



REPUBLIC OF KENYA



**Okoti & 2 others v Attorney General & 14 others (Petition 2  
(E002) of 2021) [2023] KESC 13 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KESC 13 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 2 (E002) OF 2021  
PM MWILU, DCJ & VP  
FEBRUARY 17, 2023**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> APPELLANT  
ANTHONY OTIENDE OTIENDE ..... 2<sup>ND</sup> APPELLANT  
KATIBA INSTITUTE (KI) ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
SELECTION PANEL FOR THE NATIONAL LAND COMMISSION .... 2<sup>ND</sup>  
RESPONDENT  
THE NATIONAL EXECUTIVE ..... 3<sup>RD</sup> RESPONDENT  
MOSES KIPTUM SANANGA ..... 4<sup>TH</sup> RESPONDENT  
THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT  
GERSHOM OTACHI BW'OMANWA ..... 6<sup>TH</sup> RESPONDENT  
ALISTER MURIMI MUTUGI ..... 7<sup>TH</sup> RESPONDENT  
JAMES K TUITOEK ..... 8<sup>TH</sup> RESPONDENT  
GETRUDE NDUKU NGUKU ..... 9<sup>TH</sup> RESPONDENT  
REGINALD OKUMU ..... 10<sup>TH</sup> RESPONDENT  
SAMUEL KAZUNGU KAMBI ..... 11<sup>TH</sup> RESPONDENT  
HUBBIE HUSSEIN AL-HAJI ..... 12<sup>TH</sup> RESPONDENT  
ESTHER MURUGI MATHENGE ..... 13<sup>TH</sup> RESPONDENT  
TIYA GALGALO ..... 14<sup>TH</sup> RESPONDENT**



*(Being an application for review of the Registrar's Decision dated 22nd January 2022 declining to lodge and admit for filing the Petition and Record of Appeal)*

**The thirty days' timeline for institution of appeals to the Supreme Court runs from the date of filing of the notice of appeal and transmission of the same to the court**

Reported by Kakai Toili

*Civil Practice and Procedure – appeals – appeals to the Supreme Court – timelines – computation of time – when the thirty-day timeline for instituting an appeal to the Supreme Court begins to run – whether the timeline is affected by delayed receipt of the Court of Appeal's judgment or notice of appeal—Supreme Court Rules, 2020 (cap 9B), rule 37.*

*Civil Practice and Procedure – appeals – institution of appeals – form and content of record of appeal – notice of appeal – whether a notice of appeal may be included within the record of appeal or a supplementary record of appeal – application of rule 40 of the Supreme Court Rules, 2020 – Supreme Court Rules, 2020 (cap 9B), rule 40.*

**Brief facts**

The applicant sought review and setting aside of a decision by the Registrar of the Supreme Court dated January 22, 2021, which declined to admit and lodge the petition and records of appeal. The Registrar's decision was based on the applicant's alleged failure to submit both the notice of appeal and the Court of Appeal's judgment.

The applicant contended that it had filed and served the notice of appeal within four days of the Court of Appeal's decision. It further maintained that the appeal was filed on January 20, 2021—within the prescribed thirty-day period—despite delays in receiving the certified judgment and signed notice of appeal, due to the Court of Appeal's fully virtual operations at the time.

The petition and record of appeal were eventually lodged on January 27, 2022, by the Deputy Registrar, without a formal review of the earlier ruling by the Registrar. The issue resurfaced when the matter was escalated to the Supreme Court to resolve a dispute regarding representation, prompting the filing of the instant application challenging the Registrar's decision.

The applicant explained that it had filed a supplementary record of appeal containing the missing documents, including the judgment and notice of appeal, and argued that the fifteen-day window permitted under rule 40(4) of the Supreme Court Rules, 2020, for filing such supplementary documents had been unfairly curtailed. The applicant further contended that the Registrar's decision violated the rules of natural justice, as it was made without allowing the applicant to be heard or to explain the circumstances surrounding the initial omission.

