



REPUBLIC OF KENYA



**KENYA LAW**  
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**Thuo v Gichina (Civil Miscellaneous Application E007 of 2022)  
[2022] KEHC 16501 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16501 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL MISCELLANEOUS APPLICATION E007 OF 2022  
RB NGETICH, J  
DECEMBER 15, 2022**

**BETWEEN**

**SERAH NYOKABI THUO ..... APPLICANT**

**AND**

**LILIAN NJERI GICHINA ..... RESPONDENT**

**RULING**

1. Before the court for determination is the motion dated January 26, 2022 and filed on the even date, seeking the following orders:
  - a. Spent
  - b. An order restraining the respondent and their agents/employees/people working under her instructions from interfering and /or dealing in any manner with the property known as Limuru/Bibirioni/1260 pending the hearing of the intended appeal.
  - c. That leave is granted to the applicant to file an appeal out of time against the ruling of honourable E Olwande SPM Limuru in succession cause no 98 of 2013.
  - d. That the applicant be granted fourteen (14) days to file all requisite documents in favour of the appeal.
  - e. That the costs of this application be in the cause.
2. The application is premised on the grounds that the applicant filed a summons for revocation of grant in Limuru succession no 98 of 2013. The summons was determined by the ruling dated November 12, 2020 in the absence of the applicant and his counsel. That the statutory time to appeal has lapsed and the failure to appeal within the required timeline is attributed to the applicant's then counsel who was not aware of notice of delivery of the ruling. That the delay is excusable and regrettable, and that if the orders are not granted the applicant will suffer great prejudice.



3. The application is supported by the annexed affidavit sworn by Sarah Nyokabi Thuo on January 26, 2022. She reiterates the grounds of the application. She further disposes that the application has been filed without delay and unless the orders are granted as prayed, she is apprehensive that the respondent will proceed to deal with the property known as Limuru/Bibirioni/1260.
4. In response, the respondent filed a replying affidavit sworn by Lilian Njeri Gichira on March 16, 2022 in which she disposes that the application is brought in deceit and concealment of material facts; that on November 12, 2020 when the ruling was set to be delivered, the applicant and his counsel were present in court in the morning hours when the judgments and rulings were deferred to the afternoon.
5. She averred that counsel for the applicant and the applicant deliberately skipped the afternoon session and the ruling was delivered in their absence. That the applicant had previously filed an application for review of the ruling on December 4, 2020, which was dismissed for lack of merit on November 1, 2021. That the application is an afterthought and a falsehood aimed at misinforming and misdirecting the court and urged this court to dismiss it with costs.
6. Directions were taken to have the motion disposed of through written submissions, which both counsels complied.

### **Applicant's Submissions**

7. Counsel for the applicant filed submissions on May 30, 2022 and submitted that the delay in filing the appeal is largely occasioned by the acts and omissions of the previous advocate on record who failed to advise the applicant on the best way to go about his case and submitted that the applicant had knowledge of the impugned ruling on 19<sup>th</sup> January 2022; and urged the court not to revisit the omissions' of counsel on the applicant.
8. Counsel submitted that the impugned ruling will be used to disinherit the applicant and the applicant will therefore suffer prejudice if the orders are not granted and urged the court to grant the orders sought.

### **Respondent's Submissions**

9. Counsel for the respondent filed submission on June 27, 2022 and submitted that as per section 80 of the *Civil Procedure Act*, a person who prefers a review of the trial Magistrate order cannot after the review is rejected exercise the option of appeal against the same order sought for review and cited the case of *Serephen Nyasani v Rispah Onsase* (2018) where the court held that under section 80 of the *Civil Procedure Act* to which the applicant predicted, the application for review of the trial magistrate's order of December 18, 2015, where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of. Order 45 of the *Civil Procedure Rules* which provides the procedure and the conditions that an applicant must satisfy in an application for review equally makes it clear that a party cannot seek a review of an order and appeal the same order.
10. Counsel submitted that the delay has not been explained; that the applicant filed an application for review which was unsuccessful and urged this court to dismiss the application.

### **Analysis And Determination**

11. I have considered grounds of the application and averments herein plus submissions filed. I will to consider whether delay in filing appeal has been sufficiently explained.



12. Section 80 of the *Civil Procedure Act* provides that:  
Any person who considers himself aggrieved –
- (a) By a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or
  - (b) By a decree or order from which no appeal is hereby allowed by this act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
13. In the case of *Serephen Nyasani Menge v Rispah Onsase* (2018) the court stated as follows: -
- “In my view, a proper reading of section 80 of the act and order 45 ules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted based on trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself based on the law and the evidence.”
14. From the averments by the applicant, she knew the ruling delivered on November 12, 2020, on January 19, 2022. She denied filing the review application dated December 4, 2020.
15. A perusal of the attachments on the replying affidavit of Lilian Njeri, I have noted that the applicant indeed filed a review application on December 4, 2020. She sought review, set aside, and/ or vary orders of November 12, 2020. The application dated December 4, 2020 was supported by the affidavit of Serah Nyokabi Thuo the applicant herein. The signature on the supporting affidavit of December 4, 2020 is similar to the signature affixed on the instant application. The argument that the applicant was not aware of the impugned ruling does not hold water. The applicant sought to review the ruling but the trial court dismissed for lack of merit.
16. From the conduct of the applicant, it is evident she was aware of the impugned ruling of November 12, 2020. She applied for a review of the said order on December 4, 2020 a period of about 22 days after delivery of the ruling, she therefore could not have learnt of the ruling on January 19, 2022.
17. From the foregoing, it is evident the applicant was aware of the ruling and chose to pursue the route of review of ruling and not appeal. The assertion that she was not well advised by the advocate is in my view, an afterthought.
18. It is trite law that litigation must come to an end, litigants should not be allowed to continue litigating matters for eternity. The applicant is seeking leave to file an appeal out of time after the review application was dismissed which amount to abuse of court process. I therefore find that the application dated January 26, 2022 lacks merit.



**Final Orders: -**

1. Application dated January 26, 2022 is hereby dismissed.
2. Costs to the respondent.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 15<sup>TH</sup> DAY OF DECEMBER, 2022.**

**RACHEL NGETICH**

**JUDGE**

**In the Presence of:**

Kinyua/Martin – Court Assistants

Mr. Muchiri for applicant

respondent – Present

