



**Michori v Okumu (Environment and Land Appeal E001 of 2025)
[2025] KEELC 3389 (KLR) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E001 OF 2025**

CK YANO, J

APRIL 24, 2025

BETWEEN

MARGARET WAMBUI MICHORI APPELLANT

AND

GEORGE W. OKUMU RESPONDENT

RULING

1. The Respondent filed a Notice of Preliminary Objection dated 30th January, 2025, in response to the Notice of Motion dated 22.1.2025.
2. The Notice of Preliminary Objection was raised on the following grounds: -
 - a. That there is no appeal properly filed before this court.
 - b. That consequently, the application dated 22.1.2025 is not grounded on any appeal upon which it can be based upon.
3. The Preliminary Objection was canvassed by way of written submissions. The Appellant/ Applicant filed his submissions dated 24th February, 2025 while the Respondent filed his submissions dated 18th February, 2025, which I have read, considered and taken into account in arriving at my ruling as hereunder.
4. I have noted that the Appellant's submissions are in regard to her Notice of Motion dated 22.1.2025 instead of the Notice of Preliminary Objection dated 30.1.2025 which is the subject of this ruling. Be that as it may, I will proceed with my decision as hereunder.

Respondent's Submissions;

5. Counsel submitted on 4 issues for determination. On the first issue of whether the honourable court has jurisdiction to handle the matter, it was his submission that Order 42 of the *Civil Procedure Rules*



outlines the procedure of appeals from subordinate courts to the high court, including the requirement of filing a memorandum of appeal and the timelines for doing so.

6. It is the respondent's contention that the appellant has not filed any application for leave to appeal out of time despite the fact that the judgment was delivered 10 months ago. Counsel thus asserts that the said failure raises significant jurisdictional concerns and maintained that this court could not entertain the appeal which was not properly before it.
7. The second issue was whether the appellant had demonstrated an arguable case on appeal. It was his submission that the appellant had not demonstrated that she had an arguable appeal. That the trial court judgment delivered on 25.4.2024 was clear, well-reasoned and based on the evidence presented before the court.
8. Further, the respondent submitted that the appellant has not provided any substantive grounds that the judgment was erroneous or that there was reasonable prospect of success on appeal.
9. It was also his contention that the appellant had not filed any application for leave to appeal out of time. That pursuant to section 79G of the *Civil Procedure Act*, an appeal from a subordinate court to the High Court must be filed within 30 days from the date of the decree or order appealed against. That the appellant's failure to seek leave to appeal out of time is a significant procedural oversight that undermines their application for a stay.
10. On the third issue on whether the appellant had acted promptly in seeking a stay, it was the respondent's submission that the appellant failed to act promptly. That whereas the judgment was delivered on 25.4.2024, the appellant waited until 22.1.2025 to file their present application. He maintained that the delay of 9 months is inexcusable and demonstrates a lack of urgency or seriousness in pursuing her case.
11. The last issue was whether the grant of stay would prejudice the respondent. Counsel submitted that a grant of stay would cause significant prejudice to the respondent, who has been successful in the substantive matter and is entitled to the fruits of the judgment.
12. It was added that the respondent had a legitimate expectation that the judgment will be enforced without undue delay and averred that he has already executed the same to the end.
13. In conclusion, the respondent maintained that the appellant has not complied with the necessary procedural requirements which are essential for the court to exercise its jurisdiction effectively. He thus urged the court to dismiss the appellant's application for stay of execution with costs.

Analysis and Determination;

14. It is my considered opinion that the issues arising for determination are:-
 - i. Whether the Notice of Preliminary Objection dated 30th January, 2025 meets the threshold of what amounts to a Preliminary Objection.
 - ii. Whether the Preliminary Objection is merited.
 - iii. Costs



i. Whether the Notice of Preliminary Objection dated 30th January, 2025 meets the threshold of what amounts to a Preliminary Objection;

15. It is well settled that a Preliminary Objection can only be raised on a pure point of law, which is argued on the assumption that there is no contest as to the facts. In the celebrated case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* 1969 E.A. 696, the Court held 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 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.”
16. This position was reiterated by the Supreme Court in the case of *Aviation & Allied Workers Union v Kenya Airways Ltd & 3 Others*, Application No. 50 of 2014 [2015] eKLR where it was held as follows;
- “Thus, a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
17. I have carefully considered the grounds in the preliminary objection as well as the respondent’s submissions thereto. In my considered view the same are marred with factual issues touching on whether or not a memorandum of appeal had been filed, whether leave to file the appeal out of time had been sought and whether the procedural timelines had been complied with. These are not only contested facts which may need to be ascertained but may also require the exercise of judicial discretion.
18. The issues for determination as framed and analyzed by the respondent in his submissions all touch on factual issues which require the probing of evidence. I must state that even though the respondent maintained that there was no Memorandum of Appeal on record or that no application for leave to file the appeal out of time and seek the orders for stay of execution was sought, from a perusal of the court record, there is a Memorandum of Appeal dated 22.1.2025 and the payment receipt thereof.
19. I do also note that from the Notice of Motion Application evenly dated at prayer 3 therein, is a prayer seeking the extension of time to appeal against the judgment in *Eldoret Chief Magistrate’s Court ELC No. E002 of 2021* and the memorandum of appeal filed be deemed validated by the grant of the extension of time. All these are issues which require the exercise of this court’s discretion and are not therefore pure points of law.
20. Further, the said issues can sufficiently be canvassed on merit at the hearing and determination of the Notice of Motion Application dated 22nd January, 2025.
21. In *Oraro v Mbaja* [2005] 1KLR 141, the court held as follows: -
- “Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.
22. In conclusion, it is the finding of this court that the grounds of the preliminary objection herein do not fall within the ambit of what amounts to a pure point of law for the reasons outlined above and are hereby dismissed.



Costs:

23. Pursuant to the proviso to section 27 of the *Civil Procedure Act*, the general rule is that costs shall follow the event. In this case, having held that the notice of Preliminary Objection is not merited I find that the Appellant is entitled to the costs.
24. In the upshot, I accordingly find that the Notice of Preliminary Objection dated 30th January, 2025 is not merited and is hereby dismissed with costs to the Appellant/Applicant.
25. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF APRIL, 2025.

HON. C. K. YANO

JUDGE

Ruling delivered in the presence of: -

Mr. Mogambi holding for Mr. Wambua Kigamwa for the Appellant

Dr. Chebii for the Respondent

Court Assistant – Laban

