



REPUBLIC OF KENYA



In re Estate of Manase Otieno Eshitubi (Deceased) (Civil Application E010 of 2025) [2025] KECA 713 (KLR) (25 April 2025) (Ruling)

Neutral citation: [2025] KECA 713 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E010 OF 2025
HA OMONDI, JA
APRIL 25, 2025**

IN THE MATTER OF THE ESTATE OF MANASE OTIENO ESHITUBI [DECEASED]

BETWEEN

ISMAEL O OTIENO 1ST APPLICANT

JOHNSTONE N OTIENO 2ND APPLICANT

AND

JOHN NAMAI OTIENO 1ST RESPONDENT

FESTO A OTIENO 2ND RESPONDENT

(Being an application for leave to file and serve a Notice of Appeal and a Record of Appeal out of time from the ruling of the High Court of Kenya at Kakamega (W. Musyoka, J.) dated 18th February 2022 in Cause No. 105 of 2003)

RULING

1. By a Notice of motion dated 10th February, 2025, the applicant seeks that:
 - a. The time limit for leave granted to file an appeal arising out of the Ruling on distribution in succession proceedings in Kakamega High Court Succession Case No. 105 of 2003; Re In the Estate of the late Manase Otieno Eshitubi [Deceased] be enlarged or extended within such time as this Court shall deem fit and reasonable,
 - b. subsequent to grant of extension of leave in, the time limited for the filing and service of a Notice of Appeal be enlarged or extended to allow the filing and service of the Notice of Appeal arising from the Ruling on distribution in succession proceedings in Kakamega High Court Succession Case No. 105 of 2003; Re In the Estate of the late Manase Otieno Eshitubi [Deceased] within such time as this Court shall deem fit,



- c. there be a stay of execution and implementation of the Ruling and resultant orders of Hon. Mr. Justice William Musyoka, J, on distribution in the succession cause, pending the hearing and determination of the Intended Appeal.
2. The application is supported by the affidavit dated 10th February 2025, sworn by Johnstone N. Otieno in which he sets out his grievance at the mode of distribution adopted by the trial court in distributing the assets that comprise the estate of the deceased to the beneficiaries.
 3. The decision which was rendered on 18th day of February 2022 granted any party aggrieved, twenty-eight (28) days to appeal. In the meantime, the respondents moved the trial court through a Notice of Motion application and obtained orders on the 30th day of July 2024 for a second survey of land parcel Marama/Lunza/247, the subject matter of the succession proceedings.
 4. Their lament was that those orders were obtained without the input of the other beneficiaries; and on advice of their counsel, their grievance found expression in an application for review vide a Notice of Motion application dated the 16th day of September 2024. A ruling dismissing the application for review was delivered on the 27th day of January 2025; and the Applicants were advised to file an appeal against the Ruling on distribution of the estate to as had been earlier ordered.
 5. The applicants explain that they had been tied down with the post judgment applications and a tussle with the respondents on the ground on implementation of the survey report; and that these exercises delayed filing of the substantive appeal in the matter; that since there is no automatic right of appeal in succession matters as provided leave was rightfully granted by the trial Judge, but the time has lapsed; and the ruling on review of the orders of the trial court was only just recently rendered hence the delay in filing the instant application.
 6. The respondents were 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.
 7. The applicant has presented to this Court an “omnibus” application. seeking two prayers, one of which cannot be granted by the Court sitting as a single Judge. In the present application, the prayer seeking an order of stay of execution of the judgment and decree of the trial court 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 signal 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) ...”
 8. Clearly this Court, sitting as a single Judge, lacks jurisdiction to consider the prayer for stay. This Court will therefore not render a decision in respect of the same. The applicants are at liberty to list that prayer for determination by the full bench of the Court.



9. As regards the prayer for extension of the time limited for filing and service of a Notice of Appeal, Rule 41(1)(b) of the Court of Appeal Rules 2022 provides as follows:

“In a civil matter-

(b) Where an appeal lies with leave of the Court, application for such leave shall be made-
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 Where application for leave has been made to the superior court and refused, within in fourteen days after that refusal.

10. The decision by Musyoka, J, was rendered on 18th February 2022, and 2 days given within which to lodge an appeal, between that date and 30th July 2024 when the respondents moved the court for a second survey, it would appear that the applicants were in deep slumber, which they only got to wake up from on 16th September 2024 to contest the outcome of the orders the respondents had obtained. It is therefore not entirely true that the post judgment applications were the cause of delay, those came up years later after the period within which to file an appeal had lapsed.

11. Although this Court has unfettered discretion on whether to extend time or not, that discretion must be exercised judiciously as was set out in *Leo Sila Mutiso vs. Rose Hellen Wangari Civil Application No. 251 of 1997* (unreported). I hold the view that the delay has been inexcusable, taking into consideration that this matter began in the High Court in the year 2003; and twenty-two years later it is still dabbling in gymnastics of delay. I am persuaded that this is an instance where equity must not aid the indolent, this Court therefore does not consider it judicious to exercise its discretion in favour of the applicants.

Consequently, the application is dismissed. There shall be no orders as to costs.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL, 2025.

H. A. OMONDI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

