



Catholic Diocese of Malindi Registered Trustees v Mlewa & 3 others (Environment and Land Appeal E029 of 2023) [2025] KEELC 6477 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6477 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E029 OF 2023
FM NJOROGE, J
SEPTEMBER 30, 2025**

BETWEEN

CATHOLIC DIOCESE OF MALINDI REGISTERED TRUSTEES APPELLANT

AND

KAZUNGU MWATETE MLEWA 1ST RESPONDENT

KALUME YAA BAYA 2ND RESPONDENT

ROBERT MUREITHI GITHINJI 3RD RESPONDENT

THE LAND REGISTRAR KILIFI COUNTY 4TH RESPONDENT

JUDGMENT

1. Through the firm of Muthike & Makworo Advocates, the respondents herein filed a Malindi Chief Magistrate's Court Miscellaneous Application Number E028 of 2023 on 15th August 2023 joining the Land Registrar Kilifi as the respondent. They sought the following orders:
 - a. That the Land Registrar Kilifi County do show cause why they cannot issue the title deed number Kilifi/Jimba/42 to the applicant;
 - b. That the Land Registrar Kilifi County be directed to register the decree dated 28th November 2006 in Malindi CMCC 42 Of 2006 register for Kilifi/Jimba/42;
 - c. The Court do direct the Land Registrar Kilifi County to issue title did for Kilifi/Jimba/42 to the applicants;
 - d. That the Court be pleased to issue any other order it may deem just and expedient in the interest of Justice;
 - e. That the costs of the application be provided for.



2. The application was supported by the sworn affidavit of Kazungu Mwatete Mlewa. The grounds on which the application was brought was that the applicants are the original allottees of the suit land which was allegedly fraudulently transferred to one Robert Muriithi Githinji; that the applicants filed a dispute with the Land Disputes Tribunal in Land Disputes Case Number 6 Of 2005 and the tribunal declared the transfer illegal and nullified the title and ordered the same to revert to the applicants.
3. The Tribunal award was adopted as an order of the court in Malindi CMCC Land Case Number 42 Of 2006 and a decree was issued. The decree nullified all the subdivision of Kilifi/Jimba/42 into portions numbers 472, 473, 474 and or any portions so created and sold to other parties.
4. On 4th February 2021 the Chief Land Registration Officer sought confirmation from the court that the degree was genuine and such confirmation was given by the court. From that time, the applicants' attempts to have the decree registered and/or implemented became futile. The applicants aver that it is in the interests of justice that the orders of the court be obeyed and implemented to the letter.
5. The application was granted by the Honourable Magistrate on 11th October 2023.
6. Soon thereafter, the appellant filed an application dated 16th October 2023 seeking the following orders:
 - a. That this court do order the joinder of the interested/affected party herein as a party to the suit/or cause;
 - b. The court be pleased to vary, stay, set aside and/or discharge its orders granted on the 11th October 2023;
 - c. That this court be pleased to strike out in its entirety the miscellaneous ELC Application E028 of 2023 by the applicants with costs to their effected/ interested party;
 - d. The cost of the application be provided for and be paid by the applicants;
 - e. That the cost of the application be in the cause.
7. The application was supported by the affidavit of father Bernard Mwambingu Malasi attached thereto and a further supporting affidavit by the same deponent dated 26th October 2023. The grounds supporting that application are as follows:
 - a. The court was misled into issuing the order given on 11th of October 2023;
 - b. The application from which the orders of the court originated was filed in abuse of the process of the court and without full material disclosures;
 - c. The miscellaneous applications and the orders issued therefrom are res judicata the ruling of the Land and Environment Court given by Hon Justice Makori on 19th July 2023 in Malindi ELC Petition Number 18 Of 2022;
 - d. The said orders are on attempt to circumvent review and or appeal against the findings of ELC in petition number 18 of 2022;
 - e. The applicants failed to disclose that at the institution of the miscellaneous application the parcel of land Kilifi/Jimba/42 did not exist and title had been closed on subdivision and resultant and subdivisions sold to third parties whom the applicants did not include in the application and who have acquired good title thereto and who would be prejudiced by the orders issued on 11th October 2023 including the appellant;



- f. The applicant's rights, if any, arising from Land Dispute Tribunal Case Number 6 Of 2005 and Malindi CMCC Number 43 Of 2006 were time barred under the provisions of Section 4(4) of the Limitation of Actions Act Cap 22.
- g. The appellant is aggrieved by the decision because it is the registered proprietor of Kilifi/Jimba/472, 474 and 478 which are all subdivisions of plot number Kilifi/Jimba/42. That title having been closed on subdivision, the court had no power to issue any orders in respect thereof unless that title is reconstituted by an order of court after cancellation of all the subdivisions. Also the manner in which the respondents sought to enforce the orders of 20th November 2006 against the said title is unknown in law and is an utter contravention of the Civil Procedure Act and Rules.
8. On 18th October 2023, the Learned Magistrate gave an order joining the appellant to the proceedings and granted an order of stay of execution of his own orders of 11th of October 2023. Robert Muriithi Githinji was joined as the Second Interested Party in the proceedings and he filed his submissions in respect of the application dated 16th October 2023, supporting it.
9. The motion dated 16th October 2023 was disposed of by way of written submissions filed by the parties.
10. However, it is also noted that the respondents herein had also filed an application dated 19th October 2023 seeking the following orders:
- a. The court do issue a temporary injunction restraining the interested parties/respondents whether acting directly or through third parties, agents, employees, officers and or proxies from trespassing, harassing, intimidating, threatening and/or in any way interfering with the applicants' parcel of land known as Kilifi/Jimba/42 pending the hearing and determination of the application;
- b. That in the alternative the honorable Court do issue and order for a status quo to be maintained on land parcel number Kilifi/Jimba/42 pending hearing and determination of the application;
- c. The costs of the application be provided for.
11. That application was supported by the affidavit of Kazungu Mwatete Mlewa attached thereto. The grounds in support thereof were similar to those supporting the application dated 23rd August 2023 save that it was alleged in addition that the appellant had now entered into the suit land and commenced excavation thereon without a court order. It was also claimed that the court in Malindi ELC Petition Number 18 Of 2022 did not vest the land in the appellant herein but it only downed its tools for lack of jurisdiction, and that the appellant should thus be restrained from interfering with the suit land.
12. In its ruling dated 6th December 2023, the court held that the application lacked merit and dismissed it on various grounds. It is that ruling and order that have spawned the present appeal, which is premised on the following grounds set out in the Memorandum of Appeal dated 21/12/2023:
1. That the Learned Magistrate, Honourable James N Mwaniki erred in law and in fact in dismissing the appellant's notice of motion dated 16th October 2023 which had the effect of the court erroneously and without jurisdiction upholding the ex parte orders granted on the 11th October 2023 which orders amounted to the court sitting as an appellate court and setting aside, varying or nullifying the orders, ruling and judgments of the superior court given on the following matters;



