



**Cosco Logistics Co Limited & another v Nekesa & 2 others (Suing as widows & son and legal representatives of the Estate of Godfrey Otanga Wanga) (Civil Appeal E083 of 2024) [2026] KEHC 5812 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5812 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E083 OF 2024  
REA OUGO, J  
APRIL 30, 2026**

**BETWEEN**

**COSCO LOGISTICS CO LIMITED ..... 1<sup>ST</sup> APPELLANT**

**TRANS-WAY (K) LOGISTIC CO LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ROSE NEKESA , PHANICE AWINJA SHIKUKU & GODWIN LIKUYI OTANGA  
(SUING AS WIDOWS & SON AND LEGAL REPRESENTATIVES OF THE  
ESTATE OF GODFREY OTANGA WANGA) ..... RESPONDENT**

**RULING**

1. In a Motion dated 28.10.2025, brought under section 1A, 1B, 3, 3A, 63(e), 75 and 76 of the *Civil Procedure Act* Cap. 21, Order 43 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Article 159(2) of *the Constitution* of Kenya, 2010.
2. The applicant seeks the following orders;
  - i. The honourable court be pleased to validate and/or deem this appeal as properly filed with leave of the court and is properly on record.
  - ii. That in the alternative and without prejudice to (1) above, the court be pleased to presume that leave was sought and granted but the subordinate court's record missed to capture the same hence the appeal before court is valid and proper.
  - iii. That the costs of the application be in the cause.
3. The application is supported by the grounds on the face of the application and a supporting affidavit dated 28th October 2025, sworn by Mercy Wambui Wahome, an advocate of Nyairo and Company Advocates. The applicant deposes as follows. On 8th May 2024, during the hearing of Bungoma



CMCC No. 277 of 2021, the Respondents sought to produce a bundle of receipts to support their claim for special damages. She objected, but the trial magistrate rejected the objection and admitted the receipts. Immediately after the delivery of the ruling, she sought leave to appeal against the ruling in accordance with section 75(1) of the *Civil Procedure Act* and Order 43 Rule 1 of the Civil Procedure Rules, 2010. The Court recorded her request but did not complete the statement, and the trial magistrate pronounced verbally that “leave to appeal is granted”. She recorded the same in her notes during the proceedings, and, relying on the said leave, the appellant filed the present appeal. In the typed proceedings, that portion of the proceedings was omitted, and this appears to be purely an oversight and/or a clerical/typing error that should not be visited on an innocent litigant to invalidate the appeal. This Court has inherent power and jurisdiction to validate the appeal and deem it properly on record to enable the conclusion of the matter on merit.

4. The application was opposed. Rose Ouma, the 1st Respondent, in a replying affidavit dated 25.11.2025, avers that the court cannot assume that leave to appeal was sought when there is no such record. Failure to obtain leave is a jurisdictional defect that ousts the court’s jurisdiction to hear and entertain the appeal. From the court record, the court declined a stay of prosecution/proceedings of the suit, not leave to appeal. This court cannot rely on Counsel’s notes. This appeal, having been filed without leave, is void ab initio, and the orders sought are unavailable. The appeal was filed on 27.5.2024, a period of 1 ½ years, yet no explanation has been given for such inordinate delay in filing the application. It is not clear from their application when the applicant discovered the alleged typing error, given that the Record of Appeal was filed earlier than the application. The applicant was only awakened when they filed their response to the application dated 21.7.2025, in relation to their application dated 16. 7.2025, when they sought to have the appeal enjoined with Civil Appeal No. E135 of 2024.
5. In a supplementary affidavit dated 1.12.2025, in response to the replying affidavit, the applicant avers that the issue of moving the court earlier could not have arisen, as she was still operating under the belief that the leave sought had been obtained, only to be shocked when she went through the typed proceedings and noted the missing portions, in particular the portion where the application for leave and for stay of proceedings was made and addressed by the trial court.
6. Parties filed written submissions, and I have read and considered them. The appellant reiterated what is deposed in their counsel’s supporting affidavit and further submitted as follows: Section 79 of the *Civil Procedure Act* gives this court unfettered discretion to grant leave to file an appeal out of time. The court should consider the length of the delay and the prejudice the respondent is likely to suffer if the application is allowed. It was submitted that they believe the court granted them leave to appeal on 8.5.2024, and they urge this court to validate the appeal if it finds that no leave to appeal was granted. Regarding whether the respondent would suffer any prejudice, it was submitted that they would suffer no prejudice, as the applicant moved the court in good time to have the appeal validated and the record of appeal has been complied with in readiness for the hearing. They even went a step further to apply to have the appeal consolidated with Bungoma HCCA E135 of 2024 to have this matter determined in the shortest time possible. Regarding whether the appeal has a high chance of success, it was submitted that section 35 of the *Evidence Act* requires the author of a document to produce it, which was not done, and that it’s the decision the applicant is challenging. The applicant urged this court to allow the application to ensure substantive justice is done in line with the provisions of Articles 50(1) and 159 of *the Constitution*. Reliance was placed on the following cases: *Apa Insurance Limited vs Michael Kinyanjui Muturi* [2016] eKLR and *Factory Guards Limited vs Abel Vundi Kitungi* [2014] KEHC879 (KLR).



7. The Respondent's submissions are dated 25.11.2025. The Respondent also reiterated the contents of their reply affidavit. Reliance was placed on the case of Peter Nyaga Muvake vs Joseph Mutunga [2015] eKLR, where the court held that,

“Where, as in this case, leave to appeal is necessary by dint of Section 75 of the *Civil Procedure Act* and Order 42 of the Civil Procedure Rules, the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal. Without leave, there can be no valid notice of appeal. And without a valid notice of appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water”.
8. It was further submitted that the applicant's allegation of infringement of their right of appeal, namely the failure to obtain leave before instituting an appeal, is not merely a procedural issue that can be excused under Article 159 (2) (d) of *the Constitution*, but a jurisdictional issue that cannot be excused at all, as the court lacks jurisdiction to entertain an incompetent appeal. Reliance for this argument was placed on the case of Kakuta Maimai Hamisi vs Peris Pesi Tobiko [2013] eKLR.
9. It was further submitted that the appellants failed to explain the inordinate delay of more than one and a half years. Reliance for this argument was placed on the decision in John Agina vs Abdulswamad Sharif Alwi, C.A. Civil Appeal No. 83 of 1992. The applicant is silent as to why they discovered the alleged error, given that their record of appeal was filed before the application. The respondent would suffer greater prejudice if the application is allowed.

## DETERMINATION

10. I have considered the rival affidavits filed by the parties and the submissions. The issue for determination is whether the court should grant the orders sought in the application dated 28.10.2025. The two main issues are whether the applicant was granted leave to appeal by the subordinate court and whether the court can validate the appeal.
11. On the first issue, the law is clear that the applicant was required to seek leave to appeal. The record of appeal that was filed had gaps in the proceedings of 8.5 2024. The record is as follows;

“Miss Wahome- I pray for.....  
Court. There is no basis for stay of prosecution”.
12. Counsel for the applicant who was in court insists that she sought leave to appeal. I have perused the handwritten proceedings and am unable to read the trial magistrate's recording; therefore, I will give them the benefit of the doubt and accept Counsel's account that she did seek leave. Regarding the length of the delay, the applicant explains that they were under the impression that leave to appeal had been granted, based on the trial court's oral pronouncement. The memorandum of appeal is dated 27.5.2024. The impugned ruling was delivered on 8.5.2024. The applicant has explained the delay in filing the current application, and I find their explanation persuasive.
13. Regarding the likelihood of success on appeal, the applicant is challenging the admission of documents tendered in evidence without their maker. The appeal raises plausible grounds. No prejudice will be caused to the respondent. In the case of Factory Guards Limited vs Abel Vundi Kitungi [2014] eKLR, the court held that the right of appeal should not be impeded, as it is a constitutional right and the cornerstone of the law. Where there is a delay that is explained and the courts accept the explanation



to render substantive justice and to facilitate access to justice for all by ensuring deserving litigants are not shut out of the judgment, such leave should be granted.

14. I am persuaded that the applicant has offered a reasonable explanation. To render substantive justice, to facilitate access to justice, and to ensure a just determination of the dispute on the merits, I will presume that the leave sought was granted. Accordingly, the appeal before this court is valid and proper. Costs of the application be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**R.E.OUGO**

**JUDGE**

In the presence of:

Miss Wahome-- For the Applicants/ Appellants

Miss Wanyama -For the Respondents

Wilkister - C/A

