



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, M'INOTI & J. MOHAMMED, JJ.A.

CIVIL APPLICATION NO. NAI 18 OF 2014

BETWEEN

JENNIFER KOINANTE KITARPEI APPLICANT

AND

ALICE WAHITO NDEGWA 1ST RESPONDENT

THE INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION 2ND RESPONDENT

(An application to recall, rescind, set aside cancel or review the Judgment of the Court of Appeal at Nairobi (Karanja, Kiage & Gatembu Kairu, JJ.A) dated 20th December, 2013

in

C.A. NO. 194 OF 2013)

RULING OF THE COURT

Background

This is an application by *JENNIFER KOINANTE KITARPEI* ("the applicant) dated 5th February, 2014, expressed to be brought under *Sections 3A and 3B of the Appellate Jurisdiction Act, Rule 77 (1) of the Court of Appeal Rules 2010, Article 50 (1), Article 25 (c), Article 159 (2) (a) (d) & (e) and (3) of the Constitution of Kenya 2010*, seeking the following orders:

- 1. That pending the hearing and determination of this application, this honorable court be pleased to grant interim orders staying the execution of its Judgment delivered on 20th December 2013 to the extent that the Judgment is applicable to this Application.*
- 2. That this honorable court be pleased to set aside its Judgment delivered on 20th December 2013 to the extent that the Judgment is applicable to this Application.*

The application which is supported by an affidavit sworn by the applicant on 5th February, 2014, is premised on four main grounds which can be summarized as follows:

1. That this Honorable Court delivered Judgment on 20th December 2013 nullifying the nomination of the Applicant to the Laikipia County Assembly.

2. That the applicant was not a party to the proceedings in this Appeal and was only made aware of the appeal after Judgment had been issued and specifically on 20th January 2014.

3. That this application is presented on the principle that there cannot be a wrong without a remedy.

4. That the Court of Appeal is the only court that can provide a remedy to the applicant by setting aside its own judgment in the interest of justice.

ALICE WAHITO MWANGI NDEGWA [the 1st respondent] swore a replying affidavit dated 15th March, 2014, in opposition to the instant application.

The application challenges the judgment of this Court [*differently constituted*] in *Civil Appeal Number 194 of 2013* in respect of an appeal from the decision of the High Court (*Ngugi, Korir and Majanja, JJ*) delivered on 12th July, 2013, in *High Court Petition No. 305 of 2013* dismissing the 1st respondent's petition for orders that *THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION [IEBC]*, (the 2nd respondent), should have included the names of the 1st respondent in the final list for nomination to the Laikipia County Assembly. The more relevant and specific order sought and dismissed by the High Court, was that:

“The first appellant seeks an order to be included in the final list of nominees to the Laikipia County Assembly representing Gender Top Up in place of Jennifer Koinante Kitarpei.”

Aggrieved by the decision of the High Court, the 1st respondent preferred an appeal to this Court. After re-evaluation of the evidence, rival submissions and authorities placed before it, this Court determined the matter in favor of the 1st Respondent as follows:

“[38]. For those reasons, we are persuaded that the High Court erred in dismissing the petitioner's case and therefore allow the 1st appellant's appeal. IEBC shall accordingly proceed to gazette the 1st appellant as the duly elected special member under the general category for Laikipia County Assembly.

[47]. Finally we should say that despite the reference by the appellants to numerous provisions of the Constitution which were allegedly violated in this matter, the appellants, with the exception of the 1st appellant who demonstrated that she was condemned unheard, failed to establish on a balance of probabilities how and in what specific respects those constitutional provisions and safeguards were breached. It is not enough for a party to cite and invoke provisions of the Constitution or of the law and allege breach without offering any or any adequate evidence of the manner in which those breaches are said to exist.”

It is on the basis of the above decision that the applicant has moved this Court for orders to re-open and or review its own decision in this matter.

The application before us raises fundamental jurisdictional question as to whether this Court has powers to re-open and or review its own decisions. The facts of the appeal have been well articulated by this Court in *Civil Appeal No. 194 of 2013*, the subject of this application.

Submissions by counsel

When the application came up for hearing before us, learned counsel Ms Linda Milimu appeared for the applicant while learned counsel Mr Ondieki represented the 1st respondent. There was no appearance for the 2nd respondent. The applicant's submissions focused mainly on one issue; that being an interested party whose rights were directly affected by the outcome of the appeal, she should have been served in

order to participate in the proceedings before this Court. Counsel submitted that in essence, this Court condemned the applicant unheard contrary to the rules of natural justice.

