



Omware t/a Molo Garage v Njeri & 2 others (Suing as Administrators of the Estate of Pauline Wanjiku Ndung'u) (Environment and Land Appeal E035 of 2025) [2026] KEELC 2797 (KLR) (12 May 2026) (Ruling)

Neutral citation: [2026] KEELC 2797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E035 OF 2025
EK WABWOTO, J
MAY 12, 2026**

BETWEEN

MAURICE ODHIAMBO OMWARE T/A MOLO GARAGE APPELLANT

AND

SALOME NJERI 1ST RESPONDENT

BEATRICE MUTHONI 2ND RESPONDENT

ALPHONCE MUNGAI 3RD RESPONDENT

**SUING AS ADMINISTRATORS OF THE ESTATE OF PAULINE WANJIKU
NDUNG'U**

RULING

1. This Ruling is in respect of a Notice of Motion dated 2nd March 2026 brought on behalf of the 1st, 2nd and 3rd Respondents/Applicants (hereinafter collectively referred to as "the Applicants"), who sue as the duly appointed Administrators of the Estate of the late Pauline Wanjiku Ndung'u.
2. The Application seeks the following orders:
 - i. That the Memorandum of Appeal dated 22nd May 2024 and the Record of Appeal dated 4th February 2026 be struck out;
 - ii. A declaration that this Honourable Court lacks jurisdiction to entertain the Appeal;
 - iii. vacation of the stay of proceedings issued by Hon. J.G. Kemei on 22nd July 2025;
 - iv. costs of and incidental to the Application and the struck-out Appeal.



2. The Application is supported by the affidavit of Salome Njeri the 1st Applicant sworn on 3rd March 2026, and a Supplementary Affidavit of Salome Njeri sworn on 29th April 2026. It is opposed by way of a Replying Affidavit of Maurice Odhiambo Omware the Appellant sworn on 10th April 2026.
3. The Application was canvassed by way of written submissions. The Applicants filed their Written Submissions dated 29th April 2026, supported by a List of Authorities of even date. From the perusal of the CTS, the Appellant had not file any written submissions in opposition as at the time this court retired to write its ruling.

Background

4. The background to this matter is largely common ground and may be summarised as follows. The underlying suit, MCELC E050 of 2021, was filed at the Milimani Commercial Courts. On 23rd June 2023, the Applicants filed a chamber summons seeking reinstatement of the suit, which had been dismissed for want of prosecution. Hon. S.A. Opande (PM) heard and allowed that application by a Ruling delivered on 23rd April 2024, reinstating the suit under Order 12 Rule 7 of the Civil Procedure Rules, 2010.
5. Immediately upon delivery of the Ruling, the Appellant's counsel recognized that the order in question did not carry an automatic right of appeal under Order 43 Rule 1(1) of the Civil Procedure Rules, 2010. The Appellant accordingly sought leave to appeal from the trial court, and leave was granted for a period of 14 days within which to lodge an appeal. These proceedings appear at page 210 of the Record of Appeal, as compiled and filed by the Appellant's own advocates.
6. The 14-day leave expired on or about 7th May 2024. The Appellant did not lodge any Memorandum of Appeal within that period, nor did the Appellant file any application seeking an extension of the time so granted. The Memorandum of Appeal was eventually filed on 22nd May 2024 some 15 days after the expiry of the leave, and without any extension having been sought or obtained from either the trial court or this Court.
7. On 22nd July 2025, my sister Lady Justice J.G. Kemei issued an order staying proceedings in the underlying trial court matter, pending the hearing and determination of the Appeal herein. The Record of Appeal was then compiled and filed on 4th February 2026 more than 21 months after the Memorandum of Appeal and within the 360 day prosecution direction issued by the Court.

Issues for determination

8. Having considered the application, rival affidavits and written submissions filed by the Applicants, the following five issues arise for determination in this Application:
 - (a) Whether the Ruling of Hon. S.A. Opande (PM) dated 23rd April 2024, reinstating the suit, is one against which no automatic right of appeal lies under Order 43 Rule 1(1) of the Civil Procedure Rules, 2010, such that leave to appeal was a mandatory prerequisite;
 - (b) Whether the Memorandum of Appeal dated 22nd May 2024 was filed outside the 14-day leave granted on 23rd April 2024, and without any extension of time having been sought or obtained;
 - (c) Whether Section 79G of the *Civil Procedure Act* applies so as to displace the specific time limit imposed by the trial court in granting leave;



- (d) Whether the Appellant's failure to comply with the terms of the leave and to seek an extension renders the Memorandum of Appeal a nullity, thereby depriving this Court of jurisdiction to entertain the Appeal; and
- (e) Whether, consequent upon the striking out of the Appeal, the orders of stay of proceedings issued by Hon. J.G. Kemei on 22nd July 2025 ought to be vacated and discharged.

