



REPUBLIC OF KENYA



**Lotua v Fora Commercial Agencies Limited & 2 others (Commercial Appeal E022 of 2025)  
[2025] KEHC 16580 (KLR) (Commercial and Tax) (7 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16580 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL APPEAL E022 OF 2025**

**MN MWANGI, J  
NOVEMBER 7, 2025**

**BETWEEN**

**MARY JOAN LOTUA ..... APPELLANT**

**AND**

**FORA COMMERCIAL AGENCIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**FERNANDES LUCHEVELELI SEJERO ..... 2<sup>ND</sup> RESPONDENT**

**FERMAR INTERNATIONAL LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the order of the Small Claims Court at Milimani Hon. V.M. Mochache, issued on 13th December 2024 in Nairobi SCCOMM No. E354 of 2024)*

**RULING**

1. This Ruling is in respect to the 1<sup>st</sup> respondent's Notice of Preliminary Objection dated 17<sup>th</sup> February 2025. The circumstances giving rise to the said Preliminary Objection is that the appellant filed this Appeal against an order issued by the Small Claims Court on 13<sup>th</sup> December 2024 vide a Memorandum of Appeal dated 28<sup>th</sup> January 2025, raising the following grounds of Appeal –
  - i. The Subordinate Court misdirected herself on the matters before her (sic), the relevant laws on the matter, in failing to consider that the appellant had proved their claim for objection of a Warrant of Attachment not to be issued against them;
  - ii. The Subordinate Court misdirected herself on the matters before her relevant laws on the matter (sic) in failing to consider that the 1<sup>st</sup> respondent had failed to demonstrate that they had properly proclaimed against the right person i.e. the 2<sup>nd</sup> & 3<sup>rd</sup> respondent (sic);



- iii. The Subordinate Court erred in law and fact in failing to find that the respondent had failed to meet the threshold as set out in Section 44 of the *akn ke act 1924 3 Civil Procedure Act* and Order 22 Rule 51(1) of the Civil Procedure Rules;
  - iv. The Subordinate Court erred in law and fact in failing to consider the jurisprudence set out by the higher Courts on conditions to be considered prior to issuing Warrants of Attachment and specifically the following;
    - a. Liable Property:
    - b. All property belonging to a judgment debtor, over which they have disposing power, can be attached and sold to satisfy a Court decree. And failed to consider that the subject motor vehicle does not belong to the Judgement Debtor.
  - v. The Subordinate Court misdirected herself (sic) or acted on matters which it should not have acted upon or failed to take into consideration particularly on the partial payments already made towards the clearance of the debt; and
  - vi. The Subordinate Court's decision was wholly erroneous in law, contrary to judicial precedent on the matters before her (sic) and a miscarriage of justice.
2. The appellant prays for an order allowing the Appeal with costs and for the setting aside the Warrants of Attachment issued on 10<sup>th</sup> May 2024.
  3. The Memorandum of Appeal was filed alongside a Notice of Motion application dated 28<sup>th</sup> January 2025 under the provisions of Order 10 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the *akn ke act 1924 3 Civil Procedure Act* and all enabling provisions of the law, wherein the appellant sought leave to file the instant application and Appeal and an order for setting aside or lifting of the Warrants of Attachment execution issued in Milimani Small Claims Court Case No. E354 of 2024 – *Fora Commercial Agencies Ltd v. Fernandes Lucheveli Serejo & Fermer International Ltd*, pending the hearing and determination of the Appeal.
  4. The application was premised on the grounds on the face of the Motion, and it was supported by an affidavit sworn on 28<sup>th</sup> January 2025 by Ms Mary Joan Lotua, the appellant herein.
  5. In opposition to the instant Appeal and application, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 7<sup>th</sup> March 2025 by Mr. Kevin Muaka, the 1<sup>st</sup> respondent's Director. The 1<sup>st</sup> respondent also filed a Notice of Preliminary Objection dated 17<sup>th</sup> February 2025 raising the following grounds –
    - i. The Memorandum of Appeal (pleadings) is fatally defective;
    - ii. The Appeal herein incurably offends Section 38(1) of the *akn ke act 2016 2 Small Claims Court Act* of 2016 which provides -
 

A person aggrieved by the decision or an order of the Court may Appeal against that decision or order to the High Court on matters of law.
    - iii. The Appeal herein incurably offends Section 79(G) of the *akn ke act 1924 3 Civil Procedure Act* which provides -
 

Every Appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order Appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or



order: Provided that an Appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time.

