Misigo & another v Githaiga (Miscellaneous Civil Case E184 of 2023)
[2024] KEHC 16430 (KLR) (23 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16430 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

MISCELLANEOUS CIVIL CASE E184 OF 2023

RN NYAKUNDI, J

DECEMBER 23, 2024

BETWEEN

JOSHUA MISIGO ..... 1ST APPLICANT

EGO TECH MOTOR CENTER LTD ..... 2ND APPLICANT

AND

VINCENT MUNYAGA GITHAIGA ..... DEFENDANT

RULING

1. I am called to determine a Notice of Motion dated 10th July, 2024 expressed to be brought under the provisions of Art. 47,50,159(2) and 160(1) of *the Constitution* of Kenya, 2010 and Section 1, 3, 63(e), & 80 of the *Civil Procedure Act*, Order 45 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules, section 3, 12 of the Fair Administrative Actions Act, 2015 and Section 3 of the *Judicature Act*, 2018. The applicants seeks orders to wit:

    a. Spent

    b. That pending the inter parte hearing of this application, this court be pleased to issue interim orders staying the execution of the judgment and consequential decree arising out of the judgment delivered on the 6th December, 2022 by Hon. Naomi Wairimu (SPM) under Eldoret CMCC No. 617 of 2020.

    c. That pending the inter parte hearing of this application, the Hon. Judge presiding over the above matter, Hon. Justice R. Nyakundi be obligated to disqualify and/or recuse himself from any further conduct of this matter.

    d. That this matter be placed before any other court of competent jurisdiction, for its just and conclusive determination.

e. That this Honorable court be pleased to recall, review, revise, vary and/or set aside its ruling of 21/6/2024 and in its place grant prayer 3 and 5 of the application dated 4th September, 2023.

f. That this Honorable court be pleased to issue any other orders as it deems fit and just bearing in mind the circumstances of the case.

g. That the costs of and incidental to this application be provided.

2. The application is supported by the affidavit of Joshua Misigo and grounds on the face of it. The applicant contends that the Honorable court had on 21st June, 2024 dismissed the applicant's application dated 4th September, 2023 on account of apparent error on the face of the court record. Further that the court did not consider crucial evidence, to be obtained by enforcement of prayer (3) of the application which were to be availed by calling for the subordinate court records and could have made the Honorable court rule otherwise.

3. It is a ground that the ruling of 21st June, 2024 is also incomplete on the grounds that the Honorable court omitted to make final orders on the application. The applicants stated that they have a valid apprehension thet they will not be accorded a fair trial if the present application is heard by Hon. Justice R. Nyakundi.

4. That the court while sitting on 21st May, 2024 called on counsel for the applicants to summarize the gist of their application but still ignored and/or failed to address itself to and make a determination based on those submissions.

5. That there is apparent bias towards the Respondent on the part of the Honorable judge presiding over the above matter, Hon. Justice R. Nyakundi. That the applicants have a constitutional right to a fair trial devoid of any suspicion of real and/or apparent bias, and/or prejudice towards it. That the applicants have no confidence that the current court will accord them justice, and/or a fair trial.

6. It is a further ground that in its ruling, the Honorable judge erroneously omitted and/or neglected to analyze, interpret and make a determination on the issues raised and prayers requested by the applicants. That the court failed and/or omitted to address itself to and make reference to as well as a determination on the issue of calling for and examining the records of the trial court under ELDORET CMCC NO. 617 of 2020 hence leading to the incomplete determination of the application.

7. That the Respondent/Decree holder in ELDORET CMCC NO. 617 of 2020 is in the meantime preparing to execute the decree as against the applicants and had already obtained decree and proclaimed the applicants' goods indicating an intention to execute the court decree anytime as from date of delivery of the ruling.

8. That the applicants will suffer grave prejudice if orders of stay are not granted since the Honorable court inadvertently omitted to analyze and make a decision on the crucial issues raised in the application including the unprocedurality of the proceedings from which the judgment and decree arose.

