



**Mtetu v Mugo Holdings Ltd (Civil Appeal E012 of 2023)
[2024] KEHC 4983 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4983 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E012 OF 2023
LM NJUGUNA, J
MAY 15, 2024**

BETWEEN

ALEX MUGO MTETU APPLICANT

AND

MUGO HOLDINGS LTD RESPONDENT

RULING

1. For determination is Preliminary objection dated 08th February 2024 through which the applicant is challenging the appeal on grounds that the issues raised in the appeal were already determined by the trial court where the plaint was struck out for non-compliance. It is its argument that the appeal is wrongly before this court since the appellant should have sought reinstatement of the suit by the trial court instead of filing an appeal.
2. The appellant filed a memorandum of appeal dated 08th March 2023 seeking orders that the appeal be allowed, the trial court's ruling dismissing the suit and awarding costs to the respondent, be set aside and the suit to be reinstated for hearing on merit. The appeal is premised on the grounds that the trial magistrate misapprehended the provisions of Order 11 and Order 17 Rule 2 of the Civil Procedure Rules and denied the appellant his rights to fair hearing under Article 50 of *the Constitution*.
3. Through the plaint dated 27th August 2021, the appellant sought orders for compensation against the respondent. The respondent filed a defense dated 07th December 2021 and the appellant filed a reply to defense dated 04th February 2022. When the matter went before the trial magistrate for pretrial directions on 26th July 2022, the court noted that the parties had not complied with Order 11 of the Civil Procedure Rules. The parties were given 14 days within which to comply. On the next scheduled date being 08th November 2022, the plaintiff had still not complied and another date for pre-trial directions was given. On 08th December 2022, the appellant had still not filed and served the documents in support of his case.



4. The respondent’s counsel urged the court to dismiss the suit since no cause of action has been disclosed against it. The trial magistrate noted these sentiments but still granted the appellant a last adjournment to comply and scheduled the matter for a final mention on 01st February 2023. On the final mention date, counsel for the appellant stated that the valuation report had been filed but the same had some errors and so he needed time to file another one. The court stated that the plaintiff’s behavior seemed to be a delaying tactic, given that the court had severally accommodated his non-compliance. He struck out the plaint for non-compliance, under Order 11 Rule 3(2) of the [Civil Procedure Rules](#) and awarded cost to the respondent.
5. The respondent filed its submissions regarding the preliminary objection. It is its argument that Order 11 Rule 3 empowers the trial court to make any appropriate orders at the case conference, including striking out the action or a defense and making an award of costs. It relied on section 3A of the [Civil Procedure Act](#) which gives inherent powers to the courts to make any orders it deems fit, including an order striking out a plaint. It further referred to section 65 of the [Civil Procedure Act](#) which provides that an appeal to the High Court may be on a question of law or fact. That the appeal herein raises a question of technicality of procedure and not fact or law.
6. Further reliance was placed on section 80 of the [Civil Procedure Act](#) which gives the court power to review its judgment or decree and the case of [Ivita v. Kyumbu](#) (1984) KLR 441 where the court found that delay in a matter should be proved to be detrimental to the aggrieved party. That even though this court has discretion to determine the appeal before it, such discretion should be applied in a just manner, which does not include reinstatement of the suit. It relied on the case of [Bilha Ngonyo Isaac v. Kembu Farm Ltd & Another](#) (2018) eKLR and [Shah v. Mbogo & Another](#) (1967) EA 116 where the courts discussed how far discretion can be applied. That section 79A of the [Civil Procedure Act](#) forbids a party to appeal on a matter of procedure as the appellant has done herein. It urged the court to allow the preliminary objection.
7. The issue for determination is whether this court should allow the preliminary objection.
8. The period between filing of the plaint dated 27th August 2021 at the trial court and 01st February 2023 when the court struck it out, is about 17 months. The trial magistrate struck it out on the strength of Order 11 Rule 3 of the [Civil Procedure Rules](#). The trial court had deferred the pretrial proceedings severally before eventually striking out the plaint. Order 11 Rule 3(5)(b) of the [Civil Procedure Rules](#) provide that:

“where necessary, the judge or deputy registrar or magistrate or case management officer shall allocate time within which the orders or directions shall be complied with by the parties and fix a date at which the judge or deputy registrar or magistrate or case management officer shall record compliance by the parties or make such other orders as may be just or necessary including the striking out of the suit.”

9. An appeal to the High Court may be lodged challenging matters of fact and law. Section 78(1) of the [Civil Procedure Act](#) provides for the appellate court’s power which includes to determine a case finally, to remand a case, to frame issues and refer them for trial, to take additional evidence or to require the evidence to be taken and to order a new trial. The same provision subjects the exercise of this power to the prescribed limitations. Such a limitation is provided for under Section 79A of the [Civil Procedure Act](#) which provides:

“No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity



in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.”

10. From the foregoing, the applicant’s case at trial was never heard on merits because of his delay in complying with the pretrial conference requirements. The respondent argued that the document that the applicant failed to produce in support of the plaint would have been the one to disclose the cause of action against it. As it is, there are no issues of merit arising from facts or law that are presented through the grounds of appeal.
11. The respondent also argued that the applicant should have moved the trial court for orders for reinstatement of the suit. While it is true that the applicant had the option of seeking review before the trial Court, under section 80 of the *Civil Procedure Act*, he preferred an appeal. The said provision allows for review of a decree or order from which an appeal is not allowed. As already stated, in light of section 79A, an appeal of this nature is not allowed.
12. Therefore, I find that the preliminary objection has merit and it is hereby allowed. The appeal herein is struck out with costs to the respondent.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

.....**for the Applicant**

.....**for the Respondent**

