



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ELCLA NO. E011 OF 2025

NAIPE ENE NKERE.....1ST

APPELLANT/APPLICANT

LEWIS SARUPA NKERE.....2ND

APPELLANT/APPLICANT

PARTOTI OLE NKERE alia

Julius Ntualala Nkere 3rd

APPELLANT/APPLICANT

VERSUS

TIPINA ENOLE NKERE.....

RESPONDENT

(An application for a stay of execution of Judgment pending lodging, hearing and determination of an intended appeal from the Judgment and Decree in Narok CMCELC NO. E025 OF 2022 between Tipina Enole Nkere (Plaintiff) vs Lewis Sarupa Nkere & Julius Ntualala Nkere by Hon. Phylis Lusiah Shinyanda of 18th June 2025)

RULING

1. The Appellants/ Applicants herein filed the instant **Notice of Motion Application** dated **1st July 2025**, which is premised under **Section 3A** of the **Civil Procedure Act**, **Section 3A of the Judicature Act**, **Order 42 Rules 6 & 27**, and **Order 51 Rules 1-3** of the **Civil Procedure Rules**, wherein they sought for the following orders;

- i) Extension of the 30-day stay of execution granted to the 2nd and 3rd Appellants on 18th June 2025 by the Chief Magistrates' Court until the appeal is heard and determined,*
- ii) A stay of execution of the judgment delivered against the 1st Appellant on 18th June 2025,*
- iii) An injunction restraining the Respondent or her agents from evicting the 1st Appellant from her house's share of CIS MARA/OLETUKAT/60 pending the hearing and determination of the appeal and the Notice of Motion.*
- iv) The 1st Applicant/Appellant further sought leave to adduce evidence before the hearing of the appeal and that costs of this application be in the cause.*

2. The application is supported by the grounds set out on its face being; the 1st Appellant's right to appeal under **Article 50(1)** of the Constitution, which guarantees the right to a fair trial, as interpreted by the Court of Appeal in **S.N. Kantaria v. M.C. Kantaria and Others, Civil Appeal Number 277 of 2005**; the Appellants/Applicants also cited **Order 1 Rule 10** of the **Civil Procedure Rules**, which mandates the inclusion of all Interested Parties in a suit.

3. The Appellants/Applicants argued that the Judgment being appealed against contravenes the right to life under **Article 26** of the Constitution, as interpreted by the Supreme Court of India in the following cases; **R v. Bow Street Metropolitan Magistrate (Pinochet decision) 1989 1 ALL ER PAGE 577** and **Anyang' Nyong'o v. AG of Kenya (EACJ Application No. 5 of 2006)**.
4. The Appellants/Applicants also contended that the suit property, **CIS MARA/OLETUKAT/60**, is ancestral land belonging to a polygamous household, inherited by the two houses of the late **Nkere** being the 1st Appellant and the Respondent, who were registered as co-proprietors of the suit property in **2021**.
5. Further, the Appellants/Applicants referred to the Court of Appeal decision in **Muthuita v. Muthuita and Gatimu Kinguru v. Muya Gathangi 1976 KLR 253**, which held that the **Registered Land Act(repealed)**, like its predecessor, recognizes the institution of trust and customary law trust.
6. Further, the Appellants/Applicants alleged that the Respondent herein filed a fraudulent suit to evict the 1st Appellant's house, disguising the said suit as being directed at the 2nd and 3rd Appellants, who do not reside on the suit property.

7. Further, they argued that the trial court was biased against the Appellants/Applicants and breached its duty of care under **Order 1 Rule 10** of the **Civil Procedure Rules**, by failing to join the 1st Appellant as a Defendant in the suit.
8. The Appellants/Applicants cited the inherent jurisdiction of this Court, which is to preserve the subject matter of the appeal, as was held by the Supreme Court of Kenya in the case of **Board of Governors, Moi High School Kabarak vs Malcom Bell & Another (2013) KLR-SCL**.
9. Additionally, the Appellants/Applicants referred to the case of **Kironyo v. Kironyo 1976 KLR Page 109**, which established that both Appellants and Respondent have equal rights to have the subject matter of a suit protected during the pendency of the suit.
10. In conclusion, the Appellants/Applicants emphasized their entitlement to live on their share of the suit property, which the 1st Appellant claimed has occupied since **2012**, and her right to appeal against the judgment delivered against her. She also sought protection from eviction, and the preservation of the suit property during the appeal process.
11. The Notice of Motion Application is supported by the Affidavit of **Lewis Sarupa Nkere**, the 2nd Appellant herein, and who was one of the Defendants before the trial court.

