



**Reli Farm Fresh Limited v Maersk Kenya Limited & another (Civil Appeal E118 of 2022)
[2023] KEHC 2481 (KLR) (Commercial and Tax) (27 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E118 OF 2022
PN GICHOHI, J
MARCH 27, 2023**

BETWEEN

RELI FARM FRESH LIMITED APPELLANT

AND

MAERSK KENYA LIMITED 1ST RESPONDENT

MADS SKOV HANSEN 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon. A. N. Makau (Principal Magistrate),
delivered on 29th July 2022 in MCCOMMSU No. E 1325 OF 20221 Milimani Nairobi)*

RULING

1. The background of this ruling is that appellant herein sued the respondents in suit filed in the Magistrates Court . Upon being served, the respondents entered appearance and filed a preliminary objection dated October 24, 2021.
2. The grounds that the dispute between the parties, as per the contract between the parties, was to be heard and determined exclusively by the English High Court of Justice. The appellant opposed the preliminary objection by filing grounds of opposition.
3. Upon hearing the parties on the said preliminary objection, the learned magistrate upheld the preliminary objection vide ruling dated July 29, 2022 and struck out the appellant’s suit with costs.



4. Aggrieved by the said ruling, the appellant filed a memorandum of appeal dated August 30, 2022 on the grounds;
 1. That the learned trial magistrate erred in law and fact by failing to consider the fact that the 1st and 2nd defendant were not parties to the arbitration agreement as captured in the claim and release letter.
 2. That the learned trial magistrate erred in law and fact in completely misapprehending the principles governing and /or what constitutes a preliminary objection thereby arriving at an erroneous decision with regard to the preliminary objection raised by the 1st and 2nd defendant.
 3. That the Hon Magistrate erred in law and fact by failing to take into account and /or ignoring the plaintiff's submissions.
 4. That the Hon Magistrate erred in law by holding that the preliminary objection was merited and thus proceeding to strike out the plaintiff's suit.
5. Subsequently, the respondents filed the application dated October 5, 2022 through the firm of Oraro & Co Advocates seeking that the appellant's appeal be struck out and the costs of this application and the appeal be borne by the appellant. That application is brought under section 75 and 79 G of the [Civil Procedure Act](#) cap 21 and order 2 rule 15 (1) (d), order 43 and order 51 rule 1 of the [Civil Procedure Rules 2010](#).
6. The grounds are that the ruling and orders of July 29, 2022 were made in relation to jurisdiction of the Magistrates' Court to hear the dispute between the parties and therefore, such an order is not among those from which appeal is automatic under order 43 rules 1 and 2 of the [Civil Procedure Rules](#).
7. That as the appellant did not seek leave to appeal as required under order 43 rule 3 of [Civil Procedure Rules](#) before the Magistrate Court whether orally or by a formal application, the appeal herein is an abuse of court process and ripe for dismissal for want of leave. In support of that application is the affidavit sworn by Natasha Nyakerario Gichuki on October 5, 2022.
8. In reply, Daniel Kimani Munyua swore an affidavit on October 25, 2022 and terms the application herein incompetent and an abuse of the court process for reasons that the appellant did not need leave to appeal. That the preliminary objection that was raised by the respondents sought to have the orders of dismissal of the suit for want of jurisdiction. That the orders striking the suit *vide* the ruling dated July 29, 2022, the orders were final and hence, the appellant did not need leave to appeal.

Submissions

9. The application was canvassed by way of written submissions and on their part, the respondents filed their submissions dated January 23, 2023. Counsel relies on order 43 of the [Civil Procedure Rules](#) and the case of [Moffat Nyaga Kagau & 3 others v Patrick Opundo Owiti t/a Cousin Motor Works & 2 others](#) [2021] eKLR where it was held that order 22 rule 77 under which the 2nd application was filed is not among the orders listed under order 43 rule (1) of the [Civil Procedure Rules](#) where one has an automatic right of appeal.
10. Further, counsel relies on the case of [Kenya Commercial Bank Limited v Kenya Planters Co-Operative Union & 2 others](#) [2011] eKLR where the court held that leave is not automatic as regards appeal emanated from a preliminary objection. Counsel argued that both the preliminary objection and the



ruling were that the suit was filed in the wrong forum. That in the circumstances, no rights were determined between the parties.

11. In reference to the case of *Circuit Business Systems Limited v County Government of Siaya* [2020]eKLR relied on by the appellant, counsel submits that the application therein was filed under order 2 of the *Civil Procedure Rules* which is listed under order 43 rule i and therefore not applicable to this case. Lastly, counsel urges the court to allow the application and strike of the appeal with costs to the respondents.
12. The appellant filed his submissions dated November 24, 2022. Counsel submits that the respondent's application is contradictory for reasons that the respondents are seeking orders to strike out the appeal on the grounds that there was no leave sought from the magistrate. However, the provisions the respondent has cited explicitly provide that no leave is required since the appeal lies as a matter of right from orders under order 2 of the *Civil Procedure Rules*.
13. He therefore submits that the appellant does not require leave of the lower court to appeal against the orders made under order 2 rule 15 (1) of the *Civil Procedure Rules*.
14. Counsel argues that order 43 of the *Civil Procedure Rules* is the procedural order for section 75 of the *Civil Procedure Act* as it provides in rule 1 (1) (b) that "no appeal shall lie as of right from the following orders and rules under provisions of section 75 (1) (h) of the Act...(b) order 2 (pleadings generally)."
15. Counsel therefore submits that when a magistrate strikes out pleadings under order 2 rule 15 (1) of the *Civil Procedure Rules*, an appeal lies as a matter of right. On this issue, counsel relies on the case of *Circuit Business Systems Limited v County Government of Siaya* [2020]eKLR arguing that the court therein dealt with a similar situation involving striking out of a defence. He therefore urges the court to dismiss the respondents' application with costs.

Determination

16. After considering the application, affidavits and the submissions, the issues for determination are;
 1. Whether the appellant required leave to file appeal against the order of striking out the appellants suit.
 2. Whether the memorandum of appeal dated August 30, 2022 should be struck out.
 3. Who should bear the costs.
17. A court may under order 2 rule 15 (1) of the *Civil Procedure Rules* strike out pleadings at any stage of the proceedings. A party aggrieved by the court's order striking out its pleading has recourse in form of appeal.
18. There is no dispute that the appellant did not seek leave from the trial court to file the appeal. So, did he require any leave? order 43 rule 1 provides that ;
 - (1) An appeal shall lie as of right from the following orders and rules under the provisions of section 75 (1) of the Act— (b) order 2 (pleadings generally)
19. Further, section 75 which deals with orders from which appeal lies and provides that (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—
 - (h) any order made under rules from which an appeal is expressly allowed by rules.



20. These provisions are plain and clear and there needs no argument about them. The appellant did not require any leave to appeal the against the order striking out his suit (which is a pleading) in the circumstances herein.
21. The case of *Moffat Nyaga Kagau & 3 others v Patrick Opundo Owiti t/a Cousin Motor Works & 2 others* [2021] eKLR and *Kenya Commercial Bank Limited v Kenya Planters C-Operative Union & 2 others* [2011] eKLR cited by counsel for the respondents are therefore not relevant to the circumstances herein.
22. The case of *Circuit Business Systems Limited v County Government of Siaya* [2020]eKLR cited by counsel for the appellant is relevant to the issue before this court contrary to arguments by counsel for the respondents.
23. In that case, the court dealt with similar circumstances as in this case and having found that under order 43 of the *Civil Procedure Rules* an appeal lay as of right, the court was “persuaded that a defence which was being sought to be struck out was a pleading generally hence the applicant could appeal from an order striking out or refusing to strike out the defence.”
24. It therefore flows from the above provisions of the law that the respondents’ application dated October 5, 2022 is devoid of merit. The same is dismissed with the costs to the appellant.

DATED , SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 27TH DAY OF MARCH , 2023.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms. Ochola for Appellant

Ms Mutua for the Respondents

Kevin Isindu, Court Assistant

