

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**MISCELLENOUS ELC CASE NO. E019 OF 2024**

**PERIS CHEMELI NGALA SUING AS THE ADMINISTRATIX  
OF THE ESTATE OF DAVID BICHII NGALA (DECEASED)  
.....APPLICANT**

**-VERSUS-**

**KIPKERING                      LELEI.....  
RESPONDENT**

**RULING**

- 1) In an application by way of a Notice of Motion dated 21<sup>st</sup> May 2025, the applicant in her capacity as the Administratrix of the Estate of the late David Bichii Ngala (Deceased) through Isiaho Sawe and Company Advocates is seeking the orders infra;
- a) Spent
  - b) Spent
  - c) The Applicant be granted leave to appeal out of time.

d) The Notice of Appeal filed before the Trial Court on 21/05/2025, the Memorandum and record of appeal filed in Kapsabet ELC Appeal of 2025 be deemed as properly filed and served subject to payment of the requisite filing fees.

e) Upon the grant of prayer (d) above, pending the hearing and determination of the Kapsabet ELC Appeal No. E004 of 2025, there be stay of further proceedings in Kabiyeet PMCC ELC No. E007 of 2024.

2) The Respondent through B. Murgor and Company Advocates, opposed the application by way of a preliminary objection dated 11<sup>th</sup> August 2025 on the grounds thus;

a) The application offends the mandatory provisions of Order 43 (1), (2) and (3) of the Civil Procedure Rules.

b) This Court lacks the jurisdiction to hear the intended appeal unless leave of the Court from which the order was made is sought and obtained

c) The application is fatally defective, incompetent and an abuse of the Court process and ought to be struck out.

- 3) By the submissions dated 21<sup>st</sup> October 2025, Learned Counsel for the Applicants referred to the orders sought in the application as well as the preliminary objection. Counsel submitted that leave is obtainable before the Court from which the order was made within the prescribed timelines. That the ruling of the Magistrate's Court was delivered on 20<sup>th</sup> September 2024, about eight months before the instant application was filed. That this Court is empowered to extend time to appeal out of time.
- 4) To fortify the submissions, Counsel cited sections 79G and 95 of the Civil Procedure Act Chapter 21 Laws of Kenya (The CPA herein). It was submitted that the application is properly before this Court. That therefore, the application be allowed as the sole intention of the preliminary objection is to deny the applicant a fair hearing.
- 5) In the submissions dated 19<sup>th</sup> August 2025, Learned Counsel for the Respondent made reference to the orders sought in the application, the grounds of opposition, the ruling of the Magistrate's Court delivered on 20<sup>th</sup> September 2024, Order 43 of the CPA. Counsel submitted

that the issue of leave to appeal forms the foundation of a Court's jurisdiction.

- 6) To buttress the submissions, Counsel relied on the case of **Mbaya -vs-Kamau & another {2023} KEHC 24945 (KLR)** that a Court has no jurisdiction to hear the intended appeal unless leave is sought of the Court from which the order was made is sought and obtained. That the application is not curable thus, it be dismissed with costs and the preliminary objection be upheld.
- 7) In the foregone, is there merit on the preliminary objection and if so, what orders can issue as regards the same as well as the application?
- 8) The Respondent's lamentation in the preliminary objection is that the application offends Order 43 (1) (2) (supra) which provides that an appeal shall lie as of right from the orders set out thereunder and the rules under section 75 (1) (b) of the CPA. That leave shall lie with leave of the court from any other order made under the Rules.
- 9) Notably, Order 43 (3) (supra) reads;
- 'An application for leave to appeal under section 75 of the Act shall in the first instance be made to the**

**court making the order sought to be appealed from either orally at the time when the order was made or within fourteen days from the date of such order.'**

10) In the case of **Salat -vs- Independent Electoral and Boundaries Commission & 7 others (2014) KESC 12 (KLR)**, the Supreme Court of the Republic of Kenya laid down the principles that a Court should consider in exercise of such jurisdiction and held;

**'Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party in the discretion of the court. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court whether the court should exercise the discretion to extend time.....'**

11) Moreover, in the case of **Boit -vs- Kumin; Boit & another (Interested parties) (2025) KECA 568 (KLR)**, the Court of Appeal held that the right to appeal is not automatic, leave is a fundamental jurisdictional hurdle and that.

**'The Applicant was mandatorily required by the law to first seek and obtain leave from the Court of first instance and if refused from this Court. Leave to appeal was not obtained in this case. Therefore, the applicant's application dated 3<sup>rd</sup> February, 2025 fails on two fronts.....**

12) Furthermore, the ruling from where the applicant seeks to prefer an appeal out of time, was delivered on 20<sup>th</sup> September 2024 and the instant application was filed about eight months thereafter. I bear in mind Order 50 of the Civil Procedure Rules 2010 as regards time, **Mbaya case (supra)** and sections 75, 79G and 95 of the CPA in relation to the application.

13) It is trite law that lack of jurisdiction renders a Court's decision void as opposed to being merely voidable; **see Republic -vs- Karisa & others (2017) eKLR.**

14) In the premises, I find that leave from the Court of first instance was not obtained and therefore, this court is devoid of jurisdiction over the application. The preliminary objection is sustainable and upheld accordingly.

15)A fortiori, the application dated 21<sup>st</sup> May 2025 is hereby struck out with no orders as to costs.

16)It is so ordered.

**DATED** and **DELIVERED** at **KAPSABET** this **2<sup>nd</sup>** day of **DECEMBER 2025.**

**HON. G M A ONGONDO**

**JUDGE**

**In the presence of;**

1. Walter, Court Assistant