



In re Estate of John Waba Okanda Alias Owaba Okanda (Deceased) (Family Appeal E011 of 2024) [2025] KEHC 5781 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5781 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E011 OF 2024**

DK KEMEL, J

MAY 9, 2025

**IN THE MATTER OF THE ESTATE OF JOHN WABA
OKANDA ALIAS OWABA OKANDA (DECEASED)**

BETWEEN

CHARLES OCHIENG OTIENO APPELLANT

AND

MILLICENT ANYANGO CHIAMA RESPONDENT

RULING

1. The Respondent has filed a Notice of Preliminary Objection dated 15/11/2024 and amended on 25/11/2024 wherein she has raised the following issues:
 - i. That the appeal by way of Memorandum of Appeal dated 13/9/2024 as filed is incompetent, misconceived, untenable, an abuse of the court's time and judicial process as the Appellant failed to first seek leave to appeal against the order from the court that made the order in line with the provisions of Order 43 of the Civil Procedure Rules.
 - ii. That the Appellant having failed to seek leave in line with Order 43 of the Civil Procedure Rules, this court has no jurisdiction to entertain the appeal.
 - iii. That the appeal by way of Memorandum of Appeal dated 13/9/2024 as filed therefore stands frivolous, vexatious, amounts to forum shopping, is untenable, an abuse of the court's time and judicial process and should be dismissed with costs to the Respondent.
2. The Preliminary Objection was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
3. The Respondent submitted that her objection is predicated on the provisions of Order 43 of the Civil Procedure Rules. It was submitted that the matter relates to a succession dispute and in which an appeal



does not lie as of right under Order 43(1) of the Civil Procedure Rules. It was further submitted that the Appellant herein did not seek leave in line with Order 43 (2) of the Civil Procedure Rules and thus this court has no jurisdiction to entertain the appeal. Reliance was placed in several cases such as Direct line Insurance Co. Ltd vs. Onyango (Civil Appeal E345 of 2022), Stephen Omondi Juma vs. Spincer Awuor Rabote [2022] eKLR and Jaldesa Tuke Dabelo Vs. IEBC & Another [2015] eKLR.

Learned counsel sought for the dismissal of the appeal with costs to the Respondent.

4. Learned counsel for the Appellant opposed the Preliminary Objection. He submitted that the High Court has jurisdiction under Article 165 of *the Constitution* which is unlimited and further that Article 159 (2) (d) of *the Constitution* provides that justice shall be administered without undue regard to procedural technicalities. It was further submitted that the court should give effect to the Appellant's right to access justice by dint of Article 48 of *the Constitution*. The Appellant's counsel therefore urged this court to dismiss the Respondent's Preliminary Objection with costs.
5. I have considered the preliminary objection and the rival submissions of both learned counsels. It is not in dispute that the Appellant's summons for revocation of grant dated 16/5/2024 was dismissed by the trial court on 20/8/2024 and that he was aggrieved by the said order and lodged the present appeal. The issue for determination is whether the preliminary objection raised by the Respondent has met the legal threshold.
6. A preliminary objection was established in the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696 as one which consists of 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 of the suit and that examples consist of 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.

As further noted in the Mukisa Biscuit Case (supra) aforesaid by Sir Charles Newbord that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Further, in the case of Oraro vs. Mbaja [2005] 1KLR Ojwang J (as he then was) held as follows:

“.....The principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well defined as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence.”

7. As the Preliminary Objection raised by the Respondent is in regard to the issue that the Appellant did not seek leave from the trial court pursuant to the provisions of Order 43(2) of the Civil Procedure Rules, I find that the objection aforesaid is one on a pure point of law. It is instructive that the Appellant's counsel has not challenged the fact that the Objection is on a pure point of law.
8. Learned counsel for the Respondent has argued that the orders of the trial court are not among the ones in which the Appellant could lodge an appeal as of right and hence leave of the court must be sought before the appeal could be lodged.



9. It is therefore necessary to find out whether the impugned order falls within the categories listed in Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. Section 75 of the 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 the court to which an appeal would lie if leave were granted -

- 1a) 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 in the form of a special case;
 - c) An order modeling or correcting an award.
 - d) An order staying or refusing to stay 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 this 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.
2. No appeal shall lie from any other order passed in appeal under this Section.”

