



Njoroge (Suing as the legal representative of the Estate of Christina Wageni Mburu) v Mwangi & another (Environment and Land Miscellaneous Application E038 of 2023) [2024] KEELC 5006 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEELC 5006 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E038 OF 2023**

**JG KEMEI, J
JUNE 27, 2024**

BETWEEN

**MOSES NGANGA NJOROGE APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CHRISTINA
WAGENI MBURU**

AND

**FREDRICK NYAGA MWANGI 1ST RESPONDENT
KILIMAMBOGO HOLDINGS DEVELOPERS 2ND RESPONDENT**

RULING

1. Before Court is the Appellant/Applicant’s Notice of Motion dated 31/11/2023 (sic) expressed under Rules 1, 2 and 3 of the High Court (Practice and Procedure Rules of the [Judicature Act](#) Cap 8 seeking orders THAT;
 - a. Spent.
 - b. Leave be granted to the firm of KIMANI KAHETE & CO ADVOCATES to come on record after judgement has been delivered.
 - c. The Honorable Court be pleased to grant an order of stay of execution pending appeal in MCLE 47 of 2019.
 - d. The Honorable Court be pleased to grant an order for filing of the memorandum of appeal out of time.
 - e. Costs be provided for.



2. Annexed to the Application is the Supporting Affidavit of even date sworn by Moses Ng'ang'a Njoroge, the Applicant. He deponed that there was a case between him and the Respondents and judgement was delivered to his chagrin. That he unsuccessfully sought for its stay of execution and Review which the trial Court declined. That having pursued review, the time for filing appeal has lapsed and now urges the Court to grant him the requisite leave to appeal out of time. That the Respondent instituted contempt proceedings against him and unless the orders sought are granted, his appeal will be rendered nugatory.
3. Opposing the application, the Respondent Fredrick Nyaga Mwangi filed his Replying Affidavit dated 8/12/2023. He deponed that the Judgment which the Applicant seeks to stay was delivered on 18/8/2022 and the Applicant filed an Application dated 6/10/2022 inter alia seeking Review and/or setting aside of the impugned Judgment. Copies of the Court decree and certificate of costs are annexed as 'FNM1'. That the said Motion (attached as FNM2) was dismissed with costs on 7/9/2023 and aggrieved with the dismissal, the Applicant lodged Thika Civil Appeal No. E048 of 2023 as shown by Memorandum of Appeal marked 'FNM3' and was scheduled for mention on 18/12/2023. That the instant application seeking leave to appeal out of time amounts to multiplicity of suits in light of the live appeal. That the Applicant has not explained the inordinate delay in moving the Court since 7/9/2023.
4. On 9/5/2024 directions were taken and parties elected to prosecute the Application by way of written submissions.
5. By the time of preparing this Ruling none of the parties had complied with the directions as to the filing of the written submissions.
6. Before delving into its merits, it's imperative to address the competency of the Application as filed. By his own concession the Applicant states that he unsuccessfully pursued review of the impugned Judgment but the trial Court dismissed his application. He has now moved this Court under Rules 1, 2 and 3 of the High Court Practice and Procedure Rules. A reading of those Rules reveals that none of them avails a party to seek the prayers contained in the motion as drawn. Be that as it may it is trite that an application will not fail for the sole reason that it was filed pursuant to wrong provisions of the law only. See the Court of Appeal Ruling in the case of Ashmi Investment Limited Vs. Riakina Limited & another (Civil Appeal (Application) 384 of 2019 [2023] KECA 410 (KLR).
7. The legal provision governing the Court's power to review a decision are found in Section 80 of the [Civil Procedure Act](#) and amplified by Order 45 Rules 1 & 2 of the Civil Procedure Rules that;

“ 80. Review

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 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.

Application for review of decree or order [Order 45, rule 1.]

- (1) Any person considering himself aggrieved—



- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (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.

- (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 the review.”

8. Undoubtedly a combined reading and interpretation of the above provisions reveals that 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. Courts frown upon this mode of litigation as it amounts to an abuse of Court process and it is precisely for that reason that the above provisions were enacted. The Court of Appeal in the case of *Daniel Gicheru Kingori & 2 Others Vs. Wambugu (Civil Application E167 of 2022)* [2022] KECA 1168 (KLR) while dismissing an application that sought leave to appeal out of time against an order that the Applicants had unsuccessfully attempted to Review held as follows;

“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 whole 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.”

- 9. Consequently, I find that the Application offends the express provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules and it is for dismissal as guided by the binding precedent of the Apex Court.
- 10. The Respondent averred that the Applicant already filed Thika CA No. E048 of 2023 against the Ruling delivered on 7/9/2023. The Applicant has not controverted the existence of the said appeal.



Moving this Court for leave to appeal out of time amounts to multiplicity of suits and indeed abuse of Court process.

11. The application is bereft of merit and it is for dismissal with costs to the Respondents.
12. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27TH DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Absent

Waithera Mwangi for 1st and 2nd Respondents

Court Assistant – Phyllis