Analysis and determination

(i) The Nature of the Order of 23rd April 2024 and the Necessity of Leave

9. The Ruling of Hon. S.A. Opande (PM) dated 23rd April 2024 reinstated the underlying suit, which had been dismissed for want of prosecution under Order 12 Rule 7 of the Civil Procedure Rules, 2010. Order 43 Rule 1(1) of the Civil Procedure Rules, 2010 sets out a closed and exhaustive list of orders against which an appeal lies as of right. A ruling reinstating a suit dismissed for want of prosecution is not enumerated in that list.
10. Order 43 Rule 1(2) accordingly provides that an appeal shall lie from any other decision or order that is, any order not found in the closed list under sub-rule (1) only with the leave of the court making the order or decision. This is not a procedural formality; it is a substantive precondition to the valid exercise of appellate rights. The Appellant himself recognized and accepted this position on 23rd April 2024, when his counsel, immediately upon the delivery of the Ruling, applied for and was granted leave to appeal. The Appellant is therefore estopped from now contending that the Ruling carried an automatic right of appeal.
11. Order 43 Rule 1(3) further provides that where leave is granted, the appeal shall be filed within the time specified in the leave, or, if no time is specified, within 14 days of the grant of leave. In the present case, the trial court specified a period of 14 days. That specification was not a suggestion or an administrative note. It was the operative term of the leave, defining the outer limit within which the appellate right could validly be exercised.

(ii) The Appellant's factual challenge to the record

12. The Appellant raises a factual challenge to the proceedings at page 210 of the Record of Appeal. The Replying Affidavit of Maurice Odhiambo Omware asserts that the excerpt is "erroneous, misleading, and does not relate to the proceedings of this matter but appears to relate to a different suit altogether" and that the trial magistrate "did not accurately capture the proceedings of this matter, thereby resulting in a defective and inaccurate Court record."
13. This Court has carefully considered that assertion and finds it unavailing for the following reasons:-
14. First, the Record of Appeal including the excerpt at page 210 was compiled, settled and filed by the Appellant's own advocates, Nyagito & Associates Company Advocates, on the Appellant's behalf. This is expressly acknowledged at paragraph 13 of the Replying Affidavit. It is a fundamental principle that a party who files a document with the Court is bound by its contents. A party may not approbate and reprobate with respect to their own filed court document. The Appellant cannot benefit from a document when it is convenient and seek to disown it when it is not.
15. Second, the Appellant's assertion is entirely bare and unsubstantiated. No contemporaneous record or evidence from the trial court is produced to demonstrate what actually transpired on 23rd April 2024. An affidavit assertion is not evidence of the fact asserted, particularly where it contradicts the deponent's own filed court document. If indeed the proceedings were wrongly recorded, the Appellant



had and still has the appropriate remedy of applying to the trial court for correction of the record under the relevant provisions of the Civil Procedure Rules. No such application has been made.

16. Third, and significantly, the Appellant does not specifically, categorically and expressly deny that leave to appeal was sought and granted on 23rd April 2024. The Replying Affidavit challenges only the identity of the suit to which the excerpt relates, not the fact of the leave itself. This omission is instructive and speaks volumes.
17. Fourth, the Supplementary Affidavit of Salome Njeri sworn 29th April 2026 cogently identifies the irresolvable legal dilemma created by the Appellant's own position. Whether or not the excerpt at page 210 is accurate, the Appellant faces a fatal predicament under either scenario:

Scenario A, If the excerpt is accurate and leave was granted for 14 days: The Memorandum of Appeal was filed 15 days after the expiry of that leave and without any extension. The appeal is out of time and incompetent.

Scenario B, If the excerpt is erroneous and no leave was granted as the Appellant contends: An order made under Order 12 Rule 7 of the Civil Procedure Rules is not among the orders listed in Order 43 Rule 1(1) as carrying an automatic right of appeal. If no leave was ever sought or obtained, the Appellant had absolutely no legal basis upon which to file any appeal whatsoever. The appeal would be a complete nullity, having been filed without leave in circumstances where leave was mandatory.
18. Under either scenario, this Court is divested of jurisdiction. The Appellant has created a dilemma from which there is no legal exit. This Court agrees with the Applicants' formulation in the Supplementary Affidavit that the Appellant cannot escape the legal consequences of either scenario.