9. In response to the application, the Respondent filed grounds of opposition dated 24th July, 2024.

10. The parties equally filed their written submissions, which I have had occasion to peruse through and are summarized as hereunder:

Applicant's submissions

11. It was submitted for the Applicants that the Honorable Justice R. Nyakundi ought to disqualify and/or recuse himself from any further conduct of this matter. Learned counsel grounded this submission

on allegations of possible collusion, impartiality, and aggravated failure to consider evidence tendered by the Applicants. Counsel pointed to what he termed as pointed questioning by the judge on matters that were irrelevant to the considerations at hand.

12. Learned counsel Mr. Maosa submitted that there was a clear case of bias contrary to the provisions of the Judicial Code of Conduct for judicial officers. In supporting this contention, counsel extensively relied on Rule 36 of the Judicial Service (Code of Conduct and Ethics) Regulations published under *Legal Notice No. 102 of 2020*, which mandates judicial officers to carry out their duties with impartiality and objectivity.

13. It was further submitted that Rule 41 of the said Code was violated, as the judge manifestly displayed biasness by failing to ensure compliance with his own orders of 13/12/2023. These orders had directed the Deputy Registrar to ensure the subordinate court records were actually availed. Counsel argued that this demonstrated apparent biasness and lack of objectivity in making the decision of 21/6/2024.

14. Learned counsel drew the court's attention to Rule 40 of the Code of Conduct and Ethics, submitting that the language and manner of questioning by the Honorable Judge violated this provision. To buttress this argument, counsel cited the case of *Gachuri v Attorney General & another; Kenya Judges Welfare Association & another (Interested Parties) (Constitutional Petition E0304 of 2023*) [2024] KEHC 1632 (KLR), where the court emphasized Lord Denning's principle that justice must be rooted in confidence.

15. On the question of whether the ruling dated 21/6/2024 was amenable for review, learned counsel relied on Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(b) of the Civil Procedure Rules, 2010. To support this position, counsel cited the Court of Appeal decision in Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau, which was approvingly quoted in Grace Akinyi v Gladys Kemunto Obiri & another [2016] eKLR.

16. Regarding what constitutes an error on the face of the record, learned counsel relied on the Court of Appeal decision in Nyamogo & Nyamogo v Kogo (2001) EA 174, which established the distinction between a mere erroneous decision and an error apparent on the face of the record.

17. Learned counsel emphasized that the court made serious errors apparent on the face of the record. In particular, counsel submitted that the court failed to take cognizance of its own orders issued on 13th December 2023 calling for subordinate court records. Instead, the court proceeded to deliver a ruling without any mention of these records or the prayers related to them, which counsel argued was an absurdity that infringed on the Applicants' constitutional right to fair trial.

18. Mr. Maosa further submitted that it was imperative to note that the Honorable Court failed to make a conclusive order regarding how the application dated 4/9/2023 was dealt with. He argued that the court only pronounced itself on the extension of time to file an appeal against the judgment of the subordinate court, leaving other matters unaddressed and raising questions about the ruling's actual enforceability.

19. In conclusion, learned counsel submitted that the grounds on the face of the application, as well as the evidence contained in Joshua Misigo's supporting affidavit, demonstrated merit warranting the application's allowance to enable the court to effectively deal with issues of correctness, procedural propriety, legality, and validity of the proceedings which led to the judgment delivered on 6/12/2022. On the question of costs, learned counsel submitted that the costs of both the current application and the application dated 4/9/2023 should be granted to the Applicants, as they had to move the court for errors not occasioned by themselves.

Respondent's Submissions

20. Learned counsel Mr. Kenei, appearing for the Respondent, submitted that this Honorable Court rendered a ruling on 21st June 2024, finding that the Applicant had not justified reasons to warrant extension of time for Appeal and had not met the threshold for Stay of Execution of the trial court's judgment pending appeal.

