Kenya Human Rights Commission & 8 others v Nchebere; Law Society of Kenya & 2 others (Interested Parties) (Judicial Review Application E082 of 2024) [2025] KEHC 2829 (KLR) (Judicial Review) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2829 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E082 OF 2024

RE ABURILI, J

MARCH 6, 2025

BETWEEN

KENYA HUMAN RIGHTS COMMISSION ..... 1ST APPLICANT

KATIBA INSTITUTE ..... 2ND APPLICANT

KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ KENYA) ..... 3RD APPLICANT

TRANSPARENCY INTERNATIONAL KENYA (TI) ..... 4TH APPLICANT

THE INSTITUTE FOR SOCIAL ACCOUNTABILITY (TISA) .... 5TH APPLICANT

AFRICA CENTER FOR OPEN GOVERNANCE ..... 6TH APPLICANT

SIASA PLACE ..... 7TH APPLICANT

TRIBELESS YOUTH ..... 8TH APPLICANT

MUSLIMS FOR HUMAN RIGHTS (MUHURI) ..... 9TH APPLICANT

AND

JAPHET KOOME NCHEBERE ..... RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

KENYA MEDICAL PRACTITIONERS, PHARMACISTS AND DENTISTS' UNION (KMPDU) ..... INTERESTED PARTY

KENYA UNION OF CLINICAL OFFICERS ..... INTERESTED PARTY

RULING

1. This ruling is in respect of the Notice of Preliminary objection dated 28th January 2025 filed by the exparte applicants challenges the Jurisdiction of this Court to hear and determine the Respondent's Notice of Motion dated 17th January 2025 seeking to review, stay and set aside inter-alia the exparte Judgment/Decree dated 31st December 2024 for reasons that the Respondent also filed a Notice of Appeal against the said Judgment/Decree on 9thJanuary 2025.

2. The movers of the Preliminary objection, who are the exparte applicants led by Katiba Institute and 9 others contend that since the Respondent filed a notice of appeal to the Court of Appeal, challenging the judgment of this Court rendered by Ngaah J, the application dated 17th January 2025 seeking for setting aside or review of the said judgment was untenable, as the jurisdiction of this Court on review was ousted.

3. It was argued that a party cannot play lottery with judicial process and that once the carcass had left the Court to the Court of Appeal, only the Court of Appeal has jurisdiction over the matter. Reliance was placed on the case of H.A v L.B HCC 188 of 2021; Otieno Ragot &Co. Advocates v National bank of Kenya [2020] e KLR and R v Registrar of Companies &Githunguri Ranching Company Co. Ltd [2016] eKLR.

4. The common thread in all the above cited cases, the Court of Appeal and the High Court held that it did not matter that the applicant seeking for review had only filed a Notice of Appeal and not a substantive appeal as an intended appeal to the Court of Appeal occurs when a party lodges a Notice of Appeal in the right registry. Hence a party loses the right to review the same decision upon filing a Notice of appeal to the Court of Appeal.

5. The applicants also relied on the Supreme Court case of University of Eldoret & Another v Hosea Sitienei & 3 others Petition No. 8 of 2020[2020] eKLR citing its previous decision in Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others]2015] e KLR where the apex Court held that it was an outright abuse of judicial process to pursue both an appeal and an application for review.

6. On the part of the Respondent/applicant in the application for review dated 17/1/2025, it was argued in submission relying on several judicial precedents that the filing of a notice of appeal is not the same as filing an appeal but an intention to appeal the decision hence that notice of appeal alone does not divest the High Court of jurisdiction to hear and determine an application for review or setting aside of the same decision intended to be appealed against.

7. It was argued that a Notice of Appeal is filed pursuant to the provisions of Rule 77 of the Court of Appeal Rules with the purpose of conferring Jurisdiction on the Court of Appeal over appeals preferred to it from the superior Court (High Court) BUT certainly not to divest the High Court of its Jurisdiction under Articles 165 and 159 of *the Constitution*. The case of Yani Haryanto v E.D & F. Man (Sugar) Limited Civil Appeal No. 122 of 1992 was cited where the Court of Appeal was of the view that:

> " 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 41of 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."

8. Further reliance was placed on HA v LB Civil Appeal No. 188 of 2021 as cited in the Yani Haryanto v E.D & F. Man (Sugar) Limited Civil Appeal No. 122 of 1992) case, adopting the holding as a true legal position and stating that:

> "Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact, under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens, I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review."

