

**IN THE COURT OF APPEAL
AT MOMBASA**

(CORAM: GATEMBU, LAIBUTA & NGENYE,

JJ.A.) CIVIL APPEAL NO. E036 OF 2023

BETWEEN

JULIUS CHILUMO LULU.....APPELLANT

AND

FLORENCE NICOLE NJENGA.....1ST RESPONDENT

**KENNETH MUSEMBI 2ND
RESPONDENT**

*(Being an appeal from the Directions of the High Court (S. M.
Githinji, J.) delivered on 20th July*

2023 in

Malindi HCCA No. 89 of 2022)

JUDGMENT OF THE COURT

1. The dispute between ***the appellant, Julius Chilumo Lulu*** and ***the respondents, Florence Nicole Njenga and Kenneth Musembi,*** arises from succession proceedings filed by the respondents before the Chief Magistrate's Court in Malindi, being ***Succession Cause No. E001 of 2022.*** The proceedings related to the estate of Christine Mutio Musembi (***the deceased***).
2. The appellant was issued with a grant of letters of administration of the deceased's estate on 4th March 2022, which grant was subsequently confirmed on 22nd March 2022. In the confirmed grant, the estate of the deceased

was

indicated as comprising Plot No. C.R.58002/1 measuring approximately 0.8032 HA and Plot No. 550 Vipingo Settlement Scheme measuring approximately 50 by 100 Feet. The beneficiaries were listed as: Julius Chilumo Lulu (the appellant), Kelvin Munga and Lucky Chilumo Julius, and the appellant was to hold the estate in trust for himself and for the other beneficiaries.

3. The respondents later filed an application dated 20th June 2022 seeking orders to revoke and/or annul the grant. The application was heard and, by a ruling delivered on 11th October 2022, the learned Magistrate (**Hon. Ongondo - SRM**) dismissed it.
4. Aggrieved, the respondents mounted an appeal in the High Court at Malindi, being Civil Appeal No. 89 of 2022 and, contemporaneously, filed a Notice of Motion application dated 24th October 2022 seeking: to stay the orders issued in the Magistrate's Court on 11th October 2022; and a conservatory order to preserve the deceased's estate comprised of **Plot No. 1362/IV/14 N Kikambala** and **Plot No. 550 Vipingo**.
5. The respondents filed a further application dated 14th June 2023 seeking: that one Ismael Mahat be joined as a party to the proceedings; and for interim orders of temporary injunction to restrain the appellant from interfering with the suit property. On 15th June 2023, the learned Judge (**Githinji, J.**) issued an *ex-parte* injunction order "*restraining the appellant, the third party and all other persons acting under him, his servants or agents from in*

any way dealing,

interfering and/or doing anything in all that plot known as 1362/IV/MN Title No. CR. 58002 pending further orders of this Court” and also directed that the application be served upon the respondent and the intended 3rd party; and that the matter be mentioned on 20th September 2023.

6. The appellant then moved the High Court by an application dated 26th June 2023 seeking, *inter alia*, to set aside the *ex- parte* orders of 15th June 2023.
7. Upon considering the appellant’s application dated 26th June 2023, the learned Judge directed that the application be served upon the respondents, and that there be a mention for directions on 20th July 2023. We note that the Order on this application was made on 27th June 2023 and can be found at page 146 of the record of appeal. However, the body of the Order indicates that it was issued on an application dated 20th July 2023, which cannot be correct as the Judge sat in Chambers on 27th June 2023 and the order sealed by the Deputy Registrar on even date. Hence, we conclude that it was an inadvertent typographical error to state that the application that was under consideration was dated 20th July 2023.
8. Fast forward, on 20th July 2023, the court proceedings indicate that the application was listed for hearing instead of a mention. When the matter was called out, the Judge stated that he would proceed later. The matter was later called out and the Judge directed the parties to file

submissions and reserved delivery of the ruling on 18th September 2023.

9. Aggrieved by those directions, the appellant filed this appeal. By a Memorandum of Appeal dated 13th September 2023, the appellant raised ten (10) grounds of appeal. We observe that to a large extent, those grounds do not directly attack and/or fault the Directions issued on 27th June 2023. Nonetheless, we have condensed them into the following 6 grounds that:

- a) the learned Judge erred by giving ex -parte injunctive orders running from 15th June 2023 to 20th September 2023 in respect of the respondents' application dated 14th June 2023 which violates the Civil Procedure Rules;**
- b) the learned Judge erred in law and in fact by failing to consider that the respondents had earlier filed a similar application dated 8th June 2023 seeking the same orders with the one dated 14th June 2023, which application is still pending for hearing;**
- c) the learned Judge erred in failing to consider the application dated 26th June 2023 filed under Certificate of Urgency but proceeded to give a far date of 18th September 2023;**
- d) the learned Judge erred in law and in fact in failing to consider that Plot No. 1362/V/MN Title No. CR 58002 had already changed hands;**
- e) the learned Judge erred in law and in fact in failing to consider the respondents' application dated 14th June 2023 was res judicata; and**
- f) that the learned Judge showed bias against the appellant when dealing with the**

appellant's application dated 26th June 2023.

