REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

MISCELLANEOUS APPLICATION NO. 6 OF 2018

ZIPORAH MORAA.....APPLICANT

VERSUS

DAVID OKIOMA.....1ST RESPONDENT

CHRISTOPHER OMARIBA.....2ND RESPONDENT

RULING

INTRODUCTION

1.What is before me for determination is the Plaintiff/Applicant's Notice of Motion dated 25th September 2018 brought under section 75G and 95 of the Civil Procedure Act seeking the following orders:

1). THAT the Applicant be granted leave to appeal out of time against the Ruling and order given on 21st May 2015 by Hon. Nyagah (Resident Magistrate)

2). THAT the costs of this Application be provided for.

2. The Application is based on the following grounds:

i. THAT the Ruling of the Court was delivered on the 11th day of May 2015.

ii. THAT the Applicant being aggrieved with the decision of the court, filed an application on the 4th day of June 2015 seeking to review and/or set aside the orders of the court however the same was dismissed on the 6th day of August 2015.

iii. THAT the Applicant filed an appeal on the court's decision on the 6th day of August 2015 and in dismissing the Appeal on the 4th day of May 2018, the court held that the Applicant ought to have appealed directly to this court the decision made on 21st day of May 2015.

iv. THAT the time allowed to file an Appeal has since expired.

v. THAT the Respondents are unlikely to suffer any prejudice.

vi. THAT delay to institute the appeal was not deliberate but due to an excusable excuse.

vii. THAT it is in the interest of justice to allow the instant application.

3. The Application is supported by the applicant's affidavit sworn on 25th September 2018.The Respondent opposed the application through the Grounds of Opposition filed on 22nd October 2018, key among them being that the order sought to be challenged was not appealable as of right under order 43 Rule 1 of the Civil Procedure Rules.

4. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

APPLICANT'S SUBMISSIONS

5. As a foundation of their submissions, Counsel for the Applicant referred the Court to the case of **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR** where the Supreme Court held thus:

"As regards extension of time, this Court has already laid down certain guiding principles. In the ***Nick Salat*** case, it was thus held:

> *"… it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.*
>
> *"… we derive the following as the underlying principles that a Court should consider in exercising such discretion:*
>
> 1. *"extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;*
>
> 2. *a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*
>
> 3. *whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*
>
> 4. *where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*
>
> 5. *whether there will be any prejudice suffered by the respondents, if extension is granted;*
>
> 6. *whether the application has been brought without undue delay*;"

6. The Applicant's main reason for delay in filing the appeal is that following the ruling dated 21st May 2015, which was issued in favour of the Respondents, the Applicant filed an Application for review dated 4th June 2015 which was dismissed by the subordinate court on 6th August 2015. The Applicant subsequently filed an appeal against the said ruling which was similarly dismissed.

7. The Applicant submitted that the draft Memorandum of Appeal raises arguable issues and he ought to be allowed to file the same out of time.

8. In support of their Application, the Applicant referred the court to the case of **First American Bank of Kenya Ltd vs. Gulab Shah & 2 others Nairobi (Milimani) HCCC No. 2255 of 2000 [2002] 1 EA 65** where the Court set out the factors to be considered in deciding whether or not to grant such an application and these are:

> i. the explanation if any for the delay;
>
> ii. the merits of the contemplated action, whether the matter is an arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice;
>
> iii. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the Applicant.

9. Additionally, the Applicant referred the court to the Supreme Court decision in the case of **Naomi Wangechi Gitonga & 3 Others v Independent Electoral & Boundaries Commission & 17 Others [2018] eKLR** where the court held:

> ***"The prejudice likely to be occasioned is another factor that should be taken into account before an application for extension of time is allowed. In the present matter it is evident that the respondents, with the exception of the IEBC, are sitting Members of the County Assembly of Nyeri; and thus, if the application is allowed, no prejudice will be occasioned on them. Conversely, the Applicants will suffer prejudice if extension of time is denied."***

10. It was further submitted that the Respondents have not demonstrated what prejudice they are likely to suffer, if the orders sought are not granted or whether they may suffer as a result of a favourable exercise of discretion in favour of the Applicant. The Applicant concluded by submitting that the application is merited and urged the court to grant it a prayed.

