

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCA NO. E276 OF 2025

EMBAKASI RANCHING CO. LTD

APPELLANT

(Through the directors listed on the CR12)

VERSUS

ROBERT GACHUHI NDUATI 1ST

RESPONDENT

PAULINE MBENEKA MUTUA 2ND

RESPONDENT

EMBAKASI COMPANY LIMITED

INTERESTED PARTY

(Pursuant to the order made on 30th July 2019 by Hon.

Lady Justice Grace Nzioka in Milimani High Court Civil

Case No. E096 of 2019:

Embakasi Ranching Co. Ltd vs Registrar of Companies

and 14 Others)

RULING

Introduction

1. Before this Court for determination is the Appellant's Notice of Motion dated **18th December 2025**, brought under **Articles 48 and 50 of the Constitution, Sections 1A, 1B, 3A and 79G of the Civil Procedure Act (Cap. 21), Order 42 Rule 6 of the Civil Procedure Rules 2010**, and all other enabling provisions of the law.
2. The Appellant seeks the following orders: (a) leave to file and prosecute the appeal out of time, the delay being attributed to the temporary indisposition of counsel; (b) stay of proceedings in **Milimani MCELC/E312/2025, MCELC/E453/2025 and MCELC/E385/2025** pending the hearing and determination of this application; and (c) stay of the said proceedings pending the hearing and determination of the intended appeal.
3. The appeal arises from the ruling of **Hon. Magistrate P. Achieng** delivered on **30th October 2025 in MCELC/E312/2025** (and an earlier ruling in **MCELC/E453/2025**), whereby the learned Magistrate struck out the firm of **Belinda Otieno & Co. Advocates** from the record on the ground that the directors named on the CR12 have no mandate to instruct counsel for the

Company. This ruling was premised on the interlocutory orders of **Hon. Lady Justice Grace Nzioka dated 30th July 2019 in HCC E096 of 2019.**

The parties' positions

4. **The Appellant**, through the supporting affidavit of **Achieng Otieno** sworn on **18th December 2025**, avers that it duly instructed the firm of Belinda Otieno & Co. Advocates to represent it upon being served with pleadings in MCELC/E312/2025. The Appellant contends that the learned Magistrate erred in law by relying on interlocutory orders issued in an entirely separate cause HCC E096 of 2019 to strike out counsel in unrelated proceedings, thereby violating the Company's constitutional right to counsel of its choice under Article 50 of the Constitution. The Appellant attributes the three-day delay in filing the appeal to the temporary indisposition of counsel.

5. **The 1st Respondent, Robert Gachuhi Nduati**, through his replying affidavit sworn on **16th February 2026**, supports the application. He deposes that he is a shareholder of the Company and administrator of the

Estate of Lawrence Nduati (deceased). He argues that the learned Magistrate fell into error by extending the scope of the High Court interim orders which were preservative and specifically limited to HCC E096 of 2019 to unrelated proceedings, and that the CR12 directors retain lawful authority to appoint counsel.

6. **The 2nd Respondent, Pauline Mbeneka Mutua**, opposes the application through her replying affidavit sworn on **12th January 2026**. She deposes that she is a party solely in MCELC/E312/2025 and has no legal interest whatsoever in MCELC/E453/2025 or MCELC/E385/2025. She contends that the application improperly bundles three distinct suits involving different parties and distinct factual matrices, and seeks blanket stay orders that would affect proceedings in which she is a non-party. She further argues that no adverse orders can lawfully issue against a non-party, that the application is fatally defective and amounts to an abuse of court process. She annexes the High Court orders of Lady Justice Nzioka dated 30th July 2019 (marked *PMM1*) and the Magistrate's ruling of 30th October 2025 (marked *PMM2*), maintaining that the ruling

was properly made after full consideration of subsisting High Court orders. She further argues that stay is a drastic remedy, that the Applicant has shown no irreparable prejudice, and that she would suffer substantial prejudice including delay in the determination of her suit and escalation of costs in violation of her rights under Articles 48 and 50(1) of the Constitution. She prays for dismissal of the application with costs.

7. **The Interested Party** opposes the application through the replying affidavit of **Walter Kigera Waireri** sworn on **14th April 2026**. He deposes that he is a director of the Company pursuant to the orders of Lady Justice Nzioka. He avers that the appeal has been filed without proper fiduciary capacity or authority by parties who lack the legal right to bind the Company. He contends that the High Court orders of 30th July 2019 remain in force and that several suits filed by Belinda Otieno & Co. Advocates on behalf of the Company have been struck out on that basis. He submits that the appeal constitutes an abuse of the court process and raises the rule in *Foss v Harbottle*,

arguing that the entire appeal should be struck out in limine.

