Mohamed & another v Bilel (Environment and Land Appeal 37 of 2023) [2025] KEELC 4545 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4545 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 37 OF 2023

SM KIBUNJA, J

JUNE 18, 2025

BETWEEN

BADAWY ALI MOHAMED ..... 1ST APPELLANT

MOHAMED ABDULQDIR ..... 2ND APPELLANT

AND

MOHAMED ALI BILEL ..... RESPONDENT

(Being an appeal from the judgement/decree of the Business Premises Rent Tribunal at Mombasa [Hon. Gakuhi Chege] dated 6th October 2023 in BPRT No. 261 of 2020)

JUDGMENT

1. Being aggrieved by the judgement/decree of Hon. Gakuhi Chege, in Mombasa Business Premises Rent Tribunal Case No. 261 of 2020, of 6th October 2023, the appellants filed this appeal through the memorandum of appeal dated 26th October 2023, raising eleven (11) grounds summarised as below:

    a. The learned tribunal member erred in law and fact by determining that the respondent is the landlord contrary to the provisions of the Landlord and Tenant (Shops, Hotels and Catering Establishment) Act.

    b. The learned tribunal member erred in law and fact by failing to hold the respondent to account for material non-disclosure of the suit premises until the review stage.

    c. The learned tribunal member erred in law and in fact by purporting to confer rights of administration and personal representation over a deceased estate's contrary to the Succession Act and other applicable laws.

d. The learned tribunal member erred in law and in fact in failing to find that the property is under a Wakf Commission management and cannot be transferred outside of Islamic law, which the respondent failed to tender evidence that he had complied with.

e. The learned tribunal member erred in law and in fact by failing to consider the irrefutable evidence that which questioned the respondent's right to receive rent and who insisted on all payments to be made in the deceased's name.

f. The learned tribunal member erred in law and in fact by punishing the appellants for the mistakes of their advocate and at the same time ignoring new and material evidence as well as other evidence that supports the standard required for review of a ruling or judgment.

g. The learned tribunal member erred in law in failing to find that the tribunal did not have jurisdiction to determine ownership of the suit premises.

h. The learned tribunal member erred in law and in fact by awarding rights of rent to the respondent without considering there are five other siblings of the deceased, or third parties who may claim rights over the property including the WAKF TRUST.

i. The learned tribunal member erred in fact and law by not calling for evidence from the Wakf Commission as well as the respondent's surviving members.

j. The learned tribunal member erred in fact and law by exposing the appellants to a possibility of multiplicity of suits form the deceased's family, or others claiming rights over the suit premises.

k. The learned tribunal member erred in law and in fact by making a finding on matters covered under the Succession Laws or Environment and Land Court that are outside the scope of the tribunal.

2. The appellants therefore seek the following prayers:

a. The appeal be allowed with costs.

b. The judgment issued on 6th October 2023 and the ruling issued on 15th July 2022 and all consequential orders and decree in Mombasa BPRT No. 261 of 2020 be lifted.

c. A declaration that the appellants met the required standards for review as required by law.

d. The respondent to pay costs of this appeal.

3. After delivering a ruling on the 19th June 2024, in respect of the appellants' notice of motion dated 26th October 2023, the court gave directions on filing and service of the record of appeal. The appellants and their counsel did not attend court during the subsequent mentions of 7th October 2024, 25th February 2025, and 13th March 2025, and no record of appeal was filed. During the mention of 25th February 2025, the respondent's counsel sought to be allowed to file his submissions on the appeal in fourteen days. The learned counsel subsequently filed the submissions dated the 12th March 2025, which the court has considered.

4. The issues that arise in this appeal for the court's determinations are as follows:

a. Whether there is a competent appeal before the court.

b. Whether the appeal has merit.

c. Who bears the costs?

5. The court has carefully considered the grounds on the memorandum of appeal, submissions by respondent's counsel, the record and come to the following determinations:

   a. In the ruling of 19th June 2024, the court made an observation that parties are bound by pleadings and prayers that are not supported by pleadings cannot in law be granted. At the beginning of the memorandum of appeal, the appellants stated that they are dissatisfied with the judgment of 6th October 2023, but in prayer (2), they seek for "The judgement issued on 6th October 2023, and the ruling issued on 15th July 2022, and all consequential orders and decree in Mombasa BPRT No. 261 of 2020 to be lifted." The appellants have through that prayer, sneaked in orders relating to the judgement of 15th July 2022, which was evidently was not a subject matter of this appeal. The court is left wondering whether the appellants are trying to pull a fast one against the respondent or to confuse the court or circumvent the law by appealing against that judgement after their review application was declined through the ruling of 6th October 2023, by the tribunal. I am in agreement with finding in the High Court case of HA versus LB [2022] eKLR, where the court held as follows:

> "7. It is clear from the foregoing that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time. See Orero vs. Seko [1984] KLR 238.
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> 8. Who, then is a party who is appealing? There are two contradictory decisions from the Court of Appeal. In Kisya Investments Ltd vs. Attorney General and Another Civil Appeal No. 31 of 1995 the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However, 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:
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> "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".

9. In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the Haryanto Case reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact, under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review.

10. However, the same Court in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005 had this to say:

"The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular, the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances, the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed. An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where "no appeal has been preferred" or where "no appeal is allowed". An appeal is allowed on orders made under Order 9A rule 2 Civil procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved party has "preferred" an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal in Yani Haryanto Vs. E. D. & F. Man (Sugar) Ltd Civil Appeal No. 122 Of 1992 (UR)... The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However, upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end

of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other".

11. 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. In the case of Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 Kimaru, J dealing with the issue of abuse of the process of the Court stated as follows:

"This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor, it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process, it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there 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".

12. 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. Accordingly, I associate myself with the decision in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi (supra) that both options cannot be pursued concurrently or one after the other.

13. In this case the Appellant having sought to review the order made on 27th May, 2021 cannot now purport to appeal against the same. He can only appeal against the decision made on 4th November, 2021."

Though the above decision is by the High Court, which is of equal status to this court, I hold the same position that a party cannot purport to appeal against a judgement/ruling or decree after first pursuing the review option, as it would amount to abuse of the court process.

b. A similar position was held by the Court of Appeal in the case of Sunrise Hauliers Limited versus Motaroki (Appeal E019 of 2023) [2024] KEELRC 631 (KLR) where it held as follows:

" 51. The other grounds of appeal number 4 and 5 relate to issues raised by the Applicant in its application for review before the Trial Magistrate. As rightly held by the Respondent, where a party files for review, the same party has no legal basis to file an appeal based on the very same grounds raised in the Review as cited in Gab International Construction Co; Ltd v Zachary Kabucho Ndungu(supra);

52. I uphold the position taken by Odunga, J. , in HA v LB [2022] eKLR in stating that a party who seeks review cannot appeal on the same grounds held that: -

13. In this case, the Appellant having sought to review the order made on 27th May 2021 cannot now purport to appeal against the same. He can only appeal against the decision made on 4th November 2021.

53. As to whether the last two grounds of the Memorandum of Appeal which relate to issues pending under review before the Trial magistrate can be appealed, is in the negative and the Applicant can not seek both review and appeal. The Applicant choose review on the two last grounds of Appeal and he cannot then appeal on the same grounds for the court to consider in granting stay of execution."

And, in the above cited case of Gab International Construction Co. Ltd versus Zachary Kabucho Ndungu, the court held:

> " 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."

c. For the reasons above, I take this appeal to have been strictly limited to the ruling of 6th October 2023. In the ruling delivered on the 19th June 2024, over the appellants' application for stay of execution dated 26th October 2023, the court inter earlier observed at paragraph *4* (c) that:

> " I have perused the record, both manual and on the Case Tracking System, and noted that that application was filed with only one attachment being the memorandum of appeal dated the 26th October 2023 on 30th October 2023. That on 31st October 2023, the appellants filed copies of the BPRT ruling delivered on 15th July 2022, letters dated 1st October 2020, 24th September 2020, 7th October 2020, 13th January 2021, 20th September 2021, 30th March 2022, 3rd February 2022, 30th August 2022, 2nd November 2021, 18th November 2020, 19th January 2021 & 15th February 2023 between the parties' legal counsel, and five cheques. That what followed was the filling of the appellants' further affidavit sworn on the 11th March 2024, and submissions of even date, both filed on the 14th March 2024. There is no copy of the ruling or judgement, delivered by the tribunal on the 6th October 2023, or a decree thereof that has been attached, to the application. To consider whether or not, to issue the stay of execution order sought, the court would need to confirm the existence and contents of the alleged ruling or judgement delivered on the 6th October 2023, and cannot do so without a copy thereof being availed through the application or affidavits filed subsequent thereto."

I have again perused the very same record as I prepare this judgement, and have not seen a copy of the impugned ruling delivered on 6th October 2023 by the tribunal in Mombasa BPRT No. 261 of 2020. The court cannot be called upon to make a determination over the said ruling based on conjecture. Possibly, had the appellants filed the record of appeal when directed to do so, they would have included a copy of the impugned ruling and the court would have had an opportunity to peruse it and make its determinations on the issues raised. In the absence of the said ruling, upon which the appeal is founded, the appeal filed through the memorandum of appeal, dated the 26th October 2023, that has never been admitted is for striking out.

d. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the event, unless where the court for good reasons directs otherwise. In this instance, I find no reasons to depart from that express edict. The appellants shall bear the respondent's costs.

6. From the foregoing conclusions on the appeal, the court finds and orders as follows:

a. The appeal filed through the memorandum of appeal dated the 26th October 2023 is struck out.

b. The appellants to bear the respondent's costs.

Orders accordingly.

DATED, SUGNED AND VIRTUALLY DELIVERED ON THIS 18TH DAY OF JUNE 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellants : No Appearance

Respondent : Mr Omollo

Shitemi-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.