**Issues**

- i. When did the thirty (30) days' timeline for instituting an appeal to the Supreme Court commence?
- ii. Whether, under the Supreme Court Rules, 2020, a notice of appeal could be incorporated within the record of appeal or a supplementary record of appeal.

**Held**

1. Rule 36 of the *Supreme Court Rules, 2020* required that a party intending to appeal must file a notice of appeal within fourteen (14) days from the date of the judgment and transmit a copy to the Registrar of the Supreme Court. Rule 15 empowered the court to extend time limited by the Rules or by a court decision. However, the notice of appeal was a foundational document and a jurisdictional precondition, and must be filed and transmitted within the stipulated timelines to properly invoke the court's appellate jurisdiction.



2. Under rule 6(1)(b) of the *Supreme Court Rules*, the Registrar had the authority to reject pleadings that did not comply with the Constitution, the Supreme Court Act, the Court's Rules, or applicable practice directions. In the instant case, the Registrar declined to admit the petition and record of appeal due to the omission of the judgment and the absence of a transmitted notice of appeal. However, the Deputy Registrar later admitted the appeal documents, which implied a *de facto* review of the Registrar's earlier decision, albeit improperly, as no formal application for review had been filed as required.
3. The applicant complied with rule 36(1) by filing a notice of appeal at the Court of Appeal on December 22, 2020, four days after the judgment, thereby meeting the fourteen-day requirement. However, despite the Court of Appeal operating virtually and issuing electronically signed notices, the signed notice of appeal was never transmitted to the Supreme Court Registrar as required under rule 36(3).
4. The applicant also failed to serve the respondents with a transmitted copy of the notice of appeal, contrary to rule 37(1). Instead, only an untransmitted version was served. The thirty-day period for instituting an appeal commenced upon filing the notice of appeal and transmitting it to the Supreme Court; the failure to transmit meant the appeal was not properly instituted within time.
5. While the Court of Appeal's judgment may be included in either the main record of appeal under rule 40(1)(c) or a supplementary record under Rule 40(4), the same flexibility did not apply to the notice of appeal. The notice had to be transmitted first to the Court before service on the parties. In the instant case, the notice of appeal, though filed within time, was only mentioned in the schedule to the petition of appeal and later included in the supplementary record filed on January 27, 2021, well beyond the fourteen-day window from the judgment date. This rendered it ineffective for purposes of invoking the court's jurisdiction.
6. Although the applicant invoked rule 6(2) to seek review of the Registrar's decision, it did not accompany that request with an application for extension of time or provide any explanation for the initial non-compliance. The issue only came to the fore when the court raised it in the context of resolving a representation dispute, rather than being proactively addressed by the applicant at the appropriate stage.

*Application dismissed.*

### **Orders**

*Applicant to bear the costs of the application for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents on one hand and the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> respondents on the other hand.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Bookpoint Limited v Guardian Bank Limited & Guilders International Bank Limited* Application 4 (E006) of 2021; [2021] KESC 73 (KLR) - (Explained)
2. *Nicholas Kiptoo arap Korir Salat v Independent Electoral and Boundaries Commission, Wilfred Rottich Lesan, Robert Siolei Returning Officer Bomet County, Kennedy Ochayo, Wilfred Wainaina, Patrick Wanyama, Mark Manzo & Abdikadir Sheikh* Civil Appeal 228 of 2013; [2014] KECA 782 (KLR) - (Explained)
3. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR); [2014] 2 KLR 253 - (Explained)
4. *University of Eldoret & another v Sitienei & 3 others* Petition 33 of 2019; [2020] KESC 72 (KLR) - (Explained)

#### **South Africa**

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* (CCT 27/03) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) - (Explained)



## Statutes

### Kenya

1. Constitution of Kenya In general - (Cited)
2. Supreme Court Act (cap 9B) In general - (Cited)
3. Supreme Court Rules, 2020 (cap 9B Sub Leg) rules 6(1)(b)(2); 36(1)(3); 37(1); 38(1)(a); 40(4)(c)- (Interpreted)

