

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga (CJ &P), Ibrahim, Ojwang, Njoki & Lenaola SCJJ)

PETITION (APPLICATION) NO. 17 OF 2019

–BETWEEN–

- 1. ALRFED ASIDAGA MULIMA**
- 2. CHARLES MARARO NJOROGE**
- 3. PETER KIIO KITUKU**
(Suing as Representatives of Ex-East African Airways Staff Welfare Association)

PETITIONERS

–AND–

- 1. THE ATTORNEY GENERAL**
- 2. BARCLAYS BANK INTERNATIONAL LIMITED**
- 3. BARCLAYS BANK TRUST LIMITED**
- 4. BARCLAYS TRUST CHANNEL ISLAND LIMITED**
- 5. BARCLAYS TRUST INTERNATIONAL LIMITED**
- 6. BARCLAYS BANK KENYA LIMITED**
- 7. MINISTRY OF FINANCE**
- 8. MINISTRY OF TRANSPORT**
- 9. THE REGISTRAR GENERAL**

RESPONDENTS

*(An appeal from the Judgment and Order of the Court of Appeal of Kenya at Nairobi E. M Githinji, W. Karanja & D.K Musinga, JJA dated 24 February 2017 in **Civil Appeal No. 179 of 2015**)*

RULING OF THE COURT

A. BACKGROUND

[1] On 2nd August 2019, the second to sixth Respondents (the Applicants) filed an application dated 29th July 2019, seeking amongst other prayers, the striking out of the Petition filed by the Petitioners on 10th May 2019. The application is premised on the grounds, *inter alia*, that the record of appeal filed by the Petitioners did not contain a certified copy of the decree or order from the Court of Appeal and is therefore defective for failing to comply with the provisions of Rule 33(4)(d) of the Supreme Court Rules, 2012 (the Rules).

[2] The Applicants further contend that the Petitioners did not comply with Rule 33(6) of the Rules by failing to file a supplementary record of appeal to include the missing certified copy of the order or decree of the Court of Appeal.

[3] The Applicants furthermore argue that, while the Court of Appeal Judgment was delivered on 24th February 2017, the Petitioners had failed to extract the relevant order for over two (2) years which inaction is inexcusable.

[4] It was also contended that the omission to include a copy of the certified order or decree of the Court of Appeal is fatal and inexcusable, as the Rules impose a mandatory obligation on the Petitioners to include such a the certified order or decree.

[5] The application is supported by an affidavit sworn on 29th July 2019 by the Legal Counsel of the sixth Applicant, Ms. Nereah Okanga, for and on behalf of the other Applicants. The deponent reiterates the grounds stated to be in support of the application.

(b) The Applicants' written submissions

[6] The Applicants' written submissions are dated 29th July 2019 and filed on 2nd August 2019. They submit in that regard that the omission by the Petitioners to include a copy of the decree or order of the Court of Appeal is inexcusable, and that they ought to have prepared themselves adequately before lodging an appeal to this Court.

[7] The Applicants in that regard rely on the decision of this Court in ***Law Society of Kenya v Centre for Human Rights & Democracy*** [2014] eKLR where it was held that the use of the word 'shall' in Rule 33(1) of the Rules suggests the mandatory nature of the said Rule which therefore requires strict adherence and compliance with all the components thereof. They also rely on ***Abok James Odera t/a J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] eKLR in arguing that the omission is in breach of the overriding objectives of the Supreme Court Act from which the Rules are derived.

[8] It was further submitted that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortcomings, and that the mandatory nature of Rule 33(4)(d) aforesaid is not an issue of procedural technicality, but one of procedural substance. It was thus submitted that the Petitioners have exhibited scant respect for the Rules and procedures of this Court, and cannot therefore plead and rely on Article 159(2)(d) of the Constitution as the answer to their inaction. They furthermore rely on the decision of ***Sammy Kemboi Kipkeu v Bowen David Kagongo & 2 Others*** [2018] eKLR to advance the same argument.

(c) The Petitioners' Replying affidavit

[9] The Petitioners filed their replying affidavit, sworn on 13th August 2019, on 14th August 2019. In responding to the application, they contend that they had

taken all necessary steps in obtaining a certified decree and order from the Court of Appeal to complete the record of appeal in accordance with Rule 33(4)(d) of the Rules.

[10] The Petitioners argue that the omission aforesaid is not fatal, and that the same is a curable defect pursuant to Rules 8, 53 and 55 of the Rules. The Petitioners further submit that they are not guilty of laches or indolence in any way and that the omission is a technicality in procedure and they should not be punished for the inefficiencies or delays by the Court of Appeal in issuing the decree or order.

[11] In their submissions dated 20th August 2019 and filed on 22nd August 2019, the Petitioners submitted that although the record of appeal did not contain a certified decree or order of the appellate Court, they had nonetheless substantively complied with Rule 33 of the Rules for reasons to be seen shortly.

[12] They submitted in that context that a reasonable explanation had been provided for the inadvertent omission, that is, that they had requested for approval of a draft order from the Applicants through their letters dated 22nd January 2018 and 30th April 2019. That, following belated responses from the other parties, they proceeded to write to the Registrar of the Court of Appeal on 28th May 2019, requesting for extraction of the orders of the Court of Appeal, or in the alternative, that the matter be set down for hearing of settlement of terms.

[13] The Petitioners also submitted that they made several follow ups with the Court of Appeal registry, despite having paid for the extraction and sealing of the orders of the Court of Appeal on 6th June 2019 but no action was taken by the Registrar. They also contended that the inability to comply with the provisions of Rule 33 of the Rules was as explained, on the failure by the registry or the Registrar

of the Court of Appeal in providing them with a certified decree or order of the Court despite repeated requests from the Petitioners.

[14] In arguing that it would be a travesty of justice to allow the application by the Applicants seeking to strike out the Petition, the Petitioners submitted, and relied on the case of ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 others*** Petition No. 6 of 2018, that the omission is in effect procedural and technically curable once the order or decree has been supplied. They submitted in addition that they should not be punished for the inefficiencies or delays occasioned by the Court of Appeal or its registry to issue a certified order or decree of the appellate Court, and that in any event, the omission in filing the certified decree or order was explainable.

[15] They further submitted that they would suffer undue prejudice if the application by the Applicants was allowed, in that the procedural inefficiencies or shortcomings would override the competence of the Petition before this Court. They submitted that this Court, in ***Mawathe Julius Musili v Independent Electoral & Boundaries Commission & another*** [2018] eKLR and ***Lemanken Aramat v Harun Meitamei Lempaka & 2 others*** Petition No. 5 of 2014; [2014] eKLR, had the occasion to consider the circumstances of the matters before them, similar to those presently before this Court, and declined to strike out a petition on the grounds that they were predicated on technical issues.

(d) Determination

[16] Upon careful consideration of the application, the submissions in support thereof and the response by the respective parties, the issue arising for determination is whether the Petition as filed is incomplete and incompetent for failing to comply with the provisions of Rules 33(4)(d) and 33(6) of the Rules.

[17] In that context, it is common cause that the notice of appeal and subsequent record of appeal were both filed timeously by the Petitioners on 10th May 2019. It is also common cause that the Petitioners' record of appeal does not contain a copy of the certified decree or order from the Judgment of the Court of Appeal delivered on 24th February 2014.

[18] In determining the above issue, we note that Rule 33(4) provides that a record of appeal filed in this Court shall contain, *inter alia*, the following documents;

- (a) the certificate, if any, certifying that the matter is of general public importance;
- (b) the memorandum of appeal;
- (c) the record of proceedings; and
- (d) *the certified decree or order.*

[19] We have previously held in ***Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others*** Petition (Application) No. 38 of 2018 that where a required document is lacking in the record of appeal, *devoid of a sufficient explanation for the omission*, then the said record is one for striking out. Have the Petitioners offered a plausible explanation for the omission of the decree or order of the Court of Appeal?

[20] We note in that regard that, on 22nd January 2018, the Petitioners wrote to the Applicants enclosing a copy of a draft decree for their approval. The Applicants responded to the Petitioners' letter on 2nd February 2018 stating that the decree was erroneous and proposed amendments to the same. On 30th April 2019, the Petitioners wrote another letter to the Applicants and the first Respondent enclosing a draft decree for their approval. The Applicants responded to the letter on 6th May 2019 again rejecting the draft order as in their view, it was not in

accordance with the Judgment of the Court of Appeal. On 13th May 2019, the Applicants finally wrote to the Petitioners approving the draft decree that the latter had previously sent to the parties on 9th May 2019. On 5th June 2019, the Petitioners then wrote to the Registrar of the Court of Appeal seeking to be issued with the extracted decree and order of the Court.

[21] From a careful perusal of the chronology of events that took place between 24th February 2014 and 10th May 2019, it is therefore deducible that the Petitioners engaged both the Applicants and the Registrar of the Court of Appeal on various occasions seeking to obtain a decree or order of the Court of Appeal. It is also deducible that the Applicants were aware that the Petitioners were making efforts to obtain a decree or order from the Court of Appeal, and had on several occasions sought to reach an agreement with them on the contents of the draft decree and order.

[22] Although not similar in substance, but definitely similar in principle, we held in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* [2014] eKLR that when a party fails to show that there was diligence on its part in trying to obtain proceedings, or that there was no assertion made by any of the other parties as to the industry of a party in seeking to obtain proceedings, this Court would uphold the assumption that all measures had been taken by the party to obtain the said proceedings, and that the encumbrance upon them in obtaining such proceedings was not of their own doing.

[23] In the instant matter, the Petitioners have adduced evidence that they sought, albeit unsuccessfully, to obtain a certified decree or order of the Court of Appeal. Even though there is no certificate from the Registrar of the Court of Appeal supporting or refuting this claim, it is still evident that the Petitioners took all necessary steps to obtain the said decree or order. The omission in filing the

said decree or order cannot therefore be wholly attributed to the Petitioners. The Registrar of the Court of Appeal is certainly culpable of aiding this failure to obtain the certified decree or order, and as such, the Petitioners should not be punished for the indolence of the Court of Appeal's staff and its administrative machinery.

[24] Further, this Court has the discretionary power under Rule 33(5) of the Rules to determine whether a matter before it can proceed without particular documents. That is why in **Sammy Kemboi Kipkeu v Bowen David Kagongo & 2 Others** (supra), we held that Rule 33(4) does not make a mandatory requirement for the proceedings or notes of a Judge from an appellate Court to be included in a record of appeal. And that the applicability of the requirement for such proceedings would only be mandatory under Rule 33(3)(h) of the Rules when appealing from a Court exercising original jurisdiction. In that case, we exercised discretion in favour of a party which had tendered a reasonable explanation for failure to file proceedings. The same principle applies to the present case albeit not in similar circumstances.

[25] Furthermore, in **Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others** (supra) we rendered ourselves as follows;

*“[18] ... Indeed as the learned appellate Judge stated “this Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. However, in enforcing adherence to the Rules, this Court has discretion in the interest of justice. In the **Obado case**, despite the Notice of Appeal having not been served at all, the Court considered that no prejudice had been occasioned to the Respondent(s) and excused the same.”*

[26] In reiterating the above decision, we note that the Applicants have not shown or established what prejudice they would suffer should this Court choose to exercise its discretionary power under Rule 33(5) of the Rules to disregard the inclusion of the decree or order of the Court of Appeal in the record of appeal under Rule 33(4)(d) of the Rules.

[27] The upshot of our findings above is that, while the non-filing of a document mentioned in Rule 33(4)(d) without explanation would otherwise be fatal and the whole record of appeal would attract the strict sanction of striking out, a party that explains itself sufficiently for an omission would be the beneficiary of a favourable exercise of discretion by this Court. Further, where no prejudice is shown to be caused to the opposing party, the exercise of discretion would even be more warranted. The petitioners in this case, on both fronts, are deserving of that discretion.

[28] Having found as above, it follows that the final orders to be made are;

- (a) The Application dated 29th July 2019 is hereby dismissed.***
- (b) The certified copy of the decree and order of the Court of Appeal shall be filed within 14 days of this Ruling.***
- (c) As no party is to blame for their present situation, each shall bear its costs.***

[29] Orders accordingly

DATED and DELIVERED at NAIROBI this 25th day of October, 2019

.....
D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J. B. OJWANG
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