Maingi v China Road & Bridge Corporation (Civil Appeal E116 of 2023) [2025] KEHC 17342 (KLR) (24 November 2025) (Ruling)

Neutral citation: [2025] KEHC 17342 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E116 OF 2023

TM MATHEKA, J

NOVEMBER 24, 2025

BETWEEN

MAKAU MAINGI ..... APPELLANT

AND

CHINA ROAD & BRIDGE CORPORATION ..... RESPONDENT

RULING

Introduction

1. China Road & Bridge Corporation, the applicant/respondent has brought the application dated 09/12/2024. It was filed under certificate of urgency and is brought under Sections 1A,1B & 3A of the *Civil Procedure Act* (CPA) Cap 21 of the Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules 2010 (CPR). It seeks the following orders;

    a. Spent.

    b. Spent

    c. That this honorable court be pleased to order that the Appeal and Record of Appeal be struck out/dismissed on grounds of approbation and reprobation.

    d. That the costs of this application and the entire appeal be awarded to the Respondent/ Applicant.

2. The application is supported by the grounds on its face and the Supporting Affidavit sworn by Kinyanjui Theuri on the same day. He deponed that he is an advocate of the High Court of Kenya who is well versed with the facts of the case hence competent to swear the affidavit. That, the judgment was entered against the Applicant in Makindu SPMCC 563 of 2016 for the amount of kshs 764,000/= plus costs. That on 12/03/2024, the Applicant settled the decretal sum plus costs and the Appellant's

Advocate acknowledged receipt on 26/04/2024. Copies of demand letters dated 20/12/2023 & 22/03/2024 and acknowledgment receipt are exhibited as EXH 1, 2 & 3.

3. He deponed that the Applicant's advocate learnt of possibility of existence of this appeal when he was served with a mention notice dated 21/08/2024. That, he was subsequently served with a memorandum of appeal after requesting for it on 29/08/2024. That, despite receiving the decretal sum, the Appellant proceeded to file and sustain this appeal which action amounts to approbation and reprobation. That the Appellant has not approached this court with clean hands and the appeal embarrasses the tenets of a fair trial and amounts to abuse of the process of court.

4. The application was opposed through a Replying Affidavit sworn by Jonathan Mutua on counsel for the Respondent/appellant 17/01/2025 where he deponed that he is an advocate of the High Court of Kenya with the conduct of the suit on behalf of the Appellant hence competent to swear the affidavit. That the Applicant has not shown any substantial defect or illegality of the appeal to warrant it being struck out. That the provisions under which the motion is brought do not envisage the striking out of the appeal.

5. He deponed that the appeal was filed timeously after which the record of appeal was filed on 08/10/2024 and served upon the Respondent on 09/10/2024. Consequently, he deponed that the appeal is not a candidate for dismissal for want of prosecution. A copy of the Memorandum of Appeal and email service of the Record of Appeal are exhibited as JM-1 & 2.

6. He admitted that the Memorandum of Appeal was not served subsequent to its filing but deponed that the delay in service was not intentional or in bad faith. That he never received a notice from the Deputy Registrar informing him that the Judge had not rejected the appeal. That, this appeal was filed before service of the letter dated 20/12/2023 and before the Applicant paid part of the decretal sum.

7. He deponed that it is not true that the Appellant has continuously demanded for payment of the decretal sum and that kshs 886, 030/= was paid on 12/03/2024, long after the 30 days stay period. That, if indeed the Appellant was acting in bad faith, he would have commenced execution soon after the lapse of the 30 days. That, subsequent to the service of the letter dated 22/03/2024, the Appellant has not taken any steps to execute for the balance of kshs 50,000/=.

8. He deponed that the Appellant was and is within his right to demand payment of the entire decretal sum regardless of the pendency of the appeal. That in the absence of stay orders, the appeal cannot operate as a stay of execution and there is nothing to prevent the Appellant from seeking to enjoy the fruits of his judgment.

