



**Mwaura & another v Njuguna & 12 others (Civil Appeal  
E1017 of 2023) [2024] KEHC 9615 (KLR) (Civ) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9615 (KLR)

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

**CIVIL**

**CIVIL APPEAL E1017 OF 2023**

**CW MEOLI, J**

**JULY 31, 2024**

**BETWEEN**

**SAMUEL MWAURA ..... 1<sup>ST</sup> APPELLANT**

**KIRIITA PYRETHRUM AND VEGETABLE GROWERS CO-OPERATIVE  
SOCIETY LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JONATHAN MUIGAI NJUGUNA ..... 1<sup>ST</sup> RESPONDENT**

**KAMANDE ITUTH ..... 2<sup>ND</sup> RESPONDENT**

**PETER NDUNGU NENE ..... 3<sup>RD</sup> RESPONDENT**

**GEORGE KIBATHA KAMAU ..... 4<sup>TH</sup> RESPONDENT**

**SAMUEL MUTURI NGANGA ..... 5<sup>TH</sup> RESPONDENT**

**WANYOIKE WAWERU ..... 6<sup>TH</sup> RESPONDENT**

**NJUGUNA PETER KINYAGIA ..... 7<sup>TH</sup> RESPONDENT**

**JOHN KAMAU HUHO ..... 8<sup>TH</sup> RESPONDENT**

**KANGWATHA MAMIA ..... 9<sup>TH</sup> RESPONDENT**

**HOSEAH MWICHIGI ..... 10<sup>TH</sup> RESPONDENT**

**PETER GICHUHI MWANIKI ..... 11<sup>TH</sup> RESPONDENT**

**NYOIKE WAWERU ..... 12<sup>TH</sup> RESPONDENT**

**JOHN NJENGA GICHECHE ..... 13<sup>TH</sup> RESPONDENT**



## RULING

1. Samuel Mwaura and Kiriita Pyrethrum & Vegetable Growers Co-Operative Society Limited (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicants) lodged the present appeal. Seeking vide the memorandum of appeal dated 29<sup>th</sup> September, 2023, to challenge the ruling delivered by the Co-operative Tribunal (the Tribunal) on 21<sup>st</sup> September, 2023 in Tribunal Case Number 339 of 2005 (the Claim).
2. Subsequently, Jonathan Muigai Njuguna & 12 others (hereafter the Respondents) challenged the competency of the appeal by filing the notice of preliminary objection dated 2<sup>nd</sup> December, 2023 and amended on 19<sup>th</sup> January, 2024 (the amended preliminary objection) on the following grounds:
  1. The court lacks jurisdiction to hear it by virtue of Article 162 of the Constitution and also Section 79 of the Civil Procedure Act.
  2. The appellants have no right of appeal against the judgment delivered on 26<sup>th</sup> May, 2022, in Nairobi CTC No. 339 of 2005, having already preferred a review against the judgment.
  3. The appellants cannot exercise the right of review and appeal at the same time.” (sic)
3. The preliminary objection was canvassed by way of written submissions. In support of the preliminary objection, counsel for the Respondents firstly conveyed his clients’ abandonment of ground 1) of the amended preliminary objection, pursuant to the decision rendered in Jonathan Muigai Njuguna & 12 Others v Samuel Mwaura & 3 Others [2010] eKLR to the effect that the Tribunal had specialized jurisdiction to adjudicate upon matters touching on land and land occupation.
4. Nevertheless, counsel termed the present appeal as res judicata, on the premise that the court in the above-cited case involving the parties herein, had made a determination on the issue whether the Tribunal had jurisdiction to entertain disputes pertaining to the subject of land/land occupation.
5. On the merits thereof, counsel anchored his submissions on the case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 and the decision in *John Mundia Njoroge & 9 others v Cecilia Muthoni Njoroge & another* [2016] eKLR defining a preliminary objection. Counsel then proceeded to address the remaining grounds of objection with reliance primarily on Order 45, Rule 1 of the Civil Procedure Rules (CPR) and Rule 6 of the Co-operative Societies Rules, as pertains to review.
6. In that respect, counsel submitted that the Applicants having previously moved the Tribunal by way of an application seeking review of its judgment and which application was dismissed, cannot be heard to further pursue an appeal against the very judgment. In arguing so, counsel cited the decisions in *Shah Rekhavanti Pankaj v Bank of Baroda & another* [2021] eKLR and *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR where the respective courts concurrently held that where a party files an application for review of an order or decree, such party cannot, upon his or her application being dismissed, exercise the option of challenging by way of an appeal, the very decision for which review was sought.
7. In addition to the foregoing, the Respondents’ counsel also relied on the decision rendered by the Supreme Court in *University of Eldoret & another v Hosea Sitienei & 3 others* [2020] eKLR as well the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR and *HA v LB* (Civil Appeal 188 of 2021) [2023] KEHC 18432 (KLR) (31 May 2023) (Ruling) in echoing the legal position that it is not open for a party to seek to review a decision and subsequently lodge an appeal thereon.



8. Furthermore, counsel for the Respondents whilst citing the decision in *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others* [2007] eKLR contended that the present appeal is barred by the doctrine of finality, which holds that litigation must come to an end. On the basis of the above arguments, the court was urged to uphold the amended preliminary objection and to award costs thereof as well as those arising from the appeal to the Respondents.
9. In retort, the Appellants' counsel asserted that for the avoidance of doubt, it was the ruling delivered by the Tribunal on 21<sup>st</sup> September, 2023 and not the judgment previously delivered on 26<sup>th</sup> May, 2022, that is the subject of the present appeal. In addition, counsel for the Applicants challenged the argument by his opponent on applicability of the res judicata doctrine here, by stating that the question was not raised as a ground of objection and cannot therefore be raised at the submissions stage. Counsel here citing the decision in *Palms Resort Limited v Qureshi & 2 others (Civil Appeal E167 of 2022)* [2023] KEHC 23644 (KLR) (16 October 2023) (Judgment) to the effect that parties are bound by their pleadings. Be that as it may, counsel maintained that this court is clothed with jurisdiction to entertain the present appeal, once more citing decision of *Jonathan Muigai Njuguna & 12 Others v Samuel Mwaura & 3 Others* (supra) involving the parties herein.
10. Counsel then proceeded to dismiss the remaining grounds in the amended preliminary objection as misplaced and irrelevant at best, submitting further that nothing in the law precludes a party from appealing against a decision emanating from a review application under Order 45 of the CPR. Counsel added that the present appeal in no way concerns itself with the review application and/or resulting decision, rather, it lies against a ruling delivered on an application raising constitutional matters. In the end therefore, counsel submitted that the appeal is properly before this court and therefore urged that the amended preliminary objection be dismissed with costs.
11. The court has considered the amended preliminary objection and the contending submissions and authorities cited in that respect.
12. Before going into the merits, it is worth noting that among the matters ventilated by way of the Respondents' submissions was the issue whether the present appeal is res judicata, in view of the decision previously rendered in *Jonathan Muigai Njuguna & 12 Others v Samuel Mwaura & 3 Others* [2010] eKLR. The grounds raised in the amended preliminary objection do not contain this particular ground that was only raised at the submissions stage. That being the case, the court concurs with the sentiments raised by the Applicants that the Respondents cannot raise the plea of res judicata, through their submissions.
13. Now to the merits of the amended preliminary objection, ground 1) thereof was abandoned, pursuant to the decision rendered in *Jonathan Muigai Njuguna & 12 Others v Samuel Mwaura & 3 Others* (supra). This therefore leaves grounds 2) and 3) which raise the joint issue whether the option of appeal is available to the Appellants before this court, pursuant to a review application in respect of the judgment of the Tribunal brought by the Applicants, that has already been determined by the Tribunal.
14. Beginning with the question what constitutes a preliminary objection, the court in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 stated that :

“ A Preliminary Objection is in the nature of what used to be a demurrer. 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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”



15. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

16. Going by the averments on record, an application seeking a review was filed before the Tribunal, following delivery of its judgment on 26<sup>th</sup> May, 2022, which application was, according to the Respondents dismissed. Suffice it to say that the memorandum of appeal on record patently indicates that the present appeal lies against the review ruling delivered by the Tribunal on 21<sup>st</sup> September, 2023 and not against the judgment, as purported by the Respondents. In this respect, the arguments by the Respondents that the present appeal cannot stand on the basis of a previous review application, cannot stand.

17. That notwithstanding, the memorandum of appeal while seeking to set aside the aforesaid ruling, contains two (2) other separate prayers relating to the judgment of the Tribunal. It is not clear whether this was intentional or the result of an inadvertence on the part of the Appellants’ advocates who now disavow any challenge in this appeal to the Tribunal’s judgment. Whatever the case, the court finds that the prayers pertaining to the judgment delivered by the Tribunal, cannot be sought by way of the present appeal.

18. In any event, and this brings us to the subject of review raised in the amended preliminary objection, Order 45 of the CPR which is anchored on Section 80 of the *Civil Procedure Act* states that:

“1.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

19. Where a party unsuccessfully pursues the route of review under Order 45 (supra) and/or Section 80 (supra), such party cannot subsequently seek the option of an appeal against the very decision for which review was sought and declined. This position was succinctly stated by the Court of Appeal in the



earlier cited case of *Gerald Kithu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR in the manner hereunder:-

“The applicant was aggrieved by the judgment of the trial court. 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 ...” See also the case of *Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 Others* (2020) eKLR.”

20. In the premises, it would not have been open to the Appellants having exercised the option of review to challenge the judgment delivered by the Tribunal on appeal, if that were the case. However, as earlier mentioned here, the appeal lies not against the judgment, but against the Tribunal review ruling of 21<sup>st</sup> September, 2023 despite the lack of clarity reflected in the prayers sought via the memorandum of appeal.
21. Accordingly, the amended preliminary objection dated 19<sup>th</sup> January, 2024 fails and it is hereby dismissed with no order on costs. However, for the avoidance of doubt, an order is hereby issued to the effect that prayers a) and b) of the memorandum of appeal dated 29<sup>th</sup> September, 2023 relating to the judgment delivered by the Tribunal on 26<sup>th</sup> May, 2022 are hereby struck out.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the 1st Appellant: Ms. Ochola

For the 2nd Appellant: Mr. Githinji

For Respondents: Ms. Kamau

C/A: Erick

