Kemboi (Represented by Noah Cheruiyot Kemboi and Selly Cherop Kemboi as his personal representatives of the Estate of the Deceased) v Keino alias Hezekiah Kipchoge Keino (Environment and Land Appeal E013 of 2024) [2024] KEELC 13825 (KLR) (16 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13825 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL E013 OF 2024

EO OBAGA, J

DECEMBER 16, 2024

BETWEEN

KIPKOROM ARAP KEMBOI (REPRESENTED BY NOAH CHERUIYOT KEMBOI AND SELLY CHEROP KEMBOI AS HIS PERSONAL REPRESENTATIVES OF THE ESTATE OF THE DECEASED) ..... APPELLANT

AND

KIPCHOGE KEINO ALIAS HEZEKIAH KIPCHOGE KEINO ..... RESPONDENT

RULING

1. By Notice of Motion dated 12th June, 2024, the Respondent sought the following orders THAT: -

    a. The appeal against the decision dated 16/8/2023 made by the Hon. D. Mikoyan – Chief Magistrate be struck out with costs having been filed out of time.

    b. The appeal against the decision dated 16/8/2023 made by the Hon. D. Mikoyan – Chief Magistrate be struck out for having been filed without having sought and been granted leave to appeal with costs to the respondent

    c. The appeal against the decision dated 16/8/2023 is incompetent as a review on it was filed and was unsuccessful hence it should be struck out with costs.

    d. The appeal against the decision dated 29/2/2024 by the Hon. R. Odenyo – Senior Principal Magistrate be struck out with costs for having been filed in a joint memorandum with the decision dated 16/8/2023 by the Hon. D. Mikoyan – Chief Magistrate.

    e. The costs of the Application and appeal be granted to the Respondent

2. The application is based on the 4 grounds on its face and on the Respondent's Supporting Affidavit sworn on even date. He avers that the memorandum of appeal relates to 2 decisions; one vide an order issued on 16th August, 2023 by Hon. D. Mikoyan. It is his claim that the appellant ought to have lodged an appeal within 30 days or after seeking leave of the court pursuant to sections 79G and 75 of the Civil Procedure Act.

3. He contends that the appellants opted not to appeal against the decision but filed an application for review dated 21/8/2023, which was heard and dismissed with costs by Hon. R. Odenyo vide a ruling dated 29/2/2024. He thus claims that the order dated 16/8/2023 has no automatic right of appeal by dint of section 75 of the Civil Procedure Act.

4. He further avers that the appeal against the order made on 16/8/2023 is incompetent and this court therefore lacks the requisite jurisdiction to entertain the same after the unsuccessful application for review.

5. It was also his claim that the appellants have brought an appeal against two decisions vide a single memorandum of appeal thus rendering the appeal incompetent and an abuse of the court process. He urged the court to allow the application as sought.

6. The application was opposed. The Appellant filed a Grounds of Opposition dated 16.09.2024 in response to the Application. He dismissed the application as being misconceived, vexatious and an abuse of the court process; that the application neither meets the threshold for the grant of an order of striking out nor has there been a demonstration that the memorandum of appeal is fatally defective and cannot be cured by an amendment.

7. It is his claim that they lodged the Memorandum of Appeal on 26/3/2024; within the statutory timelines of 30 days noting that the ruling was delivered on 29.2.2024 and the said appeal raises arguable points hence the need to be determined on merit.

8. The appellant conceded that both the decision issued on 16/8/23 and 29/2/24 are both the subject of the appeal. It was his contention that the respondent had not set out the legal foundation for the argument that two decisions cannot be challenged vide one memorandum of appeal. He maintained that there is no express provision of law that bars a party from filing a memorandum of appeal with respect to two decisions.

9. In conclusion, it was his claim that there is no express bar under the Civil Procedure Rules that a party who has attempted to review a decision from subsequently appealing against the decision on review. He urged the court to dismiss the appeal with costs.

10. The Application was disposed of by way of written submissions; the Respondent's counsel filed their submissions dated 21.10.2024 whilst the Appellants' counsel filed their submissions dated 15.11.2024. I have read the rival submissions and authorities cited and taken the same into account in arriving at my decision;

Analysis and Determination:

11. Having looked at the application, the Affidavits thereto, the Grounds of Opposition and the rival submissions; this court is of the considered opinion that the issues arising for determination are as follows: -

    a. Whether the Memorandum of Appeal dated 26/3/2024 was filed out of time and without leave of court

b. Whether the appeal herein ought to be struck out

12. The Respondent herein has sought the striking out of the Appeal lodged against the decision issued by Hon. R. Odenyo and Hon. D. Mikoyan. Striking out of pleadings is a draconian act which ought to be exercised sparingly. Madan JA. in the case of D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another [1980] eKLR, stated that: -

> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

Whether the Memorandum of Appeal dated 26/3/2024 was filed out of time and without leave of court

13. It is the Respondent's claim that the appeal, to the extent that it touches on the decision issued on 16/8/2023, was not filed within the statutory timelines and no leave of court was sought prior to filing the same. He thus urged the court to strike out the appeal as filed.

