Glymore Enterprises Limited v Pwani Oil Products Limited & another (Miscellaneous Application E116 of 2023) [2025] KEHC 3516 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3516 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISCELLANEOUS APPLICATION E116 OF 2023

M THANDE, J

MARCH 21, 2025

BETWEEN

GLYMORE ENTERPRISES LIMITED ..... APPLICANT

AND

PWANI OIL PRODUCTS LIMITED ..... 1ST RESPONDENT

HENRY KINUTHIA MUTURI T/A VENICE ENTERPRISES .... 2ND RESPONDENT

RULING

1. By an Application dated 26.9.23, the Applicant seeks the following orders:

    1. That this Honourable Court be pleased to grant the Applicant leave to appeal out of time against the judgment by Hon. S. K. Ngii delivered on 6th April 2023 and the Draft Memorandum of Appeal attached hereto be deemed as duly filed upon payment of requisite fees.

    2. That costs of this application be provided for.

2. The grounds upon which the Application is premises are that judgment against it was delivered on 6.4.23 and an award way above Kshs. 3,000,000/= given; that the Applicant is aggrieved by the said judgment; that the Applicant is at risk of execution which will greatly prejudice it; that the 1st Respondent has been making demands for settling the said award; that the intended appeal raises arguable grounds with high chances of success; that the Applicant initially applied for review of the judgment but is now of the view that justice would be better served if the entire judgment is relooked into in the intended appeal; that the delay in lodging the appeal was not intentional as the Applicant thought it had made a good case for review of the judgment; that the Applicant has since withdrawn the application for review; that the Applicant is ready and willing to abide by such conditional orders as the court shall make; that the Respondents will not suffer any prejudice if the orders sought are granted.

3. The Application is opposed by the Respondent vide a replying affidavit sworn on 23.10.23 by Yvonne Mbithe Mutete, counsel for the 1st Respondent. It is contended that the Application is brought in bad faith and an afterthought incompetent, a blatant abuse of the court process, is meant to deny the 1st Respondent the fruits of litigation and is an abuse of the court process. It was further averred that 7 months have passed since judgment was delivered and that the delay in filing the Application is inordinate and unreasonable; that the 1st Respondent has already commenced execution and that the Application is intended to obstruct the process; that having decided not to follow the laid down procedure, cannot be allowed to fall back on the same where no explanation has been given for failure to do so; that the Applicant has not given a good and sufficient cause for the delay in filing appeal out of time to warrant the grant of the leave sought.

   The 1st Respondent further asserted that the filing and withdrawal of the application for review is too immaterial to be considered in the determination herein; that Applicant has not demonstrated the irreparable harm it will suffer and has not established a prima facie case with possibility of success;

4. The 1st Respondent went on to set out reasons why this Court should not grant stay of execution. A reading of the Application however shows that the Applicant has sought leave to appeal out of time. There is no prayer for stay of execution.

5. Parties filed their written submissions which I have duly considered together with the authorities cited.

6. The statutory period for filing an appeal in this Court from a subordinate Court is 30 days. This is stipulated in Section 79G of the *Civil Procedure Act* which provides:

> Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
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> > Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

7. The proviso to Section 79G of the Act allows a party who gets caught up and is unable to file an appeal within the stipulated period, to seek extension of time. Such party must however satisfy the Court that there is good and sufficient reason for not filing the appeal on time.

8. The reason for delay as proffered by the Applicant, is that it first sought review of the judgment having formed the opinion that it had a good case for review. It however reconsidered its position and withdrew the said application for review and now seeks to file an appeal.

9. The issue for determination by this Court is whether having opted to file a review of the impugned decision, the Applicant can now appeal the same decision.

10. Section 80 of the Civil Procedure Code provides for review 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.

11. Order 45 Rule (1) and (2) provide the procedure for review 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.

    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.

12. A plain reading of the above provisions makes it clear that the option of review and appeal are not available in respect of the same decree or order. A party has to select the remedy to pursue and becomes bound by that selection. Such party cannot thereafter opt for the other remedy. Our courts have stated as much in numerous decisions.

13. In Serephen Nyasani Menge v Rispah Onsase [2018] eKLR, Mutungi, J. while considering an application for leave to appeal a decision out of time where the applicant had initially unsuccessfully sought to have the decision reviewed, had this to say:

    14. 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. The Supreme court has also spoken to the issue. In University of Eldoret & another v Hosea Sitienei & 3 others [2020] eKLR, the Court stated:

    (33) [W]here a litigant has more than one option to pursue, he/ she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to choose the best available option since she may not have any further recourse.

(34) We therefore note that when the applicants preferred to pursue review of the decision, as they were entitled to, that was the best option in their assessment even if it turned out to be unsuccessful. Allowing them to take the second option at this stage, as if they never exercised the first option in the first place, would not only contribute to protracting litigation but also defeat the whole essence of finality of the litigation process. This would mean that precious judicial time and resources would have been unnecessarily expended in not settling the dispute but rather satisfying the litigants' options to cherry pick and engage in trial and error at the altar of judicial process without the attendant consequences.

15. Being aggrieved by the decision of the trial court, the Applicant had the option of filing for review of the decision to the trial court or pursue an appeal before this Court. The Applicant opted for the former on the advice of its advocates. Having made that election, the Applicant cannot now come to this Court seeking to appeal the same decision, notwithstanding the withdrawal of the application for review. As stated by the Supreme Court in the cited case, the election of the course to take is done in advance and once done, the other course becomes unavailable. It is also not placed in abeyance for a party to revert to at a later stage. Litigation cannot be conducted on the basis of trial and error and the present application is an abuse of the court process.

16. Accordingly, the Application dated 26.9.23 is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 21ST DAY OF MARCH 2025.

M. THANDE

JUDGE