

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. E021 OF 2025

LOISE NJIRU KANGETHE1ST APPELLANT

NICHOLAS KIMATHI KANGETHE2ND APPELLANT

VERSUS

FRANKLINE GITONGA NGAI1ST RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER IMENTI
SOUTH2ND RESPONDENT

LAND REGISTRAR IMENTI SOUTH3RD RESPONDENT

HON. ATTORNEY GENERAL4TH RESPONDENT

RULING

1. The Appellants herein filed an application dated **10th September 2024**; before the subordinate court. The said application was premised on the provisions of **section 68 of the Land Registration Act and Order 51 of the Civil Procedure Rules 2010**. The reliefs sought at the foot of the said application [*verbatim*] were as hereunder:

(a) The Hon. Court be pleased to grant interim orders of inhibition to dispense with service at the first instance; to stop or inhibit any dealings with land parcel No. Imenti South/Mweru III/689 pending the hearing and determination of the application.

(b) The Hon. Court be pleased to grant interim orders of inhibition to dispense with service at the first instance; to stop or inhibit any dealings with land parcel number Imenti South/Mweru III/689 pending hearing and determination of the suit.

(c) Costs of the application to be in the cause.

2. The subject Application was heard and disposed of *vide* ruling rendered on **20th March 2025**; and whereupon the learned trial magistrate dismissed the application. For good measure, the orders disposing of the application are captured/ highlighted at the foot of paragraph 13 of the impugned ruling.
3. It is the said ruling and the order arising therefrom which has aggrieved the appellants and thus provoked the subject appeal.
4. The Memorandum of appeal dated **1st April 2025**; has highlighted the following grounds of appeal:
 - (i) *That the ruling of the learned magistrate offends the provisions of Articles 47, 48 and 50 (1) of the Constitution of Kenya – 2010 and Section 80 of the Land Registration Act – 2012, thus rendering the aforesaid ruling illegal, procedurally, improper, irrational, unreasonable and prejudicial to the appellants' proprietary rights.*
 - (ii) *That the decision of learned magistrate offends the principles of natural justice, particularly the fundamental principle of audi alteram partem [nobody shall be condemned unheard]*
 - (iii) *That the entire ruling is ill-reasoned, not based on any sound legal principles, lacks merit and is of poor legal jurisprudence.*
5. The subject appeal came up for directions before the court on 9th October 2025; whereupon the court noted a question pertaining to the competence or otherwise of the appeal. To this end, and taking into account the

provisions of order 15 Rule 2 of the Civil Procedure Rules as read together with Order 42 Rule 13 of the Civil Procedure Rules; the court directed the parties to file written submissions on the question of the competence of the appeal. In particular, the parties were directed to address the issue as to whether the appeal lay to this court as of right or with leave in accordance with the provisions of **Order 43 Rule 1 of the Civil Procedure Rules, 2010**.

6. The appellants filed written submissions dated 9th October 2025; and wherein same has highlighted three [3] key issues. Firstly, learned counsel for the appellants has submitted that the decision of the learned magistrate which is the subject of the instant appeal, touched on and concerned the question of jurisdiction of the court. In particular, it has been contended that the learned magistrate addressed the question of jurisdiction and proceeded to state that the court was divested of jurisdiction. Additionally, it has been submitted that the issue of jurisdiction goes to the root of the court's competence and thus an appeal from such a decision lies as of right.

7. Secondly, learned counsel for the appellants has submitted that the provisions of section 65 of the Civil Procedure Act, Chapter 21, Laws of Kenya; provide that an appeal lies as of right from any original decree or part of a decree from the subordinate court on a question of fact or law. Moreover, it has been submitted that an issue pertaining to the jurisdiction of the magistrate's court is a question of law. To this end, learned counsel for the appellants has cited and referenced the holding in the case of *Owners of Motor Vessel Lillian "S" vs Caltex Oil (K) Ltd (1989) eKLR*; which highlights the place of Jurisdiction.

8. Thirdly, learned counsel for the appellants has submitted that the impugned ruling and the consequential order arising therefrom are therefore appealable as a matter of right. Furthermore, it has been posited that jurisdiction goes to the root of the court's competence to hear and determine a matter. Consequently, and in this regard, it has been submitted that the determination of a question of jurisdiction is therefore not an interlocutory determination for which leave of the court is required before an appeal can be filed.
9. Learned counsel for the 1st respondent filed written submissions dated 21st October 2025; and wherein same has raised and canvassed two [2] key issues. Firstly, learned counsel for the 1st respondent has submitted that the ruling culminating into the appeal beforehand, touched on and concerned the application dated 10th September 2024; and which was filed by the appellants. Furthermore, it has been submitted that it is the said application which was dismissed and not the suit. For good measure, it has been submitted that the suit before the subordinate court remains alive and same is pending disposal.
10. Secondly, it has been submitted that given the statutory provisions which were invoked by the appellants, the appellants were obligated to procure and obtain leave before filing an appeal. Moreover, it has been submitted that no appeal lay as of right as against the impugned ruling of the subordinate court. To this end, learned counsel for the 1st respondent has cited and referenced the provisions of **section 75 of the Civil Procedure Act, Chapter 21, Laws of Kenya; and Order 43 Rule 1 of the Civil Procedure Rules, 2010**. Simply put, learned counsel has reiterated that

the subject appeal could only lie with leave of the court and not otherwise.

11.To buttress the foregoing submissions, learned counsel for the 1st respondent has cited the holding in the case of **Serephene Nyasani Menge vs Risper Onsase (2018) KEELC 654**, wherein the learned Judge addressed the legal import and tenor of an appeal filed without leave of the court.

