



REPUBLIC OF KENYA



KENYA LAW

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**Githogora v Equity Bank Kenya Limited (Civil Appeal E776 of 2021)
[2023] KEHC 17839 (KLR) (Civ) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E776 OF 2021

DAS MAJANJA, J

MAY 19, 2023

BETWEEN

EVERLYN MURINGI GITHOGORA APPELLANT

AND

EQUITY BANK KENYA LIMITED RESPONDENT

*(Being an appeal from the Ruling and Order of Hon.G. A. Mmasi, SPM dated 11th
December 2020 at the Magistrates Court at Milimani, Nairobi in CMCC No. 8604 of 2019)*

RULING

1. In the application dated March 9, 2023, the Appellant seeks review of the order of this court dated January 17, 2023 striking out the appeal. The court struck out the appeal because the interested parties; Grace Wamuyu Mathenge and Geepak Limited, who were parties to the proceedings in the Subordinate Court were not joined to this appeal. The application is made under order 45 rule 1 of the *Civil Procedure Rules* and section 80 of the *Civil Procedure Act* (chapter 21 of the Laws of Kenya). In addition to and or in the alternative, the Applicant seeks to review the order striking out the appeal and substitute it with an order joining the interested parties to this appeal to enable them participate in the appeal.
2. The application is supported by the appellant's own affidavit sworn on March 9, 2023 and opposed by the respondent through the replying affidavit of its legal officer, Beatrice Muraguri, sworn on May 9, 2023. Both sides have filed written submissions which I have considered.
3. The facts leading to this appeal are common ground. By a notice of motion dated December 20, 2019, two interested parties; Grace Wamuyu Mathenge and Geepak Limited applied, inter alia, to be joined to the suit as interested parties and that the suit be struck out on the ground that it was res judicata.



The appellant opposed the application and by a ruling dated May 29, 2022, the trial magistrate struck out the suit on the ground that it was res judicata.

4. Being aggrieved by the order striking out the suit, the appellant filed the notice of motion dated April 19, 2020 seeking to review the order of May 29, 2022. The Respondent and Interested Parties opposed the application. By the ruling dated December 11, 2020, the trial court dismissed the application thus precipitating this appeal.
5. Both parties have filed extensive written submissions in support of their respective positions on the substance of the appeal. The issue for consideration is whether the Appellant has satisfied the grounds or review. There is no dispute regarding the principles governing the determination of an application for review under section 80 of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules. An application may seek to review an order on the grounds, inter alia, that there is an error on the face of the record or for sufficient reason.
6. In this case, I accept that there is no error on the face of the record as the order striking out the appeal was grounded on the fact that parties directly affected by the appeal were not joined to this appeal. I also reject the appellant's contention that merely because the interested parties' application to join the main suit was rejected is a good reason not to join them to this appeal. The fact is that if the appeal succeeds, it may affect the orders rejecting their application to join them to the suit before the trial court. Further, the interested parties participated in the hearing of the application that gave rise to this appeal.
7. This court has jurisdiction to order joinder of any party to this appeal and as I understand, the appellant seeks to invoke this jurisdiction to enable the court decide the issues in this appeal effectively. Bearing in mind that the court struck out the appeal without hearing from the appellant, it may well have considered the plea to join the interested parties as an alternative to striking out. Further, I do not see any prejudice to the respondent an order for costs would not cure.
8. In the circumstances, I hold that there is sufficient reason to review the order dated January 17, 2023 and set aside the dismissal order. I therefore order joinder of the interested parties in order to allow the appeal to be heard on its merits. Since the appellant failed to join the interested parties, it must bear the cost of inconvenience to the Respondent.
9. I therefore make the following dispositive orders:
 - a. The order dated January 17, 2023 be and is hereby reviewed and the order striking out the appeal is set aside.
 - b. It is hereby ordered that Grace Wamuyu Mathenge and Geepak Limited be and are hereby joined to this appeal as the 2nd and 3rd respondents.
 - c. The 2nd and 3rd respondents shall be served with this order and the record of appeal within 14 days from the date hereof.
 - d. The appellant shall pay the Respondent costs of the proceedings assessed at Kshs. 10,000.00 within 14 days.
 - e. The matter shall be fixed for mention on June 7, 2023 before the Deputy Registrar for the taking direction on disposal of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE



Ms Omondi instructed by Gachie Mwanza and Company Advocates for the Appellant.

Mr Kamau instructed by Mukiri Global Advocates LLP for the Respondent.

