

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Misc Civ Appli 536 of 2004

EVA WANGUI MURUA.....APPLICANT

VERSUS

KIGERUA MOTORS LTD.....1ST RESPONDENT

JOHN GATHU MUKURIA.....2ND RESPONDENT

TANGO AUCTIONEERS.....3RD RESPONDENT

YUNIS MALIK.....4TH RESPONDENT

RULING

The Ruling relates to a preliminary objection that was raised by Mr. Kimatta for the 4th Respondent. According to Mr. Kimatta, the application dated 27th November, 2004 is incompetent and bad in law since the Court is being asked to extend time for filing an appeal. Further to the above, Mr. Kimatta submitted that the intended appeal arises from a Ruling from which a right of appeal is not automatic. He was of the view that the Applicant should seek the leave of the Court before they institute any appeal. Apart from the above, he revealed that the Applicant's earlier appeal had been struck out for being incompetent since they had **not** obtained leave from the Lower Court. In addition to the above, he referred the Court to **Order XLII** of the Civil Procedure Rules that sets out the appeals that lie as a matter of right.

On the other hand, **Mr. Mbiyu** for the Applicant has opposed the preliminary objection on the ground that leave had been granted on 17th December, 2004 by the Lower Court.

This Court has carefully perused the submissions by both Counsels. Besides the above, this Court is alive to the provisions of **Order XLII** which sets out the Orders where an appeal shall lie as of right. The Court hereby concurs with Mr. Kimatta that once a preliminary objection has been raised, then the Applicant should have applied for leave to file a further affidavit.

Subsequently, the Applicant should have annexed the Order that he showed the Court. That would have provided the 4th Respondent with an opportunity to rebut what has been presented to the Court. Since **Mr. Mbiyu** never complied with the proper laid down procedure, the Order dated 30th December, 2004 is hereby expunged from the record. In addition to the above, I hereby uphold the preliminary objection that has been raised.

The upshot is that the Application dated 27th November, 2004 is hereby struck out with costs.

Those are the Orders of the Court.

MUGA APONDI

JUDGE

Ruling read, signed and delivered in open Court in the presence of Mr. Kimatta for 4th Respondent.

Mr. Karanja Mbugua for 3rd Respondent – Absent.

Mbiyu for Applicant – Present.

MUGA APONDI

JUDGE

28TH SEPTEMBER, 2005