



**Kyule v Gitaari (Civil Appeal 217 of 2023) [2024] KEHC 5819 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5819 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 217 OF 2023  
FN MUCHEMI, J  
MAY 23, 2024**

**BETWEEN**

**MICHAEL KYULE ..... APPELLANT**

**AND**

**PATRICK GITAARI ..... RESPONDENT**

**RULING**

**Brief facts**

1. Before this court for determination is the respondent's Notice of Preliminary Objection dated 14<sup>th</sup> December 2023. The respondent argues that the applicants' application contravenes Section 42 of the *Small Claims Court Act* and is filed out of time. As such, the respondent contends that the court lacks jurisdiction to entertain the application as it is misconceived and an abuse of the court process.
2. Directions were issued that the application be canvassed by way of written submissions. The record shows that only the respondent complied by filing submissions on 8<sup>th</sup> April 2024.

**The Respondent's Submissions**

3. The respondent submits that the matter emanated from Small Claims Court Case No SCCCOMM/E062/2023 which arose from a breach of contract dated 7<sup>th</sup> February 2019 by the appellant. Judgment was delivered on 11<sup>th</sup> May 2023 in favour of the respondent and the appellant applied for review which was dismissed on 29/11/2023. Being aggrieved by the decision of the trial court, the appellant filed a Notice of Appeal in the instant court which the respondent contends has been filed out of time. The respondent further submits that the appellant has never appeared in court and neither has he filed any material to warrant processing of the appeal despite the court giving directions, notifications and being served by documents.
4. The respondent states that he served the appellant with the preliminary objection and hearing notice on 8/2/2024, 17/2/2024 and 21/2/2024 and filed affidavits of Service dated 21/2/2024 as proof of



service. The appellant did not file any response. The respondent argues that it is clear the appellant has abandoned the appeal and thus urges this court to dismiss it for being improperly before the court. The dismissal of the appeal will not cause any injustice on the appellant but will meet the ends of justice according to the respondent.

5. The respondent submits that the appeal has been filed out of time in that judgment in the lower court was delivered on 11/5/2023 whereas this appeal was filed on 22/06/2023. It is further argued that the appeal as filed is a misconception, bad in law, a delay tactic and an abuse of the court process.
6. The main issue for determination is whether the preliminary objection is sustainable.

## The Law

### Whether the preliminary objection is sustainable.

7. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....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.

8. 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.

9. Similarly the Supreme Court in the case of *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR held that:-

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.

10. Further in the case of *Hassan Nyanje Charo v Khatib Mwasbetani & 3 others*, [2014] eKLR the court held that:-

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 as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

11. Evidently, a preliminary objection must be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with the point of law.

12. The respondent argues that the appellant has contravened Section 42 of the *Small Claims Court Act* which limits the time within which an appeal from that court can be filed. Section 38 which provides:-

1. A person aggrieved by the decision or an order of the court may appeal against the decision or order to the High Court on matters of law.
2. An appeal from any decision or order referred to subsection (1) shall be final.



13. Section 79G of the *Civil Procedure Act* provides for time for filing appeals from subordinate courts as 30 days excluding such period which the lower court may certify as having been necessary for the preparation and delivery to the appellant 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 out of time.
14. The Small Claims Court is a subordinate court and is therefore bound by the law applicable to filing of appeals to the High Court under Section 79 G of the *Civil Procedure Act* as well as order 42 of the *Civil Procedure Rules*. It is correct that the judgment appealed herein from was delivered on 22<sup>nd</sup> May 2023. The memorandum of appeal was filed on 22<sup>nd</sup> June 2023. Therefore, the appellant lodged his appeal two (2) days late. It is evident that 30 days prescribed by the law expired on 20<sup>th</sup> June 2003. The applicant did not obtain an order for extension of time. It is therefore, correct that this appeal was filed out of time and as such, it must fail.
15. The preliminary objection has raised other numerous matters of facts which are outside the ambit of a preliminary objection. This court disregards all the said matters of facts for being irrelevant.
16. As regards the filing of the appeal out of time, I find that the preliminary objection has merit and it is hereby allowed. This appeal is accordingly struck out with costs for being improperly before the court.
17. It is hereby so ordered.

**RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF MAY 2024.**

**F. MUCHEMI**

**JUDGE**

