



Mbugua & another (Suing as the Administrators of the Estate of Joseph Kiarie Mbugua & another) v Timber Manufacturers & Dealers Limited (Civil Application E019 of 2023) [2023] KESC 86 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KESC 86 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
CIVIL APPLICATION E019 OF 2023
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & W OUKO, SCJJ
OCTOBER 6, 2023**

BETWEEN

**WAIRIMU MBUGUA 1ST APPLICANT
SYLVIA MURUGI MBUGUA 2ND APPLICANT
SUING AS THE ADMINISTRATORS OF THE ESTATE OF JOSEPH KIARIE
MBUGUA & ANOTHER**

AND

TIMBER MANUFACTURERS & DEALERS LIMITED RESPONDENT

*(Being an application for review of the Court Orders
issued by Hon. Lenaola, SCJ on 26th May 2023)*

Circumstances in which the Supreme Court could review its own decisions

The applicants were aggrieved by the Supreme Court dismissing their notice of appeal. They filed a review on grounds that time for filing their records of appeal had not started running as their application for certification as a matter of general importance was still pending before the Court of Appeal. The Supreme Court held that in invoking section 21(4) of the Supreme Court Act and rule 28 (5) of the Supreme Court Rules, the applicants sought to move the court to exercise two distinct jurisdictional powers: correcting an oversight or clerical error, and review its own decision. Correction of an apparent error on the face of the record, which was unavailable to the applicants, was distinct from a review. The application was dismissed.

Reported by John Ribia

Civil Practice and Procedure – appeals – Supreme Court appeals – appeals on matters of general importance – certification – notice of appeal - whether it was mandatory for appellants before the Supreme Court to obtain certification of a matter as one of general importance before filing a notice of appeal - , 2020 rule 36 (1) and (4)

Civil Practice and Procedure – review – application for review before the Supreme Court – what were the circumstances under which the Supreme Court could review its own decision - whether in an application for review



of the Supreme Court's decision, one could apply for correction of an error on the face of the record - section 21(4);, 2020 rule 28(5)

Brief facts

The applicants were aggrieved by the Court of Appeal's decision in Nairobi Civil Appeal No. 21 of 2015 as consolidated with Nairobi Civil Appeal No. 180 of 2015. They filed two notices of appeal for each of the consolidated matters before the Supreme Court pending the determination of their application to certify the appeal as one of general importance. They argued that the two court orders issued by a single judge of the Supreme Court that marked the aforementioned notices of appeal as withdrawn was an apparent error on the face of the record, since time for filing their intended appeal before the Supreme Court had not started running as their certification application was still pending.

Issues

- i. Whether it was mandatory for appellants before the Supreme Court to obtain certification of a matter as one of general importance before filing a notice of appeal.
- ii. Whether in an application for review of the Supreme Court's decision, one could apply for correction of an error on the face of the record.
- iii. What were the circumstances under which the Supreme Court could review its own decision?

Held

1. Rule 36 (1) of the 2020 required appellants to file a notice of appeal within 14 days. However, rule 36 (4) provided that it was not mandatory to obtain certification of a matter as a matter of general importance before filing a notice of appeal. Rule 36 (4) made it optional to file a notice of appeal either before or after certification in a matter of general public importance.
2. The applicants filed two notices of appeal within the 14-day timeframe. According to rule 38 (1) of the , an appeal should be filed within thirty days of the date of filing the notice of appeal, where the appeal was as of right; or thirty days after the grant of certification, where such certification was required. No appeal was filed within 30 days of filing of the Notice of Appeal or any indication that the applicants had filed an application for certification of matters as involving general public importance or that such an application was pending before the Court of Appeal, or at all.
3. There was nothing on record to show that, at the time the orders were issued on May 26, 2023, almost four years after the Notices of Appeal were filed, there was a pending application for certification before the Court of Appeal. Rule 46(1) of the empowered the court, on its own motion or on application by any party, to make such orders as may be necessary in instances where a party lodged a notice of appeal but failed to institute the appeal within the prescribed time.
4. In invoking section 21(4) of the and rule 28 (5) of the , the applicants sought to move the court to exercise two distinct jurisdictional powers: correcting an oversight or clerical error, and review its own decision. Correction of an apparent error on the face of the record, which was unavailable to the applicants, was distinct from a review.
5. The Supreme Court could only review its own decision under exceptional circumstances:
 1. whether the judgment, ruling or order was obtained through fraud, deceit or misrepresentation of facts;
 2. where the judgment, ruling or order was a nullity by virtue of being made by a court which was not competent;
 3. where the court was misled into giving a judgment or order under the belief that the parties have consented; or
 4. where the judgment, ruling or order was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.
6. The applicants had not delineated under which of the mentioned circumstances they sought to review the orders of the court issued by a single judge.



