



**Abdirahim (Suing as the Legal Representative of the Estate of Shariff Abdi Rahim) v Abdikadir (The Legal Representative of the Estate of Abdulkadir Shariff Abdirahim) (Civil Appeal (Application) E598 of 2025) [2026] KECA 409 (KLR) (27 February 2026) (Ruling)**

Neutral citation: [2026] KECA 409 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAIROBI**  
**CIVIL APPEAL (APPLICATION) E598 OF 2025**  
**SG KAIRU, M NGUGI & P NYAMWEYA, JJA**  
**FEBRUARY 27, 2026**

**BETWEEN**

**HUSSEIN SHARRIF ABDIRAHIM (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SHARIFF ABDI RAHIM) ..... APPELLANT**

**AND**

**DAHIR SHARRIF ABDIKADIR (THE LEGAL REPRESENTATIVE OF THE ESTATE OF ABDULKADIR SHARIFF ABDIRAHIM) ..... RESPONDENT**

*(An application for an injunction to restrain the respondent from executing the judgment of the Environment and Land Court in Isiolo (Oguttu-Mboya J.) dated 5th June 2025 and an application to strike out the record of appeal dated 29th July 2025 from the judgment of Oguttu- Mboya J. dated 5th June 2025 in Isiolo ELCC No. 004 of 2021 (formerly known as Meru ELCC No.77 of 2019)*

**RULING**

1. In this ruling, we address two applications filed by the appellant and the respondent respectively in Civil Appeal No. E598 of 2025. The appeal is filed by the appellant, Hussein Sharrif Abdirahim (suing as the Legal Representative of the estate of Shariff Abdirahim) from the judgment of the Environment and Land Court (ELC) at Isiolo (Oguttu-Mboya J.) dated 5<sup>th</sup> June 2025 in ELCC No. 004 of 2021 (formerly Meru ELC No. 77 of 2019). In the said decision, the trial court dismissed the appellant's suit and held that the property the subject of the dispute, Plot No. 130/ LR. No. 12255/22; IR NO. 5313 belonged to the respondent and did not constitute part of the estate of Shariff Abdirahim [Deceased).
2. Dissatisfied with the decision, the appellant filed Civil Appeal No. E598 of 2025. He also filed the application dated 29<sup>th</sup> July 2025 seeking a temporary injunction under rule 5(2)(b) of this Court's Rules to restrain the respondent, pending the hearing and determination of the appeal, from, among