9. It was therefore submitted that even in the instances of review, the jurisdiction of the High Court is not ousted to entertain other applications such as an application for setting aside of an exparte judgment where a Notice of Appeal has been filed.

10. Counsel for the respondent relied on Nguruman Ltd v Jahn Bond Nielsen & 2 others *CA 77/2012* where the Court stated that it would be too restrictive under Order 45 of the Civil Procedure Rules to say that a party going to the Court of Appeal is barred from coming back to the High Court to seek a discharge or setting aside of the orders.

11. The preliminary objection was argued orally restating the positions that I have summarized above and relying on the authorities filed in court.

12. In a brief rejoinder, the applicants' counsel submitted that where there are conflicting decision, one of 1992 and of 2015 and 2020, the recent decisions communicate the true position in law. Further, that the decisions in the Court of Appeal in Otieno Ragot & Co. v NBK [2020] eKLR and Feisal Mohamed v R. [2015] eKLR communicate legal position on consequences of filing a Notice of Appeal on the application for review of the same decision sought to be appealed against.

13. On whether failure to specify the provision denying the High Court jurisdiction, it was submitted that *the Constitution* cannot allow a situation where a party pursues concurrent remedies to the Court of Appeal and the High Court; and that Articles 159 and 165 of *the Constitution* do not allow such a situation.

Determination

14. What is the disposition of this court on the arguments fronted by both parties to the preliminary objection? In other words, is the preliminary objection merited? First things first. What is a preliminary objection? As to what constitutes a preliminary objection, the case of Mukisa Biscuits Manufacturing

Ltd v West End Distributors [1969] EA 696 is the instructive authority where the Court of Appeal stated as follows:

> " ...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration".
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> In the same case, Sir Charles Newbold, P. stated:
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> "a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop".

15. The issue that arises for determination herein is whether the Preliminary Objection raised is sustainable.

16. An objection to the jurisdiction of the court has been cited as one of the preliminary objections that consists a point of law. Indeed, the locus classicus case on the question of jurisdiction is the celebrated case of Owners of Motor vessel Lilian "S" v Caltex Oil (K) Ltd [1989] KLR where the Court held:

> " Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

17. In this case, the preliminary objection challenges the jurisdiction of this Court to hear and determine an application for review and setting aside of judgment while there is a pending Notice of Appeal. That in my view is a pure point of law that can determine the application without delving into its merits, should the court uphold the preliminary objection as raised.

18. First is to note that that the exparte applicants have, in support of the preliminary objection, filed and relied on decisions from the High Court and Courts of Equal Status all the way to the Court of Appeal and up to the Supreme Court. Those decisions make lots of sense and so are the authorities relied on by the respondent's counsel.

19. I will commence with the decision of this Court in the Ahmed Chege Gikeria v Githunguri Ranching Company Ltd relied on by the exparte applicant's counsel, which decision was rendered by this very court on 5th October 2015.

20. In the above said case, this Court relied on several other decisions where it was held that a Notice of Appeal was as good as an Appeal and that applying the provisions of section 80 of the *Civil Procedure Act* as read with Order 45 of the Civil procedure Rules, a party could not have both ways. In other words, a notice of appeal was considered to be as good as an appeal. The many cases referred to in that detailed ruling came from both the High Court and the Court of Appeal and they were all unanimous that a notice of appeal once filed, was an appeal. See Francis Origo v Jacob Kumali Mungala [2005] e KLR.

21. In Kitale ELC 118 of 2015 in Sheila Kabole Mabwa v Joshua Angelei & 3 others and Richard Simwa, IUR Nyagaka J rendered his decision on 19th November, 2021 on the same issue of whether a notice of appeal was an appeal and therefore whether a party who files a notice of appeal and a review is deserving

of the orders for review. The learned Judge, relying on several other decisions at several paragraphs and more importantly, decisions of the Court of Appeal found that a notice of appeal was an appeal as defined under Rule 2(2) of the Court of Appeal Rules, to the effect that an appeal in relation to appeals to the Court includes an intended appeal.

