



**Al-Rahim Tradin Limited v Makana & 2 others (Civil Appeal  
E203 of 2023) [2024] KEHC 1129 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1129 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E203 OF 2023  
RE ABURILI, J  
FEBRUARY 12, 2024**

**BETWEEN**

**AL-RAHIM TRADIN LIMITED ..... APPELLANT**

**AND**

**ROBINAS OYARA MAKANA ..... 1<sup>ST</sup> RESPONDENT**

**SAADI CARS (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**DAVEJAY KANAK T/A JEDS MOTORS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. On 30<sup>th</sup> January 2024, this court struck out the Appellant/Applicant's application for stay pending appeal and proceeded to strike out the appeal which was the substratum of the application on account of having been filed out of time.
2. Vide an application dated 1<sup>st</sup> February 2024, the Applicant filed the application seeking to review of the Ruling of 30<sup>th</sup> January 2024 on account that the appeal as filed on 30<sup>th</sup> November 2023 was within time because the Ruling declining the application for review of the Judgment rendered on 25<sup>th</sup> October 2023 by the Small Claim Court Adjudicator was delivered on 28<sup>th</sup> November 2023 and two days later, this appeal was filed hence the appeal was filed within time.
3. That therefore there is an error on the face of the record in the court striking out the appeal and the stay of execution application.
4. The application was argued orally on 7<sup>th</sup> February 2024 and the Applicant's counsel submitted reiterating the grounds adding that they wanted to appeal against the ruling of 28<sup>th</sup> November 2023 but when the Memorandum of Appeal was filed, it challenged the Judgment of 25<sup>th</sup> October 2023.



5. Opposing the application, Mr. Ontita counsel for the Respondent submitted that the Applicant had the option of either appealing against the Judgment of 25<sup>th</sup> October 2023 or seek Review of the said Judgment within 30 days. That having chosen to apply for review, they cannot appeal against the same judgment whose review application was dismissed.
6. In a rejoinder, the Applicant’s counsel submitted that nothing bars the applicant from appealing against the Judgment even if review was dismissed and that there is no provision which extinct matter which are reviewed from being appealed against. That it is in the interest of justice that the applicant be allowed to be heard on appeal to serve interests of justice hence procedural technicalities should not bar the course of justice.
7. I have considered the application and the opposition thereto as argued orally by both parties’ counsel.
8. The issue is whether this application for review is merited. The substantive provisions under which such an application for review fall is Section 80 of the *Civil Procedure Act* as read with Order 45 of the *Civil Procedure Rules* which set out the conditions to be met for review orders to issue.
9. The Section 80 of the *Civil procedure Act* provides that:

“ 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.”
10. Order 45 Rule 1 of the *Civil Procedure Rules* on the other hand provides that:

“(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.”
11. The court of Appeal held as follows regarding review and appeal options from a decision in *Yani Haryanto v E. D. & F. Man. (Sugar) Ltd.* CA 122 of 1992.

“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”.

12. Again in the *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* C. App No. 277 of 2005, the same Court of Appeal interpreted Order 44 (of the old) *Civil Procedure Rules* as follows:

“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”.

13. In *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR citing its earlier decision *Kisya Investments Kisya Investments Limited v The Attorney General & Another* [1966] eKLR the Court of Appeal- (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.”

14. In the instant case, the Appellant claims that the appeal was filed in time as it was against the Ruling on review made on 28<sup>th</sup> November 2023.
15. I have perused the Memorandum of Appeal dated 30<sup>th</sup> November 2023. It clearly states that the appeal is against the Judgment of 25<sup>th</sup> October 2023, both at the beginning and in the prayers where it prays for the appeal to be allowed and the Judgment of 25<sup>th</sup> October 2023 be stayed.
16. However, before I pronounce myself on whether to allow or dismiss the application dated 1<sup>st</sup> February 2024, as the applicant has arrested this ruling before it was delivered and sought to have the aforesaid application withdrawn, and as the respondent’s counsel has no objection to the withdrawal thereof save for costs, I shall not make a final determination on the application and therefore I hereby mark the application dated 1<sup>st</sup> February, 2024 as wholly withdrawn with an order that the applicant shall pay to the 1<sup>st</sup> respondent costs of Kshs 15,000 within seven (7) days of today and in default, the 1<sup>st</sup> respondent shall execute for recovery.
17. This file is closed save for payment of the assessed costs.
18. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF FEBRUARY, 2024**

**R. E. ABURILI**

**JUDGE**