(iii) The Applicability of Section 79G of the Civil Procedure Act

19. The Appellant contends at paragraph 7 of the Replying Affidavit that the time for filing an appeal from a subordinate court is governed by Section 79G of the Civil Procedure Act, which provides a statutory period of 30 days, and that the Appeal was filed within that period.
20. This Court is unable to accept that submission. The 30-day period under Section 79G is the general timeline applicable to appeals that lie as of right. Where, however, an appeal does not lie as of right but only with leave and where the court granting that leave has specified a period shorter than 30 days it is the specific term of the leave that governs, not the general statutory provision. Order 43 Rule 1(3) provides expressly that where leave is granted, the appeal shall be filed within the time specified in the leave. That specific provision displaces the general provision of Section 79G in the circumstances of this case.
21. To hold otherwise would render Order 43 Rule 1(3) entirely otiose and meaningless. Courts do not grant leave with specified time limits merely to have those limits overridden by a general statutory provision. The Appellant, having accepted the terms of the leave by seeking it, was bound to comply with those terms or to seek a variation thereof. The Appellant did neither.

(iv) Whether the Appeal is a Nullity and this Court Lacks Jurisdiction

22. The law on this issue is settled, consistent and admits of no exception. This Court is guided by the following authorities. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] KESC 12 (KLR) (Application 16 of 2014), in emphatic terms, held that no appeal can be filed out of time without leave of the court; that such a filing renders the document so filed a nullity and of no legal consequence; and that the court will not accept a document filed out of time without leave.



24. Similarly, the Court of Appeal in *Peter Nyaga Muvake v Joseph Mutunga* [2015] KECA 475 (KLR) confronted a materially analogous situation and held in unequivocal terms that where leave to appeal is required and has not been sought and obtained, the court has no jurisdiction to entertain, hear or determine the appeal. The Court held that the procurement of leave to appeal is a sine qua non to the lodging of the notice of appeal, that without leave there can be no valid notice of appeal, and that without a valid notice of appeal the jurisdiction of the court is not properly invoked.
25. Further, In *KCB Bank (K) Limited v Peter Wainaina Nguzi* [2020] eKLR, the High Court expressly and firmly rejected the argument that failure to obtain leave to appeal where such leave was required is a mere procedural technicality capable of being cured or disregarded under Article 159(2)(d) of *the Constitution* of Kenya. The Court held that such failure is a fundamental omission which goes to the root of the competence of an appeal and affects the jurisdiction of the court to entertain it. The court further held that an appeal filed without leave of the court where such leave is required does not properly invoke the appellate jurisdiction of the court, and the court would not consequently have any basis to entertain any application filed in the appeal.
26. In *Adrian Kenya Limited v Rubis Energy Kenya PLC (Commercial Appeal E142 of 2025)* [2025] KEHC 9715 (KLR), the court struck out the appeal and stay application where the appellant failed to seek leave under Order 43 Rule 1(2), reiterating that an appeal filed without leave does not properly invoke the appellate jurisdiction of the court. Similarly, in *Mucheri (Civil Appeal 11 of 2018)* [2024] KEHC 3222 (KLR), the court struck out the appeal for failure to seek and obtain leave under Order 43, confirming that the court lacked jurisdiction to determine the same.
27. Applying the foregoing to the facts of this case, the position is clear: the Appellant sought and was granted leave to appeal within 14 days. That leave expired on or about 7th May 2024. The Memorandum of Appeal was filed on 22nd May 2024 being 15 days after the expiry of the leave without any application for extension of time having been filed either before or after the expiry. An expired leave is no leave at all. The Appellant stands in no different legal position from one who never sought or obtained leave.
28. The Memorandum of Appeal dated 22nd May 2024 was accordingly filed without valid leave, in breach of the mandatory requirements of Order 43 Rules 1(2) and 1(3) of the Civil Procedure Rules, 2010. It is a nullity and unknown in law. The Record of Appeal filed on 4th February 2026 is equally tainted: it is a document that gives flesh to the Memorandum of Appeal and has no independent existence or validity where the Memorandum of Appeal is itself void.

