

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC LC APPEAL NO.E004 OF 2025

KENYA POWER & LIGHTING COMPANY PLCAPPELLANT

VERSUS

PAUL OJIGO OMANGA RESPONDENT

(An appeal from the ruling and orders of Honourable Denis Ogal delivered on 20th December, 2024)

IN

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT WINAM

WINAM CMELC CASE NO.E041 OF 2024

PAUL OJIGO OMANGA PLAINTIFF

VERSUS

KENYA POWER & LIGHTING COMPANY PLCDEFENDANT

R U L I N G

This ruling relates to 2 applications and a preliminary objection namely; the Notice of Motion application dated 25th February 2025 filed by the Respondent, the Notice of Motion application dated 1st April 2025 filed by the Appellant and the preliminary objection filed by the Respondent.

The Notice of Motion dated 25th February, 2025 seeks for orders that;

- a) The appeal filed by the Appellant be struck out in *limine* for being incompetent and an abuse of the court process;
- b) The costs of the application and the appeal be borne by the Appellant.

The grounds upon which the application was brought are that the appeal herein is not a matter of right, that the Appellant did not seek leave of the court before filing the appeal contrary to Order 43 Rule 2 Civil Procedure Rules and section 75(1) of the Civil Procedure Act, that dismissal of a Preliminary Objection is not appealable as of right under Order 43 Rule 1 of the Civil Procedure Rules. That without leave, the appeal is procedurally defective and should be struck out and that as the appeal is incompetent the court is devoid of jurisdiction in the matter.

The application was supported by the averments in the Supporting Affidavit sworn by the Respondent on 25th February, 2025. The Respondent deposed that he instituted the suit in the trial court for trespass after the Appellant erected power lines on his land.

That the Appellant raised a Preliminary Objection which was dismissed for lack of merit. That instead of proceedings to trial, the Appellant preferred the appeal herein challenging the dismissal of the Preliminary Objection. The Respondent deposed further that the Appellant did not seek any leave of the court to file the appeal.

The Appellant's response to the application dated 25th February, 2025 was contained in the Replying Affidavit sworn by Dennis Maanzo on 19th June, 2025 who deposed that the appeal was instituted by the Appellant under Section 79G of the Civil Procedure Act Cap 21, Order 50 Rule 4 of the Civil Procedure Rules 2010. That a preliminary objection is a point of law raised in terms of Order 2 Rule 9 of the Civil Procedure Rules 2010 and thus among the matters to which an appeal shall lie as of right under Order 43 Rule 1(1)(b) of the Civil Procedure Rules, 2010.

The application was heard by way of written submissions. It was submitted on behalf of the Respondent/Applicant vide the written submissions dated 13th June, 2025 filed by the firm of Odhiambo Oronga & Company Advocates that the appeal is statutorily barred for lack of leave. That the appeal fails to comply with Order 43 Rule 2 of the Civil Procedure Rules which provides that;

“No. appeal shall lie from an order made ex parte or from any order made under these Rules save as expressly provided.”

That dismissal of a Preliminary Objection is not one of the specific orders delineated by Section 75(1) of the Civil Procedure Act from which an appeal lies as of right.

Counsel submitted further that the Appellant’s Preliminary Objection before the trial court challenged the jurisdiction of the court under the Energy Act. Counsel referred to the case of Lucy Wanjiku Nyaga -vs- James Mwaniki Munyi & Another Civil Appeal No.17 of 2017

where the Court of Appeal held that;

“In the case of Mandaria -vs- Rattan Singh [1965] EA 118 where the Preliminary Objection was based on *res judicata* but was rejected the predecessor of this court held, inter alia, that where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or *res judicata* fails and a suit is permitted to proceed, no preliminary decree arises but only an order ; the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.”

Counsel further submitted that the Appellant cannot seek refuge in article 159(2)(d) because the matter is not a technicality but a statutory provision that behoves compliance by to parties to a suit.

Counsel further relied on the case of Mucheri (Civil Appeal 11 of 2018) [2024] KEHC 3222 (KLR) (3 April 2024) (Judgement) to support the submissions.

