

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 552 OF 2015

(FROM THE ORIGINAL CIVIL SUIT NAIROBI CMCC NO. 3795 OF 2009)

PETER MUNIU APPELLANT

JOSEPH GIATU CHEGE APPELLANT

VERSUS

ANN WANGARI KAMAU RESPONDENT

RULING

The appellants applied before the lower court for the trial magistrate to recuse herself following an application to that effect presented before her. Aggrieved by that refusal the appellant filed an application by way of Notice of Motion dated 19th November, 2015 seeking a stay of the proceedings in the lower court pending the hearing of the appeal.

The appeal lodged by the appellant and the application are opposed by the respondent. Parties have filed written submissions. There is now a notice of preliminary objection on points of law on two basic grounds.

1. The appeal and the application are incompetent and should be struck out in *limine* since no appeal lies from the orders appealed or complained about and or that appeal can only lie with leave of court which leave has neither been sought nor obtained.
2. The appeal cannot lie if the appeal itself is incurably incompetent *ab initio*.

Order 43 of the Civil Procedure Rules provides for appeals that lie as of right from orders and rules under the provisions of Section 75 of the Civil Procedure Act. An order made by a magistrate refusing to recuse herself or himself and failing to hand over a file to a fellow magistrate for directions is not an order covered under Order 43 Rule 1. Order 42 (2) provides that an appeal shall lie with the leave of the court from any other order made under these rules.

My first observation is that an order for refusing to recuse oneself is not an order covered by these rules. In any case, Order 43 Rule 3 of the rules provides that an application for leave to appeal under Section 75 of the Act shall be in the first instance be made to the court making the order sought to be appealed from, either orally or at the time when the order is made or within 14 days from the date of such order.

Going by the foregoing provisions it is clear that both the appeal and the Notice of Motion are mis -placed and incompetent. The notice of preliminary objection is therefore upheld. The end result is that both the said appeal and the Notice of Motion dated 19th November, 2015 are struck out with costs to the respondent.

Orders accordingly.

Dated, signed and delivered at Nairobi this 15th Day of June, 2016.

A. MBOGHOLI MSAGHA

JUDGE