Parliamentary Service Commission v Wambora & 36 others (Application 8 of 2017) [2018] KESC 74 (KLR) (21 December 2018) (Ruling)

Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR

Neutral citation: [2018] KESC 74 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 8 OF 2017

DK MARAGA, CJ & P, PM MWILU, DCJ & VP,
MK IBRAHIM, JB OJWANG & N NDUNGU, SCJJ

DECEMBER 21, 2018

BETWEEN

PARLIAMENTARY SERVICE COMMISSION ..... APPLICANT

AND

MARTIN NYAGA WAMBORA ..... 1ST RESPONDENT

COUNTY ASSEMBLY OF EMBU ..... 2ND RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY ..... 3RD RESPONDENT

SPEAKER OF THE SENATE ..... 4TH RESPONDENT

SENATE ..... 5TH RESPONDENT

ANDREW IRERI NJERU & 31 OTHERS & 31 OTHERS & 31 OTHERS & 31 OTHERS & 31 OTHERS ..... 6TH RESPONDENT

Guiding principles for application for review of a decision of the Supreme Court

Reported by Chelimo Eunice

Jurisdiction *– review - 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 may review its decisions - claim seeking orders for the Supreme Court to review its two judge bench decision which dismissed the applicant's plea for extension of time to file an appeal out of time - Supreme Court Act, sections 21(2) and 24(2); Supreme Court Rules, rules 4(4) and 4(3).*

Jurisdiction *– review - jurisdiction of the Supreme Court to review its decisions- review of a two judge bench decision - whether Supreme Court, constituted as a five judge bench could interfere with the exercise of discretion by a two judge bench - Supreme Court Rules, rules 4(4) and 4(3).*

Statutes *- interpretation of statutes - interpretation of section 24(2) of the Supreme Court Act as read together with rule 4(4) of the Supreme Court Rules - whether the powers donated to a single judge by section 24(2) of the Supreme Court Act and rule 4(4) of the Supreme Court Rules were to be solely exercised by a single judge - Supreme Court Act, section 24(2); Supreme Court Rules, rules 4(4).*

Civil Practice and Procedure *- reviews - applications for review at the Supreme Court - guiding principles for application for review of a decision of the Supreme Court - scope of the Supreme Court's discretionary powers of review - whether under circumstances, the Supreme Court could review its decision.*

Brief facts

The applicant sought to review a two judge bench decision of the Supreme Court which dismissed it's plea for extension of time to file an appeal out of time. The applicant averred, among others things, that the court failed to consider the public interest element in the interpretation of article 181 of the Constitution and that the issue concerning removal of a governor from office was one of great public interest. The 1st respondent opposed the application arguing that the law under which the application was brought was limited to review of the decision of a single judge of the court, hence, the court had no jurisdiction to review a two judge bench decision.

Issues

i. Whether powers donated to a single judge by section 24(2) of the Supreme Court Act and rule 4(4) of the Supreme Court Rules was to be solely exercised by a single judge.
ii. Whether the Supreme Court had jurisdiction to review a two judge bench decision as envisioned by rule 4(4) of the Supreme Court Rules, 2012.
iii. Whether Supreme Court, constituted as a five judge bench could interfere with the exercise of discretion by a two judge bench.
iv. Whether Supreme Court had the jurisdiction to review its own decisions, and if so, what was the scope of that jurisdiction?
v. What were the guiding principles for application for review of a decision of the Supreme Court?

Relevant provisions of the Law

Supreme Court Act, 2011;

Section 24;

1. *In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.*
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 4;

(3) Without prejudice to the provisions of sub-rule (1) or sub-rule (2), a single Judge of the Court may hear applications and make orders with regard to-

(a) change of representation;

(b) admission of consent;

(c) consolidation of matters;

(d) dismissal of a matter for want of prosecution;

(e) correction of errors on the face of the record;

(f) withdrawal of documents;

(g) review of the decision of the Registrar;

(h) leave to file additional documents;

(i) admission of documents for filing in the Registry; or

(j) substitution of service.

(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.

Held

1. Rule 4(4) of the Supreme Court Rules, 2012 (the Rules) did not apply to the instant application since it was not filed under rule 4(3) of the Rules, which sub-rule provided for matters which could be determined by a single judge. Those matters listed, an application for extension of time was not one of matters reserved for a single judge. Further, the application was filed pursuant to sections 21(2) and 24(1) of the Supreme Court Act, 2011 (the Act) and rules 24 and 53 of the Rules. Hence it was not an application determined within the pretext of rule 4(3) and (4) of the Rules.
2. Under rule 4(4) of the Rules, the matters reserved for a single judge were not cast in stone and it was not mandatory that those matters would only be heard by a single judge. The words without prejudice to the provisions of sub-rule 1 or sub-rule (2), demonstrated that the mandate of a single judge would be varied or was subject to what the Chief Justice or the Deputy Chief Justice could direct.
3. One of the functions of the Chief Justice, which would be delegated to the Deputy Chief Justice under rule 4(1) of the Rules was constituting a bench to hear and determine any matter filed before the court. Hence the matters listed under rule 4(3) of the Rules as being reserved for a single judge of the court, would legitimately be heard and determined by any other bench as constituted by the Chief Justice or the Deputy Chief Justice.
4. The two judge bench had the requisite jurisdiction to hear the matter, being an application for extension of time. Such an application, being a preliminary motion which sought the exercise of the court's discretion was well reserved for determination by a limited bench of the court.
5. The power(s) bestowed to a single judge of the Court by the Act and the Rules would be ably exercised by a collegial bench of more than one judge. The two judges had the jurisdiction competence to hear and determine it. Having determined the application pursuant to rule 24(1) of the Rules, it was well in order that an aggrieved person had a right of review under sub-rule 24(2). A decision made by a limited bench of the court under section 24(1) of the Act was made in exercise of discretion. It followed that a person aggrieved by the exercise of discretion by a court would file an application seeking for its review and setting aside.
6. The two judges exercised their discretion in making their decision. The court, constituted as a five judge bench could interfere with the exercise of discretion by a two judge bench. The court had the power to rise above a decision of one or a limited bench, where compelling reasons were given that the decision given was erroneous. However, as such a review would entail an interference with the exercise of a judge's discretion, it was guided by stringent legal principles.
7. A Court of Appeal could not interfere with the exercise of the discretion of a judge unless it was satisfied that the judge in exercising his discretion had misdirected himself in some matter and as a result had arrived at a wrong decision, or unless it was manifest from the case as a whole that the judge had been clearly wrong in the exercise of his discretion and that as a result there had been mis-justice.
8. An application for review of a decision of a single or limited bench of the court by a bench of five or more, was not as a matter of course to be undertaken in a casual way. The provisions in the Act and the Rules allowing review of such a decision before a bench of five or more were not part of the normal appellate jurisdiction mandates of the court so that any decision made by a limited bench of the court would automatically be reviewed by a bench of five judges or more. That would be tantamount to abuse of court process. The review window was to be exercised sparing and only deserving cases were to be allowed.
9. If caution was not taken, then in the ultimate, the abuse of section 24(2) of the Act and rule 4(4) of the Rules by filing of frivolous applications seeking review would defeat the whole essence and spirit of the legislation and the jurisprudence that procedural matters be handled by a limited bench. While

those provisions were meant to speed up access to justice, their abuse would in turn inhibit access to justice by allowing all and sundry review applications to clog the system and take up judicial time.

10. The review window so envisaged was not meant to grant an applicant a second bite at the cherry. It was not an opportunity for an applicant to re-litigate his/her case. At the core of an application for review was the court's exercise of discretion. It was the court or judge's decision that was impugned and not the substantive application being re-argued. Hence an applicant was under a legal burden to lay a basis, to the satisfaction of the court, that in exercise of its discretion, the limited bench acted whimsically or misdirected itself in reaching the decision it made.

11. The guiding principles for application(s) for review of a decision of the court made in exercise of discretion as:-

1. a review of exercise of discretion was not as a matter of course to be undertaken in all decisions taken by a limited bench of the court;
2. review of the exercise of discretion was not a right; but an equitable remedy which called for a basis to be laid by the applicant to the satisfaction of the court;
3. an application for review of exercise of discretion was not an appeal or a chance for the applicant to re-argue his/her application;
4. in an application for review of the exercise of discretion, the applicant had to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically;
5. during a review application, in focus was the decision of the court and not the merit of the substantive motion subject of the decision under review; and
6. the applicant had to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise of discretion and:

i. as a result a wrong decision was arrived at; or
ii. it was manifest from the decision as a whole that the judge had been clearly wrong and as a result, there had been an apparent injustice.

12. The applicant had failed to meet the laid down threshold. It had made no attempt at showing how the judges abused their discretion. The application, while clothed and titled review, was a re-litigation of the application for extension of time. Where the applicant impugned the judges' conduct, it emerged that it was a clear case of appeal rather than review.

13. Article 159(2)(d) of the Constitution was not applicable in the instant case. Article 159(2) (d) was not a panacea for all procedural shortfalls. All that the courts were obliged to do, was to be guided by the principle that justice ought to be administered without undue regard to technicalities. It was applicable on a case-by-case basis.

Application dismissed.

Orders

i. *Application dismissed.*
ii. *Costs to the 1st respondent.*

Citations

1. *Erad Suppliers & General Contractors Limited v National Cereals and Produce Board* [2012] 1 KLR 454 - (Explained)

2. *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* Petition No 14 of 2013; [2014] eKLR –(Explained)

3. *Macharia & another v Kenya Commercial Bank & 2 others* [2012] 3 KLR 199 - (Cited)

4. *Mbogo & another v Shah* [1968] EA 93 at 96 – (Followed)

5. *Outa, Fredrick Otieno v Jared Odoyo Okell & 3 others* Petition No 6 of [2017] eKLR 2014 – (Explained)

6. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application No 16 of 2014; [2014] eKLR – (Followed)

7. *Shah v Mbogo & another* [1967] EA 116 – (Followed)

East Africa;

Statutes

1. Constitution of Kenya, 2010 articles159 (2) (d); 181-(Interpreted)
2. Supreme Court Act, 2011, (Act No 7 of 2011) sections 21(2); 24(2) – (Interpreted)
3. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 4 (1) (3) (4) – (Interpreted)

RULING

Introduction

1. Before the Court is the Applicant's Notice of Motion application dated 20th April 2017 and filed on 26th April 2017. The application is brought under Sections 21(2) and 24(2) of the *Supreme Court Act*, 2011, Rule 4(4) of the Supreme Court Rules, 2012 and all other applicable provisions of the law.

2. The application seeks to review a Two Judge Bench decision of this Court delivered on 24th March, 2017 in Application No. 10 of 2016, Parliamentary Service Commission vs Martin Nyaga Wambora & Others, which dismissed the Applicant's plea for extension of time to file an appeal out of time.

II. Background

3. The Applicant first moved this Court via Application No. 10 of 2016, Parliamentary Service Commission vs Martin Nyaga Wambora & Others filed on 25th May, 2016 seeking for extension of time to file a petition of appeal. That application was supported by an affidavit of Anthony Njoroge sworn on 24th May 2016. Parties in the matter filed Written Submissions which were then considered by the Court.

4. The Applicant's case was that the delay in filing the Intended Appeal was not attributable to any fault or complacency on its part, but that it was as a result a delay in obtaining the typed proceedings from the Court of Appeal. In response, the 1st and 6th Respondents submitted that the Applicant had not been a party to the proceedings in the High Court but had only joined as an Interested Party, hence was not competent to file the Intended Appeal. It was also urged that the delay was inordinate and no compelling reason had been advanced to warrant the grant of the extension sought. It was particularly urged that the typed proceedings were ready on 5th April, 2016 yet the application had been filed one and a half months later, on 25th May 2016.

5. The Court, Wanjala & Lenaola, SCJJ, in a unanimous decision delivered on 24th March 2017, dismissed the application holding that "no compelling reasons have been presented to the Court as a justification for the inordinate delay."

6. It is this Ruling of the Court that the Applicant now seeks its review by a Five Judge Bench of this Court.

II. The Applicant's Case

7. The application seeks the following specific orders, that:

   (1) This application be certified as urgent and service thereof be dispensed with in the first instance;

(2) This Honourable Court be pleased to review the decision of a Two Judge Bench of this Honourable Court delivered on 24th March 2017 in Application 10 of 2016; Parliamentary Service Commission vs Martin Nyaga Wambora & others and extend the time for filing an appeal from the decision of the Court of Appeal in Civil Appeal 194 of 2015; Martin Nyaga Wambora vs The County Assembly of Embu;

(3) Any other order that this Honourable Court may deem fit in the circumstances.

(4) The costs of and incidental to this Application abide in the result of the Appeal.

8. The application is supported by an affidavit sworn by Anthony Njoroge on 20th April, 2017. The gist of the Applicant's grounds in support of the application, the averments in the Supporting Affidavit, and the Written Submissions, is that the Learned Judges failed to consider the public interest element in the interpretation of Article 181 of the *Constitution*. That the Court ought to have considered that the Intended Appeal raised weighty and substantial issues and the Court should have upheld substantive justice over procedural questions. The Applicant invokes Article 159(2)(d) of the *Constitution* and urges that ordinary rules of equity ought not to be a bar to the determination of weighty constitutional matters.

9. It reiterates it previous submissions that there was no delay and that the appeal raises novel points of law and lies on appeal to this Court as of right. Further, that the issue concerning removal of a Governor from office is one of great public interest and that the Intended Appeal was not frivolous. It is averred that the Respondents stand to suffer no prejudice if the sought orders are granted. In the ultimate, it's urged that this matter has met the threshold for the exercise of discretion and review of the Learned Judges exercise of discretion.

IV. Respondents' Case

10. Only the 1st Respondent filed Written Submissions and List of Authorities in this matter. That was on 23rd July 2017. We would like to state that the lack of Responses from the other Respondents does not in any way impair the determination of this matter: given its nature as an application for review of this Court's own decision.

11. In his submissions, the 1st Respondent argues that the law under which the application is brought, that is Rule 4(4) of the Court Rules and Section 24(2) of the Act, which gives power to this Court to review its decision, is limited to review of the decision of a Single Judge of the Court. Hence, it is submitted that the decision sought to be reviewed having been made by a Two Judge Bench, this Court has no jurisdiction to review it. In this regard, he cites the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 others, [2012] eKLR in urging that this Court cannot arrogate itself jurisdiction not bestowed to it by the *Constitution* or legislation.

12. Was the Court to find that it has jurisdiction, the 1st Respondent, acknowledges that it was held in Fredrick Otieno Outa v Jared Odoyo Okell & 3 others, [2017] eKLR that this Court may invoke its inherent jurisdiction to review its decision in exceptional circumstances. However it is submitted that that exceptional threshold has not been met in this application. Particularly, it is submitted that it has not been demonstrated that the two Judges were misled into giving a Ruling on the belief that parties had consented; neither was the Ruling based on a repealed law or a deliberately concealed statutory provision. That the Court correctly exercised its discretion and there are no grounds for review. The ruling was neither obtained by fraud or deceit.

13. Further it was submitted that the Court was properly constituted when it determined the application and therefore competent to hear the application. Reliance was placed on the case of Erad Suppliers &

General Contractors Limited v National Cereals and Produce Board, [2012] eKLR to urge that two judges of the Court could sit to determine simple applications.

14. The 1st Respondent submitted that the Applicant was attempting to re-litigate its previous application dated 24th May 2016 as the current one was based on similar grounds. As such, he urged that the current application was res judicata. He referred to the Fredrick Outa case (above), in urging that an application for review is not meant to afford the losing party an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome. He prayed that the application be dismissed.

V. Issue(s) For Determination

15. Two issues arise for determination in this matter, namely:

    (i) Whether this Court has jurisdiction to determine this review application; and if yes

    (ii) Whether a case has been made to warrant that review,

VI. Analysis

Whether this Court has jurisdiction to determine this review application

16. The 1st Respondent's contention is that this Court lacks jurisdiction to review the decision delivered on 24th March 2017, on the basis that it was made by two judges. That the power of review donated by Section 24(2) and Rule 4(4) is only exercisable where that decision has been made by a single judge.

17. The determination of this issue calls for a determination of the question whether the powers donated to a single judge by Section 24(2) of the Act and Rule 4(4) of the Court Rules is to be solely exercised by a single judge. To understand the gist of these provisions, it is imperative that they be read and understood in their wider context. Sub-section 24(2) should be read alongside Sub-section 24(1) of the Act, while Sub-rule 4(4) cannot be read in isolation of its predecessor, Sub-rule 4(3).

18. Section 24 provides in relevant part, thus:

    (1) In any proceeding before the Supreme Court, any judge of the Court may make any interlocutory orders and give any interlocutory directions as the judge thinks fit, other than an order or direction that determines the proceeding or disposes of a question or issue before the Court in the proceeding.

    (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.

    While Rule 4 in relevant parts provides:

    ...

    (3) Without prejudice to the provisions of subrule (1) or sub-rule (2), a single Judge of the Court may hear applications and make orders with regard to-

        (a) change of representation;

        (b) admission of consent;

        (c) consolidation of matters;

        (d) dismissal of a matter for want of prosecution;

        (e) correction of errors on the face of the record;

(f) withdrawal of documents;

(g) review of the decision of the Registrar;

(h) leave to file additional documents;

(i) admission of documents for filing in the Registry; or

(j) substitution of service.

(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.

20. First we would outrightly hold that Rule 4(4) does not apply to the application before this Court. The application subject of this Review application was not filed under Rule 4(3), which sub-rule categorically provide for matters which may be determined by a single judge. First, of all those matters listed, an application for extension of time is not one of matters reserved for a single Judge. Secondly, that application was filed pursuant to Sections 21(2) and 24(1) of the Act; and Rules 24 and 53 of the Court Rules. Hence it cannot be argued that it was an application determined within the pretext of Rule 4(3) and (4) of the Court Rules.

21. Be that as it may, we also find that even under sub-rule (4), as regards the matters reserved for a single Judge, it is not cast in stone that those matters can only be heard by a single Judge. The words: "without prejudice to the provisions of sub-rule 1 or sub-rule (2)" clearly demonstrates that the mandate of a single Judge may be varied or is subject to what the Chief Justice or the Deputy Chief Justice may direct. One of the functions of the Chief Justice, which may be delegated to the Deputy Chief Justice under Rule 4(1), is: "constituting a Bench to hear and determine any matter filed before the Court." Hence the matters listed under Rule 4(3) as being reserved for a single Judge of the Court, may legitimately be heard and determined by any other Bench as constituted by the Chief Justice or the Deputy Chief Justice.

22. Having found that the Ruling was pursuant to an application under section 24(1) of the Act, did the two judges have jurisdiction to determine it? We have no doubt that the two Judge Bench had the requisite jurisdiction to hear the matter, being an application for extension of time. Such an application, being a preliminary motion seeking the exercise of the Court's discretion is well reserved for determination by a limited Bench of the Court. In deed in a collegial Court, some, if not all, procedural matters are reserved for a limited Bench of judges. However, it does not follow that it is wrong where a higher number of judges sit to determine such a matter. This was well articulated by this Court in the case of Erad Suppliers (above) thus:

> "(7) In the run-up to the hearing before the five-Judge Bench, there are preparatory steps – beginning with proceedings on record before the Supreme Court Registrar, to any settling of deserving legal-procedural issues before a more limited Bench of the Court, and ending up with the substantive hearing before a Bench of five Judges. Without this mode of case-management, the task of the Court under the *Constitution* would be incapacitated. This would be contrary to the provisions of Art.159 (2)(d) of the *Constitution*. It is, therefore, our duty to give full meaning to the terms of the *Constitution* as regards the determination of contested questions – i.e., the questions of merit.
>
> (8) In that context, we find that this Bench as constituted today, is a valid and lawful framework for clearing initial and preliminary questions preceding the

hearing and determination of the substantive cause, before arriving at the stage of a Bench of five Judges. We also rule that, while the category of preliminary issues preparatory to a hearing before five Judges is by no means closed, this Bench is a lawful forum."

23. The upshot is that we find that the power(s) bestowed to a single judge of the Court by the Act and the Rules may be ably exercised by a collegial Bench of more than one judge. Hence we disabuse the Respondent's assertion that the application for extension of time having been heard by two judges is not subject of review before us. The two judges had the jurisdiction competence to hear and determine it. Having determined that application pursuant to Rule 24(1) of the Rules, it is well in order that an aggrieved person has a right of review under Sub-rule 24(2). As is discussed below, a decision made by a limited Bench of the Court under section 24(1) of the Act is made in exercise of discretion. It follows that a person aggrieved by the exercise of discretion by a Court may file an application seeking for its review and setting aside.

Whether a case has been made to warrant that review,

24. To determine whether a case has been made to warrant the review of the Ruling subject of this Application, it is important to understand the nature of the power exercised by the Two Judge Bench when it delivered that Ruling. Before the Learned Judges was an application for extension of time to file an appeal out of time. The nature of an application for extension of time was settled in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR where the Court stated in that regard thus:

> " Hence, this Court by virtue of rule 53 of the Supreme Court Rules has discretionary powers to extend time within which certain acts can be undertaken. This can be perceived by the use of the word "may" in crafting of the rule. This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realized."

25. Hence in making their decision, the two judges exercised discretion. Can this Court, constituted as a five Judge Bench interfere with the exercise of discretion by a Two Judge Bench? The answer is yes. This Court has the power to rise above a decision of one or a limited Bench, where compelling reasons are given that the decision given was erroneous. However, as such a review will entail an interference with the exercise of a judge's discretion; it is guided by stringent legal principles.

26. In the celebrated case of Shah v Mbogo and another [1967] EA 116, the High Court, Harris, J stated as follows as regards the power of the Court to set aside an ex-parte judgment made in exercise of a discretion:

> " I have carefully considered, in relation to the present application, the principles governing the exercise of the Court's discretion to set aside a judgment obtained ex-parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

27. On appeal of this decision, the Court of Appeal P (in Mbogo and Another v Shah [1968] EA 93 at 96) affirmed the decision of the High Court thus:

> " We come now to the second matter which arises on this appeal, and that is the circumstances in which this Court should upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this Court, although I think they all more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice."

28. We are persuaded by this decision of the Court of Appeal, the apex Court then, and affirm that it is still good law as regards an appeal or review motion to upset an exercise of discretion by a Judge. While the principles therein were set in an appeal, they are applicable to an application for review like this one.

29. We reiterate that an application for review of a decision of a single or Limited Bench of this Court by a Bench of five or more, is not as a matter of course to be undertaken in a casual way. The provisions in the Act and the Rules allowing review of such a decision before a bench of five or more are not part of the normal appellate jurisdiction mandates of this Court so that any decision made by a limited Bench of the Court will automatically be 'reviewed' by a Bench of five Judges or more. That will be tantamount to abuse of Court. The review window is to be exercised sparing and only deserving cases have to be allowed.

30. This Court notes with concern that if caution is not taken, then in the ultimate, the abuse of section 24(2) and Rule 4(4) by filing of frivolous applications seeking review will defeat the whole essence and spirit of the legislation and the jurisprudence in Erad suppliers (above), which is the law to date, that procedural matters be handled by a limited Bench. And while these provisions were meant to speed up access to justice, their abuse will in turn inhibit access to justice by allowing all and sundry review applications to clog the system and take up precious judicial time.

31. We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case. Sight should never be lost of the shore that in an application for review, like the one before the Court, at the core of the application is the Court's exercise of discretion. It is the Court/Judge's decision that is impugned and not the substantive application being re-argued. Hence an applicant is under a legal burden to lay a basis, to the satisfactory of this Court, that in exercise of its discretion, the limited Bench acted whimsically or misdirected itself in reaching the decision it made.

32. Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

    (i) A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.

    (ii) Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;

(iii) An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.

(iv) In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.

(v) During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.

(vi) The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:

(a) as a result a wrong decision was arrived at; or

(b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

33. Turning to the matter at hand, the Applicant before this Court has unfortunately failed to meet the above threshold. It has made no attempt at showing how the judges abused their discretion. We agree with the 1st Respondent that the application, while clothed and titled review, is a re-litigation of the application for extension of time. Where the Applicant impugns the Judges' conduct, it emerges that it is a clear case of appeal rather than review. For instance, at paragraph 29 of the Submissions, it is submitted that: [t]he learned judges failed to consider the public interest in the interpretation of Article 181 of the *Constitution*." This is a clear ground of appeal and not review.

34. Further, the Applicant also invoked Article 159(2)(d) of the *Constitution* and urges that ordinary rules of equity ought not to be a bar to the determination of weighty constitutional matters and on that basis we should grant the review. We are not at all persuaded by the Applicant's invocation of Article 159(2)(d) in urging a review application like this one. We do not think that that provision is applicable in the instant case. This Court has earlier cautioned against the indiscriminate invocation of Article 159(2)(d) by litigants even where it is not applicable. In Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR thus:

> "Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis (Raila Odinga and 5 Others v. *IEBC and 3 Others; Petition No. 5 of 2013*, [2013] e KLR)."

35. We note that the decision of the Two Judge Bench was in a summarized form. This might have erroneously informed the Applicant's assertion that some of its issues were not considered. However, that cannot be the case. In their Ruling, the Learned Judges categorically state that they had: "perused the application dated 24th May 2016; read the affidavit of Anthony Njoroge sworn on 24th May, 2016, and considered the Written submissions of both the Applicant and the Respondents." In the ultimate the application was dismissed for the reasons that: "no compelling reasons have been presented to the Court as a justification for the inordinate delay." We find nothing irregular with this decision to warrant review.

36. The upshot is that the application for review is for dismissal, which we hereby do. We make the following orders:

(i) The Notice of Motion sated 20th April, 2017 is hereby dismissed.

(ii) The Applicant shall bear the 1st Respondent's costs

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2018.

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D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-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

.....

N. NDUNG'U

JUSTICE OF THE SUPREME COURT