- a. ELC JR MISC APP NO. 1 of 2016- Kazungu Mwatete and Kalume Baya vs Robert Mureithi Githinji and the Land Registrar Kilifi (Lord Justice Angote) 2017 eKLR.
 - b. ELC JR MISC APP No. 91 of 2017 Bindika Mzungu Mlewa vs The Land Registrar Kilifi and the Honourable Attorney General (Lord Justice Olola) 2018 eKLR.
 - c. Malindi ELC Petition No. 18 of 2022 Kazungu Mwatete Mlewa & Another vs Robert Mureithi and 14 Others (Lord Justice Makori).
2. That the Learned Chief Magistrate Honourable James N Mwaniki erred in fact and in law in dismissing the Appellants Notice of Motion dated 16th October 2023 which had the effect and purport of the court erroneously and without jurisdiction upholding the exparte orders granted by the court on the 11th October 2023 which had effect of determining issued and matters that were res judicata in the following manners.
- a. ELC JR MISC APP No. 1 of 2016-Kazungu Mwatete and Kalume Baya –vs Robert Mureithi Githinji and the Land Registrar Kilifi (Lord Justice Angote) 2017 eKLR.
 - b. ELC JR MISC APP No. 91 of 2017 Bindika Mzungu Mlewa –vs The Land Registrar Kilifi and the Honourable Attorney General (Lord Justice Olola) 2018 eKLR.
 - c. Malindi ELC Petition No 18 of 2022 Kazungu Mwatete Mlewa & Another vs Robert Mureithi and 14 Others (Lord Justice Makori).
3. That the Learned Chief Magistrate erred in fact and in law in acting outside jurisdiction and in excess of jurisdiction in entertaining Malindi Misc APP No. E028 of 2023- Kazungu Mlewa and Another vs The Land Registrar Kilifi County an 2 Others and thereby dismissing the appellant’s notice of motion dated 16th October 2023 thereby upholding the ex parte orders irregularly and illegally issued on the 11th October 2023 in issues and matters already determined by the superior court in the following matters:
- a. ELC JR MIS APP No. 1 of 2016-Kazungu Mwatete and Kalume Baya vs Robert Mureithi Githinji and the Land Registrar Kilifi (Lord Justice Angote) 2017 eKLR.
 - b. ELC JR MIS APP NO. 91 of 2017 Bindika Mzungu Mulewa vs The Land Registrar Kilifi and the Honourable Attorney General (Lord Justice Olola) 2018 eKLR.
 - c. Malindi ELC Petition No. 18 of 2022 Kazungu Mwatete Mlewa & Another vs Robert Mureithi and 14 Others (Lord Justice Makori).
4. That the Learned Chief Magistrate erred in law in and in fact in dismissing the appellant’s notice of motion dated 16th October 2023 thereby condemning the appellant unheard with respect to the issues and matters raised by the 1st and 2nd Respondents in Malindi Chief Magistrate’s Misc APP No. E028 of 2023- Kazungu Mwatethe Mulewa & Another vs The Land Registrar Kilifi County & 2 others.
5. That the Learned Chief Chief Magistrate erred in fact and in law in dismissing the appellant’s Notice of Motion dated 16th October 2023 which had the effect of permitting the lower court to proceed with proceedings which were judicially null and void as instituted in Malindi ELC Misc App No. E028 of 2023-Kazungu Mwatethe Mlewa & Another vs The Land Registrar Kilifi County & 2 Others as the same were in effect execution proceedings initiated in a manner unknown in law and which were legally time barred.