He averred that his father died in **2001**, and he had two houses, namely the house of his mother, the 1st Appellant, and the house of the Respondent.

12. He deposed that what he averred in the said Affidavit is what he was told by his mother, the 1st Appellant herein. He contended that the suit land was **adjudicated** and **demarcated** between **2010** and **2011**, and at that time they were living in a **Manyatta at Oletukat**. He claimed that the Respondent and her 6 children moved into the suit land in **2011**.
13. However, the Appellants/Applicants moved into the suit land in **2012**, where they have been farming and have put up two houses. The deponent contended that his mother's house uses half of the suit land, and the Respondent uses the other half.
14. He alleged that during **land Adjudication**, the Respondent secretly caused the land to be registered in her name as opposed to both herself and his mother. It was his contention that the trial court issued a Judgment against his mother's house, despite evidence on record to show that the Respondent was holding the suit land as a **trustee** in respect of the suit property. He urged the court to allow the application pending the hearing of the Appeal.
15. The Application is opposed by the Respondent **Tipina Enole Nkere**, who filed a Replying Affidavit, and averred

that this Application is brought in bad faith, aimed at frustrating her from enjoying the fruits of her judgment.

16. She contended that she was issued with the title deed for the suit land, and she has had **exclusive utilization** of the suit land until when the 2nd and 3rd Appellants/Applicants encroached on her said parcel of land, laying claim to half share of the suit land. She then filed the suit at the trial court, which found in her favour. She urged the court to dismiss the instant application.
17. **Lewis Sarupa Nkere**, filed a Further Affidavit, and disputed all the allegations averred by the Respondent herein, in the Replying Affidavit.
18. Simultaneously to filing the Replying Affidavit, the Respondent also filed a **Notice of Preliminary Objection** dated **19th August 2025**, on the grounds that;
 - i) **The 1st and 3rd Appellants were added as parties to this suit without following the due procedure required by law for joinder parties.**
 - ii) **The Memorandum of Appeal is defective as it has new parties enjoined without following proper procedure for joinder the 1st and 3rd appellants.**
 - iii) **Based on the aforesaid reasons, that the appeal be dismissed.**

19. On **17th September 2025**, the court directed that the **Preliminary Objection** and the **Notice of Motion Application** be canvassed together by way of written submission.
20. The Appellants/Applicants filed their written submission dated **17th November 2025**, through the Law Firm of **Kamau Kuria & Co Advocates**, in support of the Notice of Motion Application and in opposition to the Respondent's **Notice of Preliminary Objection**, and submitted that the instant application should be viewed against the background of the **Memorandum of Appeal** which brings out shocking miscarriage of justice by the trial Court, and that the said **Memorandum of Appeal** shows all the things that went wrong in the lower court.
21. On **Preliminary Objection** the Appellants/Applicants submitted that, it is bad in law because it is based on disputed facts and that the Respondent is not relying on the facts as pleaded by the Appellants, but on the facts that she would like to be investigated by the court. For this the Appellants relied on the case of **Mukisa Biscuits vs West End 1969 EA 696**.
22. Further the Appellants submitted that the **Preliminary Objection** is based on a **misapprehension** of the constitutional law rule which requires a person to be given a hearing when his property rights start to be affected adversely by a decision in which he is not a party. Reliance

was sought in the case of **James Ndungu Wambu vs Republic COA NO 85 OF 1992.**

23. It was their further submissions that the Respondent herein filed **a fraudulent case** to evict the 1st Appellant from the suit property, but chose not to make her a party to the suit. Reliance was sought in various authorities among them;- **Civil Procedure Rules Order 40 Rule 10**, and also the case of **Selle vs Associated Motor Boat 1968 EA 121.**
24. The Appellants/Applicants also submitted that the lower court committed a miscarriage of justice by not joining the 1st Appellant, the co-owner of the suit property **Suo moto** in the suit before the trial court, noting that the 2nd Appellant was not the owner of the suit property. Further, that the Respondent herein intentionally omitted and/or left out the name of the co-owner to steal a match, that has now brought the appellants to this stage. Reliance was sought in **Order 42 Rule 27** of the **Civil Procedure Rules.**
25. In conclusion the Appellants/Applicants submitted that the purported **Preliminary Objection** is **misconceived** in that the Respondent wants the court to inquire into the facts on which it is based, and this is not allowed by the court, also it is based on a **misapprehension** of the facts that when interpreting the **Civil Procedure Rules**, one does so bearing in mind the constitutional rights under **Articles 48, 50 and 27** of the **Constitution** which guarantee the Appellants/Applicants the enjoyment of the

right to access justice in court; the right to fair trial; the right to equal protection and benefit of the law.

