

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLA NO. E001 OF 2025

PAUL

OTIENDE

.....**APPELLANT/RESPONDENT**

=VERSUS=

WILBERFORCE

NADIDA

.....**RESPONDENT/APPLICANT**

RULING

1. This ruling is in respect to the Respondent/Applicant's Notice of Motion dated **2nd March 2026** and the accompanying Notice of Preliminary Objection dated the same day.
2. Pursuant to the directions of this Court it was directed that both the preliminary objection and application be canvassed together and by way of written submissions.
3. In compliance therewith, the Respondent/Applicant filed written submissions dated **2nd April 2026** while the Appellant/Respondent filed written submissions dated **1st April 2026**.

4. The application dated **2nd March 2026** brought under **Article 159(2) of the Constitution of Kenya 2010 Sections 1A 1B and 3A of the Civil Procedure Act (Cap 21) Order 42 Rule 35 and Order 51 of the Civil Procedure Rules 2010** seeks for the striking out and/or dismissal of the appeal for want of prosecution and non-compliance with court directions issued on **13th October 2025**, a declaration that the appeal has been overtaken by events owing to the cessation of the landlord-tenant relationship between the parties, dismissal of the appeal on account that the substratum of the dispute before the Rent Restriction Tribunal no longer exists an order for eviction of the Appellant from the suit premises and costs of the application and the appeal.
5. The Preliminary Objection dated **2nd March 2026** raises five points of law first that the appeal is incompetent misconceived and an abuse of the court process. Second that the appeal has been overtaken by events as the landlord-tenant relationship between the parties has ceased to exist. Third that the substratum of the appeal being a tenancy dispute under the Rent Restriction Act

(Cap 296) no longer exists, fourth that the Appellant has failed to comply with mandatory court directions issued on **13th October 2025** and fifth that the appeal offends the doctrine of mootness and ought to be struck out and/or dismissed with costs

6. The Respondent/Applicant contends that the Appellant has vacated the suit premises being a three-bedroom residential house at Fort Jesus Estate Kibera, unlawfully sublet the same to four third parties from whom he collects rent and materially altered the premises without consent thereby extinguishing the landlord-tenant relationship that formed the foundation of the proceedings before the Rent Restriction Tribunal in RRC/90/2016.

7. The application and Preliminary Objection are supported by the affidavit of **Wilberforce Nadida** which annexes evidence of the alleged subletting and alterations. In its written submissions dated 2nd April 2026 the Respondent/Applicant submits that the Preliminary Objection raises pure points of law that are dispositive of the appeal and satisfies the test in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd**

[1969] EA 696 where the Court held that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication and which if argued may dispose of the suit.

8. The Respondent/Applicant further relies on **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** on the primacy of jurisdiction. In the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [2001] eKLR** that courts determine live disputes and not hypothetical questions.
9. Reliance is also placed on the cases of **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR** on abuse of court process **Order 42 Rule 35 of the Civil Procedure Rules** empowering dismissal for want of prosecution and **Utalii Transport Company Ltd & 3 Others v NIC Bank Ltd & Another [2014] eKLR** on inexcusable delay and further the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others [2016] eKLR** on the doctrine of mootness and **Sections 107-109 of the Evidence Act** on the burden of proof.

10. The Respondent/Applicant prays that the Preliminary Objection be upheld, the appeal struck out or dismissed, eviction orders issued against the Appellant and the third parties in occupation and costs to be awarded.
11. The Appellant/Respondent in his replying affidavit sworn on **16th March 2026** deposes that he still resides at the suit property in Block No. S4 Fort Jesus Estate Kibera and that he filed a 500-paged skeleton record of appeal on 13th July 2025 which was duly served on the Respondent/Applicant in printed hard copy and acknowledged by stamping.
12. He attributes the delay in completing the full record of appeal to the Lower Court's failure to type the proceedings and avail the file to the this court a matter beyond his control as a litigant. He exhibits letters written to the Deputy Registrar dated 15th July 2025 and 1st October 2025 marked POO-1 and POO-2 requesting expedition of the lower court file.
13. In his written submissions dated 1st April 2026 the Appellant/Respondent argues that the application seeks substantive final orders including eviction which go to the

root of the appeal and offend the right to a fair hearing under **Article 50(1) of the Constitution of Kenya**. He submits that even if construed as interlocutory the application fails the tripartite test in **Giella v Cassman Brown & Co. Ltd [1973] EA 358**.

14. The Appellant/Respondent further contends that the Preliminary Objection fails the test in **Mukisa Biscuit case (Supra)** because it is replete with contested factual issues including whether the landlord-tenant relationship has ceased and whether the Appellant still occupies the premises.

15. He urges the Court to find that the delay is not attributable to him and that the appeal should be allowed to proceed to hearing on the merit.

16. The Court has carefully considered the Notice of Motion, the Preliminary Objection, rival affidavits and the written submissions of the parties, the issues for determination are as follows;

i) Whether the Preliminary Objection meets the legal threshold.

- ii) Whether the appeal is incompetent an abuse of the court process or liable to be struck out or dismissed for non-compliance with court directions.**
- iii) Whether the appeal has been overtaken by events or offends the doctrine of mootness.**
- iv) Whether the Court should grant an eviction order at this stage.**
- v) What orders should issue as to costs.**

17. A preliminary objection as authoritatively defined in **Mukisa Biscuit case (Supra)** consists of a pure point of law which is pleaded or arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. It must be capable of being determined on the face of the pleadings without the need for extrinsic evidence or resolution of disputed facts.