Written submissions

8. Pursuant to directions issued by this Court, the application was canvassed by way of written submissions. The Appellant filed written submissions dated **13th April 2026**. The 1st Respondent filed written submissions dated **24th April 2026**. The 2nd Respondent filed written submissions dated **13th April 2026**. The Interested Party filed written submissions dated **5th May 2026**.
9. The Appellant framed three issues: (i) whether sufficient cause had been established to warrant leave to appeal out of time; (ii) whether the legal threshold for grant of stay of proceedings pending appeal had been met; and (iii) whether the intended appeal is arguable. Relying on **Section 79G of the Civil Procedure Act, *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR, Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] eKLR and Belinda Murai & 9 Others v Amos Wainaina [1979] eKLR***, counsel submitted that the delay was minimal, occasioned by counsel's

indisposition, and did not occasion prejudice to the Respondents. On stay, it was argued that the appeal raises fundamental questions of jurisdiction, the right to legal representation, and the proper application of interlocutory orders, and that without stay the substratum of the appeal would be destroyed.

10. The 1st Respondent filed submissions in support of the application, raising identical issues and relying on **Section 79G of the Civil Procedure Act, Leo Sila Mutiso (supra), Nicholas Kiptoo Salat (supra) and Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR.** He emphasised that the delay was sufficiently explained, that the appeal raises serious questions on the right to legal representation, land ownership, trespass and procedural fairness, and that the impugned rulings deprived the Company of counsel of its choice.

11. The 2nd Respondent addressed four issues: (i) whether sufficient cause had been demonstrated for leave to appeal out of time; (ii) whether the legal threshold for stay had been met; (iii) whether the intended appeal

raises arguable and bona fide issues; and (iv) whether the CR12 directors had lawful authority to appoint the firm of Belinda Otieno & Co. Advocates. Relying on **Nicholas Kiptoo Arap Korir Salat (supra) and Attorney General v Law Society of Kenya & Another; SC Petition No. E007 of 2023 (2024) KESC**, counsel argued that the explanation for delay was vague, generalised, and unsupported by medical evidence; that stay is a drastic remedy to be granted sparingly; and that the appeal lacks merit as it seeks to circumvent binding High Court orders.

12. The Interested Party submitted that the appeal was filed without fiduciary capacity or proper instructions and constitutes an abuse of the court process. He contended that the representation question had been conclusively settled by the interlocutory orders of Hon. Lady Justice Nzioka of 30th July 2019, which remain in force. He further invoked the rule in *Foss v Harbottle*, arguing that unauthorized directors of a company may not bring a derivative action on its behalf, and prayed that the

application be dismissed with costs and the appeal struck out in limine.

Issues for determination

13. Having considered the application, the rival affidavits, and the written submissions filed by all parties, this Court has identified the following three issues for determination:

(i) Whether the threshold objection under the rule in Foss v Harbottle is a jurisdictional matter requiring determination at this interlocutory stage.

(ii) Whether the Appellant has demonstrated sufficient cause to warrant leave to appeal out of time.

(iii) Whether the Appellant has satisfied the legal threshold for grant of stay of proceedings pending the hearing and determination of the appeal, and whether an omnibus stay covering three separate suits is warranted.

Analysis and determination

Issue (i): The Foss v Harbottle Objection, Jurisdictional or Merits Question?

14. Both the 2nd Respondent and the Interested Party raise a threshold objection grounded in the rule in **Foss v Harbottle (1843) 2 Hare 461**, contending that the CR12 directors lack the fiduciary capacity to bring or prosecute this appeal on behalf of the Company in light of the extant High Court orders of 30th July 2019.

15. The Court has carefully considered whether this objection goes to jurisdiction in which case it must be resolved at this stage or to the merits of the intended appeal, in which case it may be deferred. The distinction is significant: a court that lacks jurisdiction over a matter cannot proceed at all and any orders issued without jurisdiction are a nullity (see **Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**).

16. The rule in **Foss v Harbottle** is a principle of company law that generally bars a minority shareholder or an unauthorized agent from bringing an action in the name of a company. It is fundamentally a rule about *locus standi* and corporate capacity, not about the subject-

matter jurisdiction of the Court. The Environment and Land Court has jurisdiction under Section 13 of the Environment and Land Court Act to hear and determine land disputes. That jurisdiction is not ousted by a question of who properly represents a corporate party before it.

