



Farah v Independent Electoral and Boundaries Commission (IEBC) & 2 others (Petition (Application) E025 of 2023) [2023] KESC 71 (KLR) (11 September 2023) (Ruling)

Neutral citation: [2023] KESC 71 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E025 OF 2023
I LENAOLA, SCJ
SEPTEMBER 11, 2023**

BETWEEN

BARDAD MOHAMED FARAH APPLICANT

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

**THE RETURNING OFFICER, MANDERA NORTH CONSTITUENCY 2ND
RESPONDENT**

ABDULAIH BASHIR SHEIKH 3RD RESPONDENT

(Being an application for Review of the Ruling/Orders of the Hon. Deputy Registrar, Supreme Court, Benard Kasavuli, issued on 29th August 2023)

Conditions that would necessitate the Registrar of the Supreme Court to decline filing of pleadings

The applicant had filed an application before the Court of Appeal seeking leave to appeal to the Supreme Court on the ground that the appeal raised a matter(s) of general public importance. Pending the determination of the application, the appellant filed a petition before the Supreme Court to have the appeal determined as matter of right. The Deputy Registrar of the Supreme Court declined the petition of appeal pending the determination of the application before the Court of Appeal. Aggrieved the appellant filed the instant application to review the decision of the Deputy Registrar where the Supreme Court held that it was only right that the Court of Appeal be given an opportunity to pronounce itself on the same or grant orders withdrawing the application before the Supreme Court could seize the petition of appeal.

Reported by John Ribia

Civil Practice and Procedure – appeals – appeals to the Supreme Court - Supreme Court Registrar – power of the Supreme Court Registrar to decline pleadings - whether the Registrar of the Supreme Court had the power to decline pleadings - whether the Supreme Court’s Deputy Registrar subverted the applicant’s right to a fair hearing by declining to admit a petition of appeal because of the application that sought to certify the appeal as one



raising matter(s) of general public importance was pending at the Court of Appeal - article 163(4)(a); , sections 31, 32 and 33; , rule 6(2) or the .

Brief facts

The petitioner filed an appeal before the Supreme Court. The Deputy Registrar directed that the petition of appeal would not be admitted for hearing until the disposal of the applicant's application for leave to appeal to the Supreme Court on the ground that the appeal raised a matter of general public importance. Aggrieved the appellant filed the instant application seeking to review the decision of the Deputy Registrar on grounds that the appellant had elected to file an appeal as of right pursuant to article 163(4)(a) of the and that by filing the appeal under article 163(4)(a) he had abandoned the application for certification at the Court of Appeal.

Issues

- i. Whether the Registrar of the Supreme Court had the power to decline pleadings that were not filed in accordance with the , the , the , or the for filings.
- ii. Whether the Supreme Court's Deputy Registrar subverted the applicant's right to a fair hearing by declining to admit a petition of appeal because of the application that sought to certify the appeal as one raising matter(s) of general public importance was pending at the Court of Appeal.

Held

1. The role of the Registrar was encapsulated under rule 6 (1) of the (the) which provided *inter alia* that the Registrar could decline pleadings that were not in accordance with the , the , the Rules, or the for filings.
2. Rule 6(2) the provided that any party aggrieved by a decision of the Registrar made under the rule could apply for a review to a single judge. Since the applicant had moved the Court of Appeal for certification of the appeal as one involving matter(s) of general public importance, it was only right that the Court of Appeal be given an opportunity to pronounce itself on the same or grant orders withdrawing the application in line with the applicant's application seeking to withdraw the application dated July 28, 2023, before the Supreme Court could seize the petition of appeal. There was no evidence that the application had been withdrawn or determined.
3. The applicant should first ensure that the application for certification dated July 28, 2023 still pending before the Court of Appeal was disposed of before any other step can be taken in the petition of appeal he sought to file before the Supreme Court.

Application dismissed.

Orders

Applicant to bear the costs.

Citations

Cases

1. Charo v Mwashetani & 3 others (SC Application No 15 of 2014 [2014] eKLR) — Explained
2. Okiya Omtatah Okoiti & Another v Attorney General & Parliament of Kenya (Civil Application 1 of 2019; [2019] KESC 5 (KLR)) — Explained
3. Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Application 3 (E008) of 2022; [2022] KESC 25 (KLR)) — Explained
4. Sum Model Industries Ltd v Industrial & Commercial Development Corporation (SC Application 1 of 2011[2011] eKLR) — Explained
5. Twaha, Fahim Yasin v Timamy Issa Abdalla & 2 others (Civil Application 35 of 2014; [2015] eKLR) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 20 (3)(a), 27 (1), 50 (1), 163, — Interpreted



2. Supreme Court (General) Practice Directions, 2020 (Act No 7 of 2011 Sub Leg) — section 31, 32, 33 — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 6(2)(3), 31, 32 — Interpreted

Advocates

Mr. Kamwaro and Kere for Applicant

Mr. Nura for 1st and 2nd Respondents

Mr. Kanjama SC for 3rd Respondent

RULING

Representation

Mr Kamwaro and Kere for the applicant

(Kamwaro & Company Advocates)

Mr Nura for the 1st and 2nd respondents

(Garane & Somane Advocates)

Mr Kanjama SC for the 3rd respondent

(Muma & Kanjama Advocates)

1. Upon reading the notice of motion by the applicant dated August 30, 2023 and filed on even date, brought pursuant to articles 20(3)(a) and (b), 21(1), 27 (1), 50(1) and 163 of the Constitution, rules 6(2) and (3), 31 and 32 of the Supreme Court Rules, 2020 and sections 31, 32 and 33 of the Supreme Court (General) Practice Directions, 2020 seeking orders that;
 1. The court be pleased to review and discharge the decision of the Honourable Deputy Registrar issued on August 29, 2023; and
 2. The court do issue appropriate directions for the disposal and hearing of the petition of appeal dated August 18, 2023; and
2. Upon considering the grounds in support of the application and the averments contained in the supporting affidavit sworn by Bardad Mohamed Farah on August 30, 2023 wherein he contends that; on August 25, 2023, he filed a petition of appeal dated August 18, 2023 pursuant to article 163(4)(a) of the Constitution; subsequently, the court directed the parties to appear virtually before the Deputy Registrar on August 29, 2023 for further directions; on August 29, 2023, the Deputy Registrar directed that the petition of appeal would not be admitted for hearing and/or dispensed with until the disposal of a notice of motion dated July 28, 2023 filed at the Court of Appeal being Civil Application No Sup E006 of 2023 where the applicant had sought leave to appeal to the Supreme Court on the ground that the appeal raised a matter of general public importance; the directions of the Deputy Registrar were issued despite their submission that the Court of Appeal had not set down the application dated July 28, 2023 for hearing one month after filing; notwithstanding the application for certification at the Court of Appeal, the applicant had elected to file an appeal to this court as of right pursuant to article 163(4)(a) of the Constitution and that by filing the appeal under article 163(4)(a) he had abandoned the application for certification at the Court of Appeal; and that the Deputy Registrar's action subverted the applicant's right to a fair hearing enshrined in article 50(1) of the Constitution; and
3. Upon considering the applicant's submissions dated August 30, 2023 and filed on even date wherein he; reiterates the arguments in his supporting affidavit; faults the Deputy Registrar for selectively



relying on paragraph 44 of this court’s decision in *Fahim Yasin Twaba v Timamy Issa Abdalla & 2 others*, Supreme Court Civil Application No 35 of 2014 [2015] eKLR (*Fahim* case) and submits that the *Fahim* case is distinguishable as it sought for extension of time to file an appeal out of time and concurrently filed two certification applications at the Court of Appeal and before this court was seeking certification at the first instance and priority over the certification at the Court of Appeal; submits that he had indicated that he no longer wished to pursue the certification application before the Court of Appeal in Civil Application No Sup E006 of 10 2023, therefore, his petition under article 163(4)(a) is not premature; and in conclusion, he prays that the court ought to set aside the Deputy Registrar’s ruling of August 29, 2023; and

