

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPELLATE DIVISION
CIVIL APPEAL NO. E033 OF 2025

SOCIAL HEALTH AUTHORITY..... APPLICANT
-VERSUS-
ATHI COMPLEX GALAXY HOSPITAL..... RESPONDENT

RULING

1. For determination is **Athi Complex Galaxy Hospital** (*hereafter the Respondent*) Preliminary Objection (PO) dated **29.05.2025**. The Respondent takes issue with the instant appeal and or proceedings on grounds -;

“1. That the Honourable Court herein lacks the inherent jurisdiction to determine the matter herein as it has been filed illegally, irregularly and unprocedurally contrary to Order 42 Rule 1, 10(2) of the Civil Procedure Rules (2010) and Section 79G of the Civil Procedure Act (2010), as read with Articles 159(2)(b) and 165(3)(e) of the Constitution (2010).

2. That the matter herein is an Appeal that has been filed contrary to the provisions of the law and procedure therefore, cannot be heard and determined by this Honourable Court as envisaged in the above provisions.

3. That contrary to Order 42 Rule 1, 10(2) of the Civil Procedure Rules (2010) and Rules 77(2) and 92(1) of the Court of Appeal Rules (Legal Notice 40 of 2022), not only has the Appellant failed to issue a notice of appeal in the attendant lower court within the stipulated seven (7) days timeline but, it has also failed to file and serve their attendant record and memorandum of Appeal before this Honourable Court.

4. That additionally, in violation of Section 79G of the Civil Procedure Act (2010), the Appellant has failed to file the requisite memorandum and record of Appeal within thirty

(30) days from the date of the order appeal against as stipulated by law.

5. That it is trite law that the rule of law must be observed by all thus, the Appellant has failed to meet the minimum threshold for an Appeal as required by law.

6. That the holding in the Motor Vessel "Lillian S" case (1989) KLR establishes that jurisdiction flows from law and the recipient court is to apply the same with any limitation embodied therein. Such a court may not arrogate to itself jurisdiction through craft of interpretation or endeavor to discern or interpret the intention of parliament where the wording of legislation is clear and there is no ambiguity."

2. In response, **Social Health Authority (SHA)** (hereafter the Appellant) filed a replying affidavit deposed by **Ms. Terry Rotich** dated 11.07.2025, in opposition to the PO. That being aggrieved with the decision of the lower Court rendered on 26.02.2025, the Appellant lodged a Memorandum of Appeal dated 27.02.2025. She goes on to depose that the instant appeal was originally lodged before the Commercial and Tax Appeal Division of the High Court however the same was later administratively transferred to the Civil Appellate Division of the High Court. That there is no requirement to issue a Notice of Appeal in the lower Court prior to filing an appeal whereas upon transfer of the file, the Court did not direct for the filing of a new Memorandum of Appeal. She states that the Respondent has consistently relied on technicalities since inception of the appeal towards avoiding a substantive hearing of the matter. In conclusion, she asserts that unless the PO is dismissed, the Appellant will suffer irreversible and irreparable loss and damage.
3. Directions were taken on disposal of the PO by way of written submissions. Only the Respondent complied despite the respective

parties being accorded ample opportunity. Having set out the above, the Court has considered the pleadings, the PO and submissions filed and thus postulates that the issue for **determination concerns -:**

- a) *Whether the Respondent's Preliminary Objection is merited?*
- b) *Who ought to bear costs?*

Whether the Respondent's Preliminary Objection is merited?

4. As to the nature of a preliminary objection, the same has since been settled within our jurisdiction in the celebrated decision of **Mukisa Biscuits Manufacturing Company Ltd.** It was held therein 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

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 the 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 preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop."

5. In the case of **Oraro v Mbaja (2005) KLR 141, Ojwang J** (as he then was) reiterated the above by stating that-;

"A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in

any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

6. Meanwhile, the Court of Appeal in **Kigwor Company Limited v Samedy Trading Company Limited [2021] KECA 810 (KLR)** cited with approval the decision of the Supreme Court in **Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)** where the latter court emphasized that:-

"[16] It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others, Civil Application No. 14 of 2014, [2014] eKLR)."

