



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome, CJ & P, Ibrahim, Wanjala, Lenaola & Ouko, SCJJ)

PETITION (APPLICATION) NO. E015 OF 2023

COUNTY ASSEMBLY OF MIGORI.....APPLICANT

VERSUS

ISAAC ALUOCH POLO ALUOCHIER.....1ST RESPONDENT

VINCENCIA AWINO KIONGE.....2ND RESPONDENT

CHARLES OWINO LIKOWA.....3RD RESPONDENT

(Being an Application to strike out the 1st respondent's supplementary record of appeal and cross appeal as filed against the appeal arising from the Judgment and Order(s) of the Court of Appeal at Kisumu in Civil Appeal Nos. E37 and E38 of 2023 (Kiage, M Ngugi & J Ngugi, JJ.A) delivered on 26th May 2023)

Representation

Mr. Okongo for the Applicant
(Okong'o Wandago & Co Advocates)

Isaac Aluoch Polo Aluochier as the 1st Respondent
(Appearing in person)

Ms. Aron appearing for the 2nd Respondent
(Agnes Awuor Advocate)

Mr. Omondi for the 3rd Respondent
(Omondi Abande & Co. Advocates)

RULING OF THE COURT

[1] UPON considering the Notice of Motion filed by the County Assembly of Migori, the applicant, dated and filed on 3rd August 2023 under the provisions of Article 163(4)(a) of the Constitution, Sections 3,3A and 21(2) of the Supreme Court Act as well as Rules 31 and 65 of the Supreme Court Rules 2020, seeking Orders that;

- i) *This Court be pleased to strike out and expunge from the record in this Petition of Appeal, the Supplementary Record of Appeal dated 21st July 2023 filed by the 1st respondent, Isaac Polo Aluochier from the record of this petition of appeal;*
- ii) *The cross-appeal be struck out and the petitioner be paid the costs of the appeal;*
- iii) *Costs for this application be provided for; and*

[2] UPON also considering the grounds in support of the application, which grounds are as stated in the petition of appeal, and the averments in the supporting affidavit sworn by Edward Ouma Ooro, the leader of the Majority Party of the applicant as well as the further grounds in the applicant's submissions both filed and dated 3rd August 2023 which reiterate the grounds in support of the application contending that the 1st respondent's cross appeal does not indicate which of the Court's jurisdiction under Article 163(4) of the Constitution has been invoked, being either as of right or upon certification as determined in ***Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another***; SC Petition No.3 of 2012 [2012] eKLR and ***Cordisons International (K) Limited v Chairman National Land Commission & 43 Others*** [2020] eKLR; that Rule 47(1) of this Court's Rules places an obligation on a cross appellant to specify the grounds of contention and the nature of reliefs that the respondent seeks from the Court while Rule 47(2)(b) specifically provides that a respondent lodging a cross appeal must lodge a memorandum of appeal and the contents of the record of appeal be provided for, as dictated by Rule 40(1) of the Court's Rules and as was

held in *Jimi Richard Wanjigi v Chebukati & 2 others*; SC Petition No. 19 (E022) of 2022 [2023] KESWC (17 February 2023) (Judgment); and

[3] UPON considering the applicant's further submissions that failure to comply with Rule 40(1) renders the appeal fatally defective and incurable as was held in *Kenya Revenue Authority & 2 Others v Mount Kenya Bottlers Limited & 4 Others*; SC Petition 41 of 2019 [2021] eKLR and *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2014] eKLR; that this Court's Rules do not anticipate a respondent filing a supplementary record of appeal in a cross appeal; that the supplementary record of appeal seeks to introduce documents that did not form part of the record; and

[4] ALSO considering the 1st respondent's response to the application and written submissions both dated 10th August 2023 and filed on 14th August 2023 wherein he contends that it is premature for this Court to determine the question whether he has complied with Rule 47(2)(b) of this Court's Rules; that the applicant is seeking the striking out of his cross appeal on technicalities as opposed to substantive ones as directed by Article 159 of the Constitution; that in response to the applicant's claim that he is adducing further evidence in his supplementary record of appeal, the additional evidence meets the criteria set out under Section 20(2) of the Supreme Court Act ; and that the supplementary record of appeal was in response to the additional evidence introduced by the 2nd and 3rd respondents through their affidavits; and

[5] FURTHER considering the 1st respondent's submissions that the cross appeal is founded on Article 163(4)(a) of the Constitution and filed as of right as it involves interpretation and application of the Constitution, and more specifically, Articles 22,23, 35(1), 38(3)(c), 47(1), 50, 94(5), 178(3), 193 of the Constitution; that these Articles of the Constitution formed the substratum of the appeal before the High Court and Court of Appeal; that this application seeking an order to strike out his supplementary record of appeal is premature as it has complied with the provisions of Rule 47(1) of this Court's Rules following the filing of his Notice of cross appeal;

that the 1st respondent's right to a fair hearing under Article 50(1) of the Constitution will be infringed should the supplementary record of appeal be struck out; and

[6] NOTING the averments by Vincencia Awino Kionge, 2nd respondent, in the replying affidavit sworn and filed on 23rd August 2023 and the written submissions also dated and filed on 23rd August 2023, wherein she expresses support of the application and further contends that the 1st respondent has failed to properly invoke this Court's jurisdiction and also failed to indicate the reasons for and the constitutional provisions the Court of Appeal relied on in making its determination and as was held by this Court in *Jimi Richard Wanjigi v Chebukati & 2 Others*; SC Petition 19 (E022) of 2022 [2023] eKLR that an appeal to this court in such circumstances cannot lie; that this Court should preliminarily settle the question of jurisdiction before entertaining the cross appeal; that Rule 47(1) of this Court's Rules obliges a cross appellant to specify the grounds of contention and reliefs being sought before this Court, with Rule 47(2)(b) providing that a respondent lodging a cross appeal must lodge a memorandum of appeal and a record of appeal, while Rule 40(1) of the Rules provides for contents of such a record of appeal; that the Rules therefore do not anticipate the filing of a supplementary record of appeal; that the supplementary record of appeal has introduced evidence that concerns pleadings that are still pending before the High Court; that as a requirement, a party seeking to introduce new evidence should make a formal application under Rule 26(2) of this Court's Rules, which the 1st respondent's cross appeal has failed to abide by and for these reasons, the cross appeal should be struck out; and

[7] HAVING also read the replying affidavit sworn by Charles Owino Likowa, the 3rd respondent as well as his written submissions filed and dated 23rd August 2023, also in support of the application, wherein he reiterates the position taken by both the applicant and 2nd respondent;

[8] TAKING into account the pleadings and submissions of the parties, **WE NOW OPINE** as follows:

- i) We must first settle the issue raised by the 2nd Respondent that the appeal before us is premature and ought to be struck out and without even going into the merits of the application before us.
- ii) In that context, we note that the judgment by the Court of Appeal sought to be appealed against is brief and was delivered on 26th May 2023, with no reasons, pursuant to Rule 34(6) of the Court of Appeal Rules, 2022. The Court's direction on that day was that the reasons for the judgment would be delivered on 22nd September 2023. We are not aware whether the reasons were delivered on that day but it matters not because there is no reasoned judgment before us.
- iii) In ***Jimi Richard Wanjigi v Wafula Chebukati & 2 others***, SC Application No.6 of 2022 and ***Oscar Oluoch Ouma Abote v Loice Akoth Kawaka & 4 others***; SC Petition No. 16 of 2022, we specifically held that there can be no basis upon which a petition of appeal can be jurisprudentially determined in the absence of reasons for an impugned judgment. This in effect, renders any hearing of the applicant's petition of appeal before this Court, untenable, in the absence of the reasons for the Court of Appeal judgment. The reason for this finding is obvious-we cannot determine whether we have jurisdiction to determine the petition of appeal without having sight of a wholesome judgment from the Court of Appeal. Jurisdiction, it has been said often, is everything and without an appellant laying a firm basis for it, no court can be properly moved.
- iv) In the same limb, the 1st respondent's cross appeal, also similarly grounded on the reasons in the Court of Appeal judgment, lacks any legs to stand on and must meet the same fate as the petition of appeal. It would be a waste of precious judicial time and resources to consider whether it is properly on record or not.

- v) In effect, having found that the petition of appeal is not properly before us, we are unable to consider the application nor can we grant or deny the orders sought therein.
- vi) On costs, although they ordinarily follow the event, no party has succeeded in any manner and so each shall bear its costs of the proceedings before us.

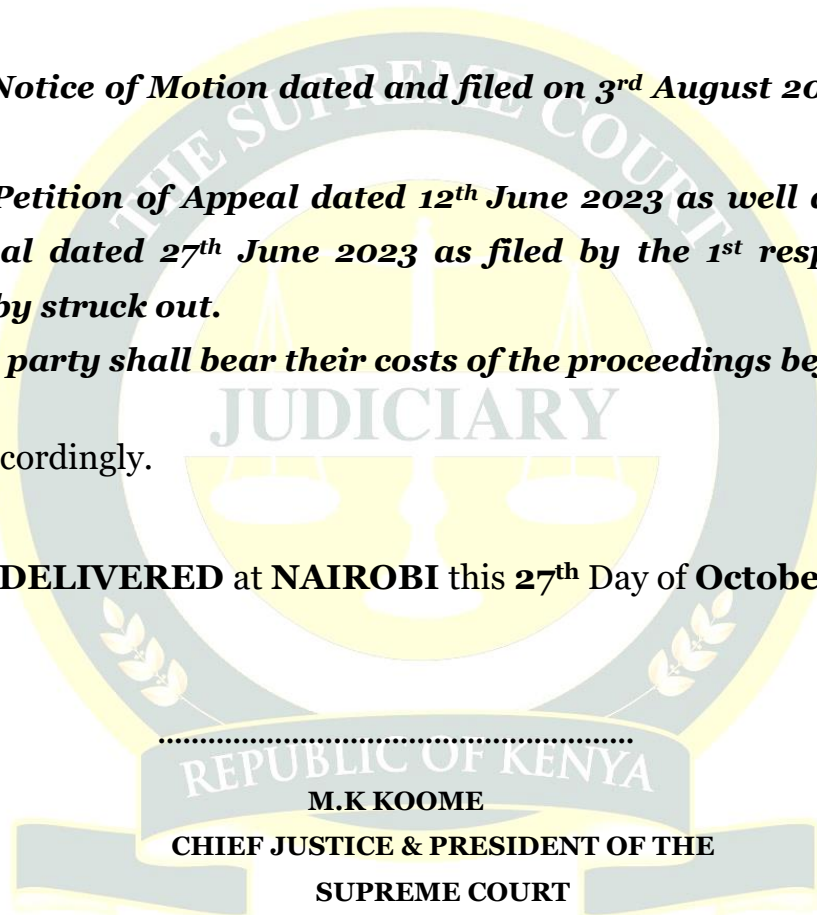
[9] Consequently, and for reasons aforesaid, we make the following Orders:

ORDERS:

- i) *The Notice of Motion dated and filed on 3rd August 2023 is struck out;*
- ii) *The Petition of Appeal dated 12th June 2023 as well as the Cross Appeal dated 27th June 2023 as filed by the 1st respondent are hereby struck out.*
- iii) *Each party shall bear their costs of the proceedings before us.*

[10] Orders accordingly.

DATED and DELIVERED at NAIROBI this 27th Day of October 2023



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REPUBLIC OF KENYA
M.K KOOME
CHIEF JUSTICE & PRESIDENT OF THE
SUPREME COURT

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

.....
S.C WANJALA
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

.....
W.OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

