



**Madowo v Oluja & another (Civil Appeal E557 of 2022)
[2023] KEHC 1205 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E557 OF 2022

JK SERGON, J

FEBRUARY 24, 2023

BETWEEN

CHARLES LIEWA MADOWO APPELLANT

AND

GEORGE OLOO OLUJA 1ST RESPONDENT

EXPEDITIOUS AUCTIONEERS 2ND RESPONDENT

RULING

1. At the onset, the appellant lodged the appeal by way of the memorandum of appeal dated 21st July, 2022 to challenge the judgment entered by the trial court on 29th March, 2022 in Small Claims Court Case no. E980 of 2021.
2. The memorandum of appeal was accompanied by the Notice of Motion dated 21st July, 2022 wherein the appellant sought for an order for a stay of execution of the decree by way of an injunction, pending the hearing and determination of the appeal.
3. Subsequently, the 1st and 2nd respondents filed the notice of preliminary objection dated 22nd September, 2022 to challenge the appellant's Notice of Motion dated 21st July 2022 and the entire appeal the following grounds:
 - a. THAT the Memorandum of Appeal dated 21st July 2022 filed against the judgment/decree of Hon. C. A. Okumu delivered on 29th March 2022 was filed out of time without leave of court and ought to be struck out with costs.
 - b. THAT the Appellant is barred in law from instituting an appeal against the judgment of judgment/decree of Hon. C. A. Okumu delivered on 29th March



2022 since he has admitted in his application that he had sought a review of the same judgment vides a review application dated 16th May 2022 which review application was dismissed on 28th June 2022.

- c. THAT the foregoing is settled law as was held in the case of *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR, *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR and *Multichoice (K) Ltd v Wananchi Group (K) Ltd & 2 Others* (2020) eKLR
 - d. THAT the Appellant is playing lottery with the judicial process and trying his second bite at the cherry and thus his appeal and application is incurably defective, bad in law and an abuse of the court process.
 - e. THAT the Appellant's application and appeal is also frivolous and vexatious and ought to be struck out with costs.
4. To oppose the preliminary objection, the appellant swore a replying affidavit on 18th October, 2022.
 5. When the parties attended court, directions were given for the preliminary objection to be heard first, pursuant to which the parties were to put in written submissions.
 6. I have taken into consideration the grounds set out in the notice of preliminary objection; the reply thereto and the contending written submissions and authorities relied upon.
 7. From a reading of the preliminary objection, it is clear that the same gives rise to two (2) main preliminary arguments of objection.
 8. The first has to do with whether the memorandum of appeal dated 21st July, 2021 ought to be struck out for having been filed out of time and without leave of court.
 9. To support their position that the appeal is time barred, the respondents argue that the appeal was filed outside the stipulated timelines for lodging an appeal and that the appellant did not first seek leave of the court to have the appeal admitted out of time.
 10. In reply, the appellant explains that the delay in filing the appeal was occasioned by the time taken in pursuing the route of a review of the impugned judgment before the trial court and therefore urges this court to exercise its discretion by allowing the appeal, which appeal has high chances of success.
 11. The appellant refers this court to the case of *County Executive of Kisumu v County Government of Kisumu & others* [2017] eKLR with reliance on the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* Application No. 16 of 2014 [2014] eKLR where the court held thus:
 - “1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;



5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
12. The provisions of Section 79G of the *Civil Procedure Act* are clear that the timelines for lodging an appeal against the decision of a subordinate court are within 30 days from the date of the decree or the order being appealed against.
 13. Upon my perusal of the record, it is clear that the present appeal was lodged outside the statutory timelines, since the impugned judgment was delivered on 29th March, 2022.
 14. Upon my further perusal of the record, I did not come across anything to indicate that the appellant had previously sought for and was granted leave/the extension of time within which to file the appeal out of time.
 15. In view of all the foregoing circumstances, I am satisfied that the appeal is time barred.
 16. The second preliminary issue concerns itself with whether the appellant is barred by law from instituting an appeal after seeking a review.
 17. On the one part, the respondents submit that the appeal is an abuse of the court process by virtue of having been filed after a review of the impugned judgment had been sought for and denied.
 18. The respondents urge this court to consider the following reasoning adopted by the court in the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR:

“In my view a proper reading of Section 80 of the Act and Order 45 Rules 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 on the basis of 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 on the basis of the law and the evidence.”
 19. For the above reasons, the respondents once again urge this court to strike out both the appeal and the Motion dated 21st July, 2022 for being an abuse of the court process.
 20. The appellant on the other part states and argues that despite having filed an application seeking a review of the trial court’s judgment, he is still within his rights to lodge an appeal against the judgment,



quoting inter alia, the case of *African Airlines International Ltd v Eastern & Southern African Trade & Development Bank (PTA BANK)* [2003] eKLR where the court stated the following:

“We would finally add that Mr Kang’ethe contended that because the applicant preferred a review, it thereby lost its right of appeal. There is no merit in such a contention. The legal position is, we think, well settled.”

21. Upon my study of the record, it is not in dispute that following delivery of the impugned judgment, the appellant filed the application dated 16th May, 2022 before the trial court and sought for a review of the judgment. It is also not in dispute that the aforementioned application was dismissed vide the ruling delivered on 28th June, 2022.
22. The question therefore remains as to whether a party is permitted by law to lodge an appeal following an application for review.
23. The relevant provisions are Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#), 2010.
24. Section 80 provides thus:
 - “ 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.”
25. Order 45, Rule 1 (a) and (b) sets out the conditions that an applicant in an application for review must satisfy in order to get the application granted. Order 45, Rule 1 (2) expresses thus:

“A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review.”
26. From my reading and understanding of the above provisions, I am of the view that the same express that a party cannot seek both a review and an appeal in respect to the same ruling/order or judgment. In my view, to seek both a review and an appeal would constitute an abuse of the court process and be akin to forum shopping before the courts.
27. In the present instance therefore, I am of the view that the appellant; upon seeking a review of the impugned judgment and which review was denied; lost its right of appeal against the said judgment.
28. In finding so, I am supported by the following decision set out in the case of [Serephen Nyasani Menge v Risipah Onsase](#) [2018] eKLR cited in the submissions by the respondents:

“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 on the basis of trial and error.”

29. I also draw guidance from the rendition by the Court of Appeal in the recent case of *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR also cited in the submissions by the respondent, when it determined that:

“Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the court stated that “From the above provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”

30. Upon my consideration of the authorities cited by the appellant including that of *African Airlines International Ltd v Eastern & Southern African Trade & Development Bank (PTA BANK)* [2003] eKLR, I note that they were decided many years ago. From my consideration of more recent authorities, I note that the courts have since offered a clear legal position on the subject. I am therefore more persuaded by the recent authorities.
31. The upshot therefore is that the notice of preliminary objection dated 22nd September, 2022 is upheld. Consequently, the memorandum of appeal and the Notice of Motion both dated 21st July, 2022 are hereby struck out with costs to the 1st and 2nd respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2023.

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the 1st and 2nd Respondents

