



**Gitau v Githinji & another (Environment and Land Appeal  
E006 of 2022) [2023] KEELC 934 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 934 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E006 OF 2022**

**JG KEMEI, J**

**FEBRUARY 16, 2023**

**BETWEEN**

**JOHN MICHUKI GITAU ..... APPELLANT**

**AND**

**MARY NJERI GITHINJI ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTURI MUNENE (SUED AS TRUSTEE OF GLORIOUS JOY  
CHURCH NDARASHA) ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Application dated 14/9/2022**

1. Before court is the respondent's notice of motion dated September 14, 2022 filed under sections 1A, 1B, 3A and 63(e) *Civil Procedure Act* seeking orders that;
  - a. Spent.
  - b. This honorable court make a finding and an order that the memorandum of appeal dated February 1, 2022 and filed contemporaneously with notice of motion application dated February 1, 2022 (that was struck out vide ruling dated June 16, 2022) is improperly on record.
  - c. The honorable court be pleased to strike out record of appeal dated March 4, 2022 for offending provisions of order 9 rule 9 of the *Civil Procedure Rules, 2010*.
  - d. Costs of this application be on cause.
  - e. Any other order that the honorable court may deem just and fit to grant in the circumstances.
2. The application is premised on the grounds on the face of it and supporting affidavit of even date of Mary Njeri Githinji, the 1<sup>st</sup> respondent. She deponed that the appellant was aggrieved by the trial court judgment- MNG1 delivered in Ruiru MELC E065 of 2021 on January 20, 2022 and lodged the instant



appeal alongside the notice of motion dated February 1, 2022. That in opposing the said application the respondents raised a preliminary objection in respect of the appeal for want of compliance with the provisions of order 9 rule 9 Civil Procedure Rules. That the preliminary objection was upheld by this court vide a ruling – MNG2 delivered on June 16, 2022 hence the instant application to strike out the entire appeal for being improperly on record.

3. The application is vehemently opposed.
4. Learned Counsel Martin Kuria Mwangi swore a replying affidavit on September 30, 2022 on behalf of the appellant. He avowed that the application is frivolous and an abuse of court process and is ripe for dismissal with costs. That the record of appeal herein was filed on March 29, 2022 and a consent to come on record signed and filed in the trial court therein at page 122. See annexure MK1. That accordingly the appellant's Counsel he is properly on record and failure to file that consent was due to the urgent nature prompting the filing of the notice of motion dated February 1, 2022 which he concedes was struck out by this court. Counsel was emphatic that an appeal is a separate suit from the trial court suit rather than a continuation of the trial court proceedings. That article 159 2 (d) Constitution of Kenya is categorical that justice shall be administered without undue regard to procedural technicalities and mistakes by Counsel ought not be visited on their client.
5. The application was canvassed by way of submissions dated March 8, 2022 by the appellant only. The respondents opted to rely on the motion and supporting affidavit.
6. The appellant submitted that the right to a fair trial is enshrined under article 50 (2) Constitution of Kenya and that the provisions of order 9 rule 9 Civil Procedure Rules are inapplicable herein since the consent to come on record was filed in the lower court. That the instant proceedings are distinct from the trial court proceedings and the issue of Counsel's representation can be easily cured under article 159 Constitution of Kenya. He urged the court to strike out the application.
7. The germane issue for determination is whether the application is merited.
8. The respondents' case is that this court vide a ruling delivered on June 16, 2022 upheld their preliminary objection which impugned the legal capacity of the appellant's Counsel to lodge appellate proceedings without complying with the provisions of order 9 rule 9 Civil Procedure Rules. That accordingly the resultant memorandum of appeal and record of appeal filed herein are improperly on record and the same ought to suffer a similar fate as the notice of motion dated February 1, 2022.
9. The appellant takes a contrary position as he did in opposing the respondents' preliminary objection dated February 18, 2022 and maintains that he is properly on record to litigate the instant appeal on behalf of the appellant. He urged this court to take notice of the filed consent to come on record marked as annexure MK1.
10. The issue of whether the impugned consent was properly on record or not was aptly considered and determined by this court at paras 19 - 23 in its ruling delivered on June 16, 2022. In my view the issue is therefore falls under the realms of res judicata. Section 7 Civil Procedure Act is to the effect that;

“7 *Res judicata*

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such



subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

11. The finding of this court that the appellant’s Counsel was not properly before this court therefore applies to the instant appeal. For avoidance of doubt the memorandum of appeal and record of appeal filed herein on February 1, 2022 and March 29, 2022 respectively stand struck out.

12. In the end I find that the application is merited and is allowed as prayed.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Kuria for Appellant

Muchiru together with Ms. Omwoyo for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Court Assistants – Esther / Kevin

