



Gallerius Investments Limited v County Government of Kwale & 2 others (Civil Appeal E014 of 2022) [2026] KECA 750 (KLR) (24 April 2026) (Judgment)

Neutral citation: [2026] KECA 750 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E014 OF 2022
F TUIYOTT, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
APRIL 24, 2026**

BETWEEN

GALLERIUS INVESTMENTS LIMITED APPELLANT

AND

THE COUNTY GOVERNMENT OF KWALE 1ST RESPONDENT

KENYA ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 3RD RESPONDENT

(Being an appeal against the Directions of the Environment and Land Court of Kenya at Kwale (A. E. Dena, J.) issued on 27th October 2021 in E.L.C Case No. 7 of 2021)

JUDGMENT

1. The impugned directions and orders of the Environment and Land Court at Kwale (A. E. Dena, J.) were given on 27th October 2021 in Kwale ELC Case No. 7 of 2021 (formerly Mombasa ELC Case No. 185 of 2015). The directions and orders were in determination of three interlocutory applications made in the two consolidated suits specified in the impugned decision (namely Kwale ELC No. 6 of 2021 and ELC No. 7 of 2021) in which the learned Judge directed that:

- “ 1. ELC No. 6 of 2021 and ELC No. 7 of 2021 having been consolidated, the latter shall be the lead file.
2. The Notice of Motion dated 26/2/2020 filed by the 1st Defendant the County Government of Kwale is hereby allowed in part to the extent that leave is hereby granted to file further amended Defence & Counterclaim. The prayer for stay of these proceedings fails because the substantive order has been allowed. The Plaintiffs Preliminary Objection is dismissed.



3. The plaintiff M/s Gallerius Investment Ltd as well as the rest of the Defendants are at liberty to respond to the 1st defendant's pleadings allowed above within 14 days.
 4. EACC shall be added as the 6th Defendant in the matter under the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules 2010 and invoking Order 50 Rule 6, time for filing of their pleadings in respect ELC 7 of 2021 shall be enlarged. The said pleadings shall be filed and served within 14 days of today's date. This shall include the proposed Counterclaim.
 5. The 2nd, 3rd 4th and 5th Defendants in ELC 6 of 21 shall remain as such defendants in the consolidated matter. The County Government of Kwale shall remain as the 1st respondent.
 6. Upon service of the pleadings by EACC, all the other parties shall be at liberty to respond and file their further documents within 14 days of service.
 7. The Application dated 3rd February 2021 by the plaintiff to vacate the caution filed by EACC in ELC 88 of 2019 is dismissed. For the avoidance of doubt, the trial court further directed that the status quo shall be maintained pending the hearing and determination of the suit.
 8. The Notice of Motion dated 14/10/21 by the Plaintiff M/s Gallerius seeking orders for transfer of the suit back to Mombasa for trial and disposal is hereby dismissed for the reasons earlier stated.
 9. It is further ordered that all the parties shall comply with Order 11 within 45 days from the date hereof.
 10. The directions shall be served on parties who are absent.”
2. According to the learned Judge, the consolidation of the two cases and the subsequent directions were intended to facilitate expeditious and cost-effective determination of the competing claims. In her words:

“9. In view of the overriding objectives of the *Civil Procedure Act* this Court is under the duty to handle matters before it efficiently in terms of both time and use of the court resources. We are also called to discharge substantive justice on merit. I have noted the time spent on applications, counter-applications and preliminary objections since the year 2015 when the suit was commenced, especially ELC 185 of 2015. Indeed, the Court in its ruling delivered on 26th February 2016 had directed parties to comply with Order 11 within 30 days. This must come to an end and the parties should focus on the disposition of the matter on merit for the ends of justice to be met. I see no prejudice that will be occasioned to any of the parties by the actions the court is proposing to take.”



