



**Odinga v Co-operative Bank of Kenya (Civil Appeal E008 of 2024)  
[2025] KEHC 6886 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6886 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAROK  
CIVIL APPEAL E008 OF 2024  
CM KARIUKI, J  
MAY 22, 2025**

**BETWEEN**

**EVANS MUNYORE ODINGA ..... APPELLANT**

**AND**

**CO-OPERATIVE BANK OF KENYA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. H.M. Nyaberi (C. M.) delivered on 16/01/2024 in Narok CMCC NO.154 OF 2016)*

**JUDGMENT**

1. This appeal challenges the judgment of the Chief Magistrate’s Court at Narok in Civil Suit No.154 of 2016, delivered on 16/01/2024, in which the trial court arrived at the conclusion that the appellant had failed to prove his case on a balance of probability and consequently dismissed the same with costs to the respondent.
2. The appellant, aggrieved with the decision, filed a memorandum of appeal dated 16/02/2024. he cited 9 grounds of appeal as follows;
  1. The learned magistrate erred in law and fact in failing to appreciate that the respondent violated its fiduciary duty by denying the appellant access to his account status.
  2. The learned magistrate erred in law and fact in failing to take into account that the violation of the respondent’s fiduciary duty left the appellant unable to fully settle the loan or comprehend why the respondent dispatched its agents.
  3. The learned magistrate misdirected himself by failing to appreciate the evidence tendered by the appellant, which demonstrated that, as at the time of being served with the proclamation notice, the appellant was up to date with his loan repayment.



4. The learned magistrate misdirected himself by failing to sufficiently address himself to the principles espoused in section 44 of the *Civil Procedure Act* and hence misdirected himself in the exercise of his discretion.
  5. The learned magistrate erred in law and fact by ignoring and disregarding the appellant's evidence, which demonstrated that he suffered loss on account of the respondent's action of carting away his tools of trade and customer goods.
  6. The learned magistrate erred in law and fact in holding that the respondent's proclamation and attachment were lawful.
  7. The learned magistrate erred in law and fact by completely considering irrelevant matters in his decision and ignoring the relevant issues canvassed before him, and therefore, he came to a wrong decision/conclusion.
  8. The learned magistrate erred in law and fact in failing to find that the appellant had specifically proven all the special damages that he had pleaded.
  9. The learned magistrate erred in law and fact in failing to find that the appellant had proven his case on a balance of probabilities.
3. The respondent filed a notice of preliminary objection dated 25/06/2024. The respondent raised the following grounds;
1. The appellant's appeal herein is defective and bad in law, and as such, the appeal contravenes mandatory provisions of the Civil Procedure Rules 2010.
  2. That the continued pendency of the appeal herein is an abuse of the process of this honourable court.
  3. That the appellant's appeal is misconceived, misdirected, and misled, and therefore the prayers sought cannot stand in law.
  4. That this appeal is incompetent and should be struck out with costs to the respondent.

#### **Directions of the court.**

4. The preliminary objection and appeal were canvassed by way of written submissions.

#### **The Appellant's Submissions.**

5. The appellant submitted that the respondent was in breach of its fiduciary duty when it denied the appellant access to his bank statement to enable him to know what amount was due and owing and whether the sums paid by the guarantors covered the money being owed. The appellant relied on the black's Law Dictionary, 11<sup>th</sup> edition, *Karanja V Family Bank Limited & Another (Commercial Case E274 of 2020) [2023] KEHC 2215*, *Eunice Wairimu Muturi & Another Vs James Maina Thuku & Another [2018] eKLR*, and *Foley Vs Hill (1848)*.
6. The appellant submitted that the proclamation was in bad faith and not lawful because, despite the pending loan being deducted from the guarantor, the respondent failed to acknowledge this and proceeded to issue a proclamation of the appellant's tools of trade.
7. The appellant submitted that the trial court misdirected itself by finding no fault in the respondent's agents' action of carting away the appellant's tools of trade in contravention of section 44(1)(ii) of the *Civil Procedure Act*. The appellant relied on *Jonathan Wepukhuli T/A Gati Cleaning Agency Limited*



Vs Julius Odhiambo Oduor [2019] eKLR, and Victoria Pumps Limited Vs Kenya Ports Authority & 4 Others [2015] eKLR