12.Having reviewed the memorandum of appeal; the ruling of the court which underpins the subject appeal and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the jurisdictional question turns on two [2] key issues, *namely*; whether the appeal against the ruling beforehand lay as of right or otherwise; and whether the appeal is incompetent and invalid.

13.Regarding the first issue, it is imperative to recall and reiterate that the appellants herein are the ones who filed the application dated 10th September 2024; before the subordinate court. In addition, there is no gainsaying that the said application was underpinned by the provisions of section 68 of the Land Registration Act [2012]; and Order 51 of the Civil Procedure Rules, 2010.

14.Moreover, it is explicit and clear from the face of the ruling that same concerned the application dated 10th September 2024. Besides, the final orders of the learned magistrate are also explicit. For good measure, the

final and dispositive orders of the learned magistrate were to the effect that the application dated 10th September 2024 was dismissed with costs to the respondent. [See paragraph 13 of the impugned ruling].

15. To my mind, the ruling that is appealed against dismissed the application and not the suit. Though the learned trial magistrate referenced the jurisdiction of the subordinate court and made various observations in the course/body of the ruling, the ratio decidendi [final order] touched on the application. Instructively, the suit before the subordinate court appears to be alive and pending.
16. The question that I must deal with is whether the ruling of the subordinate court under reference is appealable as of right or otherwise. To start with, it is common ground that the appellants invoked section 68 of the Land Registration Act [2012]; and Order 51 of the Civil Procedure Rules 2010. The said provisions, which were invoked, do not confer/vest the appellants with an automatic right of appeal. Moreover, there is no gainsaying that the ruling of the subordinate court birthed an order and not a decree.
17. In this regard, the citation and reliance on the provisions of section 65 of the Civil Procedure Act, Chapter 21, Laws of Kenya; by learned counsel for the appellants is erroneous; and based on mis-apprehension of the import of the Ruling under reference.
18. To the extent that the provisions of the statute which were invoked in approaching the jurisdiction of the subordinate court did not allow an automatic right of appeal, it behooved the appellants to seek and obtain leave of the court. [See *section 75 of the Civil Procedure Act as read together with order 43 rule 1 of the Civil Procedure Rules 2010*].

19. It is pertinent to observe that the appellants herein ought to have sought leave of the subordinate court either orally at the time of the delivery of the ruling, or formally within 14 days from the date of the delivery of the impugned ruling. Moreover, it is not lost on me that where leave to appeal is declined by the court of first instance, the applicant is at liberty to apply for such leave before the appellate court, in this case, before the Environment and Land Court. [See order 43 rule 1 (1) of the Civil Procedure Rules, whose contents are explicit and crystal clear.

20. The importance of seeking and obtaining leave before filing an appeal [where the appeal lies with leave] was highlighted in the case of **Serephene Nyasani Menge vs Risper Onsase (2018) KEELC 654 (KLR)**, wherein the learned Judge stated and held as hereunder;

11. In the instant matter the Notice of Motion dated 18th December 2015 pursuant to which the learned magistrate granted the orders of the same date sought to be appealed by the applicant, did not fall under any of the Orders set out under Order 43 Rule (1) in respect of which an appeal lies as of right. The application was expressed to be brought under Section 14 of the Landlord (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya and Sections 1A, 1B and 3A of the Civil Procedure Act. Thus, the applicant did not have an automatic right of appeal against the order made on 18th December 2015 and therefore required to obtain the leave of the court as envisaged under Section 75(1) of the Civil Procedure Act and Order 43 sub-rule (3) of the Civil Procedure Rules. Under Order 43 sub-rule (3) such leave has to be sought from the court that made the order either at the time the

order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a prerequisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently, no competent appeal can be lodged against such an order. I find that is the situation in the present matter. The application before this court is for extension of time to bring an appeal out of time and is not one for leave to appeal. Such an application under the rules could only be made before the court that made the order.

21. Turning to the second issue, I beg to state that where an appeal lies with leave of the court, such leave must be procured and obtained beforehand. Where the leave is not sought and obtained, the appeal, [if any] filed is rendered incompetent, void and a nullity. In this regard, there is no gainsaying that the subject appeal is indeed invalid for want of the requisite leave. The defect attendant to lack of leave goes to the root of the jurisdiction of this court.

22. Before concluding on this issue, I beg to reference the decision of the Court of Appeal in the case of **Pentagon Communications Limited v National Land Commission (Civil Appeal E035 of 2022) [2025] KECA 1304 (KLR) (18 July 2025) (Judgment)** where the Court addressed a similar issue and stated thus:

The appellant failed to take advantage of the latitude accorded under section 16A(2). This means that the appeal before the ELC was incompetent. The learned Judge could not, in the

circumstances, arrogate to herself jurisdiction to hear an appeal that never was. We cannot, therefore fault her for downing her tools for want of jurisdiction and for consequently dismissing the appeal before her.

23. I must have said enough to demonstrate that the appeal beforehand was filed without leave; and that same is therefore incompetent and invalid, for all intents and purpose. The failure to procure leave goes to the jurisdiction of the court.

FINAL DISPOSITION.

24. For the reasons which have been adverted to in the body of the ruling, it is apparent that the appeal beforehand is not only premature and misconceived, but same is irredeemably bad. To this end, the appeal cannot be remedied in any other manner or at all.

25. In the upshot, the final orders that commend themselves to the court are as hereunder;

- (i) The Appeal be and is hereby struck out.**
- (ii) Costs of the Appeal be and are hereby awarded to the 1st Respondent only.**
- (iii) Costs in terms of clause [ii] shall be agreed upon; and in default, be taxed in the usual manner.**

26. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF
OCTOBER 2025**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].
JUDGE.**

In the presence of:

Hussein - Court Assistant

Mr. Kaumbi for the Appellants

Mr. Mwirigi Batista for the 1st Respondent

No appearance for the 2nd to 4th Respondents