



REPUBLIC OF KENYA



KENYA LAW
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**Akhura v Simon Kibet Rugut (Civil Appeal E054 of 2024)
[2025] KEHC 3133 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3133 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E054 OF 2024**

**AC BETT, J
MARCH 5, 2025**

BETWEEN

THE HIGH PRIEST, JOHN MUHAMBE AKHURA APPELLANT

AND

**THE NATIONAL CHAIRMAN, EXECUTIVE COMMITTEE, SIMON KIBET
RUGUT RESPONDENT**

*(Being an appeal from the Ruling of Hon. J. R. Ndururi in Kakamega
CMCCC. No. E206 of 2023 delivered on the 12th day of March 2024)*

JUDGMENT

Background

1. By a Memorandum of Appeal dated 8th March 2024, the Appellant in an appeal against a ruling dated 12th March 2024, raised the following grounds of appeal:-
 1. That the learned Magistrate erred in law by failing to appreciate that the appellant was unfairly, unprocedurally and illegally suspended.
 2. That the learned Magistrate misdirected himself in dismissing the application dated 11th March, 2024 before allowing the Appellant prosecute the application inter-partes given its merits.
 3. That the learned Magistrate misdirected himself in failing to appreciate the fact that the court's ruling of 22nd February, 2024 was based on a decision by the Respondents that was not properly constituted.
 4. That the learned Magistrate erred in law and in fact in failing to consider the evidence and defence of the Appellant.



2. This is therefore an appeal from interlocutory orders and in an effort to expedite the disposal of the appeal, the court issued directions on 12th April 2024 that the Appellant should file his Record of Appeal and submissions within fourteen (14) days to enable the Respondent file and serve his submissions within fourteen (14) days of service.
3. While in the process of compliance, the parties filed further interlocutory proceedings and despite referring the parties to mediation, the parties failed to agree. In response to the interlocutory applications that were being filed, the court on 30th January 2025 directed that the status quo be maintained and the Judgement be delivered as earlier scheduled.
4. The Appellant submitted that the trial Magistrate erred in his ruling dated 12th March 2024. However, he then proceeds to make submissions in respect to the ruling dated 22nd February 2024 and not the one dated 12th March 2024.
5. The Memorandum of Appeal filed by the Appellant herein reads as follows:-

“ An appeal from the Ruling of the Hon. SPM Ms. J. R. Ndururi delivered on the 12th day of March 2024 in Kakamega Civil Suit No. E206 of 2023 the parties being The National Chairman, Executive Committee Simon Kibet Rugut & The High Priest John Muhambe Akhura.”

There is no doubt that at the time of filing the appeal that the appeal was in respect of a ruling dated 12th March 2024.
6. I have perused the Record of Appeal. It is clearly stated in the Memorandum of Appeal that the appeal is against a ruling delivered on 12th March 2024. I cannot trace any copy of the ruling delivered on 12th March 2024 or an order extracted therefrom. The ruling that is in the record is a ruling delivered on 22nd February 2024 which is in Page 108 to 110 of the Record of Appeal.
7. From the Supplementary Record of Appeal, I can deduce that there was an application under Certificate of Urgency that was placed before the trial Magistrate on 11th March 2024 which the trial Magistrate declined to consider. The said application is not part of the record and therefore I am unable to ascertain the nature of the application and or the prayers sought therein.
8. The jurisdiction of the High Court as an appellate court is invoked through a Memorandum of Appeal which outlines concisely the grounds of appeal that the aggrieved party intends to rely upon.
9. A Memorandum of Appeal is a fresh pleading before the appellate court and it is trite law that parties are bound by their pleadings. In framing the issues to be determined by the court, the Appellant made a total departure from his pleadings. The issues he submits should be determined by the court are as follows:-
 - “(a) Whether the suspension of the Appellant was procedurally lawful.
 - (b) Whether the trial court had the proper jurisdiction to entertain the matter before it and make the decision before exhaustion of the Church’s internal mechanism.”
10. I have reviewed the grounds of appeal and considered the Appellant’s submissions. They are completely at odds and not in tandem.



11. Looking at the entire Record of Appeal, I can only come to the conclusion that the appeal is misconceived. The Appellant does not know what orders he is appealing against. Certain documents in his Record of Appeal allude to the appeal being against the ruling dated 22nd February 2024 despite the Memorandum of Appeal stating otherwise.
12. In his submissions, the Appellant invites this court to find that the trial Magistrate erred in failing to appreciate that he was unfairly, unprocedurally and illegally suspended. These findings are certainly in the trial court's ruling delivered on 22nd February 2024. There is no appeal against the said ruling and therefore this court lacks the requisite jurisdiction to determine issues touching on it.
13. Furthermore, in filing submissions that purely faulted the finding of the trial court in its ruling dated 22nd February 2024, the Appellant was introducing new grounds of appeal without leave of the court. Order 42 Rule 4 of the Civil Procedure Rules provides:-

“The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:

Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.”

14. The Supreme Court in the case of *Bwana Mohamed Bwana v. Silvano Buko Bonaya & 2 others* [2015] eKLR held that an incompetent appeal divests the court of jurisdiction and stated:-

“... A Court cannot exercise its adjudicatory powers conferred by law, or *the Constitution*, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, *Ocheja Emmanuel Danganana v Hon. Atai Aidoko Aliusman & 4 Others*, SC. 11/2012, Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction: “A court is competent, that is to say, it has jurisdiction when—it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and the subject matter of the case is within its jurisdiction, and no feature in the case prevents the court from exercising its jurisdiction; and the case comes before the court initiated by the (due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction”

15. Since the Appellant opted to submit against the ruling dated 22nd February 2024, I will also address the germane issue arising from the submissions. And it is whether one can lodge an appeal after filing an application for review of the orders he is appealing against.
16. Section 80 of the *Civil Procedure Act* stipulates:-

“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.”

- 17. It therefore follows that where a party is dissatisfied with a decision of a particular court, he can either apply for review of the decision or appeal against it. He cannot opt for both. Nor can he apply for review and when the application is disallowed, proceed to appeal.
- 18. Order 45 of the Civil Procedure Rules is clear. One cannot lodge an appeal after filing an application for review. Order 45 Rule 1 state as follows:-

[Order 45, rule 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.”

- 19. In the case of Serephen Nyasani Menge v. Rispah Onsanse [2018] eKLR, the court stated as follows:-

“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.”

20. By declining to hear the application for review and directing that the matter do proceed for hearing, the trial Magistrate was in effect, disallowing the application for review of the orders dated 22nd February 2024. The Appellant therefore has no right of appeal before this court. He cannot have his cake and eat it.

21. In the case of Gerald Kithu Muchanje v. Catherine Muthoni Ngare & Another [2020] eKLR, the Court of Appeal rendered itself thus:-

“...Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. 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 ...”

22. I have carefully considered the appeal and find that if the Appellant were appealing against the ruling dated 22nd February 2024, his appeal is incompetent for reasons that he lost the right of appeal upon lodging an application for review of the said ruling. Conversely, if the appeal is against the order dated 12th March 2024, the same is still incompetent for reasons earlier set out in this Judgement.

23. Flowing from the above reasoning, I find that the appeal as it is, cannot stand. It is fundamentally flawed for it is a mongrel, an appeal which challenges two distinct rulings delivered on different dates and therefore incapable of being distinguished. Both limbs of the appeal are nonetheless incompetent.

24. The upshot is that the appeal is struck out. This being a dispute between members of one congregation, I shall make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the Presence of:

Mr. Mbetera for Appellant

N/A for Mr. Munyendo for Respondent

Parties present



Court Assistant: Polycap