14. The Appellants in response to the said allegations maintained that the appeal was filed within 30 days statutory period after the ruling of Hon. R. Odenyo was issued on 29/2/2024 and which is the subject of the instant appeal. He annexed a copy of the said Memorandum of Appeal dated 26/3/2024 and filed on 27th March, 2024.

15. I have looked at the court record and I do confirm that the Memorandum of Appeal was filed on the 27th March, 2024; the decision appealed against was issued on the 29th February, 2024 by Hon. R. Odenyo. I therefore find that the appeal was properly lodged within the statutory timelines as outlined in section 79G the Civil Procedure Act.

16. The appeal against the earlier decision dated 16/8/2023 could not be lodged within 30 days period after the date of the ruling since there was an application for review against the same decision pending in the trial court and the appellants could not file both for both review and appeal concurrently. Thus, time started running after the ruling dated 29/2/2024 was issued for purposes of computing the 30 days statutory period for filing appeals.

17. The next issue for determination is whether the appeal as filed ought to be struck out and I will proceed to discuss the same on account of;

    i. Review was preferred against the ruling issued on the 16.8.2023 and the said decision forms the subject matter of the instant appeal,

    ii. The Memorandum of appeal is in respect to two decisions by two different court.

18. The Respondent contends that pursuant to the decision of 16/8/2023, the appellants opted not to appeal against the said decision but filed an application for review dated 21/8/2023. He maintained that the decision issued on 16/8/2023 does not therefore have an automatic right of appeal by dint of section 75 of the Civil Procedure Act and the court thus lacks jurisdiction to entertain the appeal after the unsuccessful application for review.

19. The appellants on the other hand averred that there is no express bar under the Civil Procedure Rules that a party who has attempted to review a decision from subsequently appealing against the same decision on appeal.

20. Section 80 of the Civil Procedure Act as read with Order 45 Rule 1 of the Civil Procedure Rules provide the statutory framework for the review of a decision in which an appeal is allowed but from which no appeal has been preferred.

21. The appellants herein were therefore exercising their statutory rights when they opted to review the decision of Hon. D. Mikoyan issued on the 16/8/2023. The question that arises is whether after the dismissal of the said application for review vide a ruling issued on the 29/2/2024; the appellants have a right to explore the option of appeal against the same decision issued on the 16/8/2023.

22. G.V. Odunga J. (as he then was) in the case of HA v LB [2022] eKLR at paragraph 12 held as follows: -

> " 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 vs. William Mmosi Moi (supra) that both options cannot be pursued concurrently or one after the other."

23. Guided by the above case law and from my reading and understanding of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules; it is my considered opinion that a party cannot apply for review from the same decree or order, in this case the order issued on 16/8/2023 by Hon. D. Mikoyan. The same in my view would be akin to having a second bite at the cherry.

24. In this case, the Appellant having sought to review the order made on 16/8/2023 cannot now purport to appeal against the same orders he sought review of. He can only appeal against the decision on review issued on 29th February, 2024.

25. Secondly, the Respondent also avers that an appeal cannot lie against 2 decisions vide a single memorandum of appeal and the instant appeal as filed is therefore incompetent and an abuse of the court process.

26. In response to the said allegations, the appellants conceded that both the decision issued on the 29/2/2024 and 16/8/2023 are subject of the appeal. They however stated that the respondent had

not set out the legal foundation for the argument that the 2 decisions cannot be challenged vide one Memorandum of Appeal. They maintained that there is no express provision of law that bars a party from filing a memorandum of appeal.

27. I echo the sentiments by the Appellants that there is no express bar vide a statutory provision which precludes a party from challenging two decisions in one memorandum of appeal; particularly where the two decisions are as a result of the same subject matter and/or cause of action flowing from the decision from the now defunct District Land Disputes Tribunal. As a matter of fact, having to different appeals on account of the same subject matter would amount to multiplicity of suits.

28. Be that as it may, having held above that the appeal herein cannot lie against the order issued on the 16/8/2023, I find that the said ground has been overtaken by events and discussing this issue will amount to an academic exercise.

Conclusion:

29. In the upshot, I accordingly find that the Application dated 12th June, 2024 is partially merited and the same is hereby allowed in terms of prayer No. (c). The Memorandum of Appeal dated 26th March, 2024 is hereby struck out to the extent that touches on the decision issued on 16/8/2023.

30. The appeal however remains for purposes of the decision issued on the 29th February, 2024. Costs of the Application to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF DECEMBER, 2024.

E. OBAGA

JUDGE

Ruling delivered in the virtual presence of: -

M/s Chelogoi for the Appellants.

Mr. Mogambi for the Respondent.

Court Assistant - Laban

E. OBAGA

JUDGE

16TH DECEMBER, 2024