



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of the Hamisi Shaban Ali (Deceased) (Family Appeal
E070 of 2024) [2025] KEHC 3045 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3045 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E070 OF 2024
G MUTAI, J
MARCH 14, 2025**

BETWEEN

**RAWIYA HAMISI MISELEMANI 1ST APPELLANT
FATMA MWINJAKA JUMA 2ND APPELLANT
SHAABANI SHANDALA 3RD APPELLANT
DAVID MKUZI 4TH APPELLANT
MWANAIDI SHABAN 5TH APPELLANT
NEEMA MBEYU 6TH APPELLANT**

AND

**ALI HAMISI 1ST RESPONDENT
RAJAB HAMISI 2ND RESPONDENT
SHABANI HAMISI 3RD RESPONDENT**

RULING

1. The decision whose delivery is the subject of this appeal was delivered on 9th October 2024 by the Hon A J Ishaq, Principal Kadhi. Being aggrieved, the appellant/applicants filed a Memorandum of Appeal dated 18th November 2024, vide which they sought to have the impugned decision set aside, quashed and or overturned.
2. The appellant/applicants also filed a Notice of Motion dated 29th November 2024, vide which they sought a stay of execution of the said decision pending appeal.



3. In response, the respondents filed a notice of preliminary objection dated 7th December 2024, vide which they challenged the appeal on the grounds that it was filed out of time and without the leave of the court.
4. There is no doubt that the preliminary objection raises pure questions of law. This Court is not called upon to inquire into contested facts. Thus, the preliminary objection was validly raised. The Court of Appeal of Eastern Africa stated in *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696 that: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
5. The basis of the objection is that the appeal was filed outside the time allowed for filing an appeal by Section 79G of the *Civil Procedure Act* and that the impugned motion was filed without instructions of the 1st appellant.
6. The preliminary objection was canvassed by way of written submissions. The submissions of the respondent are dated 13th January 2025. The respondent's counsel urged that the appeal was filed out of time. He urged, relying on the court's decision in *Kyule v Gitaari* [2024] KEHC 5819 (KLR), that the same should be struck out for being improperly before the court.
7. In the submissions dated 4th February 2025, the appellants/applicants' counsel conceded that the appeal should have been filed within 30 days. She urged that the delay of 10 days was not inordinate and should not drive the appellants/applicants out of the seat of justice. Counsel relied on the case of *Kamlesh Mansukhlal Damki Pattni vs Director of Public Prosecution & 3 Others* [2015]eKLR in support of his contention that the court ought not to penalize the appellants/applicants for the delay.
8. I have considered the submissions of the parties and must now make my determination. The provision of Section 796 is very clear as to when an appeal may be filed. It is not in doubt that the appeal was filed out of time and that no leave to file the appeal out of time was sought prior thereto. The instant appeal, therefore, offends section 79G of the *Civil Procedure Act* and is, for that reason, struck out.
9. In my view, provisions of section 79G of the *Civil Procedure Act* are not moral exhortations which the appellants/applicants may disregard. The said section exists to ensure that the trial process is fair. By striking out the appeal, this court isn't paying undue heed to procedural technicality. Rather, it is ensuring that the trial process is fair and predictable.
10. The orders that therefore commend themselves to me are that: -
 - a. The appeal is struck out; and
 - b. Each party is to bear his/her/their own costs.
11. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 14TH DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI
JUDGE



In the presence of:-

Ms Gatimu, holding brief for Mr Mwanzia, for the respondents;

No appearance for the applicants; and

Arthur – Court Assistant.

