



**Njaramba v Signon Freight & another (Civil Appeal E107 of 2020)  
[2023] KEHC 27560 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 27560 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E107 OF 2020  
F WANGARI, J  
AUGUST 1, 2023**

**BETWEEN**

**ANTONY NJARAMBA ..... APPELLANT**

**AND**

**SIGNON FREIGHT ..... 1<sup>ST</sup> RESPONDENT**

**GAP THREE HOLDINGS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Responded filed a Notice of Motion dated 14/4/ 2020 seeking to have this appeal be struck out for want of leave. The application is based on the grounds inter alia that the Memorandum of Appeal dated 11/8/2020 challenging the orders dismissing the lower court Appellant’s application for setting aside of the execution proceedings, was filed without seeking or obtaining the mandatory leave to appeal against the said orders.
2. The Appellant raised a Preliminary Objection dated 17/10/2022 stating that the Respondent’s application offends the provisions of Section 7 of the *Civil Procedure Act*, and that leave to appeal had already been granted by the lower court via a ruling delivered on 5/8/2020 by Hon. M. Nabibya, PM.
3. I have perused through the parties’ submissions. However, they address the merit of the appeal herein. I shall not delve into the same at this stage. The Preliminary Objection does not meet the threshold on Preliminary Objections. What I see are Grounds of Opposition and nothing more.
4. The issue for determination herein is;
  - a. Whether there is need to seek leave to appeal when the court has already ordered that there is a right of appeal.
5. The issues in the court below were not the issues of execution per se but on pertinent provisions of the *Limitation of Actions Act*. The court below, rightly or wrongly granted the right to appeal.



That therefore obviated the need to seek for leave to appeal. Right to appeal overrides leave to appeal. Consequently, the appeal cannot be struck out.

6. The approach of the court is to hear matters on merit. Even when some issues require leave and others do not, the right of Appeal overrides all. In the case of *DT Dobie & Company Ltd v Muchina* [1982] eKLR it was stated thus;

“The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

7. In *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR, Justice E. C. Mwita, had this to say;

“The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Postal Corporation of Kenya v I. T Inamdar & 2 others* [2004] 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.”

8. The appeal herein should be heard on merit as it is properly before the court. However, the matters raised the Preliminary Objection are those that can be dealt normally in a Replying Affidavit. The Court is not involved in the finding of fact.

9. In hearing a Preliminary Objection, this court is to proceed on an understanding that what is pleaded in the pleadings is true. It is what the English common law used to call a demurrer. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696, made this pertinent observation. It said: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

10. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the Preliminary Objection as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd(supra)*: -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

.... 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.

At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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....”

11. A Tanzania Court of Appeal sitting in Dar-es-Salaam, in *Karata Ernest & others v Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

12. Justice Prof J.B. Ojwang J (as he then was) addressed the issue of Preliminary Objection in the case of *Oraro v Mbaja* [2005] eKLR;

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

13. It is therefore my view that a Preliminary Objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry.
14. I do not find any merit of the application given the lower court’s decision granting the right of appeal. The Preliminary Objection is basically Grounds of Appeal.
15. Consequently, I find that the application dated 14/4/2022 lacks merit and the same is dismissed. I treat the Preliminary Objection as Grounds of Opposition hence make no finding on the same.
16. To enable the parties conclude this matter, I shall give directions on hearing of the main Appeal immediately after the ruling.



## **Determination**

17. Upshot of the foregoing is that I make the following orders: -
- a. I find that the Application dated 14/4/2022 lacks merit and is accordingly dismissed.
  - b. The Preliminary Objection has no points of law and as such it is treated as Grounds of Opposition.
  - c. Directions on hearing of the Appeal immediately after the ruling.
  - d. Costs to follow the outcome of the appeal.

**DATED, SIGNED, AND DELIVERED AT MOMBASA THIS 1<sup>ST</sup> DAY OF AUGUST, 2023.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

M/S Njuguna Advocate h/b for Matheka Advocate for the Appellant

Asewe Advocate h/b for Takah Advocate for the Respondent

Barile, Court Assistant

