



Wainaina & another (As administratrixes of the Estate of the Late Margaret Wanjiru Kinyara - Deceased) v Kinyanjui & another (As administrators of the Estate of the Late Elizabeth Wanjiru Njenga - Deceased) & 3 others (Civil Application 30 of 2020) [2021] KESC 62 (KLR) (Civ) (5 March 2021) (Ruling)

Margaret Wanjiru Wainaina & another v James Njenga Kinyanjui & 3 others [2021] eKLR

Neutral citation: [2021] KESC 62 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

CIVIL

CIVIL APPLICATION 30 OF 2020

**PM MWILU, AG.CJ & AG. P, MK IBRAHIM, SC
WANJALA, NS NDUNGU & I LENAOLA, SCJJ**

MARCH 5, 2021

BETWEEN

MARGARET WANJIRU WAINAINA 1ST APPLICANT

EUNICE WANGARI MWANGI 2ND APPLICANT

**AS ADMINISTRATRIXES OF THE ESTATE OF THE LATE MARGARET
WANJIRU KINYARA - DECEASED**

AND

**JAMES NJENGA KINYANJUI, DAVID KARANJA NJENGA (AS
ADMINISTRATORS OF THE ESTATE OF THE LATE ELIZABETH WANJIRU
NJENGA (DECEASED) 1ST RESPONDENT**

DAVID KARANJA NJENGA 2ND RESPONDENT

KEZIAH MUTHONI WAINAINA 3RD RESPONDENT

PETER NJENGA WAINAINA 4TH RESPONDENT

(Being an application for stay and review of the Ruling and Order of this Court (Maraga CJ, Mwilu DCJ, Ibrahim, Wanjala & Njoki SCJJ) delivered on 4th September 2020)



Failure to indicate the provisions under which a party was moving the court is a defect that cannot be remedied through written submissions.

The main issue for determination was whether failure to indicate the legal provisions under which a party was moving the Supreme Court in its petition of appeal was a defect that could be remedied through written submissions. The Supreme Court held that failure to indicate the provisions under which a party was moving the court is a defect that cannot be remedied through written submissions.

Reported by Beryl Ikamari

Civil Practice and Procedure - review - review of decisions of the Supreme Court - circumstances under which the Supreme Court would exercise its review jurisdiction in relation to its decisions - Supreme Court Rules, 2020, rules 3(25) and 28(5).

Civil Practice and Procedure - petition of appeal - form and content - indication of provisions that a party sought to rely on when moving the Supreme Court in a petition of appeal - whether failure to indicate such provisions could be remedied by the filing of submissions.

Brief facts

The applicants sought a review of the ruling and orders of the Supreme Court with respect to a preliminary objection. They said that the decision was made due to a failure to consider their written submissions and unjustifiably denied them a fair hearing. The respondent said that there was inordinate delay in the filing of the submissions in question and those submissions could not cure the defect of failing to indicate the provisions under which the applicants were moving the court, in the applicants' petition of appeal.

Issues

- i. When would the Supreme Court review its decisions?
- ii. Whether failure to indicate the legal provisions under which a party was moving the Supreme Court in its petition of appeal was a defect that could be remedied through written submissions.

Held

- 1. Rules 3(25) and 28(5) of the Supreme Court Rules, 2020 granted the court jurisdiction to consider an application for a review of its decisions. The court could therefore consider the review application.
- 2. The application did not satisfy the principles set by the court for purposes of reviewing its decisions. The principles were set out in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* SC Petition (App.) No. 4 of 2012; [2013] eKLR and *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* SC Petition No. 6 of 2014; [2017] eKLR.
- 3. The applicants did not lay a basis for the court to consider and depart from its decision dated September 4, 2020.
- 4. The applicants did not provide the constitutional or statutory provisions that they relied on in moving the court in their petition of appeal. That was a defect which could not be remedied through submissions.

Application dismissed, each party was to bear their costs.

Citations

Statutes

None referred to

Advocates

None mentioned



RULING

1. Upon perusing the Notice of Motion by the Applicants dated 29th October 2020 and filed on 30th October 2020, which application is brought pursuant to the provisions of Rules 3(5) and 28(5) of the Supreme Court Rules, 2020 and in which the Applicants seek stay and review of the Ruling and orders of this Court dated 4th September 2020; and
2. Upon perusing the affidavit of PAUL AMUGA, advocate and counsel for the Applicants deposed to on 29th October 2020 in support of the Applicants' application of even date AND wherein the deponent contends that this Court in rendering its decision allowing the 1st Respondent's Preliminary Objection dated 30th May 2019, failed to consider their filed submissions on record and that they were therefore unjustifiably denied a fair hearing, warranting a review and setting aside of the said impugned Ruling; and
3. Upon further considering the written submissions by the Applicants dated 2nd November 2020 and filed on 4th November 2020 in support of their application for stay and review of the Ruling of this Court dated 4th September 2020; and
4. Further, Upon considering the replying affidavit of the 1st Respondent sworn on 6th November 2020 and filed on 10th November 2020 in which, in opposing the application, contends that there was inordinate delay by the Applicants in filing their submissions on their Petition of Appeal and nonetheless, that the Applicants' Petition dated 17th May 2019 was struck out on the ground of failure to indicate in which constitutional provisions they were relying on in moving the Court, a defect they contend cannot be cured through submissions; and
5. Upon considering the 1st Respondent's submissions dated and filed on 25th November 2020 in opposition to the Petitioners' application for stay and review; and
6. Having considered the application, the supporting affidavit and the submissions in support thereof, and the replying affidavit and the submissions in response and opposition to the instant application, by a unanimous decision of this Bench, we find that;
 - (a) This Court has the jurisdiction to consider an application for review of its decisions as provided under Rules 3(25) and 28(5) of the Supreme Court Rules, 2020;
 - (b) The application by the Applicants dated 29th October 2020 and filed on 30th October 2020 which contends that the jurisdiction of this Court should be invoked to review its decision dated 4th September 2020 allowing the 1st Respondent's Preliminary Objection application dated 30th May 2019 does not satisfy the principles set out by this Court on the issue of review of its decisions as pronounced in *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others* SC Petition (App.) No. 4 of 2012; [2013] eKLR and *Fredrick Otieno Outa v. Jared Odoyo Okello & 3 others* SC Petition No. 6 of 2014; [2017] eKLR and;
 - (c) The Applicants did not provide sufficient and cogent reasons for this Court to consider and depart from its decision dated 4th September 2020 (*Maraga CJ, Mwilu DCJ, Ibrahim, Wanjala & Njoki SCJJ*);
 - (d) The Applicants did not establish what constitutional or statutory provisions they sought to rely Upon in their Petition of Appeal before this Court, and which defect could nonetheless not be effectively remedied through the submissions that they had filed on 17th July 2020, and



which in any event did not conform with the principles set out by this Court in Daniel Kimani Njihia v. Francis Mwangi Kimani & another [2015] eKLR, Suleiman Mwamlole Warrakah & 2 others v. Mwamlole Tachappu Mbwana & 4 others [2018] eKLR, Rose Jebor Kipngok v. Kiplagat Kotut Application No. 34 of 2019; [2020] eKLR and Cordison International (K) Ltd v. Chairman National Land Commission & 43 others Petition No. 14 of 2019; [2020] eKLR on the requirement of parties to establish and invoke the relevant constitutional and statutory provisions that they seek to rely Upon when coming before this Court.

- (e) Neither the prayer for setting aside nor review have merit.
7. In the circumstances, we now make Orders as follows;
- (a) The Notice of Motion application by the Applicants dated 29th October 2020 and filed on 30th October 2020 is hereby dismissed;
 - (b) Each party shall bear its costs thereof.
8. Orders accordingly.

DATED AND ISSUED AT NAIROBI THIS 5TH DAY OF MARCH, 2021.

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P. M. MWILU

Ag. CHIEF JUSTICE & Ag. PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