Ms Milimu argued that *Under Rule 77(1) of the Court of Appeal Rules*, it was incumbent upon the Respondents to serve copies of the Notice of Appeal on all persons directly affected by the appeal before or within seven days after lodging the Notice of Appeal; that in the absence of such service, the appeal should be declared null and void or the judgment nullified. Counsel submitted that this Court is the only court equipped with power to remedy the injustice caused to the applicant as the applicant has no right to move the Supreme Court as the issues raised do not fall within the Jurisdiction of the Supreme Court under *Article 163 of the Constitution 2010*. Counsel urged us to allow the application.

Mr Ondieki opposed the application and argued that this Court has no jurisdiction to either set aside, nullify, re-open or review its own decision. He submitted that there are no rules providing for nullification of a judgment by the Court of Appeal as argued by the applicant. In his view, the application is incompetent and the orders sought are not available in law and this Court became *functus officio* once it delivered its judgment on 20th December, 2013. Counsel urged us to dismiss the application with costs.

Analysis and determination

We have carefully considered the application, the affidavits filed, the rival submissions by counsel and the authorities and the law.

The issues for determination before this court can be crystallized into two, namely:

(1) Whether the Court of Appeal has Jurisdiction to recall, rescind, set aside, cancel, review or re-open its own judgment.

(2) In light of a final Judgment of this Court having been delivered on 20th December, 2013, whether this court has jurisdiction to entertain an application under Rule 5(2)(b) of this Court's rules.

On the issue of jurisdiction, we are guided by the case of OWNERS OF MOTOR VESSEL "LILLIAN S" V CALTEX OIL [K] LTD, [1989] KLR 1 in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:

"Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

In the present application, the applicant sought orders for "setting aside" and "nullification of judgment" interchangeably. In this Court's decision in Lillian 'S' case, (*supra*) as restated by the Supreme Court

IN THE MATTER OF ADVISORY OPINION OF THE SUPREME COURT UNDER ARTICLE 163(3) OF THE CONSTITUTION, CONSTITUTIONAL APPLICATION NO. 2 OF 2011:

"The Lillian „S? case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity."

In light of the facts reflected in the application which show that the applicant was neither a party to the High Court Petition No. 305 of 2013 nor to the appeal No. 194 of 2013 in this Court, it is imperative for us to consider the issue of our jurisdiction in the matter having regard to the Constitution and the *Appellate Jurisdiction Act (Cap 9)*.

Article 164 of the Constitution establishes the Court of Appeal whose jurisdiction as succinctly spelt out in Article 164 (3) is to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. Section 3(1) of the Appellate Jurisdiction Act, further espouses the jurisdiction of this Court and provides that the Court of Appeal shall have jurisdiction to hear and determine appeals from the High court in cases in which an appeal lies to the Court of Appeal under any law.

Rule 35 of the Court of Appeal Rules gives this Court power to correct its judgment under what is popularly known as the slip rule. The rule provides:

“(1) A clerical or arithmetical mistake in any judgment of the Court or any error arising therein from an accidental slip or omission may at any time, whether before or after the judgment has been embodied in an order, be corrected by the Court, either of its own motion or the application of any interested person so as to give effect to what the intention of the Court was when judgment was given.

(2) An order of the Court may at any time be corrected by the Court, either of its own motion or on the application of any interested person, if it does not correspond with the judgment it supports to embody or, where the judgment has been corrected under sub-rule (1), with the judgment as so corrected.”

On the invocation of the slip rule (Rule 35), Sir Charles Newbold in LAKHAMSHI BROTHERS LTD V RAJA & SONS, [1966] E.A. 313 relied on the holding of this court in RANIGA V JIVRAJ, [1965] EA 700 (K) where the court stated that: “A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied beyond doubt, as to the order which it would have made had the matter been brought to its attention.”

From the above, it is plain to see that there is no express provision in the Constitution, the Appellate Jurisdiction Act, or the Court of Appeal Rules 2010 providing for the re-opening or review of concluded appeals save as provided under Rule 35 (slip rule).

