

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BOMET
CIVIL APPEAL NO. E003 OF 2025

RADHA MOTORS LIMITED

APPELLANT/APPLICANT

VERSUS

ELIZABETH

AKINYI

ONYANGO

.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 13th February 2025 seeking the following orders: -

I. Spent.

II. THAT the Memorandum of Appeal dated 6th February 2025 and filed on the same day be deemed as though it was filed within time.

III. THAT pending the hearing and determination of this Application interparties, there be a stay of execution of

the Judgement issued in SOTIK SPMC NO. 51 OF 2017 ELIZABETH AKINYI ONYANGO VS RADHA MOTORS.

IV. THAT pending the hearing and determination of the Appeal, there be a stay of execution of the Judgement issued in SOTIK SPMC NO. 51 OF 2017 ELIZABETH AKINYI ONYANGO VS RADHA MOTORS.

V. THAT the costs of this Application be provided for.

2. The Application was brought under **Order 42 Rule 6, Order 48 of the Civil Procedure Rules, sections 1A, 1B and 3A of the Civil Procedure Act.** It was premised on the grounds on the face of the Application and further by the supporting affidavit sworn by Rameez Mohammad on 13th February 2025.

The Applicant's case

3. The Applicant stated that it was not given an opportunity to be heard in the trial court. That when it learnt of the Judgement, it filed an Application for Review dated 20th

November 2023 so as to correct the error apparent on the face of the record. The Applicant further stated that its Application for Review was dismissed through a Ruling dated 11th September 2024.

4. It was the Applicant's case that it filed its Memorandum of Appeal on 18th September 2024 but unfortunately while keying it in the computer, it keyed in the High Court of Kenya at Mombasa instead of the High Court of Kenya at Bomet. That the error was a normal human mistake. It was the Applicant's further case that the mistake was rectified and the Memorandum of Appeal was filed in this court on 6th February 2025.

5. The Applicant stated that its Appeal had a high chance of success as there was an error apparent on the face of the record. The Applicant further stated that the subject motor vehicle had been sold to Elijah Gathogo Mwangi and could therefore not be held vicariously liable.

6. It was the Applicant's case that it would suffer substantial loss if the stay is not granted. It was the Applicant's further case that it was ready and willing to provide security.

The Response

7. The Respondent filed a Preliminary Objection dated 15th May 2025 where they sought to have the Application dismissed on the following grounds: -

- I. THAT this Honourable Court has no jurisdiction to issue orders to validate a Memorandum of Appeal filed out of time and without the prior leave of court.
- II. THAT the Memorandum of Appeal dated 6th February 2025 violates the provisions of section 79G of the Civil Procedure Act.
- III. THAT the Memorandum of Appeal dated 6th February 2025 is incurable defective and bad in law.
- IV. THAT the Application dated 13th February 2025 is *res judicata*.

V. THAT the Memorandum of Appeal and the Application were an abuse of the court process.

8. The court directed the Preliminary Objection be determined first and heard through written submissions.

Applicant's submissions

9. Through its written submissions dated 17th July 2025, the Applicant submitted that the Preliminary Objection was defective and misconceived in law. That the issues raised by the Respondent did not amount to points of law.

10. It was the Applicant's submission that this court had jurisdiction to admit an Appeal out of time provided sufficient cause is shown. It relied on **section 79G of the Civil Procedure Act**. That Article **159 (2) (d) of the Constitution of Kenya** enjoined this court to administer justice without undue regard to procedural technicalities. It was the Applicant's further submission that their error was

clerical, unintentional and an honest mistake. It relied on **Belinda Murai & 9 others vs Amos Wainaina (1979) eKLR.**

11. The Applicant invited this court to take judicial notice that the Judiciary was not immune to error including the Case Tracking System which experiences downtime. The Applicant further submitted that it was not necessary to first file the Application for extension of time before filing the Appeal since the court is granted power to extend time retrospectively. It relied on **Order 50 Rule 6 of the Civil Procedure Rules and Abubaker Mohamed Al-Amin vs Firdaus Siwa Somo [2018] KECA (KLR).**

Respondent's submissions

12. Through her written submissions dated 6th June 2025, the Respondent submitted that the Appellants filed a Memorandum of Appeal on 6th February 2025 long after the Judgement in the trial court had been delivered and the 30-day window lapsed. That the Applicant filed the Appeal

without leave of court and the Appeal became incompetent and void ab initio. She relied on **Salat v Independent and Boundaries Commission & 7 others (Application 16 of 2014) [2014] KESC 12 (KLR) CIV (4th July 2014)**.

13. It was the Respondent's submission that the law was very clear that the Applicant ought to seek leave before filing its Appeal out of time. That a defective Appeal was irregular, incompetent and had to be struck out. She relied on **John Florence Maritime Services & another vs Cabinet Secretary for Transport & 3 others (2021) eKLR** and **Nyutu Agrovet Ltd vs Airtel Networks Ltd (2015) eKLR**.

14. I have gone through and carefully considered the Preliminary Objection dated 15th May 2025, the Applicant's written submissions dated 17th July 2025 and the Respondent's written submissions dated 6th June 2025. The sole issue for

determination was whether the Preliminary Objection should be upheld.

15. What constitutes a Preliminary Objection was set out in the oft cited case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, where it was held: -

“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 the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the

assumption that all the facts pleaded by the other side are correct, It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. (Emphasis added)

16. The Court of Appeal in **Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga** [2016] KECA 817 (KLR) held: -

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are

correct; and third, that there is no fact that needs to be ascertained.”

17. Further, the Supreme Court of Kenya in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)** held: -

“.....The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.” (Emphasis

added)

18. In the present case, the Respondent stated that this court had no jurisdiction to determine the Application dated 13th February 2025 on the account of the Applicant's Memorandum of Appeal being filed out of time. On the other hand, the Applicant proffered reasons as to why it filed its Appeal out of time and attached exhibits in its Application in support of its case. It is salient to note that under **section 79G of the Civil Procedure Act**, the law allows the court to admit Appeals out of time.

19. From the above, it is clear to me that for this court to resolve this impasse, it has to interrogate the reasons put forward by the Applicant on why it filed its Appeal out of time and without the leave of the court. This was not a pure point of law as demonstrated by the authorities above. It would have been wise for the Respondent to respond to the Application through a Replying Affidavit rather than a Preliminary Objection.

20. In the end, having gone through the Preliminary Objection dated 15th May 2025, it is my finding that it did not meet the threshold of a Preliminary Objection. It is my further finding that the Preliminary Objection dated 15th May 2025 has no merit and is dismissed.

21. Consequently, the Notice of Motion Application dated 13th February 2025 is allowed. The Applicant shall meet the costs of this Application.

22. The matter will be mentioned for further directions before the Deputy Registrar of this court.

Ruling delivered, dated and signed at Bomet this 19th day of November, 2025.

.....
HON. J.K.NG'ARNG'AR

JUDGE

**Ruling delivered in the presence of;
Siele and Susan (Court Assistants).
Nyarande for the Appellant
Rono for the Respondent**

ORIGINAL