



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC APPEAL NO. 38 OF 2014**

**JANE WANGARI MISHECK ..... APPELLANT**

**VERSUS**

**MARGARET WAMBUI MAINA .....1<sup>ST</sup> RESPONDENT**

**IRENE NYAMBURA MAINA .....2<sup>ND</sup> RESPONDENT**

**(AN APPEAL FROM THE RULING DELIVERED ON 27<sup>TH</sup> SEPTEMBER, 2012 BY HON.  
E.K. NYUTU – S.R.M AT WANG’URU PRINCIPAL MAGISTRATE’S COURT CIVIL CASE  
NO. 175 OF 2009)**

**JUDGMENT**

This appeal is against the ruling of Hon. E. NYUTU Senior Resident Magistrate Wanguru Court dated 27<sup>th</sup> September 2012 in Wang’uru Principal Magistrate’s Court Civil Case No. 175 of 2009.

The facts giving rise to this appeal are fairly straightforward.

The Respondents herein were plaintiffs in Wang’uru Principal Magistrate’s Court Case No. 175 of 2009 and were seeking from the appellant who was the defendant therein an order that the rice holding No. 1781 Unit 3 Mwea Irrigation Settlement Scheme be sub-divided into three portions and two portions be transferred to the plaintiffs and in the alternative, a refund of some specific sums of money with interest.

When the matter came up before the trial magistrate on 19<sup>th</sup> April 2012, the appellants herein raised a Preliminary Objection that the trial Court did not have pecuniary jurisdiction over that dispute. In a ruling dated 27<sup>th</sup> September 2012 and which is the subject of this appeal, the trial magistrate dismissed the Preliminary Objection with costs. That ruling gave rise to this appeal which was filed on 16<sup>th</sup> October 2012 and was admitted by W. Musyoka J. on 27<sup>th</sup> November 2012. In the memorandum of appeal, the following grounds are raised with regard to the ruling sought to be set aside:-

1. *The trial magistrate erred in law and fact in holding that the Court enhanced jurisdiction vide the Statute Law Miscellaneous Amendment Act 2012 dated 12<sup>th</sup> July 2012 could be applied retrospectively to vest jurisdiction in a matter which was filed on 2<sup>nd</sup> November 2009*
2. *The trial magistrate erred in law in treating the issue of jurisdiction as a technicality yet it goes to the root of the suit*
3. *The trial magistrate erred in law and in fact in failing to appreciate the new provisions of the law do not act retrospectively unless the new law specifically provides for it.*

Submissions have been filed by both Mr. Kiama for the appellant and Mr. Kahiga for the respondent which I have considered together with the appeal herein.

It is clear from the record herein that this appeal arises from the ruling of the trial magistrate dismissing a Preliminary Objection with regard to that Court's jurisdiction to handle the dispute before it. It is also clear from the record that no leave was sought from the trial magistrate before this appeal was filed as required by law. **Section 75 of the Civil Procedure Act** together with **Order 43 Rule 1 of the Civil Procedure Rules** provides for appeals that accrue by right. **Section 75(1) of the Civil Procedure Act** provides as follows:-

***“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the Court making such order or of the Court to which an appeal was granted -***

- a. ***an order superseding an arbitration where the award has not been completed within the period allowed by the Court***
- b. ***an order on an award stated in the form of a special case***
- c. ***an order modifying or correcting an award***
- d. ***an order staying or refusing to stay a suit where there is an agreement to refer to arbitration***
- e. ***an order filing or refusing to file an award in an arbitration without the intervention of the Court***
- f. ***an order under Section 64***
- g. ***an order under any of the provisions of the Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree***
- h. ***any order made under rules from which an appeal is expressly allowed by rules”***

On the other hand, **Order 43 Rule 1(i) of the Civil Procedure Rules** provides for situations where appeals lie as of right and goes on to provide under **Sub-rule (2)** that an appeal shall lie with the leave of the Court from any other order made under the Rules. It is therefore clear that the leave of the trial magistrate was required before this appeal could be filed and therefore the admission of the same by W. Musyoka J. on 27<sup>th</sup> November 2012 could only have been in error.

A similar situation presented itself before me recently in the case of **MARGARET KANINI AND OTHERS VS ALICE MUTHONI MURICHI ELC CIVIL APPEAL NO. 717 of 2013 (KERUGOYA) where, citing the Court of Appeal's decision in G.R. MANDAVIA VS RATTAN SINGH 1965 E.A 118**, I stated that where a Preliminary Objection alleging mis-joinder limitation, lack of jurisdiction or res-judicata fails and the suit is permitted to proceed, no preliminary decree arises but only an order and the unsuccessful party has a right of appeal but with leave. As no leave was sought from the trial magistrate on 27<sup>th</sup> September 2012 when the ruling subject matter of this appeal was delivered or within 14 days as provided under **Order 43 Rule 3 of the Civil Procedure Rules**, the appeal herein is incompetent and must be struck out.

Ultimately therefore, this appeal is ordered struck out with costs to the respondents.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> APRIL, 2015**

24/4/2015

Before

B.N. Olao – Judge

Gichia – CC

Appellant – present

Ms Munene for Mr. Kiama for Appellant – present

Mr. Rurigi for Mr. Kahigah for Respondent – present

COURT: Judgment delivered this 24<sup>th</sup> day of April 2015 in open Court.

Ms Munene for Mr. Kiama for Appellant present

Mr. Rurigi for Mr. Kahigah for Respondent present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**24<sup>TH</sup> APRIL, 2015**