



**Mwangi v M'Maathi & another (Suing on their own behalf and as the administrators of the Estate of the Late Kaberia Felix Gituma) (Civil Appeal E333 of 2024) [2025] KEHC 16912 (KLR) (20 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 16912 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E333 OF 2024  
TW OUYA, J  
NOVEMBER 20, 2025**

**BETWEEN**

**PETER NJOROGI MWANGI ..... APPELLANT**

**AND**

**GEOFFREY GITUMA M'MAATHI AND MERCY NKIROTE NKURI (SUING ON THEIR OWN BEHALF AND AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE KABERIA FELIX GITUMA) ..... RESPONDENT**

**JUDGMENT**

1. The Respondent/Applicant approached this Court through a Notice of Preliminary Objection dated 9<sup>th</sup> June 2025 seeking dismissal of the Appellant/Respondent's Memorandum of Appeal dated 29<sup>th</sup> January 2025 on the following grounds:
  - i. The appeal is incompetent and fatally defective in view of the provisions of Section 79G of the [civil Procedure Act](#) and order 42 Rule 1(1) of the Civil Procedure Rules.
  - ii. In view of ground 1 above, this Court is not seized of the jurisdiction to entertain the appeal."
2. The Respondent/Applicant's case is that the Appellant's appeal was filed out of time and without seeking and obtaining this Court's leave to appeal out of time thereby, depriving the Court of the necessary jurisdiction to entertain the appeal.
3. With the concurrence of all parties, the Court on 16<sup>th</sup> June 2025 directed that the instant Notice of Preliminary Objection be canvassed by way of written submissions.
4. The Respondents/Applicants filed written submissions dated 17<sup>th</sup> July 2025 through their counsel and submitted that the Appellant's Notice of Appeal dated 3<sup>rd</sup> December 2024 flouts the provisions of Order 42 rule 1(1) of the Civil Procedure Rules as read together with Sections 78 and 79 of the



- Civil Procedure Act which require appeals to the High Court to be initiated by way of a Memorandum of Appeal. That the subject appeal is not a valid appeal because it was commenced through a process unknown in law as the Appellant filed a Notice of Appeal as distinguished from a Memorandum of Appeal. Guidance was sought in the holding of the Court in *JWB v RNK* [2015] eKLR; and, *Wandera T/A Odindiko & Company Advocates & Another v Amus Communication Limited* [2023] KEHC 22182 (KLR), to buttress the preceding argument.
5. It was further argued that at the Memorandum of Appeal dated 30<sup>th</sup> January 2025 was clearly filed out of time as the decision appealed against is dated 28<sup>th</sup> November 2024. Reliance was placed on the reasoning of the court in *Quality Group Limited v General Motors East Africa Limited* [2012] eKLR, and, *Longinus Oroni Murunga v David Masika Mafumbo* [2017] eKLR.
  6. With regard to the consequences for filing an appeal out time, it was submitted that any document filed out of time is a nullity and, therefore, incapable of invoking the jurisdiction of this Court. Guidance was sought in the decision of the Court in *Okumu v Okoth* [2024] KEELC 3397 (KLR); *Patrick Kiruja Kithinji v victor Mugira Marete* [2015] KECA 872 (KLR); *Nicholas Kiptoo arap Korir Salata v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR; *Samuel Kamau Macharia & Another v Kenya Commercial bank Limited & 2 Others* [2012] eKLR; and, *Owners of the Motor vessel Lilian ‘s’ v Caltex Kenya Limited* [1989] eKLR in support of the preceding submissions.
  7. The Appellant/Respondent filed written submissions dated 10<sup>th</sup> July 2025 through his counsel wherein four (4) issues for resolution by the Court were listed, namely:
    - i. (Whether the [instant] Preliminary Objection is improper and an abuse of the Court process?
    - ii. Whether the appeal is incompetent for failure to comply with Section 79G of the Civil Procedure Act.
    - iii. Whether the appeal can be admitted out of time where sufficient cause is shown.
    - iv. Whether the Preliminary Objection as raised is meritorious?
  8. He subscribed to the position the Notice of Appeal was lodged on 3<sup>rd</sup> December 2024 which is only five (5) days following delivery of the impugned decision on 28<sup>th</sup> November 2024. Furthermore, the delay in terms of lodging the Memorandum of Appeal dated 30<sup>th</sup> January 2025 was occasioned by the time taken to obtain certified copies of Judgment and Decree which constitutes a “good cause” within the meaning of Section 79G of the Civil Procedure Act, which delay should be attributed to the trial Court. The Appellant/Respondent also alluded to the Christmas period as having had a disruptive impact on the trial Court’s operations.
  9. He urged the Court to be mindful of the provisions of Article 159(2)(d) of the Constitution as read together with Sections 1A and 1B of the Civil Procedure Act which mandates the Courts to dispense justice without undue regard for procedural technicalities.
  10. Citing the dictum of the Court in *Mukisa Biscuit manufacturing Company Limited vs West End Distributors Limited* (1969) EA; and, *Peter Mungai v Joseph Ngaba Kuria & Another and Leah Njeri Ndichu* (2022) eKLR, the Appellant/Respondent argued that the Respondent/Applicant does not stand to suffer prejudice in the event the present Preliminary Objection is dismissed and appeal allowed to proceed.
  11. Upon careful perusal of parties’ rival submissions, the Court identified the following issue for determination, namely: whether the instant Notice of Preliminary Objection is merited?



