



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 86 OF 2019**

**GIRA HUKA GAMBE.....APPELLANT**

**VERSUS**

**DIBA KAMAYO SARITE.....RESPONDENT**

*(Being an appeal from the Judgment of Hon. E. Ngigi –*

*P. M delivered on 28/05/2019 in Isiolo CM ELC No. 23 of 2018)*

**JUDGMENT**

1. The appellant being the defendant in the trial court was sued by the respondent for “*an order of injunction restraining him (appellant) from interfering in any way with plot of Land Number LOW DENSITY/440A or in any other way dealing with the same or interfering with the respondent’s possession and user of the Suit Land; general damages and costs of the suit as well as interest*”.

2. On 28/05/2019 the trial court entered judgment in favour of the respondent. The appellant being aggrieved by the decision filed this appeal based on eight (8) grounds which may be summarized into four (4): ***that the learned magistrate erred in law and fact by disregarding the appellant’s occupation and interests in the Suit Land; shifting the burden of proof unto the appellant and considering aspects of criminal law; awarding excessive general damages for trespass; and that the whole judgment is against the law and weight of evidence.***

3. Before filing this appeal, the appellant had unsuccessfully sought to have a review of the trial courts judgment vide his application dated 11/06/2019. The said application was dismissed through a ruling dated 27/08/2019. Meanwhile, the appellant had lodged his appeal before this court on 28/06/2019.

4. **Section 80 of the Civil Procedure Act** provides that:

***“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 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.”***

5. The aforementioned provisions of law are echoed in **Order 45 Rule 1 and 2 of the Civil Procedure Rules** as follows:

***“(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”.*

6. In the case of Serephen Nyasani Menge v Rispah Onsase [2018] eKLR, J.M Mutungi J, held as follows:

*“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.*

.....

*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.”*

7. Aburili J in the case of Martha Wambui v Irene Wanjiru Mwangi & another [2015] eKLR 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/decreed or order. One must elect either to file an appeal or to apply for a review.”*

8. The Court of Appeal in the case of Mary Wambui Njuguna v William Ole Nabala & 9 others [2018] eKLR expressed itself as follows;

*“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.....*

*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.”*

9. The legal position resonating from the above mentioned case law is that a person cannot seek for a review and still proceed to lodge an appeal. The moment the appellant filed for review of the judgment delivered on 28/05/2019, he abandoned the option of appeal. Thus the appellant ought to have lodged an appeal in respect of the ruling delivered on 27.8.2019 on the issue of review.

10. In light of the foregoing analysis, I am of the view that the appeal cannot be heard on its merits. Accordingly, this appeal is struck out with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Judgment was given to the advocates for the parties by notice. In light of the declaration of measures restricting court operations due to the COVID-19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**