



**Kamwendia v Ndwiga (Civil Appeal E029 of 2025)
[2025] KEHC 14052 (KLR) (8 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14052 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E029 OF 2025
RM MWONGO, J
OCTOBER 8, 2025**

BETWEEN

ROBERT NJIRU KAMWENDIA APPELLANT

AND

GEOFFREY NDWIGA RESPONDENT

RULING

1. The respondent filed this preliminary objection dated 28th April 2025 on grounds that:
 1. The Appellant filed the Appeal no. E029 of 2025 against the Trial Magistrate's Ruling dated 7th April 2025 without first obtaining the leave to appeal the court as stipulated under Order 43 Rule (2), (3) and (4) of the Civil Procedure Rules;
 2. Under Order 43 Rule 1 (i) (a), to (aa), the Trial Magistrate's Ruling dated 7th April 2025 which is the subject of the Civil Appeal no. E029 of 2025 is not appealable as a matter of right but it is only appealable upon the granting of leave to appeal from the court appealed from as stated in Order 43 Rule (3) of the Civil Procedure Rules;
 3. The Ruling dated 7th April 2025 was made pursuant to the provision of Order 5 Rule 16 of the Civil Procedure Rules, which order and/or rule essentially relate to the examination of a process server by the court and which order/rule does not fall within the category of the orders and rules under which an appeal lie as of right.
 4. In the circumstances, the Appellant was legally obligated to first seek and obtain leave to appeal against the Ruling dated 7th April 2025 as stipulated under Order 43 Rule (2) and (3) of the Civil Procedure Rules.
 5. To the extent that the Appellant/Applicant has failed, refused and/or neglected to comply with the provision of Order 43 Rule (2) and (3) aforesaid, both the Appeal and the Application



herein are fatally defective, misconceived, dead on arrival and/or otherwise a gross abuse of the process of the court and ought to be struck out with costs.

Background to the case

2. The applicant filed a memorandum of appeal dated 10th April 2025. He seeks an order to set aside the trial court's ruling in Embu MCCC E129 of 2021 and that the case be heard afresh. Before the trial court, the respondent had filed a plaint dated 13th August 2021 seeking judgment against the appellant for general and aggravated damages for defamation, a permanent injunction restraining the appellant from publishing defamatory statements against him and an order that the appellant issues an apology to the respondent.
3. The trial court satisfied itself that the respondent had served the court processes but that the appellant had failed to enter appearance. The respondent requested for interlocutory judgment which was entered in his favour. The matter proceeded to formal proof and the trial court delivered its judgment awarding the respondent Kshs.3,000,000/= as general damages for defamation, Kshs.1,000,000/= as aggravated damages, a permanent injunction against the appellant from publishing defamatory statements against the respondent and an order that the appellant apologise to the respondent within 30 days.
4. Aggrieved, the appellant filed a notice of motion dated 21st January 2025 seeking stay of execution and setting aside of the *ex parte* judgment. The grounds were, inter alia: That the process server had lied to the court concerning service of the summons to enter appearance upon the appellant in the manner deposed in the affidavit of service. The appellant denied having been served with the court processes regarding the suit where judgment was entered against him.
5. The appellant opposed this application through a replying affidavit in which he stated that the affidavit of service speaks for itself in terms of Order 5 of the Civil Procedure Rules; and that it was sufficient to prove service before the trial court.
6. Through a ruling delivered on 07th April 2025 the application dated 21st January 2025 was dismissed, the court being persuaded that the appellant had been duly served with the pleadings but squandered his chance to defend the suit. This ruling is the subject of the appeal being objected to.
7. In this appeal, there is another filed application dated 10th April 2025 seeking that the matter be heard during the court's vacation. The application is motivated by the appellant's apprehension that without stay orders in place, the respondent may move to execute by attaching his salary, and the appeal would be rendered nugatory.

Submissions on the appeal

8. The appellant filed written submissions arguing that section 75(1) (a-g) of the *Civil Procedure Act* provides his appeal stands as of right, and that order 43 of the Civil Procedure Rules gives guidance on orders from which appeals lie as of right. He relied on the case of *Wanjau Charles Wilson & another v Christine Anyango Auma* [2022] KEHC 2564 (KLR) and urged the court to dismiss the preliminary objection.
9. The respondent relied on the grounds of objection and the list of authorities filed, namely, *Rebecca Chumo v Christina Cheptoo Chumo* [2021] KEELC 626 (KLR), *Constantine Ngiracha Gibai v Peter Boke Nyamohanga* [2020] KEHC 79 (KLR), *Moffat Nyaga Kagau & 3 others v Patrick Opundo Owiti t/a Cousin Motor Works & 2 others* [2021] KEHC 13167 (KLR) and *Trident Insurance Co. Ltd v*



Issue for Determination

10. The only issue for determination is whether the preliminary objection has merit.

Analysis and Determination

11. The merit or otherwise of a preliminary objection stands upon considerations of the nature of issues raised therein. It is trite that a preliminary objection is raised based purely on legal issues. Additionally, the legal issues should have the overall effect of determining the primary suit if the preliminary objection succeeds. This was the position taken by the court in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 at page 700 the Court of Appeal held thus:

“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....A preliminary objection is in the nature of 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.”

12. The issue raised though the objection is that the appeal filed is not as of right as it offends Order 43 Rules 2, 3 and 4 of the Civil Procedure Rules. The subject of the appeal is a ruling arising from an application for setting aside an interlocutory judgment and stay of execution. Order 43 Rule 1(g) provides that:

“An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act... Order 10, rule 11 (setting aside judgment in default of appearance).”

13. Order 10, rule 11 of the Civil Procedure Rules concerns setting aside of an interlocutory judgment in that it provides:

“Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”

14. Section 75(h) of the *Civil Procedure Act* buttresses this position by providing that:

“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 would lie if leave were granted... any order made under rules from which an appeal is expressly allowed by rules.” [Emphasis added]

Disposition

15. Upon close perusal of the grounds of objection, the argument that the appeal does not lie as of right does not hold. It is perfectly clear that an appeal against an order for setting aside anP interlocutory judgment lies on appeal as of right.
16. Accordingly, the preliminary objection has no merit and is hereby dismissed. The appeal shall be set down for hearing in the normal course.



17. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 8TH DAY OF OCTOBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Mukabana for Appellant

No Representation – E Njiru for Repondent

Francis Munyao - Court Assistant