26. On the **Notice of Motion Application**, the Appellants/Applicants submitted that they have demonstrated that they will suffer a **substantial loss** if a **stay** is not granted; the 1st Appellant stands to lose her home and half of the suit property despite the fact that she is a *tenant in common* with the Respondent, and each widow is entitled to licence her children to half of the respective shares as stated in the Appellant's Affidavit, the 1st Appellant has a home in the suit property.
27. In support of the **Preliminary Objection**, and opposition to the Appellants/Applicants **Notice of Motion Application**, the Respondent filed two sets of written submissions dated **15th October 2025**, though, **Ochego-Onduso & Co Advocates**.
28. The Respondent, **Tipina Enole Nkere**, submitted that the Memorandum **of Appeal** and the **Notice of Motion Application** dated **1st July 2025**, were procedurally defective due to the improper joinder of the 1st and 3rd Appellants without leave of the court.
29. The Respondent reiterated that she is the registered proprietor of land parcel No. **CIS-MARA/OLETUKAT/60**, a title that she obtained through **lawful adjudication**, and which was upheld by the Chief Magistrate's Court after a transparent trial. She contended that the 1st and 3rd

Appellants/Applicants were not parties to the original suit; they did not file pleadings; they did not testify, and never sought joinder, yet they appeared in the Memorandum of Appeal.

30. The Respondent raised the following issues for determination;

- i. ***Whether the 1st and 3rd Appellants were properly joined to the appeal.***
- ii. ***Whether the Memorandum of Appeal is incurably defective for introducing new parties without leave.***
- iii. ***Whether the appeal should be struck out for violating mandatory procedural requirements.***

31. The Respondent argued and submitted that the 1st and 3rd Appellants/Applicants were strangers to the trial court record and had not been properly joined in the appeal. That they did not file pleadings, testify, or seek joinder during the trial, yet they appeared in the ***Memorandum of Appeal*** without any *Application, Affidavit, or Court Order*.

32. For the above submissions, the Respondent relied on the case of ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696***, which defines a preliminary objection as a pure point of law that disposes of the matter if upheld. She further cited the case of

Benard Murage v Fine Serve Africa Ltd & Others [2015] eklr, where the Court held that pleadings filed by persons not properly joined are nullities.

33. ***On whether the Memorandum of Appeal is incurably defective for introducing new parties without leave***, the Respondent submitted that the Memorandum of Appeal dated **28th June 2025**, was **constitutionally unsound** as it introduced new parties without leave of the court. She emphasized that the **Civil Procedure Rules**, specifically **Order 1 Rule 10(2)**, require a formal application, supported by an Affidavit and **judicial discretion** for the joinder of parties. The Respondent argued that the inclusion of the 1st and 3rd Appellants was a procedural fiction and violated mandatory procedural requirements.
34. ***On whether the appeal should be struck out for violating mandatory procedural requirements***, the Respondent contended that the appeal was not merely a procedural misstep, but a complete procedural collapse. She argued that the Appellants disregarded the rules of joinder and filed a Memorandum of Appeal that was structurally unsound.
35. The Respondent, while Citing ***Odunga's Digest and Republic v Karisa Chengo & 2 Others [2017] eklr***, emphasized that jurisdiction flows from the law, and cannot be assumed or conferred by conduct. It was her further submissions that the Appellants attempted to

invoke appellate jurisdiction without a legal foundation, rendering the appeal legally unsustainable and procedurally void.

36. In conclusion the Respondent urged the court to uphold the **Preliminary Objection**, strike out the Memorandum of Appeal dated **28th June 2025**, and the application dated **1st July 2025**, for being incurably defective, and award costs of the objection and the appeal to the Respondent.
37. In response to the **Notice of Motion Application**, the Respondent opposed the same and submitted that she lawfully inherited land parcel No. **CIS-MARA/OLETUKAT/60** from her late husband **Sunkuiya Ole Nkere** through a transparent adjudication process that culminated in the issuance of a title on **26th March 2019**.
38. The Respondent further submitted that the Judgment of the trial court was an affirmation of truth and justice, restoring her lawful possession and dignity. She argued that granting a stay of execution would reverse fairness, silence the voice of truth, and deny her the peace and justice already granted by the law.
39. The Respondent set out the following issues for determination;
 - i) **Whether the Appellants/Applicants have satisfied the legal threshold for stay of**

execution under order 42 rule 6 of the Civil Procedure Rules.

