Waithira v Ngari & another (Environment and Land Miscellaneous Case E005 of 2025) [2025] KEELC 6765 (KLR) (Environment and Land) (9 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6765 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND MISCELLANEOUS CASE E005 OF 2025

MC OUNDO, J

OCTOBER 9, 2025

BETWEEN

JANE WANJIRU WAITHIRA ..... APPELLANT

AND

PAUL NGARI ..... 1ST RESPONDENT

LAND REGISTRAR, NAIVASHA ..... 2ND RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 17th May, 2025 brought pursuant to the provisions of Section 1A, 1B, 3, 3A, 79G, 95 of the *Civil Procedure Act* Cap 21, Order 42 Rule 3 of the Civil Procedure Rules and all enabling provisions of the law, the Applicant sought leave to file an Appeal out of time against the judgement of (Hon. J. Ndeng'eri SRM) given at Naivasha on 10th September 2024 in Naivasha MCELC Case Number E051/2022) and subsequently mark the Draft Memorandum of Appeal dated the 17th May 2025 as duly filed while staying execution in respect of the said judgement. Lastly, the Applicant sought that cost of the application abide the outcome of the said appeal.

2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Jane Wanjiru Waithira, the Plaintiff herein who deponed that upon the dismissal of her suit on 10th September 2024 vide the impugned judgement, she being dissatisfied with the said judgement, had filed an application for review of the same dated 25th September 2024 which Application had been dismissed on 6th May 2025. That she could therefore not file the intended appeal within the timelines stipulated as the aforesaid application for review had only been concluded on 6th May 2025.

3. That being dissatisfied with the above captioned judgement, she now seeks leave to file an appeal out of time which Appeal is arguable appeal and has very high chances of success. That further, substantial

loss would be occasioned to her if execution of the judgement was not stayed, in comparison to the Respondent who would not suffer any prejudice. That in the interest of equity and justice, she be granted the orders sought noting that the suit property was where she was currently residing having built her home therein.

4. In response and in opposition to the Applicant's Application, the 1st Respondent filed his Replying Affidavit dated 29th May 2025 wherein he deponed that the application lacked merit, had been brought in bad faith and was an abuse of the Honorable Court's process, as it was aimed at denying him the right to reap the fruits of his judgment.

5. That vide the judgement of 10th September 2024, the trial Court had dismissed the Applicant's suit in its entirety thereby allowing the counterclaim and ordering her to settle the amount owed to him in the sum of Khs. 725,000/= within 7 days of the date of the judgment and in default, the Court Administrator to execute the transfer deeds on her behalf. The 2nd Defendant had also been ordered to lift the caution on the Property Naivasha/Mwichirigiri Block 4/5374 after expiration of 7 days of the judgement. That he had also been given cost.

6. That following the delivery of the said judgement, the Appellant had immediately instituted and served both an appeal being Naivasha ELC Appeal No. E014 of 2024 Jane Wanjiru Waithira vs Paul Ngari & The Land Registrar Naivasha (hereinafter referred to as 'the initial appeal') vide a Memorandum of Appeal dated 12th September 2024 and an application for Review dated 25th September 2024, despite the same being contrary to the law.

7. That the lower Court having been unable to render a determination on the Appellant's Application for review as a result of the ongoing initial Appeal, on 24th February 2025, the Appellant withdrew her initial Appeal choosing instead to pursue the application for review. Her application for review of the judgment was heard and dismissed vide a ruling of 6th May 2025.

8. That the Appellant had the chance to pursue the initial Appeal, but voluntarily decided to withdraw it in favor of the review. That accordingly, the Appellant's actions were tantamount to forum shopping and should be estopped from abusing the court processes by instituting the instant application seeking to file an appeal out of time.

9. That indeed, under the provisions of Order 45 Rule 1 of the Civil Procedure (Amendment) Rules, 2020 and Section 80 of the *Civil Procedure Act* where a party opts to apply for review of a judgment and decree, such a party shall not, after the review application had been rejected, exercise the option to appeal against the same judgment and decree that they sought to review.

10. That the Appellant had not met the threshold for grant of stay of execution as she had not sufficiently demonstrated that she was likely to suffer any substantial loss were the stay orders not granted pending the hearing and determination of the Appeal.

11. That no evidence had been adduced by the Appellant in support of her allegation that she was residing on the suit land. That the Application was based on mere aversions. That the annexed draft Memorandum of Appeal did not demonstrate that the Appellant had an arguable appeal with a likelihood of success. That in any event, a stay of execution pending appeal was not discretionary but conditional upon the satisfaction of all the conditions under the provisions of Order 42 rule 6(2) of the Civil Procedure Rules 2010 which the Applicant herein had not satisfied.

12. That in the alternative, he would suffer unfair prejudice were the court to permit the prayers sought in the Application as he would incur unwarranted and extralegal costs and delay in execution. That it

would only be fair and in the interest of justice that he be allowed to proceed with the execution of the judgment so as to enjoy the fruits of the judgment.

13. The 2nd Respondent did not participate in the Applicant/Appellant's Application herein.

14. The Application was canvassed by way of written submission wherein the Applicant vide her written submissions dated 13th June, 2025 framed three (3) issues for determination as follows:

    i. Whether the Applicant should be granted stay of execution.

    ii. Whether the Court should grant the Applicant enlargement of time.

    iii. Who should bear the costs of the Application.

15. On the 1st issue for determination, the Applicant placed reliance on the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules to submit that she would suffer substantial loss were the order of stay of execution not granted since the suit property was the very place she called home. Reliance was placed in the decided case of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR.

16. She then submitted that the Court ought to grant her enlargement of time and mark the Draft Memorandum of Appeal dated 17th May 2025 as duly filed noting that an application for review in the instant matter had already been concluded she placed reliance on the decided case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR.

17. Lastly, she submitted that based on the provisions of Section 27 of the *Civil Procedure Act* and the decided case of Cecelia Karuru Ngayu v Barclays Bank of Kenya & Another [2016] eKLR, costs follow the event.

18. The 1st Respondent on the other hand founded his submission on the holding of J. Mativo (JJA) in Daniel Gicheru Kingori & 2 others v Wambugu [2022] KECA 1168 (KLR) to submit that where an Applicant opted for review and participated in those proceedings, (s)he was precluded from questioning the same decision by way of an appeal. That the law avoided granting parties a double opportunity to relitigate. He then framed his issues for determination as follows:

    i. Whether the Appellant, having pursued the review to conclusion, is entitled to institute an appeal against the same judgment and decree?

    ii. Whether the instant application is an abuse of the court process?

    iii. Whether the instant application is otherwise meritorious and satisfies the requirements for extension of time and stay under the *Civil Procedure Act* and Rules?

19. On the first issue for determination, reliance was placed on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010, to submit that the said provisions expressly restrict a party from seeking both a review and an appeal in respect of the same decree or order. That at the time of the filing of the application for review, the Appellant was already in contravention of the aforesaid provisions which provided that a review could not be pursued where an appeal existed.

20. That despite the aforesaid misnomer, the Appellant in a bid to rectify her error, withdrew the initial appeal on 24th February 2025 and pursued her application for review of the judgment which application had been dismissed on 6th May 2025 for being unmeritorious. Subsequently, she had filed the instant application seeking to file an appeal out of time against the whole the judgment, for which the law estopped her.

21. He placed reliance in the decided cases of Njoroge (Suing as the legal representative of the Estate of Christina Wageni Mburu) v Mwangi & another [2024] KEELC 5006 (KLR), and Daniel Gicheru Kingori (supra) to submit that that once the Appellant had elected to proceed with the review wherein the process had been finalized, she was estopped from seeking to appeal from the same decree or order. That the instant application therefore stood barred by the aforesaid trite principle and ought to be dismissed with costs.

22. That the instant application was a sacrosanct norm of the common law system and Kenyan law that litigation must eventually end, as repeated re-litigation undermined both the process and public confidence. That indeed, the provisions of Section 7 of the *Civil Procedure Act* barred re-litigation of matters directly and substantially in issue in earlier proceedings. It was his submission that the instant Application was an attempt by the Appellant to re-litigate the dispute between herself and the Respondents and her conduct of sequentially filing the initial appeal, review, and now again seeking to re-introduce a new appeal, squarely fitted the mischief sought to be prevented by the court. That her actions and instant application were, in effect, shopping for a favorable forum, which was an abuse of the court processes.

23. That it was clear that the Appellant intended to frustrate him from enjoying the fruits of the judgment by using the court as a means to delay her compliance with the decision that had been issued by the court. He thus submitted that the instant application was a waste of the court's judicial time and resources and thus an abuse of the court's process.

24. On the third issue for determination, he placed reliance on the provisions of Section 79G of the *Civil Procedure Act* to submit that the extension of time to file an appeal after lapse of time was purely discretionary where the court would only exercise its discretion where the Applicant showed sufficient reason for failure and diligence. Reliance was placed in the decided case of Jawla v Kaaria & 2 others [2024] KEHC 15968 (KLR).

25. That whereas the Applicant's argument was that she had failed to file her appeal on time because of a delay in the determination of her application to review the judgment in the lower court, she had deliberately failed to disclose that she had already filed an initial appeal which she had voluntarily withdrawn so as to prosecute her application for review in the lower court. That the failure to disclose such information had been deliberate and intended to mislead the Honorable Court. That subsequently, it was clear that no appeal could lie from a decision where a review had been preferred and pursued.

26. That further, whereas the Appellant had stated that she was seeking the orders in the instant application because she stood to suffer irreparable damage, she neither explained what the irreparable damage suffered was nor gave any evidence of such damage suffered. That instead, he was the one suffering irreparable damage as he had not been able to enjoy the fruits of the judgment as the Appellant had been subjecting him to numerous litigation costs despite it being clear that she had no case in existence. That the Honorable Court ought to dismiss her application with costs as it was legally incompetent and barred by clear judicial precedent, the *Civil Procedure Act*, and the Civil Procedure Rules.

Determination.

27. Having considered the application before the court herein, the opposition thereto, the submissions by both parties, the authorities cited and the applicable law, consequently the pending issues for determination is as follows;

i. Whether after an application for review has been dismissed, an Applicant can file a fresh notice of appeal out of time and if so;.

ii. Whether there should be Orders of stay of execution pending appeal.

28. The provisions of Section 79G of the *Civil Procedure Act* give an appellate court discretion to extend time for filing an appeal from the subordinate Court to the High Court. (Read Environment and Land Court) as follows;

> " 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:
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> 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. ''

29. The law concerning stay of execution pending Appeal is found in Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

> " 1. "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside. Prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
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> 2. No order for stay of execution shall be made under sub rule 1 unless: -
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> a. The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and
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> b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant."

30. The Applicant brings her application seeking leave to file an appeal out of time against the judgement delivered on 10th September 2024 in the trial court where the trial Magistrate upon dismissing her suit, allowed the Respondent's counterclaim.

31. It is not disputed that the Applicant had initially filed and served both an application for Review and a Memorandum of Appeal dated 12th September 2024 which she later withdrew the latter opting to pursue the Application for Review of the impugned judgement. However, their application for Review

was dismissed on the 6th May 2025 so, now she wishes to pursue their appeal hence, the need for the leave sought. She explains that the delay in filing the appeal was because she had waited for the outcome of the ruling in the application for review of the said judgement.

32. The 1st Defendant's opposition to the application is based on the grounds that the Applicant failed to disclose material information to the effect that she had filed both an Appeal and an application for review to the said impugned judgment wherein she had later withdrawn and the Appeal and the Application for revision had subsequently been dismissed. That once the Appellant/Applicant had elected to proceed with the review wherein the process had been finalized, the law estopped her from seeking to appeal from the same decree or order and therefore the instant application stood barred by the aforesaid trite principle and ought to be dismissed with costs.

33. Order 45, Rule 1 of the Civil Procedure rules provide as follows;

> "(1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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."

34. The provisions of Section 80 of the *Civil Procedure Act* also provide as follows:

> " Any person who considers himself aggrieved—
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> (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."

35. These provisions of the law provide that an aggrieved party can only apply for the review of a decree or order either where "no appeal has been preferred" or where "no appeal is allowed". The review remedy is therefore 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.

36. Indeed, an Appeal is allowed per Order 42 of the Civil Procedure rules wherein the Applicant filed her Appeal vide her Memorandum of Appeal in Naivasha ELC Appeal No. E014 of 2024 which she later withdrew. To this effect she had not been precluded from exercising the option of review of the orders of the court, which option she took and her application was dismissed vide a ruling of 6th May 2025. After her option to challenge the orders of the court via an application for revision were exhausted, would there be further jurisdiction exercisable by an appellate court on the same orders of the court?

37. The Court of Appeal in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi [2007] KECA 85 (KLR) had held as follows,

> " So that, the Board was at liberty to pursue the option of review of the orders made on 26th September, 2003 despite the filing of a notice of appeal to challenge the same orders. We have no hesitation however in stating that upon the exercise of that option and pursuit thereof until its conclusion, there would be no further jurisdiction exercisable by an appellate court on the same orders of the court. The record here shows that the Board filed an application for review dated 24th February, 2004, on 4th March, 2004. That application was determined by the superior court on 7th December, 2004 when it was dismissed for whatever reason. No further action appears to have been taken by the Board after that dismissal. In our view that was the end of the matter and the notice of appeal was rendered purposeless. Both options in our judgment cannot be pursued concurrently or one after the other."

38. Similarly, J Mativo of the Court of Appeal in the case of Daniel Gicheru Kingori & 2 others v Wambugu [2022] KECA 1168 (KLR) when faced with a similar matter and having considered the decisions in the case of HA v LB HCCC No188 of 2021, and The Chairman Board of Governors (supra) had held as follows:

> " As stated above, the applicants withdrew their notice of appeal to pursue a review. After their application for review was dismissed, they are now asking this court to open the door for them by granting them leave. My understanding of the above provision is that the applicants ought to have sought leave or extension of time from the High Court and then approach this court if unsuccessful.....
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> To quote Odunga J (supra):- 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." In this case, it would have been prudent for the applicants to appeal the ruling on their application for revision instead of opening another battle thereby subjecting the sale judgment to double attack, a review and an appeal. I do not think it was the intention of the law for a party to challenge the same decision by both review and an appeal. Litigation must come to an end."

39. In this regard and keeping that the decision from the Court of Appeal is binding on this court, I will take no further step in this matter but to find the Applicant's application dated 17th May, 2025 unmerited and thereafter proceed to dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 9TH DAY OF OCTOBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE.