



**Omole v Wachira; Communist Party of Kenya (CPK) & another (Interested Parties)
(Civil Application E247 of 2022) [2022] KECA 967 (KLR) (26 August 2022) (Reasons)**

Neutral citation: [2022] KECA 967 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E247 OF 2022
DK MUSINGA, F SICHALE & S OLE KANTAI, JJA
AUGUST 26, 2022**

BETWEEN

BOOKER NGESA OMOLE APPLICANT

AND

BENEDICT WACHIRA RESPONDENT

AND

COMMUNIST PARTY OF KENYA (CPK) INTERESTED PARTY

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

*(Being an application for extension of time to file Notice of Appeal from the Judgment of the
High Court of Kenya at Nairobi (Mulwa, J.) dated 7th June, 2022 in H.C.C.A. No. E298 of 2022)*

REASONS

1. The subject matter was an electoral dispute filed at the Political Parties Disputes Tribunal at Nairobi (PPDT Complaint No. E041 of 2022) by the applicant, Booker Ngesa Omole, against the respondent Benedict Wachira and the interested parties (Communist Party of Kenya and Independent Electoral & Boundaries Commission). That complaint was dismissed by the Tribunal in a Judgment delivered on 8th May, 2022 after which the applicant moved the High Court of Kenya at Nairobi in HCCA No. E298 of 2022 praying for various orders. In a Judgment delivered on 7th June, 2022 Mulwa, J. set aside the orders of the Tribunal and referred the complaint to the Interested party (Communist Party of Kenya) for appropriate action in terms of its (the party) constitution and rules on nomination of candidates. That Court was moved by the applicant in a Motion where various prayers were made but the application was dismissed in a ruling delivered on 30th June, 2022. The applicant did not file a Notice of Appeal on time as required by the rules of this Court. He moved this Court in a Motion which was placed before a single Judge as one of the prayers was for leave to extend time for filing a



Notice of Appeal. That Motion came up for hearing on 12th July, 2022 when counsel for the applicant applied to withdraw the prayer for leave to extend time. The Motion was marked as withdrawn under rule 54 of the Court of Appeal Rules in respect of the said prayer for leave to extend time.

2. In a Motion brought under rule 4 of the Court of Appeal Rules, Section 3A and 3B of the *Appellate Jurisdiction Act* and all enabling provisions of the law, the applicant prayed in the main that the Court be pleased to extend time for filing Notice of Appeal and Record of Appeal against the Judgment in HCCA No. E298 of 2022 and that record of appeal be deemed to have been properly filed. Grounds in support of the Motion were set out on its face and in an affidavit of the applicant. M’Inoti, J.A. considered the application and in a ruling delivered on 25th July, 2022 the learned Judge found no merit in the application which he dismissed with costs to the respondents.
3. In a letter dated 28th July, 2022 M/S Okongo, Wandago & Company Advocates indicated that the applicant was dissatisfied with the decision of the Single Judge and asked that the same be referred to the Court for it to be “.....varied, discharged or revised.”
4. We heard the reference on 27th July, 2022 when the applicant was represented by learned counsel Mr. Wandago; learned counsel Mr. Baraza appeared for the respondent, learned counsel Mr. Arande Oriri appeared for Communist Party of Kenya, while learned counsel Mr. Mbakanya appeared for Independent Electoral & Boundaries Commission.
5. Mr. Wandago submitted that the single Judge acted on a misapprehension of evidence and the law and exceeded his jurisdiction by what counsel said was considering merits or demerits of the appeal. Learned counsel thought that the Judge should have made no comment on the issue that the electoral process for the national elections scheduled in the territory of Kenya on 9th August, 2022 should not be disrupted. Counsel asked us to review the decision as the applicant has an appeal on merit.
6. In opposing the reference Mr. Baraza referred to this Court’s decision in the case of *Charles Karathe Kiarie & 2 Others v Administrator of the Estate of John Wallace Mathare (deceased) & 2 Others* [2013] eKLR on the test of what is to be demonstrated in an application for review of a decision of a single Judge. It was held in that case that a review of a single Judge’s decision entails interference with the exercise of a Judge’s discretion and such interference is permitted only in exceptional circumstances. Counsel for the respondent submitted that there were no exceptional circumstances in the matter we were being asked to review and wondered why the applicant had withdrawn the prayer for leave to extend time when the matter first appeared before the single Judge.
7. Mr. Arande Oriri went through the reasons given by M’Inoti, J.A. for dismissing the Motion and submitted that we should dismiss the reference as the Judge had not considered irrelevant factors or failed to consider relevant ones.
8. Mr. Mbakaya reminded us that IEBC was acting on strict timelines; ballot papers for the relevant constituency had been printed and delivered and interfering with that process would be costly in time and money. According to counsel, the dispute on nomination of the applicant as a candidate was a party issue which had not gone to IEBC.
9. Mr. Wandago, in reply denied that the applicant had engaged in forum shopping and stated that the applicant had not instructed his previous lawyer to withdraw the first application.
10. We gave our decision on 29th July, 2022 where we dismissed the Motion.
11. These are our reasons for that decision.



M’Inoti, J.A. considered the reasons why the applicant had not filed an appeal on time as required by the rules of this Court and was not satisfied with the reasons given. He reached the conclusion that the appellants were not entitled to a favourable exercise of discretion and he dismissed the Motion.

12. Rule 54 of the Court of Appeal Rules, 2022 (previously rule 55) allows a party who is dissatisfied with such a decision to apply informally to the Judge or by letter to the Registrar for reference to Court within 7 days for the said decision to be varied, discharged or reversed. The applicant, as we have seen, applied for reference by a letter dated 25th July, 2022.
13. The Supreme Court of Kenya gave guidance to courts on what to consider in a reference such as the one before us in the case of *Charles Karathe Kiarie & 2 Others v Administrator of the Estate of John Wallace Mathare (deceased) & 2 Others* [2020] eKLR to the following effect:

(17) As a review of a single judge’s decision entails interference with the exercise of the judge’s discretion, on the authority of the Court of Appeal for Eastern Africa in *Shah v. Mbogo & Another* [1967] EA 116, which jurisprudence was affirmed by this Court in *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, such interference is permitted only in exceptional circumstances. What are those circumstances?

18. Therefore, for such an application to succeed, the applicant must satisfactorily demonstrate that in reaching his decision, the judge acted whimsically or misdirected himself in the exercise of his or her discretion and as a result reached a manifestly wrong decision causing apparent injustice.”

That same Court in the case of *Parliamentary Service Commission v Martin Nyaga Wambora & Others* 2018 Eklr had stated on the same issue:

- (25) In the celebrated case of *Shah v Mbogo and another* [1967] EA 116, the High Court, Harris, J. stated as follows as regards the power of the Court to set aside an ex-parte judgment made in exercise of a discretion:

“I have carefully considered, in relation to the present application, the principles governing the exercise of the Court’s discretion to set aside a judgment obtained ex- parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”

26. On appeal of this decision, the *Court of Appeal P (in Mbogo and Another v Shah [1968] EA 93 at 96)* affirmed the decision of the High Court thus:

“We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.”

26. We are persuaded by this decision of the Court of Appeal, the apex Court then, and affirm that it is still good law as regards an appeal or review motion to upset an exercise of discretion by a



Judge. While the principles therein were set in an appeal, they are applicable to an application for review like this one.”

14. We reviewed the reasons given before the single Judge of this Court and the decision he reached on the matters in issue. We did not discern any error in the way the Judge exercised his discretion. He did not consider matters which he should not have considered; he did not ignore any relevant factors. We found that there was proper exercise of judicial discretion and these are the reasons for dismissing the Motion. Each party should bear its own costs of the application.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

D.K. MUSINGA, (P)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

