



**Mukolya (Suing as the legal representative of the Estate of Mukolya Kithu – Deceased) & 4 others v Mulwa & 3 others (Environment & Land Case 30 of 2019) [2023] KEELC 21010 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21010 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ENVIRONMENT & LAND CASE 30 OF 2019**  
**CA OCHIENG, J**  
**OCTOBER 25, 2023**

**BETWEEN**

**MICHAEL MBITHI MUKOLYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUKOLYA KITHU – DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**  
**RAPHAEL KALOKI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DISHON ITUTE KITHU – DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**  
**MAURICE MUTHAMA KITHU ..... 3<sup>RD</sup> PLAINTIFF**  
**PAUL MWANGANGI MUTHYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUTHYA KITHU MICHAEL ALIAS MUTHYA KITHU-DECEASED) ..... 4<sup>TH</sup> PLAINTIFF**  
**SIMON MULEI NZWILI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NZWILI NTHENGE KITHU – DECEASED) ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**BONIFACE MULWA ..... 1<sup>ST</sup> DEFENDANT**  
**HENRY MULWA ..... 2<sup>ND</sup> DEFENDANT**  
**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**  
**CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**



## RULING

1. What is before Court for determination is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Notice of Motion Application dated the 10<sup>th</sup> November, 2022 brought pursuant to Sections 1A, 3A, and 79G of *Civil Procedure Act* 2010. They seek the following Orders:
  1. That the Applicant be granted leave to Appeal out of time.
  2. Costs do abide the Application.
2. The Application is premised on the grounds that a Ruling was delivered on 10<sup>th</sup> March, 2022 and the Applicants filed an Application for review which was determined on 13<sup>th</sup> October, 2022. Further, that the delay is explainable and reasonable as Applicants have an arguable Appeal. The application is further supported by the Affidavit of Boniface Mulwa where he deposes that the Court delivered its Ruling against them on 13<sup>th</sup> October, 2022 which they are dissatisfied with and seek leave to Appeal to the Court of Appeal. He confirms that the Application for review was pending hence delay in filing the instant Application. He insists there is a valid Judgment on record vide an award of the Tribunal issued in 1997 which is yet to be set aside.
3. The Plaintiffs opposed the instant Application by filing a Replying Affidavit sworn by the 2<sup>nd</sup> Plaintiff Raphael Kaloki where he deposes that he is duly authorized by the other Plaintiffs to swear this Affidavit on their behalf. He contends that the entire Application is incompetent and misconceived as the impugned Order is not appealable as of right under Order 43 Rule 1 of the *Civil Procedure Rules*. He explains that the Applicants having opted to apply for review of the order cannot come back to seek to Appeal after the said review Application is denied. He insists that the Applicants have no good and sufficient cause for not filing the Appeal within time. He argues that the instant Application amounts to a fishing expedition and the delay of nearly a year is inordinate. He reiterates that the Applicants' action of seeking to Appeal on a decision that has been subject of review is a tactic to delay the hearing of the main suit. Further, that access to justice and the right to be heard is not an opportunity for litigants, such as the Applicants, to file an Application like the instant one that is clearly designed to vex the Plaintiffs as well as delay administration of justice. He reaffirms that if the leave sought is granted, the Plaintiffs will suffer prejudice as the hearing of the main suit continues to be delayed. Further, that the Defendants' Application does not raise grounds sufficient to warrant the leave sought.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Supplementary Affidavit sworn by Boniface Mulwa where he insists that the right to Appeal is a Constitutional right that every litigant is entitled to. He explains that the Respondents have no right to give consent to him to be able to exercise that right. Further, that they have offered reasonable explanation for leave. He reaffirms that both the Application for review and the instant Application have been filed in a timely manner. He reiterates that they have met the required threshold under the law for leave to Appeal.
5. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

6. I have considered the instant Notice of Motion Application including the respective Affidavits as well as the rivaling submissions and the only issue for determination is whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are entitled to leave to lodge an Appeal out of time.