22. Mativo J (as he then was in the High Court in Acorn Properties v Isaac Gathungu [2021] e KLR, citing many decisions in his ruling rendered on 28th January 2021 stated as follows in a similar situation where an applicant for review had also filed a Notice of Appeal:

> " 49. The uncompromising manner in which courts have construed the above provisions is evident from the fact that courts have held that even the mere filing of a Notice of Appeal is sufficient to render an application for review incompetent. In this regard, the Court of Appeal in Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [36] said:-
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> "Section 2(2) of the Court of Appeal Rules defines an appeal to include an intended appeal. The respondent lodged a notice of appeal on 30th August, 2016. The appellant submitted that though no substantive appeal had been filed, a notice of appeal had been lodged. Mr. Ojuro on the other hand submitted that the appeal was intended for part of the ruling and as such the law did not bar the respondent from filing for review on the other part of the ruling. A perusal of the notice of appeal indicates that the respondent intended "to appeal to the Court of Appeal on dismissal of the client reference and allowing the advocates reference on taxation." A careful look at the ruling dated 17th August, 2016 shows that what the respondent intended to appeal against though phrased as part was the entire ruling delivered by the learned Judge. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of Karani & 47 Others v Kijana & 2 Others [1987] KLR 557 the court held that:
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> "...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."
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> (See also: African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] 1 EA 1 (CAK)).
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> Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: Kamalakshi Amma v A. Karthayani [2001] AIHC 2264). The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose off the appeal. However, for completeness sake, I will venture further."(emphasis added)
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> 50. By filing an application for leave to appeal and at the same time seeking to review the same decision they intend to appeal against, the applicants are pursuing both processes

concurrently in contravention of the above provisions. On this ground, their plea for review collapses."

23. In the Cited Supreme Court decision, of Eldoret University, (supra), the 1st and 2nd respondent sought to have the Notice of Appeal and the Record of Appeal struck out. The Supreme Court acknowledged that one cannot have both an appeal and a review application. Further, at paragraph 36 of its ruling, the Supreme Court stated that a Notice of Appeal signifies the intention to appeal and that filing of a Notice of Appeal is a jurisdictional prerequisite for filing of an appeal.

24. The Otieno Ragot & Co Advocates decision was rendered on 31st January 2020 by A.Makhandia and Kiage JJA, post humous Otieno Odek JA.

25. However, in the subsequent case of Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR , (coram: Ouko, (P), Makhandia, Kiage, Gatembu & Sichale, JJ.A) judgment delivered on 22nd May 2020, about four months after the Otieno Ragot decision, and by a five Judge Bench comprising two of the judges who were in the Otieno Ragot case, namely, A.Makhandia and Kiage JJA, save that in the Otieno Ragot case, the third Judge Odek JA had passed on before delivery of the judgment, the same Court of Appeal in the Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others after reviewing several of its own decisions and defining the 'deeming' provisions of statutes and Rules of the Court of Appeal, but without citing or referring to its own decision in the Otieno Ragot case, expressed itself on the matter as follows and I quote the decision quite extensively due to its significance in resolving the issue before me:-

> " It is the notice of appeal, evincing the aggrieved party's intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4), respectively. For the purposes of the latter, an appeal to the Court of Appeal is "deemed to have been filed when under the Rules of that Court notice of appeal has been given". This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.
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> In colloquial terms, to deem something to be, is to "regard" or "consider" it as the thing though it is not, in fact the thing. It is, as Griffith C.J. called it, a fiction. In the Australian case of Muller v Dalgety & Co. Ltd, (1909) 9 CLR 693, at p 696, Griffith C.J. expressed as follows the meaning of the term:
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> "The word "deemed" may be used in either sense, but it is more commonly used for the purpose of creating what James L.J. and Lord Cairns L.C. called a "statutory fiction" (see Bill v East and West India Dock Co.) (1), that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate.
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> When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced." (Emphasis supplied). The word "deemed" as used in Order 42 Rule 6(4) clearly conveys the construction that it is not an appeal, strictly speaking.
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> Order 42 Rule 6(2) can be said to be in the category of what are commonly termed 'deeming provisions. It only deems a notice of appeal as "an appeal".
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> The term "deem" was defined by this Court in Telkom Kenya Ltd v Jeremiah Achila Gogo & Another Civil Appeal No. 153 of 2004, as follows: "The word "deemed" is used a great deal in modern legislation – sometimes it is used to impose for purposes of a statute an

artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain – sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible..." See also the decision of the East African Court of Justice in Anyang' Nyong'o & 10 others v Attorney-General & others [2008] 3 KLR (EP) 398, where once again it was explained that:

"The Legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist".

Though the provisions of Rules 82 to 87 (except 85) distinguish an appeal from a notice of appeal, they also show that the two are mutually complementary in the sense that one cannot exist without the other. An appeal, in terms of Rule 82 (1) is; "... instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged — a. a memorandum of appeal, in quadruplicate; b. the record of appeal, in quadruplicate; c. the prescribed fee; and d. security for the costs of the appeal".