8. The appellant submitted that the carting away of his goods including his tools of trade and customer equipment by Sonjomu auctioneers as the respondent's agents caused the appellant loss of income, loss of business, loss of reputation, potential lawsuit for recovery of the goods left in his possession and loss of trained staff. The appellant relied on Charles Oriwo Odeyo Vs Appollo Justus Andabwa & Another.
9. The appellant urged this court to find that the appellant incurred special damages due to the respondent's breach of fiduciary duty, and do set aside the judgment of the trial court and award the appellant special damages. The Appellant relied on Clerk & Lindsell On Torts (11<sup>th</sup> Edn), Page 165,
10. The appellant submitted that the PO before this court does not meet the prerequisites of a preliminary objection as it is founded on issues of fact and not law. The appellant relied on Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd[1969] EA 696, Brownstone Agencies; Td & Another V County Government Of Bomet & Another [2022] Eklr, David Karobia Kiiru V Charles Nderitu Gitoi & Another [2008] Eklr, Oraro Vs Mbaja [2005] 1klr 141
11. The appellant submitted that there was no delay as the same was filed within the 30-day period as provided by the law.
12. The appellant submitted that the decree is on page 664B of the record of appeal.
13. The appellant submitted that on 23/05/2024, the Hon. The deputy registrar gave the parties a date to appear before the Hon. Judge for further directions on the appeal, thereby in essence certifying the same ready for hearing. Therefore, the same would not have been done if the court had not examined and confirmed the same as being ready. If there was any administrative oversight, the appellant should not bear that burden

#### **The respondent's submissions.**

14. The respondent submitted that this appeal was filed out of time and no sufficient and valid reasons were given to this court as to why the same was not filed within the prescribed time, nor prove that an application for leave to file the same out of time was made. Therefore, the appeal should be dismissed for being utterly defective. The respondent relied on section 79G of the [Civil Procedure Act](#)
15. The respondent submitted that the appellant failed to extract a decree from the judgment passed by the subordinate court on 16/01/2024. The respondent relied on Family Bank Limited Vs Paul Ojigo Omanga (HCCA No. 104 of 2019).
16. The respondent submitted that the terms of the letter of offer and the appellant's admission of indebtedness cannot logically and reasonably be said that the attachment of the said goods was unlawful in the circumstances. Therefore, the respondent was just exercising its legal right of attachment as contracted with the appellant in a letter of offer. The respondent relied on National Industrial Credit Bank Limited Vs S.K. Ndegwa Auctioneer [2005] eKLR, and Sections 65-67 Of The Moveable Properties Securities Act of 2017
17. The respondent submitted that the appellant ought to have lodged a complaint before the auctioneers' board who would have made a finding touching on the conduct of the auctioneer and later file a restitution suit. The respondent relied on Napoleon W Murende Vs Moly Credit Limited & Another [2020] eKLR, and sections 4 and 24 of the [Auctioneers Act](#),
18. The respondent submitted that the appellant did not prove his case on a balance of probabilities on the premise that he had defaulted on his loan, prompting the said auctioneers to seize his property



in an auction for the respondent to recover its debts. Therefore, the appellant should not be awarded special damages. The respondent relied on Hahn V Singh (1985) KLR 716, and Wakim Soda Limited V Sammy Aritos [2017] eKLR.

19. The respondent submitted that the merits of this case do not meet the threshold to warrant allowing the appeal. The respondent relied on Miller V Minister of Pensions 1947 All ER 372, Hezron Githau v James Kagiri (JC.A No. 314 Of 2023

### **Analysis And Determination.**

20. I have considered the record of appeal, the notice of preliminary objection, and the respective parties' written submissions. The main issues that fall for determination are;
- i. Whether the preliminary objection is merited.
  - ii. Whether the appeal is merited.

### **Whether the preliminary objection is merited.**

21. On whether the decree was extracted, this court has perused the record of appeal and noted that the decree was extracted as seen at page 664 B.
22. On whether the appeal was filed within the prescribed time, Section 79G of the *Civil Procedure Act* states: -

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

23. The trial court delivered its judgment on 16/01/2024. The memorandum of appeal was filed on 16/02/2024. The 30 days expired on 15/02/2024. This court takes judicial notice that the month of January has 31 days. The appeal herein was filed 31 days after the delivery of the judgment. The appellant has not given an explanation for the one-day delay in filing the appeal.
24. In Kenya Railways Corporation v. Quicklubes E.A. Limited [2015] eKLR, the court held that:
- “It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal.... A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercised.”
25. In this regard, it is my view that timelines and timeliness contribute to fair administration of justice, and a good appeal remains just that unless the same is filed within the prescribed period.
26. The fact that an appeal is arguable cannot supersede the onus placed on an applicant to give plausible reasons for the delay. Without a satisfactory explanation for the delay, an arguable appeal does not result



in a perfunctory extension of time. To this end, the words in *Reliance Bank Ltd (In Liquidation) v. Grandways Ventures Ltd & 2 others* [2007] eKLR ring a bell thus:

“It may well be that the Applicant has a good appeal but even good appeals must be filed within the prescribed periods and when that is not done, some explanation must be given in explanation of the delay.”

27. In the circumstances, the notice of preliminary objection dated 25/06/2024 is merited. The court therefore makes the orders.

i. The appeal is struck out with costs to the respondent.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,  
THIS 22<sup>ND</sup> DAY OF MAY, 2025**

**CHARLES KARIUKI**

**JUDGE**

