



**County Government of Uasin Gishu v Njenga (Civil Appeal
E134 of 2021) [2023] KEHC 244 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 244 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E134 OF 2021
JWW MONG'ARE, J
JANUARY 24, 2023**

BETWEEN

COUNTY GOVERNMENT OF UASIN GISHU APPELLANT

AND

JAMES KIENJERU NJENGA RESPONDENT

RULING

1. What is before this court is a Notice of Preliminary Objection dated February 6, 2023 by the Respondent on the jurisdiction of the appellate court to entertain the appeal on the ground:-
 - i. That the appeal is incompetent as leave to appeal was not sought as required by order 43 rules 1 and 2 of the [Civil Procedure Rules, 2010](#).
The Respondent filed a supplementary notice of preliminary objection dated January 16, 2023 to the appeal on raising further grounds as follows;
 - i. That this appeal is a nullity having been instituted in breach of Order 9 rules 5 and 9 of the [Civil Procedure Rules, 2010](#).
 - ii. That this appeal has been instituted in breach of section 59 of the [Urban Areas and Cities Act, No 13 of 2011](#).

APPLICANT'S CASE

2. The Applicant in this application (the respondents in the Appeal filed before this court) in his written submission filed and adopted at the hearing of the Application the Applicant stated that the appeal arose from the Appellant's Appeal seeking to set aside the Warrant of Arrest issued against the County Secretary pursuant to a judgment emanating from Eldoret CMCC No 410 of 2009.



3. According to the Applicant the Appeal having been filed without the Appellant seeking the leave of the court to appeal, is incompetent and improperly before the court as it offends the provisions of section 75(1)(g) of the *Civil Procedure Act* and order 43 Rule 1 and 2 of the *Civil Procedure Rules*. It is the Applicant's submission that the said provisions of the law under Cap 21 do not donate an automatic right of appeal and that since the Appellant never sought leave from the court appealed from, the Appellate court is bereft of jurisdiction to hear the appeal on merit and the same ought to be dismissed with costs.
4. The Applicant argues that the appeal is brought purely to defeat the ends of justice and to delay the execution of the Judgment against the County Government, the Appellant in the Appeal. The appellant has cited several authorities to support its argument, to wit, *Stephen Nyasani Menge v Rispa Onsanse* (2018)eKLR and *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* (2013) eKLR, to reinforce the argument on the fatality of appellate proceedings brought without leave of the court.

RESPONDENT'S CASE

5. In his response to the Appellant/Respondent opposed both the preliminary and supplementary Preliminary objection.
6. He submitted that Order 43 of the *Civil Procedure Rules* gives a long list of orders from which an appeal lies for as a right. It therefore, follows that if one wishes to appeal in an order that is not on the list under Order 43 of the *Civil Procedure Rules* then one must seek leave of the court that made that very order. He urged the court to find that under Order 43 of the *Civil Procedure Rules* an appeal lies as of right on Order (q) on orders in proceedings against the Government.
7. On the supplementary preliminary objection, the Appellant/Respondent submitted that there was no change of advocates but there was a Notice of Appointment of advocates. He submitted that the Appellant did not change its advocate but instead appointed a further advocate to appear on its behalf.
8. On whether section 59 of the *Urban Areas and Cities Act* classified proceedings against the County Government as proceedings against a Government Entity and was therefore a bar to an automatic right of Appeal by a party, the respondent submitted that the said section of the law that allows the New County Governments to take up actions previously brought against a Local Authority, cannot stand as such as the same has no legal backing to sustain a preliminary objection. He urged the court to dismiss the preliminary objection with costs and the appeal be determined on merit.

ANALYSIS AND DETERMINATION

9. Therefore, the following issues arise for determination;
 - a. Whether the Preliminary and the Supplementary Objections are merited?

In order to arrive at a just decision on whether to uphold or dismiss the Preliminary objection the Court must address the following sub-issues;

 - i. Whether the appeal offends the provisions of Order 43 Rules 1 and 2 of the *Civil Procedure Rules, 2010*.
 - ii. Whether the appeal is in breach of Order 9 Rules 5 and 9 of the *Civil Procedure Rules, 2010*
 - iii. Whether the appeal is in breach of section 59 of the *Urban Areas and Cities Act*, No 13 of 2011.



