

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. E003 OF 2024

MARGARET KALONDU MUSAU:::::::::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

MAVOKO LAND DEVELOPMENT CO. LTD:::::::::::::::::1ST

RESPONDENT

SOLOMON MBOTE GITHINJI (DECEASED):::::::::::::2ND RESPONDENT

RULING

The 1st Respondent objected to the entire Appeal as premised before the Honourable Court based on the following grounds;

1. THAT the entire Appeal is defective based on the following grounds;
 - i. No court proceedings are attached in the Record of Appeal.
 - ii. There is no Respondents' submissions in the Record of Appeal.
 - iii. No certificate of delay is annexed to explain the grounds of delay.
 - iv. No copy of the decree appealed against.
 - v. The Memorandum of Appeal is defective.
2. THAT the Record of Appeal doesn't have complete documents from the trial file as filed by the parties in this matter and the 1st Respondent shall seek the Appeal to be dismissed.
3. THAT the Appeal be dismissed with costs

This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being;

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued 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 in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminary objection as;

(i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and*
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.*

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.

The 1st Respondent submitted that the record of appeal did not have the complete documents such as the proceedings and the decree. That the certificate of delay was also not attached.

I have perused the court record and find that the Respondent/Appellant filed a memorandum of appeal dated 26th April 2024 upon delivery of the judgement on 4th April 2024 in Mavoko MELC No. 2 of 2022. The matter came up before the Deputy Registrar on the 25th September 2024 when the Deputy Registrar granted the Appellant 30 days to file the record of appeal as the proceedings were yet to be typed. On the further mention on the 4th December 2024 and the Appellants stated they were still waiting for the Defendant's documents and typed proceedings to be able to file the same. The Appellant stated that they

paid for the typed proceedings together with the decree on the 12th February 2025. That a copy of the missing submissions has been requested for by the Appellant severally but the same has not been forthcoming.

I find that the Respondent/Appellant filed a memorandum of appeal dated 26th April 2024 upon delivery of the judgement on 4th April 2024 in Mavoko MELC No. 2 of 2022. They were granted 30 days to file the record of appeal but this was not possible as they were waiting for the record of appeal. They were to file a supplementary record of appeal but it appears the delay was beyond their control as the submissions by the Respondent's were not availed to them and the typed proceedings were not availed to them by the Court. As to the merits and demerits of the memorandum of appeal the same can only be determined once the court has a chance to subject the matter to trial and not at this preliminary stage.

The Respondent submitted that Section 79G provides that any appeal filed after 30 days after judgement has been delivered a good reason must be given but that in light of the overriding objective stipulated in sections 1A and 1B of the Civil Procedure Act, I find that the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Civil Procedure Act or in the interpretation of any of its provisions.

Section 1A(2) of the Civil Procedure Act provides that “*the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective*” while under section 1B some of the aims of the said objectives are; “*the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.*”

I find that the delay in filing a full record of appeal was beyond the Appellant’s control in the circumstances of this case. I find that the preliminary objection is not merited and the same is dismissed. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY
OF DECEMBER 2025.**

**N.A. MATHEKA
JUDGE**