An appeal is preceded by lodgment of a notice of appeal. If appeal is not instituted within the appointed time above, the notice of appeal will, by the provisions of Rules 83 and 84 be deemed to have been withdrawn or struck out, as the case may be. An appeal being a judicial examination by the higher court of the decision of a lower court, is entertained on the basis of the grounds contained in the memorandum of appeal. The appeal is presented to Court in form of a record, containing copies of all documents essential to the appeal, the pleadings, the trial judge's notes, exhibits, the judgment or order impugned and the certified decree or order. It is important to note that the notice of appeal is listed as one of the documents that must form part of the record of appeal. See Rule 86. That should suffice to demonstrate that in the strict sense, an appeal does more in the appellate process than a notice of appeal. On the other hand, and as already shown, apart from enabling courts to entertain applications for stay, the other purpose of the notice of appeal is merely to convey the intention to appeal. See Motel Schwetser v Thomas Cunningham & Another [1955] 22 EACA 252, Ujagar Singh v Runda Coffee Estates Ltd. [1966] EA 263 and Equity Bank Ltd v West Link Mbo Ltd [2013] eKLR. It must follow that, though "appeal" is defined in Rule 2 of the Court's rules, in relation to appeals to this Court to include an "intended appeal", this definition must be confined to its text and context, reading all the relevant parts of the rules together. That is what this Court advised in this extracted passage from the case of County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR; "It is one of the linguisitic canons applicable to construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act..."

To construe the provisions of Order 45 and to answer the question, whether a notice of appeal is an appeal, the court has to do so with reference to all the relevant provisions. This brings me to the crux of the first limb of this appeal, at which point it is apposite to state that as far my reading of the authorities in this field goes, there has never been any major inconsistencies in interpretation of Order 45, both by the High Court and this Court. Save for the case of Kisya Investments Ltd, (supra), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrated by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged. Conversely, the

court will not hear an application for review when an appeal has been instituted under Rule 82 of this Court's rules. This position was accepted way back in history in 1955 by the Court of Appeal for Eastern Africa in the case Motel Schwetser v Thomas Cunningham & Another [1955] 22 EACA 252, which has been cited in a number of decisions. It was cited in The Chairman Board of Governors Highway Secondary School v William Mmosi Moi, Civil Application No. 277of 2005 (Bosire, Githinji and Waki, JJ.A), with approval thus; "A notice of appeal is however only a formal notification of an intention to appeal and it cannot be said that the aggrieved party had "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 had a right to apply for review was answered in the affirmative by this Court in Yani Haryanto v E. D & F. Man (Sugar) Ltd. Civil appeal No. 122/92 (ur). In that case the application for review under order 44 of the Civil Procedure Rules was filed two years after the filing of the notice of appeal. After examining the relevant provisions of the law, the court stated:- "The Court of Appeal for Eastern Africa in the case of Motel Schwetser v Thomas Cunningham & Another [1955] 22 EACA 252, held that 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 of the East African Court of appeal Rules, 1954. Rule 81 of the Court of Appeal Rules, in addition, requires the inclusion of a memorandum of appeal. This statement of the law regarding the status of a notice of appeal was subsequently approved by the Court of appeal for Eastern Africa in the case of Ujaga Singh v Runda Coffee Estates Ltd [1966] E.A 263. So, quite clearly, the Judge had jurisdiction to entertain the application for review..... So that, 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" The Court in the two cases placed reliance on two other old but equally important cases for the point being made here, Yani Haryanto v E. D & F. Man (Sugar) Ltd. Civil appeal No. 122/92 (ur) (Gicheru, Kwach & Cockar, JJ.A) and Ujaga Singh v Runda Coffee Estates Ltd [1966] E.A 263. In the former (Yani Haryanto) the principle was highlighted as follows; "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, ... 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". (My emphasis). In Philip Ochilo Orero v Ambrose Seko (1984) eKLR, the appellant's appeal to the High Court having been rejected summarily by Scriven, J, (as he then was) he moved Schofield J with a notice of motion under section 80 of the *Civil Procedure Act* and under order XLIv rule 1 to review Scriven