4. Upon considering the 1st and 2nd respondents’ grounds of opposition dated September 1, 2023 and filed online even date where they oppose the applicant’s application on *inter alia* the grounds that; the applicant has, pending before the Court of Appeal, an application for certification and an application for withdrawal of the application for certification; the applicant approaches this court contrary to the principles set by this court in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* SC Application No 15 of 2014; [2014] eKLR and that this court’s jurisdiction can only be triggered where the Court of Appeal has determined the application for certification; the applicant’s application offends the procedure for certification set by this court in *Sum Model Industries Ltd v Industrial & Commercial Development Corporation* SC Application 1 of 2011; [2011] eKLR; and that the instant application is an abuse of the court process and incompetent; and
5. Also noting the 3rd respondent’s replying affidavit and submissions wherein he contends that; he was declared the duly elected Member of the National Assembly for Mandera North Constituency following the August 9, 2022 elections; the applicant challenged his election before the High Court and lodged an appeal before the Court of Appeal having been aggrieved by the appellate court’s decision; aggrieved by the decision of the Court of Appeal, the applicant filed an application for certification at the Court of Appeal under article 163(4)(b) of the *Constitution*; consequently the applicant filed a petition before this Court under article 163(4)(a) of the *Constitution* despite there being a pending certification application before the Court of Appeal; the applicant’s application has not met the criteria for review of the decision of the Deputy Registrar relying on this court’s decision in *Mombasa Bricks & Tiles Ltd & 5 others v Shah & 7 others* SC Application No E008 of 2022 [2022] eKLR where the court declined an invitation to review the decision of the Deputy Registrar; it is trite that the court cannot exercise concurrent jurisdiction with the Court of Appeal, therefore, the court is precluded from exercising jurisdiction; even though the applicant may have filed a notice of withdrawal, such a withdrawal can only be considered upon an order by the Court of Appeal; and he concludes that the applicant has not laid an adequate basis for review of the Deputy Registrar’s decision of August 29, 2023, he prays for dismissal of the instant application; and
6. Having considered the application, responses, and submissions before us, we now opine as follows:
 - i. The role of the Registrar is encapsulated under rule 6(1) which provides *inter alia* that the Registrar can decline pleadings that are not in accordance with the *Constitution*, the Act, the rules, or the court’s Practice Directions for filings. This court affirmed this position in *Okiya Omtatah Okoiti v Attorney General & another*, SC Application No 1 of 2019; [2019] eKLR, where it observed that one of the roles of the Registrar is;

“(b) to decline pleadings that are not in accordance with the *Constitution*, the Act, these rules, or the court’s practice directions for filings.”



- ii. Furthermore, rule 6(2) of the Supreme Court provides that;

“6(2) Any party aggrieved by a decision of the registrar made under this rule may apply for a review to a single judge.”
- iii. Bearing in mind the above, did the Deputy Registrar subvert the applicant’s right to a fair hearing by declining to admit the petition filed under article 163 (4)(a) of the Constitution pending the disposal of Civil Application No Sup. E006 of 2023 which sought certification at the Court of Appeal under article 163 (4) (b) of the Constitution?
- iv. In this context, the Deputy Registrar found as follows:

“Having consulted the court on the way forward and being guided by the decision of this court in Fahim Yasin Twaba v Timamy Issa Abdalla & 2 others, Supreme Court Civil Application No 35 of 2014 [2015] eKLR which had almost similar circumstances to this petition, the court held at paragraph 44 as follows:

“[44] It is clear to us that a party who moves the appellate court for leave and certification has recognized the relevant cause as one founded on “matter of general public importance”. Consequently, this court’s intervention is not in issue until that court’s task is complete.”
- v. In the instant application, the applicant faults the Deputy Registrar for selectively relying on paragraph 44 of the Fahim case. I reiterate that since the applicant had moved the Court of Appeal for certification of the appeal as one involving matter(s) of general public importance, it is only right that the Court of Appeal be given an opportunity to pronounce itself on the same or grant orders withdrawing the application in line with the applicant’s application seeking to withdraw the application dated July 28, 2023, before this court can seize the petition of appeal herein. I must add that, I have seen no evidence that the said application has been withdrawn or determined.
- vi. As a consequence of my findings above, I concur with the Deputy Registrar’s direction that the applicant should first ensure that the application for certification dated July 28, 2023 still pending before the Court of Appeal is disposed of before any other step can be taken in the petition of appeal he seeks to file before this court. I, therefore, find that the notice of motion dated August 30, 2023 lacks merits and is hereby dismissed.
- vii. It is well settled that costs follow the event and are awarded as a matter of discretion, I direct that costs in this application shall be paid by the applicant to the respondents.

7. Accordingly, I make the following orders:

- a. The notice of motion dated August 30, 2023 is hereby dismissed.



b. The applicant shall bear the costs of this application.

8. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF SEPTEMBER 2023

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

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

REGISTRAR

SUPREME COURT OF KENYA

