



REPUBLIC OF KENYA



**Mutinda v Kilukumi (Civil Appeal E929 of 2024)
[2025] KEHC 8994 (KLR) (Civ) (26 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8994 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E929 OF 2024

JN MULWA, J

JUNE 26, 2025

BETWEEN

BARCKLEIH KILEI MUTINDA APPELLANT

AND

KIOKO KILUKUMI RESPONDENT

RULING

1. The applicant in the Motion dated 20/09/2024, Barckleih Kilei Mutinda approached this court seeking orders among them a review, variation or setting aside of the trial court orders issued in Mccc No. E158 of 2022 Milimani between the patties allowing him pay the decretal sum at an amount of Kshs. 300,000/- per month as well as review of the court orders issued by the court (Nangea Judge) on 16/08/2024, wherein the court failed to certify the motion as urgent, pending hearing and determination of the pending appeal.
2. The motion is predicated on provisions of Order 45 and 51 of the Civil Procedure Rules (CPR) and other Constitutional Articles. Additionally, the Applicant swore the supporting affidavit on an even date in which he raises apprehension that the Respondent will proceed with execution process against him by selling his Athiriver property, adding that he is willing to and ready to pay the decretal sum stated as Kshs. 100,000,000/= in instalments of Kshs. 300,000/= monthly.
3. When this matter was placed before this court (j. Mulwa) for hearing on 24/09/2024, temporary stay orders were issued granting the Applicant leave to pay to the Respondent Kshs. 300,000/= monthly starting on 3/10/2024 as a conditional stay of execution pending inter partes hearing and determination of the motion.
4. In response to the motion, the Respondent filed a replying affidavit sworn on 6/11/2024 objecting to the prayers the applicant seeks.



In the first instance, the respondent cites Section 75(1) (h) of the *Civil Procedure Act*, as read with Order 43 Rule 1 (1) and (2) of the Rules arguing that the orders sought for payment of the decretal sum in instalments.

Under Order 21 Civil Procedure Rules is not one of orders under Order 43 Rule 1(1) Civil Procedure Rules where an appeal is as of right and therefore argues that the appeal her3ein is incompetent.

5. It is the Respondent disposition that as at 3/11/2024 the Applicant had paid Kshs. 2.1 Million leaving a balance of Kshs. 9,994,149/= and that the amount allowed at the exparte stage of Kshs. 300,000/- monthly was too low seeking for enhancement, stating that the Applicant is capable to pay the full decretal sum at once as demonstrated by his bank statements and those of his companies that he controls and therefore objects to an order to pay in instalments as sought.
6. Additionally, the Respondent submits that despite the court orders for payment in instalments from February, 2024 the Applicant has failed to comply save for months of October and November 2024.
7. The Respondent therefore proposes if the court is inclined to grant the orders, it should order that the Applicant deposits Kshs. 2, 700,000/- in court being the amount he ought to have paid from February, 2024 to December 2024, and Kshs. 750,000/= from January, 2025 and every month pending hearing and determination of the appeal with a default clause of execution if he fails to do so.
8. The court has carefully read and considered the parties pleadings and affidavit evidence in their supporting and opposing affidavits.
9. On the competence of the appeal filed by a Memorandum of Appeal dated 12/08/2024, it is evident that it is against the ruling of the trial court's ruling delivered on 12/07/2024 – (in Mccc No. E158/2022) in respect of his application dated 6/02/2024 seeking stay of execution of the decree and for leave to pay the decretal sum in instalments.
10. Section 75(1) *Civil Procedure Act* (CPA) provides for orders that may be appealed from as of right: - 75(1) (a) (b), (c), (d), (e), (f), (g). At (h) it provides for any order made under rules from which an appeal is expressly allowed by rules.
11. Order 43 Rule 1 (1) provides for Orders that may be appealed from as of right. Order 22 is in respect of the execution proceedings being Rules 25, 57, 61(3) and 73 of the Civil Procedure Rules.
12. The applicant's impugned ruling of 12/07/2024 was in respect of execution proceedings.
 - a. Sub-rule 25 is in respect of stay of execution pending suit between the decree holder and the Judgment-Debtor.
 - b. Sub-rule 57 is in respect of notification of sale by public auction.
 - c. Sub-rule 61 bars a decree holder from bidding when property is being sold in a public auction.

