

**IN THE COURT OF  
APPEAL AT NAKURU**

**(CORAM: MATIVO, JA (IN CHAMBERS))**

**CIVIL APPLICATION NO. NAK E203 OF**

**2025 BETWEEN**

**PAULINE CHEPKORIR MIBEI & ANO.....APPLICANTS**

**AND**

**RHODA CHEBWONGEN MIBEI & ANO.....RESPONDENTS**

*(Being an application for extension of time from the ruling of the High Court of Kenya at Bomet (J. K. Ng'arng'ar, J.) dated 23<sup>rd</sup> October 2025*

*in*

**ELCLA No. E019 of  
2025).**

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**RULING**

1. By an application dated 8<sup>th</sup> December 2025, the applicants pray for extension to seek leave to appeal against the ruling of Honorable Justice Julius K. Ng'arng'ar issued on 23<sup>rd</sup> October 2025 in BOMET HCFP&A E047 of 2023 and this Court deems the notice of appeal dated 24<sup>th</sup> October 2025 as duly filed. The key ground in support of the application is that despite filing a notice of appeal, the applicants' advocates inadvertently forgot to seek court's leave to appeal, which is a requirement. The said

advocates presumed that leave had been granted by the trial court and that the delay is for only 28 days.

2. The 1<sup>st</sup> respondent filed a replying affidavit dated 18<sup>th</sup> February 2026 in opposition to the application. The key highlights are that the appeal was filed without leave, that leave cannot be obtained retrospectively, that there is a delay of 28 days, no credible explanation has been provided for the delay, the judgment sought to be appealed against is well reasoned, that grant of the orders will prejudice the respondents.
3. The key highlight of the applicants' submissions is that Rule 4 of this Court Rules provides for extension of time, that the factors to be considered were highlighted in **Paul Wanjohi Mathenge vs. Gichane Mathenge [2013] eKLR** and by the Supreme Court in **Nicholas K. Arap Salat vs. IEBC & 7 Others [2014] eKLR**. Counsel urged this Court to find that the 28 days delay is not inordinate. Further, no prejudice will be suffered by the respondents.
4. In his submissions, the respondent's counsel maintained that an appeal filed without leave is incompetent, that the notice of appeal was filed, but the applicant delayed for 28 days before seeking leave. Counsel relied on this Court's decision in **Leo Sila Mutiso**

**vs. Rose Hellen Wangari Mwangi [1999] eKLR** to urge that the length of the delay and the period of delay is central to the application. Counsel argued that no credible explanation has been offered. It was also argued that as was held in **Nicholas Kiptoo Arap Salat vs. IEBC & 7 Others, [2014] eKLR** extension of time is not a right but an equitable remedy. Counsel maintained that the appeal is not arguable and asserted that seeking leave before appealing is a mandatory requirement.

5. Rule 41 of the Court of Appeal Rules, 2022 governs applications for leave to appeal in civil matters. It requires that when leave is needed, a formal application must be made to the Superior Court first or if refused to the Court of Appeal within 14 days of such refusal to appeal a civil matter. The Rule reads as follows:

***“41. Application for leave to appeal in civil matters***

***(1) In a civil matter—***

***(a) where an appeal lies with the leave of the superior court, application for such leave may be made—***

***(i) informally at the time when the decision against which it is desired to appeal is given; or***

***(ii) by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;***

***(b) where an appeal lies with the leave of the Court, application for such leave shall be made—***

**(i) in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or**  
**(ii) where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.**

**(2) An application seeking certification that a matter of general public importance is involved shall be made within thirty days after the delivery of the decision.**

**(3) Despite sub rule (2), an application brought out of time shall be marked as "lodged out of time" under rule 12 with liberty to apply for extension of time."**

6. A plain reading of Rule 41 (1) (b) clearly shows that it is couched in mandatory terms. The use of the word "shall" in the rule is worth noting. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance. It is the duty of Courts of justice to try to get at the real intention of the rules of procedure or legislation by carefully attending to the whole scope of the provision to be considered. The meaning and intention of the drafters of the rules must govern, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

7. The word "*shall*" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that "*shall*" is used to express a command or exhortation or what is legally mandatory. Ordinarily the words '*shall*' and '*must*' are mandatory and the word '*may*' is directory. This Court in **Collaboration Engineering Solutions and Products Limited vs. China Zhongxing Construction Company Limited & Ano. (Civil Application E584 of 2024) [2025] KECA 1328 (KLR) (18 July 2025) (Ruling)** while interpreting Rule 41 alongside the Arbitration Act, held that leave to appeal in such matters must be sought within 14 days of the decision.
8. Just for clarity, we can compare Rules 41 (1) (a) (i) (ii) and Rule 41 (b) (i) and (ii) and Rule 41 (2) and (3) which deal with applications for certification that a matter of general public importance is involved. In Rule 41 (1) (a) (i) and (ii), the word "*may*" which is permissive is used. Unlike Rule 41 (1) (a) (i) and (ii), the drafters in Rule 41 (2) (a) and (b) used the word "*shall*" which is mandatory. Further, the drafters at Rule 41 (2) and (3) opened a window for an applicant under sub (2) (which

deals with certification that a

matter is of general public importance) to move the Court for extension of time despite the provisions of sub rule (2). By the time the drafters were writing sub rule (3), they were not writing on a clean slate. The ink in sub rule (1) had not dried, therefore, they were aware of the cognate provisions of sub rule 1(b), yet they did not open such a window. Therefore, the rule means what it says. The application must be filed within 14 days. The drafters were also aware of Rule 4 but they deployed a mandatory language in this provision.

9. The applicants never applied for leave before the trial Court. They did not move this Court within 14 days as mandatorily required under the above cited Rules. Accordingly, this application was dead on arrival. I dismiss it but make no order as to costs bearing in mind that this is a family dispute.

**Dated and delivered at Nakuru this 16<sup>th</sup> day of March, 2026.**

**J. MATIVO**

.....  
**. JUDGE OF  
APPEAL**

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

*Signed.*

**DEPUTY REGISTRAR.**