12. A Preliminary Objection was defined in the case of *Mukisa Biscuit Manufacturing Co. Ltd v Westend Distributors Ltd*[1969] E.A. 696 as follows: `

“...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.”

13. The Appellant/Respondent submitted that the subject Preliminary Objection is invalid for the reason that it requires this Court to undertake a factual inquiry as to when certified copies of the judgment and decree of the trial Court were applied for and the date when the aforesaid judgment and decree were supplied. Furthermore, the Court is required to inquire whether the trial Court occasioned the delay in filing the subject appeal which is a factual matter.

14. The Court is unpersuaded by the foregoing submissions because the filing of an appeal out of time and without leave of Court cuts to the jurisdiction of the Court. As such, a claim to the effect that an appeal offends the provisions of Section 79G of the *Civil Procedure Act* raises a point of law as distinguished from an issue of fact. In the premises, the Court is satisfied the Notice of Preliminary Objection before it is valid.

15. Relying on the provisions of Section 57 of the *Interpretation and General Provisions Act* as read together with Order 50(2) of the Civil Procedure Rules, the Respondents/Applicants argued that in computing the 30 days period for commencing an appeal before this Court under Section 79G of the *Civil Procedure Act*, Sundays and public holidays are included. The Respondents/Applicants subscribed to the position that the statutory 30 days period for lodging an appeal before this Court lapsed on 22<sup>nd</sup> January 2025.

16. Section 79G of the *Civil Procedure Act* provides as follows;

“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.”

17. From the above provision, it is clear that all appeals from the subordinate court to the High Court must be filed within 30 days from date of the decree or order appealed against.

18. In the case of *Josephine Wambui Mwangi v Michael Mukundi Ngugi* [2021] eKLR, the proclaimed itself concerning an appeal filed out of time, without leave of Court as hereunder:

“No attempt was made to have the appeal admitted out of time. In the circumstances, the court cannot condemn the respondent to respond to an appeal that has been filed in blatant disregard of the law and no attempt has been made to regularize the defect. The net result is that the court agrees with the respondent that this appeal stands to be struck out on the ground that it was filed more than one year outside the stipulated time and without an order enlarging time for bringing the appeal.”



19. Similarly, in *PS v Republic* [2021] eKLR, the Court reasoned as follows:

“No leave has been obtained to file the appeal out of time. An appeal filed out of time without leave of the court is incompetent and the court cannot lawfully exercise jurisdiction on such appeal. Limitation of actions is a substantive matter of law. It serves a noble objective to ensure finality of litigation. Thus, failure to obtain leave to file proceedings out of time is not a mere technical omission but a substantial lapse that goes to the root of the proceeding itself.”

20. From the jurisprudence reiterated hereinabove, it is clear that the filing of a memorandum of appeal is a jurisdictional prerequisite, and its absence or lateness without justification deprives the Court of authority to consider the appeal. Thus, an appeal commenced out of time and without leave of the Court is a nullity in law and the Court lacks jurisdiction to entertain the same.

21. Order 50 Rule 4 of the Civil Procedure Rules stipulates follows:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act provided that this rule shall not apply to any application in respect of a temporary injunction.”

22. In the case before the Court, judgment was entered on 28<sup>th</sup> November 2024 while the Memorandum of Appeal was lodged on 30<sup>th</sup> January 2025, which is 63 days later. In computing the statutory 30 days period for the filling of an appeal, this Court is enjoined to deduct 24 days on account of the period between 21<sup>st</sup> December 2024 and 13<sup>th</sup> January 2025 pursuant to the provisions of Order 50 Rule 4 of the Civil Procedure Rules reproduced hereinabove. The result is that the subject appeal if found to have been filed out of time by 9 days being 63 days less 24 plus (+) 30 days statutory period. The Appellant/Respondent was obliged to seek the Court’s leave to appeal after the statutory period lapsed. Such leave would have been granted by this Court if presented good or cogent reasons in explanation for the delay in question, which he failed to do.

23. Having regard to the foregoing, it must have become apparent that the Notice of Preliminary Objection before the Court dated 9<sup>th</sup> June 2025 is merited, same is hereby allowed as per the prayers numbered (i) and (ii) therein.

24. Consequently, the Appellant/Respondent’s Memorandum of Appeal dated 30<sup>th</sup> January 2025 is hereby dismissed on account of non-compliance with the mandatory provisions of Section 79G of the [Civil Procedure Act](#).

25. The Respondents/Applicants are entitled to and are hereby awarded the costs in respect of the subject Notice of Preliminary Objection and at the trial Court.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 20<sup>TH</sup> DAY OF NOVEMBER 2025.**

**HON. T. W. Ouya**

**JUDGE**