RESPONDENT'S SUBMISSIONS

11. The Respondents compartmentalized their submissions into four main issues. The first issue they tackled was whether the order sought to be appealed against was appealable as of right.

12. On the first issue, the Respondents relied on Section 75(1) a-h of the Civil Procedure Act and Order 43 (1) a-z and aa of the Civil Procedure Rules. The said provisions provide for orders from which appeals lie as of right.

They also referred to Order 43 Rule (3) of the Civil Procedure Rules which provides as follows:

"An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

13. It was submitted that a reading of the aforementioned provisions demonstrates that the impugned order was not appealable as of right and that leave to appeal against the said order was mandatory and therefore the present application is misconceived and without merit.

14. On their second issue, the Respondents considered whether a party opting for review at the first instance was at liberty to retreat at a later stage to appeal against the same order.

15. The Respondent submitted that such an option was unavailable and further that the present application by the Applicant is a fishing expedition since she has exhausted her preferred mode of challenge.

In support of their submissions, the Respondents relied on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.

16. The Respondents submitted that a reading of the above provisions indicates that a person aggrieved by a decree or order has only one choice from the two options, either to appeal or review and not both; the Applicant opted for review and cannot now be heard to appeal against the same order.

17. Thirdly, the Respondents submitted on whether the Applicant has demonstrated "good and sufficient cause" for not filing the appeal within time under Section 79 G of the Civil Procedure Act.

Section 79 G provides as follows:

***"**79G. Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.*

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

18. The Respondents relied on various cases to elucidate the importance of establishing 'good and sufficient cause' when seeking leave to appeal out of time:

In **Morrison M'tetu v James Ireri Njagi & Grace Wanjiku Kanyiba [2016] eKLR** Gikonyo J held that:-

"Under section 79G of the Civil Procedure Act, the test for admitting an appeal out of time is that good and sufficient cause for not filing the appeal in time must be shown to the satisfaction of the court. The mandatoriness of an explanation of the delay is invariable in applications for extension of time despite the prospects of the intended appeal. On this point I am content to cite Omolo JA in the case of RELIANCE BANK LTD (In liquidation) and SOUTHERN CREDIT LIMITED that:-

"…even good appeals must be filed within the prescribed periods and when that is not done, some explanations must be given … for the delay."

This statement, although it was made within the framework of the Court of Appeal Rules, is true in the exercise of discretion under the Civil Procedure Act and Civil Procedure Rules in enlargement of time. However, in order to determine whether the explanation given is good and sufficient cause for not filing appeal in time, I think that the court should consider at least five things:

1. the amount of delay,

2. the reasons for delay,

3. the bona fides of the reasons given,

4. the prospects of the appeal and

5. the degree of prejudice to the Respondent if the application is granted.

I have set out the bona fides of the reasons given as a distinct ground because any explanation that is tinctured with mala fides, ill motive, falsehoods, mis-representation or concealment of material and relevant facts is not "good and sufficient cause" for purposes of enlargement of time. I will apply this test to the facts of this case."

19. The Respondent additionally relied on the case of **Benson Muriuki Njeru v Patrick Fundi Maina [2017] Eklr** where the court held that:

"The power to grant a party leave to file an appeal out of time is discretionary and not a matter of right. Therefore, the party seeking such an order must satisfy the Court that, as provided under ***Section 79G of the Civil Procedure Act****, there is "****good and sufficient cause for not filing the appeal in time".*** *In the case of* ***NICHOLAS KIPTOO arap KORIR SALAT VS I.E.B.C & OTHERS, S.C APPLICATION No. 16 of 2014,*** *the Supreme Court laid down the following principles that should guide a Court in exercising its discretion to extend time:*

1. Extension of time is not a right but an equitable remedy available only to a deserving party at the Court's discretion.

2. A party seeking such extension must satisfy the Court by laying the basis for the exercise of such discretion.

3. Such discretion is to be exercised on a case to case basis.

4. Where there is a delay, it should be explained to the satisfaction of the Court.

5. The Court should consider the prejudice that may be caused to the other party.

6. The application should be brought without undue delay.

7. In certain cases such as Election Petitions, public interest should be a consideration for extending time…"

20. The Respondent also relied on the Indian Supreme Court case of **Parimal v Veena (2011) 3 SCC 545**where "sufficient cause was defined in the following terms:

> *"****sufficient cause****" is an expression which has been used in large number of statutes. The meaning of the word "****sufficient****" is "****adequate****" or "****enough****", in as much as may be necessary to answer the purpose intended. Therefore the word "****sufficient****" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "****sufficient cause****" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "****not acting diligently****" or "****remaining inactive.****" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"*

21. The Respondents submitted that the present application fails the tests and considerations established in the aforementioned cases and it therefore lacks merit and should be disallowed.

22. The final issues the Respondents submitted on was whether a successful appeal if at all would override the "Business Premises Rent Tribunal's communication of 28th March 2014" as to termination of the parties' tenancy. Their submission was in the negative and they further stated that the tenancy status would still stand. They submitted that the present application is in vain and at best an attempt to continue wasting valuable judicial time.

23. The Respondents concluded by relying on the case of **Serephen Nyasani Menge v Risper Onsase [2018] eKLR** and submitted that the application is misconceived, *malafides*, soaked in laches, lacking in merit and bad in law. They urged the court to reject the application with costs.

ISSUES FOR DETERMINATION

24. The following issues fall for determination:

1. Whether the order sought to be appealed against was appealable as of right

2. Whether a party opting review at the first instance was at liberty to retreat at a later stage to appeal against the same order

3. Whether the application seeking leave to appeal out of time is merited

ANALYSIS AND DETERMINATION

i. Whether the order sought to be appealed against was appealable as of right

25. It is the Applicant's submission that the Court has jurisdiction to hear this application under Section 75 of the Civil Procedure Act.

The Respondent on the other hand argues that a reading of Section 75 of the Civil Procedure Act together with Order 43 of the Civil Procedure Rules establish that the Applicant did not have an automatic right of appeal against the decision and/or order of the learned magistrate dated 21st May 2015.

26. Order 43 Rule (1) of the Civil Procedure Rules sets out the orders and rules in respect of which appeals would lie as of right.

Under Order 43(2) it is provided that an appeal shall lie with the leave of the court from any other order made under the Rules. This means

that unless the order sought to be appealed against falls under the orders which are appealable as of right under Order 43(1) leave to appeal must be obtained before such an appeal can be preferred.

27. In the case of **Serephen Nyasani Menge v Rispah Onsase [2018] Eklr** the court held that:

> *"In the instant matter the Notice of Motion dated 18th December 2015 pursuant to which the learned magistrate granted the orders of the same date sought to be appealed by the applicant did not fall under any of the Orders set out under Order 43 Rule (1) in respect of which an appeal lies as of right. The application was expressed to be brought under Section 14 of the Landlord (Shops, Hotels and Catering Establishments) Act, Cap 301 Laws of Kenya and Sections 1A, 1B and 3A of the Civil Procedure Act. Thus the applicant did not have an automatic right of appeal against the order made on 18th December 2015 and therefore required to obtain the leave of the court as envisaged under Section 75(1) of the Civil Procedure Act and Order 43 subrule (3) of the Civil Procedure Rules.* ***Under Order 43 subrule (3) such leave has to be sought from the court that made the order either at the time the order is made by way of an oral application or within 14 days from the date the order was made. The requirement is couched in mandatory terms and my view is that where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order. I find that is the situation in the present matter. The application before this court is for extension of time to bring an appeal out of time and is not one for leave to appeal. Such an application under the rules could only be made before the court that made the order."***

28. The present application before this court is similar to the one in **Serephen Nyasani Menge v Rispah Onsase(Supra)** in that in this matter the Applicant filed the application dated 25th September 2018 seeking an Order for leave to appeal out of time against the Ruling of and order given on 21st May 2015 by Hon. Nyagah (Resident Magistrate). A scrutiny of Section 75 of the Civil Procedure Act and Order 43 of the Rules establishes that the present application could only be brought before the court that made the initial order which the Applicant wishes to appeal from. The Applicant failed to comply with the requirement set out in Order 43 of the Civil Procedure Rules consequently rendering the present application inept.

ii) **Whether a party opting review at the first instance was at liberty to retreat at a later stage to appeal against the same order**

Section 80 of the Civil Procedure Act provides that:

> *"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."*

Additionally, **Order 45, rule 1** provides that:

> *"1. (1) Any person considering 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 hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a 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 the review*"

29. In **Leonard Gikaru Wachira Vs Southern Travel Services Limited & Another [2012] eKLR** the High Court opined thus:

> ***"Whereas under Order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a carte blanche for abuse of the process of the Court."***

30. The issue of abuse of the process of the Court was considered in the case of **Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009** where it was held that it is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.

31. Coming back to the present application, 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.

32. 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".

33. 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 Court process.

34. Accordingly, I associate myself with the decision in **The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005** that both options cannot be pursued concurrently or one after the other.

35. It would also contravene the overriding objective as provided under sections 1A and 1B of the Civil Procedure Act whose aim is the expeditious disposal of cases. To find otherwise would amount to giving the Court's seal of approval to persons who wish to play the lottery with judicial process.

36. In **Mary Wambui Njuguna v William Ole Nabala & 9 others [2018] eKLR** the Court of Appeal stated that:

> *"As per the Appellant, the ELC being a court of equal status to the High court, ought to have granted the prayer for abridgment of time to enable the appellant lodge his Notice of Appeal. In disallowing that prayer, the trial court found the appellant could not pursue both review and appeal simultaneously; that having opted for review, she had effectively abandoned the option of appeal. Under Order 45 rule 2 of the rules, it is stipulated that:*
>
> > ***"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 the review."***
> >
> > ***We agree with the conclusion by the learned Judge that it was not open for the appellant to pursue an appeal and at the same time a review of the same orders. The appeal could only lie on the outcome of the application for review."***

37. I therefore find that a party who has opted to review a matter cannot thereafter abandon that avenue of redress once the same goes against what they would deem just and hop on to the option of appeal hoping to receive a more favourable outcome. This in my view is an abuse of the court process; litigation must come to an end.

iii). **whether the application seeking leave to appeal out of time is merited**

38. In determining the final issue, and in consideration of the similarities in both cases, I am inclined to align myself with the finding of the court in the case of **Serephen Nyasani Menge v Rispah Onsase(Supra)** where the court found thus:

> ***"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 she 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 to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence."***

39. I have considered the application, parties' submissions, the authorities cited to me and the relevant legal provisions as well as the circumstances of this case and I find that the present application cannot stand. The Applicant has failed to provide sufficient reason to warrant the grant of leave to appeal out of time. The Applicant was well aware of the options available to her and she knowingly opted to seek redress by way of review. It would be improper for her to now backtrack and switch to an appeal as her mode of redress after reaching a dead end in her initial option; she made her bed and now she must lie on it.

40. The upshot is that the application dated 25th September 2018 lacks merit and the same is hereby dismissed with costs to the Respondents.

Dated, signed and delivered via zoom this 20th day of May 2020.

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J.M ONYANGO

JUDGE