- ii) Whether the Appellants/Applicants have established sufficient grounds for admission of additional evidence under Order 42 Rule 27**
- iii) Whether the Appellants/Applicants' application discloses any exceptional circumstances warranting interference with a valid judgment and decree.**
- iv) Whether the Respondent's title and possession of parcel Cis-Mara/Oletukat/60 are impeachable based on the Appellants/Applicants' allegations.**

40. **On whether the Appellants/Applicants have satisfied the legal threshold for stay of execution under Order 42 Rule 6 of the Civil Procedure Rules**, the Respondent argued that the Appellants/Applicants failed to meet the legal requirements for a stay of execution under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**. It was her submission that the Appellants/Applicants delayed filing the application since the Judgment was delivered on **18th June 2025**, and the decree issued on **3rd July 2025**, yet the appellants/Applicants waited until dust had settled for them to file this application, without providing any explanation for the delay. Citing the case of **Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others**

(2015), the Respondent emphasized that unexplained delay is unjustifiable.

41. The Respondent further argued that the Appellants/Applicants failed to demonstrate substantial loss, as they already owned land parcels **Nos. Cis-Mara/Oletukat/23 and 25**, and were not at risk of losing their homes or property. Instead, their occupation of the Respondent's land was unauthorized and caused her distress and disruption.
42. For this submission, she cited the case of **Kamoye v Tipango & Others** to emphasize that possession must be protected where title is clear and occupation is lawful.
43. Additionally, the Respondent pointed out that the Appellants/Applicants failed to offer security for due performance, as required under **Order 42 Rule 6(2)(b)**. She cited the case of **Republic v Rosemary Wairimu Munene ex parte Ihururu Dairy Farmers Cooperative Society**, to argue that justice must protect the successful litigant from endless delays.
44. **On whether the Appellants/Applicants have established sufficient grounds for admission of additional evidence under Order 42 Rule 27**, the Respondent opposed the Appellants'/Applicants request to introduce additional evidence, arguing that appellate

courts are not venues for presenting evidence that was not offered during the trial.

45. Further, she submitted that the Appellants/Applicants were not parties to the original suit; they did not seek joinder, and did not present any evidence during the trial. She cited the case of ***Muthuita v Muthuita***, and argued that the trial court had already examined the root of title, the Area List, and the testimony of the Land Registrar, finding the Respondent's title valid and procedurally sound. The Appellants/Applicants' documents did not contradict this, but sought to confuse the matter.

46. The Respondent further cited the case of ***Frazer v Walker, and*** argued that a registered title is protected, unless ***fraud*** is proven against the registered proprietor. The trial court found no fraud or procedural ***irregularity***, and the Appellants' reliance on ***Frazer case*** was self-defeating. She also referred to the case of ***Kantaria v Kantaria, (supra)*** to emphasize that additional evidence should not be used to fill gaps left by negligence.

47. ***On whether the Appellants' application discloses any exceptional circumstances warranting interference with a valid judgment and decree,*** it was her submissions that the Appellants failed to demonstrate any exceptional circumstances to justify interference with the trial court's judgment. She emphasized that the Judgment of the trial court was delivered after a full trial, supported by documentary evidence, and tested through cross-

examination. The fact that the Appellants/Applicants were dissatisfied with the outcome did not constitute an exceptional circumstance.

48. The Respondent cited the case of ***Munyu Maina v Hiram Gathiha Maina, (supra)*** to argue that a registered proprietor must demonstrate the root of title when challenged, which she had done successfully. The trial court found no fraud, procedural irregularity, or basis for joint ownership, and the Appellants' allegations were unsubstantiated.
49. The Respondent also referred to the case of ***Hebert L. Martin v Margaret J. Kamar & 5 Others***, which held that when two titles exist, the one with a clear ***procedural root must*** be upheld. She argued that her title was valid, while the Appellants' documents were produced late and lacked credibility.
50. ***On whether the Respondent's title and possession of parcel CIS-MARA/OLETUKAT/60 are impeachable based on the Appellants' allegations***, the Respondent submitted that her title and possession of land parcel ***CIS-MARA/OLETUKAT/60*** were ***unimpeachable***, as they had already survived scrutiny during the trial. The Respondent argued that the trial court examined the ***Area List, the Green card***, the ***Caution*** placed by ***Naibe Ene Nkere***, and the testimony of the Land Registrar, finding no fraud, concealment, or procedural irregularity.