10. The appellant prays: that the appeal be allowed; that the application filed by the respondents dated 14th June 2023 be dismissed for being *res judicata*: and that costs be awarded to him.
11. We heard this appeal on 8th October 2025. Learned counsel **Ms. Omollo** appeared for the appellant while learned counsel **Mr. Murigu** appeared for the respondents. Both counsel relied on the respective parties' written submissions. Those of the appellant are dated 15th October 2024 while those of the respondents are dated 22nd October 2024.
12. According to the appellant, upon filing the application dated 14th June 2023, the respondents were issued with interim *ex parte* orders on 15th June 2023 which orders were to last until 20th September 2023 when the matter was scheduled for further orders and/or directions; that the orders were unlawful as they contravened **Order 40 rule 4(2)** of the **Civil Procedure Rules**, which provides that *ex-parte* interim order can only last for 14 days, and that they can only be extended once, except with the consent of parties; that it was for this reason that the appellant filed the application dated 20th June 2023, which was scheduled for *inter partes* hearing on 20th July 2023; and that the learned Judge declined to hear the parties and, instead, issued directions that they appear in court on 18th September 2023 to confirm the filing of submissions.
13. The appellant further submitted that the respondents'

application dated 14th June 2023 was *res judicata* on
the

ground that they had earlier filed a similar application dated 8th June 2023; and that, on several occasions, he (the appellant) has been denied justice and the appeal is merited.

14. On the part of the respondents, it was submitted that, although the appellant complains that an *ex parte* interim order was issued on their application dated 15th June 2023, he (the appellant) did not file a response to it, and that, therefore, the application stood unopposed; that this renders the grounds of appeal challenging the interim orders untenable; that to challenge the application at this stage is an abuse of the court process; that it would have been prudent for the appellant to respond to the application dated 15th June 2023 instead of filing an application seeking to set aside the orders issued thereon; that the interim order that was issued was merited because the respondents realised that the appellant had started wasting the deceased's estate; and that their failure to oppose the application was hinged on the fact that the appellant had already disposed of part of the deceased's estate, namely Plot No. 1362/IV/MN.
15. The respondents submitted that their application dated 14th June 2023 was not *res judicata* the application dated 8th June 2023 because the latter application was never heard and no ruling in its respect was delivered. In this regard, reliance was placed on **Section 7** of the **Civil Procedure Act** as well as the decision of **Abok James Odera T/A A. J. Odera & Associates vs. John Patrick Machira T/A Machira & Co.**

Advocates [2001] KECA 21 (KLR) on what constitutes the doctrine of *res judicata*.

16. Finally, on the contention that the learned Judge was biased against the appellant, the respondents denied any bias on the part of the Judge, submitting that that complaint was resolved by the ruling dated 5th March 2024, even though we have not seen such ruling in the record as put to us.
17. We have accordingly considered the record of appeal and the respective parties' submissions. The only issue that falls for determination is whether the learned Judge (Githinji, J.) erred in not hearing the parties *inter partes* on the appellant's application dated 26th June 2023 when it was scheduled for further orders.
18. Indeed, what the appellant is complaining about is the fact that the Judge did not hear the parties on 20th July 2023 when the appellant's application dated 26th June 2023 was scheduled for further orders but instead directed that the application be canvassed and disposed of by way of written submissions. The Judge also directed that the ruling on the application would be delivered on 18th September 2023.
19. **Order 43 Rule 1** of the **Civil Procedure Rules** provides for the instances when an appeal lies as a matter of right under **Section 75 (1) (h)** of the **Civil Procedure Act, Cap 21** as follows:
 - (a) **Order 1 (parties to suits);**

(b) Order 2 (pleadings generally);

- (c) Order 3 (frame and institution of suit);**
- (d) Order 4, rule 9 (return of plaint);**
- (e) Order 7, rule 12 (exclusion of counterclaim);**
- (f) Order 8 (amendment of pleadings);**
- (g) Order 10, rule 11 (setting aside judgment in default of appearance);**
- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);**
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);**
- (j) Order 19 (affidavits);**
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);**
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);**
- (m) Order 24, rules 5, 6 and 7 (legal representatives);**
- (n) Order 25, rule 5 (compromise of a suit);**
- (o) Order 26, rules 1 and 5(2) (security for costs);**
- (p) Order 27, rules 3 and 10 (payment into court and tender);**
- (q) Order 28, rule 4 (orders in proceedings against the Government);**
- (r) Order 34 (interpleader);**

- (s) Order 36, rules 5, 7 and 10 (summary procedure);**
- (t) Order 39, rules 2, 4 and 6 (furnishing security);**
- (u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);**
- (v) Order 41, rules 1 and 4 (receivers);**
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);**
- (x) Order 45, rule 3 (application for review);**
- (y) Order 50, rule 6 (enlargement of time);**
- (z) Order 52, rules 4, 5, 6 and 7 (advocates); (aa) Order 53 (judicial review orders).**

20. From the above provision, there is nothing to suggest that administrative directions issued by courts on the hearing of applications or of the main suit are appealable as a matter of right. This Court in **Peter Nyaga Muvake vs. Joseph Mutunga (2015) KECA 475 (KLR)** held that:

“...Appeals from other orders lie only with the leave of the court...”