This Court in ANARITA KARIMI NJERU V THE REPUBLIC, (No. 2) (1976-80) 1 KLR 1283, held that the Court of Appeal has only such jurisdiction as is expressly conferred on it by statute and cannot claim a general supervisory role over the judicial process.

The Court decided that in the special circumstances of Kenya the overriding need for finality of litigation had to take precedence.

On the issue of jurisdiction, to review its own decisions this Court in the recent case of BENJOH AMALGAMATED LTD & ANOR V KENYA COMMERCIAL BANK, CIVIL APPLICATION NO. SUP 16 of 2012, held that

it has residual jurisdiction to review its own decisions to which there is no appeal to correct errors of law that have occasioned real injustice or miscarriage of justice. The Court set the parameters for review by rendering itself thus:

“[57] As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).

[61] It is our finding that this Court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.
(Emphasis added)

[62] This Court will be reluctant to invoke its residual jurisdiction of review where, as here, there is laches or where legal rights of innocent third parties have vested during the intervening period which cannot be interfered with without causing further injustice. It will not entertain review of decisions made before the 2010 Constitution came into being. (Emphasis added)

The question for our determination is whether in the circumstances of this application, this Court can exercise its residual jurisdiction to re-open, review or reconsider the final decision as prayed by the applicant.

The application shows that the Nanyuki Chief Magistrate's Court Petition No. 2 of 2013, in which Jennifer Koinante Kitarpei (Jennifer), the applicant, was the 1st respondent, was determined and a decision made to the effect that the latter's election contravened the law and was, therefore, nullified. She filed appeal in the High Court at Nyeri, being Appeal No. 94 of

2013. That appeal is still pending.

In the meantime, Alice Wahito Ndegwa (Alice) moved to the High Court at Nairobi in Petition No. 305 of 2013, seeking an order to be included in the final list of nominees to the Laikipia County Assembly representing Gender Top Up in place of Jennifer in the 4th March, 2013 General Elections. She contended that her political party (TNA) nominated her but IEBC unfairly and unjustly removed her name and replaced it with the name of Jennifer, based she said, on the allegation that she was not a member of TNA. Her complaints to the IEBC Dispute Resolution Committee, like her petition to the High Court, was rejected. She then came to this Court. In Civil Appeal No. 194 of 2013, this Court found merit in her appeal and allowed it with costs to against IEBC. What is salient, however, is that Jennifer, although mentioned in High Court Petition No. 305 of 2013 as the person who had interest in the matter, was never made a party to the proceedings and it is not clear whether she was ever served with the petition as clearly the proceedings affected her as the person whose name was substituted for that of Alice who became aggrieved and moved to court as aforesaid seeking redress.

Jennifer seems to have been pre-occupied with Petition No. 2 of 2013 filed in the Chief Magistrate's court at Nanyuki by Alice Wahito Ndegwa against her (Jennifer), IEBC and TNA. When the Chief Magistrate held on

4th December, 2013, that she had contravened the law, nullified her election and proceeded to order that Alice who was duly nominated be gazetted, Jennifer moved to the High Court in Nyeri on appeal [No. 94 of 2013] which is still pending.

In her affidavit sworn on 19th September, 2013, in Petition No. 2 of 2013 before the Chief Magistrate at Nanyuki in response to the petition by Alice, Jennifer in paragraph 12 of that affidavit seems well aware of Election Petition No. 305 of 2013 in the High Court at Nairobi and the fact that it was dismissed. She had a copy of the judgment and it shows that although she was not named as a party, she was mentioned in connection with the substitution of her name with that of Alice. The judgment was in her favour and perhaps that is why she was not unduly concerned but abundant caution should have dictated that she keeps an eye on the matter in case an appeal against the judgment was preferred, as turned to be the case. As she now awaits for the hearing and determination of Appeal No. 94 of 2013 in the High Court at Nyeri, the appeal to this Court from the decision of the High Court in HCEP No. 305 of 2013 has already been determined in this Court's judgment delivered on 20th December, 2013, allowing the appeal by Alice for an order for Alice to be included in the final list of nominees to the Laikipia County Assembly representing Gender Top Up in place of Jennifer.

The matter now pending in the High Court at Nyeri in Appeal No. 94 of 2013 has been the subject of determination by this Court in Civil Appeal No. 194 of 2013.

