



REPUBLIC OF KENYA



KENYA LAW
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**Olayo v Olayo (Succession Appeal E007 of 2022)
[2024] KEHC 5958 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
SUCCESSION APPEAL E007 OF 2022
WM MUSYOKA, J
MAY 28, 2024**

BETWEEN

CAMULUS ODHIAMBO OLAYO APPELLANT

AND

GEORGE OCHIENO OLAYO RESPONDENT

(an appeal arising from orders made in the ruling of Hon. T Madowo, Senior Resident Magistrate, SRM, in Busia CMCS No. 604 of 2018, of 25th October 2022)

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Busia CMCS No. 604 of 2018, of 25th October 2022. The grounds of appeal revolve around the trial court not taking into account the appellant's objection dated 15th October 2019 and the protest dated 16th June 2022; that the trial court ignored the fact that the responded had failed to seek and obtain the consent of the appellant to file for representation; the trial court relied on Forms P&A 38 and 80, whose authenticity was doubtful; the trial court issued a certificate of confirmation of grant, dated 25th October 202, which was void ab initio; the report of the Land Registrar was ignored; ignoring the affidavit tendered by the appellant; among others.
2. The orders, which form the basis of the appeal, were made on an application dated 4th March 2021, for confirmation of grant. There was a protest to that confirmation application, filed by the appellant. The trial court considered it, and dismissed it, and allowed the confirmation application, as prayed, on 25th October 2022. A certificate of confirmation of grant was subsequently issued, bearing an even date.
3. The appellant was aggrieved; hence he filed this appeal, vide a memorandum of appeal, dated 15th November 2022, lodged herein on 14th November 2022. The memorandum of appeal was subsequently amended on 6th November 2023, and the amended pleading was placed on the record herein on 7th November 2023.



4. Curiously, after filing the memorandum of appeal herein on 14th November 2022, 2 or so weeks later, he lodged, at the registry of the trial court, a Motion, dated 2nd December 2022, seeking the review or the setting aside of the orders of 25th October 2022, an application that he founded on Order 12 Rule 7 and Order 45 Rule 1 of the Civil Procedure Rules. He complained that his Advocate had let him down, by not updating him on the goings on in the matter, and by failing to file written submissions. He argued that that amounted to a mistake or error apparent on the face of the record, which was reviewable. He also argued that was a sufficient reason for review. The application was resisted, through grounds of opposition, dated 9th December 2022, and a replying affidavit, sworn on 20th February 2023. The trial court determined the review application, on 27th June 2023. It was ruled that failure to file written submissions did not amount to a mistake or error apparent on the face of the record. The court further held that there was no error apparent on the face of the record, nor discovery of any new and important evidence.
5. Under Order 45 Rule 1, a review lies where a right of appeal is available, but no appeal has been preferred, and also where there is no right of appeal against the order impugned. Under Order 50(1) of the Law of Succession Act, Cap 160, Laws of Kenya, an appeal does lie, from a decision of a magistrate, in respect of any estate, to the High Court. That being the case, the appellant ought not have sought review of the order of 25th October 2022, so long as he had already filed an appeal. What Order 45 Rule 1 discourages is the spectre of a party lodging an appeal and a review at the same time. But it is just what the appellant did. He filed an appeal, on 14th November 2022, at the High Court, then he filed an application for review, of the same order that he was appealing against, at the trial court on 2nd December 2022. That was contrary to Order 45 Rule 1. It would appear that the trial court was not notified of the pendency of the appeal, for it went on to hear the review application, and to determine it on 27th June 2023.
6. The question then is, what would be the effect, on the pending appeal, of hearing and disposing of a review application, against the same decision that is on appeal. The law does not countenance the maintenance of both an appeal and a review at the same time. The 2 cannot be sought concurrently, nor consecutively. See Chairman Board of Governors Highway Secondary School v William Mmosi Moi [2007] eKLR (Bosire, Githinji & Waki, JJA). To encourage a contrary view or approach, would be an invitation for abuse of the court process. See Stephen Somek Takwenyi & Another v David Mbutia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 (Kimaru, J)(unreported). A party is called to elect between the 2. So, a party who chooses to appeal, loses the right to seek review, and vice versa. In this case, the appellant initially chose appeal, which meant that he lost the right to seek review. Then he filed for review, and proceeded to argue the review application to its final conclusion. I trust that, under such a situation, he would be deemed to have had abandoned the appeal, in favour of the review. He cannot now turnaround, after he has lost the review application, to purport to argue his appeal. He cannot have it both ways. It can only be 1 way. As he pursued the review to its logical conclusion, he cannot now turn back to revive the appeal. He cannot eat his cake, and still have it. He now can only appeal against the decision on review, which was rendered on 27th June 2023. See also HA v LB [2022] eKLR (Odunga, J), Waithira v Holding & another [2024] KEHC 3169 (KLR)(A. Visram, J) and Mwaura (Suing as the Administrator of the Estate of the Late Robert Mwaura Kagonda alias Mwaura Kagonda) v Estate of the Late Muturi Gachogu & 4 others [2023] KECA 1126 (KLR) (Laibuta, JA).
7. There is nothing for me to determine, in view of the above, for the appellant must be held to his election. The appeal herein was rendered moot, by the decision of the trial court, of 27th June 2023, on review. The appeal herein is accordingly struck out. The respondent shall have the costs. It is so ordered.



**DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA THIS 28TH DAY
OF MAY 2024**

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Wanjala, instructed by Omurwa Advocates, Advocates for the appellant.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondent.