(v) Article 159(2)(d) of *the Constitution*

29. The Appellant has implicitly invoked Article 159(2)(d) of *the Constitution*, which directs courts to administer justice without undue regard to procedural technicalities. While this Court is mindful of and faithful to the constitutional imperative of substantive justice, the settled and unambiguous position of superior courts is that a jurisdictional defect of this nature cannot be cured by recourse to Article 159(2)(d).
30. As held in *KCB Bank (K) Limited v Peter Wainaina Nguzi* [2020] eKLR, failure to comply with a mandatory leave requirement is not a procedural technicality: it is a matter of jurisdiction. A court cannot confer upon itself jurisdiction that the law does not grant. To accept that argument would render every jurisdictional precondition set by statute or rules a mere technicality to be waived at judicial discretion, which would subvert the entire structure of the civil appellate process. Article 159(2)(d) is directed at peripheral procedural irregularities, not at the foundational requirements for the valid invocation of a court's appellate jurisdiction.



31. This Court also notes the Appellant's assertion that the Court directed prosecution of the appeal within 360 days and that the Appellant has complied. It is correct that such a direction was issued and that the Record of Appeal was filed within the directed period. However, case management directions issued by the court are premised on the assumption that the proceedings before the court are properly constituted and that the court has jurisdiction to entertain them. A direction to prosecute an incompetent appeal does not transform that appeal into a competent one. The court cannot, by its own case management directions, confer upon itself jurisdiction that the law does not grant.

(vi) The Stay of Proceedings

32. The order of stay of proceedings issued by my sister Lady Justice Kemei on 22nd July 2025 was issued in support of and as an ancillary relief to the Appeal herein. The legal basis for any stay of proceedings in a trial court is the existence of valid, subsisting and competent appellate proceedings before the appellate court. Once it is established as it is in the present case that there is no valid appeal before this Court, the legal foundation upon which the stay rests collapses entirely. Every ancillary order made in the appeal falls with the appeal.
33. The Applicants are the Administrators of the estate of a deceased person. They have been pursuing the reinstatement and prosecution of the underlying suit in order to vindicate rights arising out of that estate. The continuation of a stay of proceedings predicated on a nullity would constitute an unjust and continuing denial of their access to justice. This Court has ample power under Sections 1A, 1B and 3A of the *Civil Procedure Act* to vacate orders that have been obtained or maintained in circumstances that no longer sustain them. The vacation of the stay is a necessary and just consequence of the striking out of the Appeal.

Costs

34. The question of costs is governed by the settled principle that costs follow the event, subject to the discretion of the Court. The jurisdiction of the Court to award costs in a striking-out application is well established and is not ousted by the fact that the striking out is grounded in want of jurisdiction: see Section 27 of the *Civil Procedure Act*, which vests in the Court a full discretion as to costs.
35. In the exercise of that discretion, this Court is guided by the following considerations. First, the Applicants have wholly succeeded in their Application and are, as the successful party, prima facie entitled to their costs. Second, the Appellant filed an appeal that was, on any objective analysis, out of time: the leave granted on 23rd April 2024 had a definite and specific expiry date, the Appellant allowed that date to pass without filing or seeking any extension, and yet proceeded to lodge the Memorandum of Appeal 15 days later without any application to regularise the position. The Appellant cannot be said to have had a reasonable basis for contending that the filing was competent. Third, the filing and maintenance of the incompetent Appeal resulted in a stay of proceedings that froze the Applicants' access to the trial court for a significant period. The Applicants, as Administrators of a deceased person's estate, were prejudiced by that freeze and were compelled to bring this Application to restore their access to justice. They ought not to be left out of pocket having done so. Fourth, no special circumstances have been advanced that would warrant departing from the ordinary rule that costs follow the event.
36. In all the circumstances, costs of and incidental to this Application, together with the costs of the struck-out Appeal, shall be borne by the Appellant and are awarded to the 1st, 2nd and 3rd Respondents/Applicants.



Final orders

35. For all the foregoing reasons, the Application dated 2nd March 2026 is merited and the court makes the following final orders;
- i. The Memorandum of Appeal dated 22nd May 2024 and the Record of Appeal dated 4th February 2026 are hereby struck out.
 - ii. This Court lacks jurisdiction to entertain, hear or determine the Appeal in ELCA No. E035 of 2025.
 - iii. The orders of stay of proceedings at the trial court issued by Lady Justice J.G. Kemei on 22nd July 2025 are hereby vacated and discharged.
 - iv. The costs of this Application, and the costs of the struck out Appeal are awarded to the 1st, 2nd and 3rd Respondents/Applicants.
 - v. This file shall be marked as closed.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MAY 2026.

E.K. WABWOTO

JUDGE

In the presence of:

Ms. Okumu h/b for Mr. Nyagito for the Appellant.

Mr. Mutugi and Mr. Nadio for the Respondents/Applicants.

Court Assistants; Mary Ngoira and David Ngoosa.

Ruling elca no. e035 of 2025	0
------------------------------	---

