



**Machome v Momanyi (Suing as the legal representative of Esther Moraa Morabe) (Miscellaneous Application E241 of 2023) [2024] KEHC 12012 (KLR) (2 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12012 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
MISCELLANEOUS APPLICATION E241 OF 2023  
RPV WENDOH, J  
OCTOBER 2, 2024**

**BETWEEN**

**ZACHARY MACHOME ..... APPLICANT**

**AND**

**SIMON MOMANYI (SUING AS THE LEGAL REPRESENTATIVE OF ESTHER MORAA MORABE) ..... RESPONDENT**

**RULING**

1. By the Notice of Motion dated 22/11/2023 Zachary Machome hereinafter referred to as the applicant, filed this application seeking the following orders;
  1. Spent.
  2. Spent
  3. That the court be pleased to grant leave to the applicant to file an appeal out of time from the Judgment and decree in Migori CMCC.E017 of 2022 Simon Momanyi (suing as legal Representative of the Estate of Esther Moraa Morabe Vs. Zachary Machome;
  4. That the court do grant stay of execution of the decree in Migori CMCC E017/2022 pending the lodgment, hearing and determination of the intended appeal;
  5. That upon grant of prayer 4, that the court do order the applicant to provide sufficient security in the form of a suitable Bank Guarantee from a reputable Financial institution to secure the decree;
  6. That Costs of the application to be provided for.
2. The application is premised on grounds found in the body of the application and the affidavit of Everlyne Okwoyo, Counsel for the applicant



3. The grounds for seeking the said orders are that after delivery of Judgment in the Lower court on 21/8/2023, the applicant sought review of the court's Judgment by the application dated 7/9/2023 for reason that the trial court had not had the opportunity to see and consider the applicant's submissions; but that on 7/11/2023, the trial court dismissed the said application by which time the time for filing appeal had lapsed. It is the applicant's contention that the appeal raises serious issues of law and has high chances of success; that the delay in filing the application, has been explained and was not inordinate. It was deponed that the Respondent is a man of straw and therefore if the decretal sum is paid to him, he will not be able to repay in the event the appeal succeeds, and that the applicant is willing to furnish security by providing a bank guarantee for the whole decretal sum; that it is in the interest of justice that orders sought be granted and the Respondent will not suffer any prejudice.
4. The applicant also filed written submissions on 24/1/2021 in support of the above averments. Counsel cited the case of Halai & another Vs. Thorton and Turpin (1963) Ltd. (1990) KLR 365 where the Court of Appeal set down the criteria for Grant of an order of stay. The criteria are;
  1. That the applicant will suffer substantial loss if the order for stay is not granted
  2. That the application is made without unreasonable delay.
  3. That the applicant is willing to furnish security;
  4. That the appellant has an arguable appeal.
5. On substantial loss, Counsel argued that the decretal sum is substantial and if paid to the Respondent, the applicant is apprehensive, that the respondent will not be in a position to refund it in the event the appeal succeeds and that would be prejudicial to the applicant. He relied on Kenya Orient Insurance Co, Limited VS. Paul Mathenge Gichuki & another (2014), e KLR where the court observed that the burden shifts to the respondent once the appellant states that it is unaware of the respondent's resources to refund the decretal sum in the event that appeal succeeds.
6. As to whether the application was made timeously, it was submitted that delay of one and half months is not unreasonable. It was also urged that Direct Line Assurance, the applicants Insurer, is ready and willing to furnish reasonable security by way of a bank guarantee at a reputable banking institution. Lastly, that the appeal has high chances of success and denial of the order will render the appeal nugatory.
7. It was also submitted that section 79 C and 95 CPC gives the courts the discretion to enlarge time to file appeals arising from the subordinate courts provided that an explanation for the delay has been given, the appeal is arguable and that the Respondent will be adequately compensated.
8. Though Mr. Abisai indicated that the Respondent opposed the application by filing a replying affidavit, the court has not seen it save for submissions dated 9/5/2024, filed by Abisai Advocate opposing the application. It is Counsel's submission that the application is not tenable because under Section 80 of the CPA upon which the applicant's application for review was predicated, once a party opts to apply for review, such party cannot after review, exercise the option to appeal; that Order 45 CPR also provides the procedure for filing an application for review or appeal and the conditions that a party must satisfy in an application for review which conditions are also in section 80(a) and (b); that both make it clear that review and appeal are not simultaneously available to an aggrieved party. He relied on the decisions in Serephen Nyasani Menge V. Risphah Onsase (2018) e KLR AND the [\*Chairman, Board of Governors Highway Secondary School VS. William Mmosi Moi Civil Application no. 277 of 2005\*](#) where the above provisions were considered. It was Counsel's submission that the



application which now seeks an appeal on the same Judgment is an abuse of the court process and it should be dismissed.

9. I have duly considered the said application and arguments of both Counsel. The application for review was filed pursuant to section 80 and order 45 (2) of the CPR. Section 80 of the CPA provides as follows:-

“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 hereby 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 (a) (b) of the CPR provides as follows:-

1. Any person considering himself aggrieved-

- a. by a decree or order from which an appeal is allowed, but from ..... 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 her and important collar or evidence which, after the exercise of due diligence, was not within his knowledge, he could not be produced by him at the time the decree was passed or order made, or on account of some mistakes or error apparent on the fact of the record or for any other sufficient reason desires to obtain a review of the decree or order. May apply for 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 review.

11. Flowing from the above provisions, it seems that the review remedy is only available to a party who though has a right to appeal, the said Judgment or order, he does not wish to appeal. It is also available to a party who does not have a right of appeal. It therefore follows that one cannot exercise the right of review and appeal at the same time and the courts have said this over and over again.

12. In the case cited by Mr. Abisai, Serephen Nyansani Menge, (2018) e KLR, Supra J. Mutungi held as follows; “In my view a proper reading of section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and now wishes to go back to the same order sought review of and failed and to try her luck with an appeal. The applicant wants to have a second bite of the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the process of the court and the same must surely fail. The applicant had her day in court when she chose to seek a review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made on the review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence.



13. I have said enough to demonstrate that the applicant’s application is destined to fail for the reasons that I have outlined above. I must however observe that even if I did not dismiss the application on the two grounds that I have extensively discussed above the applicant’s application would nonetheless have been unsuccessful on account of the fact that no sufficient cause has been demonstrated to show why the appeal was not processed within time. Of course, the reason of having failed to do so because the applicant had applied for a review operates against the applicant as she could not apply for a review and at the same time appeal against the same order. I take cognizance of the fact that the applicant was for all the time represented by counsel and must therefore have exercised her options consciously”.
14. The accepted position is that the applicant may appeal from the decision of the court deeming an order of review but not file an appeal on the same Judgment. J. Odunga had this to say about the application under section 80 and Order 45 CPR on review in Appeal Misc. Civil Application No. E218 of 2021(2022) Ndithya V. Total Kenya Limited KEHC “ paragraph 28 “ 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 a party who has unsuccessfully attempted to review a decision, to attack the very decision the subject of review on appeal would in my 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 are meant to assist genuine litigants who intends to review a decision to do so and not to assist parties who set out to turn judicial process into a roulette. In my considered view the wording of the provisions of Order 45 rule 1 is 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. But 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 my view, to an abuse of the process of the Court. It would also contravene the overriding objective 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.
15. J. Odunga also referred to the case of Gerald Kithu Muchanje V. Catherine Muthoni Ngare (2020) e KLR where the Court Of Appeal said paragraph 30

“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.”

16. The law is settled, that one must elect either of the processes, review or appeal. In the instant case, having elected to seek review, the applicant cannot come to this court on appeal on the same judgment he had sought review, because it would amount to the applicant attempting to have a second bite at the cherry which is itself an abuse of the court process. In the end, I find that the application is not merited. It is hereby dismissed with costs to the Respondent

**DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 2<sup>ND</sup> DAY OF OCTOBER, 2024.**

**R. WENDOH**

**JUDGE**

Delivered in the presence of:

Applicant - absent

Mr. Abisai for the Respondent - present

Court Assistants – Juma