9. It is trite law that a preliminary objection is to be raised purely on points of law. In the celebrated case of *Mukisa Biscuits Manufacturing Co Ltd vs West end Distribution Ltd* [1969] EA 696 the court defined it as; -

“a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”

10. Further, the court of Appeal recently reiterated the same in the case of *Muiruri vs Kimemia* {2002} eKLR 677 states this:

“A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

And so to determine if the Preliminary objection has merit, the court must answer the following question:

i. Whether the appeal as filed being HCCA E134 of 2021 offends the provisions of Order 43 Rules 1 and 2 of the Civil Procedure Rules, 2010.

11. Order 43 Rules 1(k) and (q) of the *Civil Procedure Rules* state as follows;

(1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—

(k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);

(q) Order 28, rule 4 (orders in proceedings against the Government);

12. The Appellant’s appeal is against the decision of the trial court in Eldoret CMCC No 410 of 2009 delivered on September 3, 2021. The decision arose from a Notice of Motion dated February 20, 2019 seeking to set aside the warrants issued against the county secretary on the same date.

13. The issue is whether the appeal from said decision required the Appellant to seek leave. In order to establish this, it must first be determined what category the orders appealed against fall under. A reading of the order of the court delivered on September 3, 2021 reveals that the orders therein were in dismissal of an application seeking to set aside warrants of execution against the County Secretary, Uasin Gishu County.

14. Section 75 of the *Civil Procedure Act* provides the orders from which an appeal lies as of right. This is further supported by the provisions of order 43 rules 1 and 2.

15. It is my view that the appeal is against orders in execution and further, in proceedings against the government. However, as the application sought to set aside the warrants of arrest, it follows that the dismissal is substantially allowing orders for warrants of arrest to issue in satisfaction of a decree. That notwithstanding, the orders also fall under the ambit of Order 45 Rule 1(q) as it is clear from the titles of the parties in the suit that the proceedings are brought against the county government, which is an agency envisioned under the *Government Proceedings Act*, Cap 40, Laws of Kenya. There



is no individual person who has been sued and therefore, the provisions of section 75(g) of the Civil Procedure Act are not applicable. In the premises, this ground of the preliminary objection fails entirely.

ii. Whether the appeal is in breach of Order 9 Rules 5 and 9 of the Civil Procedure Rules, 2010

16. Order 9 rules 5 and 9 of the Civil Procedure Rules 2010 cover the issue of change of advocates. In order to ascertain whether these points are merited the court will have to make a finding of fact to ascertain the issue of representation. The issue of representation in a civil case is proved by way of examination of actual court documents which the court will be expected to inspect and examine and determine what documents have been filed hence this amounts to the examination of evidential material and cannot be argued to be essentially a pure point of law, hence it fails to meet the threshold for that a preliminary objection that revolve around pure points of law.

iii. Whether the appeal is in breach of section 59 of the Urban Areas and Cities Act, no. 13 of 2011.

17. Section 59 of the Urban Areas and Cities Act, No 13 of 2011 gives provisions on a cause of action commenced against a local authority. The fact that the cause of action commenced in the Chief Magistrates' court and is now at the appellate stage is in compliance with the provisions cited in section 59 of the Urban Areas and Cities Act, No 13 of 2011 and therefore this ground of the preliminary objection fails.
18. Having interrogated the three sub-issues arising in the main issue of whether or not the Preliminary Objection can be sustained, the court is satisfied that the issues raised are both points of law and fact and in the premises, the Notice of Preliminary objection and the Supplementary Notice of Preliminary Objection is unmerited and hereby dismissed with costs to the appellant. The appeal to proceed on merit.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24TH DAY OF JANUARY, 2023

J. W. W. MONG'ARE

JUDGE

Ruling delivered in open court in the presence of;

1. Mr. Matekwa holding brief for Mr. Mutai for the Appellant
2. Mr. Mogambi for the Respondent

J. W. W. MONG'ARE

JUDGE

24.01.2023

