Rule 55 of the Court of Appeal Rules which states that:

“(1) Such application, other than an application specified in sub rule (2), shall be heard by a single Judge. Provided that such application may be adjourned by the Judge for determination by the Court.

(2) The rule shall not apply to-

(a) ....

b. an application for stay of execution, injunctions or stay of further proceedings.

c. ...”

6. It is therefore clear that this Court, sitting as a single Judge, does not have jurisdiction to consider prayer (3) sought by the applicant. This Court will therefore not render a decision in respect of the same. The applicant shall be at liberty to list that prayer for determination by the full bench of the Court.
7. As regards prayer (2), Rule 41(1)(b) of the Court of Appeal Rules 2022 provides thus:

“In a civil matter-

(b) Where an appeal lies with leave of the Court, application for such leave shall be made-

i. In the manner laid down in rules 44 and 45 within fourteen (14) days after the decision against which it is desired to appeal; or



ii. Where application for leave has been made to the superior court and refused, within in fourteen days after that refusal.”

8. The trial court declined to grant leave to the applicant to appeal to this Court on 31<sup>st</sup> October, 2023. The present application was

filed on 12<sup>th</sup> November,2024. This is more than one (1) year since the applicant was required to have filed the application. In the circumstances, the applicant was required, in the first instance, to seek extension of time to be granted leave to file the present application because the same was filed beyond the fourteen (14) days period provided by the Rules of this Court. The application is therefore incompetently before this Court.

9. In the premises therefore, the application is hereby ordered struck out but with no orders as to costs. The applicant shall be at liberty to appropriately move this Court as so advised.

10. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF MARCH, 2025.**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

