

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CIVIL APPEAL NO.E103 OF 2023**

**UAP                    INSURANCE                    CO.                    LTD.....**  
**.....APPELLANT**  
**-VERSUS-**  
**ABEID RAMADHAN.....RESPONDENT**

**JUDGMENT**

1. This appeal arises out of a ruling delivered in the Mombasa Chief Magistrate’s Court Civil Suit No. 256 of 2022 (Hon. D.O. Mbeja, (Principal Magistrate) on 22 December 2022. The ruling was on the appellant’s preliminary objection, objecting to the hearing of the respondent’s declaratory suit against the appellant.
2. The respondent had previously obtained judgment against the appellant’s insured in a material damage claim. According to the court’s ruling, the appellant’s objection to the suit was based on the ground that the suit offended the provisions of section 5(b) and 10(1) of the Insurance (Motor vehicles Third Party Risks) Act, cap 405.
3. In a nutshell, it was the appellant’s contention that the primary suit, being a material damage claim, was not covered under those provisions of the law and therefore the declaratory suit was unsustainable. The magistrate’s court was not persuaded by the appellant’s position; the preliminary objection was overruled.

4. Being dissatisfied with the court’s ruling, the appellant appealed to this Honourable Court. In the memorandum of appeal dated 3 May 2023, it has raised the following grounds against the learned magistrate’s ruling:

***“1.The Honorable Trial Magistrate erred in law and fact by misinterpreting the clear provisions of Section 5 (b) read together with Section 10 of the Insurance Third Party Risks Act Cap 405;***

***2. The Honorable Trial Magistrate erred in law and fact by misdirecting himself as to the principles laid down on preliminary Objections;***

***3.The Honorable Trial Magistrate erred in law and fact by failing to consider the Appellant's submissions and the cited decided Authorities';***

***4.The Honourable Trial Magistrate erred in law and fact by finding that the Appellant's Preliminary Objection was devoid of merit;***

***5. The Honourable Trial Magistrate erred in law and fact when he relied on wrong principles to arrive at wrong conclusions;***

5. The court directed parties to file written submissions; the means through which the appeal was to be disposed of. Although counsel for the appellant informed the court on 7 July 2025 that parties had complied and

filed written submissions, I have not found submissions for the appellant on the court tracking system portal.

6. The respondent has, on his part, raised two issues in his submissions one of which I find pertinent in the disposal of this appeal *in limine*. The respondent has submitted that the appeal was filed without leave of the court and, thus, it is an incompetent appeal. Section 75 of the Civil Procedure Act, cap. 21 stipulates orders from which an appeal lies as of right; it states as follows:

***75. Orders from which appeal lies***

***(1) 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—***

***(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;***

***(b) an order on an award stated in the form of a special case;***

***(c) an order modifying or correcting an award;***

***(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;***

*(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;*

*(f) an order under section 64;*

*(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;*

*(h) any order made under rules from which an appeal is expressly allowed by rules.(2) No appeal shall lie from any order passed in appeal under this section.*

7. It is clear that an order upholding or overruling a preliminary objection is not among the orders from which an appeal arises as of right. A party aggrieved by such an order is enjoined to seek leave before filing an appeal.
8. Order 43 of the Civil Procedure Rules also prescribes specific rules from which an appeal arises as of right; that is, appeals from orders made under those specific rules of the civil procedure. A preliminary objection does not fall under any of those rules, in which event, under Order 43 rule 1(2), leave of the court is mandatory and ought to be obtained before filing suit. This rule reads as follows:

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

9. Sub-rule (3) prescribes how and when the application for leave should be made; it reads as follows:

***(3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.***

10. I have read the record of the proceedings in the magistrate's court; nowhere in those proceedings did the appellant seek leave, in any manner prescribed or at all, to file an appeal.

11. The appellant made an application to this Honourable Court for leave to file the appeal out of time; an application for extension of time to file an appeal outside the period prescribed by the law and the rules. That application cannot be assumed to be an application for leave to file an appeal as contemplated under section 75 of the Civil Procedure Act and order 43 Rule 1 (2) of the Civil Procedure Rules. In the absence of leave to appeal, the order extending time to file the appeal would be of no consequence. In any event, it has been noted that the application for leave is filed, in the first instance, in the court making the order.

12. Order 42 Rule 13 (4) of the Civil Procedure Rules provides that among the documents which must be filed in the record of appeal are the order appealed from and where, as in this case, leave is required to file the appeal, the order granting leave. The rule reads as follows:

*(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—(a) the memorandum of appeal;*

*(b) the pleadings;*

*(c) the notes of the trial magistrate made at the hearing;*

*(d) the transcript of any official shorthand, typist notes electronic recording or palantypist*

*notes made at the hearing;*

*(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;*

*(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:*

*Provided that—*

*(i) a translation into English shall be provided of any document not in that language;*

*(ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f). (Emphasis added).*

13. The order appealed from is not part of the record of appeal; neither is the order granting leave, for the obvious reason that the appellant did not seek leave, in the first place. Under order 42 rule 13(4) (f)(ii) of the rules, these documents are mandatory and cannot be dispensed with; without them the record is incomplete.

14. In the absence of leave to appeal; and, without the order appealed against, this appeal is incompetent and fatally defective. It is hereby struck out with costs to the respondent. It is so ordered.

**Signed, dated and circulated on the CTS on 27 February 2026**

Ngaah Jairus  
**JUDGE**