7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their submission contend that the High Court may extend the time for giving notice of intention to Appeal from a Judgment of the High Court or for making an Application for leave to appeal or for a certificate that the case is fit for Appeal, notwithstanding that the time for giving such notice or making such Appeal may have already expired. They made reference to Rule 75 of the *Court of Appeal Rules* and Section 7 of the *Appellate Jurisdiction Act*. They reiterated that they are entitled to the orders as sought. To support their averments, they relied on the following decisions: *Nicholas Kiptoo Arap Korir Salat v The Independent Electoral & Boundaries Commission & 7 Others* (2014) eKLR and *Fakir Mohammed v Joseph Mugambi & 2 Others*, Civil Application No. Na1 332 of 2004 (unreported) the Court of Appeal; *Edward Njare Nganga & Anor v Damaris Wanjiku Kamau & Anor* (2016) eKLR; *Kenya Airports Authority & Anor v Timothy Nduri Mutungi*, Court of Appeal Civil Application No. Nai. 165 of 2013 (UR 113/2013) (2014) eKLR and *Leo Sila Mutiso v Rose Hellen Wangari Mwangi*, Civil Application No. Nai 255 of 1997) unreported.
8. The Plaintiffs in their submissions insist that this Court has no jurisdiction over the matter. They referred to Rule 77 of the *Court of Appeal Rules* and contended that it is only the Court of Appeal that can grant the prayers as sought in the instant Application. They argued that one cannot Appeal a decision after first seeking its review. They made reference to Section 80 of the *Civil Procedure Act* and Order 45 Rule 1(a) and (b) and 2 of the *Civil Procedure Rules*. They further submitted that the options of a review and an Appeal are not simultaneously available to an aggrieved party. Further, that Applicants instant Application should not be permitted. To support their averments, they relied on the following decisions: *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* (1989) which was relied on in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR; *Martim v Kibaru* [2004] eKLR; *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR; *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR and *Shiltun Kalumbo Baraza v Joseph Kamau Karanja* [2021] eKLR.
9. In this instance the Applicants have sought leave to Appeal against the decision of this Court delivered on 10<sup>th</sup> March, 2022, out of time. It is not in dispute that that Applicants had initially filed a Notice of Motion Application dated the 30<sup>th</sup> March, 2022 seeking to review this Court's decision that had been delivered on 10<sup>th</sup> March, 2022, which Application was dismissed on 13<sup>th</sup> October, 2022. The Applicants then proceeded to file the instant Application.
10. On review, Section 80 of the *Civil Procedure Rules* provides that:
- "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."
11. While Order 45 Rule 2 of the *Civil Procedure Rules* provides as follows:
- "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."



12. In the case of *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the court observed that:

"It has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the *Civil Procedure Rules* and the *Court of Appeal Rules* did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal."

13. While in the case of *Serephen Nyasani Menge v Rispa Onsase* [2018] eKLR it was 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. 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. 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."

14. From a reading of Order 45 Rule 2 of the *Civil Procedure Rules* which I have quoted above, it is very explicit that the options of a review and an Appeal are not simultaneously available to an aggrieved party. A party is bound to only stick to one remedy at a time. In this instance, I note the Applicants are seeking to use both avenues to challenge the Order of this Court dated the 10<sup>th</sup> March, 2022.
15. Based on the facts before me, while relying on the legal provisions I have cited above as well as associating myself with the decisions quoted, I find that since the Applicants had opted to seek to review the Court's decision delivered on 10<sup>th</sup> March, 2022 which the Court already made a determination of, they cannot now opt to seek to file an Appeal against the aforesaid decision as this is contrary the provisions of Order 45 Rule 2 of the *Civil Procedure Rules*. I opine that the Applicants should have weighed the remedies available to them and use the appropriate one instead of trying to abuse the court process through the instant Application.
16. In the circumstance, I find the Notice of Motion Application dated the 10<sup>th</sup> November, 2022 unmerited and will dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25<sup>TH</sup> DAY OF OCTOBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