3. Taking issue with the learned Judge’s directions, the appellant in ELC Case No. 7 of 2021, Gallerius Investments Limited, moved to this Court on appeal on the following grounds, which we take the liberty to recite as hereunder:

- “1. The trial judge erred in law and fact for (sic) determining matters for the parties in their filed applications which were pending for hearing and therefore contravened Article 47 of *the Constitution* of the Republic of Kenya 2010.
2. The trial judge grossly misdirected herself for failing to accommodate the appellant’s written submissions in response to her drafted directions and never gave any tangible and sound reasons and by doing so she acted in bad faith.
3. That, the trial judge overlooked into the matters before her and she hastily made her own personal decisions at the detriment of the appellant.
4. That, the trial judge applied the wrong principles in law and fact for dismissing other matters and allowing applications which were not merited.
5. That, in paragraph 7 of the directions the trial judge did not understand that ELC No 88 the plaintiff was Kenya Anti-corruption Commission and being a defunct commission obtained a ruling which was illegally executed and also failed to enjoin [the] land registrar of Kwale into the proceedings which was necessary to the appellant and the trial judge acted partisan in her entire directions and by doing so she arrived to the wrong decision into the same (sic).
6. That, paragraph 5 and 6 of the directions, the trial judge converted the directions into a hearing and ultimately determining issues without being heard by the parties and also went as far as granting orders which were not sought for and therefore made wrong decisions into the same.
7. The trial judge failed to consider the appellant’s submissions in response to the directions and she was biased.”

4. By reason of the matters aforesaid, the appellant prayed that the appeal be allowed; that the directions made by the trial Judge be varied and set aside; that, in the alternative, all pending applications be heard expeditiously and determined on merit; and that the costs of the appeal be provided for.

5. In support of the appeal, Ms. Meena Patel, a Director of the appellant, filed written submissions dated 27th February 2023 as well as supplementary submissions in response to the 1st respondent’s submissions dated 11th April 2023. Citing no judicial authorities or specific statutory provisions, Ms. Patel briefly narrated the history of the two suits; and challenged the directions in issue on the aforementioned grounds set out in the appellant’s memorandum of appeal.

6. Opposing the appeal, learned counsel for the 1st respondent (the County Government of Kwale), M/s. Njoroge Mwangi & Company, filed written submissions dated 21st March 2023. Counsel cited sections 66, 75 and 76(1) of the *Civil Procedure Act*, Cap. 21 (the Act), submitting that, even though section 66 recognises the right of appeal to this Court from a decree or any part thereof, or from the orders of the High Court, no appeal lies to this Court from procedural directions of the trial court; that section 75 provides the instances in which an appeal lies as a matter of right, making all other appeals incompetent until and unless leave was first sought and obtained; that no leave was sought to lodge the instant appeal; and that section 76(1) bars appeals from procedural orders and directions.



7. On their part, learned counsel for the 2nd respondent (the Ethics and Anti-Corruption Commission), M/s. Songole Brilliant, filed written submissions dated 2nd March 2023 citing section 1A(3) of the Act and submitting that the appellant appears not to be interested in having the suit proceed to hearing and determination as enjoined in section 1A(3) of the Act, which requires a party to assist the court to further the overriding objectives of the Act, to participate in the processes of the court, and to comply with the directions and orders of the court.
8. Three closely-linked issues were raised for our determination, namely: whether an appeal lies to this Court from procedural directions of the trial court; whether this Court has power to interfere with procedural directions and orders of the court below; and whether the orders and directions complained of were purely procedural and, if not, whether the appeal against them is merited.
9. It is common ground that what the appellant challenges in the instant appeal are orders couched in the form of directions and procedural orders that encroached on the merits of, and purported to determine, substantive Motions and preliminary objections, namely:
 - i. the 1st respondent's Notice of Motion dated 26th February 2020 seeking leave to file a further amended defence and counterclaim;
 - ii. the appellant's preliminary objection dated 17th March 2020 challenging the 1st respondent's Motion aforesaid;
 - iii. the 2nd respondent's Notice of Motion dated 6th March 2020 seeking leave for joinder as an Interested Party as well as consolidation of the appellant's suit in Kwale ELC Case No. 7 of 2021 with its suit in Kwale ELC Case No. 6 of 2021;
 - iv. the appellant's preliminary objection to the 2nd respondent's Motion aforesaid;
 - v. the appellant's Notice of Motion dated 3rd February 2021 seeking removal of a caution registered by the 2nd respondent on the suit property;
 - vi. the appellant's preliminary objection dated 5th July 2021 challenging the 2nd respondent's suit essentially on the ground that the 2nd respondent lacked locus standi to bring the suit; and
 - vii. the appellant's Notice of Motion dated 14th October 2021 seeking transfer of the consolidated suit back to the ELC in Mombasa.
10. Except for the appellant's Motion dated 14th October 2021 seeking transfer of the consolidated suit back to the ELC in Mombasa and whose determination was entirely within the learned Judge's discretion, the remaining Motions and preliminary objections called for determination on merit. However, the learned Judge determined them summarily without hearing the parties as if they were purely procedural in nature, hence the instant appeal grounded on the alleged denial of the appellant's right to fair administrative action and the right to be heard.
11. To our mind, the first six Motions and preliminary objections had a bearing on the merits of the two suits and ought to have been heard and determined failing which an appeal lay against the directions and orders aforesaid in the same manner as would a decree of the trial court as defined in section 2 of the Act, and as contemplated in section 66 of the Act, which reads:

66. Appeal from decree of High Court



Except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.

12. A decree is defined in section 2 of the Act thus:

“decree” means the formal expression of an adjudication which, so far 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 and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- a. any adjudication from which an appeal lies as an appeal from an order; or
- b. any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

13. On the other hand, an order is defined as “... the formal expression of any decision of a court which is not a decree, and includes a rule nisi”.

14. We hasten to observe that procedural directions and instructions are distinct from decrees and orders, which touch on the merits of the case. Court directions may be defined as written formal instructions or discretionary orders given to guide the case and set specific tasks or deadlines for the parties. Such directions ensure that cases are managed efficiently and progress towards trial and final determination. They often outline such steps as timelines for filing and serving documents, identifying key issues, and adhering to deadlines. Put differently, a procedural direction or an interlocutory (interim) order is distinct from a final decree by which a court pronounces itself on the rights of the parties.

15. Section 75 (1) of the *Civil Procedure Act* enumerates particular orders from which an appeal lies as of right, and includes orders made under the Civil Procedure Rules from which an appeal is expressly allowed with leave of the court making such order or of the court to which an appeal would lie if leave were granted. The section reads:

75. Orders from which appeal lies

1. An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court—
 - a. ...;
 - (h) any order made under rules from which an appeal is expressly allowed by rules.

16. Order 43 rule 1 of the Civil Procedure Rules provides the particular orders under the Rules from which an appeal lies as of right, but which we need not recite here, save to observe that the contested “directions and orders” were given in determination of issues raised in Motions and preliminary objections without according the parties an opportunity to be heard thereon, which prompted the instant appeal.

17. The pertinent question before us is whether the directions complained of in the instant appeal were purely procedural or discretionary directions issued for case management purposes from which no



right of appeal lies. It is noteworthy that the learned Judge described the purpose of the directions as intended “to guide on how to move the matter expeditiously but efficiently to determination on merit” in view of the overriding objectives of the *Civil Procedure Act*. However, the directions disposed of four applications (two of which were substantive) and three preliminary objections on points of law in respect of which the parties ought to have been heard. To our mind, the learned Judge having summarily determined the applications and preliminary objections on their merits, the impugned directions cannot properly be regarded as purely procedural or discretionary. To the contrary, they amounted to substantive orders.

18. First is the 1st respondent’s Notice of Motion dated 26th February 2020 seeking leave to file a Further Amended Defence and Counterclaim as well as stay of proceedings pending hearing and determination of the Motion, which was opposed vide the appellant’s preliminary objection dated 17th March 2020. In the impugned “directions and orders”, the learned Judge allowed the application and dismissed the appellant’s preliminary objection without according the parties an opportunity to submit thereon. This particular direction/order was issued under Order 8 rule 3 (amendment of pleading with leave), an order appealable as of right under Order 43 of the Civil Procedure Rules.
19. Likewise, the learned Judge summarily determined the 2nd respondent’s Notice of Motion dated 6th March 2020 in which it sought to be joined as an interested party in the proceedings as well as consolidation of the appellant’s suit with its own suit in Kwale ELC Case No. 6 of 2021 (formerly Mombasa ELC Case No. 88 of 2019). The 2nd respondent’s Motion was also opposed vide the appellant’s preliminary objection dated 16th March 2020. In her decision, the learned Judge observed that the court had already consolidated the two matters in earlier proceedings on 20th September 2021 and allowed the application by directing that the 2nd respondent be joined as the 6th defendant in the matter despite the appellant’s objection to such joinder. This direction/order was founded on Order 1 (parties), an order appealable as of right under Order 43.
20. Thirdly, the learned Judge considered the appellant’s Notice of Motion dated 3rd February 2021 seeking orders directing removal of the caution registered by the 2nd respondent on the suit property on the grounds that the 2nd respondent had no capacity to sue, as well as orders to join the Chief Land Registrar as an interested party in the proceedings. It is noteworthy that the appellant had filed submissions dated 19th May 2021 in support of the application, followed by a preliminary objection dated 5th July 2021 objecting to the 2nd respondent’s suit primarily on the ground that it lacked locus standi to sue. In her decision, the learned Judge observed that the Chief Land Registrar was already a party in Kwale ELC Case No. 6 of 2021; affirmed the 2nd respondent’s capacity to sue; and dismissed the appellant’s Motion. This direction/order was issued under Order 1 (parties), an order appealable as of right under Order 43.
21. Finally, the learned Judge considered the appellant’s Notice of Motion dated 14th October 2021 in which it sought transfer of the consolidated suits back to Mombasa for trial and final determination. Likewise, the learned Judge dismissed the appellant’s Motion summarily. Her direction/order was issued under Order 47 rule 6 (place of trial), an order from which no appeal lies as of right under Order 43.
22. In view of the foregoing, it follows that the appellant has a right of appeal against the directions/orders issued in relation to the Notice of Motion dated 26th February 2020; the Notice of Motion dated 6th March 2020; the Notice of Motion dated 3rd February 2021; and to the related preliminary objections. On the other hand, this Court cannot entertain the appeal against the directions/orders relating to the Notice of Motion dated 14th October 2021 in view of the fact that the appellant failed to obtain the ELC’s leave to appeal against the directions/orders issued in that regard.



23. The appellant primarily argues that the learned Judge converted the directions to a hearing and ultimately determined issues without affording the parties an opportunity to be heard; hastily made personal decisions to the detriment of the appellant; and applied the wrong principles in arriving at her determinations.

24. When the suits came up for directions on all of the interlocutory proceedings, the learned Judge noted the appellant's concerns in her Directions in the following words:

“On 21st October 2021 this court informed the Parties present of its thoughts on how the interlocutory matters would be dealt with to enable substantive hearing of the main suits. This was off the record... Counsel present that is Mr. Njoroge Mwangi Advocate for the Defendant and Mr. Makori of the EACC largely agreed with the Courts proposal and gave additional input especially on how the EACC would be treated as party including its documentation. Ms. Meena Patel did not appear to agree fully with the proposals stating that she was not being treated fairly as most of applications by the other parties were being proposed to be dispensed with summarily without her being heard on the objections she had filed on behalf of Gallerius Investment Ltd, the Plaintiff.”

25. From the record as put to us, it appears that, when the interlocutory matters came up for directions, learned counsel for the appellant was not accorded the opportunity to make oral submissions in support of the appellant's preliminary objections to the 1st and 2nd respondents' applications dated 26th February 2020 and 6th March 2020 respectively. Neither did counsel file any written submissions to canvass those objections. To our mind, the trial court ought to have accorded the appellant an opportunity to ventilate its position before proceeding to issue directions/orders that effectively disposed of the applications and preliminary objections on their merits, a decision that was adverse to the appellant's case in respect of which it had a right to be heard before the trial court's pronouncement either way.

26. The fundamental right to be heard was enunciated by this Court in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] KECA 282 (KLR) where it held that:

“[22] The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

27. In the same vein, this Court in *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] KECA 470 (KLR) held that:

“The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. (See *Onyango Oloo v. Attorney General* [1986- 1989] EA 456). The Supreme Court of India forcefully underlined the importance of the right to be heard as follows in *Sangram Singh v. Election Tribunal, Kotah*, AIR 1955 SC 664, at 711: ‘[T]here must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their



lives and property should not continue in their absence and that they should not be precluded from participating in them.”

28. On the other hand, the appellant filed written submissions dated 19th May 2021 by which it canvassed its Notice of Motion dated 3rd February 2021 as well as its closely related preliminary objection challenging the 2nd respondent’s capacity to sue. The appellant’s director began by stating that:

“7. ... I seek leave of the court to allow me to be heard by way of written submissions to my application dated 3.2.2021 as hereunder:-
....”

29. Taking to mind the submissions aforesaid, the learned Judge cannot be faulted for issuing directions disposing of the appellant’s Motion dated 3rd February 2021 and the related preliminary objection on their merits. From the appellant’s pleadings and submissions, it was clear that its position was that the 2nd respondent had no capacity to sue; that it was usurping the role of the Attorney General; and that the 2nd respondent could not register a caution on the suit property without first removing the caution lodged by the appellant’s directors in 2014. In the impugned Directions, the learned Judge made the following observations that informed her directions/orders on this matter:

“EACC’s capacity to commence such suit is also being challenged by the Plaintiff. I have no doubt on capacity of the EACC. This is drawn from its Constitutive statute. This application is opposed by EACC. It is noted that the caution was pursuant to a court order issued on 18/2/20. The order is still in force and has not been vacated. The caution only seeks to preserve the suit property. I also note interim orders were granted to Ms. Gallerius pending the hearing of this suit, though it has been over 12 months since the orders were given (see Order 40 Rule 6). I do not see what prejudice the caution will cause to the Plaintiffs pending the hearing and determination of this case. The court should invoke its inherent powers to summarily deal and dismiss the application.”

30. The 2nd respondent’s mandate to institute court proceedings for the recovery of public property is provided under section 11(1) (j) of the *Ethics and Anti-Corruption Commission Act*, 2011. The caution lodged by the 2nd respondent was pursuant to a court order served solely to preserve the suit property, and did not prejudice the appellant. Accordingly, the learned Judge correctly issued directions/orders dismissing the appellant’s application.

31. We need to draw a clear distinction between purely procedural directions and orders that encroach on the rights of the parties or on points of law raised by way of preliminary objections. While sections 66 and 76(1) of the Act exclude directions and orders given in the course of case management in preparation for hearing and final determination of a case, and which do not of themselves affect the decision (or merits) thereof, to our mind, not all procedural directions complained of in the instant appeal were entirely discretionary so as to warrant exclusion from the right of appeal with or without leave of the trial court.

32. We form this view cognisant of the fact that appeals from minor procedural instructions would invariably undermine the principle of expeditious administration of justice as enshrined in Article 159(2) (b) of *the Constitution*. In principle, there is no right of appeal against a procedural direction or interlocutory order that does not conclusively determine the rights of the parties. The rationale is to prevent delays and interruptions in ongoing court proceedings. It is for this reason that courts are clothed with discretionary powers to give such directions as are suitably designed to guarantee



expeditious determination of competing claims, powers that may not, and should not, be eroded by permissive approach to appeals.

33. It is not lost on us that one of the latitudes given to judges and judicial officers in the course of their work is judicial discretion. Black’s Law Dictionary, 10th Edition defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

34. Madan, JA. (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A had this to say on the matter:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

35. The immutable principle laid down by this Court in the words of Sir Charles Newbold, P. in *Mbogo and Another v Shah* [1968] EA 93 at p.96 blazed the trail from which we must not stray. In its wisdom, the Court held:

“... a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice”

36. On the authority of the afore-cited judicial decisions of this Court, we form the respectful view that the learned Judge misdirected herself and sacrificed the appellant’s right to prosecute and be heard on its Motions dated 26th February 2020 and 6th March 2020 on the altar of expedition, as well as on its respective preliminary objections dated 17th March 2020 and 16th March 2020, presumably in obedience to the oxygen principle enshrined in Article 159(2) (d) of *the Constitution*.

37. Having carefully considered the record of appeal, the grounds on which it is anchored, the impugned directions, the rival submissions, the cited authorities and the law, we come to the inescapable conclusion that the appeal partly succeeds. Consequently, we hereby order and direct that:

- a. the directions and orders dismissing the appellant’s Notices of Motion dated 26th February 2020 and 6th March 2020, as well as the preliminary objections thereto dated 17th March 2020 and 16th March 2020 respectively, are hereby set aside;
- b. the interlocutory applications and preliminary objections specified in (a) above be remitted to the ELC at Kwale for hearing and determination on their merits;
- c. the directions and orders dismissing the appellant’s Notice of Motion dated 3rd February 2021 and the related preliminary objection dated 5th July 2021 are hereby upheld;



- d. the directions and orders dismissing the appellant’s Notice of Motion dated 14th October 2021 are hereby upheld; and
- e. that the parties do bear their costs of the appeal.

It is so ordered.

CONCLUSIONS

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF APRIL 2026.

F. TUIYOTT

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