6. That the Learned Chief Magistrate erred in law and fact in dismissing the Appellant's notice of motion dated 16th October 2023 which had the effect of upholding and sustaining orders granted on the 11th October 2023 ex parte and with material; non-disclosure and dishonesty on the part of the 1st and 2nd Respondents to the effect that the orders granted on the 11th October 2023 had been sought and rejected by the superior courts in the following matters;
 - a. ELC JR MISC APP NO. 1 of 2016 –Kazungu Mwatete and kalume Baya –vs- Robert Mureithi Githinji and the Land Registrar Kilifi (Lord Justice Angote) 2017.
 - b. ELC JR MISC APP NO. 91 of 2017 Bindika Mzungu Mulewa –vs- The Land Registrar Kilifi and the Honourable Attorney General (Lord Justice Olola) 2018 eKLR.
 - c. Malindi ELC Petition NO. 18 of 2022 Kazungu Mwatete Mlewa & Another vs Robert Mureithi and 14 Others (Lord Justice Makori).
7. That the Learned Chief Magistrate erred in law and in fact and in fact in dismissing the appellant's notice of motion dated 16th October 2023 whose effect was to permit the court to illegally and irregularly entertain Malindi ELC MIS APP No. E028 of 2023-Kazungu Mwathethe Mlewa & Another vs- The Land Registrar Kilifi County and 2 Others which application was made to court in bad faith and in abuse of the process of the court.
8. That the Learned Chief Magistrate erred in law and in fact in dismissing the appellant's notice of motion dated 16th October 2023 which had the effect of the court sustaining and upholding the ex parte orders granted on the 11th October 2023 which had the effect of the court without jurisdiction ordering for the rectification of the Land Register when such jurisdiction is exclusive only to the Land and Environment Court and not to the subordinate court.
9. That the Learned Chief Magistrate erred in law and in fact in dismissing the Appellant's notice of motion dated 16th October 2023 on the 6th December 2023 in a ruling that is vague, unreasoned, biased, lacking intellectual foundation contravention of the provisions of the Civil Procedure Act and the Rules made thereunder.
10. That the Learned Chief Magistrate erred in law and in fact in dismissing the Appellant's notice of motion dated 16th October 2023 which had the court upholding and sustaining orders issued on the 11th October, 2023 whose effect was to illegally reinstate a non-existent register for Plot No. Kilifi/Jimba/42 which had ceased to exist after subdivision and parcellation and thereby affecting the registered rights of the Appellants in Plot No. Kilifi/Jimba/472, 474 and 480.
13. The appellant in this appeal prays for the following reliefs:
 - a. The ruling of Honourable James N. Mwaniki delivered on the 6th December 2023 be set aside and reversed and be substituted therefor with an order allowing the appellant's notice of motion dated 16th October 2023 as pleaded and prayed for in the said Notice of Motion;
 - b. Chief Magistrate's Court Misc APP No. E028 of 2023- Kazungu Mwathethe Mlewa & Another vs The Land Registrar Kilifi County and 2 Others be struck out with costs to the Appellants;
 - c. The orders granted by the Subordinate court on the 11th day of October 2023 be set aside and declared null and void;



- d. The costs of this Appeal be paid by the 1st and 2nd Respondent.
14. The appeal was disposed of by way of written submissions.
15. The first ground deals with the issue that the learned Magistrate's ruling and order had the effect of setting aside, varying or nullifying the orders rulings and/or judgments of the Superior Court given in several matters that is JR Miscellaneous Number 1 Of 2016, JR Miscellaneous Number 91 Of 2017, and Malindi ELC Petition Number 18 Of 2022.
16. In its submissions the appellant faulted the application before the trial Court on the basis that the same was directed against the Land Registration Officer, and that notwithstanding the fact that the appellant had a legitimate interest in the 3 plots which had descended from the suit land by way of subdivision. It was urged on behalf of the appellant parent that in Malindi Petition Number 18 Of 2022, the first and second respondents had sought inter alia orders of declaration that Kilifi/Jimba/42 belonged to them to the exclusion of the respondents, as well as prerogative order of certiorari quashing the certificate of title issued to the first respondent bearing over plot number Kilifi/Jimba/42. The appellant avers that the entire petition was struck out with costs to the respondents for being res judicata. It is stated that prayers number (d) and (e) in the petition are the same as the reliefs granted in the application dated 15th August 2023 by the learned trial Magistrate in the lower court case. The grant of the said orders by the lower Court, so urged the appellant's counsel, was tantamount to sitting as an appellate court against the orders and findings of a Court of higher jurisdiction and that is ultra vires.
17. Counsel for the appellant also urged that E L C JR Miscellaneous Application Number 1 Of 2016 had sought an order of mandamus to compel the respondent to register the applicants as the owners of the property known as Kilifi/Jimba/42 previously subdivided in plot numbers 472, 473 and 474; that that Judicial Review notice of motion was struck out, with the High Court decision pointing out that the tribunal had directed in its award that the claimants should move the High Court for cancellation of all titles arising from the objector's action; that the ELC had observed that the tribunal was alive to the fact that it was only the ELC that could cancel the title that had been issued to the objector and that in the circumstances only a suit in the ELC could address the issue. Counsel pointed out that the orders rejected by the ELC in the Judicial Review application were are the same orders that the learned trial Magistrate subsequently gave in favor of the first and second respondents in the ruling dated 11th October 2023. Consequently, it was wrong for the learned Magistrate to refuse to allow the application dated 16th October 2023 which had sought to strike out the proceedings in that court for being an abuse of the court process.
18. It was further urged that in Malindi ELC 91 Of 2017, the first and second respondents had through their attorney, one Bindika Mzungu Mulewa sought orders inter alia that the court do confirm the decision of the Principal Magistrate's court in Malindi Land Case Number 6 Of 2005 to the extent that the transfer of plot number Kilifi/Jimba/42 from Mzungu Mwatete to Robert Muriithi be declared illegal and therefore be nullified and that the title do revert back to the original owners, said to be the first and second respondents in this appeal; it was also sought that the mutation of that parcel into several subdivisions be nullified, and that the resultant titles be cancelled, with the Land Registrar Kilifi being ordered to reconstruct/open a new file or green card to register the original owners as proprietors without prior gazettement. The appellant's counsel stated that the entire suit was dismissed with the court making a finding that the tribunal did not have jurisdiction to cancel title issue from Kilifi/Jimba/42. Counsel for the appellant contended that the orders declined by the court in Malindi ELC Case Number 91 Of 2017 are the same ones the learned Magistrate granted in his ruling of 11th October 2023, and that failure to reverse those orders at the instance of the appellant's application was grossly in error.



19. The second and third grounds are that the matter before the learned trial Magistrate was res judicata JR Miscellaneous Number 1 Of 2016, JR Miscellaneous Number 91 Of 2017, And Malindi ELC Petition Number 18 Of 2022, and numerous decisions were cited in support of the said argument, including John Florence Maritime Services Limited and Another Versus Cabinet Secretary for Transport and Infrastructure and 3 Others 2015 eKLR. It was urged specifically that the matter before the learned trial Magistrate was res judicata Judicial Review Number 1 Of 2016 and Malindi Land Case Number 91 Of 2017, and thus an abuse of the court process. Again numerous decisions were also cited in support of the appellant's argument on res judicata, including Independent Electoral and Boundaries Commission Versus Maina Kiai & 5 Others Nairobi C.A. Civil Appeal Number 105 Of 2017 2017 eKLR.
20. It was submitted that Section 30 of the *Civil Procedure Act* provides that a decree may be executed either by the court which passed it or by the court which it is sent for execution. That Order 22 Rule 6 of the Civil Procedure Rules 2010 provides that where the decree holder desires to execute his decree, he should apply to the court which passed the decree or the court to which the decree has been sent for execution. It is urged that the terms of those provisions are mandatory. Thus the execution of decree by way of a miscellaneous application, as sought by the first and second respondents before the learned Magistrate, is not known in law. The appellant points out that the court in ELC Petition Number 18 Of 2022 at paragraph 34 observed that the first and second respondents have not justified why they have not followed the clear rules as to execution. It was urged that the miscellaneous application proceedings in the subordinate Court were execution procedures which had been initiated in a manner contrary to statute, and that the miscellaneous application should be struck out.
21. It was also urged that by dismissing the notice of motion dated 16th of October 2023 the Magistrate condemned the appellant unheard with respect to the issues and matters raised by the first and second respondents in the miscellaneous application, which result was contrary to Articles 50(1) of *the constitution* and Article 14 of the International Covenant On Civil and Political Rights (ICCPR) which Kenya is signatory to. Merry Beach Versus the Attorney General 16 Others 2018 eKLR was cited in this regard.
22. The other ground related to limitation of actions. Section 7 of the Limitations of Actions Act was cited. It was posited that the first and second respondent's rights to the decree issued to them on 28th November 2006 and the right to plot number Kilifi/Jimba/42 and the resultant subdivisions do not accrue in their favour as against the appellant for being statutorily time barred, the respondents having come to court after a period of over 18 years. It is posited that by failing to grant the application dated 16th October 2023 the Magistrate erred in sustaining orders of 11th October 2023 whose effect had been to effect execution proceedings in respect of others that were statutorily time barred.
23. Lastly, it was argued that the trial Magistrate erred in dismissing the notice of motion which decision had the effect of sustaining orders granted on 11th October 2023 ex parte and with material non-disclosure and dishonesty on the part of the first and second respondents; that it is the duty of any party coming to court for any order of relief to make honest and frank and full material disclosure to the court before any order or relief is granted which the first and second respondent failed to do, and that for that reason the court is entitled to set aside or strike out any order or directive given at the time of material non-disclosure. The decision in Owners of Motor Vessel Lillian S. Versus Caltex Oil Kenya Limited 1989 eKLR was cited in that regard. It was submitted that the miscellaneous application was filed in bad faith and in abuse of the process, to circumvent the superior court's orders and to achieve execution and enforcement of the orders made in Malindi Land Case Number 52 Of 2006 while execution thereof was time barred. Counsel urged the court to allow the appeal.