17. The core question on appeal is whether the learned Magistrate lawfully extended the scope of the High Court's interlocutory orders in HCC E096 of 2019 which were limited and preservative to strike out counsel in unrelated proceedings. The authority of the CR12 directors to instruct counsel is *the very substratum* of that appeal. Determining the *Foss v Harbottle* objection at this interlocutory stage would require the Court to pre-emptively decide the merits of the appeal itself, which would be neither procedurally appropriate nor consistent with justice.

18. For these reasons, the Court finds that the *Foss v Harbottle* objection does not divest this Court of jurisdiction. It raises a live question of law that is inextricably bound to the substance of the intended appeal and is properly deferred for determination at the

main appeal hearing. The threshold objection is accordingly overruled at this stage without prejudice to the parties' rights to fully canvass it on appeal.

Issue (ii): Leave to Appeal Out of Time

19. **Section 79G of the Civil Procedure Act** provides that an appeal from a subordinate court to this Court shall be filed within thirty (30) days of the decision complained of. The Court may, however, admit an appeal out of time upon sufficient cause being shown. Extension of time is an equitable remedy and not a right; it must be exercised judiciously upon a proper basis being laid: ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR (Supreme Court)***. The Supreme Court further emphasised in ***Attorney General v Law Society of Kenya & Another; SC Petition No. E007 of 2023 [2024] KESC*** that procedural timelines are not merely ornamental but go to the root of orderly administration of justice.

20. The Court of Appeal in ***Leo Sila Mutiso v Rose Hellen Wangari Mwangi [1999] eKLR*** laid down the relevant considerations: (a) the length of the delay; (b) the

reason for the delay; (c) the chances of the appeal succeeding if leave is granted; and (d) the degree of prejudice that would be suffered by the respondent if leave is granted. These principles were echoed in ***Philip Keipto Chemwolo & Another v Augustine Kubende [1986] eKLR***, where the Court held that blunders of counsel should not necessarily shut out a litigant from the seat of justice. In *Belinda Murai & 9 Others v Amos Wainaina [1979] eKLR*, the Court similarly declined to penalise the litigant for counsel's shortcomings where the delay was short and no prejudice was demonstrated.

21. Applying these principles to the present matter: The impugned ruling was delivered on **30th October 2025**. The Notice of Motion seeking leave was filed on **18th December 2025**. The thirty-day period under Section 79G would have expired on approximately **29th November 2025**. The application was therefore filed approximately **nineteen (19) days** out of time, not three days as stated elsewhere in the papers. The Court notes this discrepancy and proceeds to assess the delay of nineteen days on its merits.

22. The Appellant attributes the delay to the temporary indisposition of counsel. The 2nd Respondent correctly points out that this explanation is general and unaccompanied by medical evidence or any corroborating affidavit. The Court takes this concern seriously. A bare averment of indisposition, without medical certification or particularisation of the period of incapacity, is ordinarily insufficient to constitute "sufficient cause" within the meaning of Section 79G: **Attorney General v Law Society of Kenya (supra)**.

23. However, the Court must weigh the quality of the explanation against all relevant factors holistically. In the present case: (a) the delay of nineteen days, while not trivial, is not inordinate or deliberate; (b) the intended appeal raises arguable points of law of considerable importance specifically, the jurisdictional limits of a subordinate court when extending the scope of interlocutory High Court orders, and the right to legal representation under Article 50; (c) no concrete prejudice to any Respondent has been demonstrated that cannot be remedied by a costs order; and (d) land rights and access

to justice under **Articles 48 and 50 of the Constitution** are implicated, making the case for substantive justice particularly compelling: see **Edith Gichugu Koine v Stephen Njagi Thoithi [2014] eKLR.**

24. Balancing these considerations, the Court finds that, notwithstanding the inadequacy of medical corroboration, sufficient cause has been shown to warrant the exercise of this Court's discretion in favour of the Appellant. The delay is not inordinate, the issues are arguable, no prejudice has been demonstrated, and the interests of justice favour a hearing on the merits. Leave to appeal out of time is accordingly granted. The Appellant is, however, directed to ensure that the memorandum of appeal and record of appeal are filed and served within twenty-one (21) days of this ruling.

Issue (iii): Stay of Proceedings, Scope and Justification

25. Stay of proceedings pending appeal is a discretionary, exceptional, and drastic remedy to be granted sparingly: *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR* (Supreme Court). The applicant must satisfy three limbs: (a) that the appeal is

arguable and not frivolous; (b) that the appeal would be rendered nugatory if stay is refused; and (c) that the balance of convenience favours the grant of stay.

