Ojwang (Acting on her Behalf & on Behalf of Seth Opondo Ojwang) & another v Holy ghost Coptic Church of Africa & 6 others; National Gender & Equality Commission & another (Interested Parties) (Constitutional Petition 23 of 2018) [2024] KEHC 14156 (KLR) (14 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14156 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CONSTITUTIONAL PETITION 23 OF 2018

RE ABURILI, J

NOVEMBER 14, 2024

BETWEEN

ROSE OJWANG (ACTING ON HER BEHALF & ON BEHALF OF SETH OPONDO OJWANG) ..... 1ST PETITIONER

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS .... 2ND PETITIONER

AND

HOLY GHOST COPTIC CHURCH OF AFRICA ..... 1ST RESPONDENT

FATHER JOHN PESA ..... 2ND RESPONDENT

WILLY OJWANG ..... 3RD RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU ..... 4TH RESPONDENT

THE KISUMU COUNTY EXECUTIVE COMMITTEE MEMBER FOR HEALTH & SANITATION ..... 5TH RESPONDENT

THE CABINET SECRETARY, MINISTRY OF HEALTH ..... 6TH RESPONDENT

THE HON ATTORNEY GENERAL ..... 7TH RESPONDENT

AND

NATIONAL GENDER & EQUALITY COMMISSION ..... INTERESTED PARTY

NATIONAL COUNCIL FOR PERSONS WITH DISABILITIES .... INTERESTED PARTY

RULING

Introduction

1. The application for consideration is the Notice of Motion dated 25th June 2024 brought under certificate of urgency in which the applicants seek the following orders:

    a. Spent

    b. Spent

    c. That this honourable court be pleased to issue an order of stay of execution of the orders of this honourable court made or issued pursuant to the court judgement delivered by the honourable Lady Justice T.W. Cherere on the 22nd day of October pending hearing and final determination of the petition hereof.

    d. That this honourable court be pleased to review the judgement delivered by the honourable Lady Justice T.W. Cherere on the 22nd day of October 2020 and entertain the petition hereof to be heard afresh when the evidence of the applicants herein and that of their witnesses which was never heard should be entertained and be heard for ends of justice to be reached.

    e. That the costs of this application be costs in the cause.

2. The application was predicated on the grounds on its face as well as the supporting affidavit of Father John Pesa sworn on the 25th June 2024. The applicants averred that the petition was heard and finalized without the evidence of the 1st and 2nd applicants being taken or their contribution in the matter being entertained in a manner they would have wished, as their advocates on record failing to take the petition with the seriousness it deserves. The applicants further impugned the actions of their advocates on record who they alleged misled the court that the 2nd applicant was unwell, which was not the case.

3. The applicants further averred that they were condemned unheard and that consequently, this court ought to grant them the opportunity to have their case determined on merits for the ends of justice to be achieved.

4. The application was canvassed by way of written submissions.

The Applicants' Submissions

5. The applicants submitted that the allegations that were made throughout the petition could not successfully and justly be addressed without hearing evidence from especially the minor Seth Opondo Ojwang, his father the 3rd respondent, the 1st petitioner and the 2nd applicant whose evidence ought to have been through their respective witness statements and/or affidavits which they ought to have filed in court and cross-examined on where necessary, to enable the court arrive at a well-informed judgment.

6. The applicants relied on the case of High Court Civil Suit No. 101 of 2011, Wachira Karani v Bildad Wachira where the hearing of that case proceeded ex-parte for non-attendance of the defendant and judgement was delivered, the defendant applied and sought the said judgement to be set aside, with reasons that the alleged service upon the defendant notifying him of the hearing date was not proper and that the same was defective.

7. The applicants reiterated that they and their witnesses were not given an opportunity to present their case before the court as justice requires.

8. The applicants further relied on Civil Appeal No. 94 of 2011, Paul Asin T/A Asin Supermarket v Peter Mukembi in which the court stated that in considering an application to set aside an ex-parte judgement, the nature of the action should be considered, the defence if any being brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally, it should be remembered that to deny a litigant a hearing should be the last resort of a court.

9. The applicants submitted that they have convinced the court that they had sufficient reason to apply for review of the judgement in issue and that in granting the orders sought, the petitioners will not suffer in any way and the parties will have a chance of being heard with each party's full, fair and justifiable participation.

The Respondents' Submissions

10. It was submitted that the court is functus officio having decided on the facts by applying the relevant law and rendering itself, this matter came to a finality the moment the applicants herein filed a Notice of Appeal and that therefore this court cannot exercise its residual jurisdiction to entertain this application given the present circumstances.

11. The respondents submitted that any action taking place after the filing of the Notice of Appeal ought to be dealt with by the Court of Appeal and that the principle of finality applies in this case.

12. It was submitted that the assertion that the applicants were never heard and that this petition ought to have been heard by way of viva voce evidence is preposterous as *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 at Rule 22 (1) provides for disposal of a petition by way of written submissions.

13. It was submitted that the applicants chose to respond to the petition by way of filing Grounds of Opposition which is permissible under Rule 15 (2) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and that for the applicant to now allege that their counsel did not take the petition seriously was ridiculous and further that there was no evidence of the applicants having lodged a complaint against the said advocate.

14. The respondents submitted that at the time of taking directions on the mode of disposal of the petition, the applicants were ably represented by counsel who was agreeable and amenable to this mode of hearing by filing submissions. Reliance was placed on the case of Kibos Distillers Limited & 4 Others v Benson Ambuti Adega & 3 Others [2020] eKLR where Court of Appeal held inter alia that:

> " ..as a general rule, there is no automatic right to an oral hearing as procedural fairness does not require an oral hearing in all circumstances as the critical question is whether meaningful participation was allowed by the process chosen by the decision-maker."