51. For this submission, the Respondent cited the case of ***Munyu Maina v Hiram Gathiha Maina(supra)*** to emphasize that her title was procedurally sound and lawfully acquired. She also referred to the case of ***Frazer v Walker(supra)***, which affirms the principle that a registered title is ***indefeasible unless fraud*** is proven against the registered proprietor.
52. The Respondent argued that her possession of the land was lawful, as she had cultivated it, built her home, and raised her children on it. On the other hand, she argued that despite the Appellants/Applicants, owning land parcels ***Nos. 23*** and ***25***, they had trespassed on her land, and their presence was a violation rather than a legitimate claim. She cited the case of ***Benjo v Gathoni & Another*** to argue against overturning lawful possession based on speculative claims.
53. In conclusion, the Respondent submitted that the Appellants/Applicants ' application was not anchored in law, equity, or necessity, but was a tactical manoeuvre to ***frustrate execution, reopen settled facts***, and ***delay*** the Respondent's rightful enjoyment of her land.
54. The above are the pleadings, grounds for and against the Notice of Motion and Preliminary Objection herein which the court has carefully considered together with the rival written submissions, and the relevant provisions of law, and renders itself as follows; -

55. There are two matters be determination; the **Notice of Motion Application** dated **1st July 2025** and the **Notice of Preliminary Objection** dated **19th August 2025**, which this court directed to be canvased together by way of written submission. Given that a **Preliminary Objection** is a challenge to the whole suit, then the court will determine it first, and depending with the outcome, it will then proceed to determine the Applicants' **Notice of Motion Application**.

56. Having stated as above and the manner in which it will determine the two issues, this court finds that the main issues for determination are;

*i) **Whether the Respondent's Notice of Preliminary Objection dated 19th August 2025, is Merited;***

*ii) **Whether the Appellants'/Applicants' Notice of Motion Application dated 1st July 2025 is merited;***

*iii) **Who should bear costs of this Application and the Preliminary Objection.***

I) Whether the Respondent's Notice of Preliminary Objection dated 19th August 2025 is merited.

57. Basically, the Respondent's Notice of **Preliminary Objection** is on joinder of new parties to this Appeal herein, who were not parties before the trial court, and did not file pleadings in relation to that suit that culminated in the Judgement that is being appealed against. _

58. Given the definition of **Preliminary Objection** in the case of **Mukisa Biscuit's (Supra)** as quoted by all the parties herein and given that the **Preliminary Objection** is on the alleged *violation of the law on joinder of parties*, the court finds that the **Preliminary Objection** herein is on **pure point of law** and it fits the description of **Preliminary Objection** as stated in the **Mukisa Biscuits case**.
59. In her submissions, the Respondent argued that the **Memorandum of Appeal** as filed has introduced new parties without **leave of the court**, and therefore the said **Memo of Appeal** and the accompanying **Notice of Motion Application** are defective. She cited several decided cases to support her argument and submissions.
60. On their part, the Appellants/Applicants argued and submitted that the **Notice of Preliminary Objection** is based on **misapprehension** of the **Constitution** which requires everyone to be given a hearing when his property right are adversely affected. It was their submission that the impugned Judgment deprived the 1st Appellant her right to property, and that the Respondent had deliberately failed to join her in the suit before the trial suit, and thus this Appeal.
61. The court has considered the record from the trial court, and the impugned Judgment. The parties thereon were **Tipina Enole Nkere vs Lewis Sarupa Nkere & Julius Ntuala Nkere**. **Tipina Enole Nkere** is the Respondent

herein and **Lewis Sarupa Nkere** is one of the Appellants/Applicants herein.

62. In the Memorandum of Appeal and the Notice of Motion Application herein, the Appellants /Applicants are **Naipe Ene Nkere, Lewis Sarupa Nkere and Partoti Ole Nkere alias Julius Ntuala Nkere vs Tipina Enole Nkere**. It is evident that in the suit before the trial court, **Julius Ntuala Nkere** was not referred by an alias name, and this court cannot hold that **Partoti Ole Nkere** is also alias **Julius Ntuala Nkere**.