18. This position was reiterated by the Court of Appeal in **Oraro v Mbaja [1986] KLR** 1 where the Court emphasised that a preliminary objection must raise a pure point of law which does not require the production of evidence or resolution of contested facts.

19. In the present case the Preliminary Objection raises the issues of cessation of the landlord-tenant relationship, the absence of substratum under the Rent Restriction Act and the doctrine of mootness. These grounds turn squarely on contested factual averments. The Appellant deposes that he still resides at the suit premises while the Respondent/Applicant asserts that he has vacated and sublet the property to third parties. Such factual disputes cannot be resolved on a preliminary objection.
20. The Court therefore finds that the Preliminary Objection does not meet the legal threshold of a true preliminary objection and is hereby overruled.
21. The Respondent/Applicant invokes **Order 42 Rule 35 of the Civil Procedure Rules** which empowers the Court to dismiss an appeal for want of prosecution where there has been inordinate and inexcusable delay. The Court of Appeal in **Utalii Transport Company Ltd & 3 Others v NIC Bank Ltd & Another [2014] eKLR** held that delay which is prolonged and inexcusable is sufficient ground for dismissal.

22. It is common ground that on 13th October 2025 this Court granted the Appellant thirty days within which to file a supplementary record of appeal. The Appellant admits that the full record has not yet been filed but explains that the delay stems from the Lower Court's failure to type the proceedings and avail the file a matter beyond his control. He has demonstrated diligence by filing and serving a 500-paged skeleton record on 13th July 2025 making personal visits to the registry and writing follow-up letters to the Deputy Registrar on 15th July 2025 and 1st October 2025.

23. A litigant cannot be penalised for institutional delays that are not attributable to him as has been consistently held by the Environment and Land Court in similar appeals involving registry delays. In the circumstances the delay though regrettable is neither inordinate nor inexcusable so as to warrant the drastic sanction of striking out the appeal.

24. The Court therefore finds that the appeal is not incompetent or an abuse of the court process and is not liable to be struck out or dismissed for non-compliance with court directions.

25. The doctrine of mootness requires that courts refrain from determining matters that no longer present a live controversy as held in **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others [2016] eKLR**. The Supreme Court in **Institute for Social Accountability & another v National Assembly & 3 others [2017] KESC 1** affirmed that courts do not entertain academic or hypothetical questions where the substratum of the dispute has ceased to exist.

26. This position was similarly upheld by the Supreme Court in Kenya **Railways Corporation & 2 others v Okoiti & 3 others [2019] KESC 1**. However the doctrine cannot be invoked where the foundational facts are hotly contested. The Respondent/Applicant asserts that the Appellant has vacated the premises sublet the same and altered the structure thereby extinguishing the tenancy that formed the substratum of the Tribunal proceedings. The Appellant vehemently denies this and maintains that he remains in lawful occupation of Block S4. These are serious disputed facts that can only be resolved upon a full

hearing of the appeal where the entire record can be scrutinised.

27. The Court therefore finds that the appeal has not been overtaken by events and does not offend the doctrine of mootness.

28. In respect to the order of eviction sought, it is noteworthy that the order for eviction sought in the application is a final and substantive remedy that goes to the very heart of the appeal. Granting such an order at the interlocutory stage would determine the appeal without a hearing on the merits and would violate the Appellant's right to a fair hearing under **Article 50(1) of the Constitution of Kenya.**

29. Even if the application were to be treated as one for interlocutory relief it fails the tripartite test in **Giella case (Supra)** where the Court laid down that an applicant must first demonstrate a prima facie case with a probability of success second that he will suffer irreparable injury not compensable by damages and third where the Court is in doubt the balance of convenience must favour the grant of the injunction.

30. The existence of a prima facie case the likelihood of irreparable injury not compensable by damages and the balance of convenience have not been established on the face of the conflicting affidavits. The proper stage for determining whether the Appellant should be evicted is at the hearing of the substantive appeal.
31. The Court therefore finds that the eviction order sought cannot be granted at this stage.
32. On the question of costs, the settled principle is that costs follow the event unless there are compelling reasons to depart from it. However in keeping with the practice in appellate matters involving procedural delays attributable in part to institutional factors the Court exercises its discretion under Section 27 of the Civil Procedure Act to order that costs of the application and the Preliminary Objection be in the cause
33. In the end, the Respondent/Applicant's Notice of Motion dated **2nd March 2026** together with the Preliminary objection of even date are hereby determined as follows;

- (i) The Preliminary Objection dated 2nd March 2026 is hereby dismissed.**
- (ii) The Notice of Motion dated 2nd March 2026 is hereby dismissed in its entirety.**
- (iii) The Appellant is hereby directed to file and serve his record of appeal within 30 days from today failure of which this appeal shall stand dismissed.**
- (iv) The costs of the application and the Preliminary Objection shall be in the cause.**

Dated, Signed and Delivered Virtually this 22nd day of April, 2026.

**E. K. WABWOTO
JUDGE**

In the presence of: -

Mr. Otiende the Appellant in person.

Ms. Mati for the Respondent.

Court Assistants: Mary Ngoira and David Ngoosa.