

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

HCCA NO. E013 OF 2025

IN THE MATTER OF THE ESTATE OF NICANOR MILUGO
AMOL (DECEASED)

JANE AMOL

OKWERO.....APPELLANT

VERSUS

RAEL OMBOK MILUGO.....1ST
RESPONDENT

DANIEL WAMBOGO MILUGO.....2ND
RESPONDENT

AND

JOHN OTIENO OGUTU.....1ST INTERESTED
PARTY

PETER OKUMU OGUTU.....2ND INTERESTED
PARTY

RULING

1. The Interested Parties herein have filed a Notice of Preliminary Objection dated 12/1/2026 principally seeking that the Appellants' appeal be struck out with costs for failure to seek leave to lodge appeal before the trial court.
2. The Preliminary Objection was canvassed by way of written submissions. The Appellant and the Interested Parties complied while the Respondents did not.
3. The interested party's submissions in opposition to the appeal is premised on Order 43 of the Civil Procedure Rules. The same 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 suits);*
- (b) Order 2 (pleadings generally);*
- (c) Order 3 (frame and institution of suit);*
- (d) Order 4, rule 9 (return of plaint);*
- (e) Order 7, rule 12 (exclusion of counterclaim);*
- (f) Order 8 (amendment of pleadings);*
- (g) Order 10, rule 11 (setting aside judgment in default of appearance).*
- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);*

- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);*
 - (j) Order 19 (affidavits);*
 - (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);*
 - (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);*
 - (m) Order 24, rules 5, 6 and 7 (legal representatives);*
 - (n) Order 25, rule 5 (compromise of a suit);*
 - (o) Order 26, rules 1 and 5(2) (security for costs);*
 - (p) Order 27, rules 3 and 10 (payment into court and tender);*
 - (q) Order 28, rule 4 (orders in proceedings against the Government);*
 - (r) Order 34 (interpleader);*
 - (s) Order 36, rules 5, 7 and 10 (summary procedure);*
 - (t) Order 39, rules 2, 4 and 6 (furnishing security);*
 - (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);*
 - (v) Order 41, rules 1 and 4 (receivers);*
 - (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);*
 - (x) Order 45, rule 3 (application for review);*
 - (y) Order 50, rule 6 (enlargement of time);*
 - (z) Order 52, rules 4, 5, 6 and 7 (advocates);*
 - (aa) 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 order.*
- (4) *Save where otherwise expressly provided in this rule, “order” includes both an order granting the relief applied for and an order refusing such relief.”*

4. It was submitted that the legal threshold for a preliminary objection to lie is well settled. Gikonyo J in **Catherine Kawira v Muriungi Kirigia [2016] eKLR** put it succinctly thus;

“(5)I do not want to reinvent 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’m 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. Examples 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. This being an appeal on a succession matter, it was submitted that 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 right under Order 43 (1) of the Civil Procedure Rules. It was thus contended 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. Reliance was placed on the case of **Directline Insurance Co. Ltd v Onyango (Civil Appeal E345 of 2022) [2022]** where the court 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 order 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 lies as of right. The appellants ought to have sought leave before filing this appeal.

6. In **Stephen Omondi Juma v Sprocer Awuor Rabote [2022] eKLR**, Aburili J was faced with a similar issue as the issue before me. She cited a Court of Appeal decision and stated that:

“As was emphatically stated in Nyutu Agrovat 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 and order 43 of the Civil Procedure Rules, to seek and obtain leave from the lower court to appeal to this court.”

7. It was submitted that leave to appeal in the instant case did not lie as a matter of right. It is further submitted that this 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 contended 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.

8. It was also submitted that the application of these legal provisions has been a subject of attention by our courts, and that the law is settled on the matter. In **Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another [2015] eKLR**, the Court of Appeal had this to say of the matter: -

“It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the Elections Act stipulates that the procedure to challenge membership to the County Assembly is by way of a 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.”

9. Learned counsel for the interested parties submitted that there is no automatic right of appeal of the order sought to be appealed from by the Appellant in the instant matter. That there can therefore be no competent Appeal that would clothe this court with jurisdiction to entertain this Appeal. 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.

10. The Appellant on their part have relied on the saving provision on Order 43 Rule 3, which provides;
Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

11. It was submitted that the Appellants interpretation of this provision is erroneous in that they seem to say that any order issued by the court as long as it determines a matter in its finality, can be appealed. It was contended that if this was the position, then there would be no need for the provision of Order 43 Rule 1. That the said Order does not specify whether the appeals that are of right are for interim orders or orders that are final in nature but simply states matters that must be appealed as of right without seeking leave. It is therefore their view that the said provision of

Order 43 Rule 3 applies to matters that can be appealed as of right.

