



REPUBLIC OF KENYA



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**GAB International Construction Co. Ltd v Ndungu (Civil Appeal
E032 of 2022) [2023] KEHC 17549 (KLR) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E032 OF 2022**

DK KEMEL, J

MAY 19, 2023

BETWEEN

GAB INTERNATIONAL CONSTRUCTION CO. LTD APPELLANT

AND

ZACHARY KABUCHO NDUNGU RESPONDENT

(Being an Appeal arising from the Ruling and Order of Hon. D. Mutai Senior Principal Magistrate delivered in Bungoma CMCC No. 303 of 2020 on 18th March 2022 Between; Zachary Kabucho Ndungu (Plaintiff) v GAB International Construction Co. Ltd. (Defendant))

JUDGMENT

1. GAB International Construction Co. Ltd “the Appellant” was the Defendant while Zachary Kabucho Ndungu “the Respondent” was the Plaintiff in the trial Court. An interlocutory Judgement was entered against the Appellant on 21st January 2021 for failing to enter appearance and file defence. The Respondent proceeded to extract a decree and obtained warrants of attachment and sale of the Appellant’s moveable property.
2. Upon service with the aforesaid decree and warrants of attachments of its moveable property, the Appellant moved the Court vide a notice of motion application dated 19th July 2021 seeking to have the default judgment entered against it on 21st January 2021, set aside on the ground that it was irregular and deserving to be set aside as a matter of right as the Appellant had never been served with any summons to enter appearance and only learnt of the existence of the suit when it was served with the warrants of attachment and sale of its moveable property.
3. Vide a ruling delivered on 15th October 2021, the Hon. C A S Mutai - SPM noted that although service was not properly effected upon the Appellant, the Appellant had none the less appeared to have admitted to the claim in the Plaintiff’s suit and he proceeded to set aside the interlocutory judgement entered on 21st January 2021 on conditions that: a third of the decretal sum be deposited in a joint



interest earning bank account under the names of both Advocates on record; Kshs. 60,000/= be released to the Advocates of the Plaintiff as deposit for costs; 30 days' period of compliance and in default the orders would lapse. Further, the auctioneers who had been tasked with execution of the interlocutory judgement filed a bill of costs which the trial Magistrate proceeded to tax to a tune of Kshs. 325, 511/= in which the Appellant was ordered to pay.

4. Aggrieved by the ruling delivered on 15th October 2021, the Appellant moved the lower Court vide a notice of motion application dated 25th November 2021 seeking a review of the said conditions on grounds that the interlocutory judgement having been found irregular other subsequent events taken as a consequence of the irregular judgement including the auctioneers were irregular and deserving to be set aside.
5. Vide a ruling delivered on 18th March 2022, the Honourable lower Court dismissed the Appellant's application on grounds that no new and important evidence was tendered by the Appellant to warrant a review.
6. Aggrieved by the ruling of the lower Court delivered on 18th March 2022, the Appellant preferred this appeal raising the following grounds:
 - i. That the learned Magistrate erred in law and fact in his ruling when he failed to consider the fact that the conditions imposed for setting aside of the interlocutory judgement delivered on 21st January 2021 were erroneous and thus an impediment to justice.
 - ii. That the learned Magistrate erred in law and in fact in his ruling when he disallowed the application dated 25th November 2021 in the presence of sufficient reasons advanced by the Appellant.
 - iii. That the learned Magistrate erred in law and in fact in his ruling when he disallowed the application for review thereby allowing the Respondent to commence execution of a judgement that was entered irregularly.
 - iv. That the learned Magistrate erred in law and fact when he exercised his discretion capriciously hence occasioned a miscarriage of justice against the Appellant by having it driven away from the seat of justice.
7. He prayed for the appeal to be allowed; the ruling and consequential orders of the learned Magistrate Hon. D. Mutai delivered on 18th March be set aside and be substituted with an order setting aside the interlocutory judgement entered on 21st January 2021 and the decree issued on 19th June 2021 unconditionally.
8. The appeal was canvassed by way of written submissions. Both parties duly filed and exchanged submissions.
9. I have given due consideration to the rival submissions. This is a first appeal and this Court has a duty to re-evaluate and re-consider the evidence and arrive at its own conclusion. It also has to bear in mind that it never heard or saw the witnesses and has to make an allowance for that. See *Selle and another v Associated Motor Boat Company Limited and others* [1968] EA 123; *Kamau vs Mungai and another* [2006] 1 KLR 150.
10. I have accordingly considered the record, the grounds of appeal, submissions and authorities cited. The main issue for determination is whether the learned trial Magistrate erred in dismissing the appellant's application dated 25th November 2021 which sought to review the conditions for the setting aside of the interlocutory Judgement entered against it on 21st January 2021.



11. Under section 80 of the [Civil Procedure Act](#) where a party opts to apply for review, such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of. Order 45 of the [Civil Procedure Rules](#) which provides the procedure and the conditions that an applicant must satisfy in an application for review equally makes it clear that a party cannot seek review of an order and appeal the same order: -

Section 80 provides:

80. 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.

12. Order 45 rule 1(a) and (b) in addition to setting out the conditions that an Applicant in an application for review must satisfy in order to get the application granted, reiterates the proviso of Section 80(a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review the option of an appeal cannot at the same time be available to the party. Sub-rule (2) of Order 45 of the [Civil Procedure Rules](#) further makes the matter clearer. It provides: -

Order 45 (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.

13. In my view, a proper reading of section 80 of the [Act](#) and Order 45 Rules 1 and 2 of the [Rules](#) makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the Appellant exhausted the process of review and now wishes to go back to the same order it sought review of and failed and to try its luck with an appeal. The Appellant wants to have a second bite of the cherry. It cannot be permitted to do so. Its memorandum of appeal constitutes an abuse of the process of the Court and the same must definitely fail. The Appellant had its day in Court when it chose to seek a review of the order that it now wishes to appeal against. Litigation somehow must come to an end and for the Appellant, the end came when it applied for review. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The Appellant invoked the provisions of the law and the procedure thereto and the Court rendered itself on the basis of the law and the evidence.
14. I believe I have said enough to demonstrate that the Appellant's appeal is destined to fail for the reasons that I have outlined above. The application for a review operated against the trial court's ruling on an earlier application meant that the Appellant had opted not to appeal against the ruling in issue as it could not apply for a review and at the same time appeal against the same order. I take cognizance of the fact that the Appellant was for all the time represented by counsel and must therefore have exercised its options consciously. As the Appellant had exercised its option to lodge a review then it cannot again turn around and mount an appeal aimed at achieving the same result that had been sought before the trial court. This is unacceptable and hence the appeal is an abuse of the court process.



15. The upshot of the foregoing observations is that I find no merit in the Appellant's appeal. The same is dismissed with costs to the Respondent.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF MAY 2023

D.KEMEI

JUDGE

In the presence of;

No appearance for Khaemba Advocate for Appellant

Mutungu for Bw'Onchiri for Respondent

Peter Court Assistant

