



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KANTAI, J.A. (IN CHAMBERS))

CIVIL APPLICATION NO. 201 OF 2017

BETWEEN

FRANCIS WAKAHU THEURI.....APPELLANT/APPLICANT

VERSUS

MONICAH NJE

ESTHER WANGUI

CATHERINE MUTHONI

FRANCIS NJURU NGUGI

ALL t/a AWAGE INVESTMENT COMPANY.....RESPONDENTS

AND

JOSEPH GITUMA NDEGWA & 29 OTHERS....INTERESTED PARTIES

(Being an application for extension of time to file and serve a record of appeal out of time in an intended appeal from the Ruling and Order of the High Court of Kenya

at Nairobi (Gacheru, J.) dated 24th February, 2017

in

H.C.C.C. No. 2484 of 1994)

RULING

In the motion dated 14th August, 2017 the applicant, **Francis Wakahiu Theuri** prays for extension of time to file and serve record of appeal out of time. When the application came before me on 7th May, 2018 learned counsel for the respondents **Ms Kathungu** brought to my attention a notice of preliminary objection which the respondents had filed on 4th May, 2018.

The notice of preliminary objection is to the effect that:

“1. The application on which the proposed appeal was premised was grounded on Order 51 of the Civil Procedure Rules and under Order 43 of the Civil Procedure Rules, 2010, the applicant was required to seek leave of the High Court to file the proposed appeal.

2. The Applicant did not seek leave of the High Court to file the proposed Appeal against the Ruling of Honourable Justice L.

Gacheru delivered on 24th February, 2017.

3. The Applicant's Application dated 14th August 2017 and the proposed appeal are therefore fatally defective and incompetent for being in contravention of Order 43 Rule 2 of the Civil Procedure Rules 2010 and Rule 39 of the Court of Appeal Rules and the application should be dismissed and/or struck out with costs."

I requested learned counsel to have the objection taken within the motion but counsel was of a different view and wished to be heard on the same. In submissions made in support of the preliminary objection learned counsel informed me that the applicant did not make an application in the High Court for leave to appeal. According to counsel the initial application was made and brought under **rule 51 and 43** of the **Civil Procedure Rules** which according to counsel do not donate an automatic right of appeal. Learned counsel relied on the grounds set

out on the face of the preliminary objection and urged me to allow the same.

Mr. Samuel Kihara Ndiba who appeared with **Ms Judy Gichumbi** for the applicant opposed the objection pointing out the same was premature. He asked me to dismiss the same.

In the famous case of **MUKISA BISCUIT MANUFACTURING CO. LTD VS. WEST END DISTRIBUTORS LTD, [1969] E.A. 696** it was held by Sir Charles Newbold, P. that:

"..... 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 exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice must stop."

There was no replying affidavit to the motion and I do not have facts on what transpired in the High Court.

The material before me does not disclose whether leave was sought or not. I do not therefore believe that the preliminary objection taken is deserving as I cannot discern a pure point of law without any material being placed before me. In the premises the preliminary objection fails and I dismiss it with costs to the respondents.

The notice of motion will be listed for hearing in the usual way.

Dated and delivered at Nairobi this 8th day of June, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR