REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION 63 OF 2012

LEONARD GIKARU WACHIRA.....APPLICANT

VERSUS

SOUTHERN TRAVEL SERVICES LIMITED.....1ST RESPONDENT

ROY TRANSMOTORS LIMITED.....2ND RESPONDENT

R U L I N G

This ruling is the subject of a Notice of Motion dated 2nd February 2012 expressed to be brought under sections 1A, 1B, 3A and 95 of the Civil Procedure Act Order 50 Rule 6, Order 42 Rule 4 of the Civil Procedure Code (sic) and all other enabling provisions of the Law. The application seeks the following orders:

1. **That this Honourable Court be pleased to enlarge time for the Applicant to file an Appeal against the Ruling and Order of the Chief Magistrate's Court made on 9th September 2011 in Nairobi CMCC No. 10881 of 2005.**

2. **That draft Memorandum of Appeal annexed herein and marked as "LGW4" be deemed duly filed and served on payment of requisite Court fees.**

3. **That costs of this Application be on the cause.**

Obviously prayer 2 of the motion is premature, incompetent and misconceived and cannot be granted in this motion for the simple reason that this Cause being a miscellaneous application, there is no way the Court can deem the draft memorandum annexed to have been duly filed and served.

The application is supported by an affidavit sworn by **Leonard Gikaru Wachira**, the applicant herein on 2nd February 2012. According to the applicant the suit was filed seeking damages for personal injuries arising from a road accident on 17th March 2005. On 3rd October 2005 the said case was dismissed for non-attendance. His subsequent application seeking to have the said order of dismissal set aside was similarly dismissed on 9th September 2011. He made an application for review of the order of 9th September 2011 which application suffered the same fate when it was dismissed on 18th January 2012. It is that dismissal that has triggered the present application. The delay according to him, in appealing against the Order of 9th September 2011, was occasioned by his pursuit for review. He deposes that the order of 9th September 2011 is highly prejudicial to him as his suit was dismissed without him being given an opportunity of being heard yet he has been keen in pursuing the matter and the explanation for

the advocate's failure to attend was reasonable and the respondents would not suffer any prejudice. According to him his grounds of appeal have high probability of success.

In response to the application the respondents swore an affidavit through **Priscilla Wamuyu Kagucia**, the 1st respondent's advocate on 18th April 2012. According to the deponent, the applicant's suit was dismissed on 3rd May 2011 for non-attendance and a subsequent application seeking to set aside the order of dismissal was dismissed on 30th September 2011 after which the applicant opted to apply for review of the order of 30th September 2011 instead of lodging an appeal against the said orders. That application was also dismissed on 18th January 2012. According to the deponent although 6 months have lapsed since the application dated 4th May 2011 was dismissed, the applicants though aware of their right to appeal, blatantly ignored to lodge an appeal. The deponent's view is therefore that the present application is an afterthought merely intended to derail the course of justice and cause inconvenience to the 1st respondent who is not to blame for the material accident. To the deponent, this application is a waste of the Court's time as the applicant has been indolent in prosecuting the suit. The reason adduced for not filing the appeal, in the deponent's view, is inexcusable and insufficient. According to the deponent the applicant should have appealed against the decision of 18th January 2012 instead of revisiting the decision of 9th September 2011 which he chose to review. It is contended that an appeal cannot be lodged on a decision that had been previously challenged by way of review hence the application dated 2nd February 2012 is wrongly before the Court. As the application is misconceived, incompetent and ill advised the same cannot be sustained in law and it is in the interest of justice that the same be dismissed since litigation must come to an end, it is so contended.

The application was prosecuted by way of written submissions. The applicant in his submissions reiterated the contents of the supporting affidavit and stated that the delay in bringing the present application is not inordinate and in any case such delay has been explained. It is further submitted that under Order 45 rule 1 of the Civil Procedure Rules, the applicant had a right to seek review of the Orders of 9th September 2011 as opposed to an appeal. According to the applicant the rule does not bar a party from lodging an appeal against a decision after the refusal of the trial court to reject a review of the same since what is disallowed is the simultaneous filing of a review and appeal against the same decision. In the applicant's view, this Court is entitled to consider the present application on merits under Order 50 Rule 6 and sections 79G and 95 of the Civil Procedure Act. In order to support its case, the applicant relies on **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi, Civil Application No. 255 of 1997**. On the authority of **Kenya Bankers CO-OP. Savings vs. George Arunga Sino [2010] eKLR** it is submitted that the applicant should be given an opportunity to ventilate its case in the highest court in the land provided the rights of the other parties are not overlooked, and this can only be possible if it is granted an extension of time. It is therefore submitted that the enlargement of time will achieve substantial justice in this matter as it will lead to the hearing of the case before the subordinate court on merit. On the draft memorandum of appeal, it is submitted the same has chances of success and the cases of **Meghji Velji Chhaya vs. AG & 3 Others [1997] eKLR** and **Pithon Waweru Maina vs. Thuku Mugiria [1983] eKLR** are cited for support.

On their part the first respondent similarly reiterates the contents of the replying affidavit and submits that as the applicant chose to file an application for review of the order of September 2011 instead of lodging an appeal, the applicant has no right of appeal. It is further submitted that the 6 months has lapsed since the order of 30th September 2011 which period is undue and inordinate as it is not sufficiently explained. In line with Order 45 rule 1 this application is improperly before the court as the applicant chose to apply for review instead of lodging an appeal. In the respondent's view, this application is frivolous, vexatious and an abuse of the Court's process and hence does not deserve the court's exercise of discretion. It is finally submitted that litigation must come to an end and justice must be done to all the parties to the suit and a party who has lost a case cannot maintain an action simply because he lost.

Having considered the application, the affidavits both for and against the application, the rivalling submissions as well as the authorities cited, this is my view of the matter.

I agree with the applicant that in an application of this nature, the matters to be taken into consideration are those which were set out in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi** (supra) and these are the length of the delay, the reason for the delay, the possibility/chances of appeal succeeding and the degree of prejudice to the respondent. With respect to the first ground, the law as I understand it is that where there has been a delay of whatever period, some explanation for the same must be furnished. The decision that the applicant seeks to appeal against was allegedly made on 9th September 2011. I say allegedly because the decision itself is not annexed while according to the replying affidavit the application seeking to set aside the order dismissing the suit was made on 30th September 2011. The order annexed to the said affidavit on the other hand indicates that the order was in fact given on 9th August 2011 and was issued by the registry on 30th September 2011. The present application was made on 6th February 2012, more than 4 moths later. Obviously 4 months delay is a period that requires an explanation. The explanation given for this delay is that the applicant was trying his luck on an application for review which was heard and dismissed on 18th January 2012, about three weeks before the present application was brought. It goes without saying that no attempt was made to explain the three weeks delay. At this juncture it is important to reproduce the provisions of Order 45 rule 1 of the Civil Procedure Rules. That provision provides as follows:

1. (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.

This provision has been the subject of interpretation by the Court of Appeal. 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".

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".

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 Mbuthia 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".

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. Accordingly I associate myself with the decision in **The Charman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005** that both options cannot be pursued concurrently or one after the other.

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. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play lottery with judicial process.

Apart from the foregoing, as clearly recognised by the applicant one of the conditions to be considered is the chances of success of the intended appeal. In this case although a draft memorandum of appeal has been annexed, the decision sought to be appealed against has not been annexed. Without the decision itself, the Court is unable to make a finding on the chances of success of the intended appeal. Courts do not grant orders in vain and it is upon the applicant who has defaulted in filing his appeal to satisfy the court that the exercise of discretion in his favour is warranted. Dealing with the same issue, **Githinji, JA** in **Kenya Canners Limited vs. Titus Muiruri Doge Civil Application No. Nai. 119 of 1996** aptly expressed himself as follows:

"The power given by rule 4 of the Court of Appeal Rules to extend time is discretionary which discretion should be exercised judicially. However in exercising its discretion the Court is guided by such factors as the merits or otherwise of the intended appeal, the prejudice that the Respondent would suffer if the application is allowed and the length of the delay…For the Court to exercise its discretion judicially, the applicant should at least inform the Court of the nature of the dispute between the parties, the subject matter of the intended appeal and the magnitude of the loss that the applicant is likely to suffer if time to file the appeal is not extended. The applicant should place before the Court relevant material such as a copy of the Judgement intended to be appealed from, so that the Court could make its own assessment of all surrounding circumstances including the importance of the intended appeal to the applicant". (Underlining mine).

Without the benefit of the decision intended to be appealed against coupled with the lack of explanation for the three weeks delay from the time the last application was dismissed to the time when this application was filed I am unable to exercise my discretion in favour of the applicant.

Consequently, the application dated 2nd February 2012 fails and is dismissed with costs.

Ruling read, signed and delivered in Court this 26th day of July 2012

G.V. ODUNGA
JUDGE

In the presence of Miss Ashubwe for the 1st respondent