



REPUBLIC OF KENYA



**Merie v Maweu & 2 others (Miscellaneous Application E329 of 2024)
[2026] KEHC 1217 (KLR) (5 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 1217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E329 OF 2024**

RC RUTTO, J

FEBRUARY 5, 2026

BETWEEN

SYLVIA MERIE APPLICANT

AND

CHARLES MAWEU 1ST RESPONDENT

MERCY HEZRON 2ND RESPONDENT

AMOS KARESEGA 3RD RESPONDENT

RULING

1. By a Notice of Motion dated 28th November 2024, the applicant invoked sections 1A, 1B, 3A, 75, 79G and 95 of the *Civil Procedure Act*, together with order 42, rule 6, order 43, rule 1, order 50, rule 5 and order 51, rule 1 of the Civil Procedure Rules, seeking the following reliefs:
 1. ... Spent;
 2. ... Spent;
 3. ... Spent;
 4. That leave be granted to the 3rd defendant/applicant to file her memorandum of appeal out of time from orders delivered by the Honorable H.M. Mbatia in Machakos CMCC No. 781 of 2019 dated 18th September 2023;
 5. That this Honourable Court grants a stay of proceedings in civil suit at Machakos CMCC No. 81 of 2019 pending hearing and determination of the intended appeal;
 6. That if prayers (4) and (5) above are granted, the Memorandum of Appeal herein marked as "SM-7" attached to the Supporting Affidavit be deemed to have been filed and served upon the Respondents;



7. That the costs of this application be in the cause.
2. The application is supported by the grounds set out in the body of the Motion and the applicant's supporting affidavit. The applicant states, that she was sued as the 3rd defendant in Machakos CMCC No. 781 of 2019, a suit arising from a road traffic accident. She failed to enter an appearance and filed a defence, leading to a default judgment against her. Subsequently, the 1st respondent instructed auctioneers to execute the decree. The auctioneers proclaimed the applicant's property. The applicant alleges that it was at this point that he became aware of the existence of the suit.
3. Upon instructing her advocates, the applicant filed a Notice of Motion dated 27th January 2023 seeking to halt the execution process. However, the application was dismissed. He contends that the trial court failed to appreciate that the 1st respondent had used the wrong postal code in serving pleadings and therefore she was not properly served. She maintains that she has a strong defence as the suit vehicle was not registered in his name according to NTSA records. In fact, she sold the suit vehicle in 1993 and the log book transferred to a third party. Moreover, she was not the driver of the suit vehicle at that material time as confirmed by the police abstract.
4. The applicant further argues that although she annexed her defence to the application, it was inadvertently not marked as an exhibit. She submits that such an omission, being a mistake of counsel, ought not to be visited upon her. She laments that she risks being condemned unheard as the decree remains undisturbed. The applicant admitted that she filed an application for review in the lower court. In a ruling delivered on 9th February 2024, the trial magistrate found that the applicant was not the registered proprietor of the suit vehicle as per the NTSA records dated 6th October 2023. Nevertheless, the court dismissed her application. The applicant contends that she was unaware of the ruling since her advocates were not notified of the ruling date.
5. The applicant further explained that she only became aware of the dismissal when she was served with a Notice to Show Cause scheduled for mention on 6th December 2024. She therefore argued that the intended appeal raises a prima facie case with high chances of success. She maintained that the delay in filing the memorandum of appeal was beyond her control, as she had first pursued an application for review. She clarified that the ruling appealed against is the one dated 18th September 2023.
6. The applicant further stated that she had been condemned to satisfy the decretal sum without being afforded an opportunity to seek contribution from her co-defendants. She urged that in the interest of justice, the application ought to be allowed as no prejudice would be suffered by the other parties. She emphasized that unless stay is granted, she would suffer great prejudice and the appeal would be rendered nugatory. She also expressed her willingness to abide by any conditions imposed by the court.
7. The application attracted a response only from the 1st respondent, who filed a Notice of Preliminary Objection dated 28th January 2025. The 1st respondent prayed that the application be dismissed with costs, arguing that the applicant was barred by law from lodging an appeal against the ruling delivered on 18th September 2023, having already pursued an application for review dated 9th October 2023, which was dismissed on 9th February 2024. In support of this contention, the 1st respondent cited the authorities of *Gerald Kithu Muchanje vs. Catherine Muthoni Ngare & another* [2020] KLR, *Martha Wambui vs. Irene Wanjiru Mwangi & another* [2015] eKLR and *Serephen Nyasani Menge vs. Rispah Onsase* [2018] eKLR.
8. At the hearing of the application, the applicant informed the court that she was relying on her written submissions dated 17th September 2025, urging that the application be allowed as prayed. The 1st respondent indicated that it was relying entirely on its preliminary objection and the cited authorities.



This court has considered the application, the preliminary objection, and the applicant's elaborate submissions.

9. Before delving into the merits of the application, this court must first address the preliminary objection raised by the 1st respondent. If the objection succeeds, the application will be dismissed summarily. The central contention is that the applicant has lodged an appeal after failing in her bid to pursue an application for review.
10. From the record, it is not disputed that the 1st respondent filed suit against the applicant and other parties in Machakos CMCC No. 781 of 2019. The applicant failed to enter an appearance and consequently, a default judgment was entered against her. The 1st respondent thereafter commenced the process of execution proceedings seeking to attach the applicant's assets. This prompted the applicant to file a Notice of Motion dated 27th January 2023 seeking, inter alia, to set aside the judgment entered on 2nd November 2022.
11. By ruling of the trial court dated 18th September 2023, the trial court dismissed the application. The applicant subsequently filed a Notice of Motion dated 9th October 2023 seeking review of the ruling of 18th September 2023. That application was dismissed on 9th February 2024.
12. It is this very decision that the applicant now seeks to appeal. Clearly, the applicant is attempting to have a second bite at the cherry, which is impermissible. The Court of Appeal has settled this issue in the case of *Gerald Kithu Muchanje vs. Catherine Muthoni Ngare & Another* [2020] eKLR in the following terms:

“...Under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. In the instant application, the applicant exhausted the process of review proceedings and now wishes to go back and try his luck once again with an appeal against the original Judgment. The applicant wants to have a second bite of the same cherry and he cannot be permitted to do so. There is no doubt that this will cause prejudice to the respondents. Litigation must come to an end somehow and it cannot be conducted on the basis of trial and error. An appeal could only lie on the outcome of the application for review. In the case of *Martha Wambui v Irene Wanjiru Mwangi & Another* (2015) eKLR, the court 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/decree or order. One must elect either to file an appeal or to apply for a review...It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”

13. The orders sought in this application are intended to challenge the trial court's ruling of 18th September 2023. However, guided by the above authority this court lacks jurisdiction to entertain such an appeal, given that the applicant already exercised and exhausted her right of review. Accordingly, the preliminary objection succeeds, and the Notice of Motion dated 28th November 2024 is devoid of merit and is hereby dismissed with costs to the 1st respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 5TH DAY OF FEBRUARY 2026.



RHODA RUTTO

JUDGE

In the presence of;

.....Applicant

.....Respondent

Selina Court Assistant