Counsel urged the court to allow the application and strike out the appeal.

On behalf of the Appellant, written submissions dated 19th June, 2025 were filed by C. Mwenda Advocate. Counsel submitted that the appellant challenged the jurisdiction of the trial court pursuant to the provisions of sections 3, 10, 11, 23, 24, 25, 36, 40, 42, 157, 160 and 22 of the Energy Act, 2019 unsuccessfully.

That dissatisfied with the ruling of the trial court, the Appellant preferred the present appeal vide the Memorandum of Appeal dated 24th January, 2025.

Counsel submitted that Order 43 of the Civil Procedure Rules lists Order 2 of the same Rules among the orders under which appeals from court orders/determinations may lie to a higher court as of right. That Order 2 refers to pleadings and that Order 2 Rule 9 provides that a party may by his pleadings raise any point of law.

Relying on the case of Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors [1969]EA 696 Counsel submitted that it is trite that preliminary objections are raised on questions of law. That a preliminary objection is a point of law raised in terms of Order 2 Rule 9 of the Civil Procedure Rules 2010 and that thus it is among the matters in respect of which an appeal shall lie as of right under Order 43 Rule 1(1)(b) of the Civil Procedure Rules, 2010.

Counsel urged the court to dismiss the application with costs to the Appellant.

I have considered the application, the grounds raised in opposition thereto and the submissions made.

The issue for determination is whether or not the appeal before court is competent.

The contention of the Applicant is that the nature of the order appealed against is that the Appellant needed to seek and obtain leave to appeal pursuant to the provisions of section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules. It is common ground that leave was not sought.

The Appellant seeks refuge in Order 43 Rule 1(1)(b) and Order 2 Rule 9 Civil Procedure Rules and article 159 of the Constitution of Kenya 2010.

It is also common ground that the Preliminary Objection raised before the trial court challenged the jurisdiction of the trial court and not the pleadings of any party. My understanding of Order 2 Rule 9 Civil Procedure Rules which provides that “A party may by his pleading raise any point of law”, is that it is a provision that allows a party to plead and/or include points of law in or as part of its pleadings.

The substance of the Preliminary Objection raised before the trial court was not based on Order 2 Civil Procedure Rules. The ruling appealed against did not refer to or relate in any way to Order 2 Rule 9 Civil Procedure Rules or to pleadings generally. It related to the Energy Act and the jurisdiction of the court in light of the cited provisions thereof.

For an appeal arising from a decision on such a preliminary objection, leave to appeal was required under the provisions of Section 75 of the Civil Procedure Act. An appeal filed without leave of court for which leave is required is an incompetent appeal. In *Kiruthu v Konje [2025] KEELC 6934 (KLR)* it was held that;

Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules provide frameworks on orders/decisions against which leave to appeal is not

required. Under Order 22 of the Civil Procedure Rules, the orders/decisions against which leave is not required are those made in exercise of jurisdiction under Rules 25, 57, 61(3) and 73 of the Civil Procedure Rules. Appeals challenging orders/decisions made in exercise of jurisdiction under the rest of Order 22 require prior leave to appeal. Put differently, an appeal challenging an order made on a notice to show cause requires prior leave of the court.”

In Nyutu Agrovet vs Airtel Networks Ltd [2015] eKLR; it was held that where there was no automatic right to appeal as stipulated under Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained.

I find that the application dated 25th February, 2025 has merit and hereby allow it. The appeal is hereby struck out. Each party to bear own costs of the appeal.

Regarding the application dated 1st April, 2025 filed by the Appellant and the Preliminary Objection by the Respondent, given the findings and decision in respect of the Respondent’s application dated 25th

February, 2025, herein, the same are hereby marked as spent. No orders as to costs.

Orders accordingly.

Ruling, dated and signed at Kisumu, read virtually this 30th day of October, 2025 through Microsoft Teams Online Application.

**E. ASATI
JUDGE.**

In the presence of:

Maureen: Court Assistant.

Kihara for the appellant.

Oronga for the Respondent.