IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), KOOME & KANTAI, JJ.A]

CIVIL APPEAL NO. 385 OF 2017

BETWEEN

ADRIAN KAMOTHO NJENGA.....APPELLANT

AND

CABINET SECRETARY, MINISTRY OF INFORMATION

COMMUNICATION AND TECHNOLOGY.....1ST RESPONDENT

COMMUNICATIONS AUTHORITY OF KENYA....2ND RESPONDENT

PAUL KUKUBO.....3RD RESPONDENT

MUGAMBI NANDI.....4TH RESPONDENT

DAVID CHERUIYOT KITUR.....5TH RESPONDENT

LEVI OBONYO OWINO.....6TH RESPONDENT

CHRISTOPHER GUYO HUKA.....7TH RESPONDENT

PATRICIA W. KIMAMA.....8TH RESPONDENT

KENTICE L. TIKOLO.....9TH RESPONDENT

(An appeal from a Ruling of the High Court of Kenya (J.M. Mativo, J) at Nairobi dated 27th September, 2017 **in**

Petition No. 203 of 2016

****

JUDGMENT OF THE COURT

This is an appeal by the appellant **Adrian Kamotho Njenga,** against a ruling of **Mativo, J.** deliverd on **27th September, 2017**. The matter before the learned Judge related to an application for review of orders of **Lenaola, J**. (as he then was) in a judgment delivered on **24th February 2017**. **Mativo. J.** did not find merit in the application which he dismissed.

Let us set out the background of the matter at the High Court for a better understanding of this appeal.

The appellant filed a petition at the Constitutional and Human Rights Division of the High Court of Kenya at Nairobi being Petition No. 203 of 2016. The respondents here who were also the respondents there are Cabinet Secretary, Ministry of Information Communication and Technology (1st respondent), Communication Authority of Kenya (2nd respondent), Paul Kukubo (3rd respondent), Mugambi Nandi (4th respondent), David Cheruiyot Kitur (5th respondent), Levi Obonyo Owino, (6th respondent), Christopher Guyo Huka (7th respondent),

Patricia W. Kimama (8th respondent) and Kentice L. Tikolo (9th respondent). It was prayed in the petition that a declaration be issued that actions of the respondent were in violation of ***Articles 10*** and ***27*** of the ***Constitution*** of Kenya; that a declaration be issued to declare the actions of the respondents to be in violation of ***Section 6B(10)(c)*** of the ***Kenya Information and Communication Act***; that a declaration do issue to declare Gazette Notice No. 1267 dated 27th February and published on 26th February, 2016 to be invalid and an order of *certiorari* be issued to quash the said notice; that a declaration be issued to declare Gazette Notice No. 3152 dated 29th April, and published on 4th May 2016 to be invalid and an order of *certioari* to be issued to quash it; that an order of *mandamus* be issued directing the respondents to comply with the gender requirements and ensure that at least 4 out of the 12 appointees to the Board of the Communications Authority of Kenya were of opposite gender; that costs be granted and the court be at liberty to grant any orders or relief as may be just and expedient.

Grounds relied on in support of the motion for interim relief and the petition itself were that the composition of the Communications Authority Board failed to abide by ***Article 27*** of the ***Constitution*** and was the epitome of gender segregation and insensitivity; that the appointments to the Communications Authority of Kenya Board were in breach of the outright provisions of ***Section 6B(10)(c)*** of the ***Kenya Information and Communications Act*** which obligated the respondents to ensure that the appointees reflected the interests of all sections of society and that no candidate from the legally recognized Board of ICT proffessionals was included despite meeting their appointment criteria; that the discrimination by the respondents against members of the ICT professional community while constituting a board meant to govern ICT Sector contradicted the national values of inclusivity and good governance as ennunciated under ***Article 10*** of the ***Constitution***; that in failing to abide by the constitutional statutory and gender requirements, the respondents had fallen short of the values and principles of public service espoused under ***Article 232*** of the ***Constitution***, and, finally, that the actions of the respondents were contrary to ***Article 19*** of the ***Constitution*** which envisaged the dignity of individuals and realization of the potential of persons of both gender.

Lenaola, J. considered the case made for the appellants and that made for the respondents and found as a fact that the respondents had not breached any article of the constitution or any provision of the ***Kenya Information and Communications Act Cap 411A*** Laws of Kenya. The motion for interim relief and the petition were dismissed, parties being ordered to meet their own costs as the Judge found that the petition had been filed in the public interest. That was on 24th February, 2017.

