

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCFA NO. E018 OF 2025

**IN THE MATTER OF THE ESTATE OF THE SILVESTER
WARINGA AKELO**

.....**DECEASED**

AND

MARGARET ADHIAMBO AHONO.....

.....**APPELLANT**

VERSUS

DANIEL NG'UONO WARINGA.....

RESPONDENT

(Being an appeal from the order of the Chief Magistrate's Court at Siaya before Hon. B. B. Limo (PM), delivered on 8th day of October 2025 in Siaya Succession Cause No. MSUCC No. E113 of 2024 in the Estate of Waringa Silvester Akelo)

BETWEEN

DANIEL NG'UONO WARINGA.....

APPLICANT

VERSUS

MARGARET ADHIAMBO AHONO.....
RESPONDENT

RULING

1. The Respondent has filed a Notice of Preliminary Objection dated 30th October 2025 wherein he raised the following grounds:

- i) That the appeal by way of memorandum of appeal dated 27th October 2025 as filed is incompetent, misconceived, untenable, an abuse of the court's time and judicial process as the Appellant failed to first seek leave to appeal against the order from the court that made the order in line with the provisions of Order 43 of the Civil Procedure Rules.
- ii) That the Appellant having failed to seek leave in line with Order 43 of the Civil Procedure Rules, this court has no jurisdiction to entertain the appeal.
- iii) That the appeal as filed stands frivolous, vexatious amounts to forum shopping, is untenable, an abuse of the court's time and judicial process and should be dismissed with costs to the Respondent.

2. The Respondent opposed the application and filed a replying affidavit sworn on 31/10/2025 wherein he averred inter alia; that Respondent has not come to court with clean hands and

the application by way of Notice of Preliminary Objection dated 30/10/2025 as filed is malicious, vexatious, incompetent, improper before court, made in bad faith, a gross abuse of the court's process and judicial time and totally without merit; that an appeal to the court ought to be instituted within 30 days of filing the Notice of Appeal where the appeal is as of right; or 30 days after the grant of certification, where such certification is required; that leave to right of appeal was automatically granted to the Appellant herein by Hon. Benjamin B Limo(PM) vide the ruling of the Lower Court matter MCSUCC/E113/2024 delivered on 8/10/2025 where the magistrate stated that an appeal in this case was admitted on 27/10/2025; that the 30 days right of appeal had not lapsed prior to filing the same; that as per ground 7 in the Appellant's Memorandum of Appeal dated 27/10/2025, no ruling notice was ever issued to the Appellant who was not present during the ruling delivered on 8/10/2025 to which the lower court magistrate conveniently indicated in the ruling that the same was delivered in the presence of the parties; that the Honourable court to find the Respondent's Notice of Preliminary Objection dated 30/10/2025 to be malicious, vexatious, incompetent, improper before court, made in bad faith, a gross abuse of the court's process and judicial time and totally without merit; that the appeal raises substantive issues which need to be addressed; that Section 1(2) of the Court of Appeal Rules, Legal Notice 40 of 2022 the courts are empowered to make any orders as may be necessary for

the ends of justice or to prevent abuse of the process of the court.

3. The Respondent filed a re-joinder to the replying affidavit dated 12th November 2025 wherein he averred inter alia; that his preliminary objection is not based on the fact that the appeal was filed out of time but instead based on the fact that the same was filed without leave of the court; that it was not upon his advocate to serve the Applicant with a ruling notice as the date of ruling was issued in the presence of the Applicant's advocate; that despite the fact that the court in its ruling stated that **"any arising objections shall be subject of appeal"** that statement does not mean the Appellant was granted leave to appeal; that the Appellant having admitted that she was not present during the ruling, it is obvious the trial court could not be aware the Appellant intended to appeal the ruling for the court to grant her leave to appeal; that it is evident that the Appellant did not seek leave of the court as provided for by Order 43 of the Civil Procedure Rules hence the appeal is incompetent; that Section 1(2) of the Court of Appeal Rules does not apply in the instant case as the same is only applicable to the Court of Appeal and not the High Court.
4. The aforesaid Notice of Preliminary Objection was canvassed by way of written submissions.
5. Learned counsel for the Respondent has submitted that his Notice of Preliminary Objection dated 30th October 2025 is

premised on Order 43 of the Civil Procedure Rules which provides:

