



**Munyao v John & 2 others (Civil Appeal E009 of 2025)
[2025] KEHC 15109 (KLR) (23 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15109 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E009 OF 2025
RC RUTTO, J
OCTOBER 23, 2025**

BETWEEN

MICHAEL WAMBUA MUNYAO APPELLANT

AND

JACINTA WAENI JOHN 1ST RESPONDENT

JOHN KAMENYA NJUCA ALIAS JOHN WAINAINA 2ND RESPONDENT

GRISHON GIKIMA NJUCHA 3RD RESPONDENT

RULING

1. Before this Court for determination is a Notice of Preliminary Objection dated 11th April 2025. The 2nd and 3rd Respondent contend that this court lacks jurisdiction to hear the present appeal as leave to appeal out of time was not sought.
2. Directions were issued that the Preliminary Objection be canvassed by way of written submissions. As at the time of writing this Ruling the record shows that only the 2nd & 3rd Respondents complied by filing submissions dated 13th June 2025.

2nd & 3rd Respondents' Submissions

3. The 2nd & 3rd Respondents identified one issue for determination, that is, whether the appeal was filed out of time in contravention of the applicable law and if so, whether the same is incompetent and liable for dismissal.
4. They referred to Section 79G of the *Civil procedure Act* and Order 50 Rule 4 of the Civil procedure Rules, submitting that that it is not in dispute that the judgment appealed from was delivered on 28th November 2024 while the appeal was filed on 23rd January 2025. Excluding the court recess period from 21st December 2024 to 13th January 2025, the appeal was filed 32 days after the date of judgment.



They submitted that the Appellant neither filed an application for extension of time nor offered any explanation for the delay, thereby contravening Section 79G of the *Civil Procedure Act*.

5. Reliance was placed on the case of Salat versus Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR) and the case of Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 others [2012] eKLR to support the proposition that a court cannot arrogate itself jurisdiction exceeding that which is conferred by law.
6. In conclusion, the 2nd & 3rd Respondent submitted that the appeal is time barred, filed without leave of the court, is incurably defective and should therefore be struck out with costs.
7. I have considered the Preliminary Objection and the submissions filed by the 2nd & 3rd Respondents. The primary issue is whether the Notice of Preliminary Objection has merit.
8. In Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors (1969) EA 696, what constitutes a preliminary objection was described by the court in the following terms:

--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 the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

9. The issue of jurisdiction is one such point of law that, goes to the foundation of the substratum. See Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) eKLR. The 2nd & 3rd Respondents submitted that the Applicant did not seek leave to file the appeal out of time and therefore the court lacks jurisdiction to entertain the appeal.
10. The appeal arises from a judgment of the Small Claims Court. Section 38 of the Small Claims Act provides that:-
 1. A person aggrieved by the decision or an order of the court may appeal against the decision or order to the High Court on matters of law.
 2. An appeal from any decision or order referred to subsection (1) shall be final.
11. Appeals from the small claims court are governed by Section 79G of the *Civil Procedure Act*. This section stipulates that;

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.

12. It is undisputed that the judgment of the Small Claims Court was delivered on 28th November 2024 and the Memorandum of Appeal was lodged on 23rd January 2025. Excluding the court recess period that is, 21st December 2024 to 13th January 2025 inclusive, the appeal was filed 32 days after judgment. The last permissible day for filing the appeal ought to have been on 21st January 2025. The Appellant has not given any reasons for the delay or sought leave to file the appeal out of time.



13. I draw guidance from the Supreme Court decision in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the Court held as follows:

“No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out.

14. The upshot is that the preliminary objection succeeds the appeal herein is struck out with costs assessed at Kshs.20,000/= to the respondents jointly. This Ruling to apply to Machakos High Court Appeal No E013 of 2025.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 23RD DAY OF OCTOBER, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....For Appellant

.....For 1st Respondent

.....For 2nd & 3rd Respondent

Selina Court Assistant:

