



Swaleh & 6 others v Compact Freighters Systems Limited (Employment and Labour Relations Appeal E065 of 2021) [2023] KEELRC 983 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEELRC 983 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E065 OF 2021**

**AK NZEI, J
APRIL 20, 2023**

**BETWEEN
MOHAMMED KIAI SWALEH & 6 OTHERS CLAIMANT
AND
COMPACT FREIGHTERS SYSTEMS LIMITED RESPONDENT**

(Appeal from the judgment of Hon. M.L. Nabibya -PM delivered on 12th August 2021 in Mombasa CM-ELR No. 254 of 2018 consolidated with 250,252,253,255,157 of 2018)

RULING

1. This Court delivered its judgment on the appeal herein on October 6, 2022 and rendered itself as follows:-
 - ' 4. In the present case, the Appellant's appeal was filed outside the thirty days mandatory period. It was filed out of time, on the 31st day and without the Court's leave. For this reason, the appeal is incompetent and bad in law, and is hereby struck off with no order as to costs.'
2. Dissatisfied with the said judgment, the Appellant filed a Notice of Appeal on October 19, 2022, stating that they intended to appeal to the Court of Appeal against the whole of the said judgment.
3. Five days later, on October 24, 2022, the Appellants filed an evenly dated Notice of Motion seeking orders:-
 - a. that this Court do review and set aside the judgment issued on October 6, 2022 and determine the appeal on merit.
 - b. that costs of the application be provided for.



4. On November 7, 2022, the Respondent filed a Notice of Preliminary objection and stated as follows:-

‘Take Notice that compact Freight Systems Limited, the Respondent herein, shall raise a preliminary objection at the hearing of the Appellant’s Notice of Motion dated October 24, 2022 and shall pray that the same be struck out in limine on the following ground:-

 1. The application is misconceived and bad in law as it offends the provisions of Order 45 Rule 1 of the Civil Procedure rules 2010. The Appellant has already preferred an appeal against the judgment of October 6, 2022 by filing a Notice of Appeal lodged on October 19, 2022. Consequently, review is ousted.
5. On November 8, 2022, I directed that the preliminary objection be canvassed by way of written submissions, and directed counsel appearing for both parties to file and to exchange written submissions thereon. Written submissions have since been filed.
6. I must, right at the onset, point out that proceedings in this Court are guided and/or regulated by the Employment and Labour Relations Court (Procedure) Rules 2016, save where the provisions of the Civil Procedure Rules and the Civil Procedure Act are expressly saved in this Court’s said Rules or in the Employment and Labour Relations Court Act (No 20 of 2011), or where a lacuna and/or vacuum glaringly exists in situations where both this Court’s Rules and Act are silent on a particular procedural issue and the Court, for that reason, which must be stated, reverts to the Civil Procedure Rules.
7. Section 16 of the Employment and Labour Relations Court Act provides as follows:-

‘ The Court shall have power to review its judgment, awards, orders or decrees in accordance with the Rules.’
8. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 on the other hand provides as follows:-
 - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) On account of some mistake or error apparent on the face of the record;
 - (c) If the judgment or ruling requires clarification; or (d) for any other sufficient reason.
 - (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or any other judge if that judge is not attached to the Court station.
 - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.’



- (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
- (6) An order made for a review of a decree or order shall not be subject to further review.'
9. To a great extent, Rule 33 of the Employment and Labour Relations Court (procedure) Rules 2016 is a replication of Order 45 Rule 1 of the Civil Procedure Rules, on which the Respondent's preliminary objection is founded.
10. Order 45 Rule (1) of the Civil procedure Rules provides:-
- (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 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.'

11. The Court of Appeal stated as follows in *Mukisa Biscuits Manufacturing Co Ltd -vs- West End Distributors Limited [1969] EA 696* on what a Preliminary Objection ought to be:-

' so far as I am aware, a Preliminary Objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if urged as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.'

12. Sir Charles Newbold stated as follows in the Mukisa Biscuits Case (Supra)

' A Preliminary Objection is in the nature of what used to be called a demurrer. It raised a pure point of law, which was urged on assumption that all the other facts pleaded by the other party were correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion'

13. The Respondent submitted that since it is not in dispute that the Appellants have already evinced their intention to appeal against the judgment of October 6, 2022 by filing a Notice of Appeal that was lodged on October 19, 2022, it is not permissible in law for the Appellants to concurrently pursue an application seeking review of the same judgment. The Respondent cited the Court of Appeal's decision in *Otieno Ragot & Company Advocates -vs- National Bank of Kenya Limited [2020] eKLR* where the Court stated as follows:-

' It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of *Karani & Others -vs- Kijana & 2 Others [1987] KLR 557*, the Court held that:-



'Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal (see also *African Airlines International Limited -vs- Eastern & Southern Africa Trade Bank Limited* [2003] 1EA (CAK)).

Even though the substantive appeal had not been filed, the Respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed, it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal.'

14. On their part, the Appellants submitted that (filing of) a notice of appeal does not constitute an appeal and that a party who files a notice of appeal is not barred from filing an application for review. The Appellants relied on the Court of Appeal's decision in *Multichoice [kenya] Limited -vs- Wananchi Group [kenya] Limited & 2 Others* [2020] eKLR where a five judge bench of the Court, empaneled to resolve what the Court referred to as perceived conflict in the Court's decisions on the construction of Order 45 of the Civil Procedure Rules; stated:-

' The two limbs of this appeal are based on the construction of Order 45, whose foundation is Section 80 of the *Civil Procedure Act*. The Section is in the exact identical language as Order 45, at least in so far as the first limb of this appeal is concerned. It states, Both provisions require no further elucidation as they are as clear as they can be, that a party will only be entitled to seek review, if he has not preferred an appeal or if there is no right of appeal. While the statement requires no explanation, the dispute is on the question of, when an appeal is 'preferred' or put differently, is a notice of appeal an appeal'

15. The Court went on to state:-

' By Rule 75 of the Court of Appeal Rules, a person desiring to appeal to the Court of Appeal from the High Court or Courts of equal status has, as a first step to give notice in writing. The notice must be lodged with the registrar of the Court from which the person intends to appeal. The notice serves a significant purpose both in the Court below and in this Court. For an application seeking an order of stay of execution, an injunction or a stay of any further proceedings under our rule 5(2) (b) to succeed, it must be demonstrated by the applicant, among other things, that a notice of appeal has been lodged in accordance with Rule 75. It has been urged explained before that a notice of appeal will be treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior Courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.'

16. The Court of Appeal in the *Multichoice* case (supra) went ahead to state that an appeal, being a judicial examination by a higher Court of a decision of a lower Court, is entertained on the basis of the grounds contained in the Memorandum of Appeal, and that the appeal is presented to the Court inform of a record containing copies of documents stated in the Court's Rules. That in terms of Rule 82(1) of the Court of Appeal Rules, an appeal is instituted by lodging in the appropriate Registry, within sixty days



of the date when the Notice of Appeal was lodged, a memorandum of appeal and the record of appeal, both in quadruplicate and the prescribed fees and security for costs. The Court further stated:-

' There has never been major inconsistencies in interpretation of order 45, both by the High Court and this Court. Save for the case of Kisya Investments Ltd (supra), all the rest of the decisions cited to us by both sides are actually in agreement. The Court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged. Conversely, the Court will not hear an application for review when an appeal has been instituted under Rule 82 of this Court's rules.

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 impugned decision, that party must, in the first place withdraw the appeal.'

17. In the instant case, I have perused the Appellant's Notice of Motion dated October 24, 2022 and the affidavit of Mohammed Kiai Swaleh sworn on even date in support of the application, and I have noted that the applicants have not stated whether or not they have lodged an appeal in the Court of Appeal Registry in accordance with that Court's Rules, and if so, whether the appeal has been withdrawn prior to seeking review of the impugned judgment of this Court. For that reason only, the Appellants' Notice of Motion dated October 24, 2022 cannot be entertained by this Court, and the same is hereby struck off with no order as to costs.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH APRIL 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Appellant

..... for Respondent

