Omukanda v Indepedent Electoral and Boundaries Commission of Kenya & 2 others (Civil Application 32 of 2014) [2015] KESC 10 (KLR) (12 May 2015) (Ruling)

Joseph Amisi Omukanda v Indepedent Electoral and Boundaries Commission of Kenya & 2 others [2015] eKLR

Neutral citation: [2015] KESC 10 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 32 OF 2014

PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

MAY 12, 2015

BETWEEN

JOSEPH AMISI OMUKANDA ..... APPLICANT

AND

INDEPEDENT ELECTORAL AND BOUNDARIES COMMISSION OF KENYA ..... 1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA RETURNING OFFICER NAVAKHOLO CONSTITUENCY ..... 2ND RESPONDENT

EMMANUEL WANGWE ..... 3RD RESPONDENT

(Being an application for leave to extend time to file an appeal in the Supreme Court from the Judgment of the Court of Appeal at Kisumu dated 14th March 2014)

Whether the Supreme Court could grant an extension of time to file an intended appeal on the basis that the said appeal raised issues of interpretation and/or application of the Constitution.

Reported by Nelson Tunoi

Civil Practice and Procedure– *extension of time – application for leave for extension of time to lodge the record of appeal against judgment and orders of the Court of Appeal – whether the Supreme Court could grant an extension of time to file an intended appeal on the basis that the said appeal raised issues of interpretation and/or application of the Constitution – whether the application was merited - Constitution of Kenya, 2010, article 163(4)(a)&(b); Supreme Court Rules, 2012, Rule 33; Supreme Court Act, section 15(2).*

Brief facts

The applicant filed an application before the Supreme Court for extension of time to lodge the record of appeal against the judgment and order of the Court of Appeal at Kisumu. The background of the application

was as follows: the applicant was one of the eight (8) candidates who contested the National Assembly seat for *Navakholo* Constituency during the 2013 general elections, to which the 3rd respondent in the instant application was declared the winner. The applicant filed an election petition in the High Court at *Kakamega* but the High Court found, *inter alia*, that the errors and irregularities proved did not affect the results of the election. Aggrieved by the decision, the applicant appealed to the Court of Appeal at Kisumu, which appeal was dismissed in its entirety. Upon delivery of the Court of Appeal decision, the applicant filed an application seeking certification from the Court of Appeal for an appeal to the Supreme Court, on grounds that issues of interpretation of the Constitution were involved; that a miscarriage of justice was apprehended; and that matters of general public importance were involved. The Court of Appeal dismissed the application for certification on the ground that it failed to meet the threshold set by article 163(4)(b) of the Constitution, as the intended appeal did not involve matters of general public importance.

Issues

i. Whether the Supreme Court could grant an extension of time to file an intended appeal on the basis that the said appeal raised issues of interpretation and/or application of the Constitution.

Held

1. An appeal could only be lodged "as of right" to the Supreme Court on the basis of article 163(4)(a), if it raised an issue entailing the interpretation or application of the Constitution; whereas article 163(4)(b) could only support an intended appeal if the question was one involving a "matter of general public importance". The question as to what constituted a matter of general public importance was considered in detail in the *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone [2013]* eKLR (*Hermanus* case).

2. The applicant filed an application for extension of time to file a composite appeal on the basis of article 163(4)(a)&(b) of the Constitution, and not an application for review of the dismissal of his application for certification by the Court of Appeal on the basis of article 163(5). There was no justification for such application by the applicant having elected to seek certification from the Court of Appeal on the basis of article 163(4)(b) of the Constitution. The application having been dismissed, the only option available to the applicant was to seek review of the Court of Appeal's decisions by the Supreme Court on the basis of article 163(5).

3. The applicant sought to approach the Supreme Court directly as a matter of right, quite out of the time allowed by the applicable Rules. He sought to impugn the Court of Appeal's judgment on the basis of article 163(4)(a) of the Constitution, notwithstanding his own acknowledgment before the Court of Appeal that the judgment did not raise any issues of constitutional interpretation or application, so as to support a direct appeal to the Supreme Court. He further sought to appeal on the basis of article 163 (4)(b) of the Constitution, even without having sought and obtained from the Supreme Court a reversal of the Court of Appeal's denial of certification.

4. The instant application before the Supreme Court was an afterthought and not founded on merit. The applicant originated his appeal on the basis of article 163(4)(b) of the Constitution with no mention of article 163(4)(a) of the Constitution. The dismissal of the application by the Court of Appeal, against which he had not sought review, left the applicant with no basis for approaching the Supreme Court at that stage.

Application disallowed.

Orders

i. The application for extension of time was disallowed, with the consequence that the intended appeal was terminated.

ii. *The costs of the application were to be borne by the applicant.*

Citations

Statutes

1. Constitution of Kenya, 2010

2. Supreme Court Act

Advocates

None mentioned

RULING

A. Introduction

1. This is an application dated 28th July, 2014 brought under certificate of urgency, seeking the following Orders:

    i. the motion be certified as urgent, and heard inter parties on priority basis;

    ii. the applicant be granted leave for extension of time to lodge the record of appeal against the Judgment and Order of the Court of Appeal at Kisumu, in Civil Appeal No.45 of 2013 dated 14th March, 2014;

    iii. the costs of this application to abide the outcome of the intended appeal.

2. The application is premised on Rule 33 of the Supreme Court Rules, 2012, Section 15(2) 0f the *Supreme Court Act*, and Article 163(4)(a) of *the Constitution*.

B. Background

3. The applicant, Joseph Amisi Omukanda, was one of the 8 candidates who contested the National Assembly seat for Navakholo Constituency, during the 4th March, 2013 General Elections. On 5th March, 2013, the IEBC declared the 3rd respondent, Emmanuel Wangwe, to be the winner and duly-elected member of the National Assembly, Navakholo Constituency.

4. Aggrieved by the declaration, the applicant filed an election petition in the High Court at Kakamega, challenging the 3rd respondent's election. He sought, inter alia, an order of scrutiny of all ballot papers cast at the election, and a recount of all the votes cast, and a declaration that after the exercise of scrutiny and recount, he be declared as the duly elected Member of Parliament representing Navakholo Constituency.

5. The High Court found that, no basis had been laid for an order for scrutiny and recount of all votes. It ordered a scrutiny and recount in two polling stations. After the exercise, the 3rd respondent still emerged the winner, with an increased margin: i.e from 32 votes to 373 votes. In a Judgment delivered on 20th September, 2013, the High Court (Chitembwe J) dismissed the petition, holding, inter alia, that the errors and irregularities proved did not affect the results of the election. The Court further ordered each party to bear their own costs.

6. Aggrieved by the decision, the petitioner appealed to the Court of Appeal, contesting the trial Court's decision on several grounds: that the trial Court erred by not ordering for a scrutiny and recount of all the votes; that the re-tally of the votes had proceeded on the basis of inadmissible evidence; and that the trial Court erred by upholding an election despite the small margin only of only 32 votes.

7. Likewise, the 3rd respondent being aggrieved by the High Court's Order directing each party to bear their own costs, filed a cross-appeal.

8. In a decision delivered on 14th March, 2014, the Court of Appeal (Musinga, Azangalala & Ole Kantai, JJA) dismissed the appeal in its entirety, agreeing with the finding of the High Court. However, the

Court allowed the cross-appeal, and granted an Order for costs to be paid by the appellant to the 3rd respondent. The Appellate Court capped the costs at Kenya shillings 1,500,000/=.

9. Upon delivery of the Court of Appeal decision, the applicant filed a Notice of Appeal on 17th March, 2014 expressing his intention to appeal to the Supreme Court. Thereafter, on 28th March, 2014, he filed an application, Court of Appeal Civil Application No. 14 of 2014 (UR 5/2014) seeking certification from the Court of Appeal for an appeal to the Supreme Court. His application was premised on three set of grounds, namely:

    i. that issues of interpretation of *the Constitution* are involved;

    ii. that a miscarriage of justice is apprehended; and

    iii. that matters of general public importance are involved.

10. In a Ruling delivered on 27th June, 2014, the Court of Appeal (Waki, M'Inoti & Murgor, JJ.A) dismissed the application for certification on the ground that it failed to meet the threshold set by Article 163(4) (b) of *the Constitution*, as the intended appeal did not involve matters of general public importance.

11. The said decision of the Court of Appeal led to the present application before this Court. The applicant seeks leave for extension of time to lodge the record of appeal against the Judgment and Orders of the Court of Appeal at Kisumu. The application is supported by the applicant's affidavit, and premised on thirteen grounds.

12. At the hearing, the parties were represented by learned counsel as follows: Mr. Amasakha for the applicant, Mr. Lubulellah for the 1st and 2nd respondents, and Mr. Namada for the 3rd respondent.

C. The Parties'respective Submissions

i. Applicant

13. Learned counsel, Mr. Amasakha submitted that the delay in filing his petition was occasioned by the Courts' procedures at the Court of Appeal, in the processing of proceedings, and the circumstances were not within his control. Counsel contended that it would be just and fair to grant the applicant leave to appeal so that he can exercise his right to access justice under Article 48 of *the Constitution*.

14. Giving a chronological account of the events that led to the delay, counsel submitted that on 17th March, 2014 he filed and served the notice of appeal against the decision of the Court of Appeal delivered on 14th March 2014. Thereafter, on the 18th March, 2014 he applied for certified copies of the proceedings of the Court. However, it was not until the 27th of March, 2014 that the proceedings were made available to him. Subsequently, on 28th March, 2014 the applicant made an application for certification under Article 163(4) (b).

15. The said application was heard on 7th May 2014 and the Ruling delivered on 27th June, 2014, this being 61 days after the lapse of the stipulated time for lodging an appeal. Consequently, the applicant applied for a certified copy of the ruling and proceedings, to enable him file this application. He avers that it was not until 16th July, 2014 that all certified copies of the proceedings were availed to him.

16. In sum, it is counsel's submission that the applicant has always exercised due diligence in pursuit of justice, and the failure to lodge the appeal under rule 33 of the Supreme Court Rules had been occasioned by the Court itself.

17. With regard to the intended petition of appeal, Mr. Amaskha, submitted that it is two fold: the first limb was an appeal under Article 163(4) (b), while the second was an appeal under Article 163(4) (a) of *the Constitution*. He submitted that at the Court of Appeal, he had applied for leave under Article 163(4) (b) of *the Constitution*. However, the Appellate Court made determinations that touched on constitutional issues. In this regard, he argues that the law does not allow the Judges of Appeal to make such findings, as such determinations are a preserve of the Supreme Court. Counsel cited the case of Lawrence Nduttu & 6000 Others vs. Kenya Breweries Ltd. & Another [2012] eKLR in support.

18. Counsel submitted that the Court of Appeal had erred by making a substantive determination on matters of constitutional interpretation and application, while these matters were a preserve of the Supreme Court. He urged that the Court of Appeal's determination of those issues was a nullity.

19. Counsel submitted that in situations where the appeal involves twin matters of general public importance, and of constitutional interpretation, the correct procedure would be for the applicant to seek certification from the Court of Appeal and then proceed to the Supreme Court on matters of constitutional interpretation and application "as of right". According to counsel it would not be practical for the applicant to lodge two appeals to the Supreme Court, one to deal with constitutional matters, and the other in respect of matters of general public importance.

20. Counsel submitted that *the Constitution* and the Supreme Court Rules are silent on the question of time, as regards an appeal that raises both categories of issues. Counsel submitted that in the circumstances, it was only logical to first make an application for certification before lodging the entire appeal.

(ii) 1st and 2nd Respondents

21 Learned counsel, Mr. Lubulellah relied upon the replying affidavit of Ahmed Issack Hassan dated 25th September, 2014 together with his written submissions dated 25th September 2014.

22. Counsel submitted that this application was an afterthought, as the applicant had from the very beginning, opted to seek certification by invoking Article 163(4) (b). The applicant, counsel urged, was now engaged in forum- shopping.

23. Placing reliance on the wording of Article 163(5), and this Court's reasoning in Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone [2013] eKLR, counsel submitted that the best course was for the applicant to seek review of the Court of Appeal's decision at the Supreme Court, rather than to invoke this Court's jurisdiction as contemplated in Article 163(4)(a) of *the Constitution*.

24. Counsel submitted that the applicant had ample time to comply with the provisions of Rule 33 of the Supreme Court Rules, as proceedings were available on 27th March, 2014, which was one month and one day before the timelines lapsed. He submitted that this being an application pursuant to Article 163(4)(a) of *the Constitution*, Rule 33(1) of the Supreme Court Rules, 2012) does not require a copy of certified proceedings relating to the application for review at the Court of Appeal.

25. Counsel urged the Court to invoke the provisions of Rule 37(1) of the Supreme Court Rules, and make a finding that the notice of appeal is to be deemed as withdrawn. Rule 37(1) provides:

> "Where a party has lodged a notice of appeal but fails to institute the appeal within the prescribed time, the notice of Appeal shall be deemed to have been withdrawn, and the Court may on its own motion or on application by any party make such orders as may be necessary."

26. Counsel urged the Court to dismiss the application with costs, as the High Court at Kakamega, and the Court of Appeal at Kisumu had exercised their judicial authority fairly, and in a manner that promoted and protected the principles of *the Constitution*.

(iii) 3rd Respondent

27. Learned counsel, Mr. Namada relied upon the grounds of opposition as lodged, together with submissions filed on the 9th October 2014. In the grounds of opposition, counsel contended that the notice of motion does not disclose or raise any valid constitutional matter to warrant an appeal to this Court. He argued that by seeking leave at the Court of Appeal, the applicant appreciated that the suit raised no matters involving the interpretation or application of *the Constitution*. Counsel urged that the draft appeal does not disclose any arguable appeal, as the subject matter of the dispute was conclusively dealt with by the Court of Appeal.

28. In support of his case counsel referred to the cases of Lawrence Nduttu (Supra) and Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others (2012) eKLR. He urged this Court to dismiss the application with costs.

D. Analysis

29. From the pleadings, and from the submissions, the following issue crystallizes for determination:

> Whether this Court should grant an extension of time to file the intended appeal on the basis that the said appeal raises issues of interpretation and/or application of *the Constitution*...

30. This Court has on several occasions, authoritatively pronounced itself in a number of decisions, as to the circumstances that may support an appeal before it under Articles 163 (4) (a) and 163 (4) (b) respectively. (See for example Lawrence Nduttu Case supra, Hermanus Philipus Steyn case, Sum Model Industries Ltd v. Industrial Commercial Development Corporation, and Peter Ngoge case supra). By these decisions, an appeal can only be lodged "as of right" to this Court on the basis of article 163(4) (a), if it raises an issue entailing the interpretation or application of *the Constitution*; whereas Article 163(4) (b) can only support an intended appeal if the question is one involving a "matter of general public importance". The question as to what constitutes a matter of general public importance was considered in detail in the Hermanus case.

31. The question in this instance is whether the appeal for which extension of time is being sought, would properly lie before this Court. In this regard, we do not have to look beyond the record that is now before us. It is clear that upon being aggrieved by the Appellate Court's Judgment dismissing his petition, the applicant herein sought certification from that Court, in order to appeal to this Court, on the basis of Article 163 (4) (b) of *the Constitution*. He did not seek to appeal "as of right", on the basis of Article 163(4) (a) 0f *the Constitution*.

32. The applicant's decision not to appeal as of right was informed by his belief that no questions entailing the "interpretation and application of *the Constitution*" had arisen from the Appellate Court's Judgment. This is evidenced by para 7 of his affidavit, the contents of which were cited by Mr. Lubullelah. The Court of Appeal dismissed the application for certification on grounds that it had not met the threshold in Article 163(4) (b) of *the Constitution*, as indicated by this Court in Hermanus.

33. The applicant now moves to this Court seeking an extension of time to file, not an application for review of the dismissal of his application for certification by the Appellate Court, on the basis of Article 163 (5) of *the Constitution*, but a composite appeal against the Court of Appeal's Judgment, on the

basis of Article 163(4) (a) as well as 163 (4) (b) of *the Constitution*. We see no justification for such an application. We are in agreement with Mr. Lubullellah that, having elected to seek certification from the Court of Appeal on the basis of Article 163(4) (b) of *the Constitution*, and the application having been dismissed, the only option available to the applicant was to seek a review of the Court of Appeal's decision by this Court, on the basis of Article 163 (5) of *the Constitution*, as indicated in Sum Model.

34. Instead, the applicant now seeks to approach this Court directly as a matter of right, quite out of the time allowed by the applicable Rules. He seeks to impugn the Court of Appeal's Judgment on the basis of Article 163(4) (a) of *the Constitution*, notwithstanding his own avowal before the Appellate Court that the Judgment did not raise any issues of constitutional interpretation or application, so as to support a direct appeal to this Court. In addition, he seeks to appeal on the basis of Article 163 (4) (b) of *the Constitution*, even without having sought and obtained from this Court a reversal of the Appellate Court's denial of certification.

35. This application is, in our view, an afterthought, and is not founded on merit. The authority of the Charo case cannot avail the applicant any relief, as the circumstances are clearly distinguishable. The applicant herein originated his appeal on the basis of Article 163 (4) (b) of *the Constitution*, with no mention of Article 163(4) (a) of *the Constitution*. The dismissal of the application by the Court of Appeal, against which he has not sought a review, leaves the applicant with no basis for moving this Court at this stage.

E. Orders

i. The application for extension of time is hereby disallowed, with the consequence that the intended appeal is terminated.

ii. The costs of this application are to be borne by the Applicant.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2015.

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K. TUNOI

JUSTICE OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J.B. OJWANG

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar, Supreme Court