



**Wabomba v Wanyonyi (Family Miscellaneous Civil Case
E005 of 2024) [2025] KEHC 11318 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11318 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
FAMILY MISCELLANEOUS CIVIL CASE E005 OF 2024**

MS SHARIFF, J

JULY 30, 2025

BETWEEN

ODILIA WABOMBA APPLICANT

AND

MAXIMILLA NAKHUMICHA WANYONYI RESPONDENT

RULING

1. The applicant herein, Odilia Wabomba, has approached this court vide a Notice of Motion dated 25.7.2024 which is supported by her own affidavit of even date and is premised on the provisions of article 159 of *the constitution* of Kenya 2010, Order 50 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules. She also invokes the provisions of Section 79 G, 3A and 63 (e) of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. The applicant craves for the following prayers:
 1. Spent
 2. Spent
 3. Spent
 4. That the honourable court be pleased to issue interim stay of execution of and/or any further proceedings in Bungoma Succession Cause No. E182 of 2023; In the Matter of the Estate of Paul Wabwile Nasokho (Deceased) and Odilia Wabomba & Another pending the hearing and determination of the appeal.
2. The application is grounded on reasons disclosed on the face of it and the ones contained in the supporting affidavit. The applicant avers that the application herein and her already filed memorandum of appeal, were filed without undue delay given that the impugned ruling was delivered on 25.5.2024 and the memorandum of appeal was filed on 26.6.2024 while this application was filed on 25.7.2024.



3. The applicant deposes that the delay in lodging her appeal within the 30 days' limitation period was occasioned by lack of communication of the delivery of the impugned ruling by her then advocates on record and that she only became aware of the ruling on 22.7.2024.
4. It is the applicant's position that she has an arguable appeal which has high chances of success. She maintains that the impugned ruling made orders that are punitive towards her without according her an opportunity to be heard wherefore, the tenets of natural justice were breached and that she stands to suffer irreparable loss in the event that the execution of the said ruling is not stayed. Further that she has received advice from her advocates to the effect that she has a right to have the ex-parte orders set aside so as to enable her defend the respondents' application, whose ruling she now impugns.
5. This application has met resistance from the respondent by way of an affidavit in reply sworn by Maximilla Nakhumicha Wanyonyi on 4th October 2024. The respondent points out that this court cannot grant final orders at the interim stage pending the determination of this application as so to do will negate the need to hear this application.
6. The respondent deposes that contrary to the allegations made by the applicant, her (Respondent's) application dated 8.5.2024 was heard inter partes and the applicant duly filed a replying affidavit in opposition thereto and submissions through the Wekesa P advocate. Further that on 29.5.2024 when the ruling to the respondents' said application was delivered, the applicant was present virtually and her advocate had instructed M/S Masiga Wainaina & Associates Advocates to hold his brief wherefore the applicant cannot feign ignorance of the ruling when she in fact she had due knowledge of it's delivery but opted to sleep on her right to appeal within time..
7. The respondent maintains that the distribution as made by the subordinate court was fair as it distributed the properties of the estate of the deceased at 50:50 in favour of the two household yet the Applicant had separated from the deceased since 2007.
8. The respondent further deposes that she is jobless and has young children who need maintenance unlike the applicant who is gainfully employed and whose children are grown up. That the respondent and her children stand to suffer irreparable loss if stay orders are granted as she should would then be restrained from accessing her share of the monies in the accounts of the deceased.
9. The respondent deposes that the delay by the applicant in moving this court has not been adequately explained and that the alleged negligence of the applicant's counsel ought not be visited upon the respondent. Further that equity aids the vigilant and not the indolent.
10. Parties herein opted to rely on their respective affidavits in support and in reply.

Legal Analysis.

11. The operative Section 79 G of the *Civil Procedure Act* CAP 21 Laws of Kenya prescribes a limitation period of 30 days for filing of an appeal against a decision of the subordinate court to the High court, with a rider that an appeal can be admitted out of time when an applicant satisfies the court of good and sufficient cause for the delay.
12. The grant of leave to file an appeal out of time is an exercise of unfettered discretion by a Judge based on cogent reasons and not on whim or caprice. When considering an application for enlargement of time to lodge an appeal, this court must take into account the following factors: -
 - i. The length of the delay.
 - ii. The reasons for the delay.



- iii. The probability of success of the unintended appeal.
 - iv. The degree of prejudice to the respondent if the leave is granted.
13. This court is by virtue of the provision of article 163 (7) of *the Constitution* of Kenya 2010 bound by the decision of the Supreme Court. The Principles applicable in an application for leave to file an appeal out of time were well enunciated by the Supreme Court in the case of Nicholas Kiptoo Korir Arap Salat -Vs- IEBC & 7 others [2014] eKLR as outlined hereunder:
- “The underlying principles a court should consider in exercise of such discretion should include: -
- a. Extension of time is not a right of any party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
 - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-by-case basis;
 - d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
 - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
 - f. Whether the application has been brought without undue delay.
14. It is trite law that a party is bound by its own pleadings and so is the Court and that any evidence adduced by a party that does not align to the pleadings goes to no issue. Prayer No. 3 of the applicants’ application craves that this court be pleased to enlarge time for the appellant to file her appeal out of time and the court be pleased to admit the memorandum of appeal filed, pending the hearing and determination of this application. The Respondent has correctly stated that this court cannot grant final orders at an interim stage and indeed this court did not accept the applicant’s invitation to do so at the ex-parte stage. There is thus no substantive prayer made for enlargement of time. This court cannot grant that which has not been sought for in the applicant’s application.
15. The applicant’s only surviving prayer is prayer No. 4 which seeks for an order of interim stay of execution and/or further proceedings in Bungoma Succession Cause No. E182 of 2023: Re Estate of Paul Wabwile Nasokho (deceased) pending the hearing and determination of the appeal.
16. It is a misnomer for the applicant to crave for orders of stay of execution and of proceeding of a case whose complete citation she has not disclosed; it is not the business of this court to engage in conjecture and supposition. A party’s application must speak for itself. In any event there is no competent appeal that the applicant has so far filed wherefore her prayer for orders of stay of execution pending the hearing and determination of the appeal herein is an absurd one.
17. Premised upon the reasons stated hereinabove I need not dwell on whether the applicant has met the threshold for grant of leave to file an appeal out of time.
18. In conclusion, I do find that the application herein is devoid of merit, is unsustainable and I thus dismiss it with costs to the respondent which I assess at Ksh 15,000/-.



19. This file is hereby marked as closed.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 30TH DAY OF JULY 2025.

M.S. SHARIFF

JUDGE