Again, under Order 43 of the Civil Procedure Rules, the same lists the Orders from which appeals would lie as a matter of right. They are 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–
- a. Order 1 (Parties to suit);
 - b. Order 2(Pleadings generally);
 - c. Order 3 (Frame and institutions of suits);
 - d. Order 4 Rule 9 (Return of Complaint);
 - e. Order 7, Rule 12 (Exclusion of counter claim);
 - f. Order 8 (amendments of pleadings);
 - g. Order 10 Rule 11 (Setting aside judgment in Default of appearance);
 - h. Order 12 Rule7 (Setting aside judgment or dismissal for nonattendance);
 - i. Order 15 Rule 10,12 and 18 (Sanctions against witnesses and parties on certain cases);



- j. Order 19 (affidavits);
 - k. Order 22 Rules 25,57, 61 (3) and 73 (Order in execution)
 - l. Order 23 Rules 7 (trial of claim of third person in attachment of debts);
 - m. Order 24 Rule 5 and 7 Legal Representatives);
 - n. Order 25 Rule 5 (Compromise of suits);
 - o. Order 26 Rules 1 and 5(2) (Security for costs);
 - p. Order 27 Rules 3 and 10 (Payment into court and tender);
 - q. Order 28 Rule 4 (Orders in proceedings against the Government);
 - r. Order 34 (Inter pleader)
 - s. Order 36 Rules 5,7, and 10 (Summary procedure);
 - t. Order 39 Rule 2,4, and 6 (furnishing security);
 - u. Order 40 Rules 1,2,3, 7 and 11 (temporary injunction)
 - v. Order 41 Rules 1 and 4 (Receiver)
 - w. Order 42 Rules 3,14, 23 and 35 (Appeals);
 - x. Order 45 Rules 3 (application for review);
 - y. Order 50 Rule 6 (enlargement of time);
 - z. Order 52 Rules 4,5,6 and 7 (Advocates)
 - aa. Order 53 (Judicial Review Orders)
2. An appeal shall lie with the leave of the court from any other order made under these rules.
 3. An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made or within fourteen days from the date of such order.
 4. Save where otherwise expressly provided in the rule ‘Order’ “includes both an order granting the relief applied for and an Order refusing such relief.”

10. From the foregoing orders wherein an appeal lies as of right as provided by Section 75(1) of the *Civil Procedure Act* and Order 43(1) of the Civil Procedure Rules, it is quite clear that the impugned order appealed by the Appellant herein does not fall in that category. Hence, the Appellant was under obligation to seek the leave of the trial court before filing the present appeal in accordance with Section 75 (2) of the *Civil Procedure Act* and Order 43 (2) of the Civil Procedure Rules. As the Appellant did not do so, I find that the appeal is incompetent. The Appellant’s counsel has urged this court to invoke the provisions of Articles 159 (2) (d) and 48 of *the Constitution* and sustain this appeal. The Appellant is deemed to have been aware that the order he sought to appeal is not appealable as of right and that



he had to seek the leave of the trial court. Hence, it is my finding that this court has no jurisdiction to entertain the Appellant's appeal. I find further that the Appellant's entreaties to this court to resort to save the appeal are not convincing in view of the clear provisions of the law that leave of the trial court should be sought before filing the appeal. Indeed, the right of appeal is conferred by statute and therefore the same cannot be inferred. Suffice to add here that the specific provisions have been listed in Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. As the Appellant has not complied with the requisite legal provisions, then this court cannot sustain this appeal. The Court of Appeal in the case of *Jaldesa Tuke Dabelo Vs. IEBC & Another* [2015] eKLR held as follows:

“It has often times been stated that rules of procedures are handmaidens of justice; where there is clear procedure for redress of any grievance prescribed by an Act of Parliament, that procedure should be followed. In the instant case, the Election Act stipulates that the procedure to challenge membership to the County Assembly is by way of petition. The Appellant having chosen the wrong procedure cannot turn around and rely on Article 159 of the Constitution. Article 159 was neither arrived at conferring jurisdiction where none exists nor intended to derogate from express statutory procedures for instituting a cause of action before the courts. The statutory procedures stipulated for determining where none exists nor intended to derogate from express statutory procedures for instituting a cause of action before the courts. The statutory procedures stipulated for determining the question of membership to the County Assembly is by way of Petition.

11. Being guided by the foregoing authority, I find that Section 75 (2) of the Civil Procedure Act and Order 43 (2) of the Civil Procedure Rules clearly provided the procedure for lodging appeals where such appeals do not lie as of right and hence the Appellant was under obligation to adhere to the same. As the Appellant failed to follow the requisite procedure, he cannot now seek refuge under Article 159 (2) of the Constitution which has not conferred this court with jurisdiction. This court's hands are tied and cannot come to the aid of the Appellant who failed to comply with the statutory procedure regarding filing of appeals with the leave of court.
12. In view of the foregoing observations, it is my finding that the Respondent's Preliminary Objection dated 15/11/2024 and amended on 25/11/2024 has merit. The same is allowed with an order that the Appellant's Memorandum of Appeal dated 13/9/2024 is struck out. As the matter is a succession cause involving family members, I order each party to bear their own costs.

DATED AND DELIVERED AT SIAYA THIS 9TH DAY OF MAY, 2025.

D. KEMEI

JUDGE

In the presence of

Odhiambo B.F.....for Appellant

Ooro F.....for Respondent

Okumu.....Court Assistant

