



**Omole v Wachira; Communist Party of Kenya (CPK) & another (Interested Parties)
(Civil Appeal E298 of 2022) [2022] KEHC 11115 (KLR) (Civ) (4 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 11115 (KLR)

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

CIVIL

CIVIL APPEAL E298 OF 2022

JK SERGON, J

AUGUST 4, 2022

BETWEEN

BOOKER NGESE OMOLE APPELLANT

AND

BENEDICT WACHIRA RESPONDENT

AND

COMMUNIST PARTY OF KENYA (CPK) INTERESTED PARTY

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION . INTERESTED
PARTY**

RULING

- 1) The subject matter of this ruling is the motion dated July 31, 2022 taken out by Booker Ngesa Omole, the appellant herein whereof the appellant sought for the following orders:
 - i. The application be certified urgent, service thereof be dispensed with and the same be heard ex-parte in the first instance.
 - ii. The honourable court be pleased to review the Order No. (b) in the judgment delivered on 7/6/2022.
 - iii. That the court do order the respondent and the 1st Interested Party to transmit the name of the appellant to the 2nd Interested party.
 - iv. That this honourable court grant any other relief that it considers just and fair.
 - v. Costs of this application be provided for.



- 2) The appellant filed an affidavit and a supplementary affidavit he swore in support of the application. When served with the motion, Benedict Wachira, the respondent herein, filed a replying affidavit he swore to oppose the motion.
- 3) Communist Party of Kenya (CPK), the 1st Interested party filed a notice of preliminary objection to oppose the application. When the aforesaid motion came up for interpartes hearing, parties were directed to file and exchange written submissions.
- 4) I have considered the grounds stated on the face of the motion and the facts deponed in the rival affidavits. I have further considered the grounds stated on the notice of preliminary objection dated August 2, 2022.
- 5) It is the submission of the appellant that this court made orders that were not prayed for and which were not supported. The appellant pointed out that amounts to an error of law which is apparent on the face of record. It is argued that although the appeal was allowed the prayers in the memorandum of appeal were not granted. This court was urged to correct the error which is apparent on the face of record by ordering the 1st Interested Party to submit the name of the appellant to the 2nd Interested Party.
- 6) Mr. Wandago, learned advocate for the appellant urged this court to resolve the question as to whether the appellant exercised his right of appeal. The learned advocate stated that the appellant had simply filed a notice of appeal and thereafter applied for extension of time to appeal out of time.
- 7) The respondent through the arguments of Mr. Opwora learned advocate opposed the application stating that the application does not qualify to be regarded as an application for review since it does not meet the requirements specified under order 45 of the [Civil Procedure Rules](#).
- 8) The learned advocate further argued that the appellant/ applicant having lodged a notice of appeal expressing his intention to prefer an appeal against the decision of this court, he lost the right to file an application for review. This court was therefore beseeched to find the appellant's application to be incompetent.
- 9) The respondent further argued that the orders sought by the appellant cannot be granted since the elections are just seven days away and the 2nd Interested Party (IEBC) has already printed, received and distributed the ballot paper to all constituencies. It is also argued that the appellant has not demonstrated a single ground warranting a grant of an order for review of the judgment of Lady Justice Mulwa of June 7, 2022.
- 10) In its notice of preliminary objection, the 1st Interested Party through the submissions of Mr. Arende, learned advocate urged this court to find that it has no jurisdiction to entertain the instant application since the appellant/applicant has opted to exercise and fully exhausted his right of appeal against the judgment of this court to the Court of Appeal.
- 11) The 1st Interested Party further argued that the instant application is an abuse of the process of this court since the applicant has already invited this court to consider prayers 2, 3 and 4 of the current application vide his application on record dated 9th June 2022 in which Lady Justice Mulwa held that the court was functus officio as far as the prayers were concerned.
- 12) The 2nd Interested Party through the submissions of Mr. Mbakaya urged this court to find that the appellant's application is an abuse of the court process since the applicant has exhausted the right of appeal against the impugned judgment of this court all the way to the Court of Appeal and a ruling delivered on July 29, 2022. The 2nd Interested party also stated that it has already exercised part of its



constitutional mandate and has printed and delivered to the country the August General Elections ballot papers.

- 13) In response to the submissions of both the respondent and the Interested Parties, Mr. Wandago, learned advocate for the appellant/applicant urged this court to find that the appellant has not exhausted the right of appeal hence the application for review is properly before this court.
- 14) Having considered the material placed before this court plus the rival submissions, it is apparent that two issues were presented to this court for determination. First, is whether the application for review is competently before this court. Secondly, whether the application meets the conditions required in order for it to be regarded as an application for review.
- 15) I will start with the second question as to whether the application meets the requirements of an application for review. I have already taken into account the rival submissions over this ground. The appellant avers that this court made an order referring the complaint to be reconsidered by the Political Parties Disputes Tribunal yet the appellant did not pray for such an order. This court was beseeched to treat this as an error apparent on the face of record.
- 16) It is apparent from the record that the appellant did not pray for an order referring the complaint to be considered afresh by the Political Parties Disputes Tribunal.
- 17) The Court of Appeal in the case of *Otieno, Ragot & Co. Advocates vs National Bank of Kenya Ltd* (2020) eKLR held inter alia

“The respondent sought an order that the application be allowed which meant that the reference that had been dismissed be allowed. It did not ask that the reference be heard afresh. Yet the learned judge went ahead to grant an order not prayed for by the respondent. As correctly submitted by Mr. Otieno, once the learned Judge formed the view that the respondent was not entitled to the order allowing its reference as prayed, he should have dismissed the application. There is no power on the part of the learned Judge to grant a relief that has not been asked for.....”

- 18) I have already stated that there is no dispute that there was no order seeking to have the complaint referred back to the Political Parties Dispute Tribunal for fresh consideration. The question is whether that can that be treated as an error on the face of record?
- 19) In my view the error pointed out cannot be a ground for review. The correct position in law is that the error is a perfect ground of appeal and not a ground for review. The fact that a Judge has misapprehended the applicable law cannot by itself be regarded as an error apparent on the face of record. It is an issue which can only be determined by the appellate court and not by way of review.
- 20) Under order 45 rule 1(1) of the *Civil Procedure Rules*, the main grounds for review are specified to be inter alia:

“Discovery of new and important matter or evidence, mistake or error apparent on the face of record or for any other sufficient reason and that the application has to be made without unreasonable delay.”

- 21) Having considered the arguments put forward in support and against the application, I am not convinced that the appellant has demonstrated any ground warranting a grant of review of the judgment of Lady Justice Mulwa of June 7, 2022. There is no error that is apparent on the face of



record, there is no new discovery of evidence and there is no sufficient reason justifying a grant for review. In sum, the instant application does not qualify to be regarded as an application for review.

22) The first issue is whether the application is competently before this court. I have already taken into account the rival submissions. The respondent and the Interested Parties have argued that the appellant is not entitled to file an application for review having filed an appeal. The appellant is of the submission that he never filed an appeal but he instead merely filed an application seeking for extension of time to file an appeal out of time.

23) I have considered the material placed before this court and it is apparent that the appellant lodged a notice of appeal and later filed an application for extension of time to file an appeal out of time. The aforesaid applications were later dismissed by the Court of Appeal. There is no doubt that the filing of an appeal in the Court of Appeal is initiated by the lodging of a notice of appeal. The Court of Appeal expressed itself in the case of *Francis Origo & another vs= Jacob Kumali Mungala* (2005) eKLR as follows:

“In the present appeal, appellants preferred an appeal first from the Magistrate’s court to the High Court and then to the Court of Appeal by filing a notice of appeal. Their appeal was however struck out since the notice of appeal had been filed out to time.

24) A similar situation arose in *Kisya Investments Ltd vs= A. G and R. L. Odupoy* C. A. No. 31 of 1995 (unreported) in which the court interalia said:

“The principal and the only ground of appeal urged before us was that the 1st defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law.”

Review application should be filed before the appeal is lodged. It is presented before the appeal is preferred, the court has jurisdiction to hear it although the appeal is pending. Jurisdiction of the court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with..... A review application is incompetent after appeal is preferred.”

25) In the instant matter, it is not in dispute that the appellant filed a notice of appeal and an application for leave to file an appeal out of time. Both the notice of appeal and the application were struck out. It is clear to me therefore that the appellant’s application for review dated August 1, 2022 is incompetently before this court. This court has no jurisdiction to entertain the application. The same is ordered struck out and dismissed with costs to the respondent and the Interested Parties.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF AUGUST, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent



..... for the 1st Interested Party

..... for the 2nd Interested Party