Jennifer now seeks orders for stay of execution of this Court's judgment delivered on 20th December, 2013 in Civil Appeal No. 194 of 2013 in which she was not a party. She also seeks an order to set aside the said judgment.

Stay of execution which Jennifer seeks is governed by *Rule 5 (2) (b) of this Court's Rules*. The jurisdiction of this Court under the rule arises only where an appeal has been filed or a notice of appeal has been lodged. This is not the case here. The *Rule* states:

“5. (2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may-

(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.” (Emphasis added)

An application under *Rule 5(2)(b)* presupposes that such stays of execution of judgments or proceedings are only applicable when an appeal has been filed, under *Rule 75 and is pending* in this Court. The application under *Rule 5(2)(b)* contemplates a stay of the judgment of the High Court or any tribunal authorized by law while an appeal is pending in this court and NOT a stay of a final judgment of this court. Therefore, once a final judgment has been delivered in respect of any substantive appeal, this court becomes *functus officio*.

We find that this Court has no jurisdiction to entertain an application under *Rule 5(2)(b)* after a final judgment of this court has been rendered.

The rule gives this Court discretionary power to order stay of execution and is intended to facilitate preservation of the subject matter of the appeal in order to ensure the just and effective determination of appeals.

In *ISHMAEL KAGUNYI THANDE V HFCK, CIVIL APPLICATION NO. NAI 157 OF 2006*, this Court stated that:

“Two principles guide the court in the exercise of that jurisdiction (under rule 5 (2) (b) of the Rules of this Court). These principles are now well settled. For an applicant to succeed, he must not only show that his appeal or intended appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory.”

Civil Appeal No. 194 of 2013 has been disposed of. The judgment was delivered on 20th December, 2013. There is no evidence that it has not been implemented. The question of staying its execution cannot arise not least because in the first place, the party seeking stay was never a party to the appeal or to the proceedings giving rise to the judgment appealed from. This reasoning holds true for the second order in the application which seeks setting aside of the judgment.

It is patent, needless to emphasise, that the applicant, Jennifer, was not a party to the Civil Appeal NO. 194 of 2013 by Alice which this Court allowed on 20th December, 2013, against IEBC, the 2nd respondent herein, with costs, nor was she a party to the High Court Election Petition No. 305 of 2013 which gave rise to Civil Appeal No. 194 of 2013. In the circumstances, it is not open to her to challenge or seek to review the decision given in litigation to which she was not privy and did not participate. In short, she has no standing in the matter.

As a matter of principle, if, after litigation has been concluded, the court were to allow persons who are not parties to such litigation to butt in with applications to review decisions that are not directed to them, this would introduce chaos and wreak havoc to the administration of justice. A person who has no standing in a matter has no right to seek review or variation of the orders issued in the case. Standing is “a party's right to make a legal claim or seek judicial enforcement of a duty or right”. See page 1536 of *Black's Law Dictionary, 9th Edn*. Without standing, the applicant is a stranger and her application is bereft of merit because she is not privy to the litigation resulting in the orders she seems intent on having reviewed.

The applicant argues that her case cannot be canvassed before the Supreme Court. Her argument is that

being an interested party whose rights were directly affected by the outcome of the appeal, she should have been served by the 1st Respondent in order to participate in the proceedings before this court as provided for *Under Rule 77(1) of the Court of Appeal Rules*. That, in the circumstances she was condemned unheard against the rule of natural justice. The applicant alleged “*denial of fair hearing*”. Although it was open to the applicant to seek to be served with the appeal record in pursuance with *Rule 77 (1)* and thereafter participate in the appeal, she did not.

The right to a fair hearing is enshrined under *Article 50* of the Constitution. *Article 50* provides in relevant part that:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

Article 163 (4)(a) of the Constitution confers jurisdiction to the Supreme Court in matters involving the interpretation or application of the Constitution. It specifically provides that:

“(4) Appeals shall lie from the Court of Appeal to the Supreme Court-

(a) as of right in any case involving the interpretation or application of this Constitution; and ...”[emphasis added]

The applicant may, therefore, have a recourse to move the Supreme Court as of right for the interpretation or application of the Constitution without seeking the certification or leave of this Court. From the foregoing, it is therefore, evident that the applicant’s argument that her case can only be canvassed before this Court is misplaced.

In the result, this application has no basis and is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of October, 2014.

G. B. M. KARIUKI

JUDGE OF APPEAL

K. MINOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR