



**Pawa Africa v Cooperative Bank & 2 others (Civil Appeal
E029 of 2023) [2024] KEHC 10442 (KLR) (23 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E029 OF 2023
FN MUCHEMI, J
AUGUST 23, 2024**

BETWEEN

PAWA AFRICA APPLICANT

AND

COOPERATIVE BANK 1ST RESPONDENT

GIDEON MURIUKI 2ND RESPONDENT

NGURU AUCTIONEERS 3RD RESPONDENT

RULING

Brief facts

1. The application for determination dated 9th November 2023 seeks for orders of review of the ruling/orders delivered on 1st November 2023 in Thika CMCC No. E251 of 2023.
2. In opposition to the application, the respondents filed a Replying Affidavit sworn on 22/07/2024.

The Applicant's Case.

3. The affidavit was sworn by one Patrick Gitaari, a director of the applicant company, a civil society organization specializing in Social Justice, Human Rights and Governance in Kenya.
4. The applicant states that there was an error of law and fact on the face of the ruling dated 1st November 2023. The applicant further discovered new facts previously not before the court. The applicant further states that the trial magistrate overlooked the fact that the affected person was terminally ill incapable of filing the case or otherwise approaching the court for justice on her own.
5. The applicant argues that the applicant overlooked the locus standi granted by them by the law and the nature of the case which is entirely premised on breach of Article 47 and Chapter 4 of *the Constitution*. Furthermore, the trial magistrate overlooked Article 3, 22 and 258 of *the Constitution*.



and legal Notice No. 117 of 2013, *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

6. The applicant further argues that the trial magistrate erred by failing to appreciate the lack of basis of the objection raised and the subservive nature of activities of the respondents leading to the application, the adverse consequences of its projects on the public, the aggrieved party and parties unable to defend themselves before the court.

The Respondent's Case

7. The respondent states that the application has no merits, is null and void, bad in law and is incompetent. The respondent argues that the 1st & 2nd applicants have not met the threshold to warrant the orders sought for review of the judgment entered on 25th January 2024.
8. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

9. The applicant states that the matter in the lower court being Thika CMCC No. E251 of 2023 was a petition for orders under Article 22 of *the Constitution* to restrain the respondents from causing abuse or threat to the constitutional rights under Article 47 of an aggrieved party named Caroline Gichuki, a member of the applicant company, who is unable to file the case under her own name and defend herself due to the adverse illness.
10. The applicant submits that the applicant company derives authority to file the petition under Article 3(i), 22, 23(3), 47, 258 of *the Constitution* and Legal Notice No. 117 of 2013 part II, 4(2)(i). Pursuant to Article 22(2) of *the Constitution*, the aggrieved party was not able to file the petition under her own name due to the nature of the work she is engaged in. The applicant further submits that the applicant has locus standi pursuant to Article 22(2)(d).
11. The applicant submits that the aggrieved party has a credit facility which she is servicing with the 1st respondent and had already agreed with the 1st respondent on how to clear accruing arrears of Kshs. 100,000/- which consisted of her making monthly payments of Kshs. 10,000/-. The respondents arbitrarily and without notice descended on the aggrieved party with threats to dispossess her property unless she pays the extra amount outside the loan settlement plan.
12. The 1st respondent immediately issued an undated letter confirming payment of Kshs. 100,000/- but indicated an additional figure of Kshs. 140,000/- which was not part of the payment plan. Unable to defend herself, the aggrieved person called the applicant, a social justice organization to intervene and seek administrative justice, clarity and resolution of the matter.
13. The applicant submits that the respondents made a public advertisement to dispose and sell the property of the aggrieved person to recover the amount of Kshs. 140,000/- illegally imposed on her. As a result, the aggrieved person's health deteriorated because of the persistent threats and intimidation and she had no other way of protecting her right to fair administrative action under Article 47 of *the Constitution*. The applicant further submits that it filed a case in the Central Bank of Kenya and the Commission on Administrative Justice.
14. The applicant argues that the trial magistrate overlooked the fact that the matter was filed under Article 22 of *the Constitution* and that the petitioner had the locus standi granted in law to institute the petition. The applicant further submits that the appeal is solely based on law.



15. The applicant argues that the replying affidavit dated 13th May 2024 is signed by a stranger who is neither a party or advocate in the matter, not has he provided any document to prove his interest, relationship, authority and therefore the replying affidavit should be declared inadmissible and expunged from the court records.
16. The applicant submits that the respondents are in breach of the law by threatening and trespassing on the aggrieved party's property even though the matter is pending determination by the Commission on Administrative Justice.

