



**Ojienda v Kenya Revenue Authority & another (Petition 6 of 2019)  
[2019] KESC 46 (KLR) (Civ) (11 February 2019) (Ruling)**

*Tom Odhiambo Ojienda v Kenya Revenue Authority & another [2019] eKLR*

Neutral citation: [2019] KESC 46 (KLR)

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

**CIVIL**

**PETITION 6 OF 2019**

**DK MARAGA, CJ, MK IBRAHIM, JB OJWANG, SC WANJALA & I LENAOLA, SCJJ**

**FEBRUARY 11, 2019**

**BETWEEN**

**TOM ODHIAMBO OJIENDA SC ..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**LAW SOCIETY OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Application for review of the decision of a single Judge of the Supreme Court dated 7th February, 2019 and issuance of conservatory orders pending an appeal from the Ruling and Order of the Court of Appeal (Koome, Murgor & Kantai JJ.A) delivered on 6th February, 2019)*

**Requirements to be met before the decision of a single judge of the Supreme Court could be reviewed by a bench of five judges.**

*A single judge's decision could be reviewed by a bench of five judges if the applicant can show that the judge made a clear error or that the decision was unjust. The applicant must file a fresh application for review.*

Reported by Flora Weru and Kakai Toili

***Jurisdiction*** - jurisdiction of the Supreme Court - special jurisdiction - jurisdiction to review the decision of a single judge of the Supreme Court by a bench of five judges - requirements to be met - what were the requirements to be met before the decision of a single judge of the Supreme Court could be reviewed by a bench of five judges - Supreme Court Act, section 24(2); Supreme Court Rules, 2012, rule 4(4)

***Civil Practice and Procedure*** - orders - conservatory orders - application for conservatory orders - documents to be filed in support of an application for conservatory orders - petition of appeal - failure to file a petition of appeal - what was the effect of failure to file a petition of appeal in support of an application for conservatory orders, where an applicant sought conservatory orders at the Supreme Court against a decision of the Court of Appeal



## **Brief facts**

The applicant applied for conservatory orders from the Supreme Court against a decision of the Court of Appeal. However, the single judge of the court dismissed the application holding that the application was not predicated upon a petition of appeal. Aggrieved by the decision the applicant filed the instant application on the ground that the single judge erred in holding that the application was not supported by a petition of appeal yet a petition of appeal was on record.

## **Issues**

- i. What were the requirements to be met before the decision of a single judge of the Supreme Court could be reviewed by a bench of five judges?
- ii. What was the effect of failure to file a petition of appeal in support of an application for conservatory orders, where an applicant sought conservatory orders at the Supreme Court against a decision of the Court of Appeal?

## **Relevant provisions of the Law**

### **Constitution of Kenya, 2010**

#### **Article 163 (4);**

*Appeals shall lie from the Court of Appeal to the Supreme Court—*

*(a) as of right in any case involving the interpretation or application of this Constitution; and*

*(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).*

### **Supreme Court Act**

#### **Section 24 (2);**

*Any person dissatisfied with the decision of one judge in the exercise of a power under subsection (1) is entitled to have the matter determined by a bench of five judges.*

### **Supreme Court Rules, 2012**

#### **Rule 3 (5)**

*Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.*

#### **Rule 4(4)**

*A party aggrieved by the decision of a single Judge of the Court may file an application for review of the decision to the Court.*

#### **Rule 26(1)**

*A party who seeks to have an application heard on a priority basis shall file an application which shall be —*

*(a) accompanied by a certificate of urgency; and*

*(b) supported by an affidavit setting out the urgency.*

## **Held**

1. Section 24(2) of the Supreme Court Act, 2011 and rule 4(4) of the Supreme Court Rules, 2012 contemplated that decisions of a single judge of the court could be reviewed by a bench of five judges.
2. In an application for review, the applicant had to demonstrate how a single judge erred in making the impugned decision or how the said decision was clearly wrong as a result of which there had been an apparent injustice.
3. Although the applicant filed a petition of appeal on February 7, 2019, seeking to appeal the ruling and order of the Court of Appeal which ruling and order was the subject of the application which was dismissed by the single judge, the petition was not before the judge neither was it traceable at the time she made her orders. The single judge did not err by holding that there was no petition of appeal on



record and striking out the applicant's notice of motion dated February 7, 2019. However, since there was a petition on record, the applicant was at liberty to file a fresh application.

*Application dismissed*

### **Orders**

- i. *The applicant's notice of motion dated February 8, 2019 was dismissed.*
- ii. *The applicant was at liberty to file a fresh application for conservatory orders as he deemed fit and the same to be determined on its merits.*
- iii. *No orders as to costs.*

### **Citations**

#### ***East Africa***

1. *Abdallah, Yusuf Gitau v Building Centre (K) Ltd & 4 others* Petition No 27 of 2014; 2014 eKLR-(Explained)
2. *Parliamentary Service Commission v Martin Nyaga Wambora & others* Application No 8 of 2017; [2018] eKLR-(Followed)

### **Statutes**

#### ***East Africa***

1. Constitution of 2010 article 163(4)(a) –(Interpreted)
2. Supreme Court Act, 2011 (Act No 7 of 2011) section 24(2)-(Interpreted)
3. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rules 3(5); 26(1) –(Interpreted)

## **RULING**

1. Before the Court is the Applicant's Notice of Motion dated 7<sup>th</sup> February, 2019 and filed on 8<sup>th</sup> February, 2019. The Application is brought under Article 163(4)(a) of the Constitution, Section 24(2) of the Supreme Court Act, 2011 and Rules 3(5) and 26(1) of the Supreme Court Rules, 2012.
2. The Application seeks the following orders:
  - (a) The Applicant's application for conservatory Orders filed on 7<sup>th</sup> February, 2019 and dismissed on the same day by Honourable Lady Justice Njoki Ndungu (SCJ) be referred to a bench of five Judges for consideration.
  - (b) The Order made on 7<sup>th</sup> February, 2019 by Honourable Lady Justice Njoki Ndungu (SCJ) dismissing the Applicant's application for conservatory Orders filed on 7<sup>th</sup> February, 2019 be and is hereby reviewed and set aside.
  - (c) The Applicant's application for conservatory Orders filed on 7<sup>th</sup> February, 2019 be heard by five Judges.
  - (d) The costs of this Application be provided for.
3. The Application is supported by an affidavit sworn by Prof. Tom Odhiambo Ojienda on 7<sup>th</sup> February, 2019 who depones that the single Judge erred by holding that the Application for Conservatory Orders was not predicated upon a Petition of Appeal yet a Petition of Appeal is indeed on record. The Applicant thus urges that there is an error on the face of the record requiring consideration by five Judges of this Court and that he stands to suffer grave injustice if the Order by the single Judge is not reviewed and his application for Conservatory Orders is not referred to a five Judge bench for consideration.



4. On our part, we find that Section 24(2) of the Supreme Court Act, 2011 and Rule 4(4) of the Supreme Court Rules, 2012 contemplates that decisions of a single Judge may be reviewed by a bench of five Judges. Further, that the jurisprudence of this Court on the conditions for grant of a review order was well expressed in the case of Parliamentary Service Commission v. Martin Nyaga Wambora & Others SC Application No. 8 of 2017; [2018] eKLR in which we held that in an application for review, the Applicant has to demonstrate how a single Judge erred in making the impugned decision or how the said decision is clearly wrong as a result of which there has been an apparent injustice.
5. In the present case, we note that the single Judge dismissed the Applicant's Notice of Motion, on the singular ground that the Application was not supported by a Petition of Appeal. As such, the Judge found that there was no substantive matter for the Court to address. In holding so, the Judge relied on the decision in Yusuf Gitau Abdallah v. Building Centre (K) Ltd & 4 Others SC Petition No. 27 of 2014; 2014 eKLR in which held that an interlocutory application cannot originate proceedings before the Court.
6. Having considered the application and on reading the Court record, we find that although the Applicant filed a Petition of Appeal on 7<sup>th</sup> February, 2019, seeking to appeal the Ruling and Order of the Court of Appeal in Civil Application No. 363 of 2018 (UR 296 of 2018) which Ruling and Order is the subject of the application which was dismissed by the single Judge, the said Petition was not before the Judge neither was it traceable at the time she made her orders. Accordingly, we find that the single Judge did not err by holding that there was no Petition of Appeal on record and striking out the Applicant's Notice of Motion dated 7<sup>th</sup> February, 2019. However, since there is now a Petition on record, the applicant is at liberty to file a fresh application as he may wish.

#### **Orders**

7.
  - (a) The Applicant's Notice of Motion dated 8<sup>th</sup> February, 2019 is hereby dismissed.
  - (b) The Applicant is at liberty to file a fresh application for Conservatory Orders as he deems fit and the same to be determined on its merits.
  - (c) There shall be no Orders as to costs.
8. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF FEBRUARY, 2019.**

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**D. K. MARAGA**

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

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**J. B. OJWANG**

**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**