By a Notice of Motion accompanied by a certicate of urgency filed at the High Court on 17th May 2017, the appellant prayed to that court to review the judgment and or set aside the orders made on the said date, 24th February, 2017. In the grounds set out in support of the review application and in a supporting affidavit of the appellant, it was stated, amongst other things:

> ***1. "...***
>
> ***2. THAT the judgment culminating in the orders made did not take into account fundamental matters of law raised during the proceedings***
>
> ***3. THAT in particular, no determination was made with regard to the mandatory provisions of Section 1(2) of the First Schedule to the Kenya Information and Communication Act (KICA)***
>
> ***4. THAT Section 1(2) of the First Schedule to KICA dictates that the members of the 1st Interested Party's Board be appointed at different times so that the respective expiry dates of their terms of office shall fall at different times***
>
> ***5. ……***
>
> ***6. THAT the Respondent blatantly violated the law by gazetting all the seven members of the Board on the same effective date notably 29th April, 2016.***
>
> ***7. THAT, the appointments having been gazetted on the same effective date, the terms of the members will lapse on the same date contrary to Section 1(2) of the First Schedule to the Kenya Information and Communications Act.***
>
> ***8. ..."***

We need not set out all the grounds which were stated as those we have set out capture the essence of the matter before the High Court on the application for review.

The motion was opposed and in a considered ruling, **Mativo, J**, as we have said did not find merit in the same and dismissed it. In the course of the ruling, the Judge considered various case laws and the provisions of ***Section 80*** of the ***Civil Procedure Act, order 45*** of the ***Civil Procedure Rules*** and came to the conclusion that the motion before him did not fall within the province of review as matters raised challenged the judgment instead and should have been taken on appeal. No appeal had been filed against the judgment delivered on 24th February, 2017.

There are 20 grounds of appeal set out in the Memorandum of Appeal drawn by the appellant. It is stated *inter alia* that the ruling appealed is:

> ***"..... an outright plagiarism/piracy/copypaste of the decision in Stephen Gatua Kimani vs. Nancy Wanjira Waruingi t/a Providence Auctioneers [2016]eKLR, rendered by the High Court of Kenya at Nyeri on 19th February, 2016".***

It is also said that the learned Judge violated ***Articles 73, 74, 75*** of the ***Constitution*** as read together with the judicial oath of office set out under ***schedule 3*** of the ***Constitution*** by pirating the said case we have set out.

In other grounds, it is said that the decision appealed violates Clauses 4, 5, 6, 7, 8 and 9 of the Judicial Code of Conduct and Ethics. The learned Judge is further faulted for failling to independently and without prejudice consider the appellant's case on merits and thus occassioning the appellant a miscarriage of justice. It is also said that the learned Judge abdicated the original jurisdiction and that the ruling is untenable in law. In other grounds it is said that the appellant's right to fair hearing was contravened; that the learned Judge was wrong in failing to record the appellant's submissions; that the learned judge was wrong in failing to take into account sufficient reasons preferred by the appellant; that there was no unreasonable delay in lodging the application for review; that the Judge misapprehended the identities of the parties; that the ruling was altered after delivery; that the ruling ran counter to case law and finally:

> " ***That the learned trial judge tremendously compromised public interest and the rule of law, by generating a judicial verdict that absurdly grants the 1st respondent the latitude, liberty and convenience to choose whether or not to comply with plain provisions of the Constitution and the Kenya Information and Communications Act''.***

For all that we are asked to allow the appeal and in effect allow the application for review which was dismissed by the High Court.

The appeal came up before us for hearing on 29th January,2019 this year when the appellant appeared in person and **Miss Okimaru** appeared for the 2nd to 9th respondents. The 1st respondent represented by the Attorney General had been served with a hearing notice on 5th of December, 2018 but did not appear. We allowed the appeal to proceed for hearing.

