



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL.NO. 258 OF 2015

EDWARD FOR INDUSTRIAL &

COMMERCIAL CO. LTD.....PLAINTIFF

VERSUS

BOLLORE AFRICA LOGISTICS (K) LTD.....DEFENDANT

RULING

1. The question for courts determination is whether an appellant who has preferred an order for review under Order 45 Rule 1 Civil procedure Rules is entitled, upon the court dismissing an application for review, to lodge an appeal from decision upon what the trial court had considered and determined an application for review.
2. By a Notice of Motion dated 17/9/2015 and filed in court on the same date, the applicant, herein has sought from court orders that time for lodging a memorandum of appeal from the judgment of the lower court in Mombasa Civil no.1550 of 2013; that the draft memorandum of appeal be deemed duly filed upon grant of leave and payment of court fees; that the leave so granted to operate as stay.
3. The application is expressed to be brought under the provisions of section 1A, Section 1B, 3A 63(e) 64(1) b and 67 as well as orders 42 Rule 6, 50 Rule 5 and 51 Rule 1 Civil Procedure Act.
4. The brief facts to this application are that the Respondent sued the Applicant in the lower court seeking a liquidated sum of USD 27,852 on account of alleged losses incurred by the Respondent as a result of the Applicant's negligent manner in handling a cargo of sugar entrusted to it for purposes of clearance and transport from India to Juba at a reward.
5. The matter proceeded before the trial court who delivered its judgment in favour of the Respondent. Against that judgment the appellant approached the trial court with an application for review under Order 45 on the basis that the submissions by the appellant had not been taken into account. That application was canvassed in full and on reserved ruling dated the 14/8/2015 the application was diminished with costs to the Respondent.
6. Upon dismissal, the applicant by the present application now seeks the orders sought and relies on the provisions cited as well as the provisions of Article 159(2)d of the Constitution.
7. The starting point for the determination of the applicant is the statutory provisions allowing review being section 80 and Order 45 Rule 1.

The provisions provide:

Section 80 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.”

and Order 45 Rule 1 provides

“(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.”

8. In arguing the application parties filed list of authorities and offered oral submissions before court.

The Applicants case:

9. Mr.Wafula for the applicant submitted before the court that he relied on the grounds in the application and the list of authorities filed. From the grounds of the application the reason for the delay is that the applicant had preferred an application for review and in that pursuit time to file the appeal lapsed. On the application for stay the applicant says that its stands to suffer undue substantial loss unless stay of execution is granted and that it is prepared to offer security to secure the satisfaction of the Decree as the court may order.

10. In reply the submission by the Respondent that the intended appeal does not lied after are application for review was dealt with conclusively, Mr. Wafula submitted that no statutory provision had been cited to court to limit the options the applicant took.

11. The applicant cited three decisions and the code of Civil Procedure by Mulla my relying of the decision in **A.G -VS- R.L.ODUPOY** to the effect that it is permissible for party to lodge and prosecute an application for review provided there is no pending application for review.

12. The next decision of **PANCRAS T. SUMI -VS- KENYA BREWERIES** was largely on when to apply for review and or an appeal. It does not assist much on the question of whether an appeal lies after a review is disposed of.

Respondent’s arguments.

13. The Respondent, in opposition to the application filed grounds of opposition dated 27.9.2015 in which it is contended that the right to appeal against the judgment dated 21/2/2015 was exhausted once the application for review was heard and determined and that the applicant could only appeal against the

decision on review and not against the judgment upon which an application for review had been dealt with on the merits.

14. To support its stand, the Respondent cited to court four decisions, one by High Court and three by the court of appeal as well as Mulla on code of Civil Procedure.

15. The decisions in **BOG HIGHWAY HIGH SCHOOL -VS- WILLIAM MKOSI MOI** and **OBADIA KIILU WEFUGI -VS NATHAN KALAUSI MTWIWA** are to the effect that a party who has sought review loses the right to appeal. On the other hand the decisions in **CHARLES ALEXANDER KIAI -VS- FRANSICS WANGUI GICHERU & 4 OTHERS** was on the applicability of Article 159 and the provisions of section 1A & 1B with regard to the relevance of Rules of Procedure. The last decision in **NGURAMAN LTD. -VS- JAN ROUNDE NIELSEN** is on the point covered by the treatise by Mulla on Civil Procedure Code that once an application for review is granted, there is no justification of an appeal against the same order as the order an appeal became the final order.

Determination

16. When all is considered and done, the simple questions that I must address and answer is whether a party who has opted to apply for review is allowed, to appeal against the same order once the review is refused.

17. My reading of order 45 Rule 1 is that only a party who has the right of appeal **but does not intend to appeal** or that who has no right of appeal is entitled to apply for review. In the matter before me the applicant had a clear right of appeal but chose to proceed under order 45 Rule 1(a) by seeking review and must be taken to have intended not to appeal. He indeed pursued his option to the logical conclusion but lost. He now comes before me to have the chance to appeal by seeking extension of time. Is that permissible merely because the law provides for the overriding objective of the court?

18. It is true that the purpose of the court and indeed any judicial system is to render substantial justice. That substantial justice however is also subject to other virtue and parameters being that there ought not to be delay and that it be done proportionately and judicial time need to be employed efficiently. I am of the persuasion that the remedy for review and appeal are not to run concurrently or consecutively but are alternatives.

19. Having opted for review, the applicant is not entitled to an appeal for to do that would be to seek double allocation of judicial time and therefore fail on its obligation to help in the efficient use and employment of judicial resources as commanded by section 1A and Article 159 (2) b.

20. In Chairman Board of Governors **HIGHWAY HIGH SCHOOL -VS- WILLIAM MKOSI MOI**, (*supra*) the court of appeal said, and I am bound by the decision that:-

“(I) The board was at liberty to pursue the option of review of the orders made on 26/9/2003 despite filing of a notice of appeal to challenge the same orders. We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion there would be no further jurisdiction exercisable by an appellate court on same orders of the court... both options cannot in our view be pursued concurrently or one after the other.”

21. The foregoing finding lead me to conclude and find that, the applicant made a deliberate election under Order 44 Rule 1(a) and opted for review, he thus forbore the right to appeal and not entitle to seek a second bite at the cherry once his option came to an unfavourable end as it did. No appeal will lie from an order of the court which has been challenged on review.

22. Having so found, and there being no appeal pending so as to create a pedestal for stay, the other consideration whether there would be substantial loss, to me, become inconsequential and I need not give the same any consideration.

23. Ultimately the application fails in entirety and the same is hereby dismissed with costs to the Respondent

Dated, signed and delivered at Mombasa this 18th day of December 2015.

P.J.O.OTIENO

JUDGE

In the presence of

Miss Kisa for Wafula for the Applicant/plaintiff.

Mr.Omwenga for Ngigi the Defendant/Respondent.

JUDGE

Ms Kisa: I seek leave to appeal and stay for 30 days. I also pay for certified copies of the proceedings.

Mr.Omwenga: We have no objection to leave and copies of the proceedings. However there is nothing to stay.

Court: Leave is granted to the Appellant to appeal and the appellant will also get certified copies of the proceedings.