63. It is obvious that **Naipe Ene Nkere** and **Partoti Ole Nkere** were not parties in the suit before the trial court, but have now been added as 1st and 3rd Appellants herein, which joinder has been opposed by the Respondent herein through this **Preliminary Objection**.

64. In opposition to the **Notice of Preliminary Objection**, the Appellants relied on **Order 1 rule 10 (2)** of the **Civil Procedure Rules**, which provides;

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the

court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”

65. The Appellants/Applicants argued that the lower court committed a miscarriage of justice by not joining the 1st Appellant, who was a co-owner of the suit property. From the court record, the 1st Appellant was a witness for the Defence as DW1, and the Defendants before the lower court were represented by an advocate of their choice, and must have received legal advice from the said counsel. There is no reason to blame the trial court for failure to join the 1st Appellant as a party to the suit before the trial court.
66. The provision of law cited by the Appellants/Applicants are clear that the court may at any time of the proceedings with or without an application strike out and/or join a party to the suit before it. The ***Memo of Appeal*** and the ***Notice of Appeal*** are a new suit, and not proceedings before this court, and therefore the Appellants cannot argue that at ***‘any stage of the proceedings,’*** because the suit before the trial court is finalised and this is an appeal from the Judgement emanating from the proceedings before the trial court.
67. In the case of ***J M K vs M W M & Another [2015] eKLR***, the Court held that;

“...an application for joinder of parties can be filed only in pending proceedings; that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings, either before, or during the trial; and that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable”.

68. Even assuming this Appeal is a continuing suit, **Order 1 rule 10(2) of the Civil Procedure Rules**, cited by the Appellants /Applicants require leave of the court before joinder of a party. See the case of **Ngiricha & 4 others (Intended Interested Party) (ELC 151 of 2013) [2025] KEELC 936 (KLR)**.
69. Who can file an Appeal against a judgment of a trial court? Any aggrieved party to a civil suit who is dissatisfied with a trial court's decision has the right to file an appeal. As provided by Section **79 G** of the **Civil Procedure Act**, an appellant who is aggrieved by the decision of the subordinate court must file the appeal within **30 days** of the decision and or Judgment.
70. Who is the aggrieved party? An aggrieved party is any party to the original suit who is dissatisfied with the judgment of the trial court, and if aggrieved by the said Judgment, he has a right of appeal. The Defendants before the trial court were the aggrieved parties, and they had a

right of appeal. However, the 1st and 3rd Appellants were not parties before the trial court, and even if **Partoti Ole Nkere is alias Julius Ntuala Nkere**, he was not referred by the alias name before the trial court, and 1st Appellant was not a party in the said suit.

71. Therefore, it is evident that the **Memorandum of Appeal** and the accompanying **Notice of Motion Application** herein are drawn by parties or persons who were not original parties in the suit before the trial court, which is being appealed. See the case of **Deported Asians Custodian Board -vs- Jaffer Brothers Ltd (199) 1 EA 55 (SCU)**.
72. Can a person who was not a party before the trial court file an Appeal against the Judgment of the trial court? Generally, a person who was not a party to the suit in the trial court cannot file an appeal because such a person lacks **locus standi**. However, if such a person is adversely affected by the judgment, and was not a party, he/she **may seek leave** of the Court to Appeal. See the case of **Kimwele vs Kubora & another; Mwasya & 5 others (Interested parties)(2025) KEELC 5636(KLR)**
73. Courts have generally held that a person who was not a party to the original suit before trial court's suit cannot file an appeal against that judgment as a matter of right. This was the holding of the Supreme Court of Kenya in **Scok App No. E026 of 2023 Everton Coal Enterprises Ltd Vs Rose Wakanyi Karanja & Others**.

74. In the above case, the SCOK, while quoting the case of ***Francis Kariuki Muruatetu & another v. Republic & 5 others [2016] eKLR***, held as follows;

“...any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties before the Court....Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court”.

75. The **SCOK** further held;

“ STRICTLY SPEAKING, though joined, the applicant was not a party to “the proceedings” in the Court of Appeal having been joined post-judgment, yet a joinder contemplates a situation where proceedings are still pending before the court and in terms of Rule 5 (d) (ii) of the Constitution of Kenya (Protection of Rights

and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules) which is in pari materia with Order 1 Rule 10(2) of the Civil Procedure Rules, a party will only be added to on-going proceedings in order to enable the court adjudicate fully upon and settle all the questions involved in the particular proceedings before it.

76. Therefore, it is evident that a person who was not a party to the original suit before the trial court cannot file an appeal against that judgement, **without leave** of the court. Such an appeal filed by a **non-party** without leave of the court is considered **incompetent** and **invalid**, as the court lacks jurisdiction to hear it. See the case of **Mucheri [2024] KEHC 3222 (KLR)**, where the court held;

“Given that the appellant did not seek or obtain leave to appeal before filing the present appeal, I find that the appeal is incompetent and this court lacks jurisdiction to determine the same. In the premises, the appeal is hereby struck out with costs to the respondent”.

77. The same principle can be applied herein where the 1st and 3rd appellants who were not parties before the trial court

were required to seek leave to be joined in this appeal, but they failed to do so.

78. Even if a new party can be joined at the appeal stage, that is not an **automatic right**, as it is a **discretionary power** exercised by the court, after an application has been filed and determined. Joinder of a new party in an Appeal requires the applicant to file an application before the court, to show a direct, proximate interest, prejudice he will suffer if not joined.
79. The 1st Appellant and 3rd Appellant herein did not do so, and so the **Memo of Appeal** as filed is **incompetent** as the 1st Appellant did not have an **automatic right** to be joined in the suit. This is by assuming that the 3rd Appellant is indeed **Julius Ntuala Nkere**, though as the court pointed out, he had not been sued with an **alias** name.
80. Having come to a conclusion that the 1st Appellant or even the 3rd Appellant were not parties in the suit before the trial court, as original parties who are aggrieved by the judgement of the trial court, this court concurs with the Respondent that the **Memorandum of Appeal and the Notice of Motion Application dated 1st July 2025**, are defective, as Appellants who were not parties in the suit before the trial court have been added without leave of the court. This is not a mere technicality, but the omission which goes to the jurisdiction of the court and **locus standi** of the said appellants.

81. The court will borrow from the SCOK holding in the case of **Law Society of Kenya vs Centre for Human Rights and Democracy & Others (2014) eKLR**, where it held that

“Procedural rules are not decorative -they are the scaffolding of justice. Where a party fails to comply with mandatory requirements, the court must act decisively. The defects are not technical, it is foundational. It strikes at the very competence of the appeal itself”

82. The omission or default by the Appellants/Applicants is not a mere technicality which can be cured by **Article 159(2) (d)** of the Constitution. The Court of Appeal in the case of ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR*** stated as follows:

“The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at Article 159 (2) (d) of the Constitution. We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.Having already found that jurisdiction stands on a higher, firmer and more peremptory position than procedural rules, we can only re-iterate that it goes to the

very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance - procedure dichotomy of Article 159 of the Constitution.”

83. The defect by the joined Appellants to file an appeal without leave of the court is foundational and goes to the ***jurisdiction*** and ***locus standi***, which are key pillars in any litigation. Therefore, this court finds and holds that the Appeal herein and the ***Notice of Motion Application*** by the Appellants as filed are ***defective, legally unsustainable*** and consequently are ***struck out*** in their entirety for being incurably defective.
84. On the second issue of whether the Appellants/Applicants ***Notice of Motion Application*** dated ***1st July 2025***, is merited, this court finds and holds that having ***struck out*** the entire Appeal and the Application, then there is no need to deal with its merit or demerits.
85. ***iii) On who should bear costs of this Preliminary Objection and the suit;*** the court is guided by ***Section 27*** of the ***Civil Procedure Act***, which provides that costs are granted at the discretion of the Court. Given that the parties herein are related; each party should bear its own costs.
86. In a nutshell, the Respondent's ***Notice of Preliminary Objection*** dated ***19th August 2025***, is ***upheld***, and the entire ***Memo of Appeal*** and ***Notice of Motion Application*** dated ***1st July 2025***, are struck out, with an

order that each party to bear its own costs. *For avoidance of doubt, any interim orders issued earlier are hereby vacated.*

It is so ordered

Dated, signed and delivered virtually at Narok this 19th day of March 2026.

**L. Gacheru
Judge**

Delivered online in the presence of

Elijah Meyoki - Court Assistant

Mr. Mwendwa holding brief Dr. Kamau Kuria for the Appellants/Applicants

Mr. Onduso for the Respondent/Objector.

**L. Gacheru
Judge**