- 1) An appeal shall lie as of right from the following orders and rules under the provisions of Section 75 (1) (h) of the Act -
 - a) Order 1 (Parties to suit)
 - b) Order 2 (Pleadings generally)
 - c) Order 3 (frame and institution of the suit)
 - d) Order 4 rule 9 (return of Plaintiff)
 - e) Order 7, rule 12 (exclusion of counter claim)
 - f) Order 8 (amendment of pleadings)
 - g) Order 10, rule 11 (setting aside judgment or dismissal for non-attendance)
 - h) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases)
 - i) Order 19 (affidavit)
 - j) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - k) Order 23, rule 7 (trial of claim of third person in attachment of debts)
 - l) Order 24, rule 5, 6, and 7 (legal representation)
 - m) Order 25, rule 5 (compromise of a suit)
 - n) Order 26, rules 1 and 5(2) (security for costs)
 - o) Order 27, rules 3 and 10 (payment into court and tender)

- p) Order 28, rule 4 (orders in proceedings against the Government)
- q) Order 34 (interpleader)
- r) Order 36 rules 5, 7 and 10 (summary procedure)
- s) Order 39, rules 2, 4, and 6 (furnishing security)
- t) Order 40 (rules 1, 2, 3, 7 and 11 (temporary injunction))
- u) Order 41, rules 1 and 4 (receivers)
- v) Order 42, rules 3, 14, 21, 23 and 35 (appeals)
- w) Order 45, rule 3 (applications for review)
- x) Order 50, rule 6 (enlargement of time)
- y) Order 52, rules 4, 5, 6 and 7 (advocates)
- z) Order 53, (judicial review orders)

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

(3) 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 is made, or within fourteen days from the date of such orders.

(4) Save where otherwise expressly provided in this rule, "order" includes both an order granting the relief for and an order refusing such relief"

4. Counsel for the Respondent further submitted that the legal threshold for a preliminary objection is well settled.

Reliance was placed in the case of **Catherine Kawira v. Muriungu Kirigia (2016) eKLR** put it succinctly thus;

“(5) I do not want to reinvest the wheel on the legal threshold for preliminary objection. It is now well settled principle that a preliminary objection should be a point of law that is straight forward and not obscured in factual details for it to be proved. Again, it must be potent enough to decimate the entire suit or application. on this I am content to cite the case of Mukisa Biscuit manufacturing Company Limited V West End Distributors Limited (1969) EA 696 where it was stated as follows:

“So far as I am aware, 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. Example, 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.”

5. It was further submitted that this being an appeal on a succession matter, the Appellant ought to seek leave of the court before filing the instant appeal as this appeal is not an appeal being filed as a matter of a right under Order 43

(1) of the Civil Procedure Rules. The Appellant having failed to seek leave in line with order 43(2) of the Civil Procedure Rules, this court has no jurisdiction to entertain the appeal.

Reliance was placed in the case of **Directline Insurance Co. Ltd v Onyango (Civil Appeal E345 of 2022) [2022]** while faced with a similar application as the instant application had this to say:

“ It is then clear that under Order 43(2) an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the orders sought to be appealed against falls under the orders which are appealable as of right under order 43 (1) leave to appeal must be obtained before such an appeal can be preferred. (See Mutungi J in Serephen Nyasani Menge v Rispah Onsase [2018] eKLR). Order 42 Rule 6 under which applications for stay of execution fall is not one of the orders mentioned in order 43(1) where the appeal lie as of right. The Appellants ought to have sought leave before filing this appeal.”

Again, in the case of Stephen **Omondi Juma v Sprocer Asuor Rabote [2022] eKLR, Aburili J** was faced with a similar issue as the issue where she cited a Court of Appeal decision and stated that:

“As was emphatically stated in Nyutu Agrovet Ltd vs Airtel Networks Ltd [2015] eKLR, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. further, that the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of Section 75 of the Civil Procedure Act and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”

6. Further, it was submitted that leave to appeal in the instant case was matter of right. That the preliminary objection being a matter that touches on the jurisdiction of the court and the procedure to be followed before filing the appeal is provided for, it is our submission that reliance on Article 159 Article 48 of the Constitution and Section 1A and 1B of the Civil Procedure Act does not cure this procedural misstep. That the application of these legal provisions has been a subject of attention by our courts and the law is settled on the matter. Counsel further relied on **Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & Another [2015] eKLR**, where the Court of Appeal stated that:

“It has often times been sated that rules of procedure are handmaidens of justice; where there is a clear procedure to challenge membership to the County Assembly is by way of Petition. The Appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of the Constitution, Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition.”

7. Further, the counsel submitted that the trial court in its ruling concluded by saying that **“any objections shall be subject of appeal”** and that statement does not mean that the Appellant was granted leave to appeal. that in ordinary circumstances, courts when delivering their rulings and judgments advice parties that if any of them is not satisfied, then they have the right of appeal in the higher court. That it is just a point of information that the party if not satisfied still has redress in another forum but it does not in itself grant leave unless a party seeks the said leave as required by order 43 of the Civil Procedure Rules. That the argument by the Appellant that the trial court granted them leave to appeal when the court made the said statement is therefore not true. The learned counsel concluded by stating that

there is no automatic right of appeal of the order sought to be appealed from by the Appellant in the instant matter. That the can therefore be no competent appeal that would clothe this court with jurisdiction to entertain this appeal. that in essence, this court has no jurisdiction to hear the intended appeal unless leave of the court from which the order was made is sought and obtained.

8. The Appellant's submissions are dated 9th December 2025. It was the Appellant's submissions that that appeal to the Court ought to be instituted within 30 days of filing the notice of appeal where the appeal is as of right; or 30 days after the grant of certification, where such certification is required.
9. It was submitted that the leave to right of appeal was automatically granted to the Appellant herein by the **Hon. Benjamin B. Limo (PM)** vide the Ruling of the Lower Court matter **MCSUCC/E113/2024** delivered on **8TH October, 2025** where the magistrate stated that any objection which could rise out of the lower court Ruling was subject to appeal, to which an appeal in this case was admitted on **27TH October, 2025**. That the 30 days right of appeal had not lapsed prior to filing the same.
10. Learned counsel for the Appellant submitted that as per ground 7 in the Appellant's Memorandum of Appeal dated **27TH October, 2025** no Ruling Notice was ever issued to the Appellant who was not present during the Ruling

delivered on **8TH October, 2025** to which the lower court magistrate conveniently indicated in the Ruling that the same was delivered in the presence of the parties.

11. Further, it was submitted that this Appeal be allowed to proceed to be heard on merits as the Appellant stands to be heavily prejudiced by the decision of the lower court's ruling delivered on **8th October, 2025** on the mode of distribution of the late **Waringa Silvester Akelo's** estates.
12. Counsel further placed reliance on the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit ... the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

13. Reliance was placed in the case of **Cosmas Mrombo Moka vs Co-operative Bank of Kenya Limited and Legacy Auctioneering Services**, court held as follows;

“...Where however, the final determination is grounded on lapses like failure to attend court or takes steps in prosecuting the case, the court would not have gone into the merits. I am always reminded that **‘the court is often said to exist from the purposes of deciding the rights of the parties not for purpose of imposing discipline [2]’**.”

Again, reliance was further placed on **Article 159 (2) (d)** of the Constitution and **Section 3 (2)** of the Judicature Act, Cap. 8, Laws of Kenya provides for the **‘Overriding Principle’** or **‘Oxygen Principle’** where the Honourable Court are allowed to administer justice without undue regard to procedural technicalities and with the aim of achieving a just outcome over minor procedural errors or technicalities.

14. I have considered the rival submissions regarding the Notice of Preliminary Objection dated 30th October 2025. I find the issue for determination is whether the said Preliminary Objection has merit.

15. The legal threshold for a preliminary objection is well settled in the famous case of **Mukisa Biscuit Manufacturing Company Limited Vs West End**

Distributors [1969] EA 696 where Sir Charles Newbold stated as follows:

“So far as I am aware, 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. Example, 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.”

Also, in **Catherine Kawira v. Muriungu Kirigia (2016) eKLR** Gikonyo J held as follows:

“(5) I do not want to reinvest the wheel on the legal threshold for preliminary objection. It is now well settled principle that a preliminary objection should be a point of law that is straight forward and not obscured in factual details for it to be proved. Again, it must be potent enough to decimate the entire suit or application. on this I am content to cite the case of Mukisa Biscuit manufacturing Company Limited V West End Distributors Limited (1969) EA 696.

It is clear from the foregoing that the threshold for a Preliminary Objection is where the issue raised is one on a point of law. The same must be quite clear and does not invite the court to inquire into certain set of facts in order to determine it. The same is raised on the understanding that the pleadings as they are on the record are clear and unambiguous and that if the said Preliminary Objection is argued then it may dispose off the suit. Already, the Appellant has lodged her Memorandum of Appeal where she has raised the various grounds of appeal. On the other hand, the Respondent has raised a germane issue namely that the Appellant did not seek leave from the trial court in order to lodge the present appeal. I find this is a moot point and if it is determined then it will help to dispose this appeal. There is no controversy or dispute as to the nature of the pleadings as filed and that this court will not go into establishing the facts since the only issue in contention is whether it was necessary for the Appellant to seek leave from the trial court in order to lodge the present appeal.

16. It is noted that this being an appeal on a succession matter, the Appellant was expected to seek leave of the court before filing the instant appeal as this appeal is not an appeal being filed as a matter of a right under Order 43 (1) of the Civil Procedure Rules which provides as follows:

1. An appeal shall lie as of right from the following orders and rules under the provisions of Section 75 (1) (h) of the Act -

- a. Order 1 (Parties to suit)
- b. Order 2 (Pleadings generally)
- c. Order 3 (frame and institution of the suit)
- d. Order 4 rule 9(return of Plaintiff)
- e. Order 7, rule 12(exclusion of counter claim)
- f. Order 8(amendment of pleadings)
- g. Order 10, rule 11 (setting aside judgment or dismissal for non-attendance)
- h. Order 15, rules 10,12 and 18 (sanctions against witnesses and parties in certain cases)
- i. Order 19 (affidavit)
- j. Order 22, rules 25,57, 61(3) and 73 (orders in execution);
- k. Order 23, rule 7(trial of claim of third person in attachment of debts)
- l. Order 24, rule 5,6, and 7 (legal representation)
- m. Order 25, rule 5 (compromise of a suit)
- n. Order 26, rules 1 and 5(2) (security for costs)

- o. Order 27, rules 3 and 10 (payment into court and tender)
- p. Order 28, rule 4 (orders in proceedings against the Government)
- q. Order 34 (interpleader)
- r. Order 36 rules 5, 7 and 10 (summary procedure)
- s. Order 39, rules 2,4, and 6 (furnishing security)
- t. Order 40 (rules 1,2,3, 7 and 11 (temporary injunction)
- u. Order 41, rules 1 and 4 (receivers)
- v. Order 42, rules 3,14,21,23 and 35 (appeals)
- w. Order 45, rule 3 (applications for review)
- x. Order 50, rule 6 (enlargement of time)
- y. Order 52, rules 4,5,6 and 7 (advocates)
- z. Order 53, (judicial review orders)

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

(3) 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 is made, or

within fourteen days from the date of such orders.

(4) Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief for and an order refusing such relief.”

17. The Respondent contends that the Appellant having failed to seek leave in line with order 43(2) of the Civil Procedure Rules, this court has no jurisdiction to entertain the appeal and has sought for its dismissal. Reliance was placed in the case of **Directline Insurance Co. Ltd v Onyango (Civil Appeal E345 of 2022) [2022]** where the court handling a similar issue held as follows:

“ It is then clear that under Order 43(2) an appeal shall lie with the leave of the court from any other order made under the rules. This means that unless the orders sought to be appealed against falls under the orders which are appealable as of right under order 43 (1) leave to appeal must be obtained before such an appeal can be preferred. (See Mutungi J in Serephen Nyasani Menge v Rispah Onsase [2018] eKLR). Order 42 Rule 6 under which applications for stay of execution fall is not one of the orders mentioned in order 43(1) where the appeal lie as of right. The

Appellants ought to have sought leave before filing this appeal.”

