



Institute for Social Accountability & another v National Assembly of Kenya & 4 others (Petition 1 of 2018) [2020] KESC 74 (KLR) (4 August 2020) (Ruling)

Institute for Social Accountability & another v National Assembly of Kenya & 4 others [2020] eKLR

Neutral citation: [2020] KESC 74 (KLR)

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

PETITION 1 OF 2018

**DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, SC WANJALA & N NDUNGU, SCJJ**

AUGUST 4, 2020

BETWEEN

**INSTITUTE FOR SOCIAL ACCOUNTABILITY 1ST APPELLANT
CENTRE FOR ENHANCING DEMOCRACY AND GOOD
GOVERNANCE 2ND APPELLANT**

AND

**NATIONAL ASSEMBLY OF KENYA 1ST RESPONDENT
THE SENATE 2ND RESPONDENT
THE ATTORNEY GENERAL 3RD RESPONDENT
CONSTITUENCY DEVELOPMENT FUND BOARD 4TH RESPONDENT
COMMISSION FOR THE IMPLEMENTATION OF THE
CONSTITUTION 5TH RESPONDENT**

(Appeal from the Judgment of the Court of Appeal of Kenya at Nairobi (Githinji, Okwengu & G.B.M Kariuki, JJ. A) in Civil Appeal No.92 of 2015 dated 24th November, 2017)

Whether absence of a judge’s trial notes in the supplementary record of appeal fundamentally affected the record

Reported by Chelimo Eunice

Civil Practice and Procedure - appeals – appeals to the Supreme Court – documents required in filing appeals to the Supreme Court – supplementary record of appeal – what should be contained in a supplementary record of appeal – whether absence of a judge’s trial notes in the supplementary record of appeal fundamentally affected the record – whether absence of a judge’s trial notes in the supplementary record of appeal automatically rendered the



appeal fatal – whether an application to exclude a judge’s trial notes would be made through an oral application – Supreme Court Rules, rule 33(5).

Brief facts

On November 8, 2019, the court in its ruling allowed the applicants to file its supplementary record of appeal containing the certified order of the Court of Appeal and the typed proceedings within 7 days of receipt of the documents. Following the said ruling, the appellants lodged a supplementary record of appeal on November 14, 2019 and a copy of a letter to the Deputy Registrar requesting for the exclusion of proceedings by Justice (Rtd) G.B.M. Kariuki (retired judge) from the intended supplementary record of appeal for non-availability and copies of correspondence between the appellants and the Court of Appeal registry. The 4th respondent through an application dated February 5, 2020 sought orders to strike out the record of appeal for being incomplete and therefore invalid.

On their part, the appellants, under rule 33(5) of the Supreme Court Rules filed an application dated February 10, 2020 seeking to exclude from the record of appeal the trial notes of the retired judge. The application was founded on various grounds, including that; the main petition was ready for hearing and parties had filed submissions on it; the appellants had exercised due diligence to get the trial notes to no avail and that in any case, the presence of the trial notes in a second appeal was not a mandatory requirement.

Issues

- i. What should be contained in a supplementary record of appeal?
- ii. Whether absence of a judge’s trial notes in the supplementary record of appeal fundamentally affected the record?
- iii. Whether an application to exclude a judge’s trial notes would be made through an oral application.

Held

1. According to the court’s ruling of November 8, 2019, the filing of the supplementary record was dependent on documents being availed by the Court of Appeal. That presupposed that all the documents would have been made available to the appellants at the same time. It turned out otherwise. The contention that the appellants should not have filed the supplementary record containing documents already received from the Court of Appeal despite the court’s ruling until all the documents were received by them was untenable. The appellants exercised due diligence and bore no fault in the absence of the trial notes.
2. The situation was compounded by the fact that Justice (Rtd) G.B.M. Kariuki had since retired from public service as a judge of the Court of Appeal. The appellants had brought to the attention of the court’s Deputy Registrar of the intention to exclude the notes by the retired judge through an oral application. Rule 33(5) of the Supreme Court Rules (the Rules) allowed for the making of oral applications and the appellants were entitled to that option until otherwise directed, as they were eventually, to file a formal application.
3. The 4th respondent’s application to strike out the petition was not made in good faith under the circumstances considering its timing. It was filed barely a day after the mention before the Deputy Registrar and three days before the appellants could file their formal application. The 4th respondent had reasonable notice that the appellants faced challenges in obtaining the trial notes of the retired judge and that they intended to seek court’s intervention, albeit orally. To allow the action by the 4th respondent would be to validate sharp practice of law that the court would not sanction.
4. Further, in considering the nature of the document to be excluded, the same was so far untraceable. There was no purpose to be served by stalling the appeal and continuing to wait for a document on which nothing might eventually turn. In addition, the judgment by the Court of Appeal, the subject of the instant appeal, was unanimous and the trial notes by the retired judge were not likely to fundamentally affect the record and it did not automatically render the appeal filed before the court fatal.



5. The court exercised its discretion under rule 33(5) of the Rules in favour of the appellants and added that since the parties had already filed submissions on the substantive appeal and cross appeal, it was imperative that the legal and constitutional questions raised therein be determined on their merits without further delay.

Application allowed

Orders

- i. *Appellants' application allowed*
- ii. *4th Respondent's application dismissed*
- iii. *Costs in the appeal.*

Citations

East Africa

1. *Charo, Hassan Nyanje v Khatib Mwashetani & 3 others* Application 15 of 2014;[2014] eKLR –(Cited)
2. *Kipkeu, Sammy Kemboi v Bowen David Kangogo & 2 others* Petition 23 of 2018;[2018] eKLR-(Cited)
3. *Mulima, Alfred Asidaga & 2 others (suing as representatives of Ex-East African Airways Staff Welfare Association) v Attorney General & 8 others* Civil Application 1 of 2018;[2019] eKLR- (Explained)
4. *Nuri, Hamida Yaroi Shek v Faith Tumaini Kombe & 2 others* Petition (Application) 38 of 2018;[2019] eKLR-(Cited)

Statutes

East Africa

- 1 Supreme Court Rules 2012 (Act No 7 of 2011 Sub Leg) rule 33 (4)(5) –(Interpreted)

RULING

Introduction

- 1 On November 8, 2019, we delivered a ruling on the appellants' Notice of Motion application dated 30th January, 2018 and lodged in the Supreme Court Registry on 31st January, 2018 allowing the application in the following terms:
 - a The Application dated 30th January, 2018 is hereby allowed;
 - b The Applicants shall file its Supplementary Record of appeal containing the Certified Order of the Court of Appeal and the typed proceedings within 7 days of receipt of those documents; and
 - c Costs shall be in the cause.
- 2 Following the said ruling, the appellants lodged a supplementary record of appeal on 14th November 2019 incorporating the order issued by the Court of Appeal; certified proceedings by Honourable Mr. Justice Githinji and Honourable Lady Justice H.M. Okwengu and a copy of the letter dated 4th September 2019 to the Deputy Registrar requesting for the exclusion of proceedings by Justice Rtd G.B.M. Kariuki from the intended supplementary record of appeal for non-availability and copies of correspondence between the appellants and the Court of Appeal registry.

The Applications

- 3 The 4th respondent by way of a Notice of Motion application dated 5th February 2020 and filed on 7th February 2020 now seeks orders to strike out the record of appeal herein for being incomplete and



therefore invalid. The application is based on the annexed affidavit of Isaac O. Miencha, Advocate, reiterating the grounds that the record as filed is incomplete; that if relied upon, the incomplete record of appeal will cause miscarriage of justice to the respondents and that the appellants have not made an application, pursuant to Rule 335 of this Court's Rules to exclude the proceedings by Justice Rtd G.B.M. Kariuki, a fact which they had intimated in their letter of 4th September 2019.

- 4 On their part, the appellants, under Rule 335 of this Court's rules filed an application dated 10th February, 2020 seeking to exclude from the record of appeal the trial notes of Justice Rtd G.B.M. Kariuki. This application is founded on the grounds that the main petition is ready for hearing and parties have filed submissions on it; the appellants have exercised due diligence to get the trial notes by the said retired judge to no avail; that the omission of the proceedings by the said judge cannot be attributed to any fault by the appellants; that the appellants reminded the Deputy Registrar of this Court to mention the matter before the Court to enable the appellants make an oral application under Rule 335 to which the Honourable Deputy Registrar directed the appellants to file a formal application; and that in any case, the presence of trial notes in a second appeal is not a mandatory requirement under Rule 334 and their omission is not fatal to the hearing and determination of this matter.
- 5 The application is supported by an affidavit sworn on 10th February, 2020 by Michael Kioko Munguti, the Legal Assistant to the appellants' counsel, in which he sets out the efforts he took to follow up the proceedings. He annexes correspondence in support of his assertion. The appellants have further filed submissions in support of the application. They submit that the Court has discretion under Rule 335 to exclude a document where a matter can sufficiently proceed without the particular document.

Appellant's Case

- 6 The appellants raise three main grounds to support their argument. First, that the trial notes are not a mandatory requirement under Rule 334 and their omission is not fatal to the hearing and determination of this matter on the merits they refer to *Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others* [2018] eKLR and *Hamida Yaro Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR. Second, and in the alternative, that even if the trial notes were compulsory, they are unavailable by no fault of the appellants, despite the appellants' diligent effort spanning the course of two years they refer to *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014] eKLR. And lastly, that the public interest in the constitutionality of the Constituency Development Fund Act and the Fund call for an expeditious hearing of the main appeal on the merits and without undue regard to technicalities of procedure allowing this Court to address the transition from former attempts at decentralization including through the Constituency Development Fund to the current devolved system of governance. The appellants thus invite us to fix an early hearing date for the main appeal which has been pending for far too long.
- 7 In addition, and in response to the 4th respondent's application to strike out the appeal, the appellants rely on *Alfred Asidaga Mulima & 2 others suing as representatives of Ex-East African Airways Staff Welfare Association v Attorney General & 8 others* [2019] eKLR in which the Court was mindful to exercise favourable discretion to a party who sufficiently explains the omission taking into account the prejudice to be suffered by the other party.

The 4th Respondent's Case

- 8 The 4th respondent filed its submissions on 30th April 2020 in support of its application to strike out the appeal for non-compliance with Rule 33 of the Supreme Court Rules. It submits that the appeal should be struck out for being incomplete for lack of the record of proceedings in the Court of Appeal



contrary to Rule 334. They rely on *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR which relates to what constitutes a competent appeal before the Supreme Court.

- 9 The 4th respondent further submits that the appellant did not make any application under Rule 335 at the time of filing the supplementary record of appeal but instead wrote to the Deputy Registrar of this Court seeking to bring the matter for mention before the bench to enable them make an oral application for exclusion of the proceedings by Justice Rtd G.B.M. Kariuki. That the appellants did not pursue this and instead filed the supplementary record and only responded to the 4th respondent's application by filing their application for exclusion of Justice Rtd G.B.M. Kariuki's proceedings.

Analysis

10. Upon considering the two rival applications, the issue that emerges for our determination is whether or not to exclude the trial notes by Justice Rtd G.B.M. Kariuki of the Court of Appeal. This determination will also address the issue on whether the record of appeal should be struck out as sought by the 4th respondent.
- 11 In considering this issue, we note that our ruling of 8th November 2019 allowed the filing of the Supplementary record within 7 days of receipt of those documents. Accordingly, the filing of the supplementary record was dependent on the documents being availed by the Court of Appeal. This presupposed that all the documents would have been made available to the appellants at the same time. It turned out otherwise. If we understand the 4th respondent correctly, it is his contention that the appellants should not have filed the supplementary record containing documents already received from the Court of Appeal despite our ruling until all the documents were received by them. With respect, this is untenable. We need not belabour the fact that the appellants exercised due diligence and bear no fault in the lack of the said trial notes, a situation that the 4th respondent does not challenge.
- 12 This is compounded by the fact that Justice Rtd G.B.M. Kariuki has since retired from public service as a judge of the Court of Appeal. The appellants had as early as 4th September 2019 brought to the attention of this Court's Deputy Registrar of the intention to exclude the notes by Justice Rtd G.B.M. Kariuki through an oral application. This is a position that was reiterated both in correspondence and when the matter was last mentioned before the Honourable Deputy Registrar who in the end asked the appellants to make a formal application. Rule 335 allows for the making of oral applications and the appellants were entitled to that option until otherwise directed, as they were eventually, to file a formal application.
- 13 In the intervening period, the 4th respondent applied to strike out the petition barely a day after the mention before the Deputy Registrar and three days before the appellants could file their formal application under Rule 335. We do not think that the application by the 4th respondent has been made in good faith under the circumstances considering its timing. The 4th respondent had reasonable notice that the appellants faced challenges in obtaining the trial notes of the now retired judge of the Court of Appeal and that they intended to seek court intervention, albeit orally, under Rule 335. To allow the action by the 4th respondent would be to validate sharp practice of law that this court would not sanction.
- 14 Further, in considering the nature of the document to be excluded, we are persuaded that the same is so far untraceable. There is no purpose to be served by stalling the appeal and continuing to wait for a document on which nothing might eventually turn. In addition, the judgment by the Court of Appeal, the subject of this appeal, is unanimous and the trial notes by Justice Rtd G.B.M. Kariuki are



not likely to fundamentally affect the record. We maintain the position we adopted in Hamida Yaroi Shek Nuri case supra thus:

“23 It therefore emerges that failure to include the ‘record of proceedings of the Court of Appeal’ in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such an omitted document may be filed later, the same law cannot be said to render a Record of Appeal with that omission outrightly fatal. However, we hasten to add that where a required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal.”

15 In the Alfred Asidaga Mulima case supra we excused the applicant for a delay occasioned by the Court of Appeal. We are therefore inclined to exercise our discretion under Rule 335 in favour of the appellants and hasten to add that since the parties have already filed submissions on the substantive appeal and cross appeal, it is imperative that the legal and constitutional questions raised therein be determined on their merits in line with this Court’s mandate without further delay.

Determination

16 The upshot of our findings leads to our making the following Orders:

- a The Appellants’ application dated and filed on February 10, 2020 is allowed;
- b Consequently, the 4th Respondent’s application dated 5th February, 2020 and filed on February 7, 2020 is disallowed;
- c Costs shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH OF AUGUST 2020.

D. K. MARAGA P. M. MWILU

CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT OF THE SUPREME COURT

M. K. IBRAHIM S.C. WANJALA

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar,

Supreme Court Of Kenya

