



Daniel Gicheru Kingori & 2 others v Wambugu (Civil Application E167 of 2022) [2022] KECA 1168 (KLR) (28 October 2022) (Ruling)

Neutral citation: [2022] KECA 1168 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E167 OF 2022
JM MATIVO, JA
OCTOBER 28, 2022**

BETWEEN

DANIEL GICHERU KINGORI & 2 OTHERS APPLICANT

AND

ANTHONY WAMBUGU RESPONDENT

(An application for extension of time within which to file and serve the Notice of Appeal and the Record of Appeal out of time against the judgment and decree in Nairobi HC Succession Cause No. 2543 of 2004 (Achode J) delivered on 9th April 2019))

RULING

1. By an application dated May 16, 2022, the applicants seek extension of time to file and serve a notice of appeal and the appeal out of time. They also pray for any such orders/directions this court may deem fit and just to grant and for the costs of and incidental to the application to abide the result of the intended appeal.
2. The grounds in support of the application are that the judgement they desire to appeal against was delivered on April 9, 2019 and they filed and served notice of appeal on May 10, 2019. However, they withdrew the said notice of appeal on August 14, 2019 and instead applied for review of the same judgement. However, their application for review was dismissed on the March 8, 2022, so, now they wish to pursue their appeal hence, the need for the leave sought.
3. The application is opposed *vide* the respondent's replying affidavit dated September 14, 2022. The salient points are that: - (a) the applicants chose to withdraw their notice of appeal in order to pursue an appeal, now they can't seek leave to appeal out of time against the same judgment after their application for review was dismissed; (b) they are not appealing against the ruling on their application for review but against the same judgment they sought to review;



- (c) the judgment is final under section 50(1) of the *Law of Succession Act*; (d) the application has been brought after the expiry of 3 years.
4. On behalf of the applicants, it was submitted that:- (i) having been mis-advised to withdraw the notice of appeal, they now wish to pursue their appeal; (ii) the withdrawn notice of appeal had been filed within time and the instant application has also been filed without delay; (iii) this courts discretion to extent time is founded on rule 4 of the *Court of Appeal Rules*; (iv) the courts discretion is unfettered and does not require sufficient reasons, and the discretion is meant to open the doors of appeal to parties aggrieved by a judgement. He relied on by *Visbva Stone Suppliers Company Limited v RSR Stone (2006) {2020} eKLR*.
5. The respondent’s advocate’s submissions were essentially a replication of the replying affidavit. The highlights are that:- (a) having applied for a review, the applicants cannot now pursue an appeal against the same decision; (b) no leave was sought to appeal; (c) the judgment is final under section 50 (1) of the *Law of Succession Act* and *Rhoda Wairimu Karanja & another v Mary Wangui Karanja [2014] eKLR*; (d) the application has been filed after 3 years.
6. First, I will address the question whether having withdrawn their notice of appeal to pursue an application for review which was heard and dismissed, it is open for the applicants to pursue an appeal. Granted, withdrawal of a notice of appeal or a suit is not a bar to subsequent proceedings. In the context of this case, it is not a bar to filing another notice of appeal (provided it is still filed within time or with leave of the court). However, the circumstances of this case require further interrogation. The applicants withdrew their notice of appeal in order to pursue a review application against the same judgment. Unfortunately, their application for review was dismissed. Now they have come back to this court knocking the door for the court to open the doors of justice for them to file a fresh notice of appeal out of time.
7. I am aware of decisions of this court holding that once a litigant opts to file an application for review, he cannot sustain an appeal. However, there are other decisions holding the opposite. In *Kisya Investments Ltd v Attorney General and Another Civil Appeal No 31 of 1995* the Court of Appeal held that a party who has filed a notice of appeal cannot apply for review but if an application for review is filed first, the party is not prevented from filing an appeal subsequently even if a review is pending. However, in *Yani Haryanto v E D & F Man (Sugar) Limited Civil Appeal No 122 of 1992* the Court of Appeal stated:

“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.”

8. After considering the diametrically opposed court decisions rendered by the Court of Appeal, Odunga J (as he then was) in *HA v LB HCCC No188 of 2021* the stated: -

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 v William Mmosi Moi* (supra) that both options cannot be pursued concurrently or one after the other.”

9. The applicants approached this court after losing the application for review. To borrow from the above excerpt, they are now seeking to open another front by re-opening an attack on the same decision. The courts must be cautious and only on genuine reasons, the courts are empowered to condone the delay and grant leave in cases of this nature. The condonation of delay cannot be claimed as a matter of right and only on genuine reasons.
10. It is entirely in the discretion of the court whether to grant or refuse an application for extension of time. That discretion is, however, judicial and so, it must be exercised according to the rules of reason and justice, the deciding factor being the showing of “good cause” by the applicant. What constitutes “good cause” is dependent upon a variety of factors which may include the length of the delay, the reasons for the delay, whether the intended appeal is arguable, and the degree of prejudice to the respondent if the application is granted.
11. Time frames are provided under the law as a matter of public policy to fix a limit within which an action must be brought. These statutes rest upon sound policy, and tend to the peace and welfare of society. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution. Statutes of limitation are designed to promote justice by preventing surprises through the revival of



claims that have been allowed to slumber. The fundamental purpose of the statute of limitations is to give defendants reasonable repose, that is, to protect parties from defending stale claims.

12. The other important point to note is that before the High Court was a succession dispute, governed by the *Law of Succession Act*. Again, the Court of Appeal has rendered conflicting decisions on whether or not High Court decisions under the act are appealable and whether leave is required. Section 50 of the *Law of Succession Act* provides that appeals from the decree and order made by the Resident Magistrate courts shall lie to the High Court whose decision thereon shall be final. The *Law of Succession Act* has no provision for appealing decrees and order made by the High court.
13. In *Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 2 others [2013] eKLR*, Otieno- Odek, JA, found that leave to appeal from the High Court to the Court of Appeal in succession matters was not required. On the other hand, in *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another [2014] e KLR*, Musinga, Ouko and Kairu, JJA found that such leave was necessary and stated: -

“We have found that the application was presented out of time; that the applicant lacked capacity to bring it at the time he did; that leave of the High Court to appeal to this court in succession matters is necessary in the former's exercise of its original jurisdiction; and that where application for leave has been rejected by the High Court, it can be made to this court.”
14. My reading of the law and decided cases leaves me with no doubt that there is no automatic right of appeal from the judgments/decrees and orders made by the High Court in succession matters. On the other hand, there is absence of a positive provision in the act stipulating that the judgment, decree and order made by the High Court are final. In the absence of a clear provision to that effect, I do not agree that the intention of the Parliament was to make the judgment, decree or order of the High Court as final. If that was the intention, then Parliament could have stipulated expressly.
15. However, it's my view that a judgment/decree or an order made by the High Court under the *Law of Succession Act* is not appealable to the Court of Appeal as of right. Leave must be sought and obtained from the High Court. Rule 39 of the *Court of Appeal Rules, 2022* provides:
 41. Application for leave to appeal in civil matters (1) In a civil matter—
 - a. where an appeal lies with the leave of the superior court, application for such leave may be made—
 - i. informally at the time when the decision against which it is desired to appeal is given; or
 - ii. by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
 - b. where an appeal lies with the leave of the court, application for such leave shall be made—
 - i. in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or
 - ii. where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal.
16. 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.

17. To quote Odinga 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.
18. Flowing from the issues discussed above and the conclusions arrived at, I find and hold that the applicant’s application is unmerited. In conclusion, I dismiss the applicant’s application dated May 16, 2022 with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2022.

J MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

