



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**MISC. APPLICATION NO. 5 OF 2018**

**SEREPHEN NYASANI MENGE.....APPLICANT**

**VERSUS**

**RISPAH ONSASE.....RESPONDENT**

**R U L I N G**

1. The applicant vide her Notice of Motion application dated 11<sup>th</sup> July 2018 expressed to be brought under Section 79G and 95 of the Civil Procedure Act seeks orders:-

**1. That the applicant be granted leave to appeal out of time against the ruling of and order given on the 18<sup>th</sup> day of December 2015 by Hon. Makila (Senior Resident Magistrate).**

**2. That costs of the application be provided for.**

The application is grounded on the grounds set out in the body of the application and on the affidavit sworn in support of the application by the applicant. The applicant has set out the following grounds in support of the application:

**a) That the ruling of the court was delivered on the 18<sup>th</sup> day of December 2015.**

**b) That the applicant being aggrieved with the decision of the court, filed an application on the 22<sup>nd</sup> day of December 2015 seeking to review and/or set aside the orders of the court however the same was dismissed on the 3<sup>rd</sup> day of March 2016.**

**c) That the applicant filed an appeal on the court's decision on the 3<sup>rd</sup> day of March 2016 and in dismissing the appeal on the 13<sup>th</sup> day of April 2018 the court held that the applicant ought to have appealed, directly to this court against the decision made on 18<sup>th</sup> day of December 2016.**

**d) That the time allowed to file an appeal has run out.**

**e) That the respondent is unlikely to suffer any prejudice.**

**f) That the delay herein is not so inordinate or so great as to be inexcusable.**

**g) That it is in the interest of justice to allow the instant application.**

2. The respondent filed grounds of opposition to the applicants Notice of Motion on 26<sup>th</sup> July 2018 and inter alia contended that:-

**(i) The application was incompetent and misconceived as the impugned order was not appellable as of right under Order 43 Rule 1 of the Civil Procedure Rules.**

**(ii) That the applicant having opted to apply for review of the order cannot come back to seek to appeal after the review application was denied.**

**(iii) The applicant had no good and sufficient cause for not filing the appeal within time.**

**(iv) That the application amounts to a fishing expedition and that the delay of nearly 3 years was inordinate.**

3. The parties argued the application by way of written submissions. The applicant's submissions were filed on 13<sup>th</sup> August 2018. The respondent's written submissions were filed on 30<sup>th</sup> August 2018.

4. To contextualize the instant application it is necessary to give a brief background of the matter. It is apparent from the record that the respondent, as Landlord served a Notice to Terminate tenancy upon one Serephine Otundo and Charles Onchieku vide notices dated 25<sup>th</sup> September 2015 which notices were not responded to. The respondent filed a Miscellaneous Civil Application No. 162 of 2015 in Kisii Chief Magistrate's Court seeking enforcement of the notice against the applicant and the said Charles Onchieku. The application was initially granted ex parte on 18<sup>th</sup> December 2015 which provoked the Notice of Motion by the applicant dated 22<sup>nd</sup> December 2015 seeking to review and/or set aside the orders granted on 18<sup>th</sup> December 2015. The court by its ruling dated 3<sup>rd</sup> March 2016 dismissed the application which in turn gave rise to the appeal filed by the applicant before this court being Kisii ELC Appeal No. 11 of 2016. This court dismissed the applicant's appeal vide a judgment dated 13<sup>th</sup> April 2018. The applicant's appeal having been dismissed by this court, the applicant now seeks to go back to the Magistrate's Court where the charade started and through the instant application seeks extension of time to be able to file an appeal out of time against the learned trial magistrate's ruling of 18<sup>th</sup> December 2015.

5. The applicant's instant appeal is premised on Sections 79G and 95 of the Civil Procedure Act which provide for filing of appeals from the subordinate courts and for enlargement of time respectively. Section 79G 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.**

Section 95 provides thus:-

**95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.**

6. The applicant has explained that she did not appeal against the learned magistrate's ruling of 18<sup>th</sup> December 2015 but rather sought to have the same reviewed unsuccessfully and that was the cause of the delay in preferring an appeal. The applicant appealed against the learned magistrate's refusal to review the order of 18<sup>th</sup> December 2015 and the consequent appeal was determined on 13<sup>th</sup> April 2018 and the order of the trial magistrate dismissing the application for review was upheld. The applicant thus argues that she was not guilty of inordinate delay in bringing the instant application seeking extension of time to file an appeal against the magistrate's order of 18<sup>th</sup> December 2015.

7. The respondent in response argues that the applicant did not have an automatic right of appeal against the decision and/or order of the learned magistrate of 18<sup>th</sup> December 2015 as it was not an order that was appellable as of right under Order 43 of the Civil Procedure Rules. The respondent submitted that the applicant was obligated to seek and obtain leave to appeal against the order from the court that made the order under the provisions of Order 43 Rules (2) and (3). The respondent further submitted that the applicant having exercised the option to seek review of the order made by the Magistrate's Court on 18<sup>th</sup> December 2018 it was not open for her to come back to seek to appeal the order after the process of review and the resultant appeal had come to an end. The respondent's argument was that the applicant could either have exercised the option to seek review of the order or appeal from the order and not both.

8. The respondent further argued, the appellant did not demonstrate that she had any good and sufficient cause for not filing the appeal within time to be able to benefit under the proviso to Section 79G of the Civil Procedure Act.

9. Section 75(1) of the Civil Procedure Act provides for the orders against which an appeal would lie as of right and/or with the leave of the court. It provides thus:

**75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-**

- (a) An order superseding an arbitration where the award has not been completed within the period allowed by the court;**
- (b) An order on an award stated in the form of a special case;**
- (c) An order modifying or correcting an award;**
- (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;**
- (e) An order filing or refusing to file an award in an arbitration without the intervention of the court;**
- (f) An order under section 64;**
- (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of**

**any person except where the arrest or detention is in execution of a decree;**

**(h) Any order made under rules from which an appeal is expressly allowed by rules.**

10. 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. The procedure for obtaining leave is provided under Order 43(3) which states as follows:-

**(3) 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.**

11. In the instant matter the Notice of Motion dated 18<sup>th</sup> 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 18<sup>th</sup> 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.

12. Under Section 80 of the Civil Procedure Act pursuant to which the applicant predicated the application for review of the trial Magistrate's order of 18<sup>th</sup> December 2015, where a party opts to apply for review such a party cannot after the review is rejected exercise the option to appeal against the same order he sought review of. Order 45 of the Civil Procedure Rules which provides the procedure and the conditions that an applicant must satisfy in an application for review equally makes it clear that a party cannot seek review of an order and appeal the same order:-

Section 80 provides:

**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.**

13. 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. Subrule (2) of Order 45 of the Civil Procedure Rules further makes the matter clearer. It provides:-

**Order 45 (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 review.**

14. 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.

15. I have said enough to demonstrate that the applicant's application is destined to fail for the reasons that I have outlined above. I must however observe that even if I did not dismiss the application on the two grounds that I have extensively discussed above the applicant's application would nonetheless have been unsuccessful on account of the fact that no sufficient cause has been demonstrated to show why the appeal was not processed within time. Ofcourse, the reason of having failed to do so because the applicant had applied for a review operates against the applicant as she could not apply for a review and at the same time appeal against the same order. I take cognizance of the fact that the applicant was for all the time represented by counsel and must therefore have exercised her options consciously.

16. The upshot is that I find no merit in the applicant's application dated 11<sup>th</sup> July 2018 and the same is ordered dismissed with costs to the respondent.

17. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED at KISII this 23<sup>RD</sup> DAY of NOVEMBER 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Magara for Bosire for the applicant

Mr. Oyugi for Nyatundo for the respondent

Saitoti Court assistant

**J. M. MUTUNGI**

**JUDGE**