15. It was further submitted that it was strange that four years after the judgement, the applicants have approached this court alleging that they were not heard whereas they had a right of appeal which right they exercised by filing a Notice of Appeal and that it was not clear whether they had abandoned the said appeal or not, as it appears they have squandered their chance of prosecuting their intended appeal by failing to comply with the orders issued by this court on the 20.4.2024.

16. The respondents submitted that following the delivery of the judgment and after they took out execution proceedings, the applicants in an attempt to satisfy the decree made partial payments in the sum of Kshs. 205,130 and are thus estopped from re-opening the case to which they are already making payments.

17. It was submitted that the cases relied on by the applicants have no relevance and/or applicability and are easily distinguishable to this case specifically the cases of Wachira Karani v Bildad Wachira and that of Njoroge v Kiarie where the matters proceeded ex-parte for non-attendance whereas in the instant case, the parties were all heard.

18. The respondents submitted that the instant application was solely intended to delay and/or frustrate them from realizing the balance of the decretal sum and was thus an abuse of the process of court and ought to be dismissed with costs.

Analysis & Determination

19. I have considered the application and the response as well as the written submissions filed in support of the parties' respective positions. The issue for determination is whether the application as filed is tenable or whether it is an abuse of the process of the Court.

20. It is undeniable that following the impugned judgment of this court by the Honourable Lady Justice T.W. Cherere on the 22nd day of October 2020, the applicants herein filed a Notice of Appeal on the 9th November 2020 pursuant to Rule 74 of the Court of Appeal Rules.

21. It is contended by the respondents that the applicants herein having opted to file a Notice of Appeal intending to challenge the judgment of this court before the Court of Appeal, the applicants cannot seek review of the same judgement, noting that there is no Notice of withdrawal of the applicants' Notice of Appeal as filed.

22. The question of whether a party who has filed a Notice of Appeal against a decision is precluded from filing an application for review against the same decision is a pure point of law. In Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 the Court of Appeal was of the following view that:

> " The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".

23. Thus, in Kenya, once a party is dissatisfied with the outcome of a matter, there are only 2 recognized ways of challenging the same. The first is by appeal and the second is by review. These two options are mutually exclusive and cannot be exercised concurrently but there are rules as to when each applies.

24. The filing of a Notice of Appeal is a good as filing an appeal. This is according to Rule 2 of the Court of Appeal Rules, 2010 which define an appeal as:

> " appeal" in relation to appeals to the Court, includes an intended appeal and "appellant" includes an intended appellant."

25. What this means is that where there is a Notice of Appeal filed, as is the case herein, then there is indeed a valid appeal pending in the Court of Appeal against the decision of this Court delivered on 22nd October 2020.

26. Turning to the provisions which allow for the filing of an application for review which is Section 80 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and its procedural aspect under Order 45 Rule 1 of the Civil Procedure Rules, 2010, the instances when an application for review may be made are limited to the following: -

Any person who considers himself aggrieved: -

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b. By a decree or order from which no appeal is allowed

27. It is therefore clear that a litigant may only apply for review if he has not filed an appeal. This was the firm holding of the Court of Appeal in the case of Otieno, Ragot & Company Advocates Vs National Bank of Kenya Limited Civil Appeal No. 60 & 62 of 2017 [2020] eKLR where P. O. Kiage JA and Asikhe Makhandia JA in expressing disapproval of litigants who seek to review a Court's decision whilst there is a pending appeal held as follows:

> " ...If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed..."

28. This was also the finding in the case of Karani & 47 Others v Kijana & 2 Others, Civil Appeals No. 43 and 153 of 1986 (Consolidated) (1987) KLR 557, 562 where the Court of Appeal, Platt JA held as follows: -

> " ...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or the order complained of, and then by an appeal, complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal."

29. This was also the finding in the case of African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited [2003] 1 EA 1(CAK) where it was held that:

> " Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed, it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There

can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See Kamalakshi Amma v A Karthayani (2001) AIHC 2264. The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the order sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. This determination is sufficient to dispose of the appeal..."

30. Without delving too much on the possibility that the applicants may be gambling and/or forum shopping with the aim of obtaining orders by all means, now that the Judge who delivered the judgment which they were not happy with and filed a notice of appeal to challenge the decision, this Court finds that a party who files a Notice of Appeal against a decision is barred from subsequently filing an application for review against the same decision; and that it amounts to abuse of court process to file both a Notice of Appeal and an application for review in that order.

31. Accordingly, I find and hold that the orders for review as sought are not available to the applicants. The prayer for review of the judgment delivered on... is declined and dismissed.

32. As to whether the applicants merit an order staying the execution of the orders of this Court issued pursuant to the court judgement delivered by T.W.Cherere J in this court on the 22nd day of October 2020 pending hearing and final determination of the petition herein, this Court having found that the order of review is not available to the applicants, no rehearing of this petition will be undertaken. Accordingly, the prayer for stay is moot.

33. The upshot of the above is that the application dated 25th June 2024 is found to be devoid of any merit and is an abuse of the court process. It is dismissed.

34. Each party shall bear their own costs of the application.

35. Subject to any pending previous execution process, this file is closed

36. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 14TH DAY OF NOVEMBER, 2024

R.E. ABURILI

JUDGE