

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E970 OF 2024

-between-

ALEX GITHINJI WAGENI
T/a **WAGENI** & **CO.**
ADVOCATES.....APPELLANT

-versus-

ROSE **MUTHONI**
KAMARA.....RESPONDENT

[Being an appeal from the Ruling of Hon. Mbulikah (PM) in Milimani Chief Magistrates Court Commercial Case No. 8810 of 2019 delivered on 25th July 2024]

JUDGMENT

Background:

1. The Respondent, *Rose Muthoni Kamara*, sued *Alex Githinji Wageni p/a Wageni & Co. Advocates*, the Appellant herein, in *Milimani Chief Magistrates Court Commercial Case No. 8810 of 2019* [hereinafter referred to as ***'the suit'***] for defamation regarding a letter he wrote to the Deputy Registrar of Milimani High Court accusing her of hiding files and capturing the Judiciary.
2. In opposition to the suit, the Appellant filed a Notice of Preliminary Objection dated 19th July 2024 challenging the jurisdiction of the trial Court and the Respondent's *locus standi* of the suit. The Appellant contended that the issues raised concerned the professional conduct of an Advocate and privileged correspondence, matters which ought to be determined by the High Court or the Advocates Complaints Commission.
3. The trial Court dismissed the objection on 25th July 2024 and found that it had jurisdiction to proceed with the hearing. Aggrieved, the Appellant filed the instant appeal. Subsequently,

the Appellant filed a Notice of Motion dated 24th October 2024 seeking a stay of proceedings in the trial Court pending the appeal.

4. Through the consensus of parties on 28th February 2025, the arguments canvassed in the application for stay were adopted as the substantive submissions for the main appeal, to obviate the need for further filings and delay.

The Appeal:

5. In the Memorandum of Appeal dated 23rd August 2024, the Appellant set out the following grounds: -
 1. *The Learned Magistrate erred in law and in fact, in failing to find that the Honourable Court has no jurisdiction to hear and determine the suit, as filed by the Respondent, as relates to the issues raised in the pleadings.*
 2. *The learned Magistrate erred in law and in fact, by failing to find that she lacks jurisdiction to decide over matters and pleadings filed and determined by the High Court.*
 3. *The Learned Magistrate erred in law and in fact, by failing to find that the suit offends the doctrine of exhaustion of available statutory remedies, which are mandatory.*
 4. *The Learned Magistrate erred in law and in fact, by failing to find that the Respondent has not exhausted the mechanisms provided for as in the above dictum, before instituting the proceedings.*
 5. *The Learned Magistrate erred in law and in fact, by failing to uphold the provisions of sections 90 of the Fair Administrative Action Act, that provides for the Doctrine of Exhaustion and sections 56 of the Advocates Act that designates Advocates as officers of the Court, granting exclusive powers to the High Court, and where it explicitly grants powers to the Chief Justice or Judges to deal with the conduct of Advocates in the course of their profession.*
 6. *The Learned Magistrate erred in law and in fact, by failing to uphold the institutions established by the Constitution of Kenya 2010 and statute law that are mandated to deal with disputes, from acts or omissions of an Advocate in the cause of his professional duties.*

The Submissions:

6. The Appellant's submissions, dated 28th November 2024, originally filed in support of the application for stay, advanced the substantive arguments for the appeal by emphasizing that the suit touches on official and privileged correspondences between a Law Firm and the Deputy Registrar, as well as pleadings filed in High Court proceedings. The Appellant contended that the Magistrate's Court usurped the powers of the High Court by determining issues touching on proceedings in a superior Court. The Appellant argued that the suit concerned an Advocate's practice issue and the conduct of an Advocate, making the proper forum for such disputes the *Advocates Complaints Commission* or the *Advocates Disciplinary Tribunal* rather than the Magistrate's Court.
7. To buttress its case, the Appellant relied on the *Doctrine of Exhaustion*, and the Supreme Court decision in *Albert Chaurembo Mumbo & 7 others -vs- Maurice Munyao & 148 others (SC Petition No 3 of 2016, [2019] eKLR)* where it was established that even where superior Courts have jurisdiction, the first opportunity must be given to the relevant bodies, tribunals, or quasi-judicial authorities established by statute to deal with the dispute.
8. The Appellant emphasized that Courts must exercise restraint and give deference to the dispute resolution bodies. Learned Counsel urged that the appeal be allowed with costs.