The Judgment appealed against was delivered on 13<sup>th</sup> December 2024 while the Notice of Appeal was filed on 28<sup>th</sup> January 2025; and

- iv. The impugned Memorandum of Appeal raises issues of fact and thus is fatally incurable as the anomaly goes into the tapestry of the pleadings and ought to be dismissed with costs to the 1<sup>st</sup> Respondent.
6. The Preliminary Objection was canvassed by way of written submissions. The 1<sup>st</sup> respondent's submissions were filed on 18<sup>th</sup> March 2025 by the law firm of Clara Barasa & Company Advocates, while the appellant's submissions were filed by the law firm of Wambilianga Majani Associates on 19<sup>th</sup> March 2025.
7. Ms Barasa, learned Counsel for the 1<sup>st</sup> respondent submitted that this Appeal is incompetent and ought to be dismissed for having been filed out of time and for improperly raising issues of fact contrary to the law. She argued that pursuant to the provisions of Section 79(G) of the *akn ke act 1924 3 Civil Procedure Act*, an Appeal from a Subordinate Court must be lodged within thirty (30) days from the date of the decree or order Appealed against. She contended that in the present case, the Ruling appealed against was delivered via email on 13<sup>th</sup> December 2024, yet the Appeal was filed on 28<sup>th</sup> January 2025, well beyond the prescribed statutory period. Counsel further contended that the appellant neither sought nor obtained leave to file the Appeal out of time and has not offered any good or sufficient cause to justify the delay.
8. Ms Barasa submitted that the appellant cannot rely on Order 50 Rules 2 & 4 of the Civil Procedure Rules, 2010, to justify the timeliness of the Appeal, as those provisions do not apply to the 30-day limitation period or to matters involving temporary injunctions, such as the present case. She relied on the decision in the case of *Kyule v Gitaari (Civil Appeal 217 of 2023) [2024] KEHC 5819 (KLR)*, and emphasized that even a minimal delay in filing an Appeal renders it incompetent, and therefore, this Appeal is time-barred.
9. Ms Barasa cited the decision in the case of *Mbochi v Kanja (Civil Appeal E285 of 2023) [2023] KEHC 26004 (KLR)*, and submitted that under Section 38(1) of the *akn ke act 2016 2 Small Claims Court Act*, Appeals to the High Court are limited to matters of law, but the appellant's Memorandum of Appeal raises issues of both law and fact. She argued that the appellant's reliance on Section 44 of the *akn ke act 1924 3 Civil Procedure Act* and Order 22 Rule 51(1) of the Civil Procedure Rules, 2010, is misplaced, as these provisions concern objector proceedings, in which the appellant was duly accorded a hearing and even filed an application for review. Counsel emphasized that the dismissal of that application does not amount to a denial of the right to be heard.
10. Mr. Wambilianga, learned Counsel for the appellant submitted that this Appeal was lodged within the prescribed timelines, or in the alternative, any delay is justifiable in the circumstances. He argued that under Sections 75 & 79(G) of the *akn ke act 1924 3 Civil Procedure Act*, an Appeal from a Subordinate Court must be filed within 30 days from the date of the decision. He stated that the Ruling of the Small Claims Court was delivered on 13<sup>th</sup> December 2024, while this Appeal was filed on 23<sup>rd</sup> January 2025. Counsel submitted that pursuant to Order 50 Rule 4 of the Civil Procedure Rules, 2010, the period between 21<sup>st</sup> December and 13<sup>th</sup> January is excluded from computation of time. He submitted that the Appeal was filed on the 20<sup>th</sup> effective day and therefore the Appeal falls within the prescribed statutory timeline.



11. Mr. Wambilianga maintained that the application dated 28<sup>th</sup> January 2025 seeks an order for stay of execution as opposed to a temporary injunction as claimed by the 1<sup>st</sup> respondent. Counsel contended that this Appeal raises substantive issues of law that warrant determination by this Court. He relied on the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, and argued that as a first appellate Court, the High Court has the duty to re-evaluate the evidence, reconsider the findings of the Trial Court and arrive at its own independent conclusion, while bearing in mind that it did not have the advantage of observing the witnesses testify first hand.

### **Analysis And Determination.**

12. Upon consideration of this Memorandum of Appeal, the Preliminary Objection raised by the 1<sup>st</sup> respondent and the written submissions by Counsel for the appellant and the 1<sup>st</sup> respondent, the issues that arise for determination are –
- i. Whether this Appeal was filed outside the prescribed timelines; and
  - ii. Whether this Appeal offends the provisions of Section 38 (1) of the *akn ke act 2016 2 Small Claims Court Act*.

### **Whether this Appeal was filed outside the prescribed timelines.**

13. The 1<sup>st</sup> respondent contends that the Appeal between the parties herein was filed out of time as it was filed outside the 30 days provided for under Section 79G of the *akn ke act 1924 3 Civil Procedure Act* which states that –

Time for filing Appeals from subordinate Courts

Every Appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order Appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order;

Provided that an Appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the Appeal in time.”

