



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ISIOLO**  
**CIVIL APPEAL NO. E002 OF 2026**

**GALGALO GUYA ABKIYO .....**  
**APPELLANT**

**VERSUS**

**1. HALIMA IBRAHIM**

**2. BUKE ALI**

**ABDULAHAMAN ..... RESPONDENT**  
**S**

**RULING**

1. The Appellant's Notice of Motion dated 09/02/2026 is what is due for determination. Substantially, the Application seeks for stay of proceedings in **Kadhi Succession Cause No. 13 of 2019** pending the hearing and determination of the Appeal.
2. The Appeal arises from the Kadhi's dismissal of the recusal Application dated 26/01/2026, by the Appellant herein. The Applicant states that the recusal Application was based on reasonable apprehension of bias by the trial Kadhi; that he will suffer irreparable prejudice if he was compelled to proceed before a court whose impartiality is under Appeal, and that the Appeal will therefore be rendered nugatory.
3. The Application is opposed through the replying Affidavit of the 1<sup>st</sup> Respondent (The respondent). The

Respondent states that this Court lacks jurisdiction to determine the Application as no leave was sought, or granted to file an Appeal against the dismissal of the said Application contrary to **Order 43 Rule (1) and (2) of the Civil Procedure Rules**. It is stated that the right of appeal is only conferred by statute, or the constitution; that if stay is granted, it will prejudice the Respondents as the Applicant continues to misappropriate the funds from the deceased's estate, meant for the beneficiaries.

4. The respondents further state that the Application has not met the threshold for stay of proceedings. That the Appeal is not arguable. It is finally stated that the Application is aimed at curtailing the rights of the beneficiaries and to give room to the Applicant to continue misusing the Estate funds.
5. The parties submitted orally through their respective Advocates and which submissions I have considered.

### **Determination**

6. I have considered the Application, the Supporting Affidavit and the Respondents' response. I have also read through the Oral Submissions of the counsels as aforesaid.

#### *Issues for determination*

- a) Whether this Court has jurisdiction to entertain this Application.
- b) Whether the Lower Court proceedings should be stayed.

#### *The question of Jurisdiction.*

7. From the submissions of both parties, it is common ground that no leave was sought by the Appellant

- before filing the present Appeal. Rather the contest is whether leave to appeal was necessary.
8. The Respondent has argued that pursuant to the provisions of **Order 43 Rule (1) and (2) of the Civil Procedure Rules**, the Appellant ought to have sought leave to appeal against the lower court's decision. That to the extent that no leave was sought this Court lacks the jurisdiction to entertain both the Appeal and Application.
  9. In response, the Applicant has argued that the issue of leave is only applicable to orders or decree issued under the Civil Procedure Rules. In this regard, the Applicant has made specific reference to **Order 43 Rule (2)** which states: "*An Appeal shall lie with the leave of the Court from any other order made under these Rules*". The Applicant has argued that an Application for recusal is made under Judicial Service Code of Conduct Regulations, not the Civil Procedure Rules, and therefore the issue of leave does not arise.
  10. **Section 75 of the Civil Procedure Act** is the substantive law on Appeals. Under **subsection 1**, the orders from which an Appeal is available to a litigant as a matter of right, is under **Section 75 (1) (h)** which are :- "*any order made under rules from which An Appeal is expressly allowed by Rules*".
  11. My understanding of Section **75(1)(h)** is that the provisions of Subsection (h) is an appreciation of the fact, the Right of Appeal can be provided under other statutes, not necessarily falling under the Civil Procedure Act. Thus, it is only if a particular statute provides the Right of Appeal that, no leave will then be needed under the civil procedure Rules. I have deliberately sought guidance from the substantive law, because of the apparent discrepancy between

section 75(h) (h) of the Act and Order 43 rule 2 of the Rules.

12. It follows therefore that pursuant to the provisions of section 75(1) (h), when the Appellant argues that leave against a Ruling on recusal Application is exempted because it is not an Application made under the Civil Procedure Rules, it was upon him to demonstrate that the Judicial service Act or the Regulations thereunder, which was the basis of his Recusal Application, gave him the right to Appeal. The Applicant did not demonstrate that such a right exists. His only salvation was to seek leave, which he did not.

13. In other words, there is no automatic right of Appeal. It must be granted by the Constitution or statute, and where it is not expressly provided by law, a party must then seek leave. This position was extensively explained by the Court of Appeal in ***Boit v Kumin; Boit & another (Interested Parties) [2025] KECA 568 (KLR)*** where the Court stated: -*“In our considered opinion, for this Court to properly entertain an appeal from the High Court, as the above section suggests, the appeal must lie to this Court under any written law. In other words, unless a right of appeal is clearly and expressly provided by a statute, it does not exist. This is because a right of appeal infers in no one and therefore an appeal for its maintainability must have the clear authority of law. If the statute does not create any right of appeal, no appeal can be filed.”*

14. ***In Boit’s case ( supra )*** the appeal was from the high court to the court of Appeal. However, the same principle applies on appeals from the subordinate courts to the high court. In ***Kakuta Maimai Hamisi***

**vs. Peris Pesi Tobiko and 2 Other [2013] eKLR**  
the high court held:- “ *It behaves an intending Appellant to be able to show under which law his right of Appeal is donated. Unless such appeal donating law can be found, no appeal can lie*”. I fully associate myself with the high court decision in this regard.

15. In the absence of leave, the Appeal before this Court is a nugatory. There is no proper Appeal, on record. It follows that the Application has no foundation. I further agree with the Respondent that no jurisdiction has been bestowed to this Court where there is no Appeal on record.
16. The Applicant has argued that such technical omissions should not defeat substantive justice. However, a jurisdictional question is a substantive issue. Whatever the Court does, devoid of jurisdiction is a nugatory. It is not an issue that can be cured by invoking Article **159 (2) (d) of the Constitution**.
17. The 2<sup>nd</sup> issue arising is dispensed with in view of the court’s finding on jurisdiction.
18. In the Circumstances, the only option left for this Court is to strike out the Application, which I hereby do. The Appeal is hereby summarily rejected.

Dated, Signed and Delivered virtually, at Nairobi, this 9<sup>th</sup> day of April 2026.

S. Chirchir  
Judge

In the presence of:-  
Roba Katelo -Court Assistant  
Mr. Jarso for the Applicant/Appellant  
Ms. L. Mohammed for the Respondent.

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