



**Pawa Africa v Cooperative Bank & 2 others (Civil Appeal  
E029 of 2023) [2025] KEHC 4116 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4116 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL E029 OF 2023  
FN MUCHEMI, J  
MARCH 27, 2025**

**BETWEEN**

**PAWA AFRICA ..... APPELLANT**

**AND**

**COOPERATIVE BANK ..... 1<sup>ST</sup> RESPONDENT**

**GIDEON MURIUKI ..... 2<sup>ND</sup> RESPONDENT**

**NGURU AUCTIONEER ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**Brief facts**

1. The application dated 24<sup>th</sup> October 2024 seeks for orders that this appeal be struck out in its entirety for being defective in form and substance.
2. In opposition to the application, the respondents filed a Replying Affidavits dated 18<sup>th</sup> November 2024.

**The Applicants' Case.**

3. The applicants state that the respondent has not filed a Memorandum of Appeal but has instead filed a Notice of Appeal at the appellate court contrary to the provisions of the law. Furthermore, the applicants aver that the respondent has filed a Petition of Appeal in place of a Record of Appeal and has not taken out any proceedings of the lower court before filing the appeal which is a mandatory requirement in the institution of an appeal.
4. The applicants argue that the respondent purports to have filed an appeal yet he is seeking orders of review in the said Notice of Appeal which orders ought to be sought from the court that rendered the decision.



5. The applicants state that the respondent does not have the requisite locus standi to institute the suit since he does not have any legitimate interest in the suit property which forms the subject matter of the suit and the appeal. Furthermore, the respondent is not even remotely affected by the actions of the applicants with relation to the suit property. Thus, the applicants argue that the appeal is defective having been filed by a person who lacks capacity to institute this appeal.
6. The applicants aver that the respondent is a busy body, who is out for a forum shopping expedition yet he has no legitimate interest in the suit property to warrant audience before the court. The applicants aver that they will be prejudiced if the orders sought are not granted.

### **The Respondent's Case**

7. The respondent states that it is the main party and has locus standi by virtue of being the appellant and has legitimate interest in the outcome.
8. The respondent further states that during the mention on 6/11/2024, the court and the 1<sup>st</sup> applicant confirmed that it had been granted leave on 23/8/2024 to file the appeal. Both parties confirmed that the Memorandum of Appeal was filed and that the appeal was properly before the court for hearing and determination. Thus, the claims by the 1<sup>st</sup> applicant that the appeal is defective in substance and form have no basis and if any, it should have been pointed out for rectification and in the interests of substantive justice, it should not override the substance of the matter.
9. The respondent states that the 1<sup>st</sup> applicant's supporting affidavit is fatally defective as it has been sworn by one Duncan Matisero who is neither a party, the owner, or has filed any document to demonstrate legal authorization by the applicants and is thus a stranger in the case. Thus, the application ought to be struck out.
10. The respondent states that the originating matter leading to the appeal is a petition filed under Article 22(1), (2)(a), (3)(a), (b) & (d) and 258 of *the Constitution* of Kenya and *Legal Notice No. 117 of 2013* on Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013 and as such it has the requisite locus standi granted in law and *the Constitution*.
11. The respondent avers that the instant application is a clear mischief whose aim is to divert the court's attention from the substantive matter. Furthermore, the applicants have not provided any material to show that they shall suffer prejudice if the orders sought are not granted.
12. Parties disposed of the application by way of written submissions.

### **The Applicants' Submissions**

13. The applicants submit that the instant appeal is incurably defective in substance and in form and as such the same cannot stand before the court. The applicants submit that the appeal betrays the provisions of the Court of Appeal Rules on the institution of appeals as the appeal is poorly drafted and does not meet the required drafting standards in accordance with the Civil Procedure Rules.
14. The applicants submit that an appeal is instituted by filing a memorandum of appeal within thirty days from the date of the decision being appealed from yet the respondent approached the court by filing a petition of appeal, which document is not recognized in the institution of appeals and is a non-existent pleading and ought to be struck out.
15. The applicants further submit that the respondent filed a Notice of Appeal which ought to have been filed in the trial court and not the appellate court as was done by the respondent.



16. The applicants submit that the instant appeal is not properly anchored in any provision of law and ought to be dismissed. The appeal has not been brought under any provision of the law and is fatally defective and therefore should not be entertained by any court of law.
17. The applicants argue that the respondent is guilty of forum shopping having instituted numerous baseless applications during the pendency of the appeal. The respondent is trying his luck with the court to see which order will be granted out of the many orders that have been sought. The applicants further argue that the respondent has set out numerous unrelated orders which he is seeking from the court and is casting his net wide hoping that any of the orders he is seeking will be granted by the court. Additionally, the grounds upon which the appeal is premised on, point to the fact that the respondent does not know what he wants from the court and is out for a forum shopping expedition.
18. The applicants rely on Order 2 Rule 15 of the Civil Procedure Rules and the case of *Kivanga Estates Limited vs National Bank of Kenya Limited* [2017] eKLR and submit that the instant appeal is frivolous and an abuse of the court process. The applicants further submit that admitting the said appeal would contravene the rules of drafting and that may set a precedent for bad practice in the filed of appellate litigation. The applicants thus urge the court to dismiss the appeal on account of poor drafting, lack of clarity on the orders sought and lack of provisions of the law to support the appeal which elements point to abuse of the court process by the respondent.

### **The Respondent's Submissions**

19. The respondent reiterates the contents of its affidavit and submits that it was the main party in the trial suit being *Thika MCCC/E251/2023* and thus has the locus standi to lodge the appeal in the instant court. The respondent further submits that the outcome of the appeal and cause of action shall directly affect him and thus has the locus standi to lodge the appeal. The respondent submits that the reason for filing the instant appeal is the fact that the lower court made a substantial error by agreeing with the applicants' allegations that it lacks locus standi to institute the claim.

### **Issue for determination**

20. The main issue for determination is whether the application has merit.

### **The Law**

SUBDIVISION - Whether the application has merit.

21. The appellant/respondent lodged an appeal by filing a Notice of Appeal and Petition of Appeal both dated 9<sup>th</sup> November 2023. On 6<sup>th</sup> December 2023, the instant court through the Deputy Registrar wrote to the lower court requesting for the original record, copies of the ruling and the proceedings, pleadings and exhibits and a certified copy of an extracted decree or order appealed against. Notably, the respondent did not make any application to the lower court requesting for a certified copy of the proceedings and ruling.
22. The lower court was received on 17<sup>th</sup> April 2024 and the appeal was admitted for hearing under Section 79B of the Civil Procedure Act on 28<sup>th</sup> May 2024. The law is clear on what documents ought to be in the court record before the appeal goes to hearing. Order 42 Rule 13 (4) of the Civil Procedure Rules which are listed as: the memorandum of appeal, the proceedings of the magistrate, all documentary exhibits, the judgment and the decree.
23. The applicants has not cited the law upon which this application is premised that would support striking out an appeal for being defective in form. I have perused the documents filed by the appellant



and noticed that one of the grounds of appeal against Hon. Mutua’s judgement was that he dismissed the lower suit MCCC No. E251 of 1<sup>st</sup> November 2023 for the reason that the appellant herein had no locus standi. This is the main ground of appeal which can only be determined on hearing of the appeal but not in an application.

24. The other issue is that the appellant has asked this court to review the decision of Hon. Mutua and at the same time, he has filed an appeal against the said ruling. On this issue, the court has already pronounced itself on the issue of review in a previous ruling delivered on 23<sup>rd</sup> August 2024. This court said that under Order 45 of the Civil Procedure Rules, it has no jurisdiction to review the decision of the trial magistrate. Such review can only be done by the magistrate who gave the said orders.
25. The other issues raised by the applicant relate to the main ground of appeal. These issues relate to the appellant having no legitimate interest in the property in question which had been given as security to the respondent for a loan borrowing by one Caroline Gichuki. These are issues of evidence that ought to have been addressed in the lower court.
26. It is further argued that the respondent filed a petition of appeal instead of a memorandum of appeal. Article 159 (...) of *the Constitution* emphasized on courts paying regard to substance rather than form. If the hearing court will look at the substance or content of the document. A document cannot just be struck out due to a wrong heading. Parties can amend documents any time before final orders are made. I find no substance in this argument about “form.”
27. Consequently, I find no merit in this application and it is hereby dismissed.
28. The issue of costs shall abide in the appeal.
29. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF MARCH 2025**

**F. MUCHEMI**

**JUDGE**