The Respondents' Submissions

17. The respondents submit that the applicant filed a suit being CMCC No. E251 of 2023 seeking for injunctive orders restraining the bank from selling the suit property belonging to Caroline Gichuki. The respondents filed a preliminary objection on the grounds that the applicant did not have locus standi to institute the suit and the trial court rendered its ruling on 1st November 2023 dismissing the entire suit on the premise that the applicant did not have locus standi to institute the suit.
18. The respondents submit that the instant application is incurable defective for want of procedural and substantive correctness and as such the same is scandalous, frivolous, vexatious and an abuse of the court's time. Relying on the case of *Kivanga Estates Limited vs National Bank of Kenya Limited* [2017] eKLR and Order 2 Rule 15 of the Civil Procedure Rules, the respondents submit that the application is not properly anchored in any provisions of the law and is fatally defective and ought to be dismissed. Further, the respondents argue that the application is poorly drafted and does not meet the required drafting standards in accordance with the Civil Procedure Rules. The applicant is not clear on the type of orders that he is seeking as he has sought orders for review of the impugned ruling and on the other hand he has sought orders for restraint against the respondents from interfering with the suit property and crystallizing their statutory power of sale.
19. The respondents argue that the applicant 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 application is premised on point to the fact that the applicant does not know what he wants from the court and is out for a forum shopping expedition.
20. The respondents submit that the applicant wants the court to grant orders of review and restraint and thereafter still direct the parties to mediation while there is a Notice of Appeal on record. The respondents argue that the court does not have jurisdiction to grant the orders of review or restraint as sought in the application. Further if the matter proceeds by way of an appeal, the orders of mediation sought by the applicant will be null and void
21. The respondents submit that the applicant is undeserving of the orders sought on the premise that he is forum shopping while employing delaying tactics with the aim of preventing the 1st respondent from crystallizing its statutory power of sale. The respondents further argue that an application for review can only be made before the judicial officer pursuant to Order 45 Rule 1 and 2 of the Civil Procedure Rules. The application has been made in an appeal cause which renders it fatally defective as the court has no jurisdiction to hear the application. Relying on the case of *Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR, the respondents argue that a party to a litigation may not pursue an appeal and a review of the same court decision simultaneously.
22. The respondents submit that the orders of restraint that the applicant seeks have already been dismissed by the lower court and thus the matter is res judicata having been determined by a court of competent



jurisdiction. Furthermore, filing the instant application equally amounts to forum shopping since the issue has already been determined by a court of competent jurisdiction.

23. The respondents argue that the appeal is on a point of law that cannot be canvassed in mediation.
24. The respondents submit that the applicant's suit having been dismissed by the lower court, the applicant has not approached the court in the right manner to seek orders of either review or appeal of the lower court's decision.

Issue for determination

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

The Law

Whether the application has merit.

26. From the outset, it is not clear what orders the applicant is seeking. The applicant has filed the instant appeal against the decision of the trial magistrate in issuing the orders in Thika CMCC No. E251 of 2023 dated 1st November 2023. In the same breadth, the applicant has filed the instant application seeking for orders of review of the orders issued on 1st November 2023 in Thika CMCC No. E251 of 2023 and at the same time the applicant seeks for orders of restraint against the respondents from interfering with the suit property and further that the matter be referred to mediation. The lack of clarity is expounded by the fact that the applicant has not sworn a substantive affidavit to support his application.
27. On the issue of review, it is trite law that orders of review under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 & 2 of the *Civil Procedure Act* can only be instituted before the judicial officer who rendered the impugned decision. Thus, the applicant cannot pursue for orders of review from this court as the decision it is seeking to review was made by the learned trial magistrate in Thika CMCC No. E251 of 2023. Section 80 of the *Civil Procedure Act* provides:-

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 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.
28. It is further clear from the foregoing that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time. H.A. vs L.B [2022] eKLR. In the instant case, the applicant has already lodged an appeal against the impugned ruling of 1st November 2023, therefore they are precluded from reviewing the said orders at the same time.
29. On the issue of granting orders of restraint, the lower court already rendered its ruling on the issue on 1st November 2023 and the matter can only be appealed from which the applicant has done here. Therefore it cannot bring up the issue again in an application as the lower court already heard and made a determination on the same.



30. Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, this court has no jurisdiction to review the judgment of the learned magistrate. An application for review ought to have been filed before the same Magistrate's court.
31. It is noted that this court can only deal with an appeal from the magistrate's decision if such an appeal is within the legal requirements. The applicant is talking of constitutional issues brought under Articles 3, 22 and 2578. The magistrate's court has no jurisdiction to interpret *the Constitution*. However, the respondent has clarified that what was before the magistrate was a commercial suit seeking for an injunction against the respondent not to dispose off a loan security of one Caroline Gichuki. The court found that he appellant had no locus standi or authority to institute the suit on behalf of the said Caroline.
32. It is my finding that this application for review is incompetent and misconceived. It is hereby struck out with costs to the respondent.
33. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 23RD DAY OF AUGUST 2024.

**F. MUCHEMI
JUDGE**