The above are the only orders, which a judgment debtor may appeal against as of rights under Order 43 Civil Procedure Rules.

13. It is without a doubt therefore that any other order by a Judgment Debtor seeking to appeal in respect of execution proceedings must be by leave of court. Further, an order from an application under Order 45 Rule 6 Civil Procedure Rules for Review of an order made on an application for a review of a decree or order made on a review shall not be entertained; thus a bar of subsequent applications when the initial review application is rejected by the trial court. It is not subject to further review.



14. Coming back to the application at hand and in light of the above underpinning rules is the ruling of the trial court issued on 12/07/2024 under the motion dated 6/02/2024 is it appealable as of right?

A perusal of the motion shows that the same was made under Order 45 Rule 1 Civil Procedure Rules and Section 80 *Civil Procedure Act* among others, and basically for an order of stay of execution of the decree by way of arrest and committal to civil jail of the Applicant as well as attachment of his assets and also leave to pay the decretal sum in instalments. The motion was rejected by the trial court and now subject of the Appeal.

15. In the case of *Nyutu Agrovot Ltd V. Airtel Networks Ltd (2015) eKLR*, the Court rendered itself that a right of appeal lies where the law specifically provides to accrue and where no such right is automatic, a party must seek leave first. Further, the right of appeal is conferred by statute and cannot be inferred.

16. The impugned orders subject of the present appeal were made under Order 45(1) Civil Procedure Rules where the trial court declined to review its execution orders denying the appellant leave to pay the decretal sum in instalments. In the court's considered view, when the Applicant took the option to appeal under this appeal it lost its option to seek review of the said orders. Both options cannot be invoked at the same time.

17. The instant application is well predicated under Order 45 Civil Procedure Rules and section 80 *Civil Procedure Act*, that provides:- “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 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.

18. It is therefore trite that a party may only exercise its right to appeal or review, but not both at the same time. The superior Courts have rendered in respect of this holding; *Orero v. Seko [1984] KLR 238*; *Kisya Investments Ltd v. AG & Another [1995]eKLR*; *Yani Haryanto vs. E. D. & F Man (sugar) Limited (Civil Appeal NO. 122 of 1992)*.

19. In the case of *HA v. LB[2022]eKLR*; the court (Odunga J. as he then was) when interrogating similar issues as in this motion held that:-

“Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequent appealing against it, it must be noted that Rules are subject to 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 court. To allow parties who have in the past successfully 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.”

20. Additionally, the learned Judge went ahead to add that:-

“But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from the review and an appeal against the order sought to be reviewed amounts in my view to an abuse of court process”.



21. Ridding on the above analysis and taking into account the material placed before the court and the learned precedents, it would be extremely prejudicial to the Respondent to allow the reliefs and orders sought by the Applicant.
22. Upon the above, this court cannot deem the pending appeal as competent, the Applicant having taken the option of a review relief from the ruling of the trial court dated 12/07/2024 in MCCC No. E 158 of 2022.
23. It is not only an abuse of court process but also an abstraction to the Respondent from pursuing recovery of the decretal sum taking cognizance that over the time, the Applicant has been granted sufficient opportunity to pay the decretal sum in instalments by the trial court and this court since judgment was delivered. No persuasive reasons have been advanced by the applicant for further indulgence by this court.
24. For the foregoing, and being reminded of the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act and for the ends of justice to prevent further abuse of the Court process, the court finds no merit in the application dated 20/09/2024. It is dismissed with costs.
25. Additionally, the court finds no competent appeal on record and moves to strike out the present appeal No. E929 of 2024 with costs to the Respondent.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF JUNE, 2025.

.....
JANET MULWA.
JUDGE