Again, in the case of Stephen **Omondi Juma v Sprocer Awuor Rabote [2022] eKLR, Aburili J** was faced with a similar issue where she cited a Court of Appeal decision and stated that:

“As was emphatically stated in Nyutu Agrovet Ltd vs Airtel Networks Ltd [2015] eKLR, a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. further, that the right of appeal is conferred by statute and cannot be inferred. It follows that where a right of appeal does not lie automatically, a party can only invoke the provisions of Section 75 of the Civil Procedure Act and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”

18. Even though the Appellant contends that leave to appeal in the instant case was matter of right, the clear provisions of Order 43 of the Civil Procedure Rules and Section 75 of the Civil Procedure Act provides otherwise in that leave must be sought from the trial court before lodging an appeal. Hence, the preliminary objection being a matter that touches on the jurisdiction of the court and the procedure to

be followed before filing the appeal is provided for, the reliance on Article 159 and Article 48 of the Constitution and Section 1A and 1B of the Civil Procedure Act as sought by the Appellant does not cure this procedural mis-adventure. In the case of **Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & Another [2015] eKLR**, the Court of Appeal held as follows:

“It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure to challenge membership to the County Assembly is by way of Petition. The Appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of the Constitution, Article 159 was neither aimed at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for initiating a cause of action before courts. The statutory procedure stipulated for determining the question of membership to the County Assembly is by way of petition.”

19. The learned counsel for the Appellant has urged this court to pardon the Appellant for the blunders in not complying with the law and to do justice for the Appellant as this was a succession matter involving families of deceased persons and further proceed to rely on the overriding principle or oxygen principle as well as Article 159 (2) (d) of the Constitution. Reliance was placed on the case of **Philip**

Chemowolo & Another v Augustine Kubende, [1982 - 881] KAR 103 which stated that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

Further, Appellant’s counsel placed reliance in the case of **Cosmas Mrombo Moka vs Cooperative bank of Kenya Limited and Legacy Auctioneering Services** the court held that:

“.... Where however, the final determination is grounded on lapses like failure to attend court or take steps in prosecuting the case, the court would not have gone into the merits. I am always reminded that the court is often said to exist from the purposes of deciding the rights of the parties not for purposes of imposing discipline.

20. Learned counsel for the Appellant seems to bank on the orders made by the trial court vide its ruling when it held

that **“any objections shall be subject of appeal”** which should not be construed as granting the Appellant the requisite leave to lodge an appeal since that is a standard procedure by all courts to inform parties of their right of appeal. However, the right of appeal depends on whether the matter for appeal is one of right or one where leave must be sought from the trial court. It is therefore upon the parties to take up their matters in the appropriate manner. Simply put, the same is just a point of information that the party if not satisfied still has redress in another forum but it does not in itself grant leave unless a party seeks the said leave as required by Order 43 of the Civil Procedure Rules. Hence, the argument by the Appellant that the trial court granted them leave to appeal when the court made the said statement is therefore not true and misleading since there is no automatic right of appeal of the order sought to be appealed from by the Appellant in the instant matter. That being the position, there seems to be no competent appeal that would clothe this court with jurisdiction to entertain this appeal and hence this court has no jurisdiction to hear the intended appeal unless leave of the court from which the order was made is sought and obtained by the Appellant. Further, the Appellant’s reliance on the provisions of Article 159 (2)(d) of the Constitution and the Oxygen principle is not convincing since the rule of thumb is that those provisions are not a panacea for all mistakes by parties. The strict rules of procedure must not

be sacrificed at the altar of massaging egos of parties who have fallen fowl of the rules.

21. In view of the foregoing observations, it is my finding that the Respondent's Notice of Preliminary Objection dated 30th October 2025 has merit. The same is allowed with an order that the Appellant's Memorandum of Appeal dated 27th October 2025 lacks merit and is hereby struck out with costs to the Respondent.

Orders accordingly.

Dated, signed and delivered at Siaya this 13th day of February 2026

D. KEMEI

JUDGE

In the presence of:

Ochanyo.....for Appellant

N/A Ooro F. for Charles Ochieng.....for Respondent

Maurine/Kimaiyo.....Court Assistant

SIAYA HCFA NO. E018 OF 2025 - RULING