



**Diwoma v Wanjiku & 2 others (Miscellaneous Application
E158 of 2024) [2025] KEHC 4630 (KLR) (10 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4630 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS APPLICATION E158 OF 2024**

BK NJOROGE, J

APRIL 10, 2025

BETWEEN

MILLER IBWENZI DIWOMA APPLICANT

AND

MARGARET WANJIKU 1ST RESPONDENT

WATU CREDIT LIMITED 2ND RESPONDENT

PIUS MWANZIA MWINZI 3RD RESPONDENT

RULING

1. This is a Ruling in respect of the proposed Appellant/Applicant's application by way of a Notice of Motion dated 2nd October, 2024. It is supported by the Affidavit of Miller Imbenzi Diwoma sworn on 2nd October, 2024.
2. It seeks the following orders;
 - a. That the proposed Appellant be granted leave to appeal out of time against the whole judgment of the Hon. Sheila Tirop, Resident Magistrate and Adjudicator, delivered on 8th August, 2024 at Thika.
 - b. That this Honourable Court be pleased to stay the judgment entered herein on 8th March, 2024 and any other order that may be issued pursuant thereto, pending appeal.
 - c. That the Notice of Appeal and Memorandum of Appeal annexed hereto be deemed as duly filed and served.
 - d. That the costs of this application be provided for.



3. The application is opposed by 3rd Respondent who has filed Grounds of Opposition dated 9th October, 2024. The 1st Respondent has also filed a Replying Affidavit sworn on 20th November, 2024.
4. The application was disposed of by way of written submissions.
5. The Court has seen and read the Applicant's written submissions dated 19th November, 2024 and the authorities cited. The Court has also read and seen the 3rd Respondent's written submissions dated 25th November 2024 and the authorities cited.

Issues for Determination

6. The Court frames two (2) issues as sufficient to dispose of the Application.
 - a. Whether the application for leave to appeal out of time is meritorious
 - b. Whether a party can seek to file an appeal from decision where it has exercised its right of review.

Analysis

7. An application for leave to appeal out of time lies to this court pursuant to Section 79 G of the [Civil Procedure Act](#), which states as follows;

79G. Time for filing appeals from subordinate courts

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:

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.

8. As correctly submitted by the Applicant, the Supreme Court of Kenya has laid out the legal principles to guide the Court in granting such orders. This is in the case of *Nicholas Kiptoo Arap Salat -vs- IEBC & 7 others* [2014] eKLR. The Supreme Court has established the guidelines as follows;

“Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court; A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court; Whether there will be any prejudice suffered by the respondents if the extension is granted; Whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

9. The Court is therefore called upon to consider the reasons advanced by the Applicant herein. The Applicant makes it clear that after the delivery of the judgment by the Learned Adjudicator on 8th



August, 2024, he pursued a review before the Learned Adjudicator. No appeal was filed. The Applicant avers as follows;

“.....The typed judgement was delivered on 20th August, 2024 and the applicant being aggrieved and dissatisfied with the judgement instructed its advocate on record to pursue an application for review hoping the review would go through.

4. That by the time the application for review was determined and sufficient instructions could be obtained from the proposed appellant, the time allowed to file an appeal had ran out.
 5. That further I did not appeal on time because we were pursuing the application for review. I truly believe that the application for review was discussed on 30th September, 2024 and that is when we decided to lodge an appeal.
 5. That the appellant is aggrieved and dissatisfied with the said judgment and has instructed its advocates on record to appeal against the same.”
10. From the above, the Court hears the Applicant to advance the argument that the only reason it did not appeal on time, is because he hedged his bet on the outcome of the application for a review. He was not hindered or precluded by any other reason.
 11. The 3rd Defendant relies on the case of Thuita Mwangi -vs- Kenya Airways Limited [2003] eKLR and County Executive of Kisumu -vs- County of Kisumu & others Civil Application No. 3 of 2016. He submits that the period of the delay and the arguability of the Appeal are factors to be considered. He submits that the explanation given for the delay is insufficient and the period of 52 days has not been explained satisfactorily.
 12. The Court is persuaded by the 3rd Respondent’s submissions. There was nothing that barred the Applicant from filing the Appeal. He just hedged on a process that did not give him the desired outcome. He is now seeking to place a second bet, a second bite at the cherry so to speak. Unfortunately, this is no longer plausible as time for filing an Appeal has lapsed.
 13. This is a party who was represented by Counsel and hence had the benefit of a legal advisor. He cannot be said to have been prejudiced.
 14. The Court reminds itself that Appeals to this Court from the Small claims Court are pursuant to Section 38 of the [Small Claims Court Act](#). It states as follows;
 38. Appeals
 - (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.
 15. Such Appeals are limited to matters of law or points of law only. Looking at the draft Memorandum of Appeal, annexed to the application, it contains eight (8) grounds. However, they challenge the decision of the Learned Adjudicator on factual grounds or the interpretation of the evidence before the Small Claims Court. The Court is not able to discern any substantive point of law sought to be argued in the intended appeal.



b. Whether a Party can Seek to file an Appeal from a Decision where it as Exercised its Right of Review

16. The Applicant seeks leave to Appeal against two separate decisions. One is the judgment delivered on 8th March, 2024. The other is the application for review delivered on 8th August, 2024. There is no doubt that it is out of time in filing both.
17. What the Applicant submits is that it is proper and in order for a party to pursue an application for review of a decision. That when that avenue of review is lost, the same party can go back and pursue the Appeal on the original decision.
18. The 3rd Respondent opposes this argument. He maintains that one cannot seek a review and also an Appeal against the same order. That the exercise of one right exhausts the other.
19. This Court has been referred to the decision of the Court of Appeal in *Gerald Kituu Muchanje -vs- Catherine Muthoni Ngare & Another* [2020] eKLR. The Court of Appeal has rendered itself on this issue as follows;

“The applicant was aggrieved by the judgment of the trial court. 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 ...” See also the case of *Multichoice (K) Ltd V Wananchi Group (K) Ltd & 2 Others* (2020) eKLR. This is exactly what happened here. Contrary therefore to the submissions by the applicant, the law on the issue is purely settled.”

20. The Court is bound by this decision and holds that it would be improper for a party to mount an Appeal against the same decision, after having exhausted its right of a review.
21. Suffice to state that this dispute arose from the Small Claims Court whose focus on expeditious hearing and determination of disputes. Appeals from that Court are clearly circumscribed. They are not open to challenge matters of fact. There has to be an end to litigation and this maxim aptly applies to this matter.
22. On who bears the costs, the same follow the event. The same are awarded to the Respondents.



Determination

- 23. The application by way of Notice of Motion dated October 2, 2024 is dismissed in its entirety.
- 24. The costs thereof are awarded to the Respondents.
- 25. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF APRIL, 2025

NJOROGE BENJAMIN K

JUDGE

In the presence of;

Mr. Maranga for the Applicant

Miss Muthiani for the 1st Respondent

N/A.....for the 2nd Respondent

Mr. Mutinda for the 3rd Respondent

Mr. Luyai – Court Assistant

