



**Voya v Voya & another (Miscellaneous Application E145 of 2021)
[2023] KEHC 22190 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22190 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E145 OF 2021**

F WANGARI, J

JULY 7, 2023

BETWEEN

KATAMBO CHIMERA VOYA APPLICANT

AND

NDETI CIMERA VOYA 1ST RESPONDENT

JOSEPH NGAO KYONZO 2ND RESPONDENT

RULING

1. This ruling relates to an application dated July 1, 2021 which sought for the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That the honourable court be pleased to stay execution of the judgement/decree and all other subsequent orders that was issued on July 23, 2018 and July 5, 2019 pending the hearing and determination of the instant application and appeal respectively;
 - d. That the honourable court be pleased to grant leave to the applicant to file their memorandum of appeal out of time and the draft memorandum of appeal be deemed as filed upon payment of the requisite court fees;
 - e. That this honourable court do make any other order it deems fit in the circumstance;
 - f. That the costs of this application be provided for.
2. The application was opposed through grounds of opposition dated July 7, 2021 and filed on the same day. The respondents posited that a party having opted for review, it was not open for him/her/it to equally appeal the same.



3. Directions were taken that the application be disposed of by way of written submissions. Despite the applicant being granted several opportunities to file his submissions, it is only the respondents that complied.

Analysis and Determination

4. I have considered the application, response, the respondents' submissions together with the authorities relied upon by the parties as well as the law and in my respectful view, the following issues are for determination;
 - a. Whether the applicant having exercised his right of review could equally pursue an appeal;
 - b. If the answer in (a) above is in the affirmative, whether the applicant merits the orders he seeks;
 - c. Who bears the costs?
5. On the first issue, it is settled that a party aggrieved by a decision of a court or tribunal has a right to apply to review that decision before the same court or tribunal or appeal to a higher court. It is not in dispute that the applicant being aggrieved by the judgement delivered on July 23, 2018 sought to review the said judgement before the same court through an application dated November 23, 2018. Section 80 of the *Civil Procedure Act* and order 45 of the rules thereunder provides the framework for review.
6. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, the court while commenting on the framework for review had the following to say:

- "... A clear reading of the above provisions shows that section 80 gives the power of review while order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay..."
7. Order 45 rule 1 (a) and (b) delineates circumstances under which review can be preferred. In the first instance, a party is allowed to review an order or decree which is appealable but no appeal has been preferred. On the second scenario, a party is allowed to review an order or decree which is not appealable. In the prevailing circumstances, there is no doubt that the applicant decided to exercise his rights under order 45 rule 1 (a) as the matter he reviewed was amenable to appeal. From the applicant's affidavit, it is clear that the review was not successful. This is when he sought to appeal the decision. Can this be allowed?
8. In *HA v LB* [2022] eKLR, the court while considering an almost similar circumstances as herein cited various authorities among them *Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 others*, Nairobi (Milimani) HCCC No 363 of 2009 and held as follows: -

"...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 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 and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view 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. 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...”

9. Based on the above, a party is not allowed to cherry pick an option and when that option turns sour, he turns back to want to exercise the decision he initially picked against. That amounts to the proper definition of abuse of process and a court of law ought not to countenance such conduct. Putting the above facts into perspective, the applicant chose his avenue of addressing his grievance. Having not succeeded in that avenue, it was not open for him to turn around and try to have a second bite of the cherry. That would obviously amount to abuse of process.
10. The applicant’s recourse was only limited to appealing the decision on review and not turning back to the initial judgement. I believe I have said enough to show that the respondents’ objection has merit and the consequence thereof is that having chosen review, the applicant could not opt for appeal having lost on review. Having found as above, I see no reason to delve on the other prayers in the application as the finding herein renders them otiose.
11. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the Civil Procedure Act. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. In the present circumstances, the applicant chose its path fully aware of the consequences and I thus see no reason why I should deny the respondents costs of the application.
12. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The application dated November 23, 2018 is without merit and is hereby dismissed
 - b. Costs to the respondents.

Orders accordingly.

Dated, signed and delivered at Mombasa this 7th day of July, 2023.

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F. WANGARI

JUDGE

In the presence of;



Julu Advocate for the Respondent

N/A for the Appellant

Barile, Court Assistant

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