



REPUBLIC OF KENYA



KENYA LAW
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**Aboge v Aboge & 2 others (Civil Application E057 of 2025)
[2025] KECA 1285 (KLR) (11 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1285 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION E057 OF 2025
P NYAMWEYA, JA
JULY 11, 2025**

BETWEEN

LUCY WAMBUI ABOGE APPLICANT

AND

ORPHA ADONGO ABOGE 1ST RESPONDENT

BEATRICE WAMUYU ABOGE 2ND RESPONDENT

GEORGE ABICH OWALO 3RD RESPONDENT

(An application for enlargement of time to apply for leave to appeal against the judgment of High Court of Kenya at Migori (R. Wendo J.) dated and delivered on 20th October 2023 in Migori HCC Succ Cause No 405 of 2014)

RULING

1. Lucy Wambui Aboge, the applicant herein, intends to lodge an appeal against the judgment delivered by the High Court at Migori (R. Wendo J.) on 20th October 2023 in Migori HCC Succ Cause No. 405 of 2014 on the distribution of the matrimonial property of the estate of George Aboge Owallo (Deceased). The applicant is one of the widows of the deceased. She has accordingly filed an application in this Court by way of a Notice of Motion dated 8th April 2025 seeking orders that the time to file an application for leave to appeal against the said judgment is enlarged for a period of 14 days from the date of the order, or for such other period as the Court deems just and equitable. The application is expressed as being brought pursuant to Rule 41 (1) (b), 44 (1) & (2) and 55 (1) of the [Court of Appeal Rules](#), 2022; Rule 73 of the [Probate and Administration Rules](#); and Article 159 (2) (a) (b) (d) and (e) of the [Constitution](#) of Kenya, 2010.
2. The application is supported by an affidavit sworn by the applicant on 8th April 2025, in which she asserts that under the [Law of Succession Act](#), there is no express automatic right to appeal to the Court



- of Appeal, and an appeal would only lie with leave of the High Court or Court of Appeal. She asserted that on 31st October 2024, her application for leave to appeal was denied by the High Court in a ruling delivered by A. Onginjo J. Further, that her advocate inadvertently made a typographical error in a subsequent application dated 12th November 2024 lodged in this Court, being Civil Application No. E169 of 2024, by indicating that the date of delivery of the above- mentioned ruling by A. Onginjo J. was 31st October 2023 instead of 31st October 2024. Consequently, that the application was struck out by this Court for being incompetent in a ruling delivered on 28th March 2025.
3. Accordingly, the instant application for enlargement of time is necessitated by the need to apply afresh for leave to appeal, and the applicant averred that she ought to have a fair opportunity to present her case before the Court of Appeal, and not be locked out of the temple of justice due to the inadvertent error of her counsel. The applicant set out various grounds of appeal in her application which she averred merit serious considerations by this Court and which make her intended appeal arguable, and further averred that she will suffer irreparable loss and prejudice if not heard, as she will lose part of her inheritance arising from the imminent distribution of the Estate of the deceased. Further, considering the sentimental value of matrimonial homes to spouses and inheritance to beneficiaries, this loss cannot be compensated by damages. On the other hand, that the Respondents stood to suffer no prejudice if the matter is heard expeditiously and the orders sought are granted. additionally, this being a succession cause involving family members, she prays that security for costs should not be a consideration for the instant application.
 4. The applicant identified four legal issues for determination in her written submissions dated 7th May 2025, namely: whether sufficient cause for the delay has been demonstrated; whether the extension of time to file an appeal is merited; whether the respondents will suffer prejudice if the extension is granted; and whether the intended appeal has an arguable chance of success, and reiterated the averments made on the four issues. On the sufficient cause for delay, the applicant submitted that the inadvertent error by counsel in indicating the wrong date when drafting the application constituted sufficient case as recognised in *Richard Nchapu Leiyagu v IEBC & 2 others* [2013] eKLR, and her right to appeal should not be sacrificed on account of a technicality. Reference was also made to Rule 4 of the *Court of Appeal Rules* and the decision of the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR that judicial discretion should favour substantive justice and procedural technicalities should not override a party's right to be heard on merit.
 5. Orpha Adongo Aboge, the 1st respondent herein and also a widow of the deceased, opposed the application in a replying affidavit she swore on 12th April 2025. The 1st respondent deponed that the subject succession battle began back in 2014, over a decade ago, and it was not the first time that the Applicant was seeking to appeal against the said judgment, having initially filed Civil Application E169 of 2024 which was struck out and is thus a serial litigant given the numerous applications and court cases she has filed regarding the estate of their late husband. Therefore, that the instant application is an afterthought aimed at continuing to frustrate the respondents from enjoying the fruits of the judgement by the High Court. Further, the estate of their late husband was fairly distributed by the High Court, and the applicant is out to frustrate the co-wives from proceeding to share the estate, and the application is intended to pave way for the applicant to solely continue collecting rents for rooms built on LR. No. Aguthi/Gatitu/1744 that were equally distributed. It was therefore in the interest of justice that the instant application be denied.
 6. The 1st respondent reiterated these averments in written submissions dated 11th May 2025, and added that the power to enlarge time and/or extend time is discretionary and should be exercised judiciously after weighting the reasons for not filing the application for leave to file an appeal out of time. Reliance