21. It was submitted for the Respondent that not every allegation of bias would justify recusal of a judge. In supporting this position, learned counsel relied heavily on the Court of Appeal decision in Rawal v Judicial Service Commission & Another; Okoiti (Interested Party); International Commission of Jurists & another (Amicus Curiae) [2016] eKLR, which adopted the test propounded by the Supreme Court of Canada in R. V. S. (R.D.) [1977] 3 SCR 484. The test, counsel submitted, established that the apprehension of bias must be reasonable and held by reasonable and right-minded persons applying themselves to the question with the required information.

22. Mr. Kenei further submitted that the Applicants had not proffered any evidence to demonstrate that the Honorable Judge was biased or that the manner in which the proceedings were conducted pointed to an advantage to the Respondent. He emphasized that the court had given the Applicants' counsel an opportunity to submit orally on the gist of their application.

23. On the question of forum shopping, learned counsel relied on the case of Solomon Wanyoike Wainaina v Sunrise Synthetic Limited [2020] eKLR, where it was held that seeking recusal while simultaneously seeking review of the same decision amounts to forum shopping and giving the Applicant an opportunity to choose its court at the detriment of the Plaintiff/Respondent.

24. Regarding the review application, learned counsel cited the case of Khalif Sheikh Adan V Attorney General [2019] eKLR, which referenced Republic -Vs- Public Procurement Administrative Review Board & 2 Others (2018) eKLR, to outline the restricted grounds for review. These grounds, counsel submitted, included discovery of new and important matter, mistake or error apparent on the record, or any other sufficient reason, provided the application is made without unreasonable delay.

25. Mr. Kenei placed significant reliance on Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR, emphasizing that a review may only be granted to correct an apparent error or omission, which must be self-evident and should not require elaborate argument to establish.

26. In conclusion, learned counsel submitted that this was a classic case of abuse of court process, noting that the Applicants had failed to lodge an appeal within the timelines set by law and had resorted to frustrating execution through multiple applications. He urged the court to dismiss the application with costs to the Respondent, characterizing it as a continuation of mischief by the Applicants.

Analysis and determination

27. Having carefully considered the submissions, evidence, and arguments presented by all parties, this matter raises questions about judicial impartiality and the circumstances under which a judge should recuse themselves from proceedings. At its core, this court must examine not only the specific allegations of bias but also their implications for the administration of justice and public confidence in the judiciary.

28. From the onset, let me point out that the instant application presents a peculiar challenge in its structure and approach. The applicants have, in what appears to be a single application, conflated multiple distinct prayers seeking various reliefs; from recusal to review, from stay of execution to setting aside previous orders. This shotgun approach to litigation, where multiple prayers of varying nature

are stuffed into a single application, not only complicates the court's task but also risks obscuring the real issues requiring determination.

29. The practice of lumping together disparate prayers, some of which could potentially conflict with others, does not align with the ideals of focused and efficient litigation. For instance, the applicants simultaneously seek my recusal while asking me to review my previous decisions, prayers that are inherently contradictory in nature. As noted in Solomon Wanyoike Wainaina v Sunrise Synthetic Limited [2020] eKLR, seeking recusal while simultaneously seeking review of the same decision amounts to forum shopping and gives the applicant an opportunity to choose their court at the detriment of other parties.

30. This scattergun approach to litigation, while perhaps tactically advantageous from a litigant's perspective, does not serve the interests of justice. It unnecessarily complicates proceedings and may actually work against the applicant's interests by diluting the force of any legitimate grievances they might have. The better practice would have been to file separate applications for distinct reliefs, allowing each to be considered on its own merits.

31. Nonetheless, the issue that is predominant and needs attention is that of recusal.

32. The principles governing judicial recusal are now well settled. The Supreme Court in Gladys Boss Shollei v Judicial Service Commission & Another [2018] eKLR established that there is a presumption of impartiality that attaches to judicial officers by virtue of their training and oath of office. This presumption can only be displaced by cogent evidence demonstrating actual or perceived bias. The court stated:

> " It must always be remembered that there is a presumption of impartiality of a Judge. In The President of the Republic of South Africa & 2 others v South African Rugby Football Union & 3 others, (CCT16/98) [1999] the South African Constitutional Court held that there was a presumption of impartiality of judges by virtue of their training. Therefore, they would be able to disabuse themselves of any irrelevant personal beliefs or predispositions when hearing and determining matters."

33. The test for bias, as articulated in various authorities including Jan Bonde Nielsen v Herman Philipus Steyn & 2 Others [2014] eKLR, is whether a fair-minded and informed observer, having considered all the facts, would conclude there was a real possibility the tribunal was biased. Mere suspicion or speculation is insufficient.

34. The concept of recusal, while seemingly straightforward, requires careful consideration of competing principles. On one hand, justice must not only be done but must manifestly be seen to be done. On the other hand, judges have a solemn duty to hear and determine matters before them, and should not lightly abdicate this responsibility. The Supreme Court articulated this balance eloquently in Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others, emphasizing that while the circumstances requiring recusal are not cast in stone, the underlying objective remains constant: to ensure that justice between parties remains uncompromised. The court stated:

> " The term is thus defined in Black's Law Dictionary, 8th ed. (2004) [p.1303] as: "Removal of oneself as judge or policy maker in a particular matter, [especially] because of a conflict of interest." From this definition, it is evident that the circumstances calling for recusal, for a Judge, are by no means cast in stone. Perception of fairness, of conviction, of moral authority to hear the matter, is the proper test of whether or not the non-participation of the judicial officer is called for. The object in view, in the recusal of a judicial officer, is that justice as

between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised."

35. This court is called upon to determine whether sufficient grounds exist to warrant my recusal from further hearing this matter. The applicants' case for recusal rests on several grounds: first, that I failed to ensure compliance with my own orders of 13th December 2023 directing production of subordinate court records; second, that I displayed bias through pointed questioning during proceedings; and third, that my ruling of 21st June 2024 was incomplete and failed to address crucial aspects of their application.

36. Examining the first ground regarding the subordinate court records, the applicants contend that my failure to ensure compliance with directions demonstrates bias. This argument is unpersuasive. Administrative delays in producing court records, while regrettable, cannot alone sustain an allegation of bias. The record shows appropriate directions were given, and any delay in compliance does not evidence partiality toward either party.

37. The applicants' concerns about pointed questioning during proceedings similarly fall short of establishing bias. Robust case management and thorough examination of submissions are integral to the judicial function. The mere fact that questions may have seemed pointed to the applicants does not demonstrate prejudice or predetermination of issues.

38. Regarding the ruling of 21st June 2024, the applicants argue that my failure to address all aspects of their application reveals bias. This misapprehends the nature of judicial decision-making. While courts must consider all material issues, they are not required to address every argument exhaustively. A review of the ruling shows that essential issues were considered and determined, even if the outcome was unfavorable to the applicants.

39. Of particular concern is the suggestion that I demonstrated bias by failing to consider evidence that would have been available in the subordinate court records. However, the applicants have not demonstrated how access to these records would have materially altered the court's findings on the specific issue of extension of time to appeal.

40. Based on an objective assessment of all circumstances, I find that a fair-minded and informed observer would not conclude there exists a real possibility of bias. The grounds advanced by the applicants reflect disagreement with judicial decisions rather than demonstrable bias. In these circumstances, recusal would not serve the interests of justice but would instead risk undermining the court's ability to discharge its constitutional mandate effectively.

41. The applicants have also sought review of my ruling dated 21st June 2024. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules set out the grounds upon which a court may review its own decisions. These include discovery of new and important evidence, error apparent on the face of the record, or other sufficient reason. The threshold for review is deliberately high to prevent it from becoming a backdoor appeal.

42. In this instance, the applicants argue that there were errors apparent on the face of the record, particularly my alleged failure to consider the subordinate court records and to make conclusive orders. However, a careful reading of the ruling of 21st June 2024 reveals that the primary issues of stay and whether extension of time should be granted were comprehensively addressed. The Supreme Court in Republic v Independent Electoral & Boundaries Commission & 2 others [2018] eKLR emphasized that an error apparent on the face of the record must be self-evident and should not require elaborate argument to establish.

43. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

> "(1). Any person considering himself aggrieved-
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> (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 the 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.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."

44. In Republic –vs- Public Procurement Administrative Review Board & 2 Others the court held that:-

> "Section 80 gives the power of review and Order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review."

45. Further, in Shanzu Investments Limited v Commissioner for Lands (Civil Appeal No 100 of 1993) the Court of Appeal held that: -

> "Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *civil procedure act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

46. Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 had this to say:-

> "the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be

pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

47. It is trite law in our legal system that for the court to entertain the provisions of Order 45 Rule 1 of the Civil Procedure Rules, the error or mistake must be apparent on the face of the record of the impugned ruling or judgment as the concepts prescribed in Order 45 Rule 1 suggests an error or mistake to qualify as a ground for review must be such which may strike one on a mere looking at the record without requiring a long drawn process of reasoning to reach the conclusion that there has been a mistake or error. Therefore, the error and mistake on the face of the record must be self-evident. In my considered view, the Canon of review in our *Civil Procedure Act* is a jurisdiction to be exercised by the session judge who processed analyzed and made a determination on the issues touching on the dispute to vindicate or decline the rights of the applicant litigant or claimant to a petition, suit or originating summons. So, what is the essence of review? To me, it is the act of looking over something again with a view to correct or improve certain aspects of the impugned judgment or ruling, which is underpinned in the basic philosophy inherent in the universal acceptance of human fallibility. In the letter and the spirit of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, literally review means re-examination and reconsideration of the subject matter but not with the depth of an appellate jurisdiction. The review court must stay within the boundaries of the grounds clearly stated in Order 45 Rule 1 of the *Civil Procedure Act*. The power of review is very much endowed upon the High Court under Art. 165 of *the Constitution*, being a court of plenary jurisdiction with wide powers from unlimited original jurisdiction in criminal and civil matters, jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of rights has been denied, violated, infringed or threatened, jurisdiction to hear an appeal from a decision of a tribunal under *the Constitution*, the question whether anything said to be done under the authority of this constitution or any law is inconsistent with or in contravention of this Constitution, supervisory jurisdiction over the subordinate court and over any person, body or authority exercising a judicial or quasi-judicial function, for purposes of clause 6, the High court may call for the record of any proceedings before any subordinate court or person, body or authority and may make an order or give any directions it considers appropriate to ensure the fair administration of justice and it shall also hear and determine appeals from the subordinate courts and tribunals. In order to prevent miscarriage of justice or to correct grave and palpable errors committed by it or other subordinate courts and tribunals. It is instructive to appreciate that the object and ambit of Order 45 Rule 1 of the Civil Procedure Rules is invoked when a person considering himself or herself aggrieved either by a decree or by an order of the court from which appeal is allowed but no appeal is preferred and having met the criteria outlined therein is to apply for review of the decree or order before that same court which passed it. Interestingly, my reading of Order 45 Rule 1 has not imposed any prohibition or condition precedent to be met for the court to exercise the power of review. The only rider is a jurisdiction which is more restricted in its application than that of an appeals court. It is never an appeal in disguise.

48. In the present case, I have re-examined and reconsidered the original pleadings filed by learned counsel Mr. Maosa for the applicant seeking various remedies comprising of and not limited to enlargement of time to file an appeal, stay of execution of the judgment/decree of the trial court and any other orders incidental arising out of the grievances from the decision of the court below. The ratio decidendi of the ruling dated 21s June, 2024 was to the effect that the applicant had not met the criteria expressly stated in Section 79G of the *Civil Procedure Act*. The import of it denied the applicant the Constitutional right of appeal.

49. The grounds enumerated therein in the instant application are specific. The principles for interference in exercise of review jurisdiction are well settled as reiterated in the above case law or authorities. This court which passed the order is entitled to review the order or ruling pursuant to Section 80 of the

Civil Procedure Act as read conjunctively with Order 45 Rule 1 of the Civil Procedure Rules. What therefore I am now concerned with is whether the decision in the ruling of 21st June, 2024 did impair the provisions of Section 79G of the *Civil Procedure Act*, right of appeal over decisions generated by the subordinate courts and tribunals, the right to a fair hearing under Art. 50 and right on access to justice.

50. It follows therefore that the power of review can be exercised for correction of a mistake and error apparent on the face of the record. The re-appreciation of the trial court record and the substratum of the primary application in the impugned ruling is within the scope and purview of review jurisdiction. On perusal of the order under challenge by the applicant, it is clear that this court considered many questions whether the criteria set out in the proviso of Section 79G of the *Civil Procedure Act* has been met. Apparently prima facie there were underpinnings of the averments in the affidavit in support of the application like the missing file of the trial court, delayed preparation of the proceedings and the judgment which was to be a subject matter of the appeal, and the omissions made at that forum with regard to non-determination of the preliminary objection before the final outcome of the entire suit. Having had a second re-examination and scrutiny of the historical litigation of the trial court record and the basis laid for enlargement of time and the constitutional imperatives on fair trial rights and access to justice, the decision and order sought to be reviewed suffered from an error and mistake apparent on the face of the record. If the review sought by the applicant is not settled under this jurisdiction, that order if permitted to stand will lead to a failure of justice. This is not a repetition of old and overruled arguments by the applicant to re-open this litigation. This decision on review has been exercised with extreme care, caution and circumspection given the exceptional and compelling circumstances of this case. The material so canvassed was overlooked and is an excusable misfortune, mistake and error apparent on the face of the record. The words justice and injustice in my view are sometimes loosely used and have different meanings to different persons, litigants, petitioners or claimants of a suit particularly those on opposite sides of the dispute. This is what gave rise to the maxim that one man's justice is another's injustice. It is trite law that in any litigation or adjudication process, the man or woman who succeeds may think justice is on his/her side whereas the man or woman who loses is always prone to think injustice has been done to him/her by the court or tribunal. The courts of law under Art. 50(1) of *the Constitution* remain to be constitutional organs mandated to exercise such adjudicatory powers for the public good and have to balance the rights of parties and this has to be done within the four corners of the law. As a consequence, the arguments which were advanced by the applicant have shown that besides an error apparent on the face of the record has demonstrated reasonable sufficient grounds to call upon this court to exercise review jurisdiction. This is within the domain of Section 80 of the *Civil Procedure Act*.

51. For those reasons, following the guidelines of the case of Salat v. Independent Electoral and Boundaries commission & 7 others (2014) KLR-SCK, the right on access to justice under Art. 48 and the right to a fair hearing in Art. 50 of *the Constitution*, the order on enlargement of time be and is hereby reviewed to the extent that the applicant be allowed to approach the High Court on appeal. That the High Court then be bound to pronounce and rule on all issues before it while exercising appellate jurisdiction from the decision of the trial court.

52. The case of Leo Sila Mutiso v Hellen Wangari Mwangi (1999) 2 EA 231 laid down the parameters as follows:

> "It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the

appeal succeeding if the application is granted; and, fourthly, the degree of prejudice to the Respondent if the application is granted."

53. The entrenchment protection of the equality clause in Art. 27 of *the Constitution* puts forward the formulae that arbitrary, unjustified distinctions between the same class of people may subject them to discrimination in our constitutional sphere. The basic law guarantees in unlimited terms that all Kenyan citizens shall be equal before the law. It extends these guarantees and protection to all persons in Kenya even if they are not Kenyan citizens. This court has always recognized that the fundamental rights and freedoms have to be interpreted generously. Within the ultimate test of whether the departure by a court in considering various aspects of a case sharing identical characteristic but giving effect individualized decisions can be viewed as discriminatory. It is therefore necessary and useful to identify various factors by reference to which any such departure can be examined with a view to determining whether such a decision is non-discriminatory and therefore compatible with equality clause before the law. Clearly, there is no requirement of literal equality as premised in Art. 27 in the sense of unrelentingly identical treatment. For such rigidity will subvert rather than promote through even-handedness. So that in adjudication of cases and in certain circumstances a departure by the court from the literal equality will be a legitimate course and indeed the only legitimate course. The courts of law have a duty to justify such a departure that it is sensible and the fair minded people will recognize a genuine need for some difference of treatment. What is of significance is that the difference embodied in the particular departure selected by the court to meet that need is itself rational and proportionate to such a need. The binding factor is that when speaking about justice which courts do on people's behalf, it should have regard to their sense of fairness. In my experience as a judge of both the subordinate courts and superior courts I see no reason why the courts should not openly acknowledge such regard. There is much to be said in this application around the question of legitimate expectation and making the legal process before the courts as visibly participatory and as much as possible practicable.

54. This discussion would be incomplete without a word or so on stay of execution which has also been a subject matter in the litigation between the applicant and the respondent. The question of stay was extensively discussed in the impugned ruling, in which court placed reliance on Order 42 Rule 6(2) of the Civil Procedure Rules and the case of Butt v. Rent Restriction Tribunal (1982) KLR 417.

55. Having carefully weighed all considerations presented, and having found sufficient grounds to exercise review jurisdiction, the question of stay would then automatically kick in. The court recognizes the fact that where the right of appeal would be rendered nugatory in the absence of s stay, such orders ought to be granted. In the present circumstances, having allowed the applicant's request for review and consequently permitted the filing of an appeal, it follows that the execution of the decree at this stage would potentially negate the very purpose of the appeal. The court must therefore exercise its discretion in favor of granting stay of execution pending the hearing and determination of the intended appeal subject to suitable conditions that balance the interest of both parties.

56. In the upshot, the application for review is hereby allowed on the following terms:

    a. The ruling dated 21st June, 2024 is hereby set aside.

    b. The applicant is granted leave to file an appeal against the judgment delivered on 6th December, 2022 by Hon. Naomi Wairimu (SPM) in Eldoret CMCC No. 617 of 2020, such appeal to be filed within 45 days from the date of this ruling.

    c. Stay of execution of the judgment and decree in Eldoret CMCC No. 617 of 2020 is granted pending the hearing and determination of the intended appeal, on condition that:

i. The applicants shall deposit a bank guarantee of 50% of the decretal sum in court within 21 days from the date of this ruling, with a reputable bank.

ii. In default of either condition, the stay of execution shall automatically lapse.

d. The Deputy Registrar shall expedite the preparation and certification of proceedings from the subordinate court to facilitate the timely filing of the appeal.

e. Taking into consideration principles of efficient case management and shared judicial responsibility, and acknowledging that public confidence in the administration of justice is paramount, I hereby direct that the further hearing and determination of the substantive matter shall be conducted by Lady Justice Ominde.

f. The Deputy Registrar shall: Ensure a smooth transition of the complete file to Lady Justice Ominde and List the matter before Lady Justice Ominde for mention and further directions within 30 days of this ruling.

g. The costs shall abide by the outcome of the appeal.

57. It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET VIA CTS, THIS 23RD DAY OF DECEMBER 2024

.....

R. NYAKUNDI

JUDGE