



**Omosa v Isaac (Succession Cause E090 of 2023)
[2023] KEHC 27136 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27136 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE E090 OF 2023
TA ODERA, J
DECEMBER 19, 2023**

BETWEEN

CHARLES ONGERI OMOSA APPLICANT

AND

MOMANYI PAUL ISAAC RESPONDENT

RULING

1. By a Chamber Summons Application filed under a Certificate of Urgency by the firm of Omwando Mbaka & Co. Advocates, and dated 19.6.2023, the Applicant sought the following orders: -
 1. Spent.
 2. That this Honourable Court be pleased to grant a Temporary Order of Injunction against the Respondent, his agents, assigns, servants, employees and/or any other person acting on his behalf restraining them jointly and severally from making and/or erecting any construction or structure on parcel land being LR No West Kitutu/ Bomatara/ 1192 and/or interfering with the said land in any manner whatsoever pending the hearing and determination of this Application inter-partes.
 3. That this Honourable Court be pleased to grant a conservatory order against the Respondent, his agents, assigns, servants, employees and/or any other person acting on his behalf restraining them jointly and severally from selling, charging, leasing, assigning, transferring the suit land and/or evicting the Applicant from Land Parcel Number West Kitutu/ Bomatara/ 1192 and/or interfering in any manner (sic) whatsoever with the Applicant's use and/or occupation of the said suit land pending the hearing and determination of this Application inter-partes.
 4. That the Applicant be granted leave to appeal out of time against the whole Ruling made by Hon. S.K. Onjoro (Principal Magistrate), in Kisii CMCC Succ. Cause No 171 of 2019 on the 25th day of March 2022.



5. That this Honourable Court be pleased to grant a Temporary Order of Injunction against the Respondent in terms of prayer 2 and 3 above pending the hearing and determination of this suit.
 6. That costs of this application to be provided for.
2. The grounds on the face of the Application are that on 25.3.2022 Hon. S. K. Onjoro (Principal Magistrate) delivered his ruling in respect of the Applicant's Application dated 2.3.2021 dismissing the said Application. The orders sought in the Application were for revocation of the Grant confirmed on 7.2.2020. The Respondent had since procured registration and title of the suit property in his name and he was likely to transact and deal with it to the Deceased's survivors' prejudice. The Applicant opposed the Ruling by way of review which was subsequently dismissed. The Applicant's family was in full possession of Parcel Number West Kitutu/ Bomatara/ 1192 which forms part of the Deceased's Estate from the 1970s to date. The Applicant had since elected to oppose the Ruling vide an appeal.
 3. The Application was supported by an Affidavit sworn by the Applicant on 19.6.2023. He deponed that the Deceased died on 28.2.1981 and left behind several beneficiaries and that he was the Deceased's eldest son. He deponed that he had sought for orders of revocation of grant vide an Application dated 2.3.2021. However, on 25.3.2022, Hon. S.K. Onjoro, PM, in Kisii CMC Succ. No 171 of 2019 dismissed it. He deponed that he had put forth strong grounds for revocation of grant that the Respondent was not a survivor or the Deceased's Estate; the Respondent had procured and used a forged letter of introduction from the Chief, Nyakoe Location; omitting the bonafide survivors of the Deceased; presenting the suit property as the Deceased's sole property; and intermeddling with the Deceased's Estate. He deponed that he challenged the ruling vide an application for review which was subsequently dismissed, hence the present appeal. He deponed that the Letter of Introduction by the Chief, Nyakoe Location dated 25.1.2019 was renounced by a further letter dated 1.3.2021. The Chief Nyaribari Keumbu also issued a letter dated 23.2.2021 confirming that the Deceased had more than one beneficiary. He deponed that his family had been in possession of the suit property from the 1970s. He was apprehensive that since the Respondent had already processed the title to the suit property in his name, he was likely to evict the Applicant and his family. He deponed that while he may have erred in failing to file an appeal, he had a constitutional right to be heard on appeal. He referred the Court to the decision of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] eKLR.
 4. The Respondent did not participate in the proceedings, and therefore the application is unopposed.

Determination

5. I have considered the Application, the Affidavit in Support and the annexures thereto.
6. I note that the Applicant accedes that he applied for review which application was dismissed, hence the current application and appeal.
7. I took the liberty of calling for the Lower Court file for the sole purpose of satisfying myself that indeed the Application for review was filed. Indeed, the said application was filed and it was dismissed on 8.2.2023.
8. Can one file for review and still appeal? The answer is in the negative. The Courts have over time pronounced themselves on the same.



9. Rule 63 of the *Probate and Administration Rules* provides that Order 45 of the *Civil Procedure Rules* shall apply to succession matters. Rule 45 of the *Civil Procedure Rules, 2010* provides thus:

45. Application for review of decree or order

(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 reasons, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for 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 the review.

10. A reading of Order 45 Rule 1 of the *Civil Procedure Rules, 2010*, envisages a situation where a party either applies for review or appeals, and not where both an appeal and application for review are filed with regard to the same decision. It would wreak utmost havoc and allow for abuse of court process if a litigant would be allowed to appeal and subsequently apply for review should the decision rendered not be in their favour, and vice versa. Therefore, litigants are expected to exercise utmost caution when determining which route to take. As has been held by numerous courts, an issue may be a good ground for both review and/or appeal, but a ground of appeal is usually not a good ground for review.

11. The Court of Appeal has also pronounced itself on the same. In *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR, the Court of Appeal held as follows:

“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. This is exactly what happened here.

12. In *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR, the Court was faced with a similar situation. The Applicant unsuccessfully applied for review before the Magistrate’s Court. The said Applicant then filed an application for leave to appeal out of time and attributed the delay to the review application. In dismiss the application for leave to appeal out of time, the Court held thus:

12. Under Section 80 of the *Civil Procedure Act* pursuant to which the applicant predicated the application for review of the trial Magistrate’s order of 18th December 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 review of an order and appeal the same order....

13. Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party...

14. 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.

13. In *HA v LB* [2022] eKLR, the Court held that “a person cannot exercise the right of appeal and review at the same time. See *Orero v Seko* [1984] KLR 238 Also see *Ndithya v Total Kenya Limited*



(Miscellaneous Civil Application E218 of 2021) [2022] KEHC 10080 (KLR) (14 July 2022) (Ruling) among others.

14. Therefore, the Application herein must suffer the same fate. Having unsuccessfully applied for review of the Trial Court's decision, it is not open for the Applicant to appeal against the same decision as purported vide the Application dated 19.6.2023.
15. It follows, therefore, that the prayer for leave to appeal out of time will also stand automatically declined. Looking at the case of *Gerald Kitbu Muchanje v Catherine Muthoni Ngare & another* [2020] eKLR, the Court of Appeal noted that the Applicant's reasons for delay was because he was pursuing the application for review. The Court found that the said reason was not good enough. I also find as much.
16. In any event, and not that it would have meant that the application was proper, but the application for review was dismissed on 8.2.2023. There is no reason why the Applicant filed the present application on 19.6.2023.
17. I believe I have said enough to show the fate of the Applicant's Application.
18. In the end, and for the reasons set out herein, I find that the Application dated 19.6.2023 lacks merit and I proceed to dismiss it.
19. I make no order as to costs.
20. Before I pen off, I wish to state something briefly. The Affidavit of Service on record indicates that the Respondent was served via WhatsApp vide +25472158XXXX. The process server merely indicated that he got the phone number from the Applicant. However, there is no proof whatsoever that the said number actually belongs to the Respondent herein. In the circumstances, service in itself was not proper.
21. In *Omar Shallo v Jubilee Party of Kenya & another* [2017] eKLR, the Court went to great lengths to discuss the procedure for service and the importance of service. Service ensures that the other side is aware of the suit and that party is thus given an opportunity to appear and defend or admit the claim. Without service, it cannot be said that there was a fair hearing.
22. It is so ordered.

DATED, DELIVERED AND SIGNED AT KISII THIS 19TH DAY OF DECEMBER 2023.

TERESA ODERA

JUDGE

In the presence of:

Counsel for applicant the Applicant absent

Mwiti : Court Assistant