J's order, and to admit the appeal to hearing. Schofield, J. refused to review the orders of dismissal and dismissed the application. On appeal to the Court of Appeal (Hancox JA, Chesoni & Nyarangi Ag JJ.A), it was stated that since Scriven, J's order was appealable but no appeal had been preferred, the case fell within section 80(a) of the *Civil Procedure Act* and was capable of being reviewed under that section. A similar view was expressed in the following passage from I.C.Kamau Ndirangu v Commercial Bank of Africa Limited [1994] eKLR, where Cockar,- as he then was -Omolo & Tunoi- as he then was - JJ.A, restated the proposition thus; "However, Mr Gatonye is on a much stronger pitch in his other reason which is supported by a decision of this Court in Civil Appeal No 122 of 1992 Yani Haryanto v ED &F Man (Sugar) Ltd (unreported) that a mere filing of notice of appeal did not constitute preferment of an appeal. The learned judge had clearly erred in holding that the appellant had by virtue of order 41 rule 4(4) of the Civil Procedure Rules preferred an appeal by filing his notice of appeal. Order 41 rule 4(4) of the Civil Procedure Rules is confined only to the purpose of staying execution". (My Emphasis). If further proof is required that this question has been long settled, I will cite, finally the case of Noradhco Kenya Limited v Gloria Michele, [1998] eKLR, where Pall, JA also agreed with the earlier decisions in Yani Haryanto (supra) and Motel Schwetser (supra), and added that; "I agree that the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is: Can the lodging of the notice of appeal be tantamount to preferring an appeal itself? The filing of a notice of appeal in my humble view cannot deprive a party of his right under O.44 r. 1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal. ..... I am therefore unable to agree with Mr. Ndubi that as the applicant had lodged a notice of appeal which was pending when it applied to the superior court for review of the summary judgment, the superior court did not have jurisdiction to entertain the said application and that there was therefore very little chance of the applicant having a successful appeal from the order refusing the application which did not lie in law". The consistency in these authorities is inescapable. As indicated, although Mumbi Ngugi, J. lumped Equity Bank v Westlink (supra) together with Kisya Investments (supra) as authority for saying that a party who has lodged a notice of appeal is barred from filing an application for review, my careful reading of Equity Bank v Westlink (supra) does not support that position. In Kisya Investments (supra), the Court (Kwach, Tunoi and Lakha, JJ.A) took new tangent and broke the long established chain when it declared that; "The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law". The only other case that appears to have followed the same path as Kisya Investments (supra) is Tanjal Investments Ltd v El Nasr Export & Import Company [2004] eKLR (Tunoi, Okubasu, and O. Otieno, JJ.A). In that case, after judgment was entered against the appellant, it filed a notice of appeal but failed to file the record of appeal. Being out of time, it applied to a single judge of this Court in chambers for extension of time to bring the appeal out of time. It was dismissed. With the notice of appeal still on record, it returned to the Judge in the High Court to review or set aside the judgment. On the ground that it had filed a notice of appeal, the respondent raised a preliminary objection and the application for review was dismissed. On appeal to this Court, and though counsel for the appellant cited Motel Schweitzer (supra), Yani Haryanto (supra), and Thomas Edward Cunningham, (supra), and counsel for the respondent, on the other hand cited Kisya Investments (supra), the Court went by the conclusions in the latter;

that the appellant having filed a notice of appeal it could not by a subsequent application made thereafter proceed by way of review. In agreeing with the finding of the High Court and borrowing from Kisya Investments (supra), the Court said; "Mr. Amin brought to our attention this Court's decision in Kisya Investments Limited v The Attorney - General & R. L. Odupoy – Civil Appeal No. 31 of 1995 (unreported)... But even more important is the fact that the appellant applied for a review after its efforts for lodging an appeal had come to naught". While it cannot be denied that Kisya Investments (supra) case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position. The five Judge bench decision of this Court in Equity Bank Ltd vWest Link (supra) did not apply Kisya Investment (supra). In fact none of the learned Judges in their separate but unanimous judgments cited it or any other authority aligned to the proposition it advances, perhaps because the authority was not relevant to the sole issue before it, the jurisdiction of this Court to entertain an application under Rule 5(2) (b) of the Court of Appeal Rules. For example Githinji, JA after noting that Rule 5(2) (b) is the counterpart of Rule 6(1) of Order 42 Civil Procedure Rules, quoted with his approval the following passage from Safaricom Limited vOcean view Beach Hotel Limited and two others (2010) eKLR: "At the stage of determining an application under Rule 5(2) b. there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court." (per Omolo, JA) Githinji JA noted that, although by Rule 2, an appeal in relation to appeals to the Court is defined to include an intended appeal, that definition is limited only to the jurisdiction to hear Rule 5(2)(b) applications. Musinga, JA considered that it was relevant in considering what an appeal is to also bear in mind Order 42 rule 6 (4) of the Civil Procedure Rules. Because it is his decision that has been cited and misunderstood in some of the authorities cited as leaning towards Kisyan Investments, it is, important to reproduce the relevant part. The learned Judge said; "46. What is "an intended appeal"? Rule 75 (1) states as follows: "Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court." The first step in instituting an appeal is the filing of a notice of appeal. Order 42 rule 6 (4) of the Civil Procedure Rules is also relevant in considering what an appeal is. It states that: "for the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given."

