



REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
THIKA**

ELCLA NO. E61'B' OF 2024

**FRANCIS MURIU KANJA.....1ST
APPELLANT**

**MARYLYN DOREEN MURIU.....2ND
APPELLANT**

VERSUS

**CATHERINE KANYI WANYOIKE.....1ST
RESPONDENT**

**BERNADETTE WAMBUI WANYOIKE.....2ND
RESPONDENT**

**THE CHIEF LAND REGISTRAR.....3RD
RESPONDENT**

RULING

1. The 1st and 2nd Respondents herein have filed a Preliminary Objection to this Appeal stating that they shall move this Honorable Court at the hearing thereof to have the Appeal struck out on the following grounds:

a. THAT the Appeal is wholly defective and a non-starter as it offends the mandatory provisions of Section 75 of the Civil Procedure Act (Cap 21,

Laws of Kenya) read with Order 43 Rule 1(2) of the Civil Procedure Rules, 2010 Laws of Kenya.

b. THAT this Honorable Court lacks jurisdiction to hear and determine the instant Appeal insofar as the Appeal offends the mandatory provisions of Article 162 (2) (b) of the Constitution of Kenya, 2010; Section 13 (1) of the Environment and Land Court Act (Chapter 12A, Laws of Kenya); and Section 101 of the Land Registration Act (Chapter 300, Laws of Kenya).

c. Therefore, the Applicant prays that the Appeal be dismissed with costs to the Respondents.

2. My perusal of the records did not come up with a response from the Respondents although they filed their written submissions.
3. In support of the Preliminary Objection, the 1st and 2nd Respondents filed their submissions dated 10/07/2025 and they reiterate that their Preliminary Objection dated 3/05/2024 seeks to have the Appeal struck out on the grounds that it is incompetent, defective, and filed without the requisite jurisdiction.
4. The Respondents submit that the legal foundation of this Objection rests on the mandatory provisions of **Section 75** of the **Civil Procedure Act (Chapter 21)** as read with

Order 43 Rules 1 and 2 of the Civil Procedure Rules, 2010.

5. The gist of the Respondents' contention is that the orders being challenged in this Appeal are not among those listed under **Section 75(1) of the Civil Procedure Act** or **Order 43 Rule 1** of the **Civil Procedure Rules** from which an Appeal lies as a matter of right. Consequently, the Appellants were strictly required to seek and obtain leave from either the trial Court or this Court before lodging the Appeal.
6. According to the Respondents, they stated that in the Subordinate Court, the Appellants sought orders for specific performance and mesne profits under **Order 21 Rule 13(a) & (b)**. That the trial Court's refusal to grant these orders resulted in the instant Appeal. The Respondents maintain that since these orders fall outside the categories Appealable as of right under **Order 43**, the procurement of leave is a *sine qua non* meaning it is an indispensable condition for the commencement of any valid appellate process.
7. The Respondents contend that without leave, there can be no valid Notice of Appeal. In the absence of a valid notice, the jurisdiction of this Court is not properly invoked. To support this position, the Respondents rely on the case of **Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR** where the Court of Appeal held that where leave is required

by dint of **Section 75** of the **Civil Procedure Act**, an Appeal filed without such leave has no chance of succeeding. The Court further clarified that the procurement of leave is a prerequisite to the lodging of a Notice of Appeal; without it, the Appellate Court lacks the jurisdiction to entertain the matter.

8. Further, in the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR** the Court of Appeal emphasized that the right to Appeal is a matter of jurisdiction and not a mere procedural technicality. The Court held that **Article 159(2)(d)** of the Constitution which directs Courts to administer justice without undue regard to technicalities is not a panacea or general whitewash that cures fundamental jurisdictional defaults.
9. In view of the foregoing, the Respondents submit that the failure to obtain leave goes to the very root of the Appeal's substantive validity. As the defect is jurisdictional rather than procedural, the Appeal is incurably defective and ought to be struck out with costs.
10. On their part and in response, the Appellants filed Submissions dated 23/11/2025 and contested the Preliminary Objection (PO) raised by the 1st and 2nd Respondents, asserting that the Objection is fundamentally flawed both in law and on the available facts.

11. The Appellants contend that no Record of Appeal has been lodged before this Court. Consequently, there are no lower Court proceedings available for perusal to determine whether an application for leave to Appeal was necessary, whether such leave was sought, or the merits thereof. The Respondents have failed to provide any evidentiary basis for their assertion that leave was a prerequisite.
12. It is the Appellants' primary submission that the Appeal emanates from a Judgment delivered by the lower Court. Under **Section 65** of the **Civil Procedure Act**, such an Appeal originates as a matter of right. The Appellants argue that the Respondents' reliance on **Section 75** of the **Civil Procedure Act** is misplaced, as that provision specifically governs Appeals from orders made by Subordinate Courts, rather than final Judgments.
13. Further, the Appellants submit that the Respondents' Objection does not meet the strict criteria for a Preliminary Objection as established in the *locus classicus* of **Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696**. In that case, the Court defined a Preliminary Objection as follows:

"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 an exercise of judicial discretion."

14. Given that the parties are in dispute regarding the necessity of leave and the factual existence of lower Court records, the Appellants argue that the matter is not a pure point of law. Since the Court would be required to ascertain facts and exercise judicial discretion, the Objection falls outside the ambit of the **Mukisa Biscuit** rule.
15. The Appellants maintain that the Preliminary Objection is an abuse of the Court process and lacks merit. Accordingly, the Court is urged to dismiss the Objection *ex debito justitiae*.

Analysis and Determination

16. The Preliminary Objection raised by the 1st and 2nd Respondents invites this Court to determine whether the Appeal is incurably defective for want of leave and whether the Court's jurisdiction has been properly invoked.
17. The legal standing and sustainability of a Preliminary Objection are anchored on the principles established in the landmark decision in East African law **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. A valid Objection must raise a pure point of law and proceed on the assumption that the facts pleaded by the opposing party are correct. It must not require the

Court to ascertain facts or delve into the exercise of judicial discretion.

18. In the instant case, the Appellants contend that the Objection falls outside this ambit because it necessitates a factual inquiry into whether the decision appealed from is a Judgment which is appealable as of right or an order that is appealable only with leave. However, jurisdiction is a threshold issue of law. If the statutory path for invoking the Court's jurisdiction was not followed, the matter remains a question of legal competence rather than factual contestation.
19. The right of Appeal is a creature of statute; it does not exist in a vacuum. Under **Section 65** of the **Civil Procedure Act**, Appeals from a Decree/Judgment of a Subordinate Court lie as a matter of right. Conversely, **Section 75** of the **Civil Procedure Act**, as read with **Order 43 Rule 1** of the **Civil Procedure Rules**, specifies the limited categories of orders appealable as of right. For any order not listed therein, **Order 43 Rule 1(2)** mandates that leave must be obtained from the trial Court or the High Court/Environment and Land Court.
20. The Respondents have identified that the Appellants' suit sought specific performance and mesne profits, and the Appeal arises from the Court's refusal to grant those specific prayers. While the Appellants characterize this as a

Judgment, the legal nature of a decision is determined by its substance. If the decision resolved a specific application rather than the entire suit, it constitutes an order requiring leave.

21. Jurisdiction is the lifeblood of judicial proceedings. As held in **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others [2013] eKLR**, the lack of a statutory donation of power cannot be brushed aside as a procedural technicality. **Article 159(2)(d)** of the Constitution cannot be used to confer jurisdiction where a mandatory statutory prerequisite such as obtaining leave has been ignored.

22. The Court of Appeal in **Peter Nyaga Muvake v Joseph Mutunga [2015] eKLR** was emphatic that where leave is required, it is a *sine qua non*. Without leave, there is no valid Notice of Appeal, and without a valid Notice of Appeal, the Appellate Court is not seized of the matter. The absence of the Record of Appeal at this stage, as pointed out by the Appellants, does not cure the defect; rather, it underscores the lack of a proper foundation for the Appeal. If the Appellants intended to Appeal against an interlocutory refusal of specific performance, the failure to move the Court for leave is fatal to the competence of the Appeal.

Final Orders

23. Having considered the Preliminary Objection, the rival submissions, and the cited authorities, this Court finds that

the Objection is well-founded in law. The Appellants have failed to demonstrate that they obtained the requisite leave to Appeal against a decision that does not fall within the ambit of Appeals as of right under **Order 43**.

24. Accordingly, the Court makes the following orders:

i) The Preliminary Objection dated 3/05/2024 is hereby upheld.

ii) The Appeal is found to be incompetent and is hereby struck out for want of jurisdiction.

iii) The costs of the Preliminary Objection and the Appeal are awarded to the 1st and 2nd Respondents.

iv) It is so ordered.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIRTUALLY AT THIKA VIA VIDEOLINK THIS 22ND DAY OF APRIL, 2026.

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**MOGENI J
JUDGE**

In the presence of: -

Henry Kamau for the Appellants

Masaviru for the 1st and 2nd Respondents

Melita - Court Assistant

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**MOGENI J
JUDGE**

ORIGINAL