### Advocates

None mentioned

## RULING

1. Upon perusing the notice of motion by the applicant, Katiba Institute, dated July 23, 2022 and filed on November 3, 2022 brought pursuant to rule 6(2) of the [Supreme Court Rules, 2020](#) seeking orders that:
  1. The court be pleased to review and vacate the Registrar's (Hon. Nyaiyaki) decision of January 22, 2021 declining "to lodge and admit for filing" the petition and records of appeal "for failure to submit the notice of appeal and the judgment of the Court of Appeal";
  2. There be no costs order;
2. Upon considering the grounds in support of the application, based on the supporting affidavit sworn by Michael Munguti on July 23, 2022 and the submissions dated July 26, 2022 and filed on November 3, 2022 wherein the applicant contends that, aggrieved by the decision of Court of Appeal delivered on December 18, 2020 they filed and served the notice of appeal on December 22, 2022, within four days of the Court of Appeal decision, with no party contesting this fact; that the appellant thereafter filed its appeal on January 20, 2021, within the 30 days of filing the notice of appeal under rule 38(1) (a) of the [Court's Rules](#) by which time it had not received the certified judgment and signed notice of appeal from the Court of Appeal which fully operates virtually; that having omitted some documents, they filed a supplementary record of appeal dated January 26, 2021 under rule 40(4) of the [Supreme Court Rules, 2020](#) containing the judgment and notice of appeal; and that the fifteen (15) day window envisaged under the said rule 40(4) was curtailed by the Hon. Registrar's decision of January 22, 2021 which declined to lodge and admit for filing the petition of appeal;
3. Upon considering the applicant's further grounds that the Registrar's decision was unfair and against the rules of natural justice, the applicant not having been allowed any opportunity to explain the circumstances of the filing; and that it was also irrational and unreasonable as comparatively enunciated in the South Africa's Constitutional Court's case of [Bato Star Fishing \(Pty\) Ltd v Minister of Environmental Affairs and others](#) [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC); and
4. Upon considering that the application is not opposed by the 1<sup>st</sup> and 2<sup>nd</sup> appellants and the 5<sup>th</sup>, 6<sup>th</sup> to 14<sup>th</sup> respondents in the petition of appeal, respectively.
5. Noting the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' grounds of objection and submissions dated November 3, 2022 and December 3, 2022 respectively wherein they pray that the application be dismissed as the pleadings submitted by the applicant herein are not in consonance with the provisions of the [Supreme Court Rules, 2020](#); that the Registrar reasonably and lawfully exercised her mandate within the confines of the law as guided by the provisions of rule 6(b) of the [Supreme Court Rules, 2020](#); that the petitioners



(applicants) neglected and or ignored to transmit the notice of appeal to the Registrar which is a prerequisite to the institution of an appeal; that, contrary to what is alluded by the applicant, the notice of appeal is not among the documents rule 40 (4) gives room to be availed if omitted from the record of appeal; and that the applicant failed to obtain and file a certificate of delay in relation to the absence of a certified judgment of the decision sought to be appealed against;

6. Further noting the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents' submissions dated November 9, 2022 and filed on November 18, 2022 wherein they submit that the application is bad in law and is unmeritorious since the petitioners lodged a non-compliant and defective record of appeal; and that the Registrar cannot be blamed for acting in accordance with the Supreme Court Rules; and
7. Considering rule 36 of the Supreme Court Rules which provides that a person who intends to appeal to this court ought to file a notice of appeal within fourteen (14) days from the date of judgment and to transmit a copy to the Registrar of this court; and rule 15 provides that the court may extend the time limited by its rules or by any decision of the court; and
8. Appreciating this court's decision in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others; SC Application No 16 of 2014, [2014] eKLR, as echoed in Bookpoint Limited v Guardian Bank Limited & another; SC Application No 4 (E006) of 2021 where it was held that a notice of appeal is a primary document to be filed outright and that it is a jurisdictional pre-requisite.
9. Taking into account the record in which I note that the Registrar made her ruling on January 22, 2021 in which she declined to lodge and admit for filing the petition and record of appeal for failure of the appellant to submit the notice of appeal and judgment of the Court of Appeal; that the said petition of appeal and record of appeal were nevertheless lodged in court on January 27, 2022 by the Deputy Registrar without any formal review of the Registrar's ruling paving way for compliance before the Registrar; and that it was only upon the matter being escalated to the court to consider the issue of representation that the issue of the Registrar's ruling was brought to the attention of parties prompting the present application seeking to review the Registrar's decision.
10. Having carefully considered the record, arguments and submissions by all the parties, I now opine as follows:
  - a) Rule 6(1)(b) of the Supreme Court Rules allows the Registrar to decline pleadings that are not in accordance with the Constitution, the Act, the rules, or the court's practice directions for filings. The Registrar's impugned ruling made under this provision was on account of failure to include the judgment and the absence of a notice of appeal. However, the Deputy Registrar, in admitting the lodging of the petition and record of appeal referred to in the impugned ruling, impliedly reviewed the said ruling, albeit un-procedurally in the absence of a formal review application.
  - b) It is acknowledged that the applicant, in line with rule 36(1) of this Court's Rules, filed at the Court of Appeal a notice of appeal on December 22, 2022 and served it on the parties. This was four days after delivery of the Court of Appeal judgment within the 14-day period. Notwithstanding the assertion that the Court of Appeal operates 100% virtually, resulting in notices of appeal being filed electronically, signed and returned to the parties, the signed Notice of Appeal by the Registrar of the Court of Appeal was never transmitted to the Registrar of this court within the said timelines as stipulated under rule 36(3) or at all.
  - c) The applicant did not serve upon the respondents the transmitted copies of the notice of appeal in compliance with rule 37(1) of the Court's Rules but served an un-transmitted copy thereof.



- d) The thirty days' timeline for institution of appeal run from the date of filing of the notice of appeal and for purposes of this court, transmission of the same to the court. As held in University of Eldoret & another v Hosea Sitienei & 3 others SC Application No 8 of 2020 [2020]eKLR:

“(36) Rule 36 of the Supreme Court Rules 2020 provides for the filing of a notice of appeal within fourteen days of a decision of the Court of Appeal from which an intended appeal is founded. The filing of a notice of appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a notice of appeal signifies the intention to appeal.” (Emphasis mine)

I reiterate that the notice of appeal is a jurisdictional pre-requisite without which the court cannot infer the intention to appeal for purposes of this Court's Rules.

- e) While the Court of Appeal judgment could be contained in the record of appeal under rule 40(c) or a supplementary record under rule 40(4), the same cannot be said of the notice of appeal which has to be transmitted to the court before service upon the parties.
- f) The notice of appeal in this matter, having been availed to the court at the first instance by being mentioned as a schedule in the petition of appeal and as part of the supplementary record filed before this court on January 27, 2021, the same was already way out of the fourteen (14) day period of delivery of the judgment, despite having been filed on time.
- g) Though the applicant has exercised its right to seek a review of the decision by the Registrar as provided under rule 6(2) of the Supreme Court Rules, the request has neither been accompanied by an application for extension of time nor an explanation for the lack of compliance offered as the mundane step in the first place, the issue being brought to the attention of the parties by the court. I am not satisfied as to the merit of the application and decline to exercise discretion to review the Registrar's decision.
- h) On the issue of costs, I stand guided by the decision of this court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others; SC Petition No. 4 of 2012 [2014] eKLR where this court observed that the basic rule on attribution of costs is: costs follow the event. On this account, the applicant shall bear the costs of the respondents who opposed, to wit, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the one hand and the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents on the other hand.

11. Consequently, I make the following orders:

- (i) The notice of motion dated July 23, 2022 be and is hereby dismissed.
- (ii) The applicant shall bear the costs of this application for the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents on one hand and the 13<sup>th</sup> 14<sup>th</sup> and 15<sup>th</sup> respondents on the other hand.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....  
**P. M. MWILU**

**DEPUTY CHIEF JUSTICE &**

**VICE PRESIDENT OF THE SUPREME COURT**



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

**REGISTRAR,**

**SUPREME COURT OF KENYA**