was placed on the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* (1999) 2 EA 231 on the parameters that apply under Rule 4 of the Court of Appeal Rules.

7. Beatrice Wamuyu Aboge and George Abich Owalo, the 2nd and 3rd respondents herein, did not file any responses to the application.
8. I have considered the arguments put forth by the applicant and 1st respondent, and it is prudent to emphasise and clarify at the outset that the application before the Court for determination is for extension of time and the Court will therefore restrain from a consideration of any of the merits or otherwise of the respective parties' cases that were averred to. The principles that apply to an application for extension of time, which is made pursuant to Rule 4 of the *Court of Appeal Rules* of 2022, have been the subject of many decisions of this Court and the Supreme Court of Kenya. The Court of Appeal confirmed in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997 (ur) that the decision whether or not to extend time for appealing is essentially discretionary, taking into account the length of delay and reason for the delay.
9. In the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, Supreme Court of Kenya Application No. 16 of 2014, the Supreme Court set down the underlying principles that a Court should consider in exercising its discretion as being:
 - i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 - ii. A party who seeks an extension of time has the burden of laying a basis to the satisfaction of the court;
 - iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
 - iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 - v. Whether the respondents will suffer any prejudice if the extension is granted;
 - vi. Whether the application has been brought without undue delay; and
 - vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."
10. The Supreme Court of Kenya also pronounced as follows in the case of *Andrew Kiplangat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR:

“the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”
11. I have perused the copy of the ruling of the High Court dismissing the applicant’s application for leave to appeal annexed to the applicant’s supporting affidavit, and note that it was indeed delivered on 31st October 2024. I also note that this date of delivery is not controverted by the respondents. Rule 41(1) (b) of the *Court of Appeal Rules* 2022 in this respect provides that where an appeal lies with leave of the Court in a civil matter, the application for such leave shall be made within fourteen (14) days after the



decision against which it is desired to appeal, or where an application for leave has been made to the superior court and refused, within fourteen days after that refusal.

12. The instant application for extension of time was filed approximately five months after the delivery of the ruling by the High Court. The applicant's explanation for the delay is that due to an inadvertent error on the part of her counsel in an earlier application for leave to appeal made to this Court in Civil Application E169 of 2024, the date of the delivery of the ruling by the High Court was indicated as 23rd October 2023 instead of 23rd October 2024. It is not in dispute that the applicant did file the said application in this Court, and that the ruling on the said application was delivered by this Court on 28th March 2025.

13. It is evident from the ruling delivered by this Court that the date of delivery of the ruling of the High Court, as indicated in the said application, was the main consideration taken into account in striking out the application. The learned Judge of Appeal noted as follows in this respect:

“8. The trial court declined to grant leave to the applicant to appeal to this Court on 31st October, 2023. The present application was filed on 12th 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.”

14. Therefore, in effect, were it not for the error made by the applicant's advocates as regards the date of delivery of the ruling by the High Court, the application for leave to appeal lodged in this Court in Civil Application E169 of 2024 was otherwise filed in time, having been filed on 12th November 2024, which was 12 days after the delivery of the ruling by the High Court on 31st October 2024. It is also notable the instant application was filed on 8th April 2025, about 10 days after that the delivery of the ruling by this Court on 28th March 2025.

15. I am therefore persuaded that sufficient cause for the delay in filing the application for leave has been demonstrated, and that the delay was not inordinate in the circumstances. I am also of the view that the respondents will not be unduly prejudiced as they still have opportunity to raise the issues they have raised during the hearing of the substantive application for leave to appeal.

16. Consequently, the application dated 8th April 2025 is found to be merited, and the applicant is accordingly granted leave to file an application for leave to appeal out of time, within fourteen (14) days of the date of delivery of this ruling. As this is a family-related dispute, there shall be no order as to the costs of the application.

17. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

P. NYAMWEYA.

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JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed



DEPUTY REGISTRAR.

