



REPUBLIC OF KENYA



Katelo v Halo (Family Appeal E001 of 2025) [2026] KEHC 90 (KLR) (15 January 2026) (Ruling)

Neutral citation: [2026] KEHC 90 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT**

FAMILY APPEAL E001 OF 2025

FR OLEL, J

JANUARY 15, 2026

BETWEEN

MARIAM GALGALLO KATELO APPELLANT

AND

KALICHA DIMA HALO RESPONDENT

RULING

A. Introduction

1. The application before this court is the Notice of Motion application dated 18th November 2025 brought pursuant to provisions of Section 1A, 1(B), 3A and 63(E) of the *Civil Procedure Act*, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules 2010 and Rule 86 of the Kadhi's courts (Procedure and Practice rules) and all other enabling provisions of law. The prayers sought were that;
 - a. Spent
 - b. This court be pleased to set aside and review its ruling delivered on 3rd November 2025.
 - c. The Honourable court be pleased to consider the merits of the Applicant's notice of preliminary objection dated 6th October 2025.
 - d. The Honourable court be pleased to strike out and/or dismiss the Application for stay of execution dated 28th July 2025 for want of jurisdiction.
 - e. The costs of this application be awarded to the Respondent/Applicant.
2. This application is supported by the grounds on the face of the said application and the affidavit of the respondent/Applicant dated 18th November 2025, while the respondent opposed this application through her grounds of opposition dated 26th November 2025.
3. The Appellant averred that on 3rd November 2025, this court did deliver its ruling to the Appellants application dated 28th August 2025 and had the same published, on the CTS portal, but they noted



that crucially the court had failed to address a fundamental issue raised vide their preliminary objection, to wit; that the appellant had failed to file a notice of Appeal within thirty (30) days as required under Rule 86 of the Kadhi's courts (Procedure and practice) Rules, thereby rendering the said appeal to be incompetent.

4. Unfortunately the court had erroneously construed their preliminary objection as relating to the timing of the filing of the memorandum of Appeal, which was an error as the issue in contention was that the appeal was initiated by filing of memorandum of appeal instead of by way of notice of appeal, contrary to Rule 86 of the Kadhi's court (Procedure and Practice) Rules and as a result the court lacked jurisdiction to hear and determine the appeal filed
5. Since the appeal filed was devoid of any legal foundation and premised on an incompetent and non-existent appeal it was clear beyond preadventure that there was an error apparent of the face of the proceedings, which the court ought to correct as it had been moved in an improper manner and was divested of jurisdiction to hear and determine the Application dated 28th July 2025 and or the said Appeal filed.
6. In response, to the said application, the Appellant/respondent filed grounds of apportion dated 26th November 2025, where she averred that the application under consideration was misconceived as Section 87 of the Kadhi's court (procedure and practice) rules provided that all procedures on appeal shall be in accordance to the civil procedure rules. Further it was contented that if there was a lacuna as to the interpretation of Section 86 and 87 of the said rules, the court could rely on Section 173 Kadhi's court (procedure and practice) rules , which provided that where there was any lacuna in the said rules or where any matter was not expressly provided for in the said rules, the provisions of Civil procedure rules would apply so far as it was relevant to the said proceedings.
7. To that extent, the notice of motion filed was ill conceived, mischievous and constituted an abuse of the court process and thus urged this court to dismiss the same.

B. Analysis & Determination

8. I have carefully considered the Application, its Supporting Affidavit, the Respondent's grounds of opposition, and the parties respective submissions filed. The only issue arising for determination is whether the Appellant has met the pre requisite conditions necessary to enable the court review its ruling dated 3rd November 2025.
9. Section 80 of the *Civil Procedure Act* provides as follows: -

Section 80. Review

“Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

Order 45 Rule 1 of the Civil Procedure Rules

[Order 45, rule 1.] Application for review of decree or order.

- “1. (1) Any person considering himself aggrieved—



- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

10. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

11. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd vs Ndungu Njau (2001)eKLR.

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

12. In Chandrakant Joshibhai Patel -v- R [2004] TLR, 218 , it had been held that an error stated to be apparent on the face of the record:

“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions.”

13. The issue in contention is that the court failed to consider the provisions of Rule 86 of the Kadhi’s court (Procedure and Practice) Rules, which provides that an appeal from the decision of the Kadhi to the high court shall be initiated by filing a notice of Appeal, within 30 days from the date on which the decision was pronounced. The appellant failed to do so and had instead filed her memorandum of appeal, which invalidated the said appeal and made it incompetent.

14. Rule 86 of the Kadhi’s court (Procedure and Practice rules) provides that;
Rule 86; Notice of Appeal



1. An appeal against the decision of the Kadhi's court shall be made to the high court, and against the decision of the High court to the court of Appeal.
 2. An appeal shall be made by giving a notice of appeal
 3. An appellant may appeal against the whole or any part of a decision.
 4. The notice of appeal shall be filed within thirty days from the date on which the decision was pronounced and shall state whether the whole or part only, and what part, of the decision is appealed against.
15. The law is also clear that, where there is no valid notice of appeal it renders the said appeal to be incompetent and the same cannot be cured by provision of Article 159 of *the Constitution* as the said lacuna relates to a mandatory procedural step that goes into the court's jurisdiction. See *Scope Telematics International Sales Ltd Vs Stoic Company Ltd & Another (2017) Eklr*, Where the court held that;
- “The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned judge cannot be said to have excised his discretion properly. There can be no other interpretation of rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For those reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.”
17. In *Raila Odinga v. I.E.B.C & others (2013) eKLR*, the Supreme Court further observed that:
- “Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”
18. It is clear that the appellant initiated this appeal by filing her memorandum of appeal and though she relies on provision of Rule 87 of the said Act to sanitize her action, the said provision is inapplicable as it deals with the “procedure on appeal” and not how the said appeal is commenced, which is expressly provided for under Rule 86 of the said rules. A notice of appeal is what gives the court its inherent jurisdiction to handle the appeal and in absence of the same there cannot be any competent appeal.
19. Indeed, the appellant had raised this issue through the preliminary objection filed and it was not an issue tackled in the ruling he sought to have reviewed. He has established that an error occurred, which is open on the face of the prior proceedings and thus is deserving of the orders sought.

Disposition

16. Taking into consideration the above findings, I do order that;
- a. The Application dated 18th November, 2025 has merit and is allowed in terms of prayer (2), (3) & (4).
 - b. This Appeal is incompetent for being filed in breach of Rule 86 of the Kadhi's Court (Procedure & Practice Rules) and is therefore struck out.



c. This being a family matter each party will bear their own costs.

17. It is so ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 15TH DAY OF JANUARY, 2026.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 15TH day of January ,2026.

In the presence of: -

N/A Appellant

N/A Respondent

Mr. Jarso..... Court Assistant

