



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

*(Coram: Mwilu, DCJ &VP)*

**PETITION NO. 2 (E002) OF 2021**

**-BETWEEN-**

**OKIYA OMTATAH OKOITI ..... 1<sup>ST</sup> APPELLANT**  
**ANTHONY OTIENDE OTIENDE ..... 2<sup>ND</sup> APPELLANT**  
**KATIBA INSTITUTE (KI) ..... 3<sup>RD</sup> APPELLANT**

**VERSUS**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**SELECTION PANEL FOR THE**  
**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**  
**THE NATIONAL EXECUTIVE ..... 3<sup>RD</sup> RESPONDENT**  
**MOSES KIPTUM SANANGA ..... 4<sup>TH</sup> RESPONDENT**  
**THE SPEAKER OF THE NATIONAL ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT**  
**GERSHOM OTACHI BW'OMANWA ..... 6<sup>TH</sup> RESPONDENT**  
**ALISTER MURIMI MUTUGI ..... 7<sup>TH</sup> RESPONDENT**  
**JAMES K. TUITOEK ..... 8<sup>TH</sup> RESPONDENT**  
**GETRUDE NDUKU NGUKU ..... 9<sup>TH</sup> RESPONDENT**  
**REGINALD OKUMU ..... 10<sup>TH</sup> RESPONDENT**  
**SAMUEL KAZUNGU KAMBI ..... 11<sup>TH</sup> RESPONDENT**  
**HUBBIE HUSSEIN AL-HAJI ..... 12<sup>TH</sup> RESPONDENT**  
**ESTHER MURUGI MATHENGE ..... 13<sup>TH</sup> RESPONDENT**  
**TIYA GALGALO ..... 14<sup>TH</sup> RESPONDENT**  
**NATIONAL LAND COMMISSION ..... 15<sup>TH</sup> RESPONDENT**

*(Being an application for review of the Registrar's Decision dated 22<sup>nd</sup> January 2022 declining to lodge and admit for filing the Petition and Record of Appeal)*

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### **RULING OF THE COURT**

**[1]** UPON perusing the Notice of Motion by the applicant, Katiba Institute, dated 23<sup>rd</sup> July, 2022 and filed on 3<sup>rd</sup> November, 2022 brought pursuant to Rule 6 (2) of the Supreme Court Rules, 2020 seeking orders that:

1. *The court be pleased to review and vacate the Registrar's (Hon. Nyaiyaki) decision of 22<sup>nd</sup> January 2021 declining "to lodge and admit for filing" the Petition and Records of Appeal "for failure to submit the Notice of Appeal and the Judgment of the Court of Appeal";*
2. *There be no costs order;*

**[2]** UPON considering the grounds in support of the application, based on the supporting affidavit sworn by Michael Munguti on 23<sup>rd</sup> July, 2022 and the submissions dated 26<sup>th</sup> July, 2022 and filed on 3<sup>rd</sup> November, 2022 wherein the applicant contends that, aggrieved by the decision of Court of Appeal delivered on 18<sup>th</sup> December, 2020 they filed and served the Notice of Appeal on 22<sup>nd</sup> December, 2022, within four days of the Court of Appeal decision, with no party contesting this fact; that the appellant thereafter filed its appeal on 20<sup>th</sup> January 2021, within the 30 days of filing the Notice of Appeal under Rule 38(1)(a) of the Court's Rules by which time it had not received the certified judgment and signed Notice of Appeal from the Court of Appeal which fully operates virtually; that having omitted some documents, they filed a Supplementary Record of Appeal dated 26<sup>th</sup> January, 2021 under Rule 40 (4) of the Supreme Court Rules, 2020 containing the judgment and Notice of Appeal; and that the fifteen (15) day window envisaged under the said Rule 40(4) was curtailed by the Hon. Registrar's decision of 22<sup>nd</sup> January, 2021 which declined to lodge and admit for filing the Petition of Appeal;

**[3] UPON** considering the applicant's further grounds that the Registrar's decision was unfair and against the rules of natural justice, the applicant not having been allowed any opportunity to explain the circumstances of the filing; and that it was also irrational and unreasonable as comparatively enunciated in the South Africa's Constitutional Court's case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC)*; and

**[4] UPON** considering that the application is not opposed by the 1<sup>st</sup> and 2<sup>nd</sup> appellants and the 5<sup>th</sup>, 6<sup>th</sup> to 14<sup>th</sup> respondents in the petition of appeal, respectively.

**[5] NOTING** the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents' grounds of objection and submissions dated 3<sup>rd</sup> November, 2022 and 3<sup>rd</sup> December, 2022 respectively wherein they pray that the application be dismissed as the pleadings submitted by the applicant herein are not in consonance with the provisions of the Supreme Court Rules, 2020; that the Registrar reasonably and lawfully exercised her mandate within the confines of the law as guided by the provisions of Rule 6(b) of the Supreme Court Rules, 2020; that the petitioners (applicants) neglected and or ignored to transmit the Notice of Appeal to the Registrar which is a prerequisite to the institution of an appeal; that, contrary to what is alluded by the applicant, the Notice of Appeal is not among the documents Rule 40 (4) gives room to be availed if omitted from the Record of Appeal; and that the applicant failed to obtain and file a certificate of delay in relation to the absence of a certified judgment of the decision sought to be appealed against;

**[6] FURTHER NOTING** the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents' submissions dated 9<sup>th</sup> November, 2022 and filed on 18<sup>th</sup> November, 2022 wherein they submit that the application is bad in law and is unmeritorious since the petitioners lodged a non-compliant and defective Record of Appeal; and that the Registrar cannot be blamed for acting in accordance with the Supreme Court Rules; and

[7] **CONSIDERING** Rule 36 of the Supreme Court Rules which provides that a person who intends to appeal to this Court ought to file a Notice of Appeal within fourteen (14) days from the date of judgment and to transmit a copy to the Registrar of this Court; and Rule 15 provides that the Court may extend the time limited by its Rules or by any decision of the Court; and

[8] **APRECIATING** this Court's decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*; SC Application No. 16 of 2014, [2014] eKLR, as echoed in *Bookpoint Limited v Guardian Bank Limited & another*; SC Application No. 4 (E006) of 2021 where it was held that a Notice of Appeal is a primary document to be filed outright and that it is a jurisdictional pre-requisite.

[9] **TAKING INTO ACCOUNT** the record in which I note that the Registrar made her ruling on 22<sup>nd</sup> January 2021 in which she declined to lodge and admit for filing the Petition and Record of Appeal for failure of the appellant to submit the Notice of Appeal and judgment of the Court of Appeal; that the said Petition of Appeal and Record of Appeal were nevertheless lodged in court on 27<sup>th</sup> January 2022 by the Deputy Registrar without any formal review of the Registrar's ruling paving way for compliance before the Registrar; and that it was only upon the matter being escalated to the Court to consider the issue of representation that the issue of the Registrar's ruling was brought to the attention of parties prompting the present application seeking to review the Registrar's decision.

[10] **HAVING** carefully considered the record, arguments and submissions by all the parties, I **NOW OPINE** as follows:

- a) Rule 6(1)(b) of the Supreme Court Rules allows the Registrar to decline pleadings that are not in accordance with the Constitution, the Act, the Rules, or the Court's practice directions for filings. The Registrar's impugned ruling made under this provision was on

account of failure to include the judgment and the absence of a Notice of Appeal. However, the Deputy Registrar, in admitting the lodging of the Petition and Record of Appeal referred to in the impugned ruling, impliedly reviewed the said ruling, albeit un-procedurally in the absence of a formal review application.

- b) It is acknowledged that the applicant, in line with Rule 36(1) of this Court's Rules, filed at the Court of Appeal a Notice of Appeal on 22<sup>nd</sup> December, 2022 and served it on the parties. This was four days after delivery of the Court of Appeal judgment within the 14-day period. Notwithstanding the assertion that the Court of Appeal operates 100% virtually, resulting in Notices of Appeal being filed electronically, signed and returned to the parties, the signed Notice of Appeal by the Registrar of the Court of Appeal was never transmitted to the Registrar of this Court within the said timelines as stipulated under Rule 36(3) or at all.
- c) The applicant did not serve upon the respondents the transmitted copies of the Notice of Appeal in compliance with Rule 37(1) of the Court's Rules but served an un-transmitted copy thereof.
- d) The thirty days' timeline for institution of appeal run from the date of filing of the Notice of Appeal and for purposes of this Court, transmission of the same to the Court. As held in ***University of Eldoret & another v Hosea Sitienei & 3 others*** SC Application No. 8 of 2020 [2020]eKLR:

***“[36] Rule 36 of the Supreme Court Rules 2020 provides for the filing of a Notice of Appeal within fourteen days of a decision of the Court of Appeal from which an intended appeal is founded. The filing of a Notice of Appeal is not premised on any occurrence or condition to be fulfilled by the appellant. The filing of a Notice of Appeal signifies the intention to appeal.”*** (Emphasis mine)

I reiterate that the Notice of Appeal is a jurisdictional pre-requisite without which the Court cannot infer the intention to appeal for purposes of this Court's Rules.

- e) While the Court of Appeal judgment could be contained in the record of appeal under Rule 40(c) or a supplementary record under Rule 40(4), the same cannot be said of the Notice of Appeal which has to be transmitted to the Court before service upon the parties.
- f) The Notice of Appeal in this matter, having been availed to the Court at the first instance by being mentioned as a schedule in the Petition of Appeal and as part of the Supplementary Record filed before this Court on 27<sup>th</sup> January 2021, the same was already way out of the fourteen (14) day period of delivery of the judgment, despite having been filed on time.
- g) Though the applicant has exercised its right to seek a review of the decision by the Registrar as provided under Rule 6(2) of the Supreme Court Rules, the request has neither been accompanied by an application for extension of time nor an explanation for the lack of compliance offered as the mundane step in the first place, the issue being brought to the attention of the parties by the Court. I am not satisfied as to the merit of the application and decline to exercise discretion to review the Registrar's decision.
- h) On the issue of costs, I stand guided by the decision of this Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others***; SC Petition No. 4 of 2012 [2014] eKLR where this Court observed that the basic rule on attribution of costs is: costs follow the event. On this account, the applicant shall bear the costs of the respondents who opposed, to wit, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the one hand and the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> respondents on the other hand.

**[11] CONSEQUENTLY, I make the following orders:**

- (i) *The Notice of Motion dated 23<sup>rd</sup> July 2022 be and is hereby dismissed.*
- (ii) *The applicant shall bear the costs of this application for the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents on one hand and the 13<sup>th</sup> 14<sup>th</sup> and 15<sup>th</sup> respondents on the other hand.*

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 17<sup>th</sup> day of February, 2023.**

.....  
**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR,**  
**SUPREME COURT OF KENYA**