



REPUBLIC OF KENYA



**Thomas Kamau Ndegwa t/a Ndeeri Motorcar Enterprises v Njiru;
Al-Ginza Automobile Motors Ltd (Third party) (Civil Appeal
E064 of 2023) [2023] KEHC 26656 (KLR) (19 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E064 OF 2023
FN MUCHEMI, J
DECEMBER 19, 2023**

BETWEEN

**THOMAS KAMAU NDEGWA T/A NDEERI MOTORCAR
ENTERPRISES APPLICANT**

AND

REUBEN GITONGA NJIRU RESPONDENT

AND

AL-GINZA AUTOMOBILE MOTORS LTD THIRD PARTY

*(Being appeal against the judgment delivered on 14th September 2022
in Thika Small Claims Court Commercial Case No. E374 of 2022)*

RULING

Brief facts

1. Coming up for determination is the 3rd party's Notice of Preliminary Objection dated 19th May 2023 which is premised on the following grounds: -
 - a. That the appellant has no right of appeal against the judgment delivered on 14th September 2022 in Thika Small Claims Court Commercial Case No. E374 of 2022 having already preferred a review against the judgment.
 - b. The applicant cannot exercise the right to review and appeal at the same time.
2. Parties disposed of the preliminary objection by way of written submissions.



The 3rd Party's Submissions

3. The 3rd party submits that the appeal arose from Thika Small Claims Court Commercial Case No. E374 of 2022 where the appellant and the respondent entered into a sale agreement for importation of a motor vehicle. The appellant took out third party proceedings. Judgment was delivered on 14th September 2022 and the trial court found the appellant liable for the claim against the respondent and judgment was entered in the sum of Kshs. 916,500/-.
4. The 3rd party further states that the appellant filed an application seeking to review the judgment but the application was dismissed with costs awarded to it and the respondent. The 3rd party thus argues that once the appellant filed a review seeking to set aside the judgment, he could not at the same time prefer the judgment to an appeal. To support its arguments, the 3rd party relies on the case of H. A. vs L. B. [2022] eKLR.

The Appellant's Submissions

5. The appellant submits that he entered into a car sale agreement with the respondent for a consideration of Kshs. 1300USD. The respondent paid Kshs. 950,000/- as a deposit for the purchase price of the motor vehicle and ordered for the said motor vehicle from an exporter by the name Minato. The appellant further submits that when he asked the respondent for the balance of the purchase price, the respondent was unable to fulfill his obligation thereby breaching the car sale agreement.
6. Consequently, the import duty charges continued accruing because the motor vehicle was held at the Kenya Revenue Port Authority. Due to the fear and loss of the money and the motor vehicle, the exporter approached the 3rd party and they took up the motor vehicle and paid for all the duty owed as well as the balance of the purchase price. The respondent then instituted a suit against the appellant seeking a refund of the deposit paid being Kshs. 950,000/-. The trial court entered judgment in favour of the respondent and awarded costs to the respondent and the 3rd party.
7. The appellant relies on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and submits that he filed an application for review first and when the trial court dismissed his application in November 2022 he filed the application dated 27th February 2023 seeking to file his appeal out of time. Thus contrary to what the 3rd party alleges, the appellant contends that the appeal and review were not filed at the same time as the law bars one from reviewing a matter that has already been preferred for appeal.
8. The appellant further urges the court to allow him a chance to lodge an appeal as he was aggrieved by the trial court's judgment. The appellant argues that the trial court failed to consider many factors and thus the judgment entered against him is unfair. Furthermore, the appellant contends that he stands to suffer injustice as he was ordered to refund the motor vehicle in question yet he does not have the motor vehicle. The subject motor vehicle was already sold by the 3rd party due to the respondent's default in his contractual obligations which the appellant contends the trial court did not consider in making its decision. Thus, the appellant argues that the appeal has high chances of success.

Issue for determination

9. The main issue for determination is whether the preliminary objection is sustainable.



Whether the preliminary objection is sustainable.

10. The case of *Mukisa Biscuits Manufacturing Ltd vs West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

"a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

11. Sir Charles Newbold P. stated:-

" 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 if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop."

12. Similarly the Supreme Court in the case of *Hassan Ali Jobo & Another vs Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR held that:-

" A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit."

13. Further in the case of *Hassan Nyanje Charo vs Khatib Mwasbetani & 3 Others*, [2014] eKLR the court held that:-

" Thus a preliminary objection may only be raised on a 'pure question of law.' To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."

14. Evidently, 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.

15. The 3rd party argues that the appellant having opted to apply for review of the judgment dated 14th September 2022 cannot seek to appeal from the same judgment after the application for review was dismissed. The 3rd party further argues that would amount to a contravention of Section 80 of the *Civil Procedure Act* and Order 45 Rule 2 of the *Civil Procedure Rules*.

16. 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.



17. Order 45 Rule 1(b) of the *Civil Procedure Rules* provides:-

1. Any person considering himself aggrieved by
 - a. 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 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 was 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.
2. 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 the review.

18. It is thus 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. One cannot exercise the right of appeal and at the same time apply for review of the same judgment. One must elect either to file an appeal or to apply for review.

19. The Court of Appeal in *Gerald Kithu Muchanje vs Catherine Muthoni Ngare & Another* [2020] eKLR held:-

" 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 want 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 a 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 of review."

20. This position was adopted by the High Court in *Serephen Nyasani Menge vs Risipah Onsae* [2018] eKLR where the court held as follows:-

" 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 a 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. Subrule (2) of Order 45 of the *Civil Procedure Rules* further makes the matter clearer...



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 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 review of the order that's he 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."

21. Applying the above principles to the instant application, the appellant filed an application dated 10th October 2022 seeking to review the judgment dated 14th September 2022 and have it set aside. The trial court dismissed the said application in November 2022. Thus it is evident that the law precludes the appellant from lodging an appeal on the same judgment. The applicant by electing to have the impugned judgment reviewed lost his chance to lodge an appeal against the judgment.
22. Consequently, I find that this preliminary objection has merit and it is hereby upheld. This appeal is hereby dismissed with costs to the claimant/3rd party.
23. It is hereby so ordered.

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

F. MUCHEMI

JUDGE

