

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
MISC. APPLICATION NO. 260 OF 2019

BETWEEN

VILLACARE MANAGEMENT LIMITED.....

APPLICANT

AND

KENGEN RETIREMENT BENEFITS SCHEME.....

.....RESPONDENT

RULING

1. By the application dated 27th May 2025, the Respondent seeks leave of the court to appeal the ruling and order dated 13th May 2025 that allowed the Applicant’s Preliminary Objection that struck out the Respondent’s motion titled “*Chamber Summons (Memorandum of Appeal)*”. The application is supported by the grounds on its face and the affidavit of Gloria Kimani, a Senior Associate in the law firm of the Respondent’s advocates sworn on 27th May 2025. It is opposed by the Applicant through the Grounds of Opposition dated 20th June 2025 and the replying affidavit of Christopher Kariuki, the Applicant’s counsel, sworn on 23rd June 2025.

2. The application was canvassed by way of written submissions which are on record and together with the pleadings I have considered and I will be making relevant references to the same.
3. I note that the Applicant has raised a technical issue that the Respondent has filed its Notice of Appeal without first seeking leave of the court hence the same is a nullity. However, I am in agreement with the Respondent's submission that it is not necessary for the party intending to appeal to seek leave in order to file the Notice of Appeal by dint of **Rule 77(4)** of the **Court of Appeal Rules** which provides that *"When an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal."* I am also in agreement with the Respondent that the Supreme Court in **Salat v Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)** held that a Notice of Appeal ought to be filed outright whether or not the subject matter under appeal is that which requires leave or not as this notice is a jurisdictional prerequisite.

4. I find that the Applicant has misinterpreted the holding of the Supreme Court above in its submissions because that decision was primarily concerned with timelines, that is, filing a Notice of Appeal out of time and then seeking to backdate it. The principle from the decision is that one cannot file a document out of time and then ask for time to be extended retrospectively to validate it. This is fundamentally different from the issue of leave. The Supreme Court did not hold that a Notice of Appeal filed before obtaining leave is an incurable illegality but rather, it is the foundational document that must be filed first to properly invoke the appellate process. Thus, the dicta in ***Salat(supra)***, when read together with **Rule 77(4)**, confirms that the Notice of Appeal comes first. It is therefore my finding that no leave of court was required for the Respondent to file its Notice of Appeal.
5. Turning to the merits of the application, the parties agree that the statutory foundation for seeking leave to appeal is provided under inter alia **section 75** of the ***Civil Procedure Act*** and **Order 43 Rule 1** of the ***Civil Procedure Rules*** which highlight the orders where an appeal lies as of right and states that any other order that is not listed therein would require the leave of the court before such an appeal is lodged. In this case, the Plaintiffs are desirous of

appealing against an order striking out the Respondent's motion titled "*Chamber Summons (Memorandum of Appeal)*" which is not one of the orders where an appeal would lie as of right and therefore leave is a prerequisite before an appeal is filed. **Order 43 Rule 1(3)** provides that such leave ought to be sought within 14 days from the date of such an order. The Ruling was delivered on 13th May 2025 and the Respondent filed its application on 27th May 2025, meaning that the leave to appeal was sought within the statutory timeline.

6. On whether to grant or decline such an application, the Court of Appeal

in

Bandali t/a Shimoni Enterprises v Wills

[1991] KECA 8 (KLR) held as follows:

Mr Juma referred us to Sango Bay Estates Ltd v Dresdner Bank AG [1971] EA 17 at 20 in which Spry V P said:

"I turn to the application itself which can, I think, be disposed of very briefly . As I understand it, leave to appeal from an order in civil proceedings will normally be granted where prima facie it appears that there are grounds of appeal which merit serious judicial considerations but where, as in the present case, the order from which it is sought to appeal was made in the exercise of a judicial discretion, a rather stronger case will have to be made out."

The reason which motivated Spry VP to give this ruling was the wording of the corresponding Uganda section 77(1) of the Uganda Civil Procedure Act. This differs in one respect from our section 75(1) because the words 'and from no other orders' do not appear in our section and the Vice President felt that that negative provision (although para (h) was identical to the Kenya para (h) had the effect that the earlier case of Gurbacan Singh Kalsi v Yowani Ekori [1958] EA 456 was wrongly decided, because in the earlier case it had been assumed that leave to appeal would be granted automatically.

The quotation above shows us that this is not so and that the applicants must show that there are grounds of appeal which merit serious consideration; if it is a matter of discretion, a stronger case is required.

7. From the above, it is clear that the applicant seeking leave has to demonstrate that it has arguable grounds of appeal. In my view, I find that the Respondent has shown prima facie grounds of appeal that merit serious judicial consideration. The Applicant's Preliminary Objection succeeded based on inter alia the ruling in **Nyangweso v Barasa & 2 others [2023] KEHC 19281 (KLR)** and the Respondent's proposed appeal challenges the correctness of that decision, and importantly, the reasoning behind it.

8. The Respondent also raises a fundamental question of statutory interpretation of whether **Order 49 Rule 7(2)** of the **Rules** create a statutory right of appeal to a judge from a Deputy Registrar's decision. This court held in the ruling that an appeal does not lie, relying on **Nyangweso(supra)** whereas **Order 49 Rule 7(2)** states that "*An appeal from a decision of the registrar under the Orders referred to in subrule (1) shall be to a judge in chambers*" This is not a trivial point as it potentially raises a direct conflict between a specific provision of the **Rules** and the persuasive decision in **Nyangweso(supra)**. The question of which prevails is clearly an arguable point that merits the attention of the Court of Appeal.
9. The Respondent also raises the question of whether striking out the appeal based on the title "*Chamber Summons (Memorandum of Appeal)*" was proper, especially in light of **Article 159(2)(d)** of the **Constitution**, which mandates courts to administer justice without undue regard to procedural technicalities. This ground is arguable because the document contained the word "Memorandum of Appeal," signaling the party's intention. The question is whether a hybrid title, which could be an error in drafting, goes to the substance of the court's jurisdiction or is merely a technical defect

that can be ignored. I find that this issue is of general public importance because it affects how courts treat documents filed by litigants, especially self-represented ones, in the future and the Court of Appeal's guidance on this point would be valuable.

10. The Respondent correctly points out that this court treated ***Nyangweso(supra)*** as a binding decision from the Court of Appeal and yet this decision was from this court by Musyoka J. While it is a persuasive authority, it is not binding on another High Court judge in the same way a Court of Appeal decision would be. If this court struck out the appeal based solely on a misunderstanding of the binding nature of that decision, then that is a legal error that warrants correction.
11. In sum, I find that the above arguments are not fanciful but substantive legal questions that require serious judicial consideration. Further, the fact that the appeal touches on the rights of a retirement benefits scheme to recover a significant sum, of Kshs. 166 million adds to the weight of the application, as it highlights the practical importance of getting the legal question right. I therefore exercise discretion and grant the Respondent leave to appeal against the ruling and order of this court dated 13th May 2025 with costs being in the cause.

**DATED SIGNED and DELIVERED virtually at NAIROBI this
19TH DAY OF MARCH 2026**

.....
**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

1. Ms. Kimani holding brief for Mr. Kimani Kiragu SC for the Respondent/Applicant.
2. Ms. Kariuki holding brief for Mr. Gachugi for the Respondent.
3. Amos - Court Assistant

ORIGINAL

ORIGINAL