



**Waithira v Holding & another (Civil Appeal E331 of 2022)
[2024] KEHC 3169 (KLR) (Civ) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E331 OF 2022

AA VISRAM, J

APRIL 4, 2024

BETWEEN

ESTHER WAITHIRA APPELLANT

AND

FORTCOM HOLDING 1ST RESPONDENT

PETER KIMATHI 2ND RESPONDENT

RULING

1. Vide a Memorandum of Appeal dated 23rd May, 2022, the Appellant lodged an appeal to this court against the ruling of the Small Claims Court delivered on 11th May, 2022, in SCCC No.E989 of 2021.
2. The said ruling dismissed the Appellant’s application dated 21st March, 2022, which sought a review of the ruling dated 15th March, 2022, where the Appellant’s claim was dismissed for being statutorily time barred.
3. The 1st Respondent filed a Preliminary Objection dated 6th June, 2022, opposing the present appeal on points of law. In the Preliminary Objection, the 1st Respondent argued that the appeal contravened section 80 of the *Civil Procedure Act* and order 45 rule 1(b) of the Civil Procedure Rules as, the Appellant, having sought to review the order made on 15th March, 2022, cannot now appeal against the same when its application was dismissed on 11th May, 2022.
4. The 1st Respondent argued that the appeal was bad in law and ought to be dismissed with costs.
5. The Appellant opposed the Preliminary Objection by filing a replying affidavit sworn on 24th February, 2023, by Dickson Khisa, her advocate.



6. The Applicant averred that the Appellant filed a review after the trial magistrate failed to consider the submissions of all the parties on record and therefore, arrived at a ruling not based on facts or law. That during the delivery of the ruling on review, the magistrate stated that the court could not review its own ruling and hence disallowed the application stating that the Appellant ought to have filed an appeal.
7. Further, the Appellant contended that the application for review had already been dispensed with before filing the current appeal and that the Applicant filed an appeal to this court to seek justice.

Analysis and determination.

8. The Appellant filed written submissions dated 3rd April, 2023, while the 1st Respondent's is dated 15th March, 2023.
9. The court has carefully considered the submissions and pleadings filed in this matter.
10. The sole issue for determination is whether the 1st Respondent's Preliminary Objection is merited.
11. Section 80 of the *Civil Procedure Act* states:-
 - “ 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
12. It is trite law that a review application and an appeal cannot be sought concurrently or one after the other. This was held in the Court of Appeal case of Chairman Board of Governors Highway Secondary School v William Mmosi Moi [2007] eKLR it was held:-
 - “ We have no hesitation however in stating that upon the exercise of that (review) option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court. The record here shows that the Board filed an application for review dated 24th February, 2004, on 4th March, 2004. That application was determined by the superior court on 7th December, 2004 when it was dismissed for whatever reason. No further action appears to have been taken by the Board after that dismissal. In our view that was the end of the matter and the notice of appeal was rendered purposeless. Both options in our judgement cannot be pursued concurrently or one after the other.”
13. I have looked at the Memorandum of Appeal and it is evident that the said appeal relates to the ruling dated 11th May, 2022, which was a decision of the lower court in relation to an application for review. The appeal does not relate to the decision made by the lower court prior to review, which was dated 15th March, 2022.
14. The said appeal is therefore against a different ruling from the one the Applicant sought a review of. Therefore, to my mind, the principle in Chairman Board of Governors Highway Secondary School v William Mmosi Moi (supra), as stated above does not apply; and has not been violated because as stated, the appeal which is the subject matter of the Preliminary Objection, relates to the ruling in respect of the review.



15. Further, to my mind, there is no express bar in the Civil Procedure Rules to a party who has attempted to review a decision from subsequently appealing against the same. The bar as stated in *Chairman Board of Governors Highway Secondary School v William Mmosi Moi*, is simply that a party may not seek a review and appeal at the same time, or one after the other. That has not been done.
16. In the celebrated case of *Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd.* Civil Appeal No. 9 of 1969 [1969] EA 696, Law, JA was of the following view:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises from a 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 the contract giving rise to the suit to refer the dispute to arbitration.”
17. Therefore, a Preliminary Objection is only competent where its success would dispose of the whole suit. In this case, the Preliminary Objection fails because the rules permit an appeal of a decision arising out of an application for review and accordingly, the suit has not been disposed of.
18. Based on the reasons as set out above, the Preliminary Objection fails and is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 4TH DAY OF APRIL 2024.

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

- For the Appellant
- For the 1st Respondent
- For the 2nd Respondent

