



REPUBLIC OF KENYA



**Mcintosh v Mugambi & 2 others (Miscellaneous Application E010 of 2024)
[2024] KEHC 10803 (KLR) (Civ) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10803 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS APPLICATION E010 OF 2024
JN MULWA, J
SEPTEMBER 19, 2024**

BETWEEN

MARCIA ALISON MCINTOSH APPLICANT

AND

PRISCILLA KAGWIRA MUGAMBI 1ST RESPONDENT

HAZMILL LIMITED 2ND RESPONDENT

DOUGLAS KIBIWOTT BARASSA 3RD RESPONDENT

RULING

1. The Applicant herein seeks leave of court to file Appeal out of time from the Small Claims Court Judgment against delivered on 17/05/2023, 232 days after the said judgment.
His explanation for the delay is that he had made a review application before the said court whose ruling dismissing the Review Application was delivered on 8/12/2023.
2. By the instant application dated 4/01/2024, he has explained the delay to the satisfaction of the court.
3. However, it is trite that a litigant being dissatisfied with the outcome in the judgment has two options; to exercise its right of appeal or to apply for review of the said judgment under Order 45 of the *Civil Procedure Rules*, but not both options.
4. I have considered the Opposing Replying Affidavit and Submissions by the Respondents as well as the Supporting Affidavit.
5. On the matter of extension of time to file appeal out of time, whereas the delay has been explained satisfactorily to this court, this option to appeal after losing the review application cannot be available to the applicant.



6. In a myriad of superior courts decisions, it is trite that upon a party exercising a right of review, he cannot attempt to attack the same judgment that was subject of the review through an appeal. The only option would have been to appeal against the ruling of the trial court dismissing his application but not otherwise. That would be double attack on the same judgment which is an abuse of court process.
7. Among them are *Rafiki Microfinance Bank Limited v Youth Enterprise Development Fund Board* [2024] eKLR and the *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* in Civil Application No 277 of 2005.
8. For the foregoing, the application dated 4/01/2024 is dismissed with costs to the Respondents.
9. The court notes that as at September, 2023 the Decretal sum was Kshs 94,000/= out of which by an order of the court on 11/09/2023 a sum of Kshs 50,000/= was deposited in court as a condition to stay orders of execution pending hearing and determination of this application which has been dismissed.
10. There being no reason to have the sum of Kshs 50,000/= retained in court, it is directed that the said sum be released to the Decree holder through his Advocates TLO Advocates LLP. It follows therefore that the Applicant shall proceed to pay the balance of the decretal sum to avoid execution proceedings against him
11. The upshot is that the application is dismissed with costs and the interim stay orders are hereby vacated.
Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

JANET MULWA

JUDGE.

