



**Wafula v Wekunda & 2 others (Civil Application E085 of 2024)  
[2025] KECA 978 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KECA 978 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E085 OF 2024  
LK KIMARU, JA  
MAY 23, 2025**

**BETWEEN**

**CHRISANTUS JUMA WAFULA ..... APPLICANT**

**AND**

**WILLIAM WAMALWA WEKUNDA ..... 1<sup>ST</sup> RESPONDENT**

**DONALD OKUMU SIKUNYILI ..... 2<sup>ND</sup> RESPONDENT**

**BEN SIMIYU WAFULA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for stay of execution from the ruling of the High Court of Kenya at Bungoma (R. Ougo, J.) dated 12th March 2024 in Succ. Cause No. 64 of 1998)*

**RULING**

1. The applicant Chrisantus Juma Wafula was aggrieved by the Ruling rendered by the High Court sitting at Bungoma (R. Ougo, J.) delivered on 12<sup>th</sup> March 2024 in respect of estates of Sikunyili Lusike Mulia (deceased) and Stephen Wekunda (deceased). He wishes to appeal against the said decision to this Court. In that regard, he has moved this Court in a notice of motion, inter alia, under Rule 4 of the Court of Appeal Rules, seeking to be granted leave to file the memorandum and the record of appeal out of time.
2. The applicant explained that after the said ruling was delivered, he timeously lodged the notice of appeal on the same day i.e on 12<sup>th</sup> March 2024. However, his effort to secure typed and certified copies of the proceedings and judgment in time were frustrated by lethargy on the court's registry. The applicant states that despite requesting for the typed copies of proceedings and judgment immediately after the ruling was delivered, the same was not availed to him in time. He wrote several letters to the court with a view of eliciting positive response but to no avail. He annexed copies of the said letters in the affidavit in support of the application as proof of his diligence.



3. The applicant laments that by the time the said typed copies of the proceedings were made available to him, the period in which he was required to have filed the memorandum and record of appeal had elapsed. It is for the above reasons that the applicant craves for this Court's exercise of discretion to allow him extension of time to file the said pleadings out of time.
4. The application is opposed. The 2<sup>nd</sup> respondent swore a replying affidavit to the application. In the said affidavit, the 2<sup>nd</sup> respondent essentially set out the litigation history of the Succession dispute involving the applicant and the respondents. He contends that the applicant's application has no merit because the ruling delivered by the High Court only substituted the deceased's parties to the Succession Cause and did not delve into the merits or otherwise of the succession dispute. In any event, he pointed out that the decision to distribute the estate of Sikunyili Lusike Mulia (deceased) was made on 5<sup>th</sup> October 2017 and no party appealed against the said decision. In essence, the respondents are saying that this Court should not exercise its discretion in vain and in aid of the applicant who wants to unnecessarily prolong litigation for no good reason.
5. This Court has considered the application, the replying affidavit, the written submissions filed by the respondents and the cited cases. The principles to be considered by the court in determining applications under Rule 4 of the Court of Appeal Rules are well settled. This Court has unfettered discretion to extend time, for any steps that is time bound by the Rules. The discretion is, however, not exercisable capriciously or whimsically but judiciously. In *Leo Sila Mutiso vs. Rose Hellen Mwangi* [1999] 2 EA 231 the court held that some of the considerations to be taken into account in such applications include, the length of delay, the reason for delay, the chances of the appeal succeeding if the application is granted and the degree of prejudice to the respondents.
6. In the present application, it is clear to this Court that the applicant is desirous of exercising his right of appeal to this Court. He timeously filed the notice of appeal. He requested for the certified and typed copies of the proceedings in time. He diligently pursued the typing of the proceedings with the Deputy Registrar of the High Court. The several correspondences that he wrote to the trial court is sufficient evidence of his desire to proceed with his appeal. The respondents have not challenged this assertion by the applicant. The applicant has therefore given persuasive reason for the delay in lodging the memorandum and the record of appeal in time. The length of delay is not that long as to attract opprobrium from the court.
7. The Court will not delve into the question whether the intended appeal is meritorious or not suffice for this Court to state that the intended appeal does not, on the face of it, appear to be frivolous. Any prejudice to be suffered by the respondents will be compensated by an award of costs.
8. In the premise therefore, the applicant's application has merit and is allowed. The applicant is granted extension of time to file and serve the memorandum and record of appeal. The same shall be filed and served upon the respondents within twenty one (21) days of today's date. The respondents shall have the costs of the application.

**DATED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> DAY OF MAY 2025.**

**L. KIMARU**

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**JUDGE OF APPEAL**

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

Signed



Deputy Registrar