26. Before applying these principles, the Court must first address a preliminary issue of competence: this Court's jurisdiction to grant an omnibus stay order covering three separate suits two of which are not the direct subject of the appeal.

(a) Jurisdictional Basis for the Stay

27. The appeal in ELCA E276 of 2025 arises directly from the ruling in MCELC/E312/2025, and arguably from the related ruling in MCELC/E453/2025. The jurisdiction to stay proceedings in the court below pending the determination of an appeal is specifically conferred by **Order 42 Rule 6(1) of the Civil Procedure Rules 2010**, which empowers the appellate court to stay execution or proceedings in the court below pending the appeal.

28. However, the stay sought in respect of **MCELC/E385/2025** is in a suit that is not the subject of the appeal and whose connection to the impugned ruling has not been

articulated before this Court. There is no evidence that MCELC/E385/2025 was a subject of any ruling appealed from. Granting a stay in a suit that is not before this Court as an appellate matter would amount to the exercise of an original injunctive jurisdiction a step that requires separate grounding in either Section 3A of the Civil Procedure Act (inherent jurisdiction) or Section 13 of the Environment and Land Court Act.

- 29.** The Court notes that the impugned representation ruling appears to apply identically across the three suits and that permitting MCELC/E385/2025 to proceed while the appeal is pending could result in multiplicity of conflicting decisions on the representation question an outcome that would itself prejudice the administration of justice. The Court therefore invokes its **inherent jurisdiction under Section 3A of the Civil Procedure Act** which empowers the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court as the basis for extending the stay to MCELC/E385/2025, while noting that this extension is strictly limited in duration to the pendency of this appeal.

(b) Application of the Munya Test

30. Turning to the three-limbed test in *Munya (supra)*:

Arguability: The intended appeal is clearly arguable. It raises bona fide questions on whether a subordinate court can extend interlocutory High Court orders which were preservatory and limited to a specific suit to strike out counsel in entirely unrelated proceedings, and whether such action violates Article 50 rights to legal representation and the provisions of the Companies Act, 2015 regarding corporate authority.

Nugatory appeal: If proceedings in the lower courts are allowed to continue and conclude on the basis of the impugned ruling which found that the CR12 directors have no authority to appoint counsel the appeal would be rendered entirely nugatory. Any orders in those proceedings would be made against the Company without representation, creating irreversible procedural prejudice that cannot be undone even if the appeal succeeds.

Balance of convenience: The balance of convenience favours a temporary stay. The 2nd Respondent's concern about delay in the determination of MCELC/E312/2025 is

legitimate. However, the Court notes that no irreversible prejudice has been demonstrated that cannot be adequately compensated by a costs order or addressed through an expedited hearing of the appeal. The Court is therefore directing that the appeal be heard and determined on a priority basis.

Non-party prejudice: Regarding the 2nd Respondent's objection that she is a non-party to MCELC/E453/2025 and MCELC/E385/2025, the Court notes this concern carefully. The stay granted is not an adverse order against the 2nd Respondent in those suits it preserves the status quo in all three proceedings solely to avoid conflicting determinations on the representation question. It does not determine any substantive rights of the 2nd Respondent and is strictly temporary pending the appeal.

Having regard to the foregoing, the Court is satisfied that the legal threshold for grant of stay of proceedings has been met in respect of all three suits. The stay shall apply on a temporary basis and the appeal shall be given priority listing.

Final orders

32. In the premises, the Appellant's Notice of Motion dated **18th December 2025** is hereby allowed in the following terms:

(i) The Appellant is granted leave to file and prosecute the appeal out of time.

(ii) The Appellant's Memorandum of Appeal dated 18th December 2025 and Record of Appeal dated 27th February 2026 are deemed as duly filed.

(iii) Proceedings in Milimani MCELC/E312/2025 and MCELC/E453/2025 are stayed pending the hearing and final determination of this appeal or until further orders of this Court.

(iv) Proceedings in Milimani MCELC/E385/2025 are stayed pending the hearing and final determination of this appeal or until further orders of this Court, pursuant to Section 3A of the Civil Procedure Act for the sole purpose of preventing multiplicity of conflicting decisions on the representation question.

(v) Each party shall bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 7TH DAY OF MAY 2026.

**E. K. WABWOTO
JUDGE**

In the presence of:

Ms. Achieng for the Appellant.

Ms. Kagiri for the 1st Respondent.

Ms. Kuria h/b for Ms. Khalayi the 2nd Respondent.

Ms. Irungu h/b for Ngata Kamau for the Interested Party.

Court Assistants: Mary Ngoira and David Ngoosa.