

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KISII**  
**CIVIL APPEAL NO. E020 OF 2025**

JOSEPH JUMA OIRERE .....

APPELLANT

VERSUS

VINCENT OSIEMO OIGARA .....

RESPONDENT

**JUDGMENT**

1. The appeal arises from the Judgment and decree of the lower court delivered on 12.09.2024 in Etago PMCC E078 OF 2023. The appeal was filed on 10.02.2025 from the decision of Hon. Mugendi Nyaga given on 12.09.2025 raising five grounds of appeal. I have perused the file and cannot find any leave to appeal out of time. It is also not set out in the memorandum of appeal.

2. The jurisdiction of the court in respect of appeals is set out in section 79 G of the civil procedure act 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.

3. It follows therefore that this court cannot take up jurisdiction it does not have, where no appeal is filed within 30 days. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

4. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. The appeal was filed in February 2025 for a decision that ought to have been filed on 12.10.2024. The appeal cannot proceed as it is fatally defective. Having found that the appeal is untenable for having been filed out of time, it is accordingly struck out. The next question is who is to bear the costs. The issue of costs is governed by section 27 of the Civil Procedure Act, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

5. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

**It is our finding that the position in law is that costs are at the discretion of the court**

**seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

6. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR**, as follows:

“[18] It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs- that costs follow the event - it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of

legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

7. The matter having been struck out after being defended, the Respondent is entitled to costs. The respondent is entitled to costs. a sum of Ksh. 65,000/= will suffice.

**Determination**

8. In the upshot, I make the following orders: -

- (a) The entire appeal is struck for being filed out of time.  
Costs of Ksh. 65,000/= to the Respondent.
- (b) 30 days stay of execution.
- (c) The file is closed.

**DELIVERED, DATED and SIGNED** at **NYERI** on this **18<sup>th</sup>** day of **November, 2025**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**  
**JUDGE**

**In the presence of: -**

Ms Miyogo for the Respondent

Mr. Kiprono for the Appellant

Court Assistant – Michael