



Okoiti & another v Attorney General & another (Civil Application 1 of 2019) [2019] KESC 5 (KLR) (Civ) (20 December 2019) (Ruling)

Okiya Omtatah Okiiti & another v Attorney General & another [2019] eKLR

Neutral citation: [2019] KESC 5 (KLR)

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

CIVIL

CIVIL APPLICATION 1 OF 2019

I LENAOLA, SCJ

DECEMBER 20, 2019

**IN THE MATTER OF: AN APPLICATION TO A SINGLE JUDGE OF THE SUPREME COURT OF KENYA FOR REVIEW OF THE DECISION OF THE HON. OLE KEIWUA, DEPUTY REGISTRAR, DATED 27TH NOVEMBER 2018, DECLINING TO ADMIT THE APPLICANTS' APPLICATION DATED 26TH NOVEMBER 2018, WHICH APPLICATION URGES THE SUPREME COURT TO DEPART FROM ITS FINDINGS AND HOLDING IN ADVISORY OPINION NO. 2 OF 2012 THAT THE TWO-THIRDS GENDER PRINCIPLE APPLIES TO THE COMPOSITION OF THE SENATE AND THE NATIONAL ASSEMBLY CONTRARY TO THE EXPRESS PROVISIONS OF ARTICLES 97 AND 98 OF THE CONSTITUTION
IN THE MATTER OF: RULE 4A (2) OF THE SUPREME COURT RULES, 2012**

BETWEEN

OKIYA OMTATAH OKOITI 1ST APPLICANT

NYAKINA WYCLIFFE GISEBE 2ND APPLICANT

AND

THE HON ATTORNEY GENERAL 1ST RESPONDENT

THE PARLIAMENT OF KENYA 2ND RESPONDENT

Supreme Court allows a review application against a deputy registrar's decision to decline to admit pleadings.

The Supreme Court held that under rule 4A(2) of the Supreme Court Rules, 2012, a party aggrieved by the deputy registrar's decision to decline to admit pleadings could seek a review of the decision before a single judge of the Supreme Court. As to whether it was the deputy registrar was bound to give a reason for declining to admit



pleadings, the Supreme Court held that it was necessary for the deputy registrar to make specific reference to parts of the Constitution and the Supreme Court Act which the pleadings did not comply with.

Reported by Beryl Ikamari

Jurisdiction - *jurisdiction of the Supreme Court - review jurisdiction - review application against a decision of the deputy registrar of the Supreme Court - whether the Supreme Court had jurisdiction to review a decision by the deputy registrar to decline to admit pleadings - Supreme Court Rules, 2012, rules 4A(1)(b), 4A(2) & 7E(2).*

Statutes – *subsidiary legislation - interpretation of subsidiary legislation - interpretation of rule 4A(1)(b) of the Supreme Court Rules, 2012 - requirements relating to a deputy registrar's decision to decline to admit pleadings for non-compliance with the law - giving of reasons for the decision - effect of failure to give reasons that were sufficiently detailed - Supreme Court Rules, 2012, rules 4A(1)(b), 4A(2) & 7E(2).*

Brief facts

The applicants sought a review of the deputy registrar's decision to decline to admit pleadings. They said that the decision was a political one and that it was meritless, unreasonable, arbitrary and offensive. They also stated that it was a decision made contrary to the rules of natural justice and in violation of the applicants' rights of access to justice.

Issues

- i. Whether the Supreme Court had jurisdiction to review a decision by its deputy registrar to decline to admit pleadings.
- ii. Under what circumstances would the Supreme Court review a decision by its deputy registrar to decline to admit pleadings?

Held

1. Under rule 4A(1)(b) of the Supreme Court Rules, 2012 the role of the registrar included declining to admit pleadings that were not in accordance with the Constitution, the Supreme Court Act, the relevant rule or the court's Practice Directions for filings. Under rule 4A(2) of the Supreme Court Rules, 2012, a party aggrieved by the registrar's decision to decline to admit pleadings could seek a review of that decision before a single judge of the Supreme Court. Therefore the Supreme Court had jurisdiction to hear and determine a review application against the registrar's decision.
2. The registrar's role in declining to admit pleadings that did not conform to the law was a role that could be referred to as a case management or administrative role of the registrar. Under rule 4A(1)(b) of the Supreme Court Rules, 2012, the registrar's role was limited to declining to admit documents that were yet to be filed and were therefore not on record. That role was similar to the role of the registrar provided for in rule 7E(2) of the Supreme Court Rules, 2012.
3. The difference between rule 4A(1)(b) and 7E of the Supreme Court Rules, 2012, was that rule 7E provided a remedy for documents that did not comply with the Supreme Court Act or the Supreme Court Rules; it allowed the registrar to issue an order to rectify the pleadings in order to bring them into conformity with the Act or Rules. Since the word 'may' was used in the Rules, the powers of the registrar to order for rectification were discretionary. Rule 4A(1)(b) of the Supreme Court Rules, 2012, was worded in strict terms and it did not provide for such a discretion.
4. Under rule 4A(1)(b) of the Supreme Court Rules, 2012, pleadings would be declined where they were not in accordance with the Constitution, the Supreme Court Act, the relevant Rules or Practice Directions. In making the decision, it was necessary for the deputy registrar to make specific reference to parts of the Constitution and the Supreme Court Act which the pleadings did not comply with. There was a failure to give such specifics in the registrar's decision.
5. In making the decision, the deputy registrar was to be cautious in ensuring that the reasons given for the decision could clearly and specifically be distinct from a decision on the merits of the pleadings as opposed to a mere administrative action that could lead to injustice.

Application allowed.



Orders

No order as to costs.

Citations

Cases

Kenya

1. *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* Civil Appeal 37 of 1978; [1980] KECA 3 (KLR) - (Applied)
2. *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinions Application 2 of 2012; [2012] KESC 5 (KLR) - (Applied)
3. *Kigen, Luka Kipkorir v National Oil Corporation Limited* Civil Suit 723 of 2001; [2014] KEHC 8674 (KLR) - (Applied)
4. *Okoiti, Okiya Omtatab v Attorney General & 2 others* Petition 192 of 2013; [2013] KEHC 4176 (KLR) - (Applied)
5. *Sikona, Elijah & another (on Behalf of Trusted Society of Human Rights Alliance) v Mara Conservancy & others* Civil Case 37 of 2013; [2014] KEHC 4420 (KLR) - (Applied)
6. *Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC)* Civil Suit 304 of 2014; [2015] KEHC 7371 (KLR) - (Applied)

Statutes

Kenya

1. Constitution of Kenya articles 48, 50(1); 163(7)- (Interpreted)
2. Supreme Court Act (cap 9B) In general- (Cited)
3. Supreme Court Rules, 2012 (cap 9B Sub Leg) rules 4A(1)(b)(2); 7; 7B; 7E(2)- (Interpreted)

Advocates

None mentioned

RULING

1. Before this court is the application by the applicants brought pursuant to the provisions of rule 4A(2) of the [Supreme Court Rules, 2012](#). The applicants seek *inter alia*, an order of review and setting aside of the decision of the Deputy Registrar dated November 27, 2018.
2. The grounds upon which the Application is premised are that the decision by the Deputy Registrar to decline to admit pleadings was *ultra vires*, a political decision that was meritless, unreasonable, arbitrary and offensive. They further argue that the decision was made contrary to the principle of natural justice and violates the applicants' right to access to justice pursuant to articles 48 and 50(1) as read with article 163(7) of the [Constitution](#).
3. The application is further supported by the affidavit of the 1st applicant sworn on January 14, 2019. In the affidavit, the applicants aver that their right of access to justice and access to this court under articles 48, 50(1) and 163(7) were violated by the impugned decision of the Deputy Registrar.
4. Further to averments made in the grounds in support of the application, the applicants contend that in their main cause they seek to challenge the validity of this court's advisory opinion in Advisory Opinion No 2 of 2012 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate*; [2012] eKLR because in High Court Constitutional Petition No 288 of 2015 *Okiya Omtatab Okoiti & another v Attorney General & 2 others*; [2015] eKLR, the High Court had declined to hear the matter on the grounds that it lacked jurisdiction to do so following the Advisory opinion aforesaid.



5. In the submissions dated and filed on July 12, 2019, the applicants reiterate their arguments in the pleadings, and further submit that, no adverse action, such as the one taken by the Deputy Registrar to strike out pleadings, should stand without a fair hearing. They also submit that the decision by the Deputy Registrar constitutes misadministration of justice and the abrogation of all the articles of the Constitution relating to the right of access to justice and fair hearing.
6. They furthermore submit that the decision by the Deputy Registrar did not pass constitutional muster, and that the Deputy Registrar is not vested with the judicial power to dismiss or strike out pleadings at the nascent stage of any proceedings, or at all. They, in addition, contend that the Deputy Registrar has no powers to interrogate any pleadings and make a determination whether or not the pleadings offend the law on the merits.
7. The applicants also submit that the decision by the Deputy Registrar was not reasoned, and that it merely restated the provisions of rule 4A(1)(b) of the *Supreme Court Rules*. They relied on the decision in Civil Appeal No 37 of 1978 *DT Dobies & Co (K) Ltd v Joseph Mbaria Muchina & another*; [1980] eKLR in which the Court held that no suit ought to be summarily dismissed unless it appears not to disclose any reasonable cause of action. They also relied on the cases of *Luka Kipkorir Kigen v National Oil Corporation Limited* [2014] eKLR, *Elijah Sikona & another on behalf of the Trusted Society of Human Rights Alliance v Mara Conservancy & 5 others* [2014] eKLR and *Transcend Media Group Limited v Independent Electoral & Boundaries Commission* [2015] eKLR for the submission that striking out of a pleading is a jurisdiction that ought to be exercised sparingly and in clear and obvious cases. And that the present case did not merit that draconian action.
8. The 2nd respondent filed its Notice of Appointment of Advocate dated March 11, 2019 on March 12, 2019. The 1st respondent did not enter appearance. Both respondents did not file any pleadings in support of or in objection to the application.
9. Having carefully considered the pleadings and the submissions made by the applicants, the following issues arise for determination;
 - (a) Whether this court has jurisdiction to review the decision of the Deputy Registrar; and
 - (b) Whether the decision made by the Deputy Registrar warrants a review.
- (a) Whether this court has the jurisdiction to review the decision of the Deputy Registrar.
10. In the above context, rule 4A (1)(b) provides:

“ The role of the Registrar shall be to–

 - (a) ...
 - (b) decline to admit pleadings that are not in accordance with the Constitution, the Act, the relevant rule or the court’s practice Directions for filings”
11. Rule 4A (2) of the Rules then reads;

“ Any party aggrieved by the decision of the Registrar made under this rule may apply to a single judge of the court for a review of the decision.”



12. The decision by the Deputy Registrar made on November 27, 2018 reads in part as follows:

“It is clear that the application stands in conflict with the terms of the Constitution and the *Supreme Court of Kenya Act*, as well as the Court Rules. In the circumstances, I decline to admit it under rule 4A(1)(b) of the *Supreme Court Rules 2012*.”

13. From a concise reading of the Deputy Registrar’s Ruling, it is not in doubt what provisions he relied upon in making his decision and it is self-evident from the decision itself that he invoked rule 4A(1)(b) in doing so. The merits of his decision will be shortly addressed. Without belaboring the point therefore, we hold that this court is vested with the requisite jurisdiction to hear and determine the present application which seeks to review and/or set aside the impugned decision of the Deputy Registrar.

(b) Whether the decision made by the Deputy Registrar warrants a review

14. The roles of the Registrar are provided under rule 4A of the *Supreme Court Rules*. One such role under rule 4A(1)(b) is to decline to admit pleadings that are not in accordance with the law. These roles may be referred to as case management, or the administrative roles of the Registrar and they are also set out broadly in rule 7 of the Rules. These roles, in addition, extend to the maintenance of the register under rule 7B and the filing of documents under rule 7E.

15. Under rule 4A(1)(b), the role of the Registrar is limited to declining to admit documents that are yet to be filed and are therefore not on the record. The ‘not on record’ role is similar to that provided under rule 7E(2) of the *Rules* which reads;

“The Registrar may refuse to accept any document that does not comply with the Act or these rules and may issue an order rectifying the pleadings so that the document complies with the Act or these Rules.”

16. The dissimilarity however between the two provisions i.e. 4A(1)(b) and 7E is that rule 7E provides for a remedy in the event that the Registrar finds that a document that a party seeks to file does not comply with the Act or the Rules, i.e. issue an order rectifying the pleadings so that they are in conformity with the Act or the *Rules*. The power to issue such orders is discretionary as the Rule also states that the Registrar “may” issue such orders. It is a power that the Registrar may, in carrying out her obligations, choose to either exercise or not. This discretion is not provided under rule 4A(1)(b) which is worded in strict terms once the pleadings do not meet the muster of the law.

17. Did the Deputy Registrar therefore act or issue an order that was unreasonable or arbitrary? It is not in dispute in that regard that the powers exercised by the Deputy Registrar were delegated powers from the Registrar, and as such, and in exercise of these delegated powers, acted as provided in the Rules, and in particular within rule 4A(1)(b). However, the applicants nonetheless contend that the decision was bereft of reasons or merit, and therefore, in contravention of articles 48, 50(1) and 163(7) of the *Constitution* which speak to the right to access to justice and fair trial.

18. The applicants also contend that the Deputy Registrar sought to delve into the merits of the application, and struck out the pleadings before the same could be interrogated on their merits. They argue in that regard that the striking out of pleadings is a power that should be cautiously exercised, and only so exercised in the most deserving and clear of cases. They however also admittedly contend that the decision made by the Deputy Registrar was an administrative decision, stating in their submissions that the power to dismiss pleadings and the power to decline to admit pleadings are distinguishable, with the former being a judicial function, while the latter is an administrative function.



19. The above is an important observation that was made by the applicants and which is germane to the instant application, and in determining whether the Deputy Registrar struck out or refused to admit pleadings.
20. From the record, the Deputy Registrar in refusing to admit the pleadings of the applicants, issued a short decision, in which he stated that the pleadings that the applicants sought to be admitted were not in accordance with the Constitution, the Act, the Rules or Practice Directions.
21. The Applicants fault the Deputy Registrar for making the above decision which, their opinion, was bereft of reasons. We note in that regard that rule 4A(1)(b) of the Rules, generally provides the reasons for declining to admit pleadings; that the pleadings are not in accordance with the Constitution, the Act, the relevant Rules or Practice Directions. Any one of these reasons therefore suffices at a general level as to why the Deputy Registrar may have refused to admit the applicants' pleadings. However, it is also our view that specific reasons needed to be adduced with specific references to the parts of the Constitution and the *Supreme Court Act* that the pleadings were afool of. It is not enough to cite the relevant Rule without giving details of the specifics thereof.
22. Further, while the Deputy Registrar had the opportunity to review and consider the documents that the applicants intended to be admitted, caution and precaution had to be observed to ensure that the reasons given would then clearly and specifically separate a decision on the merits of the pleadings as opposed to a mere administrative action. Not giving reasons and merely restating the applicable law and rules is an action that may lead to mis-justice. We say so because it is indeed trite that any decision that affects the rights of parties must, at the very least, have reasons that are cogent and explanatory of the decision made.
23. It is also our view that, rule 4A(1)(b) is not a mere administrative provision. It calls upon the Registrar/Deputy Registrar to consider the pleadings sought to be filed against the expectations of the Constitution, the Supreme Act, the *Supreme Court Rules* and Practice Directions and apply his/her legal mind to the question whether the said pleadings are in accord with specific provisions of the said Laws and Directions. Where they are not, justice demands that reasons, predicated on specific provisions of the Laws and Directions, ought to be given to an applicant as being locked out of the seat of justice, more so at the apex Court, is a serious matter indeed.
24. With respect therefore, and without going into the merits of whatever issues the applicants has sought to place before the court, the decision of the Deputy Registrar is one for review and setting aside.
25. As to costs, the respondents did not make any attempt at filing any pleadings in support or in objection to the application. As such, the application was uncontested, even though the 2nd respondent entered appearance and intimated that it intended to file its pleadings. In accordance with rule 46(1)(a) of the *Rules*, any costs payable shall be assessed by the court when making its decision. Since this is an uncontested application, it would only be prudent that no order as to costs be made.
26. The upshot of our findings above is that the following orders are issued;
 - (a) The notice of motion dated January 14, 2019 is hereby allowed and the Ruling of the Deputy Registrar made on November 27, 2018 is hereby reviewed and set aside.
 - (b) There shall be no order as to costs.
27. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019

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I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar

Supreme Court of Kenya