9. He deponed that the pending appeal seeks the enhancement of the award of damages and there is nothing to prevent him from enjoying the fruits of the award already made. That, if he is seeking more money from the Applicant, then why would he return the money that the Applicant is willing to pay. That the Appellant never stated or made a representation that he accepted the amount paid in lieu of the appeal or in full settlement of the decretal sum hence the claim of approbation and reprobation is misplaced.

10. He deponed that the Applicant has not been denied an opportunity to defend the appeal thus the issue of unfair trial cannot arise. Consequently, he deponed that the motion lacks merit and should be dismissed.

11. The application was canvassed through written submissions

The Applicant's Submissions

12. It was submitted that the Appellant's conduct of probating and approbating is unscrupulous and mischievous hence the appeal should be dismissed. Reliance was placed on Dr. Sunny Samuel -vs- Simon M. Mbwika & Anor [1998] eKLR stated where the Court of Appeal stated;

> " In my judgment, in the circumstances now obtaining, the Applicant is precluded from attacking the judgment. He is no longer an aggrieved person. Nor can he be allowed to approbate and reprobate the judgment at the same time. I am not persuaded that in the circumstances the Applicant is entitled to proceed with his appeal."

13. Further reliance was placed on Premier Food Industries Limited -vs- Public Health Prosecutor – Kisumu [2021] eKLR where the court observed;

> " 30. Having received payment on the strength of the Ruling dated 16th September 2020, the Applicant was now seeking leave to challenge the very same Ruling. In effect, the Applicant was seeking to challenge the validity of the decision from which it has been conferred with a benefit, whilst at the same time retaining the said benefit."

14. It was submitted that having received, acknowledge receipt and retained the amount paid out in settlement of the decretal sum, the Appellant is not entitled to pursue an appeal from a judgment whose proceeds they're enjoying.

The Respondents' Submissions

15. It was submitted that the Applicant has not laid a basis for striking out the appeal both in law and fact. That the provisions under which the motion is brought do not envisage striking out of the appeal. Reliance was placed on Blue Shield Insurance Company Ltd -vs- Joseph Mboya Oguttu (2009) eKLR where the Court of Appeal stated;

> " The application that was before the learned Judge of the superior court was an application seeking to dispose of the entire case by way of striking out a pleading namely the statement of defence, on grounds that it was scandalous, frivolous, vexatious and could otherwise prejudice, embarrass or delay fair trial of the action. At the base of it, it was seeking striking out a pleading and entering judgment in terms spelt out in the plaint. The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -
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> "The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.

16. It was submitted that the issues raised in the appeal are substantive and arguable. That, the appeal need not be successful as long as it is arguable. Reliance was placed on Yaya Towers Ltd -vs- Trade Bank Ltd (in liquidation) (2000) eKLR where the court stated;

> " A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial."

17. Further reliance was placed on D.T. dobie & Company Kenya Limited -vs- Joseph Mbaria Muchina & Another [1980] eKLR where Madan, J. A. (as he was then) held;

> " No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."

18. It was submitted that the Applicant has failed to demonstrate that the appeal is hopeless or discloses no reasonable cause of action hence this court should not strike out the appeal.

19. It was submitted that the doctrine of approbation and reprobation cannot be a sufficient basis for striking out the appeal and is not applicable in the instant case. That, the appeal was filed seven days after delivery of the trial court's judgment and there is consensus that the matter is not fully settled, there being a balance of kshs 50,000/=. That, it is not in contest that the Appellant has never initiated execution proceedings and has taken steps to have the appeal heard.

20. It was admitted that the Memorandum of Appeal was not served subsequent to its being filed but contended that under Order 42 Rule 12, service of the Memorandum of Appeal is after the Appellant is notified by the Deputy Registrar that the judge has not rejected the appeal. That, the Appellant has never received the notice from the Deputy Registrar. It was submitted that the Appellant never made a representation that he was receiving the payment to abandon his appeal.

21. It was submitted that even if the doctrine is applicable in this case, it is not sufficient to justify striking out the appeal. That, it is common ground that by appealing the decision of the trial court, the Appellant is exercising his constitutional and statutory right of appeal which cannot be curtailed by application of the substance of common law and/or doctrines of equity. The Appellant relied on the following cases;

a. Consolata Muthoni Kariuki –vs- Martin Mutembei Kaburu & 2 Others [2020] KEHC 8976 (KLR) where the court stated;

> "30. It is the Applicants' case that by accepting the payments made to them, in terms of settlement of the decretal sum, the Respondent is subsequently estopped from making a further claim against the Applicants in the form of advancing the instant appeal and as such the filing of this appeal is frivolous, vexatious and an abuse of the court process.
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> 31. In my considered view, that the estoppel referred to in the D & C Builders case (supra) is a situation where parties have on their own volition entered into a contractual obligation. In this application, the Applicants were judgment debtors who chose to settle the decretal amount which in itself does not preclude the Respondent herein from pursuing her appeal where she feels dissatisfied with the trial court's judgment.
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> 32. The right to appeal is a constitutional right enshrined under Article 50 of *The Constitution* that provides for the right to a fair trial and to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court and thus the same cannot be fettered by the settlement of a decretal sum where the dissatisfied party feels the same was inordinately low.
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> 33. In my considered view, the Applicant has not demonstrated sufficient reason for striking out this appeal.
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> 34. The upshot of the above is that the application dated 24th September 2019 lacks merit and it is hereby dismissed. (Emphasis added)."

b. Ismael Lonkishu Kobei -vs- David Kariuki Gichangi & Anor [2017] KEHC 2600 (KLR) where the court (Bwonwog'a J) stated thus:

> "Section 65 (1) (b) confers a right of appeal on an aggrieved party to challenge a judgement of a magisterial court. The appeal of the Appellant was admitted into hearing by this court on 28/6/2017 pursuant to section 79 of the *Civil Procedure Act*. The effect of such an admission is that the appeal is not frivolous. It is also not an abuse of the court process. A statutory right of appeal guarantees a fair trial. If the trial court committed errors of law or fact, the appeal court is at liberty to review and correct those errors. The right of appeal which is conferred upon the Appellant can only be taken away by another statute.
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> 6. Furthermore, the invocation of section 3A of *Civil Procedure Act* which saves the inherent powers of the court cannot defeat the express provisions of section 65 (1) (b) of the *Civil Procedure Act*. In the circumstances, I find that the provisions of section 3A cannot defeat the provisions of section 65 (1) (b) of *Civil Procedure Act*. Additionally, the provisions of section 1A and 1B of the *Civil Procedure Act* are not applicable to the instant appeal. Those provisions are in relation to the just determination and efficient disposal of court cases in terms

of section 1B of the *Civil Procedure Act* whose main objective is to require the courts to facilitate the just, expeditious, proportional and affordable resolution of civil dispute. It is therefore clear that those provisions are of no assistance to the Respondents.

7. The equitable doctrine of "clean hands" and the rule that one cannot approbate and reprobate at the same time cannot override the Appellant's statutory right of appeal.

c. Muriuki alias Micheal Ndei Muriuki -vs- Muthee (civil appeal e040 of 2021) [2023] KEHC 26895 (KLR) where the court (Mwongo J) held thus:

"18. It is the Applicant's case that by accepting the payment made to them, the Appellant/Respondent is estopped from making a further claim and thus the decretal sum should be deposited in an interest earning account as the cheque should have been rejected and returned to the paying entity.

19. Section 120 of the *Evidence Act* provides for the basis of estoppel in general. The section provides:

"When one person has by his declaration, act or omissions, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of such thing."

21. In the case of Consolata Muthoni Kariuki v Martin Mutembei Kaburu & 2 others [2020] eKLR the court held that payment of the decretal sum does not fetter a party's right to appeal the judgement. The court there stated:

"The right to appeal is a constitutional right enshrined under Article 50 of *The Constitution* that provides for the right to a fair trial and to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court and thus the same cannot be fettered by the settlement of a decretal sum where the dissatisfied party feels the same was inordinately low."

d. Bash Hauliers Limited -vs- Peter Mulwa Ngulu [2020] KEHC 8183 (KLR) where the court (Odunga J) stated;

"27. It was again contended that it was an abuse of the court process for the Respondent to proceed with the appeal after the decretal sum had been settled.....

28. It follows that the mere fact that a party has paid or has been paid the full decretal sum does not preclude him or her from preferring an appeal where he/she is dissatisfied with the award. It may well be that he/she feels, as the Respondent herein, that the award was not sufficient. In fact, the general rule is that once judgement is made, it ought to be settled notwithstanding the fact that one may or may

not have appealed since an appeal does not act as automatic stay of execution.

29. It is therefore my view that the fact of settlement of the decretal sum herein did not preclude the Respondent from proceeding with his cross-appeal and a person exercising his/her constitutional right cannot be said to be abusing the court process. The fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant.....

30. Accordingly, this court cannot deny the Respondent a right to be heard simply because he has received the award decreed to him by the trial court."

e. Machakos District Co-operative Union Limited -vs- Philip Nzuki Kiilu [1997] KECA 192 (KLR) where the Court of Appeal stated;

> " Mrs. Mwangangi also argued that there is no point in appealing as the decretal sum has been paid. With respect, payment of decretal sum does not take away a right of appeal."

22. It was submitted that the decisions of Dr. Sunny Samuel -vs- Simon M. Mbwika & Anor and Premier Food Industries Limited -vs-Public Health Prosecutor – Kisumu, which the Applicant relied on to support its position, are distinguishable and inapplicable in the present case. That, in the former decision, the Applicant was seeking leave to appeal out of time after receipt of the decretal sum and in the latter case, the Applicant was seeking leave to file a reference out of time after receipt of the taxed costs. It was contended that in the instant case, the appeal was filed in compliance with the law and long before payment was made. Reliance was placed on Ouma -vs- Bukheit & Anor [2025] KEHC 774 (KLR) where the court (Ougo J) stated that;

> " The Respondent in opposing the appeal argues that the law does not permit the Appellant having accepted payment of the decretal sum to challenge the decree on appeal again. They cited the case of NAIROBI C.A No 297 of 1998 Dr Sunny Samuel v Simon M Mbwika & Anor [1998] eKLR where the court held that "since the Appellant had obtained the full benefit of the judgment, he cannot now appeal against it while he is still in enjoyment of the benefits as otherwise, he would be approbating and reprobating the judgment at the same time.
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> In this court, the appellant has filed his appeal according to Order 42 of the Civil Procedure Rules and section 79 of the *Civil Procedure Act* in a court clothed with the requisite jurisdiction. The respondent's assertion that the appellant lacked the right to appeal the trial magistrate's decision is unfounded."

23. The Appellant reiterated that under section 3 (1) of the *Judicature Act*, the doctrine of approbation and reprobation cannot override an express statutory right of appeal and would only apply so long as written laws do not extend or apply. That, it is established in law that the substance of common law and doctrines of equity do not apply where there are express statutory provisions. Reliance was placed

on David Sironga Ole Tukai -vs- Francis Arap Muge & 2 Others [2014] KECA 155 (KLR) where the Court of Appeal stated;

> " To begin with it is difficult to comprehend the legal basis of the view that the court has the power to ignore clear and express provisions of a statute under the guise of equity. We have already pointed out that in Karuri -vs-Gitura (supra), Simiyu -vs- Watambamala (supra) and W Amukota -vs- Donati (supra) this Court held that the provisions of the *Land Control Act* were clear enough to leave no room for application of the principles of equity.
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> But perhaps the more compelling argument against the approach taken by the learned judge lies in the provisions of our *Judicature Act*, cap 8 Laws of Kenya, regarding the application of statutes and the doctrines of equity. Section 3(1) thereof embodies what has been called the hierarchy of norms and provides for how the jurisdiction of the courts in Kenya shall be exercised. The section creates a deliberate and hierarchical sequence of laws, starting with *the Constitution*, followed by Statutes and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897. It does not require too much imagination to see that under section 3(1) the application of the substance of the common law and the doctrines of equity is subject first to *the Constitution* and the Statutes. Indeed, to emphasize that the substance of common law and the doctrines of equity cannot override provisions of the statute, section 3(1) (c) makes it clear that the substance of common law and the doctrines of equity apply only in so far as the statute does not apply. (Emphasis added). In other words, the *Judicature Act* does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrines of equity....."

24. Consequently, it was reiterated that the doctrine cannot apply as to take away the Appellant's constitutional and statutory right of appeal. That, the right can only be restricted by statute and since the Applicant has not demonstrated that the appeal offends any statutory provision, this application should fail.

25. Having looked at the application, the supporting affidavit, the replying affidavit and the rival submissions, the only issue for determination is whether the appeal should be struck out.

Whether the appeal should be struck out

26. The Applicant's argument is that the Appellant is approbating and reprobating by sustaining the appeal yet he has received the decretal sum and costs awarded by the trial court.

27. The trial court judgment was delivered on 11/12/2023 and the appeal was filed seven days later on 19/12/2023. Order 42 Rule 1 of the CPR provides that every appeal to the High Court shall be in the form of Memorandum of Appeal signed in the same manner as a pleading. The appeal was therefore filed within 30 days as prescribed by section 79G of the *Civil Procedure Act* and in the manner prescribed by Order 42 of the CPR. Subsequently, the appeal was admitted on 30/05/2024 and is therefore properly on record.

28. The letter dated 22/03/2024 from the Appellant's advocate acknowledged receipt of kshs 886,030/= and noted that there was a balance of kshs 50,000/=. It is evident that the payment of the decretal sum was done after the appeal had been filed and considering that there were no stay orders in existence, the Appellant was well within his right to demand for payment of the decretal sum and to receive it. Order 42 Rule 6 of the CPR is clear that an appeal does not operate as a stay of execution.

29. The Respondent's Advocate deponed that he was served with a mention notice on 21/08/2024 and subsequently with the record of appeal. The email extract marked 'JM-2' confirms that indeed the record of appeal was served upon the Respondent's Advocate on 09/10/2024. Evidently, the Appellant was taking active steps to follow up on the appeal and the timelines within which an appeal should be dismissed for want of prosecution had not lapsed. Order 42 Rule 35 of the CPR provides that; 'If, within one year after the service of the memorandum of appeal, the appeal shall not have been set down for hearing, the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.'

30. Further, section 65 (1)(b) allows an aggrieved party to challenge the decision of a surbodinate court in the High Court. This right of appeal is also codified in Article 50 (1) of *the Constitution* of Kenya and is one of the tenets of a fair trial. The memorandum of appeal reveals that one of the grounds of appeal is that the general damages awarded were inordinately low compared to the injuries sustained by the Appellant. In my view, this is an arguable point which deserves audience of the appellate court. The Appellant is basically seeking enhancement of the award hence the fact that the decretal award given by the trial court has been paid does not disadvantage the Respondent in any way. In any case, the Respondent did not file a cross-appeal and its right to oppose the appeal has not been taken away. The numerous authorities cited by the Appellant are in agreement that payment of a decretal amount does not take away the right of appeal.

31. Further, courts have repeatedly held that striking out of pleadings is draconian and should be an act of last resort. In the case of Co-operative Merchant Bank Ltd. -vs- George Fredrick Wekesa (Civil Appeal No. 54 of 1999) the Court of Appeal stated that;

> "Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...."

32. The applicant sought the following orders:

    i. That this honorable court be pleased to order that the Appeal and Record of Appeal be struck out/dismissed on grounds of approbation and reprobation.

    ii. That the costs of this application and the entire appeal be awarded to the Respondent/ Applicant.

33. However, from the foregoing it is evident that the appellant/respondent is entitled to the appeal and the prayers sought by the Respondent/Applicant are untenable.

34. In that event the application is without merit. It is dismissed with costs to the appellant/ respondent.

DATED, SIGNED AND DELIVERED VIA CTS ON 24TH NOVEMBER 2025

MUMBUA T MATHEKA

JUDGE

CA Chrispol

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