- other things, entering upon, encroaching, trespassing or in any way dealing or interfering with the suit property.
3. On his part, the respondent filed the application dated 14<sup>th</sup> August 2025 under rules 44, 1(2) and 86 of this Court's Rules seeking an order to strike out the appellant's record of appeal. The grounds for the application are that there was no competent, dated and signed notice of appeal in the record to formally and procedurally commence the proceedings relevant to the impugned record of appeal. The respondent also sought the striking out of the record of appeal on the basis that the notice of appeal had been filed in contravention of Order 9 rule 9 of the Civil Procedure Rules as there was no consent or order of the court for the advocate to come on record for the appellant.
  4. We heard the two applications together on 28<sup>th</sup> October 2025. Learned counsel, Mr. Nyamwaro, appeared for the appellant, while learned counsel, Mr. Mwenesi, appeared for the respondent. As an outcome favourable to the respondent on the application seeking to strike out the record of appeal would render the appellant's application for a temporary injunction otiose, we shall address ourselves to the striking out application first.
  5. The application is dated 14<sup>th</sup> August 2025 and is supported by an affidavit sworn on the same date by the respondent, Dahir Shariff Abdulkadir. The respondent contends that the record of appeal should be struck out as essential steps in the institution of the appeal were not taken, there being no competent, dated and signed notice of appeal in the record to procedurally commence the proceedings relevant to the record of appeal; that without a valid notice of appeal that is signed and dated as required under rule 77 and Form D of the Court of Appeal Rules, the appeal is incompetent and cannot found any subsequent proceedings, including the applicant's application for injunction. The respondent also alleged that the appeal was incompetent as it was filed in breach of order 9 rule 9 of the Civil Procedure Rules, there being no consent or order of the court for the advocate who filed the undated notice of appeal to come on record for the appellant.
  6. The appellant opposed the application by an affidavit sworn on 21<sup>st</sup> October 2025. It is his case that Order 9 rule 9 of the Civil Procedure Rules applies to change of advocates within the proceedings in the trial court post judgment, and not to appellate proceedings before this Court; and that the trial court was functus officio and could not determine issues related to proceedings before this Court, which are independent and governed by the Court of Appeal Rules. Accordingly, that no leave was required for the advocate representing him in the appellate process to come on record.
  7. Regarding the respondent's contention that the notice of appeal was incompetent as it was not signed or dated, the appellant avers that it was signed, and that it was dated 17<sup>th</sup> June 2025 at the lodging section and signed by the Deputy Registrar. It is his case that the notice of appeal meets all the requirements of this Court's Rules; and in any event, the Court, in accordance with the provisions of Article 159(2)(d) and sections 3A and 3B of the [Appellate Jurisdiction Act](#), should overlook technicalities and determine the matter on merit.
  8. We have considered the application and the submissions of the parties. We have also examined the notice of appeal at page 197 of the record of appeal that the respondent seeks to strike out. We note, as counsel for the appellant also concedes, that while it is signed by his counsel, the date is not inserted above the signature. A date is, however, inserted immediately below, indicating that it was lodged with the Registrar on 17<sup>th</sup> June 2025, 12 days after the decision of the trial court.
  9. We appreciate the importance of compliance with rules of procedure, and that the notice of appeal is a critical jurisdictional document upon which an appeal is founded-see *Bogonko v Ndege* (Civil Application E002 of 2021) [2024] KECA 351 (KLR). In our view, however, the notice of appeal in this case, while it is missing the date indicating when it was signed by counsel for the appellant, contains



the date it was lodged before the Registrar, well within the 14-day period prescribed under rule 77 for lodging a notice of appeal. The omission of the date in this instance, in our view, is the sort of mistake or blunder recognised by this Court in the case of *Belinda Murai & 9 others v Amos Wainaina* [1979] KECA 25 (KLR) when it held:

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate.”

10. Counsel for the appellant made a mistake, which he admits, in not dating the notice when it was signed. This, however, is not the sort of omission that should drive a litigant from the seat of justice. We accordingly find no merit in the application to strike out the record of appeal on this ground.
11. We also find no merit in the contention that the notice and record were filed in contravention of Order 9 rule 9 of the Civil Procedure Rules. As correctly argued by the appellant, this rule applies to matters in the trial court occurring post- judgment, not to proceedings before this Court. We find, therefore, that the application dated 14<sup>th</sup> August 2025 is devoid of merit, and it is hereby dismissed.
12. We now turn to consider the application for an injunction dated 29<sup>th</sup> July 2025, which is supported by an affidavit sworn by the appellant on the same date. The dispute before the trial court related to ownership of the suit property, described as Plot No. 130, Land Reference No. 12255/22; IR No. 5313 situate in Moyale Township. The appellant’s case was that the suit property had been allocated to his father, Shariff Abdirahim (deceased) on 2<sup>nd</sup> March 1999, and that he and his mother have been living on the said property for decades. He averred that after his father died, the respondent, who is his father’s stepbrother, claimed ownership of the property, yet the property formed part of his father’s estate.
13. The appellant contends that he has an arguable appeal that raises serious issues of law touching on jurisdiction under Article 162(2)(b) of *the Constitution*, particularly, whether the Kadhi’s Court had jurisdiction to hear and determine a matter dealing with ownership of land; and if it purported to do so, whether such a determination could bar the ELC from determining that issue. A further arguable issue, according to the appellant, is whether, should the ELC find that the matter was *res judicata* for having been the subject of Moyale Kadhi’s Case No. 50 of 2014, it should have downed its tools; or whether it should have proceeded, as it did, to determine the disputes and to issue declaratory orders.
14. With respect to the nugatory aspect, the appellant avers that he and his mother have been in possession and occupation of the suit property for decades, and are now in danger of being evicted.
15. In his affidavit sworn in opposition to the application on 8<sup>th</sup> August 2025, the respondent reiterates his contentions that the appellant’s notice of appeal is incompetent and, accordingly, the application dated 29<sup>th</sup> July 2025 is also incompetent. The respondent argues that this Court lacks jurisdiction because the notice of appeal in the record is unsigned and undated, and therefore cannot invoke the Court’s powers under rule 5(2)(b). We have already addressed ourselves to the competence of the notice of appeal and found in favour of the appellant.
16. The respondent further takes issue with the proper name(s) of the parties as indicated in the application, including his own, arising from the deponent of the affidavit in support of the application being indicated as ‘Hussein Shariff Abdi’. The respondent contends that the capacity of the appellant, indicated as ‘Hussein Shariff Abdi’ or ‘Hussein Shariff Abdirahim’ instead of ‘Hussein Shariff



