



REPUBLIC OF KENYA



KENYA LAW
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**Mzingo v Nzaka (Deceased) & another (Environment & Land Case
93 of 2019) [2023] KEELC 17525 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 93 OF 2019**

**MAO ODENY, J
MAY 18, 2023**

BETWEEN

ABDALLA CHOGO MZINGO PLAINTIFF

AND

JUMA NZAKA (SON) 1ST DEFENDANT

JOHN NZAKA (DECEASED) 2ND DEFENDANT

RULING

1. This Ruling is in respect of an application dated December 7, 2022 by the defendant/applicant seeking the following orders;
 - a. Spent
 - b. That this honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Justice J.O. Olola delivered against the applicant on the April 30, 2021 pending the hearing of this application inter-parte.
 - c. That the Honourable Court be pleased to review its ruling delivered on November 16, 2022 and determine the same on the basis that the earlier application for leave dated August 12, 2021 had no bearing with regards to stay in any event on the application dated March 15, 2022 which is subject of the Ruling delivered on November 16, 2022.
 - d. That the costs of this Application be provided for.
2. The application was supported by the affidavit sworn by Juma Nzaka on the same day where he deponed that the application dated August 12, 2021 subject of the ruling dated February 22, 2022 was an application for leave to appeal and had no prayer for stay of execution pending appeal.



3. The Applicant also sought for the review of a ruling delivered on November 16, 2022 and determine the same on the basis that the earlier application for leave dated August 12, 2021 had no bearing with regards to stay of execution.
4. In response, the plaintiff/ respondent filed a replying affidavit sworn on the February 1, 2023 where he deponed that the orders for stay sought were for stay of execution of the ruling and/or order delivered by this court on April 30, 2021. And urged the court to dismiss the application as the issue for stay had already been dealt with and that the applicant has not met the legal threshold for grant of review orders.

Analysis And Determination.

5. This is the third ruling I am writing in respect of the same application and I hope this is the last one I will write otherwise the doctrine of abuse of court process will set in.
6. The applicant filed Notice of Motion dated August 12, 2021 seeking the following orders:
 - a. Spent.
 - b. That the honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Justice J. O Olola delivered against the Applicant on the April 30, 2021 pending the hearing of this application inter partes.
 - c. That the honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Justice J.O Olola delivered against the applicant on the April 30, 2021 pending the hearing and determination of the appeal in the Court of Appeal.
 - d. That the costs of this application be provided for.
7. The court heard the application and vide a ruling dated February 22, 2022, granted the applicant leave to file an Appeal out of time and dismissed the stay of execution of the ruling dated April 30, 2021.
8. The Applicant has contended that there was no application for stay but the record speaks for itself and if he was aggrieved with the ruling then he should have appealed.
9. After the delivery of the ruling, the Applicant filed another Notice of Motion dated March 15, 2022 seeking the following orders: -
 - a. Spent.
 - b. That the honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Justice J. O Olola delivered against the Applicant on the April 30, 2021 pending the hearing of this application inter partes.
 - c. That the honourable court be pleased to grant a stay of execution of the Order emanating from the decision of Justice J.O Olola delivered against the applicant on the April 30, 2021 pending the hearing and determination of the appeal in the Court of Appeal.
 - d. That the costs of this application be provided for.
10. The court similarly heard the application and vide a ruling dated November 16, 2022 the court dismissed the application for being an abuse of court process of which the Applicant has filed another application which is similar apart from an additional prayer for review of the ruling dated November 16, 2022.



11. I have given a background of the applications which is on record to show what has transpired in this case. The issue for determination is whether the Applicant has met the threshold for review and whether this application is an abuse of court process.
12. The law in respect of review of orders or judgments is anchored under section 80 of the Civil Procedure Act cap 21 which provides 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.”
13. Order 45 Rule 1 of the Civil Procedure Rules, 2010 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.”
14. In the Supreme Court of India in the case of Ajit Kumar Rath v State of Orisa & others, 9 Supreme Court Cases 596 at Page 608. The court held that:-

“ the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”
15. Similarly, in the case of Evan Bwire v Andrew Nginda Civil Appeal No. 103 of 2000 LLR 8340 the court held that:

“ An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh”.



16. From the application and the supporting affidavit, it seems that the applicant wants to reopen the application for another bite of the cherry. There is no new discovery of evidence which was not within the applicant's knowledge at the time of the impugned ruling. Further there is no proof of a mistake or error apparent on the face of the record.
17. The issue of the court having dealt with stay of the ruling was as a result of one of the orders the Applicant had prayed for and not as the applicant would want us to believe that it was not part of the applicant. What was the court staying from execution? It is the ruling dated April 30, 2021.
18. The issues raised are not to be dealt with is a review application but an appeal which the court had granted leave to appeal out of time.
19. It is on record that the applicant had applied for leave to file an Appeal out of time of which he filed a Notice of Appeal February 23, 2022 and lodged in court of February 28, 2022.
20. It is trite law as provided for under Order 45 (2) that a party cannot apply for review and appeal from the same decree or order. The applicant wants to engage parallel processes.
21. In the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR the court held that: -

“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.”
22. Similarly 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 ...”
23. It therefore follows that the applicant elected to file an appeal which he successfully applied for leave to file it out of time and subsequently filed and served a notice of motion. The application for review is therefore an afterthought and an abuse of court process.
24. The upshot is that the application lacks merit and is therefore dismissed with costs. The applicant still has the option of pursuing his appeal.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF MAY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