21. In the same vein, in **Nyutu Agroviet Limited vs. Airtel Networks Limited (2015) KECA 1012 (KLR)**, this Court held that a right of appeal lies where the law specifically provides for such a right and, where no such right lies, a party must seek or obtain leave of the court. Therefore, the right to appeal is conferred by statute and cannot be

inferred.

22. The impugned High Court proceedings indicate what transpired as follows:

“20/7/2023

Before Hon. Justice S.M.

Githinji Mathew: C/A

Miss Omollo for the Respondent: The application is dated 20/7/2023 (should read 20/6/2023). ***In it, we are the applicant.***

Mr. Murigu is for the Respondent.

Miss Omollo: We have received a Replying Affidavit and Grounds of Opposition. I am willing to argue the application orally. I am ready to proceed.

Mr. Murigu: I am also ready to proceed.

Court: We shall hear the matter after mentioning others.”

23. It would appear that the court file was then placed aside to allow the mentioning of other matters after which it was called out when the learned Judge stated:

“Court: I am now exhausted. I am not in a position to take submissions. Parties should file submissions. Applicant within 14 days and serve. Respondent within 14 days upon service. Ruling on 18/9/2022.”

24. Administrative orders or Directions given by courts are intended to manage how matters should proceed, more so for purposes of easing case management pursuant to **Order 11** of the **Civil Procedure Rules**. They are also intended to overlook the formalistic way of managing the procedure by which a hearing should be undertaken, and thereby accord

with **Article 159** of the **Constitution** by administering justice without undue regard to procedural technicalities. Such directions may, *inter alia*, include, giving timelines within which certain things should be undertaken, for instance, filing of submissions and direct whether to proceed on hearing by way of *viva voce* evidence or by affidavits. Suffice it to state that Directions are issued at the court's discretion based on what is before the court, and at the expedience of parties and the court. The ultimate objective of such Directions is to fast-track and expedite the dispensation of justice.

25. As a general principle in civil procedure, court Directions or case management directions are purely administrative — that is to that directions that merely regulate the conduct or timetable of proceedings without determining any substantive right of the parties — and are ordinarily not subject to appeal. The rationale is that such directions do not finally or materially dispose of any right, and allowing appeals against them would cause unnecessary delay and abuse of the appellate process.
26. In the landmark English Court of Appeal decision in **Gilbert vs. Endean (1878) 9 Ch D 259**, **Jessel MR and Cotton LJ**. drew a critical distinction between: administrative/procedural directions — which they said merely govern the mechanics of how a case is to proceed, for example, issuing of timelines, filing directions and directing the conduct of trial; and Orders determining rights — which materially affect the legal position of the parties. The Court

held that a mere administrative direction given in chambers for the conduct of proceedings does not constitute an "order" within the meaning of the rules conferring a right of appeal. Only an order that determines or materially affects the rights of a party is susceptible to appeal. This case laid the foundation for distinguishing appealable orders from non-appealable administrative directions across common law jurisdictions.

27. Further, in ***re Coles and Ravenshear [1907] 1 KB 1***, the Court of Appeal reinforced the principle that procedural and administrative directions issued in the course of managing litigation do not give rise to a right of appeal. The Court emphasized that the rules of civil procedure are designed to facilitate justice and should not be used as instruments to stall proceedings through interlocutory appeals against directions of a purely administrative character. The Court reasoned that the threshold for appellate intervention is met only when the direction or order conclusively determines a question affecting the substantive rights of the parties, not merely when it governs the procedural pathway of the case.

28. In the instant case, it is instructive that the Directions as issued were not dispositive of the appellant's application dated 15th June 2023. In other words, the Directions were not tantamount to a substantive ruling capable of being appealed against. All that the learned Judge did was to give directions regarding the manner of disposal of the matter. None of the parties was locked out and/or driven from the seat of justice. The application was not

determined, and parties were given

the opportunity to file written submissions. The parties were fortunate, and the Judge was magnanimous, to have a ruling date slated for 18th September 2023 during the court recess.

29. It is unfortunate that parties have expended considerable time on this appeal while the appeal before the High Court is still pending. Compliance by the appellant with the Directions given by the Judge, would no doubt have expedited the disposal of the matter.

30. In conclusion, we find no merit in the appeal and the same is hereby dismissed with costs to the respondents.

Dated and delivered at Mombasa this 24th day of April, 2026.

S. GATEMBU KAIRU, Carb, FCI Arb

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA, Carb, FCI Arb

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is the true copy of the original

signed
DEPUTY REGISTRAR