IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI, & SICHALE, JJ.A.)

CIVIL APPLICATION NO.135 OF 2015

BETWEEN

DR. JOHN RITHO KANOGO.....1ST APPLICANT/RESPONDENT

DR. GEOFFREY AVUGWI RITHO.....2ND APPLICANT/RESPONDENT

MARGARET RITHO.....3RD APPLICANT/RESPONDENT

AND

JOSEPH NGUGI .....1ST RESPONDENT/ APPELLANT

THE STANDARD GROUP LIMITED.....2ND RESPONDENT APPELLANT

(An application to strike out Civil Appeal No.135 of 2015 from decision of the High Court of Kenya at Nairobi (Onyancha, J) dated and delivered on the 24th day of March 2015 at Nairobi

in

H.C.C.C NO. 589 OF 2012*)*

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RULING OF THE COURT

1. Messrs John Ritho Kanogo, Geoffrey Arugwi Ritho and Margaret Ritho (hereinafter referred to as **"the applicants")** filed suit No.589 of 2012 in the High Court of Kenya at Milimani Commercial Courts in Nairobi on 13th December 2012 against Joseph Ngugi, a journalist employed by the Standard Group Limited and the latter (both of whom are hereinafter referred to as **"the respondents"**) alleging that respondents libeled them in an article published on 13th December 2011 in the Standard Newspaper. The particulars of the libel are not material to this ruling. Suffice it to state that interlocutory judgment was entered against the respondents by the Deputy Registrar on 8th April 2014, a week before the respondents filed their defence. The respondents filed a Notice of Preliminary objection contending that the High Court lacked jurisdiction to hear the suit by virtue of Article 34 (2) of the Constitution of Kenya 2010. The Article enshrines the freedom of the media but does not extend to freedom of expression enshrined in Article 33 of the Constitution. The High Court found the Preliminary Objection unmerited and dismissed it on 24th March 2015 paving way for the formal hearing of the suit.

2. Undeterred, the respondents lodged on 24th May 2015 in this court an interlocutory civil appeal

No.135 of 2015 following their notice of appeal under rule 75 of this Court's Rules. They contend in the appeal that the High Court judge erred in his ruling and decision in dismissing the Preliminary Objection.

3. The applicants on the other hand lodged in this court on 24th June 2015 in the said appeal an application by way of notice of motion dated 19th June 2015 seeking an order that the appeal No.135 of 2015 be struck out on the grounds that the respondents had no automatic right of appeal to this court against the decision of the High Court on the preliminary objection; that the appeal is incompetent; that leave of the High Court or of this court to lodge the appeal was required in law and that it was not sought and obtained; and that the interest of justice demands that the appeal be struck out.

4. When the application came up for hearing, the parties through their counsel made submissions. The respondents contended that the appeal had merit while the applicants contended that the appeal was incompetent for the reasons stated in the application for striking out.

5. We have perused the application and the record of appeal and have duly considered the submissions made by the parties. If there is a competent appeal, it is desirable that it is determined on merit. However, if the appeal is incompetent, it will be pointless to set it down for hearing if it will eventually be struck out on grounds of incompetency. For the appeal to be struck out at this stage, a cogent case must be made out showing that the appeal is either a non-starter or is dead in the water.

6. The ground on which the appeal is said to be incompetent is that leave of the High Court or of this court to appeal the impugned ruling was not sought and obtained. Was such leave required in law and if so under what provision of the law? If such leave was required, what is the legal consequence of not obtaining it?

7. For starters, the Preliminary Objection by the appellants which the High Court dismissed was on a point of law. It was said in 1969 in the case of **Mukisa Biscuit Co. versus West End Industries** [1969] EA 696 that-

> ***"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 may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

8. Per law, J.A... Newbold P. opined 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 the 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 should stop...***

9. In this application, the High Court dismissed the Preliminary Objection raised by the respondents. As a result, we now have an interlocutory appeal against that decision while the suit instituted by the applicants is still pending in the High Court for formal hearing.

10. Section 66 of the Civil Procedure Act provides that an appeal lies to this court from the decree or part of a decree of the High Court and from orders of the High Court. Under section 75 of the Civil Procedure Act, an appeal lies as of right from the orders referred to in (a) to (h) in the said section and also lies 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. The order by the High Court made on 24th March 2012 dismissing the Preliminary Objection was predicated on Article 34 of the Constitution which is not one of the orders referred to in subparagraphs (a) to (h) of Section 75 (supra). Section 75 of the Civil Procedure shows that appeals to this court are allowed from orders of the High Court, some without need for leave to appeal as they are

said to be appealable as of right and others with leave either of the High Court or of this Court. Where an appeal lies with leave, the effect of not obtaining such leave is to render such appeal incompetent for the simple reason that if leave is not sought and obtained, no appeal would lie. In effect, it is the grant of leave that crystallizes the right of appeal.

11. As the order appealed from required leave and as the exercise of the right of appeal did not crystallise in absence of such leave, it seems clear to us that the contention that leave to appeal was not required does not hold good.

12. The object of leave where an order is not appealable as of right under the rules is to enable the court to determine whether the intended appeal is frivolous, or is bound to frustrate dispensation of justice or to delay proceedings unreasonably or amounts to an abuse of the court process. Normally, leave may be denied where the order sought to be appealed against is not final or conclusive and where parties will have opportunity during the trial or hearing to address the issues in the order.

13. As we have stated above, the fact that no leave was obtained to appeal against the impugned order renders the appeal incompetent. That sums up pretty much the crux of our decision.

14. In the result, we find merit in the application which we hereby allow and strike the appeal with costs.

Dated and delivered at Nairobi this *24th day of March, 2017*.

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR