



REPUBLIC OF KENYA



KENYA LAW
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**Malamu v Gakuru & another (Civil Appeal 31 of 2018)
[2021] KECA 359 (KLR) (17 December 2021) (Ruling)**

Neutral citation: [2021] KECA 359 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 31 OF 2018
DK MUSINGA, RN NAMBUYE & AK MURGOR, JJA
DECEMBER 17, 2021**

BETWEEN

DAVID MULWA MALAMU APPLICANT

AND

PETER MURAGE KAMANJA 1ST RESPONDENT

JOHN WAWERU GAKURU 2ND RESPONDENT

(An Application seeking a review of the Ruling and Orders issued by this Court dated 23rd October 2020 in respect to the Appellant's application dated 25th February 2020.)

RULING

1. This ruling is in respect of the respondents' application dated 2nd December 2020 which is brought under Articles 25(c), 27, 50 and 159 of the Constitution, as well as sections 3, 3A and 3B of the Appellate Jurisdiction Act and rules 31 and 57 (2) of this Court's Rules. The respondents urge this Court to review its ruling and orders issued on 23rd October 2020 in respect of the appellant's application dated 25th February 2020.
2. In the supporting affidavit to the application sworn by Washington Nderitu Komu, the respondents' former advocate, he deposes that by a motion dated 25th February 2020, the appellant sought leave to adduce additional evidence and pursuant to this Court's directions, the appellant filed and served his written submissions on 14th July 2020.
3. The respondents instructed their advocates to oppose the application, which he did, by preparing and electronically filing a replying affidavit on 21st July 2020; a notice of preliminary objection dated 21st July 2020 and written submissions dated 21st July 2020. All the said documents were filed on 22nd July 2020. The documents were also served upon the appellant's Advocates.



4. The appellant's application was disposed of by way of submissions without any participation by counsel and the ruling thereon was delivered on 23rd October 2020. In the said ruling, this Court indicated, inter alia that: "the motion has not been opposed by any replying affidavit from the respondents." That statement was occasioned by the fact that the respondent's replying affidavit was not part of the documents that were availed to the Court during the hearing of the appellant's application.
5. When the respondents' advocates received a copy of the impugned ruling, he wrote to the Court's Deputy Registrar on 27th and 30th October 2020 drawing attention to the fact that a replying affidavit had indeed been filed, and that the same was not brought to the judges' attention.
6. By an email dated 24th November 2020, this Court's Deputy Registrar acknowledged that indeed the respondents' replying affidavit was inadvertently not availed to the judges during the hearing and directed the respondents to move the court appropriately for the necessary orders.
7. Mr. Ngatia, Senior Counsel for the respondents, submitted that the respondents were prejudiced by the inadvertent omission of the respondents' replying affidavit from the court's record. They urged us to allow the application for review.
8. The appellant opposed the respondents' application. In his replying affidavit on which his advocate, Dr. Kamau Kuria, Senior Counsel relied upon, he stated that the application is incurably defective in that:
 - a) This Court lacks jurisdiction as it is functus officio;
 - b) The respondents, being aggrieved by this Court's ruling of 23rd October 2020 ought to have filed a notice of appeal within fourteen (14) days and an application for leave to appeal to the Supreme Court against the ruling and therefore the application is before the wrong court;
 - c) In the alternative, the respondents should have applied for the setting aside of the impugned ruling within (fourteen) 14 days from the date of its delivery, and having failed to do so, this Court lacks jurisdiction to entertain the application for review.
9. The appellant further stated that even if the Court had jurisdiction to hear the application, the same is wholly lacking in merit; the respondents' advocates have breached the rule of professional conduct which requires advocates' letters addressed to the court to be copied to the other side but they did not do so in their letters dated 27th and 30th October, 2020 and 24th November 2020.
10. For those reasons we were asked to dismiss the respondents' application.
11. We have considered the affidavits on record and submissions by Senior Counsel. One of the documents that is in the court file and which we consider germane to our determination of this application is a letter dated 11th November 2020 from Lorraine Ogombe, this Court's Deputy Registrar addressed to the Hon. Lady Justice R. N. Nambuye, J.A. who presided over the hearing of the appellant's application that gave rise to the impugned ruling. In the said letter, the Deputy Registrar states as follows:

"We have rechecked the court record and confirm that the respondent filed documents in reply to the application. The documents were filed electronically before the hearing date. On 29th July 2020, I sent the following electronic documents by email to the Hon. Judges:

 - a. Notice of motion
 - b. Applicant submissions (sic)



- c. Applicant list of authorities (sic)
- d. Respondent submission (sic)
- e. Respondent list of authorities (sic)
- f. Preliminary objection
- g. Notice of change of advocates

Our registry staff were also requested to print the documents and to place them in the court file for your Ladyship's consideration.

Unfortunately, the said documents were not placed in the court file, nor was the Replying Affidavit availed, due to inadvertent omission.

We sincerely apologize to your Ladyship and the Honourable Judges for this omission and seek your further directions.”

12. It is therefore evident that the respondents’ replying affidavit was inadvertently not availed to the judges during the hearing of the appellant’s application. To that extent, the respondents’ right to a fair trial that is guaranteed by Articles 25(c), and 50 of the Constitution was compromised. That is sufficient to dispose of this application. We shall however pronounce ourselves, albeit briefly, on the appellant’s submissions in objection to the application for review.
13. Regarding the issue of lack of jurisdiction to handle the application for review, in the circumstances as highlighted above, we are satisfied that the Court has jurisdiction to review its ruling that was occasioned by an inadvertent omission of a vital document that had been filed by the respondents. Likewise, we do not agree that the respondents’ remedy only lay in filing an appeal to the Supreme Court. In any event, the Supreme Court cannot entertain an appeal from an interlocutory ruling of this Court.
14. The respondents cannot be blamed for any delay in instituting their application. As soon as they became aware of the ruling, they engaged this Court’s Deputy Registrar to find out what became of their replying affidavit.
15. All in all, we are satisfied that the interests of justice in this matter tilt in favour of granting the orders as sought by the respondents. Consequently, we hereby review this Court’s ruling delivered on 23rd October 2020 and set it aside in its entirety. We further direct that the application dated 25th February 2020 seeking to adduce additional evidence be heard afresh before a bench that shall exclude Musinga, (P), Nambuye and Murgor, JJ.A. Each party shall bear its own costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