47. It follows therefore that as soon as a notice of appeal is lawfully filed, an appeal is deemed to be in existence and a litigant can move this Court for grant of an order of stay under rule 5 (2) (b) of this Court's Rules. The Court is said to be exercising special independent original jurisdiction because in considering whether to grant or refuse an application for stay it is not hearing an appeal from the High Court decision". (My Emphasis). The learned Judge in the above passage made two critical points. In reference to the definition of "appeal" to include an "intended appeal" he made it clear that the definition "intended appeal" was intended specifically to give the Court jurisdiction for the purpose of Rule 5(2)(b) applications. Secondly, he stressed that the notice of appeal is "deemed" to be an appeal for the grant of an order of stay under rule

5 (2) (b). I do not, with respect see how that conclusion can be compared with that of Kisyan Investments. The other three judges were equally in agreement. Kiage, JA said; "The jurisdiction exercised under Rule 5(2)(b) is anchored and founded on Rule 74. Without a Notice of Appeal having been filed, this Court cannot issue any of the orders under Rule (5) (2) (b)". M'inoti, JA for his part concurred thus; "In my view, Rule 5(2) (b) was to address powers of the Court of Appeal that are incidental to hearing and determination of appeals from the High Court. Those powers were never meant to exist independent of the jurisdiction of the Court to hear appeals. In fact, and in practice they do not. The fact of the matter is that the Court of Appeal cannot assume or exercise jurisdiction in an application under rule 5(2) (b) unless a competent notice of appeal has been filed. The filing of a Notice of Appeal from the decision of the High Court is a condition precedent before the powers under Rule 5(2) (b) can be invoked. This position is reiterated in Order 42 Rule 6(4) of the Civil Appeal Rules, 2010 which provides that an appeal to the Court of Appeal is deemed to have been filed when a notice of Appeal has been given under the Court of Appeal Rules. It is for this reason that rule 2 defines an appeal to include an intended appeal (i.e. where a notice of appeal has been filed). In my view Rule 5(2) (b) read together with rule 2 leaves no doubt that the powers under Rule 5(2) (b) are exercised only in the context of an appeal". Finally, Sichale, JA, agreed with Omolo, JA's holding set out earlier in Safaricom Limited v Ocean view Beach Hotel Limited (supra), although she erroneously attributed it to Ruben & 9 others v Nderito & Another [1989] KLR. She summarized her view on the matter stating that; "Indeed, the Court of Appeal cannot entertain such an application (under Rule 5(2)(b)) unless a notice of appeal had been filed. To this extent I am in agreement with the learned Counsel for the applicant that the basis of an application for stay is the notice of appeal".

In concluding this limb of the judgment, 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. So, quite clearly, the learned Judge had jurisdiction to entertain the application for review as no appeal had been filed. In the result, the ground on which the 1st respondent invited the Court to find the learned Judge ought to have relied upon in rejecting the application for review is bereft of merit and is accordingly rejected."[emphasis added]

26. I have reproduced the above decision in extenso because it is on all fours with the present case. In the said decision, the Court of Appeal even went to great lengths to explain the historical justification for empaneling a five Judge Bench which includes, to among others, to depart from its own past decision meaning, that the issue of whether the filing of notice of appeal ousted the jurisdiction of the court to

hear an application for review or setting aside of judgment or orders is so important that it must be resolved once and for all.

