



**Gathongo v Njenga & 4 others (Civil Application E137 of 2025)  
[2026] KECA 836 (KLR) (30 April 2026) (Ruling)**

Neutral citation: [2026] KECA 836 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPLICATION E137 OF 2025  
JM MATIVO, MB KIARARIA & AI HASSAN, JJA  
APRIL 30, 2026**

**BETWEEN**

**FRECIA WANJIKU GATHONGO ..... APPLICANT**

**AND**

**JOYCE NYAMBURA NJENGA & 4 OTHERS ..... RESPONDENT**

*(Being an application to strike out the respondents' undated notices of appeal giving notice of an intended appeal against the judgment of the High Court of Kenya at Nakuru (S. M. Mubochi, J.) dated 7th October 2025 in Succession Cause No. 211 of 2015)*

**RULING**

1. Frecia Wanjiku Gathogo (the applicant) vide her application dated 10<sup>th</sup> December 2025 is urging this Court to strike out both the 1<sup>st</sup> and the 2<sup>nd</sup> respondents' undated notices of appeal served upon her via e-mail on 13<sup>th</sup> November 2025. She also prays for costs of the application. The application is premised on the provisions of Rules 77 (2) and 86 of the Court of Appeal Rules, 2022, Section 3A and 3B of the *Appellate Jurisdiction Act*, Article 159 of *the Constitution* of Kenya 2010 and all other enabling provisions of the Law.
2. The grounds in support of the application are that the respondents' undated notices of appeal against the judgment delivered on 7<sup>th</sup> October 2025 by the Superior Court were served upon her simultaneously via e-mail by the respondents on 13<sup>th</sup> November 2025. The applicant maintains that the said notices of appeal are irregular and that they were served as an afterthought because the respondents filed them out of time without the leave of this Court. Further, the respondents did not pay the requisite Court fees. It is the applicant's case that the impugned judgement was delivered on 7<sup>th</sup> October 2025, therefore, the notice of appeal ought to have been filed by 21<sup>st</sup> October 2025, paid for and served in accordance with the Rules of this Court. Also, they were uploaded in the CTS on 14<sup>th</sup> November



2025, which was 24 days late. Lastly, the applicant asserts that it is in the best interests of justice and fairness that this application be allowed.

3. The 1<sup>st</sup> respondent filed a replying affidavit dated 28<sup>th</sup> December 2025 in opposition to the application. The salient averments are:
  - a. the High Court Judgment was delivered on 7<sup>th</sup> October 2025, that they were granted leave to appeal within 45 days;
  - (b) the 1<sup>st</sup> respondent claimed that pursuant to the said leave, he lodged his notice of appeal on 14<sup>th</sup> November 2025, a mere 38 days from the date of Judgment and well within the leave period granted;
  - (c) that he did not manage to pay the filing fees immediately upon filing the notice of appeal owing to technical challenges experienced on the CTS payment platform because despite prompt and genuine attempts to effect payment, the payment process was not going through. Therefore, the non-payment was not deliberate or in bad faith;
  - (d) the instant application is a nonstarter, brought in bad faith, vexatious, frivolous, devoid of merit, waste of precious judicial time and meant to clog the justice system because:
    - (i) the application is brought under Rule 77 (2) and Rule 86 of the Court of Appeal Rules, 2022, provisions which apply to appeals that lie as a matter of right,
    - (ii) there is no automatic right of appeal from the High Court to the Court of Appeal in probate matters as averred by the applicant, therefore, the respondent could not file an appeal under Rules 77 (2) and 86 that apply to matters with an automatic right of appeal,
    - (iii) the notice of appeal was timeously filed within the 45 days leave granted by the Court.
  - (e) the application consists of erroneous assertions of law and selective misapprehensions of the Court record, all aimed at hampering right to access justice;
  - (g) the application is a technical and premature attempt to defeat his Constitutional right to appeal and access to justice contrary to the principles of substantive justice under Article 159;
  - (f) the applicant has not demonstrated any prejudice that would be suffered should the appeal be filed and determined on merits; and
  - (g) the application is wholly misconceived, frivolous, vexatious and amounts to an abuse of the Court process. It ought to be dismissed with costs.
4. The 2<sup>nd</sup> respondent in opposition to the application filed a replying affidavit dated 28<sup>th</sup> December 2025 whose contents are a replica of the 1<sup>st</sup> respondent's affidavit. Therefore, it will add no value to rehash it here.
5. In support of the application, the applicant filed submissions dated 23<sup>rd</sup> March 2026 essentially rehashing the grounds in support of the application. The applicant cited Rule 77 of the Court of Appeal Rules, 2022 and this Court's decisions in *Murila vs. Langat & Ano*. (Civil Application No. 62 of 2020) [2024] KECA 1667 (KLR) (22<sup>nd</sup> November 2024) (Ruling) where a notice of appeal was struck out for similar reasons. The applicant also cited *Khaemba vs. Teachers Service Commission & 2 Others* (Civil Appeal No. 186 of 2019) [205] 203 (7<sup>th</sup> February 2025) (Judgment) in which this Court struck out a notice of appeal for being incompetent again under similar circumstances and urged this Court to allow the application.



