**Kariuki v African Banking Corporation (Commercial Appeal 75 of 2020)**
**[2024] KEHC 4361 (KLR) (Commercial and Tax) (19 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4361 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL APPEAL 75 OF 2020**

**MN MWANGI, J**

**APRIL 19, 2024**

**BETWEEN**

**JULIUS NDEGWA KARIUKI ..... APPLICANT**

**AND**

**AFRICAN BANKING CORPORATION ..... RESPONDENT**

**RULING**

1. The appellant/applicant filed a Notice of Motion application dated 20th February, 2023, brought under Order 42 Rule 6 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act*, seeking the following orders-

    i. Leave for the firm of George Wakahiu & Njenga Advocates to appear on record for the appellant;

    ii. Leave to amend the Memorandum of Appeal dated 11th December, 2020; and

    iii. Stay of proceedings in CMC Civil Suit No. 4854 of 2017 at Milimani Commercial Courts pending the hearing and determination this application and the appeal.

2. The application is supported by the affidavit of the applicant, Julius Ndegwa Kariuki. The applicant deposed that the Memorandum of Appeal dated 11th December, 2020 is faulty and erroneous in fact and law, hence this application to amend it, contrary to which the applicant is poised to suffer injustice, substantial loss and irreparable damage, as his intention was to appeal against the ruling of 12th February, 2020 and not the one that was delivered on 4th December, 2020. The applicant contended that the Advocates that were representing him at the time of filing of the Memorandum of Appeal erred in filing an appeal against the ruling he did not intend to appeal against.

3. He averred that if stay of proceedings in CMC Civil Suit No. 4854 of 2017 at Milimani Commercial Courts, from which this appeal originates from is not granted, his appeal will be rendered nugatory and he will suffer irreparable damage, and substantial loss will result to him.

4. In their written submissions, Mr. Wakahiu the learned Counsel for the applicant stated that he has met the threshold for leave to be granted for the firm of George Wakahiu & Njenga Advocates to be allowed to represent him in the appeal. He relied on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010. He also relied on the case of Global Impex Machinery Limited v Vlan Construction Limited [2021] eKLR to argue that the Court cannot stand in the way of a party seeking to exercise his right to legal representation as long as it is shown that such representation will not prejudice any of the parties to the suit, and that legal fees for previous Advocates on record have been settled.

5. The applicant's Counsel further relied on Rule 46 of the Court of Appeal Rules, 2010, which provides for leave to amend pleadings. He cited the case of George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & another [2016] eKLR for the proposition that the Court has an unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. He relied on the case of Uchumi Supermarket Limited v Sidhi Investments Limited [2018] eKLR on the factors to be considered by Courts in applications for amendment of pleadings.

**Response by the respondent**

2. The application was opposed by the respondent through a replying affidavit sworn by Kajuju Marete on 3rd March, 2023. The respondent faulted the applicant for filing an appeal against orders which he had earlier elected to review, which is contrary to the express provisions of Section 80 of the *Civil Procedure Act*, as read with Order 45 Rules 1 and 2 of the Civil Procedure Rules, 2010. The respondent contended that the Court has no jurisdiction to grant the orders sought by the applicant.

3. In support, of its arguments, Mr. Gacheru, learned Counsel for the respondent relied on decisions in Phillip Ochilo Orero v Ambrose Seko [1984] eKLR and in Serephen Nyasani Menge v Rispah Onsase [2018] eKLR.

4. Counsel argued that the applicant did not seek leave to appeal against the ruling of 12th February, 2020 as required under Order 43(2) of the Civil Procedure Rules, 2010. The respondent further argued that the application has been brought with inordinate delay, three (3) years after the ruling of 12th February, 2020 was delivered.

**ANALYSIS AND DETERMINATION**

2. I have considered the application, the supporting and replying affidavits as well as the parties' respective submissions and the authorities relied on. The issues for determination are-

    i. Whether this Court ought to grant leave for the firm of George Wakahiu & Njenga Advocates to come on record for the applicant;

    ii. Whether the applicant has made out a case for the grant of leave to amend the Memorandum of Appeal dated 11th December, 2020; and

    iii. Whether the applicant has made out a case for the grant of stay of proceedings in CMC Civil Suit No. 4854 of 2017 at Milimani Commercial Courts pending the hearing and determination of the appeal.

2. On the first issue, I note that from the record that the Memorandum of Appeal was drawn and filed by the firm of K. Itonga & Company Advocates. The present application was however filed by the firm

of George Wakahiu & Njenga Advocates. A Notice of Change of Advocates dated 21st February, 2023 was filed by the law firm of George Wakahiu & Njenga Advocates under the provisions of Order 9 Rule 5 of the Civil Procedure Rules, 2010. The said Notice however indicates that the firm would act in place of Njuguna and Kireria Advocates who were not representing the applicant in the first instance. As such, there is an apparent error on the Notice of Change of Advocates filed.

3. Further, since judgement had already been entered in the Trial Court, in line with the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010, the law firm of George Wakahiu & Njenga Advocates (incoming Advocates) would need to either seek leave of the Court to come on record or enter into a consent with the law firm of K. Itonga & Company Advocates (outgoing Advocates) who represented the applicant herein in the Trial Court, so that the incoming Advocates can be properly on record.

4. On the second issue on whether the applicant has made out a case for the grant of leave to amend the Memorandum of Appeal dated 11th December, 2020, the record shows that judgment was entered by the Trial Court in favour of the respondent in the sum Kshs.3,000,000/- on 27th November, 2018, following formal proof proceedings. Thereafter, the applicant filed the Notice of Motion dated 17th September, 2019 seeking stay of execution, the setting aside of the judgment and for warrants of arrest against the applicant to be lifted, suspended and for him to be allowed to file his statement of defence. Through a ruling dated 12th February, 2020, the Trial Court dismissed the aforementioned application.

5. Subsequently, the applicant filed another Notice of Motion dated 17th July, 2020 seeking review of the ruling of 12th February, 2020. The said application was dismissed by the Trial Court through a ruling dated 4th December, 2020. The applicant then instituted this appeal by way of a Memorandum of Appeal dated 11th December, 2020 seeking to appeal against the Trial Court's ruling of 4th December, 2020 in CMCC No. 4854 of 2018.

6. Through the supporting affidavit annexed to the present Notice of Motion, the applicant deposed that he wished to amend his Memorandum of Appeal to reflect his dissatisfaction with the ruling of 12th February, 2020, as opposed to the one issued on 4th December, 2020. The applicant elaborated that the error in the Memorandum of Appeal was occasioned by his previous Advocate who neglected to involve him in its preparation. He asserted that an appeal against the ruling of 4th December, 2020 does not raise the question that needs to be determined by the Court.

7. On the other hand, the respondent contended that the applicant cannot appeal against an order in which he had earlier applied for review.

8. On this issue, Section 80 *Civil Procedure Act* is relevant. It 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."

17. Order 45 Rule 1 of the Civil Procedure Rules 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.

(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."

17. Having carefully read the above provisions, it is evident that a party cannot apply for both review and appeal from the same decree or order. That is the position of the law. In the Court of Appeal decision in The Chairman Board of Governors Highway Secondary School v William Mmosi Moi Civil Application No. 277 of 2005, the Court stated as follows-

> "The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular, the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances, the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed..... 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".

18. See also the decisions in Edward for Industrial & Commercial Co. Ltd v Bollore Africa Logistics (K) Ltd [2015] eKLR and Shah Rekhavanti Pankaj v Bank of Baroda & another [2021] eKLR.

19. The above principlesndo not preclude an aggrieved party from pursuing an appeal against the ruling and order made in an application for review. When faced with a similar scenario, the Court of Appeal in *Rafiki Microfinance Bank Limited v Youth Enterprise Development Fund Board (Civil Appeal E222 of 2022*) [2024] KECA 239 (KLR) (8 March 2024) (Judgment), expressed itself thus-

> "26. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the rules are subject to the provisions of the *Civil Procedure Act* under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a

decision, to attack the very decision upon which the review application was anchored on appeal, would in our view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 Rule 1 were meant to assist genuine litigants and not parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. It is our view that the wording of the provisions of Order 45 Rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of "any person considering himself aggrieved". An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. However, to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in our view, to an abuse of the process of the Court. It would also contravene the overriding objectives as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play lottery with judicial process.

27. In this case, the appellant having sought to review the judgment and decree cannot now purport to appeal against the same after its review application was dismissed. It can only appeal against the ruling and order on its application for review made on 11th November 2021. Further and as we have already demonstrated, the notice and record of appeal in respect of the impugned judgment and decree were both filed way out of time."

20. Applying the above principles to the matter at hand, it is my

finding that the instant application is an abuse of the process of the Court as it attempts to amend the Memorandum of Appeal dated 11th December, 2020 so as to appeal against the ruling and order of 12th February, 2020, from which the applicant already filed a review. As earlier stated, the applicant filed an application dated 17th July, 2020 seeking review of the ruling of 12th February, 2020. The said application was dismissed by the Trial Court through a ruling dated 4th December, 2020. It then follows that no appeal can lie to the High Court against the ruling of 12th February, 2020 as the applicant decided to apply for review against the said decision.

20. Guided by the reasoning of the Court of Appeal in the case of Rafiki Microfinance Bank Limited v Youth Enterprise Development Fund Board (supra), the applicant can only appeal against the ruling made on 4th December, 2020. Thus, the proper appeal before this Court is the appeal against the ruling and order of Hon. L. Gicheha, Chief Magistrate dated 4th December, 2020 as reflected in the Memorandum of Appeal dated 11th December, 2020.

21. The final issue for determination is whether the applicant has made out a case for the grant of stay of proceedings in CMC Civil Suit No. 4854 of 2017 at Milimani Commercial Courts pending the hearing and determination of the appeal. On this issue, the applicant argued that unless stay of proceedings is granted, his appeal will be rendered nugatory, while the respondent argued that the applicant has not met the threshold for the grant of stay of proceedings pending appeal.

22. The principles for consideration in determining whether or not to grant stay of proceedings pending appeal are underpinned in Order 42 Rule 6 of the Civil Procedure Rules, 2010, which reads as follows-

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
>
> (2) No order for stay of execution shall be made under subrule (1) unless—
>
> (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
>
> (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application."

20. In the case of Lucy Waithera Kimanga & 2 others v John Waiganjo Gichuri [2015] eKLR, the Court observed as follows on the issue of stay of proceedings:

a) The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.

b) The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.

c) In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.

d) In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously." (emphasis added).

25. In the present application, the applicant has not established that he has an arguable appeal. Despite claiming that he will have to pay the respondent over and above the loan amount that he had already repaid, he did not provide any proof of payment. It is noted that even if the applicant has also not provided security for costs, in order to be granted stay of proceedings.

26. The application for stay of proceedings has been filed with inordinate delay, three (3) years after the impugned decision was made. No explanation whatsoever has been given for such inordinate delay. In conclusion, I find that the applicant has not made out a case for grant of stay of proceedings pending appeal.

27. The upshot is that the Notice of Motion dated 20th February, 2023 is bereft of merits. It is dismissed with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI on this 19th day of April, 2024. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

No appearance for the applicant

Ms Wambui for the respondent

Ms B. Wokabi – Court Assistant.

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