14. The Small Claims Court at Milimani, in SCCCOMM No. E354 of 2024, entered Judgment in favour of the 1<sup>st</sup> respondent on 10<sup>th</sup> May 2024. Subsequently, the appellant filed objector proceedings, which were dismissed in a Ruling delivered on 18<sup>th</sup> October 2024. Dissatisfied with that outcome, the appellant sought a review of the decision, but the application was again dismissed through a Ruling delivered on 13<sup>th</sup> December 2024. It is the latter Ruling that forms the subject of this Appeal.
15. Pursuant to the provisions of Section 79G of the *akn ke act 1924 3 Civil Procedure Act*, the Appeal ought to have been filed on or before 13<sup>th</sup> January 2025 in accordance with Order 50 Rule 3 of the Civil Procedure Rules, 2010, noting that the 30<sup>th</sup> day from the date of the Ruling fell on 11<sup>th</sup> January 2025, which was a Saturday. This Court takes cognizance of the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010, which stipulate that –

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time



(whether under these Rules or any order of the Court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

16. The effect of the foregoing provisions is that the period between 21<sup>st</sup> December 2024 and 13<sup>th</sup> January 2025 is excluded from the computation of time within which the appellant was required to take any procedural step in respect to the Appeal, except in applications relating to temporary injunctions. This Court notes that although the 1<sup>st</sup> respondent contends that the appellant filed an application for an injunction, thus she is excluded from the benefit of this Rule, the Court record and the Case Tracking System indicate otherwise. The application on record seeks an order for stay of execution and an order for the setting aside or lifting the Warrants of Attachment execution issued in Milimani Small Claims Court Case No. E354 of 2024.
17. In the circumstances, this Court finds that the provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010 are applicable to this case. Therefore, considering that the Ruling being appealed from was delivered on 13<sup>th</sup> December 2024 and taking into account the exclusion of time provided in the aforesaid Rule, this Appeal ought to have been filed on or before 4<sup>th</sup> February 2025.
18. In the premise, since this Appeal was filed on 28<sup>th</sup> January 2025, this Court finds that it was filed within the prescribed timelines and is therefore not time barred.  
Whether this Appeal offends the provisions of Section 38(1) of the *akn ke act 2016 2 Small Claims Court Act*.
19. Section 38(1) of the Small Claims Act provides that –  
A person aggrieved by the decision or an order of the Court may Appeal against that decision or order to the High Court on matters of law.
20. It is not in dispute that under the above provisions, Appeals from the Small Claims Court to the High Court are confined strictly to matters of law.
21. Upon a perusal of the Memorandum of Appeal dated 28<sup>th</sup> January 2025, this Court notes that some of the appellant's grounds of Appeal challenge the Trial Court's interpretation and application of the law, particularly in relation to Section 44 of the *akn ke act 1924 3 Civil Procedure Act* and Order 22 Rule 51(1) of the Civil Procedure Rules, 2010, as well as the legal principles governing Attachment and objection proceedings. These grounds raise questions of law properly falling within the ambit of Section 38(1) of the *akn ke act 2016 2 Small Claims Court Act*. The appellant however also challenges the Trial Court's findings on ownership of the attached property and alleged partial payment of the decretal sum, which are issues of fact which fall outside the scope of this Court's appellate jurisdiction under the aforesaid provisions.
22. This Court is of the considered view that the mere fact that the appellant's Memorandum of Appeal contains both issues of fact and law does not render the Appeal incompetent. This Court is still vested with the jurisdiction under Section 38(1) of the *akn ke act 2016 2 Small Claims Court Act* to consider and determine the issues of law properly raised before it. Accordingly, this Court finds that the Appeal is not fatally defective as the Memorandum of Appeal can be amended to bring the Appeal within the confines of Section 38(1) of the *akn ke act 2016 2 Small Claims Court Act*.



23. The question as to what constitutes a valid Preliminary Objection was addressed in the case of Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696, where the Court held that-

So far as I am aware, a preliminary objection 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. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

24. In the said case, Sir Charles Newbold P., stated thus–

... the first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues. This improper practice should stop.

25. Having addressed the two issues that I identified for identification; it is my finding that the 1<sup>st</sup> respondent's Notice of Preliminary Objection dated 17<sup>th</sup> February 2025 is devoid of merits. It is hereby dismissed with costs to the appellant.

26. The appellant is granted fourteen (14) days to file and serve an Amended Memorandum of Appeal to bring her Appeal within the confines of Section 38(1) of the Small Claims Courts Act.

It is so ordered.

**DELIVERED , DATED AND SIGNED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF NOVEMBER 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Ms Barasa for the 1<sup>st</sup> respondent applicant

Ms Okemo h b for Mr. Wambilyanga for the appellant respondent

Ms B. Wokabi – Court Assistant.