7. A perfunctory review of the Respondent's preliminary objection, it essentially challenges this Court's jurisdiction to entertain the proceedings as presented saliently on the premise of **Section 79G** of the **CPA**, **Order 42 Rule 1 & 10(2)** of the **CPR** among others. It warrants mentioning that *ex facie* from the proceedings before this Court it can be garnered therefore that the appeal emanates from the impugned decision of the lower Court, particularly the Small Claims Court.

8. The nature, procedure and manner of appeals from the Small Claims Court to the High Court are codified in **Section 38** of the **Small Claims Court Act** as read alongside **Section 79G** of the **CPA** and **Order 42 Rule 1** of the **CPR** therefore the **Court of Appeal Rules** have no bearing on appellate proceedings before the High Court.

9. That said, **Section 79G** of the **CPA** provides that-;

Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty (30) 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.

10. Meanwhile, **Order 42 Rule 1** of the **CPR** on its part provides that-;

(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.

(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

11. In a proper case, an objection appertaining to jurisdiction constitutes a pure point of law, that ought to be determined *in limine*. The words of **Nyarangi. JA**, in the *locus classicus* decision in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** require no restatement save for the exhortation which still endures that "Jurisdiction is everything. Without it, a court has no power to make one more step."

12. At the risk of repetition, it is well-trodden that a preliminary objection is a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. The gist of Respondent's PO is the Court lacks the requisite jurisdiction to entertain the appeal as presented on accord of the fact that the same was filed outside the statutory timelines, without leave, whereas the memorandum of appeal was not timeously served upon the Respondent as required by statute.
13. A cursory review of the record and Appellant's affidavit material, *ex facie* it can be garnered from the face of the appeal that the impugned decision being applied was delivered on 17.02.2025 (**Annexure TR-2**) whereas the memorandum of appeal was filed on or about the 27.02.2025 (**Annexure TR-2 & TR-3**) in compliance with the statutory provision of **Section 79G** of the **CPA**. Therefore, the Respondent's objection that the instant appeal was filed out time and without leave is not well taken in the circumstance.
14. As to whether there was non-service of the memorandum of appeal, **Order 42 Rule 12** of the **CPR** provides that-;
- Where the judge admits the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.***
15. It is common knowledge that upon institution and service of court processes, the aforementioned begins to set in motion what can said to be "a chain reaction" of events, for instance.....time within which to enter appearance and filed defence begin to run, a litigant may enlist the services of counsel, pleadings may be prepared for filing in respect of the suit and so forth.

16. Here, the Court process before the appellate Court was instigated by way of a memorandum of appeal, unlike the Court of Appeal Rules which expressly provides for timelines on service upon lodging of a Notice of Appeal and memorandum of appeal, the **CPR** only provides for timelines on service of a Memorandum of Appeal after directions on the appeal have been issued pursuant to **Section 79B** of the **CPA**, which states that-;

Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79C, reject the appeal summarily.

17. From the record it can be gathered that not such direction pursuant to **Section 79B** of the **CPA**, have been issued by this Court, to wit, it can be stated that the time within which to serve the Memorandum of Appeal began to run. Likewise, to the earlier objection, this Court is not convinced by the Respondent's objection on service of the Memorandum of Appeal. In any event, in hindsight, while I do not intend to water down the requirement of service of Court process, in the advent of the e-filing through the Judiciary Case Tracking System (CTS) as at lodging of the Memorandum of Appeal, and the Respondent being mapped on the CTS, logic would dictate that it had access to the Memorandum of Appeal as filed by the Appellant. Therefore, the Respondent cannot feign that it has not had the opportunity of the Appellant Memorandum of Appeal while it has equally been lodging pleadings using the said platform.

18. Anyway, I digress, whereas this Court maintains that the question of service of the Appellant's Memorandum of Appeal does not arise in the absence of directions being issued by this Court under **Section 79B** of the **CPA**. I believe the Court has sufficiently addressed itself to the Respondent PO, to wit, the Court reasonably concludes that the same lack merit and is dismissed with attendant costs to the Appellant.

19. Orders Accordingly.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 18TH DAY OF DECEMBER 2025.

**HON L P KASSAN
JUDGE**

**In the presence of;
Njue for Appellant
Ms Kamau for Respondent
Carol – Court Assistant**