**JKG v PWK (Civil Application 1 of 2016) [2020] KESC 33 (KLR) (4 August 2020) (Ruling)**

*JKG v PWK [2020] eKLR*

Neutral citation: [2020] KESC 33 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**CIVIL APPLICATION 1 OF 2016**

**DK MARAGA, CJ & P, PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ**

**AUGUST 4, 2020**

**BETWEEN**

**JKG ............................................................................................................ APPLICANT**

**AND**

**PWK ........................................................................................................ RESPONDENT**

***(Being an application for review of a two-judge-bench ruling by this Court (M.K Ibrahim & S.C. Wanjala SCJJ) made on 24th March, 2017)***

**Circumstances in which the Supreme Court could review its decisions**

*The main issue was what were the circumstances in which the Supreme Court could review its decisions? The Supreme Court held that a review of a decision of a single judge or judges of limited bench of the court by a bench of five or more, was not an appeal. There could be no appeal from the decision of a single judge or limited bench of the court to the full court. For a review application to succeed, the applicant had to satisfactorily demonstrate that in reaching his/their decision, the judge(s) acted whimsically or misdirected himself or themselves in the exercise of his or their discretion and as a result reached a manifestly wrong decision causing apparent injustice.*

Reported by Chelimo Eunice

***Jurisdiction*** *– jurisdiction of the Supreme Court - jurisdiction of the Supreme Court to review its decisions – scope of the Supreme Court's power to review its decisions – circumstances in which the Supreme Court could review its decisions – whether uncertainty in law was a ground for the Supreme Court to review its decision – whether the law on division of matrimonial property including properties registered in a company's name was unsettled and uncertain to warrant a review by the Supreme Court.*

***Jurisdiction*** *– jurisdiction of the Supreme Court - jurisdiction of the Supreme Court to review its decisions – review of a two-judge bench decision – whether the Supreme Court, constituted as a five-judge bench, could interfere with the exercise of discretion of a two-judge bench – application seeking orders for the Supreme Court to review its two-judge bench decision which declined to certify an intended appeal as involving a matter of general public*

*importance and also seeking extension of time to file a notice of appeal out of time -Supreme Court Act, section 24(2).*

**Brief facts**

The applicant sought to review a two-judge-bench decision of the Supreme Court delivered on March 24, 2017 and to reconsider afresh the applicant's application dated January 19, 2016. The applicant and respondent were a couple whose marriage was dissolved on May 7, 2009. In the divorce petition, the respondent had also sought for division of matrimonial property. In its judgment, the trial court held that two properties registered in the name of a limited liability company did not form part of matrimonial properties and that the respondent was entitled only to half of another property.

On appeal, the Court of Appeal overturned that decision and directed that the two properties registered in favour of the company as well as the other property all formed part of the matrimonial properties and were available for distribution. Aggrieved by that decision, the appellant applied to the Court of Appeal for certification that his intended appeal involved a matter of general public importance. The Court of Appeal dismissed that application thus provoking the application to the Supreme Court (the court) dated January 19, 2016, seeking a review of the Court of Appeal's decision and also seeking extension of time to file a notice of appeal out of time. In its ruling, the two-judge-bench dismissed that application thus prompting the instant review application.

**Issues**

i. What were the circumstances in which the Supreme Court could review its decisions?
ii. Whether uncertainty in law was a ground for the Supreme Court to review its decisions.
iii. Whether the Supreme Court, constituted as a five-judge bench, could interfere with the exercise of discretion of a two-judge bench.

**Held**

1. Besides section 24(2) of the Supreme Court Act which granted the Supreme Court (the court) jurisdiction to review the decision of a single judge, the court could also review such decisions under its inherent jurisdiction. That, however, was not a *carte blanche* jurisdiction to review all and every decision of a single judge or limited bench of the court.
2. Since a review of the decision of a single judge or limited bench of the court entailed interference with the exercise of a judge(s)'s discretion, such interference was permitted in exceptional circumstances only.
3. A review of a decision of a single judge or judges of limited bench of the court by a bench of five or more, was not an appeal. There could be no appeal from the decision of a single judge or limited bench of the court to the full court. To allow such an appeal would not only be an abuse of the court process but it would also lead to endless litigation and clog the system. Such a review was also not meant to grant an applicant a second bite at the cherry; it was not a regurgitation of the matter that was before a single judge or limited bench. The focus of such review was the decision of the single judge or limited bench and not the merits of the substantive application that was the subject of the decision under review.
4. For such an application to succeed, the applicant had to satisfactorily demonstrate that in reaching his/their decision, the judge(s) acted whimsically or misdirected himself or themselves in the exercise of his or their discretion and as a result reached a manifestly wrong decision causing apparent injustice.
5. The applicant's application dated January 19, 2016 was two pronged: review of the Court of Appeal's failure to certify that the applicant's intended appeal involved a matter of general public importance, and leave to appeal out of time. The two-judge-bench considered the applicant's prayer for leave to appeal out of time and dismissed it for being unmeritorious. The court concurred with the two judges that the applicant's financial difficulties and/or his advocate's misapprehension of the law were not reasonable grounds for granting extension of time to appeals out of time.

6. However, the two judges inadvertently failed to consider the second prayer that the applicant's intended appeal involved a matter of general public importance. In the circumstances, the applicant's review application was allowed to that extent.
7. The appellate jurisdiction of the court was not to be invoked merely for the purpose of rectifying errors with regard to matters of settled law. As such, contradictory decisions of the Court of Appeal could not be the basis for granting certification.
8. The issue of whether property owned by a limited liability company was available for distribution between husband and wife as matrimonial property was squarely before the High Court and the Court of Appeal. The court endorsed the Court of Appeal decision that property that was so closely linked to or mixed inextricably with property in the name of a company under the sole shareholding of a couple without outsiders to it, and on which a matrimonial home was built, was and ought to be treated as matrimonial property available for distribution between husband and wife. The law on division of matrimonial property including properties registered in a company's name was well settled and there was no uncertainty in it.
9. There was no warranty to review the Court of Appeal decision declining to certify the applicant's intended appeal as involving a matter of general public importance requiring the court's consideration.

*Application dismissed with each party bearing its own costs of the application.*

**Citations**

***East Africa***

1. *Fredrick Otieno Outa vJared Odoyo Okell & 3 others Petition* 6 of 2014;[2017] eKLR –(Explained)
2. *Malcolm Bell v Daniel Toroitich Arap Moi & another* Application 1 of 2013; [2013] eKLR – (Followed)
3. *Muthembwa v Muthembwa* [2002] 1 EA 186 – (Followed)
4. *Parliamentary Service Commission v Martin Nyaga Wambora & others Application* 8 of 2017;[2018] eKLR – (Followed)
5. *Rai, Jasbir Singh & 3others v Tarlochan Singh Rai & 4 others* Petition 4 of 2012; [2013] eKLR – (Explained)
6. *Shah v Mbogo & another* [1967] EA 116 – (Affirmed)
7. *SNK v MSK & 5 others* Civil Appeal 139 of 2010; [2015] eKLR – (Cited)

***United Kingdom***

1. *Salomon v Salomon (*1897) AC 22 – (Explained)

**Statutes**

***East Africa***

1. Constitution of Kenya, 2010 articles 50(1)l;159(2)(d); 163(4)(b)- (Interpreted)
2. Supreme Court Act, 2011 (Act No 7 of 2011) sections 3(a) (e); 24(2) – (Interpreted)
3. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 3(2)(4) (5); 51(2) – (Interpreted)

## RULING

### A. Introduction

1. Before Court is a Notice of Motion dated 30th May, 2017 seeking to review the two-judge-bench (Ibrahim & Wanjala, SCJJ) decision of this Court delivered on 24th March, 2017 and to reconsider afresh the applicant's application dated 19th January, 2016. The review application is brought under Section 3(a) and (e) of the Supreme Court Act; Rules 3(2), (4) and (5), 51(2) of the Supreme Court Rules, 2012; Article 159(2)(d) of the Constitution of Kenya and all other applicable provisions of the law. It is supported by the applicant's affidavit sworn on 30th May 2017.

## B. Background

2. The applicant and respondent were a couple whose marriage was dissolved on 7th May 2009. In the divorce petition, the respondent had also sought for division of matrimonial property. In its judgment dated 21st February 2014, the trial court held that the properties known as Nyeri Municipality Block x/xxx and Nyeri Municipality Block x/xxx, registered in the name of a limited liability company, [particulars withheld] Chemists Ltd, did not form part of matrimonial properties and that the respondent was entitled only to half of the property known as Title No. Nyeri Municipality Block xx/xxx.

3. On appeal, in its judgment dated 1st July 2015, the Court of Appeal overturned that decision and directed that the two properties registered in favour of the company as well as the one known as Title No. Nyeri Municipality Block xx/xxx all formed part of the matrimonial properties and were available for distribution.

4. Aggrieved by that decision, the applicant wishes to appeal to this Court. In that regard, he applied to the Court of Appeal for certification under Article 163(4)(b) that his intended appeal involved a matter of general public importance mete for further consideration by this Court. The Court of Appeal dismissed that application in its ruling dated 2nd December 2015 thus provoking the application to this Court dated 19th January 2016.

5. In that application dated 19th January 2016, the applicant sought a review of the Court of Appeal's said decision of 2nd December, 2015 denying him certification to appeal to this Court that his intended appeal involved a matter of general public importance. The application also sought extension of time to file a notice of appeal out of time. In its ruling delivered on 24th March 2017, the two-judge-bench (Ibrahim & Wanjala, SCJJ) dismissed that application thus prompting the current review application dated 30th May 2017.

## C. The Applicant's Case

6. In his application dated 30th May 2017, the applicant's case is that the two-judge-bench ruling of 24th March 2017 was made in error in that it did not consider whether or not his intended appeal raises a matter of general public importance. In that alleged failure, the applicant contends, the two-judge-bench not only denied him access to justice contrary to his constitutional rights under Article 48, but also failed to accord him a fair hearing contrary to Article 50(1) of the Constitution.

7. On refusing to extend time for him to file his appeal out of time, the applicant accused the two-judge-bench of elevating timelines, a procedural technicality according to him, to a fetish contrary to Article 159(2)(d) of the Constitution.

## D. The Respondent's Case

8. On her part, the respondent urges us to dismiss this application. She argues that in its ruling of 24th March 2017, the two-judge-bench of this Court considered the applicant's application dated 19th January 2016 and found no merit in it. She asserted that as the two-judge-bench found, the applicant's financial difficulties and/or his Advocate's misapprehension of the law are not reasonable grounds for granting extension of time to appeals out of time.

## E. Analysis

9. Besides Section 24(2) of the Supreme Court Act which grants this Court jurisdiction to review the decision of a single Judge, in Fredrick Otieno Outa v Jared Odoyo Okell & 3 others [2017] eKLR,

this Court held that it can also review such decisions under its inherent jurisdiction. That, however, is not a carte blanche jurisdiction to review all and every decision of a single judge or limited bench of this Court.

10. Since a review of the decision of a single judge or limited bench of this Court will entail interference with the exercise of a judge(s)'s discretion, on the authority of the Court of Appeal for Eastern Africa in Shah v. Mbogo & Another [1967] EA 116, which jurisprudence was affirmed by this Court in Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR, such interference is permitted in exceptional circumstances. What are those circumstances?

11. Before we outline the circumstances in which a review can be undertaken, we need to bear in mind the fact that a review of a decision of a single judge or judges of limited bench of this Court by a bench of five or more, is not an appeal. There can be no appeal from the decision of a single Judge or limited bench of this Court to the full Court. To allow such an appeal will not only be an abuse of the court process but it will also lead to endless litigation and clog the system. As this Court stated in Parliamentary Service Commission v. Wambora & Others, [2018] eKLR, such a review is also not meant to grant an applicant a second bite at the cherry; it is not a regurgitation of the matter that was before a single judge or limited bench. The focus of such review is the decision of the single judge or limited bench and not the merits of the substantive application that was the subject of the decision under review.

12. For such an application to succeed, the applicant must satisfactorily demonstrate that in reaching his/ their decision, the judge(s) acted whimsically or misdirected himself or themselves in the exercise of his or their discretion and as a result reached a manifestly wrong decision causing apparent injustice.

13. The applicant's application dated 19th January, 2016 was two pronged: review of the Court of Appeal's failure to certify that the applicant's intended appeal involved a matter of general public importance, and leave to appeal out of time. Having perused the ruling of 24th March 2017, we find that the two-judge-bench considered the applicant's prayer for leave to appeal out of time and dismissed it for being unmeritorious. We concur with the two Judges that the applicant's financial difficulties and/or his Advocate's misapprehension of the law are not reasonable grounds for granting extension of time to appeals out of time.

14. We, however, find that the two Judges inadvertently failed to consider the second prayer that the applicant's intended appeal involved a matter of general public importance. In the circumstances, we allow the applicant's review application to that extent and now wish to consider that prayer on its merits.

15. On certification, the applicant's case in the application dated 19th January 2016 was fairly simple and straightforward: on the locus classicus decision of the English House of Lords in Salomon v. Salomon (1897) AC 22, a limited liability company is a legal personality, separate and distinct from its shareholders. As such, the applicant contends, it was erroneous for the Court of Appeal to hold that property owned by a limited liability company is available for distribution between husband and wife as matrimonial property. He therefore urges us to review the Court of Appeal's said decision and grant him certification to appeal for this Court to re-affirm the law in Salomon v. Salomon (1897) AC 22, a decision that has stood the test of time and applied in many cases in this country including S.N.K VS M.S.K & 5 Others (2015) eKLR. He further urges that this Court's pronouncement and resolution of that uncertainty in the law occasioned by contradictory decisions, will transcend his interest in this matter and also benefit the public at large.

16. On her part, the respondent cites this Court's decision in Malcolm Bell Vs Daniel Toroitich Arap Moi & Another [2013] eKLR and argues that the appellate jurisdiction of this Court should not

be extended to mere clarification of contradictions in court decisions. In the circumstances, the respondent urges us to dismiss this application with costs.

**F. DETERMINATION**

17. We have considered the application, the grounds and the written submissions in support and in opposition to it. As this Court stated in Malcolm Bell Vs Daniel Toroitich Arap Moi & Another (supra), "it is now sufficiently clear that as a matter of principle and judicial policy, the appellate jurisdiction of the Supreme Court is not to be invoked ... merely for the purpose of rectifying errors with regard to matters of settled law." As such, contradictory decisions of the Court of Appeal cannot be the basis for granting certification.

18. At any rate, in this matter, the issue of whether property owned by a limited liability company is available for distribution between husband and wife as matrimonial property was squarely before the High Court and the Court of Appeal.

    The evidence on record was that the parties' matrimonial home was built on the property known as Nyeri Municipality Block x/xxx. The other, known as Nyeri Municipality Block x/xxx, which was adjoining, was used as the kitchen garden prior to the applicant transferring both of them to [particulars withheld] Chemists Limited without any consideration at all. In its judgment dated 1st July 2015, the Court of Appeal, following its earlier decision in Muthembwa v. Muthembwa [2002] 1 EA 186, held that property that is "so closely linked to or mixed inextricably with property in the name of a company under the sole shareholding of a couple without outsiders to it", and on which a matrimonial home is built, is and should be treated as matrimonial property available for distribution between husband and wife.

19. We endorse that Court of Appeal decision and its later ruling dated 2nd December 2015, that the law on division of matrimonial property including properties registered in a company's name is well settled and there is no uncertainty in it. As such, we find no warranty to review the Court of Appeal decision declining to certify the applicant's intended appeal as involving a matter of general public importance requiring this Court's consideration.

20. The applicant, having initially partly succeeded in his application, we find that each party should bear its own costs of this application.

21. Before we make final orders in this matter, it is imperative that the composition of the Court in this Ruling be explained.

22. The two Judges (Ibrahim & Wanjala, SCJJ) whose decision is the subject of this review, are part of this Bench. It is pragmatic and good legal practice that where this Court sits as a full bench to review a decision of a single or limited bench, the Judge(s) whose decision, is the subject of review do not form part of the reviewing Bench. This rule is, however, not cast in stone.

23. This is a collegial Court with a limited composition of seven Judges and a constitutional quorum of five Judges. Occasionally, not all the seven Judges may be available to sit to hear and determine cases before the Court. A Judge may be indisposed or unavailable due to one reason or the other such as bereavement or maternity/paternity leave. There may also be a vacancy in the Court. Does it mean that in such situations the Court suspends its operations? The answer is an emphatic no. To meet the constitutional quorum, it will, of necessity, require that a judge or judges whose decision is under

review sit. In Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2013] eKLR the challenge caused by a vacancy was aptly captured and navigated by the majority of the Court as follows:

> "(15) By Article 163(2) of the Constitution, the Supreme Court membership comprises seven Judges; and this Court is properly composed for normal hearings only when it has a quorum of five Judges. We take judicial notice that, for about a year now, the Court has had a vacancy of one member; and also that half of the current membership were previously in service in other superior Courts – and so having the possibility of having heard matters which could very well come up now before the Supreme Court. Recusal, in these circumstances, could create a quorum-deficit which renders it impossible for the Supreme Court to perform its prescribed constitutional functions.
>
> (16) Such a possibility would, in our view, be contrary to public policy and would be highly detrimental to the public interest, especially given the fact that the novel democratic undertaking of the new Constitution is squarely anchored firstly, on the superior Courts, and secondly, on the Supreme Court as the ultimate device of safeguard.

24. In his concurrence in the same case, Ibrahim, SCJ, stated that in the case of a quorum deficit, the Judge(s) concerned are "allowed to sit and determine the matter under the doctrine of necessity to avoid a miscarriage of justice."

25. It is public knowledge that the Court has a vacancy, the Hon, Justice Ojwang' having retired. It is for this reason, and in invocation of the doctrine of necessity, that the two judges whose decision is the subject of this application, formed part of the Bench in this matter.

26. Having made that clarification and consequent upon our above stated view, we dismiss this application and make the following final orders:

    (a) The Application dated 30th May 2017 is hereby dismissed.

    (b) Each party shall bear its own costs of the application.

27. Orders accordingly

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

**...............................................**

**D.K MARAGA**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

**...............................................**

**P.M MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUREME 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**

**.................................................**

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**