



**Amani National Congress Party & 2 others v Shimenga & another (Election
Petition Appeal E001 of 2022) [2022] KECA 740 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 740 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
ELECTION PETITION APPEAL E001 OF 2022
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JUNE 24, 2022**

BETWEEN

AMANI NATIONAL CONGRESS PARTY 1ST APPELLANT

**AMANI NATIONAL CONGRESS NATIONAL ELECTION BOARD 2ND
APPELLANT**

RAMADHAN BUTICHI 3RD APPELLANT

AND

DAVID KUBASU SHIMENGA 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 2ND RESPONDENT**

*(Being an Appeal from the Judgment of the High Court of Kenya at Kakamega
(Musyoka, J.) dated 27th May, 2022 in High Court Elections Appeal No. E001 of 2022)*

JUDGMENT

KIAGE, JA'S REASONS FOR THE JUDGMENT

1. By our judgment delivered on 7th June, 2022, we allowed the appellants' appeal and remitted the matter to the Political Parties Disputes Tribunal (The Tribunal) for the expedited hearing of their review application dated 28th April, 2022. We found to be erroneous the holding by the High Court at Kakamega (Musyoka, J.) that a notice of appeal previously filed by the appellants precluded them from pursuing the said review application before the Tribunal but reserved our reasons. These are mine.
2. The 1st and 2nd appellants had initially been sued through a complaint before the Tribunal by David Kubasu Shimenga the 1st respondent, over the issuance of a party nomination certificate to Ramadhan Butichi, the 3rd appellant herein to represent Amani National Congress for the Ikolomani



- Constituency National Assembly contest. The Tribunal by a judgment delivered on 28th April, 2022 found in favour of the 1st respondent.
3. Following that judgment, the said appellants were aggrieved and filed a notice of appeal on the date of the judgment.
 4. They then filed, germane to this appeal, an application dated 7th May, 2022 by which they sought, in the main, a review of the judgment. The basis of that application was that the 1st respondent had misrepresented to the Tribunal that he had attempted internal dispute resolution with the party mechanisms before filing his complaint. He had not in fact done so, they contended, as he had not paid the requisite fees for the party to hear him. This omission was unknown to them at the hearing of the complaint. Moreover, they had also discovered that the 1st respondent was not a paid up member of the party.
 5. The 1st respondent answered that application by stating that it was an abuse of the process of the court since the appellants had already filed a notice of appeal. Moreover, the matters raised did not meet the threshold for review. The Tribunal on 14th May, 2022 issued what it called “Directions” and “Ruling” expressing satisfaction that the appellants had discovered new and important evidence not in their possession when judgment was rendered. It thus set aside the judgment and directed the parties to file and serve further replies and skeletal arguments. In the meantime, the appellants were restrained from submitting the 1st respondent’s name to the 3rd respondent, the Independent Electoral and Boundaries Commission (IEBC).
 6. It was the 1st respondent’s turn to be aggrieved, and he filed an appeal before the High Court. The learned Judge allowed his appeal, restored the judgment of the Tribunal and directed that the 1st respondent be deemed to be the 1st appellant’s nominee and candidate for member of Parliament for Ikolomani Constituency. A cross-petition by Butichi, the 3rd appellant was dismissed.
 7. The appellants were aggrieved by the learned judges’ determination and have preferred this appeal by which they contend that he erred in law in four respects which can be summarized as;Allowing the appeal on account of the notice of appeal they filed yet no memorandum of appeal had been filed.Declining to consider and determine the review application pending before the Tribunal.
 8. Following directions given for the efficient and expedited hearing of the appeal, the parties filed written submissions and authorities which were highlighted by Mr. Malenya, learned counsel holding brief for Mr. Biketi at the plenary hearing of the appeal on 6th June, 2022. The appellants first submitted, citing Order 42 Rule (1)(1) of the *Civil Procedure Rules*, that an appeal to the High Court is by way of a memorandum of appeal and that under those rules, there is no requirement or provision for a notice of appeal in appeals to the High Court, unlike in appeals to this Court.
 9. They argued further, citing this Court’s decision in *CHAIRMAN BOARD OF GOVERNORS HIGHWAY SECONDARY SCHOOL -VS- WILLIAM MUOSI MOI* [2007] eKLR that a notice of appeal is only a formal notification of an intention to appeal and does not amount to the preferring of an appeal that precludes the exercise of the option of review. To them, therefore, the notice of appeal they filed did not constitute an appeal to the High Court. They faulted the learned Judge for finding incompetent, by reason of the notice of appeal, their review application in which they questioned the Tribunal’s jurisdiction given they had found evidence that the 1st respondent had not exhausted the internal dispute resolution mechanism of the 1st appellant as required by section 40 of the *Political Parties Act*. Their case was that they discovered the 3rd respondent had not paid the requisite Kshs.50,000 for his complaint before the 2nd appellant to be processed.



10. Mr. Malenya concluded his submissions by stating that the learned Judge had the jurisdiction and discretion to himself hear the review application and criticized him for declining to do so. He urged us to allow the appeal, set aside the judgment of the High Court, dismiss the 3rd respondent's complaint before the Tribunal for want of jurisdiction and order that Ramadhan Butichi be deemed the duly nominated candidate for the Amani Congress Party for the position of member of National Assembly for Ikolomani Constituency.
11. Opposing the appeal, the 1st respondent addressed the issue of review after notice of appeal mainly. He took the view in his submissions, highlighted by his learned counsel Mr. Isinta, that at the time the appellants filed their application for review, their notice of appeal "*was still in play*" and this showed a saving of the appeal in case the review failed, yet a party cannot have it both ways. He cited this Court's decision in *Otieno Ragot & Company Advocates -v- National Bank of Kenya Limited* [2020] eKLR which described such conduct as "*gambling with the law and the judicial process*" and that '*it is precisely to avoid this kind of scenario*' that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal.
12. Counsel rejected as "*strange and not backed by law*" the argument that the learned Judge ought to have himself heard and determined the review application filed and pending before the Tribunal. He then restated that whatever grievances the appellants had against the judgment of the Tribunal could only be addressed in an appeal as opposed to an application for review, which latter path amounted to proceeding in the wrong direction. He cited *Pancras T. Swai -v- Kenya Breweries Limited*[2014] eKLR, a decision of this Court.
13. The 2nd respondent, IEBC took the position that it was improperly and prematurely joined in these proceedings. This was in its brief written submissions adopted by its learned counsel Mr. Bosire.
14. It is apparent that this appeal turns on the single issue of whether the learned Judge erred in holding that the Tribunal was bereft of jurisdiction to entertain an application for review by the applicants who had previously filed a notice of appeal.
15. It is worth noting at the outset that under the *Civil Procedure Act* and Rules and the *Political Parties Act* and the Rules thereunder, appeals of the Tribunal are not originated by a notice of appeal. Indeed, a notice of appeal on the part of a party intending to appeal to the High Court is not contemplated and is an unknown document. Thus, we should think that whatever the jural and jurisdictional significance of a notice of appeal signifying, intent to appeal from the High Court or courts of equal status to this Court may be, it would be erroneous for that significance to be imported and applied to a notice of appeal improperly and gratuitously filed by a party intending to appeal to the High Court. In the latter case the notice of appeal is a document of no legal force or significance that ought to be either struck out or ignored at best. It cannot confer any rights or benefits, nor can it impose liabilities or penalties.
16. Whether acting out of ignorance or *ex-abundanti cautela*, it is plain that the appellants filed a wrong and incompetent document in the form of a notice of appeal, which did little more than introduce confusion and contention. Had they intended to file an appeal to the High Court, all they needed to have done, at the basic minimum, was file a memorandum of appeal complying with Order 41(1) which states that "every appeal to the High Court should be in the form of a memorandum of appeal signed in the same names as a pleading." On that double basis then, namely that the notice of appeal filed in respect of this matter is not a document of any legal force, and, further, that the appellants did not file a memorandum of appeal to legally and effectually have filed an appeal, the conclusion would



seem inescapable that they would not have been precluded from pursuing the path of review by dint of Rule 45(1) of the Civil Procedure Rules which provides as follows;

“Any person considering himself aggrieved— (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.”

17. The learned Judge when interpreting the foregoing provision and the jurisprudence on the issue expressed himself thus; in paragraph 22 of the judgment, which is worthy of our quoting in extenso;

22. Ground 1 is about the 1st and 2nd respondents pursuing an appeal and a review concurrently, contrary to Order 45 Rule 1 of the *Civil Procedure Rules*. Under that provision review is sought in cases where an appeal is allowed, but none has been filed; and where no appeal is allowed. So, where an appeal is allowed, a party may only seek review where the appeal has not been filed. The classical position on entertaining review where a notice of appeal has been filed is that stated in *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR [Makhandia, Kiage & Otieno-Odek, JJA] where it was asserted that there can be no place of review once an intention to appeal has been intimated by filing a notice of appeal. That is so as the notice of appeal is treated as the appeal itself. In *Multichoice (Kenya) Limited vs. Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR [Ouko P, Makhandia, Kiage, Gatembu & Sichale, JJA, it was stated, by Ouko P, that the filing of a notice of appeal is a mere manifestation of an intention to appeal, and the notice is not the appeal, it is not a bar to the filing of an application for review. The Court of Appeal is, no doubt, conflicted on the matter. I will go by the position stated in *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR [Makhandia, Kiage & Otieno-Odek, JJA], for, under the Court of Appeal Rules, which provide for filing of notices of appeal, the date of filing of appeal is reckoned from the date the notice of appeal was filed. Consequently, the filing of a notice of appeal is of consequence. That being the case, the 1st and 2nd respondents could not file appeal and review at the same time. They ought to have filed a notice to withdraw the notice of appeal, if they had abandoned the appeal route, and had chosen to pursue review instead. The application for review, dated 28th April, 2022 was, by dint of *Otieno Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR (Makhandia, Kiage & Otieno-Odek, JJA), incompetent.” (Emphasis in original)

18. In this excerpt, the learned Judge captured the crux of the controversy before him and in this appeal. He took the view that this Court “*is conflicted on the matter*” and proceeded to prefer the interpretation espoused in *OTIENO RAGOT & COMPANY ADVOCATES -VS- NATIONAL BANK OF KENYA LIMITED* (Supra) which he referred to as “*the classical position*” that there can be no place for review once an intention to appeal has been intimated by the filing of a notice of appeal since the notice of appeal is treated as the appeal itself.

19. The contrary view, which the learned Judge therefore rejected, is in *Multichoice (K) Limited -v- Wananchi Group (K) Limited & 2 Others* (Supra) which posits that the filing of a notice of appeal, is a



mere manifestation of an intention to appeal and not an appeal and is therefore no bar to the filing of an application for review. It is a matter of some awkwardness that two Judges of this Court, Makhandia, JA and I, sat on both decisions which were rendered within four months of each other, but it seems the later decision did not refer to the earlier one. As I shall shortly show, however, what controversy, confusion, conflict and contention over the issue as may be said to exist at the present moment is more apparent than real, as the question was in fact authoritatively and conclusively laid to rest in the later of the decisions, namely *Multichoice*. *Multichoice* was a decision of an extra ordinary bench of this Court comprising five Judges and empaneled by the President of the Court for precisely the purpose of providing clarity on the issue of whether or not the filing of a notice of appeal precludes the pursuit of the path of review.

20. The President of the Court had been urged by Waki, Nambuye and Koome, JJA (as they then were) to constitute a five-Judge bench because it was submitted before them that some cases, such as *Kisya Investments Limited -V- Attorney General & Another* [1966] eKLR had taken the *preclusion* posture contrary to the “*mere intent*” position taken in others including the *Equity Bank Limited -VS- West Link MBO Limited* [2013] eKLR, a five-Judge decision. It is apposite to point out that *Kisya Investments* is the sole decision that was relied on by the Otieno-Ragot bench.
21. The decision of the Court on the question was an emphatic No, as made abundantly clear in the lead judgment of Ouko, P (as he then was) with all the other Judges (including Makhandia, JA and me, who had with the late Odek, JA decided Otieno-Ragot concurring. I think and hold that *Multichoice*, therefore, is the authoritative pronouncement of the law on this question and it is the one the learned Judge ought to have adopted and applied as it was binding on him. It was a later decision and by an extraordinary bench, which does count for something. I would be bold as to hold that by the sheer weight of precedent to the contrary, decisions such as *Kisya Investments* and *Otieno Ragot*, are black swans and do not reflect the thinking of this court on the subject.
22. In a thorough and impressively reasoned judgment, in my respectful view, Ouko, P undertook a kaleidoscopic survey of the more relevant jurisprudence on the question at hand. The end result is that virtually all the distinguished Judges of this Court and its predecessor had since 1955 (with the decision of *Motel Schwetser -VS- Thomas Cunningham & Another* [1955] 22 EACA 252) spoken overwhelmingly in favour of the view that a notice of appeal is only a formal notification of intention to appeal, and does not amount to the party filing it having preferred an appeal and does not therefore preclude the party from exercising the option of review. And that would be the case even if the notice of appeal had not been withdrawn.
23. After surveying the cases he sampled, Ouko P then made the following observation, with which I am in full agreement now, as I was when I penned my concurrence then;

A similar view was expressed in the following passage from *I. C. Kamau Ndirangu v Commercial Bank of Africa Limited (1994) eKLR*, where Cockar,- as he then was -Omolo & Tunoi- as he then was - JJ.A, restated the proposition thus;

*‘However, Mr Gatonye is on a much stronger pitch in his other reason which is supported by a decision of this Court in Civil Appeal No 122 of 1992 *Yani Haryanto v ED & F Man (Sugar) Ltd (unreported)* that a mere filing of notice of appeal did not constitute preferment of an appeal. The learned judge had clearly erred in holding that the appellant had by virtue of order 41 rule 4(4) of the Civil Procedure Rules preferred an appeal by filing his notice of appeal. Order 41 rule 4(4) of the*



Civil Procedure Rules is confined only to the purpose of staying execution". (My Emphasis).

24. If further proof is required that this question has been long settled, I will cite, finally the case of *Noradhco Kenya Limited V. Gloria Michele*, (1998) eKLR, where Pall, JA also agreed with the earlier decisions in *Yani Haryanto* (supra) and *Motel Schwetser* (supra), and added that;

‘I agree that the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is: Can the lodging of the notice of appeal be tantamount to preferring an appeal itself’ The filing of a notice of appeal in my humble view cannot deprive a party of his right under O.44 r. 1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.

..... I am therefore unable to agree with Mr. Ndubi that as the applicant had lodged a notice of appeal which was pending when it applied to the superior court for review of the summary judgment, the superior court did not have jurisdiction to entertain the said application and that there was therefore very little chance of the applicant having a successful appeal from the order refusing the application which did not lie in law.’ ”

25. The learned President Emeritus had earlier adverted to the fact that even though a notice of appeal is “deemed” to be an appeal, such deeming is meant to provide the jurisdictional basis for entertaining stay of execution, injunction and like interlocutory relief pending appeal. It does not in actuality convert a notice of appeal into an appeal. His own words were these;

Likewise, for the purpose of applying for an order of stay of execution under Order 42 Rule 6(4) of the Civil Procedure Rules provides that;

‘6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

...

4. For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.’ ” (Emphasis).

26. It is the notice of appeal, evincing the aggrieved party’s intention to challenge, in this Court the impugned decision, that gives jurisdiction to the courts to entertain applications under Rule 5(2)(b) and Order 42 rule 6(4), respectively. For the purposes of the latter, an appeal to the Court of Appeal is “deemed__ to have been filed when under the Rules of that Court notice of appeal has been given”. This is the only instance, as far as I am concerned, where the notice of appeal is treated as an appeal, yet strictly speaking, the two are distinct. It has been explained before that a notice of appeal will be



treated as an appeal only for the very specific and limited purpose of enabling a party who has lost in the superior courts below to seek an order of stay of execution, or of proceedings, or an injunction before this Court.

27. In colloquial terms, to deem something to be, is to “regard” or “consider” it as the thing though it is not, in fact the thing. It is, as Griffith C. J. called it, a fiction. In the Australian case of *Muller V. Dalgety & Co. Ltd*, (1909) 9 CLR 693, at p 696, Griffith C. J. expressed as follows the meaning of the term:

‘The word deemed may be used in either sense, but it is more commonly used for the purpose of creating what James L.J. and Lord Cairns L.C. called a “statutory fiction” (see *Bill v. East and West India Dock Co.*) (1), that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purpose for which the statutory fiction is introduced.’ (Emphasis supplied).

28. The word “deemed” as used in Order 42 Rule 6(4) clearly conveys the construction that it is not an appeal, strictly speaking.”

29. The matter is thus quite settled and I would leave it at that, but for the need to address as a practical matter the question whether a party who has previously filed a notice of appeal and decides to pursue a review should first withdraw the notice of appeal. Given what I have already stated as the position of this Court that a notice of appeal is not a preferment of an appeal, it should be plain that the notice of appeal need not be first withdrawn.

30. Argument was made before us, based on the brief concurring judgment of my learned brother Gatembu Kairu, JA in [Multichoice](#). The full text of his Lordship’s judgment was this;

I have had the benefit of reading, in draft, the judgment of Ouko, JA (P) and I am fully in agreement with the reasoning and the conclusions. I would only emphasize that where a party has filed a notice of appeal but subsequently applies to the court from which the appeal came to review the decision impugned, that party must, in the first place, withdraw the notice of appeal.”

31. Whereas, indeed, the judgment says a party must in the first instance *withdraw the notice of appeal*, my own thinking is that his Lordship must have meant *withdrawal of the appeal*. This interpretation would accord with the settled case law set out by Ouko P and Gatembu Kairu, JA expressed himself as being in full agreement with the President’s reasoning and conclusions, as were the rest of us who sat on that bench.

32. I think, with respect, that the part of Ouko P’s judgment that Gatembu Kairu, JA was properly laying emphasis on, is found at page 21-22 of the former’s judgment and it should put the matter beyond the pale of controversy;

In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from



which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal.”

33. So then, it is with the observation that a party wishing to pursue review must first withdraw his previously filed *appeal*, which is not synonymous with a notice of appeal, that Gatembu Kairu, JA, alongside the rest of us, was agreeing.
34. In the premises, the Tribunal did have jurisdiction to entertain the application for review and the learned Judge was, respectfully, in error in holding otherwise.
35. It is for these reasons that I allowed the appeal, reversed the learned Judge and ordered that the matter be remitted to the Tribunal for the hearing of the application for review.

NGUGI, JA'S REASONS FOR THE JUDGMENT

1. This appeal was heard on 6th June 2022 and a judgment of the Court delivered on 7th June 2022, with the reasons therefor to be delivered on 24th June 2022. The reasons are as captured by Kiage JA in the Reasons for the Judgment, which I agree with fully and have nothing further to add.

TUIYOTT, JA'S REASONS FOR THE JUDGMENT

1. I have had the advantage of reading the reasons captured by Kiage, JA with which I am in full agreement and have nothing useful to add.

DATED AT KISUMU THIS 24TH DAY OF JUNE, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the judgment.

Signed

DEPUTY REGISTRAR

