



**Njirati v Diamond Trust Bank Kenya Limited (Civil Appeal  
86 of 2022) [2023] KEHC 2056 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 86 OF 2022  
F WANGARI, J  
MARCH 10, 2023**

**BETWEEN**

**IRENE MUTHONI NJIRATI ..... APPELLANT**

**AND**

**DIAMOND TRUST BANK KENYA LIMITED ..... RESPONDENT**

*(Being an appeal against the entire Ruling/Order dated 3rd June, 2022 in Mombasa Chief Magistrate's Case No. 110 of 2020 by Learned Resident Magistrate Honourable Gideon Kiage)*

**JUDGMENT**

1. This is an appeal against the ruling delivered by Honourable Gideon Kiage, Senior Resident Magistrate on June 3, 2022. The Appellant being dissatisfied with the said ruling has preferred this appeal. The appellant preferred a total of ten (10) grounds of appeal in urging this court to set aside the ruling and order made on June 3, 2022 amongst them that the Learned Magistrate erred in law and fact by dismissing the Appellant's application dated March 18, 2020.
2. Directions were taken and the appeal was to be disposed of by way of written submissions. However, before submissions on the appeal were filed, the Respondent vide an application dated January 12, 2023 sought for the appeal to be struck out for being incompetent due to the Appellant's failure to seek the court's leave to appeal in breach of Order 43 Rule 1 and 2 of the *Civil Procedure Rules* as read together with section 75 of the *Civil Procedure Act*.
3. I directed parties to file responses and submissions in respect of the application as well as the appeal. This was to save on court's time considering that if the application dated January 12, 2023, the court will not concern itself with the appeal. In the event the court finds no merit in the application, it shall proceed to render itself on the appeal.
4. Both the Appellant and the Respondent duly complied and relied on various decisions in support of their rival positions.



5. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano vs Associated Motor Boat Co Ltd* (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni versus Kenya Bus Service Ltd* (1982-88) 1 KAR 278 and *Kiruga versus Kiruga & Another* (1988) KLR 348).
6. I have carefully perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the ruling ought to stand or otherwise I will carefully revisit the record.
7. The Appellant *vide* a plaint dated January 29, 2020 sought to enforce a judgement against Invesco Assurance Company Limited. The said judgement had been obtained in a primary suit being Malindi CMCC No 103 of 2019 between the Appellant and Tawakal Bus Company Limited. Having gone through all the requisite motions, the Appellant sought to garnish Invesco Assurance Company Limited's account held at the Respondent's bank.
8. The Respondent opposed the garnishee proceedings stating that they were not operating the said account on behalf of the judgement debtor and further, all the accounts operated by the judgement debtor had been closed *vide* a notice of closure issued by the Respondent on January 20, 2020. Having considered the garnishee application, the Lower Court *vide* a ruling delivered on June 3, 2020 dismissed the application. It is this ruling that precipitated the present appeal. As set out above, an application was filed to have the appeal struck out. I will first consider the said application.

### **Appellant's submissions in respect of the application dated 12/1/2023**

9. The Appellant submitted that the issues arising from the Lower Court's ruling makes the appeal to be as right without the necessity for leave under section 75 (1) (h) of the *Civil Procedure Act*. It was submitted that the appeal deals with substantive rights where garnishee proceedings in the Lower Court were execution proceedings. The case of *Francis Mwanza Mulwa v Kanji Vagjiani & 2 Others* [2018] eKLR was cited for the proposition of the need to seek leave. The Appellant stated that the Lower Court's ruling fell under section 75 (h) of the *Civil Procedure Act* and thus the appeal was as of right.
10. Further reliance was placed in the cases of *Kenya Commercial Bank Limited v Kenya Planters Cooperative Union & 2 Others* [2011] eKLR, *Dharmagma Patel & Another v T A (a minor suing through the mother and next friend H H)* [2014] eKLR, *First Assurance Co Ltd v Osienala (Friends of Lake Victoria) & Another* [2021] eKLR and *Diamond Trust Bank Kenya Limited v Kazungu Gogo Mwanzele & Another* [2020] eKLR.
11. The Appellant equally pointed out that the memorandum of appeal was filed on June 21, 2022 and served the same upon the Respondent on June 24, 2022. It was received without any protest. The record of appeal was filed on September 1, 2022 and served on September 8, 2022. It equally never elicited any objection. The appeal was admitted under section 79 (B) and 79 (G) of the *Civil Procedure Act* and directions on the disposal of the appeal taken.
12. The Respondent only filed its application dated January 12, 2023 a period of over six (6) months after the memorandum of appeal was filed and served. The Appellant equally laid emphasis on Order 43 Rule 13 (2) which required the Respondent to raise objection to the court's jurisdiction before directions were taken. The Appellant deemed the Respondent's application to have been made in



bad faith. She therefore urged that the application dated January 12, 2023 be dismissed and the court proceeds to render its decision on the appeal.

### **Respondent's submissions in respect to the application dated 12/1/2023**

13. For the Respondent, it was submitted that the order and ruling dated June 3, 2022 do not qualify for an automatic right of appeal under the provisions of Order 43 Rule 1 (1) and (2) of the *Civil Procedure Rules* and section 75 of the *Civil Procedure Act*. The Respondent stated that the appeal arises from an order made under Order 23 of the *Civil Procedure Rules* and that the test for ascertaining whether leave is required is determined by looking through Order 43 Rule 1 (1) of the *Civil Procedure Rules*.
14. In support of this proposition, the case of *Tatu City Limited v Calla Limited* [2022] eKLR was cited. The Respondent further cited the cases of *Circuit Business Systems Limited v County Government of Siaya* [2020] eKLR and *Nyutu Agrovot v Airtel Networks Ltd* [2015] eKLR for the proposition that where there was no automatic right to appeal under section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules*, then the appellate court had no jurisdiction to hear or determine an appeal unless such leave was first sought and obtained.
15. The Respondent further submitted that the proceedings on record do not show that leave to appeal was sought or obtained. On reliance on article 159 (2) (d), of the *Constitution*, the Respondent submitted that the Appellant was placing over reliance on the said provision as a means to avoid bearing the consequences of her own indolence in following due process and procedure. The cases of *Kakuta Maimai Hamisi v Peris Pesu Tobiko & 2 Others* [2013] eKLR, *Arphaxad Mutiso Mutisya v Rose Katungwa* [2021] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others* [2013] eKLR to back the assertion that article 159 (2) (d) is not a panacea for all ills.
16. The Respondent submitted that the appeal was incompetent for want of seeking leave and thus ought to be struck out. Lastly, it sought for costs of the appeal and the application.

### **Analysis and Determination**

17. After considering the application, responses, submissions and the law, I find that there are three (3) issues for determination: -
  - a. Whether the appeal ought to be struck out as sought for by the Respondent;
  - b. If the answer to (a) above is in the affirmative, what orders to issue; and
  - c. What is the order as to costs?
18. The application is premised on compliance with the provisions of Order 43 Rule 1 and 2 of the *Civil Procedure Rules*, 2010 and section 75 of the *Civil Procedure Act*. In *Circuit Business Systems Ltd v County Government of Siaya* (*supra*), it was held as follows:

“...On the other hand, Order 43 of the *Civil Procedure Rules* gives a long list of orders from which an appeal lies from as of right. It therefore follows that if one wishes to appeal on an order that is not on the list under Order 43 of the *Civil Procedure Rules*, one must seek leave of court that made that very order...”
19. It therefore goes without saying that where the law requires leave to be sought, the same has to be done. Similarly, it is not in dispute that the nature of the proceedings before the Lower Court was premised on the provisions of Order 23 of the *Civil Procedure Rules*. Under Order 43 Rule 1 (1) of the *Civil Procedure Rules*, the only appeal as of right under Order 23 of the *Civil Procedure Rules* is the one that



concerns trial of claim of third person in attachment of debts (Order 23 Rule 7). It is thus settled that since the order or ruling made on June 3, 2022 was not among the excepted orders under the rules, leave was a prerequisite.

20. Having gone through the Lower Court proceedings, I have no doubt in my mind that leave was neither sought nor obtained. The consequences of this finding would be to strike out the appeal. However, would this serve the ends of justice? In *Kenya Commercial Bank Limited v Kenya Planters Co-operative Union & 2 Others* (*supra*) cited by the Appellant, the Court of Appeal held that it would be wrong to drive a litigant from the seat of justice on technicalities. That would be the ultimate result if the application dated January 12, 2023 is allowed.
21. I have further noted that the Respondent took more than six (6) months to raise the issue of leave. By the time the objection was raised, the appeal had already been admitted and directions taken. The conduct of the Respondent in waiting until the Appellant had compiled, filed and served her record of appeal would not be described as one of a diligent litigant. In *Dharmagma Patel & Another v T A* (*supra*), the court while dealing with an almost similar issue as herein noted as follows: -

“...While I agree with the respondent's counsel that leave of the trial magistrate was required before the appellant could appeal from that court's decision, the respondent having taken so long to raise that issue, I invoke the powers donated to this court under Section 3A of the *Civil Procedure Act*, and declare the procedural defect herein incapable of overriding the objective and duty of this court under Section 1A and 1B of the *Civil Procedure Act*. The upshot of the foregoing is that, despite the appeal having been filed without the leave of the court as required under Order 43 (2) above, for purposes of the just determination of the proceedings I shall consider the appeal on its merits...”
22. Having found that leave was a prerequisite and the same having not been sought for or obtained, I am hesitant to invoke the draconian step of striking out the appeal. It has been severally held that striking out of a pleading is a draconian act. I am guided by the Court of Appeal in *DT Dobie & Co (Kenya) Ltd v Joseph Mbaria Muchina & Another* [1980] eKLR. I am equally alive to the provisions of section 79 G of the *Civil Procedure Act* while allows a party to seek leave to appeal out of time.
23. Turning to the second issue, I am guided by the case of *Tatu City Limited v Calla Limited* (*supra*) cited by the Respondent. In that case, though the court found as I have in the present case, it proceeded to allow the Appellant a period of thirty (30) days to take steps to regularize the anomaly and in default, the appeal would stand struck out. As dictated by the provisions of Order 43 Rule 1 (3), the application for leave ought to be made before the Lower Court.
24. On the issue of costs, the same is discretionary and exercising my discretion, I direct that each party shall bear their own costs. Though I had indicated that the finding of the application shall guide the court on the appeal, having found as above, the appeal shall await compliance of the directions issued.
25. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -
  - a. In lieu of striking out the appeal herein, I direct as follows: -
    - i. The Appellant is granted a period of thirty (30) days from the date hereof to take the necessary steps to regularize the grant of leave;
    - ii. In default of (i) above, the appeal shall stand as struck out;
    - iii. The Lower Court file be placed before the Chief Magistrate or any other magistrate for purposes of compliance with order (i) above.



b. Each party shall bear their own costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**F. WANGARI**

**JUDGE**

**In the presence of;**

Ananda Advocate for the Appellant

Kavata Advocate for the Respondent

**Guyo, Court Assistant**