Submissions of The First Respondent.

24. The first respondent addressed two issues
 - a. Whether Malindi ELC Miscellaneous Application Number E 28 Of 2023 is res judicata;
 - b. Whether the orders issued by the honorable Court in Malindi Miscellaneous Application Number E028 of 2023 were merited.
25. On the first issue, it was submitted that the appellants never availed any of the mentioned prior judgments of the superior court in order for this court to make a decision on the issue. It was contended that the dispute has never been finally concluded and the acquisition of the titles for the plots resultant from subdivision of Kilifi/Jimba/42 was illegal and irregular.
26. It was further contended that rectification of the register can be by court or by the Registrar and it was elected that the Registrar do the rectification in this case in accordance with Section 79 LRA. Consequently, the orders issued by the Magistrate in Malindi ELC Miscellaneous Application Number E 28 Of 2023 were deserving for the reason that the court and the tribunal had found that the impugned title held by the appellant was obtained through fraud. The case of Florence Nyaboke Machani V Mogere Amosi Ombui & 2 Others CA 1184 Of 2011 (2014) eKLR was cited in this regard.
27. It was urged that the appellant slept on its rights even though it was aware of the Tribunal award.

Submissions of The 2nd Respondent.

28. The second respondent submitted that the present appeal does not fall under the category of appeals that can be filed as of right, and that leave of court, which the appellant never secured first, was required in order for it to be lodged. By reason of failure to apply for such leave, the appeal is incompetent. Mbaya V Kamau & Anor CA E012 of 2023 (2023 KEHC) 24945 KLR was cited in this regard.
29. It was also argued that the appellant sought to be joined to the miscellaneous application while the court had already become functus officio, that is, after the court had already disposed of the miscellaneous application. Gladys Nduku Nthuki V Letshego & Anor CA E012 Of 2022 eKLR was cited in this regard.
30. Regarding res judicata, it was submitted that the cases cited by the appellant were indeed heard and determined but that none of them addressed the same subject matter as Malindi ELC Miscellaneous Application Number E 28 Of 2023; that the courts that dealt with those matters lacked jurisdiction and hence referred the 1st and 2nd respondents to the right forum.
31. On the issue of time bar, it was submitted that the decree would have been executed timely but for the filing of Malindi MISC JR NO 1 of 2016 which is claimed to have stopped time from running; that time began running afresh after that case was terminated and by 2023 the 1st and 2nd respondents were still within time for execution proceedings. Lillian Njeri Muranja & John Muranja Mahinda V Virginia Nyambura Ndiba & Another 2014 eKLR was cited in this regard.
32. On whether the lower court had power to direct rectification of title it was argued that the court had initially found the 4th respondent's title to be fraudulent, and there was thus no requirement to notify the party affected by that cancellation. Secondly, the value of the subject matter did not exceed Kshs 20, 000,000 and so the Magistrate's court had jurisdiction.
33. On the last issue it was denied that the Magistrate sat as an appellate court over the orders of the superior court.



Analysis And Determination.

34. The one inescapable legal issue that arises in the appeal on a preliminary level is whether the appeal is incompetent for want of leave of court to file it. It is necessary to address it first.
35. The appellant's counsel's oral submission on 3/4/2025 in response to the said issue was that no application for striking out has been filed. However, this court notes that the issue goes to the jurisdiction of court and must be dealt with now that it has been drawn to the attention of the court, for if a court finds that it is without jurisdiction, it must down its tools in the matter.
36. In reference to Section 75 of the CPA the provisions are as follows:
- “75. Orders from which appeal lies
- (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—
- (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) an order under section 64;
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.
- (2) No appeal shall lie from any order passed in appeal under this section.”
37. The appeal herein is from an order dismissing an application for joinder as well as setting aside orders of court made on 11/10/2023 in a different prior application. The joinder application had also sought a further order to strike out the Miscellaneous application in which the orders of 11/10/2023 had been made. That miscellaneous application had been brought under sections 1A,1B and 3A of CPA as well as sections 79 and 80 of the LRA. The joinder application had been brought under order 1 rule 8 and 10 of the Civil Procedure Rules, Order 22 rule 22 of the Civil Procedure Rules, section 4 (4) and 7 of the Limitation of Actions Act and sections 1A,1B and 3A of CPA.



38. Order 43 CPR reads as follows:

1. Appeals from Orders [Order 43, rule 1]

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
- (a) Order 1 (parties to suits);
 - (b) Order 2 (pleadings generally);
 - (c) Order 3 (frame and institution of suit);
 - (d) Order 4, rule 9 (return of plaint);
 - (e) Order 7, rule 12 (exclusion of counterclaim);
 - (f) Order 8 (amendment of pleadings);
 - (g) Order 10, rule 11 (setting aside judgment in default of appearance);
 - (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - (j) Order 19 (affidavits);
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);
 - (n) Order 25, rule 5 (compromise of a suit);
 - (o) Order 26, rules 1 and 5(2) (security for costs);
 - (p) Order 27, rules 3 and 10 (payment into court and tender);
 - (q) Order 28, rule 4 (orders in proceedings against the Government);
 - (r) Order 34 (interpleader);
 - (s) Order 36, rules 5, 7 and 10 (summary procedure);
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);
 - (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);
 - (v) Order 41, rules 1 and 4 (receivers);
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - (x) Order 45, rule 3 (application for review);
 - (y) Order 50, rule 6 (enlargement of time);
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);
 - (aa) Order 53 (judicial review orders).



- (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
 - (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.
 - (4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”
39. It would appear that the prayer for joinder of the appellant and the 4th respondent into the miscellaneous application was granted. The grant of those orders is not the subject of this appeal. This appeal is not therefore brought pursuant to right under Order 43 rule 1(a). It is the failure of the Magistrate to grant the other orders in the joinder application that led to the present appeal.
40. Order 22 rule 22 provides as follows:
- “ 22. When court may stay execution [Order 22, rule 22]
- (1) The court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time to enable the judgment-debtor to apply to the court by which the decree was passed, or to any court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by the court of first instance, or appellate court if execution has been issued thereby, or if application for execution has been made thereto.
 - (2) Where the property or person of the judgment-debtor has been seized under an execution, the court which issued the execution may order the restitution of such property or the discharge of such person pending the results of the application.
 - (3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor the court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.”
41. However, Orders made under Order 22 rule 2 which the appellant relied on in its application, are excluded from orders appealable as of right under Order 43.
42. Sections 4 and 7 of the *Limitation of Actions Act* do not deal with right of appeal but only specify the periods of limitation and so they are of no avail to the appellant on the present objection.
43. It would appear then that much of what was sought in the application dated 16/10/2023 was the discretion of the court. This is notable because the main provisions under which the applicant came to court were sections 1A,1B and 3ACPA
44. In the circumstances, this court is of the view that leave of court to file the present appeal was needed but it was not applied for or obtained prior to its filing and that the appeal is thus incompetent.



45. I therefore strike out the said appeal entirely. As the objection was raised rather late in the day, I order that each party shall bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 30TH DAY OF SEPTEMBER, 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