- Abdirahman' to lodge the application, is therefore uncertain. The appellant attributes this to a typographical error, and in our view, it is not a material error on the part of the appellant.
17. With respect to the substance of the application, the respondent asserts that the appellant does not have an arguable appeal as the suit property is registered in the respondent's late father's name, Abdulkadir Shariff Abdirahim, and was never part of Shariff Abdirahim's estate. It is also his contention that the appellant has not shown that the appeal will be rendered nugatory as no eviction orders have been sought.
  18. We note that in its decision, the trial court ruled that the suit property belonged to Abdulkadir Shariff Abdirahim and not Shariff Abdirahim, and the appellant has expressed the apprehension that he and his mother, who have been in occupation of the property, would be evicted, thus rendering the appeal nugatory.
  19. The twin principles to be satisfied on an application under rule 5(2)(b) are well settled. An applicant is required to satisfy the Court that the appeal (or intended appeal) is arguable, meaning it raises at least one bona fide issue deserving appellate consideration. An arguable appeal is not one that must necessarily succeed, but one that is not frivolous, one that merits appellate consideration. Additionally, an applicant must satisfy the Court that absent the orders sought, the appeal or intended appeal will be rendered nugatory- see Stanley Kangethe Kinyanjui V Tony Ketter & 5 others [2013] KECA 378 (KLR)
  20. We are satisfied, on a consideration of the material before us, that the appellant has an arguable appeal on the two issues identified: whether, in light of the provisions of Article 162(2), the Kadhi's Court in Moyale had jurisdiction to determine the question of ownership of the suit property so as to render the appellant's suit before the trial court res judicata. A second arguable point, arising from the first, is whether, once the trial court found the case to be res judicata, it could properly proceed to make a declaration in favour of the respondent.
  21. With respect to the nugatory aspect, the test to be applied is whether what is sought to be stayed, if allowed to happen, is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. In this case, the appellant avers that he and his mother have been in possession of the suit property. The respondent has asserted that he has not sought an eviction order, and that the appellant is not interested in the suit property but in another property known as plot 188.
  22. From the decision of the ELC on record, the suit property was Plot No. 130 or UNS Residential Plot No. 188 Moyale Town, so the appellant's application cannot be challenged on this basis. Secondly, the respondent has a judgment in his favour, and there is nothing that prevents him from enforcing it. Should the respondent take action to remove the appellant and his mother from the suit property pursuant to the declaration made in his favour, it would render the appellant's appeal nugatory, no averment having been made by the respondent that he can compensate the appellant in damages should his appeal succeed.
  23. We are therefore satisfied that the appellant's application is merited, and we hereby allow it.
  24. Our final orders on the two applications before us are therefore as follows:
    - i. The respondent's application dated 14<sup>th</sup> August 2025 is without merit and is hereby dismissed.
    - ii. The application dated 29<sup>th</sup> July 2025 is hereby allowed and an order is hereby issued restraining the respondent, by himself, his servants or agents, from evicting or in any manner whatsoever interfering with the appellant's occupation of the suit property, Plot No. 130, LR No. 12255/22; IR 5313, Moyale Township, pending the hearing and determination of the appeal.



- iii. The appellant shall have the costs of the application dated 14<sup>th</sup> August 2025.
- iv. The costs of the application dated 29<sup>th</sup> July 2025 shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**S. GATEMBU KAIRU, FCIArb, C.Arb.**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

