



**Rutto & another v Kemboi (Civil Appeal E1437 of 2023)  
[2025] KEHC 12718 (KLR) (Civ) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12718 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1437 OF 2023**

**DKN MAGARE, J**

**SEPTEMBER 18, 2025**

**BETWEEN**

**PATRICK K RUTTO ..... 1<sup>ST</sup> APPELLANT**

**AFRICAN MEDICAL & RESEARCH FOUNDATION ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HOSEA KIPYEGO KEMBOI ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal from the judgment and decree of Hon. B.C. Mulemia (PM) delivered in Nairobi Milimani Commercial Courts, Civil Case No. E1244 of 2022 delivered on 11.08.2022. The appellants were the defendants in the court below.
2. The court made the following orders on 11.08.2023:
  - a. The appellants were wholly jointly and severally liable
  - b. General damages Ksh. 1,000,000/=
  - c. Special damages Ksh. 5,000/=
  - d. Future medical costs Ksh. 150,000/=
  - e. Physiotherapy consultations after treatment Ksh. 20,000/=
3. The Appellant was aggrieved and filed a Memorandum of Appeal on 19.12.2023. I have perused the file and noted that the appeal was filed out of time. I cannot see the order granting leave on the CTS or



in the record of appeal. In spite of humongous submissions being filed, there is no valid appeal before me. Section 79(g) of the Civil Procedure Act provides as follows:

Time for filing appeals from subordinate courts Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time

4. The court cannot by craft assume jurisdiction it does not have. The said jurisdiction flow from section 79(g) of the Civil Procedure Act. Without such requisite appeal, the court has nothing to hear. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

5. Having found that the appeal was filed out of time, then what does the court do, in the circumstances? The law in respect of what the court does is equally well settled. In Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Nyarangi JA, as he then was stated as doth;

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.



6. In effect there is no valid appeal before me. The appeal is consequently struck out. The next question is costs of the struck out appeal. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

7. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

“It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.”

8. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

9. The Respondent defended the appeal. He is entitled to costs of Ksh. 95,000/= since costs follow the event.

### **Determination**

10. The upshot of the foregoing is that I make the following orders: -



- a. The appeal was filed out of time without leave. Consequently, the appeal is struck out with costs of Ksh. 95,000/=.
- b. 30 days stay of execution.
- c. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

Represented by: -

ROM Law Advocates for the Appellants

V.K. Yegon & Co. Advocates for the Respondent

Court Assistant – Michael