The Respondent's case:

9. *Rose Muthoni Kamara* opposed the appeal through her Replying Affidavit sworn on 29th November 2024. She clarified that the nature of her claim was a simple defamation case arising from the Appellant's letter alleging that she had captured the Judiciary and was hiding Court files. She argued that the matter had been pending in Court since 2019 amid repeated delays by the Appellant including failing to attend hearings and seeking unending adjournments.
10. Regarding the objection that gave rise to this appeal, the Respondent contended that it was filed in the suit on the night of 23rd July 2024, immediately prior to the hearing scheduled for 22nd July 2024 (sic), with the intention to scuttle the hearing rather than as a genuine jurisdictional challenge. In addition, the

Respondent raised the issue regarding the competence of the appeal itself, expressing doubt as to whether the Appellant had an automatic right of appeal against a ruling on an objection. She maintained that the Appellant had pleaded justification in the suit and that the suit ought to proceed to hearing.

The Submissions:

11. In its written submissions dated 11th February 2025, the Respondent argued that since the impugned order arose from a ruling on a Preliminary Objection, and under Order 43 of the Civil Procedure Rules, then any appeal against it could only be preferred with the leave of Court. It is her case that the Appellant failed to obtain the requisite leave to appeal thereby rendering the appeal incompetent. To buttress her position, she drew support from the case of *Mbaya -vs- Kamau & Another* (Civil Appeal E012 of 2023), where the Court held that any appeal outside what was expressly provided for in the rules required leave of the Court. Similarly, she cited the decision in *Chege -vs- Osidai Limited (Environment & Land Court Appeal E011 of 2024)* [2024] KEELC 1507 (KLR), where it was observed that a party has no automatic right of appeal and must seek leave where the order is not expressly listed as appealable.
12. On the substantive merit of the jurisdiction argument, the Respondent submitted that she was not a client of the Appellant; therefore, the dispute resolution mechanisms under the Advocates Act governing Advocate-Client disputes do not apply to her third-party claim for defamation.

Analysis:

13. From the foregoing discourse, the following issues arise for determination: -
 - i. Whether the appeal is competent.*
 - ii. Depending on (i) above, whether the Trial Magistrate erred in dismissing the objection.*
14. The Court will now deal with the above issues.

[a] Whether the appeal is competent:

15. The competency of this appeal is a threshold issue. It is a challenge on this Court's jurisdiction to entertain the appeal. *Section 75 of the Civil Procedure Act* provides that an appeal shall lie as of right from specific orders listed therein, and from any other order with the leave of the Court.
16. *Order 43 Rule 1 of the Civil Procedure Rules* provides a comprehensive list of orders from which an appeal lies as of right. A ruling dismissing a Preliminary Objection is not a final decree but an interlocutory order. A perusal of *Order 43 Rule 1* confirms that an order dismissing a Preliminary Objection is not listed as an order appealable as of right. The Respondent relied on the decision in ***Mbaya -vs- Kamau & Another*** [2023] KEHC 24945 (KLR). In that case, the Court held thus: -

.... Where a preliminary issue alleging misjoinder, limitation, lack of jurisdiction or res judicata fails... no preliminary decree arises... the unsuccessful party has a right of appeal with leave and accordingly the appeal was incompetent for want of leave.

17. *Order 43 Rule 2* explicitly states as under: -

An appeal shall lie with the leave of the Court from any other order made under these Rules.

18. In the instant case, the Appellant has preferred this appeal against the dismissal of his Preliminary Objection. There is no evidence on record, that leave to appeal was sought or obtained from the trial Court or this Court prior to filing the appeal. As held in ***Peter Nyaga Muvake -vs- Joseph Mutunga*** (2015) eKLR a decision cited within the case in *Chege -vs- Osidai* (supra) the procurement of leave is a *sine qua non* to the lodging of the notice of appeal where no automatic right exists. Without leave, there is no valid appeal, and the jurisdiction of this Court is not properly invoked.
19. With the foregoing, this Court finds and hold that the failure to seek leave was fatal to the Appellant's case. As such, the appeal is incompetent and is for rejection.

20. Having so found, this Court finds no basis in dealing with the next issue and hereby brings this appeal to an end.

Disposition:

21. Drawing from the above conclusions, the following final orders hereby issue: -

[a] The appeal is hereby struck out with costs.

[b] The suit in *Milimani CMCC No. 8810 of 2019* shall forthwith proceed for hearing and determination before the trial Court.

[c] Costs of this appeal to the Respondent.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 20th day of February, 2026.

**A. C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

No appearance for the Appellant.

Mr. Mushindi, Learned Counsel for the Respondent.

Michael/Amina - Court Assistants.