27. The Court stated as follows as it went on to discuss the subject before arriving at a decision that overturned the earlier position held that filing of a notice of appeal ousted the jurisdiction of the court to entertain any application for review:

> " As way back in history as 1954, it was recognized by the predecessor of this Court, in the case of Income Tax v T [1954] E.A 549, that the role of empaneling a five-Judge bench rested with the President of the Court. Spry Ag. vP explained the process and circumstances of doing so as follows:
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> "I would also remark that where it is intended to ask this Court to reverse one of its own decisions, the President should be asked to consider convening a bench of five judges, although a bench-of –three has the same powers (see Lands Commissioner v Bashir, [1958] E.A. 45)" (My emphasis).
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> See also Nguruman Limited v Shompole Group Ranch & Another, Civil Application No. NAI 90 of 2013.
>
> From decided cases the following two situations have been identified as some of the grounds convening a five-judge bench. In the first place, such a bench will be constituted where the Court is being asked to depart from one of its own previous decisions as was stated in Income Tax v T (supra) and reiterated thus in P.H.R. Poole v R (1960) E.A 62:
>
> "A full court of appeal has no greater powers than a division of the court; but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that a matter should, if practicable, be considered by a bench of five judges."
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> In the case of Peter Mburu Echaria v Priscilla Njeri Echaria, Civil Appeal 75 of 2001, the Court reiterated that:
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> "Dr. Kamau Kuria intimated before the appeal was heard that he was asking the court to depart from the decision in Kivuitu's case and thus asked for a bench of five judges in accordance with the practice recommended in Poole v R [1960] EA 62. That is why this bench is so constituted. This Court while normally regarding its own previous decisions as binding is nevertheless free in both civil and criminal cases to depart from such decisions when it is right to do so. (See Dodhia v National & Grindlays Bank Ltd & Another [1970] EA 195."

28. The Court was dealing with a similar situation where there were a plethora of decisions from the High Court and the Court of Appeal, establishing that a Notice of Appeal was an appeal for all purposes. Mumbi Ngugi J in the High Court had been confronted with the question of whether the appellant, having filed a notice of appeal to challenge the judgment, was at the same time entitled to seek a review of the very judgment and therefore whether under Order 45 of the Civil Procedure Rules, the filing of a notice of appeal to the Court is or is not a bar to the filing of an application for review. In her analysis of the situation and from her research, she observed that, there are "several conflicting decisions on this point, both from the High Court but also from the Court of Appeal". She cited the decisions where she found that a notice of appeal is not an appeal but only a manifestation of intention to appeal.

29. In the end, the learned Judge arrived at that conclusion, choosing to go with the authorities that state that a notice of appeal is not an appeal but is a means through which a party evinces an intention to

appeal. Consequently, she declared that the applicant was properly before her despite the notice of appeal in the Court of Appeal.

30. In agreeing with the decision by Mumbi Ngugi J in the above Multichoice Case, the five judge bench of the Court of Appeal departed from that position established by the same Court and held that a Notice of appeal was only deemed to be an appeal for purposes stipulated in Rule 5 (2) (b) of the Court of Appeal Rules. Further, that for all other purposes, a Notice of Appeal only signifies a party's manifestation of the intention to appeal against the decision of the High Court or Courts of Equal Status.

31. The above position was also the situation in the earlier cases of Equity Bank Ltd v West Link Mbo Ltd [2013] e KLR by Githinji JA citing Safaricom Limited v Ocean view Beach Hotel Limited & 2 others [2010]e KLR noting that Rule 5(2) (b) of the Court of Appeal Rules is the counterpart to Order 42 of the Civil procedure Rules and that although the definition of an appeal in Rule 2 of the Court of Appeal Rules included an intended appeal, that definition is limited only to the jurisdiction to hear Rule 5(2) (b) applications.

32. In the Safaricom Limited v Ocean view Beach Hotel Ltd, the Court, Omollo JA stated:

> " At the stage of determining an application under Rule 5(2) b. there may be no actual appeal. Where there is no actual appeal already lodged, there nevertheless must be intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court." (per Omolo, JA).

33. The second justification for empaneling a five Judge bench was found to be for purposes of the Court of Appeal reviewing its conflicting opinions that have ignored or without justification departed from settled law as was explained in Eric v J. Makokha & 4 others v Lawrence Sagini & 2 others, Civil Application No. NAI.20 of 1994 that:

> " We must now examine the Nyamogo case. We must, of course, treat the holdings in that case with great respect. We are not sitting on appeal from that ruling and have no jurisdiction to make any orders on that case. But the holdings in that case and the orders made in it, have raised eye-brows in the profession as to its correctness. The conclusion is also at variance with the view of the law expressed in the court below not only in the Nyamogo case itself but in the one expressed in the court below in the present application before us. It also seems, prima facie, at odds with the common law position as we know it. We think it in the interest of the profession to say which of these conflicting views is right. That explains the somewhat unusual composition of the court.
>
> Some muted but not impolite observation was made about the numerical composition of the court by the applicants' counsel but the breadth and sophistication of the submissions made to us for four whole days, justified the strengthening of the normal bench of three by two more heads. Because of the hierarchal structure of the court, it is also the practice adopted to review the inconsistent decisions of this Court. But it would be technical and narrow to suggest that as the two consistent rulings of the High Court only differed from one ruling of the Court of Appeal, the practice of constituting 5 judges recommended and adopted in the Income Tax v T 1974 EALR 546 and followed as recently as October1993

in Trouistik Union International and another v Jane Mbeyu and another Civil Appeal No. 145 of 1990 should not be followed." (My Emphasis)

34. The five Judge bench in *Patrick Gathenya v Esther Njoki Rurigi & Another, Civil Application No. 290 of 2005* was similarly constituted to resolve an apparent conflict in previous decisions of the full Court in Rafiki Enterprises Ltd. v Kingsway Tyres & Automart Ltd, Civil Appl. Nai. 375/95 (UR), on the one hand, and Musiara Limited Ltd v William Ole Ntimama (2004) eKLR, which was, applied in Chris Mahinda t/a Nyeri Trade Centre v Kenya Power & Lighting Co. Ltd Civil Appl. Nai. 174/05 (UR), on the other hand, on whether the Court of Appeal has residual jurisdiction to reopen the appeal once decided.

35. From the exposition in the Multichoice Case bench, it is clear that indeed, the latter decision settled the position as to whether a notice of appeal serves as an appeal or merely an intention to lodge an appeal against a decision of this Court to the Court of Appeal. That decision unsettled the Otieno Ragot & Co Advocates decision although it did not refer to the said latter case in the analysis.

36. In the present case, the exparte applicant has not cited the Multichoice case which was decided much later than the cases that were cited from the Court of Appeal. Furthermore, the cases from the High Court are only persuasive to this Court and they all cited the pre Multichoice cases in determining the question of whether a notice of appeal once filed ousted the jurisdiction of the High Court to hear an application under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

37. The Supreme Court decision in the University of Eldoret case quoted the hallowed principle that a party cannot pursue both an appeal and a review at the same time. The apex Court did not expound on the matter the way the Court of Appeal in the Multichoice case did and it did not say that a notice of appeal is in itself an appeal but an intention to appeal. See paragraph 36 of the University of Eldoret Case. The Supreme Court was categorical that the filing of notice of appeal signifies an intention to appeal. However, the apex court was dealing with a situation where the notice of appeal was a mandatory step yet the material notice of appeal was not filed in time and it was filed without first obtaining leave of apex Court.

38. For all the above reasons, I have no difficulty in finding and holding, as was the case in the Yani Haryanto v ED & F Man (Sugar) Ltd Case as upheld in the Multichoice Case that a mere filing of a Notice of Appeal does not constitute preferring of an appeal but a manifestation of an intention to appeal and that the definition of an appeal in Rule 2 of the Court of Appeal Rules to include an intended appeal is only for purposes of an application under Rule 5(2) (b) of the Court of Appeal Rules, akin to Order 42 Rule 6(1) of the Civil Procedure Rules, otherwise known as applications for stay of execution of decree/order pending appeal.

39. I must however, emphasize, as was in the case in the Multichoice case 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."

40. For the above many reasons, I find and hold that in the circumstances of this case, this Court has jurisdiction to entertain the application for review and or setting aside of judgment on its merits as no appeal had been filed before the Court of Appeal by the respondent.

41. In the end, I find the preliminary objection dated 17th January, 2025 not merited. It is dismissed.

42. On costs, it cannot be said that the preliminary objection as raised was frivolous. It was not, in view of the many conflicting decisions on the issue raised which was important even for this Court which had previously relied on decisions of the Court of Appeal in finding in favour of the objection to jurisdiction in the Republic v Registrar of Companies & Githunguri Ranching Company Co. Ltd [2016] e KLR where both a notice of appeal and review application had been were filed. Furthermore, the respondent, in this case did not refer to the MultiChoice case which has changed the landscape on the question of whether a notice of appeal is, in fact, an appeal.

43. For the above reasons, I make no orders as to costs.

Dated, Signed and Delivered virtually at Nairobi this 6th Day of March, 2025

R.E. ABURILI

JUDGE