



**Makhatsa v Mutuku (Civil Appeal 28 of 2023)  
[2023] KEHC 26921 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26921 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 28 OF 2023  
FR OLEL, J  
DECEMBER 18, 2023**

**BETWEEN**

**BRANTON MAKHATSA ..... APPELLANT**

**AND**

**RUTH SYOMBUA MUTUKU ..... RESPONDENT**

**RULING**

**A. Introduction**

1. Before court for determination is the preliminary objection dated February 17, 2023 filed by the respondent. She does raise three grounds of objection the bases upon which she seeks to have this appeal dismissed, namely;
  - a. The appellant's application dated February 1, 2023 is fatally defective, bad in law as it offends the provisions of section 38 of the small claims Act No 2 of 2016.
  - b. The application and intended appeal contravene mandatory provisions of the law.
  - c. The appellant's application/appeal is incompetent, barred in law, an abuse of the court process and the same should be dismissed with costs to the applicant.
2. The respondent did file written submissions in support of the said preliminary objection, where she averred that under section 38 of the *Small claims Act* No 2 of 2016 a person aggrieved by the decision or order of the court could only appeal to the high court on matters of law. The appeal filed fell foul of this provision as the appellant had attempted to present factual matters regarding the award of quantum as legal issues in the appeal filed. Further the courts attention was drawn to the case of SCC Civil Suit No E509 of 2022 Joseph Masau Mutunga Vrs Azan Motors & Branton Makhatsa, where a comparable award was given by Hon Luova and the appellants had promptly started to settle the said decree.



3. The respondent/applicant thus urged this court to find that there was no compliance with Section 38 of the small claims Act No 2 of 2016 and the same invalidated the appeal as filed and the application for stay of execution filed therein. The court was urged to strike out the appeal with costs to the respondent.
4. The Appellant/respondent did not file any replying affidavit, grounds of opposition or submissions to oppose the preliminary objection filed.

### **Determination**

5. I have carefully considered the preliminary objection filed to the effect that the appeal filed offends provisions of section 38 of the *Small claims Act* No 2 of 2016 and therefore the court had no jurisdiction to entertain the same. I have also considered the fact that the respondent did not file any response to the said preliminary objection.
6. The case of *Mukisa Biscuits Manufacturing Ltd vrs West End Distributors* (1969) E.A. 696 is notorious on what constitutes a preliminary objection, where the lordships observed thus;

“a preliminary objection consists of points of law which have been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off 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 a contract giving rise to the suit to refer the dispute to arbitration.”

In the same case, Sir Charles Newbold P. further stated 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.”

7. The appellant did file his appeal on 30<sup>th</sup> January 2023, wherein he raised four grounds of appeal majorly dealing with the issue of quantum. It is the appellants argument that the quantum awarded was excessive and the court made an erroneous decision in arriving at the sums awarded. The respondents on the other hand submitted that the grounds of appeal as filed did not touch on any matters of law and thus it would be just and equitable to dismiss the said appeal and application filed for stay of execution.
8. It is trite law that the appellate court can justifiably interfere with quantum of damage's awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factors or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.
9. In so determining if the trial court made an error on its award on quantum, the appellate court obviously will look at both law and facts and such determination cannot solely be based on facts as alleged by the respondent. To that extent the preliminary objection does not raise a not a pure point of law and is dismissed as unmerited.
10. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF DECEMBER 2023.**



**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 18<sup>th</sup> day of December, 2023.**

**In the presence of;**

No appearance for Appellant

Mr. Munyao for Respondent

Susan/Sam Court Assistant