Applications dismissed.

Orders

No order as to costs.

Citations

Cases

1. Fredrick Otieno Outa v Jared Odoyo Okello, Independent Electoral And Boundaries Commission, Returning Officer, Nyando Constituency & ODM Party (Petition 6 of 2017; [2017] KESC 25 (KLR)) — Explained
2. Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Application 3 (E008) of 2022; [2022] KESC 25 (KLR)) — Explained
3. Singh Rai & 3 other v Tarlochan Singh Rai & 4 others (Petition No. 4 of 2012) — Explained

Statutes

1. Constitution of Kenya, 2010 (Const2010) — article 159 — Interpreted
2. Supreme Court Act (No. 7 of 2011) — section 3, 21A,(4); 23,(2C) — Interpreted
3. Supreme Court Rules, 2010 (No. 7 of 2011 Sub Leg) — rule 28(5); 36(1)(4); 38(1)(a)(b); 46(1) — Interpreted

Advocates

Ms. Grace Ndinda h/b for Mr. Mbabu for Applicant

Ms. Ivy Kathongo h/b for Judy Thongori, SC for two Administrators Of the Estate (Grace Wanjiku & Peter Chege) (Judy Thongori & Co. Advocates)

Mr. Karuga for Respondent

RULING

1. Upon perusing the notice of motion by the applicants dated June 8, 2023, and filed on July 6, 2023, pursuant to article 159 of the [Constitution of Kenya, 2010](#); sections 3 and 21(4) of the [Supreme Court Act, 2011](#); rule 28(5) of the [Supreme Court Rules, 2020](#) and all other enabling provisions of the law seeking orders:
 1. That this honourable court be pleased to review, vary and/or set aside the court orders issued by Hon Lenaola, SCJ on May 26, 2023 marking the 2 notices of appeal dated October 7, 2019 and filed on October 11, 2019 in respect of the intended appeals from Nairobi Court of Appeal Civil Appeal No. 21 of 2015 as consolidated with Nairobi Court of Appeal Civil Appeal No. 180 of 2015, as withdrawn on account of failure to institute the appeal within the prescribed time.
 2. That this honourable court be pleased to make any further orders as it deems fit in the circumstances to meet the ends of justice.
2. Upon perusing the grounds on the face of the application and the supporting affidavit sworn on June 8, 2023, by Lawrence M Mbabu wherein the applicants contend that aggrieved by the Court of Appeal's decision in Nairobi Civil Appeal No 21 of 2015 as consolidated with Nairobi Civil Appeal No 180 of 2015 delivered on September 27, 2019, the applicants filed two Notices of Appeal for each of the consolidated matters, both dated October 7, 2019 and filed on October 11, 2019, before this court pending the determination of their certification application before the Court of Appeal in Nairobi Court of Appeal Civil Application Sup 13 of 2020. Therefore, they argue that the two court orders issued by Hon Justice Lenaola, SCJ on May 26, 2023, marking the aforementioned Notices of Appeal



as withdrawn is an apparent error on the face of the record, since time for filing their intended appeal before this court has not started running as their certification application is still pending; and

3. Upon considering the applicants' submissions dated June 8, 2023, and filed on July 6, 2023, the applicants submit that: the import of section 21(4) of the [Supreme Court Act, 2011](#) as explained in this court's decision in [Fredrick Otieno Outa v Jared Odoyo Okello & 3 others](#) SC Petition No 6 of 2014; [2017] eKLR assert that the error committed by the Honourable Judge falls within the purview of the exceptional circumstance alluded to under rule 28(5) of the [Supreme Court Rules](#), for the reasons that the honourable judge was under the mistaken belief that the appeal was as of right or had already been granted certification and as a result, the applicants had failed to file their requisite appeal within 30 days of filing the Notices of Appeal or grant of certification under rule 38(1)(a) or (b) of the [Supreme Court Rules, 2020](#) respectively; accordingly, failure to set aside the court orders issued on May 26, 2023 due to the error committed will occasion the applicants great injustice; and
4. Cognizant that *vide* a consent signed by the parties' advocates dated August 29, 2023, the respondent herein is not opposed to the application; and
5. Taking into account provisions of section 21 of the [Supreme Court Act](#), rule 28(5) of the Supreme Court Rules, 2020 as well as this court's decision in [Fredrick Otieno Outa](#) case, we have considered the totality of the application and now opine as follows:
 - i. Rule 36(1) of the [Supreme Court Rules 2020](#) provides that "a person who intends to appeal to the court shall file a notice of appeal within fourteen (14) days from the date of judgment or ruling which is the subject of appeal." However, rule 36(4) states that "in lodging an appeal on a matter of general public importance, it shall not be mandatory to obtain such certification before filing the notice of appeal." We have previously emphasized in [Arvind Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others](#); SC Application No 3 (E008) of 2022 that rule 36(4) makes it optional to file a notice of appeal either before or after certification in a matter of general public importance.
 - ii. Turning to the instant matter, the applicants, aggrieved by the decision of the appellate court in Nairobi Civil Appeal No 21 of 2015 as consolidated with Nairobi Civil Appeal No 180 of 2015 delivered on September 27, 2019, filed two notices of appeal before this court on October 11, 2019, within the 14-day timeframe. According to rule 38(1) of the [Supreme Court Rules](#), an appeal should be filed within thirty days of the date of filing the notice of appeal, where the appeal is as of right; or thirty days after the grant of certification, where such certification is required. It is manifest that no appeal was filed within 30 days of filing of the notice of appeal or any indication that the applicants had filed an application for certification of matters as involving general public importance or that such an application was pending before the Court of Appeal, or at all.
 - iii. On that account, is there an apparent error on the face of the record in the issuance of the court orders on May 26, 2023 by the honorable judge? Hardly. There is nothing on record to show that, at the time the orders were issued on May 26, 2023, almost four years after the notices of appeal were filed, there was a pending application for certification before the Court of Appeal. Rule 46(1) of the [Supreme Court Rules](#) empowers the court, on its own motion or on application by any party, to make such orders as may be necessary in instances where a party lodges a notice of appeal but fails to institute the appeal within the prescribed time.
 - iv. In invoking section 21(4) of the [Supreme Court Act](#) and rule 28(5) of the Supreme Court Rules the applicants seek to move the court to exercise two distinct jurisdictional powers: correcting



an oversight or clerical error, and review its own decision. In the [Fredrick Otieno Outa](#) case we accentuated our position as follows:

“[85] This section as quoted, embodies what is ordinarily referred to as the “Slip Rule”. By its nature, the Slip Rule permits a court of law to correct errors that are apparent on the face of the judgment, ruling, or order of the court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the court. In other words, the Slip Rule does not confer upon a court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it ”

Correction of an apparent error on the face of the record, which is unavailable to the applicants, is distinct from a review.

- v. On the review relief as set out in the application before us, the principles in [Fredrick Otieno Outa](#) case now buttressed in section 21A of the [Supreme Court Act](#) highlight the exceptional circumstances in which this court may review its own decision as:
 - a. Whether the judgment, ruling or order was obtained through fraud, deceit or misrepresentation of facts;
 - b. Where the judgment, ruling or order is a nullity by virtue of being made by a court which was not competent;
 - c. Where the court was misled into giving a judgment or order under the belief that the parties have consented; or
 - d. Where the judgment, ruling or order was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.
 - vi. From the foregoing, the applicants have not delineated under which of the mentioned circumstances they seek to review the orders of the court issued by a single judge. At any rate, this is a different jurisdiction from that granted under section 23 (2C) of the [Supreme Court Act](#), which provides that:

“ A party aggrieved by the decision of a single judge or two judges may apply for review of the decision by five or more judges of the Court.”
 - vii. In the end, we decline to exercise discretion in favour of the applicants as prayed. At all times, the applicants remain at liberty to approach the court under the relevant rule, if at all a determination is made on their alleged application for certification. On costs, award of the same is discretionary and follows the event as enunciated in [Jasbir Singh Rai & 3 other v Tarlochan Singh Rai & 4 others](#), SC Petition No 4 of 2012; [2014] eKLR. This application having been uncontested, no costs have been sought.
6. Consequently, we make the following orders:
- i. The notice of motion dated June 8, 2023 and filed on July 6, 2023, lacks merit and it be and is hereby dismissed.
 - ii. No order as to costs.



It is so ordered.

DATED and DELIVERED at NAIROBI this 6th day of October, 2023.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

