



**Odingo v Faulu Micro Finance Bank (Civil Appeal E004 of 2024)  
[2024] KEHC 78 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 78 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E004 OF 2024  
RE ABURILI, J  
JANUARY 17, 2024**

**BETWEEN**

**CHARLES OPONDO ODINGO ..... APPELLANT**

**AND**

**FAULU MICRO FINANCE BANK ..... RESPONDENT**

**RULING**

1. This Ruling determines the merits of the respondent’s Notice of Preliminary Objection dated January 16, 2024 filed this morning, seeking to have the application and memorandum of appeal dated January 14, 2024 struck out.
2. The grounds upon which the Preliminary Objection is predicated are that:-
  1. The appellant has failed to annex the ruling/order from which he appeals making the appeal and application incompetent.
  2. The appellant has abused the court process by seeking review and appeal of the same decision at the same time, before different courts.
  3. This appeal is incompetent as the Memorandum of Appeal is appealing against the review of the decision of January 11, 2024 and not against the order of 9<sup>th</sup> October 2023 dismissing the application for injunction.
3. The respondent prays that the application be struck out with costs.
4. The Preliminary Objection was argued orally this morning with the Respondent’s counsel submitting that the appeal does not lie because the Applicant sought an injunction which was dismissed. Then he sought for review of that dismissal which application for review was also dismissed and that he cannot have both an appeal and review at the same time, contrary to the provisions of the *Civil Procedure Act*.



5. In response, counsel for the applicant submitted that the copy of Ruling appealed from will be filed in the record of appeal. That he was granted leave to appeal from the Ruling on review and that the appeal is not incompetent.
6. That if the suit property is not protected then there is no essence in prosecuting the case in the lower court.
7. In a rejoinder, the respondent's counsel submitted that the leave to appeal was from the Ruling on review and not the earlier Ruling dismissing the application for injunction which had been overtaken by the time lapse for filing of the appeal.

### **Determination**

8. I have considered the Preliminary Objection as filed and argued. The issue for determination is whether the Preliminary Objection is sustainable. The question to be resolved is whether the Preliminary Objection as raised meets the threshold of a Preliminary Objection as laid out in the case of *Mukisa Biscuits Manufacturing Limited vs West End Distributors* (1969) EA 696; on what constitutes a Preliminary Objection.
9. The court in the above case observed and defined a Preliminary Objection as follows:

“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...”
10. In the same case, Sir Charles Newbold, P. stated:

“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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.”
11. In this case, the respondent contention is that no ruling or order from the appeal made is annexed thereby making the appeal and the application incompetent.
12. With utmost respect, that issue does not fit a Preliminary Objection because there is no legal requirement that a ruling or order appealed from must be annexed to the Memorandum of Appeal or the application. If anything, as submitted by Mr. Onyango counsel for the applicant, such documents would be included in the record of appeal if the appeal is sustained to be heard on merit.
13. Accordingly, I find the first point of the Preliminary Objection not merited and is overruled.
14. On the contention that the appellant has abused the court process by seeking review and appeal of the same decision simultaneously before different courts, the parties hereto are in agreement that the Applicant sought for an injunction before the lower court and vide a ruling of 9<sup>th</sup> October 2023 the application was dismissed.



15. The applicant never appealed against the said Ruling. He then filed an application for review of that ruling and vide a Ruling of January 11, 2024, the court dismissed the application for review.
16. The law under section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules* is clear that one cannot seek for review and appeal at the same time.
17. The appellant/applicant herein from the Memorandum of Appearance, is challenging both the ruling of January 11, 2024 and October 9, 2023. Without belabouring so much, the Ruling of October 9, 2023 could have been appealed against within 30 days of the decision. As the time lapsed for appeal, no appeal lies thereafter.
18. Nonetheless, the Applicant having chosen to apply for review and failed to get orders in review, he can only appeal against the ruling of January 11, 2024 dismissing his application for review, and not of October 9, 2023, dismissing the application for injunction.
19. It follows that no appeal lies against the ruling of October 9, 2023 and any ground of appeal on that ruling is incompetently before this court and is hereby struck out.
20. However, as the appeal combines the two rulings, the entire appeal is not incompetent since the court can still hear and determine the appeal against the ruling of January 11, 2024.
21. The second point of the Preliminary Objection therefore succeeds partially.
22. On the third point of the Preliminary Objection, I have already pronounced myself that the appeal against the ruling of October 9, 2023 does not lie since there was an application for review of that Ruling hence the appeal against the ruling of January 11, 2024 is competently before the court.
23. Consequently, the Preliminary Objection only succeeds partially and the memorandum of appeal and application dated January 14, 2024 are sustained to the extent stated above.
24. I make no orders as to costs of the Preliminary Objection and order that the parties proceed to canvass the application dated January 14, 2024 on its merits.
25. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 17<sup>TH</sup> DAY OF JANUARY, 2024**

**R. E. ABURILI**

**JUDGE**