12. Learned counsel for the Appellant filed submissions dated 18/3/2026. It was submitted that Order 43 (1) as read with Section 75 (1) (h) provides for appeals from orders as of right without seeking the leave of the trial court or appellate court. However, Order 43 (2) provides that an appeal shall lie with the leave of the court from any other order made under the Civil Procedure Rules.
13. It was submitted that the Interested Parties have forgotten that there is a saving clause/exception clause provided under Order 43 Rule 3 as follows:

43(3) ...Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit.

14. That the understanding of the saving rules and Orders of Honourable Limo dated 4th July 2025 were final orders which conferred rights to the successful parties. That they were not interlocutory orders which are applicable under Order 43 but rather they were orders distributing the Estate, which are final orders which are tantamount to judgments and decrees.

15. It was further submitted that the appeal as filed is competent and therefore the High Court has requisite jurisdiction to determine it because legally the Appellant was not required to seek leave to appeal and pray that the Preliminary Objection be dismissed with costs.

16. I have considered the Preliminary Objection and the rival submissions. I find the issue for determination is whether the objection has merit.

17. The legal threshold for a preliminary objection was laid down in 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’m 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. Examples 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.”

In the case of Catherine Kawira v Muriungi Kirigia [2016] eKLR Gikonyo J echoed the foregoing thus;

“(5)I do not want to reinvent the wheel on the legal threshold for Preliminary Objection. It is now a 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.”

17. Order 43(1) of the Civil Procedure Rules provides that 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 suits);

(b) Order 2 (pleadings generally);

(c) Order 3 (frame and institution of suit);

(d) Order 4, rule 9 (return of plaint);

(e) Order 7, rule 12 (exclusion of counterclaim);

(f) Order 8 (amendment of pleadings);

(g) Order 10, rule 11 (setting aside judgment in default of appearance).

(h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);

(i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);

(j) Order 19 (affidavits);

(k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);

(l) Order 23, rule 7 (trial of claim of third person in attachment of debts);

(m) Order 24, rules 5, 6 and 7 (legal representatives);

(n) Order 25, rule 5 (compromise of a suit);

(o) Order 26, rules 1 and 5(2) (security for costs);

(p) Order 27, rules 3 and 10 (payment into court and tender);

(q) Order 28, rule 4 (orders in proceedings against the Government);

- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security);
- (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers);
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);
- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);
- (aa) 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 order.

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

18. It is noted that this is a succession matter governed by the Law of Succession Act. The practice all over the courts is that such matters upon determination by the court, the aggrieved parties ought to seek leave to lodge appeals. 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. Even though learned counsel for the Appellant has urged this court to resort to the provisions of Order 43 (3) of the Civil Procedure Rules that have saving provisions, I find that the same cannot come to the aid of the Appellant.

43(3) ...Nothing in this Order shall apply to any adjudication which, as regards the court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit.

The foregoing provision seems to address situations where a matter has been conclusively determined. The Appellant contends that Hon Limo had made final orders in the matter and hence the same were not interlocutory in nature requiring to be subject of Order 43 (1) and (2) of the Civil Procedure Rules. As noted above, the subject matter being a succession cause, it was mandatory for the Appellant to seek leave of the trial court.

The court in **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 order 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 Seraphine 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 lies as of right. The appellants ought to have sought leave before filing this appeal.”

19. Also, in **Stephen Omondi Juma v Sprocer Awuor Rabote [2022] eKLR**, Aburili J was faced with a similar issue as the issue before me. She cited a Court of Appeal decision and stated that:

“As was emphatically stated in Nyutu Agrovat Ltd vs Airtel Networks Ltd [2015] eKLR, a right of appeal only lies where the law specifically provides for such a right to accrue and where no such right is automatic, then a party seeking to appeal must first obtain leave of court. Further, 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."

20. It is therefore that leave to appeal in the instant case did not lie as a matter of right. Hence, this 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, there is no room for the Appellant to wriggle out by trying to seek reliance on Article 159, Article 48 of the Constitution and section 1A and 1B of the Civil Procedure Act as the same do not cure this procedural misstep and not a panacea for all mistakes.. Also in **Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & another [2015] eKLR**, the Court of Appeal had this to say of the matter: -

"It has often times been stated that rules of procedure are handmaidens of justice; where there is a clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should strictly be followed. In the instant case, the Elections Act stipulates that the 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.”

22. Looking at the matter as a whole and based on the foregoing case law, I am satisfied that there is no automatic right of appeal of the order sought to be appealed from by the Appellant in the instant matter. There can therefore be no competent Appeal that would clothe this court with jurisdiction to entertain this Appeal. 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.

24. In the result, it is my finding that the Interested parties' Notice of Preliminary Objection dated 12/1/2026 has merit. The same is allowed as prayed. The Appellant's Memorandum of Appeal dated 22/7/2025 is hereby struck out. Each party to bear their own costs of the appeal.

Dated and delivered at Siaya, this 23rd day of April 2026

**D.KEMEI
JUDGE**

In the presence of:

Lawi Ogutu.....for Appellant

Ogadafor Respondents

Ooro F.....for Interested Parties

M/s Mourine.....Court Assistant