6. In opposition to the application the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed substantially identical submissions basically restating the reasoning proffered in their replying affidavits. It will add no value to rehash the arguments here.
7. The respondents' argument as we understand it is that, they sought and obtained leave to appeal before the trial court. They were granted 45 days to appeal. They filed the notice of appeal after 38 days within the 45 days leave they were granted. They admit not paying for the notice of appeal at the time of filing, but they blame the system for failing to process the payment.

Therefore, they maintain that they filed their notice of appeal perfectly within the 45 days they were granted leave to appeal.

This argument sounds attractive. However, that is how far it goes. It is legally flawed and serves as a timely reminder for legal practitioners to diligently consult the rules of procedure before instituting proceedings to avoid the pitfalls that may arise from failing to follow the rules correctly.

8. We must underscore that there is a clear distinction between leave to appeal and filing a notice of appeal. "Leave to appeal" is the Court's permission to challenge a decision when no automatic right to appeal exists. A "notice of Appeal" is a formal document that initiates an appeal as of right. Once filed within the limitation period, the Court is generally obligated to "admit" the appeal. Filing the notice of appeal is a "jurisdictional pre-requisite" for the appellate court to entertain the case. This position was settled by the Supreme Court with sufficient clarity in *Mbugua alias George Boniface Nyanja vs. Iqbal* (Personal representative of the Estate of the Late Ghulam Rasool Jammohamed) (Miscellaneous Application 7 (E011) of 2021) [2021] KESC 41 (KLR) (6 August 2021) (Ruling) as follows:

} "[17] On the arguability of the appeal, and strictly in accordance with the above strictures, the jurisdiction of the Court is invoked and proceedings commenced, first under Rule 36 of the Court's Rules, by filing a notice of appeal within fourteen days from the date of judgment or ruling which is the subject of appeal. A notice of appeal is therefore a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave. This Court in *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others*, Application 16 of 2014, [2014] eKLR stressed that a notice of appeal is a jurisdictional pre-requisite."

9. Clearly, a notice of appeal must be filed within the stipulated period whether or not leave is required. This Court in *Agricultural Development Corporation & Ano. vs. Mbugua & 7 Others* (Civil Appeal (Application) E005 of 2025) [2026] KECA 316 (KLR), delivered on 25<sup>th</sup> February 2026 aptly reminded legal practitioners regarding the necessity of mastering procedural law. The Court observed that Article 159 of *the Constitution*, which encourages courts to administer justice without undue regard to technicalities, was never intended to oust the obligation of litigants and their counsel to comply with procedural imperatives.
10. In *Nicholas Kiptoo Arap Korir Salat vs. IEBC & 6 Others* [2014] eKLR the Court emphasized that rules of procedure and timelines are meant to make judicial adjudication fair, certain, and even-handed. Disregarding these rules leads to "anarchical free-for-all" in the administration of justice. Back to the facts of this case, the respondents clearly admit filing the notice of appeal out time, of course, acting under the misapprehension that by filing it within the leave period, they were safe. Unfortunately for them, this was a grave misreading of the law. Rule 77 (2) of the Court of Appeal Rules provides that each notice under sub-rule 1 shall, subject to Rule 84 and 97 be lodged within 14 days after the date of the decision against the decision for which appeal is lodged.



11. As clearly stipulated by Rule 77 (2), the notice of appeal must be filed within 14 days of the date of the decision being challenged. By computing time to be within the 45 days allowed when the trial court granted them leave to appeal, the respondents are in effect trying to re-write Rule 77 (2). We decline the invitation to re-write the rules. But what is clear is that filing a notice of appeal outside this window without first obtaining leave of the court (an extension of time) is a jurisdictional defect that typically leads to the notice being struck out or declared a nullity. This position has been affirmed in countless decisions of this Court among them *Safaricom Limited vs. Jack K. Khanjira & Ano*. [2018] KECA 141 in which this Court struck out both the notice of appeal and the record of appeal because the notice was filed out of time without leave rendering it incurably defective.
12. By now it is manifestly clear that the 1<sup>st</sup> and 2<sup>nd</sup> respondents' undated notices of appeal served upon the applicant via e-mail on 13<sup>th</sup> November 2025 and filed on 14<sup>th</sup> November 2025 are a nullity and candidates for striking out. Accordingly, we allow the applicant's application dated 10<sup>th</sup> December 2025 in terms of prayers (2) and (3) and strike out the undated notices of appeal served upon the applicant via e-mail on 13<sup>th</sup> November 2025. The respondents shall pay the costs of this application to the applicant.

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

**J. MATIVO**

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**JUDGE OF APPEAL**

**MURUNGI B. KAIRARIA**

.....

**JUDGE OF APPEAL**

**AHMED ISSACK**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed.

**DEPUTY REGISTRAR.**