The appellant who appeared in person is shown in the record to be a lawyer and a holder of various other qualifications including being the Secretary General of the Information Communications Technology Association of Kenya. This is borne out by his affidavit sworn at an unstated date, filed in High Court on 15th May, 2017. He had filed written submisisons which he fully relied on. In those submssions, the appellant gives a background of the appeal and says many things which are not helpful in determining this appeal. For instance he says that the application which was dated 15th May 2017 (this is the application for review) was finalized in less than a day, three weeks ahead of the scheduled delivery date of 18th October 2017. We do not understand the complaint here whether the appellant is questioning why a ruling was delivered before its date. It would appear that the parties including the appellant were present when the ruling was delivered. The appellant also complains in the submissions that the ruling was altered and cites as an example page 99 of the record. A perusal of that page shows that there is a handwritten addition of the words "& the interested parties" at the tail-end of the ruling. Again this complaint has no merit as a judicial officer who is delivering a judgment or a ruling is entitled to add or remove any word or words as a judgment is being delivered before the same is penned-off. The additional words were minor and did not alter the substance of the decision.

In further submissions, the appellant identifies Articles of the Constitution and case law conferring jurisdiction on the High Court to do various things. He submits that the trial Judge did not address his case at all. He asks us in conclusion to uphold the rule of law as enshrined in the Constitution by allowing the appeal.

Miss Okimaru had also filed written submissions in opposition to the appeal which she addressed us on in a highlight. She identified as an issue for our determination the question whether the appellant had met the threshold to warrant the High Court to review or set aside the earlier judgment. According to counsel, the appellant was wrong in attempting to appeal the findings of the High Court arising from the petition in this appeal. Counsel submits that the appellant was heard both on the petition and the review application and determinations made according to law. Relying on various case law, counsel prays that the appeal be dismissed. She also asks for costs.

We have considered the record of appeal, the submissions made and the law. We identify as the only issue arising in this appeal whether **Mativo, J.** was right in holding that the application before him did not meet the principles that guide a court in an application for review. The other matters raised in the Memorandum of Appeal are irrelevant and we should not spend time considering them at all. For instance, there is no mechanisms provided to us by the appellant to hold that Mativo, J. engaged in plagiarism of another case. Judges are free to refer to previous decisions and quote from them if they find useful material in past cases which are relevant to the matter before them.

Section 80 of the ***Civil Procedure Act*** and ***order 45 Rule 1 Civil Procedure Rules*** are well set out in the ruling appealed from. By ***Section 80*** of the said ***Act*** any person who considers himself aggrieved by a decree or order from which an appeal is allowed by the said Act but from which no appeal has been preferred or is aggrieved by a decree or order from which no appeal is allowed by the said Act may apply for a review of the judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit.

> ***Order 45*** of the said rules which sets out the procedure to give effect to the said ***section 80*** of the ***Act*** is in the following terms:

''45 (1)(1) 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, this is below and who from the discovery of new and important matter or evidence which, afrer the exercise of due diligence was not within his knowledge, or could not be produced by him at the time when the decreee was passed or the order made, or on account of some mistake or error apparrent 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 review of judgment to the courts which passed the decree or made the order without unreasonable delay''.

A useful discussion as to when a court may consider and order a review is to be found in the case of ***National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR,*** where the following passage appears:

''A review may be granted whenever the court considers that it is necessary to correct an apparent error or an ommission on the part of the court. The error or an ommission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.''

Mativo, J. in the ruling appealed from found that the power of review was available only when there was an error apparent on the face of the record and that the judgment which was sought to be reviewed did not suffer any error apparent on the face of the record. The judge also found that there was no new or important matter or evidence which had come to the appellants knowledge or that there was sufficient reason to occasion a review. He also found that the application was made with unexplained delay; that the issues raised were matters touching on the court's finding, interpretation and application of the law and that such issues or matters could be challenged only by an appeal but not on a review application.

We have set out in this judgment some of the grounds the appellant relied on in his application for review. It is said for instance that **Lenaola, J** made orders which did not take into account fundamental matters of law raised during the proceedings; that the Judge did not make a determination on provisions of a statute which were cited before him and that he erred in the interpretation he made of statutes; and that the Judge erred in not finding that the statute provided that a Board be appointed whose members should serve terms of office which should end at different times.

These were not issues that could be taken in an application for review by a Judge of equal jurisdiction. Those were matters that belonged to the province of an appeal.

We have considered the whole record and we have come to the conclusion that the learned Judge reached a correct decision in rejecting the application for review. Having so found and because we do not see any merits in the other grounds of appeal, this appeal is dismissed.

The appellant says that he is motivated by public interest in moving the courts in litigations he files and we note that **Lenaola, J**. accepted that position. We will go in the same direction and order each party to meet their own costs of this appeal.

Dated and delivered at Nairobi this 8th day of March, 2019.

W. OUKO (P)

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JUDGE OF APPEAL

M. KOOME

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR