



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 188 OF 2021

HA.....APPELLANT

VERSUS

LB.....RESPONDENT

(Being an Appeal from the Ruling and Orders of the Hon. B. Kasavuli (PM) given on 27th May, 2021 and 4th November, 2021 in Mavoko Children’s Case No. 18 of 2020)

BETWEEN

LB.....PLAINTIFF

VERSUS

HA.....DEFENDANT

RULING

1. A perusal of the record of these proceedings reveals that on 27th May, 2021, the learned trial magistrate made some maintenance orders against the Appellant herein. Subsequently, by a Motion on Notice dated 3rd June, 2021, the Appellant sought to have the said orders reviewed and set aside. By her ruling delivered on 4th November, 2011, the learned trial magistrate disallowed the said application for review.

2. It is that decision which provoked this appeal. However, a reading of the memorandum of appeal reveals that the Appellant is challenging both the ruling dated 27th May, 2021 and the other one dated 4th November, 2011.

3. Before me for determination is whether the Appellant can competently challenge the said decisions. The objection has been taken by way of a preliminary objection.

Determination

4. I have considered the material placed before me in this matter.

5. Order 45 rule 1(b) of the Civil Procedure Rules, provides as follows:

“(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.

(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.”

6. The foregoing provisions are based on section 80 of the Civil Procedure Act Cap 21 Laws of Kenya which states as follows:

“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.”

7. It is 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. See **Orero vs. Seko [1984] KLR 238.**

8. Who, then is a party who is appealing? There are two contradictory decisions from the Court of Appeal. In **Kisya Investments Ltd vs. Attorney General and Another Civil Appeal No. 31 of 1995** the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However, in **Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992** the Court of Appeal was of the following view:

“The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed..What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal”.

9. In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the **Haryanto Case** reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact, under Rule 77(1) of the **Court of Appeal Rules** it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review.

10. However, the same Court in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005** had this to say:

*“The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed. An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under Order 9A rule 2 Civil procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved party has “preferred” an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal in **Yani Haryanto Vs. E. D. & F. Man (Sugar) Ltd Civil Appeal No. 122 Of 1992 (UR)**... The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other”.*

11. Whereas under Order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a *carte blanche* for abuse of the process of the Court. In the case of **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 Kimaru, J** dealing with the issue of abuse of the process of the Court stated as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

12. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the ***Civil Procedure Act*** under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the ***Civil Procedure Act*** whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court’s seal of approval to persons who wish to play lottery with judicial process. Accordingly, I associate myself with the decision in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi** (supra) that both options cannot be pursued concurrently or one after the other.

13. In this case the Appellant having sought to review the order made on 27th May, 2021 cannot now purport to appeal against the same. He can only appeal against the decision made on 4th November, 2021.

14. In the celebrated case of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696. Law, JA** was of the following view:

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

15. Therefore, a preliminary objection is only competent where its success would dispose of the whole suit. In this case, the success of the preliminary objection will only dispose of the appeal in so far as it challenges the decision made on 27th May, 2021 but the part attacking the decision made on 4th November, 2021 would remain intact.

16. In the foregoing while I find that the Appellant is barred from challenging the decision made on 27th May, 2021, the issues herein ought not to have been raised by way of a preliminary objection.

17. Accordingly, I disallow the preliminary objection but with no order as to costs.

18. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 24TH DAY OF JANUARY, 2022.

G.V. ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Susan