



REPUBLIC OF KENYA



**Bob Morgan Services Ltd v Ochieng (Appeal E058 of 2023)
[2024] KEELRC 2477 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2477 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E058 OF 2023
CN BAARI, J
OCTOBER 11, 2024**

BETWEEN

BOB MORGAN SERVICES LTD APPELLANT

AND

WYCLIFFE OCHIENG RESPONDENT

*(Being an appeal from the Ruling of Hon. Mwenda Ngugi (PM) Kisumu
delivered on 16th October 2023 in Kisumu CMELRC Cause No. 44 of 2019)*

JUDGMENT

1. This Appeal stems from the decree of the lower court issued on 15th of March 2023, which included the following provision on the payment of interest:

“Interest on the principal amount from 29/4/2019 to 07/03/2023 i.e 14% of 46,518 x 58(months)= Kshs 377,726.16/=”
2. Believing that there was an error apparent on the face of the decree given that interest was calculated per month, and from the date of filing suit, the Appellant filed an application for review dated 8th August 2023.
3. In a ruling delivered on 16th October 2023, the Learned Magistrate dismissed the application arguing that issues raised by the Respondent could only constitute grounds of appeal.
4. Aggrieved by this ruling, the Respondent lodged an amended Memorandum of Appeal dated 20th November 2023, premised on the following grounds:
 - i. That the Honourable Magistrate erred in law and fact in holding that the Appellant had filed an appeal against the trial court’s judgment delivered on 24th August 2022 yet no material had been placed on record to confirm the appeal had been filed.



- ii. That the Honourable Magistrate erred in law in holding that since an appeal had been filed by the Appellant herein against the judgment of 24th August 2022, the court no longer had jurisdiction to consider the question of review of the decree issued on 15th March 2023.
 - iii. That the Honourable Magistrate erred in law and in fact in holding that the application for review of the rate of interest from 12% per month to 12% per annum was a question of opinion and should have been filed as an appeal not a review.
5. The Appellant prays that the appeal is allowed, and the lower court's ruling delivered on 16th October, 2023 be set aside, and the application dated 8th August, 2023, be granted.
 6. Following directions taken on 24th June, 2024, parties agreed to dispose the appeal by way of written submissions. Submissions were received from both parties.

The Appellant's Submissions

7. On the first ground of appeal, it is submitted that it was wrong for the magistrate to infer the existence of an appeal in the absence of evidence. The Appellant avows that nowhere in the application of 8th August, 2023, replying affidavit and submissions was there a mention of an appeal.
8. The Appellant asserts that the onus was on the court to satisfy itself beyond the parties' averments that an appeal indeed existed.
9. On jurisdiction, the Appellant submits that in the absence of an appeal the court had jurisdiction to entertain the application on the strength of Section 80 of the Civil Procedure Act, that allows for review in the absence of an appeal.
10. Regarding the interest rate herein being an issue of appeal not review the Appellant submits to the contrary. It contends that the error in the decree was arithmetic qualifying it for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.
11. The Appellant's further submission is that the interest rate should be 12% based on the Chief Justices' practice direction number 1 of 1982.
12. Regarding the calculation of interest rate from the date of filing suit, the Appellant submits that this is not a liquidated claim. It cites the case of *Mukisa Biscuits Manufacturing Co.Ltd v West End distributors Ltd (No 2) [1970] E.A 469 at 475* which quoted Centre for mathematics Science and Technology Education in Africa (CEMESTEA) v Apex Security Services Ltd [2021] eKLR in the following terms:-

“The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing suit. Where, however damages have to be assessed by the court the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment.”
13. In further support of interest being charged per annum the Appellant urges the court to be guided by Section 26(2) of the Civil Procedure Act. Additionally, it submits that giving interest of Kshs 377,726/= on a principal sum of Kshs 46,518/= amounts to unjust enrichment.



The Respondent's Submissions

14. The Respondent submits that there was a subsisting appeal based on the Appellant's application dated 17th April 2023 which sought a stay of execution pending appeal. Additionally, the Respondent asserts that the learned magistrate was right in inferring the existence of an appeal as the application indicated that an appeal had been lodged.
15. On jurisdiction, the Respondent submits that it is discretionary based on the word 'may' in Section 80 of the Civil Procedure. He draws the court's attention to the case of Mbogo v Shah (1968) E,A 93 where it was held that an appellate court will not interfere with a trial court's exercise of discretion unless the exercise of that discretion was wrong and not guided by sound judicial principles.
16. On whether an appeal should have been filed, the Respondent submits that the divergence of opinion on the question of interest between the parties' formed grounds for appeal and not review.

Analysis and Determination

17. Having considered the Record of Appeal and the rival submissions, the issues that arise for determination are: -
 - i. Whether the Magistrate erred in disallowing the application for review: and if so
 - ii. Whether the Appellant is entitled to prayers sought in the instant appeal.

Whether the Trial court erred in disallowing the application for review.

18. This being a first appeal, my role is to re-evaluate, re-assess and re-analyse the record to determine whether the conclusions reached by the learned Trial Magistrate should stand or not, and give reasons either way. (See the Court of Appeal case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR).
19. From the Record of Appeal and the submissions this appeal turns on whether the Magistrate was wrong in disallowing the application for review of the judgment and decree.
20. It was the Appellant's contention that the Magistrate was wrong in declining review on the basis of a pending appeal. He avers that had the Magistrate done a little digging, he would have realised that no appeal had been lodged. Additionally, the Appellant contends that the error in the decree was arithmetic hence susceptible to review under the Civil Procedure Act and Rules.
21. On his part, the Respondent countered that the Magistrate was right in inferring the existence an appeal based on the application for stay pending appeal dated 17th April, 2023.
22. In reaching the conclusion that an appeal had been filed, the court had this to say: -

“By this motion dated 17th April 2023 he asserts on ground (i) “the defendant has lodged an appeal against the judgment of the lower court delivered on 24th August 2022 being Chief Magistrate's Court ELRC No.44 of 2019 appealing against the said judgment in its entirety.” The supporting affidavit to the said motion made by Dennis Michieka on the 17th May 2023 at paragraph 13 says “That the facts [sic] that an appeal has been filed is sufficient reason in law for this honourable court to order stay pending appeal”

That being the factual situation which has been placed on the record. This court cannot exercise its power of review.



23. The application dated 17th April 2023 alluded to by the Magistrate is not present in the Record of Appeal. However, this court takes cognisance of the court record of the 19th April 2023 where Mr Neriko counsel for the Appellant alludes to an appeal having been filed against the judgment of 24th August, 2022. The decree complained of emanates from that same judgment which was also the subject of the review application.

24. The legal position is that a party to litigation is not supposed to pursue an appeal and a review of the same court decision simultaneously. In *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the Court of Appeal expressed itself on the matter as follows: -

“In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”

25. On whether there was an error on the face of the record, Section 80 and Order 45 Rule 1 of the [Civil Procedure Act](#) and the Civil Procedure Rules respectively are instructive. Section 80 of the [Civil Procedure Act](#) Cap 21 provides as follows: -

“ 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.”

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“ 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.”

26. By the foregoing provisions, it is clear that an application for review and an appeal against the same decision/judgment cannot run simultaneously. The question for this court is whether an appeal had actually been filed against the same decision subject of the review motion.
27. The impugned ruling refers to an appeal filed by the Appellant. From the record, there is no evidence of an appeal having been filed in this matter, other than the instant appeal. Parties were also in agreement that the record of appeal as filed was complete paving way for directions on filing of submissions.
28. In the absence of prove that the Appellant had filed an appeal simultaneously with the motion for review, I find the appeal herein to have merit and is allowed in the following terms:
 - i. That the trial court’s ruling dated 16th October, 2023 be and is hereby set aside.
 - ii. That the Appellant’s review motion dated 8th August, 2023 be heard and determined on merit by a different judicial officer.
 - iii. Each party shall bear their own costs of the appeal.
29. Judgment of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 11TH DAY OF OCTOBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Cheruiyot present for the Appellant

Mr. Okelloh present for the Respondent

Mr. Kirui - C/A

