



**Nuri v Kombe & 2 others (Application 38 of 2018) [2019] KESC 77 (KLR) (8 May 2019) (Ruling)**

*Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others [2019] eKLR*

Neutral citation: [2019] KESC 77 (KLR)

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

**APPLICATION 38 OF 2018**

**DK MARAGA, CJ, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**MAY 8, 2019**

**BETWEEN**

**HAMDIA YAROI SHEK NURI ..... APPELLANT**

**AND**

**FAITH TUMAINI KOMBE ..... 1<sup>ST</sup> RESPONDENT**

**AMANI NATIONAL CONGRESS ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

*(Being an Application for leave to file an affidavit seeking to be excused from proceedings)*

**A party cannot use an affidavit, on its own, to withdraw from proceedings.**

Reported by Beryl A Ikamari

*Civil Practice and Procedure*-proceedings before the Supreme Court-applicable law-whether the Civil Procedure Act and the Civil Procedure Rules 2010 were applicable to Supreme Court proceedings.

*Statutes*-interpretation of statutory provisions-interpretation of rule 8 of the Supreme Court Rules 2012-whether the rule was applicable where a party sought to completely withdraw from proceedings-Supreme Court Rules 2012, rule 8.

*Civil Practice and Procedure*-affidavit-purposes of an affidavit-whether an affidavit without a substantive application, could be used by a party for purposes of withdrawing from proceedings.

**Brief facts**

The 2<sup>nd</sup> respondent made an application for purposes of being granted leave to file an affidavit seeking to be excused from the proceedings and to be granted the costs of the application. The basis of the application was that the 1<sup>st</sup> respondent colluded with the former officials of the 2<sup>nd</sup> respondent to secure her nomination as a Member of County Assembly of Tana River County contrary to the party's Constitution. The appellant



successfully sued the 1<sup>st</sup> respondent at the Magistrate's Court but the decision was quashed by the High Court on the basis of a legal technicality.

When the political party realized that there had been collusion, it instructed an advocate to go on record at the High Court and subsequently at the Court of Appeal. The political party wanted to bring the true factual position to the Court's attention. The Court of Appeal dismissed the appeal on grounds of lack of jurisdiction. The 2<sup>nd</sup> respondent wished to withdraw from the proceedings as it considered its continued participation as amounting to perpetuating a fraud and sanitizing an illegality.

The 1<sup>st</sup> respondent stated the dispute related to election of Member of the County Assembly of Tana River County and was between members of the 2<sup>nd</sup> respondent and therefore the 2<sup>nd</sup> respondent could not run away from its responsibilities to its members. The 3<sup>rd</sup> respondent stated that the 2<sup>nd</sup> respondent did not address the question on jurisdiction which was before the Court of Appeal and that the application raised issues that should have been raised before the Political Parties Disputes Tribunal. The 3<sup>rd</sup> respondent added that the 2<sup>nd</sup> respondent had participated in the proceedings and could not exit the proceedings and that the application was frivolous and lacked merit.

### **Issues**

- i. Whether the Civil Procedure Act and the Civil Procedure Rules 2010 were applicable to proceedings before the Supreme Court.
- ii. Whether rule 8 of the Supreme Court Rules 2012 could be a basis for filing an application seeking leave to file an affidavit to withdraw from proceedings.
- iii. Whether a party could use an affidavit for purposes of seeking to withdraw from proceedings.

### **Relevant provisions of the Law**

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

#### **Rule 8;**

*(1) A party may, with leave of the Court or with the consent of other party, lodge further pleadings or affidavits.*

*(2) An application for leave under this Rule may be made orally.*

*(3) Any pleadings, affidavits or other documents filed under this rule shall be served on all parties in accordance with rule 10.*

#### **Held**

1. In making its application the 2<sup>nd</sup> respondent invoked rule 8 of the Supreme Court Rules 2012, section 1A, 1B & 3A of the Civil Procedure Act, order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. However, the Civil Procedure Act and the Civil Procedure Rules 2010 were not applicable when moving the Supreme Court. The Civil Procedure Act and the Civil Procedure Rules 2010 were inapplicable and would not help the 2<sup>nd</sup> respondent's cause.
2. Rule 8 of the Supreme Court Rules 2012 could not be a basis for filing an application seeking leave to file an affidavit to withdraw from proceedings. That rule allowed parties to seek leave orally to file a further pleading in addition to what the party had already filed. It could not be invoked where a party sought to completely withdraw from proceedings. The application was fatal for being predicated on a wrong statutory provision.
3. The application was alien in law and not properly before the Court. A party which sought to withdraw from proceedings was required to file a substantive application seeking to withdraw from the proceedings. An affidavit was a document that presented evidence on oath and could not, on its own, be a tool for withdrawal from proceedings.

*Application struck out*

#### **Orders**

- i. *Application struck out*
- ii. *No order as to costs.*



## Citations

### Statutes

1. Appellate Jurisdiction Act
2. Civil Procedure Act
3. Constitution of Kenya, 2010
4. Supreme Court Act

### Advocates

None mentioned

## RULING

1. The substantive matter before the Court is a Petition of appeal dated and filed on the even date of 26<sup>th</sup> October 2018. The appeal seeks to set aside the Court of Appeal (Ouko, P, Musinga & Murgor, JJA) judgment delivered in Election Petition Appeal No. 5 of 2018 as consolidated with Election Petition No. 1 of 2017, which judgment dismissed the Appellant's appeal for lack of jurisdiction.
2. Upon being served with the Petition of appeal, the 2<sup>nd</sup> Respondent (Applicant herein) filed a Notice of Motion Application dated 17<sup>th</sup> December 2018, subject of this Ruling. The application is stated to be brought under Rule 8 of the Supreme Court of Kenya Rules, 2012, Section 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
3. The application seeks for orders that: the 2<sup>nd</sup> Respondent be and is hereby granted leave to file an affidavit seeking to be excused from the proceedings before this Honorable Court, and that the 2<sup>nd</sup> Respondent be granted costs of this application.
4. The application is premised on grounds in the body of the Notice of Motion and a Supporting Affidavit sworn by one, Barrack Okwaro Muluka, the 2<sup>nd</sup> Respondent's Secretary General. The crux of the application is that the 1<sup>st</sup> Respondent colluded with the 2<sup>nd</sup> Respondent's former officials to secure her nomination as a Member of County Assembly of Tana River County contrary to the Party's Constitution. That while the Appellant successfully sued the 1<sup>st</sup> Respondent at the Magistrate Court the decision was quashed by the High Court on the basis of a legal technicality. Further, that the Party was not aware of the collusion until the Appellant wrote a letter to the Party.
5. It is deposed that upon realizing the collusion, the Party instructed an advocate who went on record at the High Court and subsequently at the Court of Appeal, with the aim of bringing to the attention of the court(s), the true factual position. However, the Court of Appeal cited lack of jurisdiction and downed its tools. Consequently, the Applicant now wishes to withdraw from the matter as it deems its continued participation in this matter as amounting to perpetuating a fraud and sanitizing an illegality. Hence the current application for leave to file an affidavit to withdraw from the proceedings.
6. In response to the application, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by its advocate on record, one Sylvester Ngacho Mukele, on 27<sup>th</sup> February 2019 in which it seeks the dismissal of the application. It is averred that the dispute involves the election of a member to the County Assembly of Tana River on account of being a member of the 2<sup>nd</sup> Respondent which election is challenged by another member of the 2<sup>nd</sup> Respondent and therefore the 2<sup>nd</sup> Respondent cannot run away from its responsibilities to its members.



7. On its part, the 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn by one Salome Oyugi, its manager for Political Parties and Campaign Financing. She deposes that the 2<sup>nd</sup> Respondent does not address the principal question that was before the Court of Appeal: whether it had jurisdiction to determine the matter before it. That the Court of Appeal having held as it did, it could not delve into the merits of the case. Further that the issues being raised by the 2<sup>nd</sup> Respondent in its application should have been properly raised before the Political Parties Disputes Tribunal, which was not done. And that the 2<sup>nd</sup> Respondent has all along been a party to these proceedings since the lower Court upto the Court of Appeal and cannot now exist them. She urges that application to be dismissed for being frivolous and with no merit.
8. The Supreme Court has considered the Notice of Motion Application and its supporting affidavit. We have also perused the 1<sup>st</sup> and 3<sup>rd</sup> Respondents Replying Affidavits. The sole issue for determination is whether the Applicant (2<sup>nd</sup> Respondent) should be granted leave to file an affidavit to withdraw from proceedings. However, before considering this meritorious issue, there are two aspects that we need to consider. Both are fundamental question of procedure.
9. In making its application, the 2<sup>nd</sup> Respondent invoked Rule 8 of the Supreme Court of Kenya Rules, 2012, Section 1A, 1B & 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. This Court has been emphatic that the Civil Procedure Act is not applicable when moving this Court. The issue was stated in Daniel Kimani Njihia v Francis Mwangi Kimani & Another, [2015] eKLR, and affirmed in County Executive of Kisumu v County Government of Kisumu & 8 others [2017] eKLR. In the Njihia case, this Court stated:
  - "13. We have found still another impropriety. The Notice of Motion has been brought under Sections 3A and 3B of the Appellate Jurisdiction Act (Cap 9, Laws of Kenya), and Rules 39, 42 and 43 of the Court of Appeal Rules, 2010. These are not the right provisions of law under which the applicant should move the Supreme Court, where a review of denial of certification is sought.
  14. This Court's jurisdiction is exercisable only on the basis of express provisions of the Constitution and the law. The operational rules for this Court (Supreme Court Rules, 2012) are made pursuant to the Constitution, Article 163(8) of which provides:

"The Supreme Court shall make rules for the exercise of its jurisdiction".
15. Consequently, the only applicable sources of law when moving the Supreme Court are the Constitution, the Supreme Court Act, and the Supreme Court Rules, 2012. The Appellate Jurisdiction Act is not applicable when moving this Court. Neither is the Civil Procedure Code." (Emphasis provided).
10. Consequently, we find and hold that the reference to the Civil Procedure Act and Rules by the 2<sup>nd</sup> Respondent is inapplicable and insufficient to help its cause before this Court.
11. Secondly, Rule 8 remains as the only legal provision under which the application is made. Rule 8 provides for Further pleadings, affidavits etc. It provides:
  - (1) A party may, with leave of the Court or with the consent of other party, lodge further pleadings or affidavits.
  - (2) An application for leave under this Rule may be made orally.



- (3) Any pleadings, affidavits or other documents filed under this rule shall be served on all parties in accordance with rule 10.
12. Upon a pragmatic interpretation of this rule, we find that it cannot be a premise for filing of an application like the one before us: seeking leave to file an affidavit to withdraw from proceedings. This rule allows parties to seek leave (orally) to file a further affidavit or further pleading in addition to what a party might have already filed before Court. The rule cannot be invoked where a party seeks to completely withdraw from proceedings. Hence on that basis alone, we find that the application is fatal for being predicated on a wrong statutory provision.
13. Be that as it may, we are of the considered view that the application before this Court is alien in law and it is not properly before us. A party who seeks to withdraw from proceedings is required to file a substantive application seeking to withdraw from the proceedings. One cannot withdraw from proceedings by way of an affidavit. An affidavit is a document that presents evidence on oath and cannot, on its own, be a tool for withdrawal from proceedings. Hence the proper cause of action is for the 2<sup>nd</sup> Respondent to file a substantive application seeking leave to withdraw from the proceedings and not an application seeking leave to file an affidavit to withdraw from proceedings. Such a relief is not available for granting by way of an affidavit.
14. The upshot is that we have no hesitation in striking out the application for being fatally defective. Consequently, the Notice of Motion application dated December 17, 2017 is hereby struck out with no orders as to costs.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY, 2019**

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**D. K. MARAGA**

**CHIEF JUSTICE & PRESIDENT JUSTICE 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**

.....

**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**

