



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

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

PETITION (APPLICATION) NO. E020 OF 2023

—BETWEEN—

KOMBE HARRISON GARAMA.....APPELLANT/APPLICANT

—AND—

KENGA STANLEY KARISA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....2ND RESPONDENT

AMIR ABUBAKAR SENG (MAGARINI

CONSTITUENCY RETURNING OFFICER)3RD

RESPONDENT

MICHAEL THOYAH KINGI.....4TH RESPONDENT

(Being an application for review of the Judgment and Order of the Supreme Court (Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ) delivered on 31st May 2024 in S.C. Petition No. E020 of 2023 Kombe Harrison Garama vs. Kenga Stanley Karisa & 3 Others)

Representation:

Mr. Munyua Ezekiel, Mr. Ometo Bryson & Mr. Wakwaya Kelvin for the Applicant
(Rachier & Amollo LLP)

Mr. Wesley Gichamba for the 1st Respondent
(Gichamba & Co. Advocates)

Ms. Kiboi & Mr. Julius Anyonka for the 2nd and 3rd Respondents
(Hussein Mutembei & Co. Advocates)

Ms. Naazi & Mr. Edgar Busiega for the 4th Respondent
(*Mayende Busiega Advocates*)

RULING OF THE COURT

- [1] **UPON** perusing the Notice of Motion by the applicant dated 6th June 2024 and filed on 13th June 2024 pursuant to the provisions of Section 21 A (a) of the Supreme Court Act and Rule 28 (5) of the Supreme Court Rules, 2020 seeking an order of review of our judgment dated 31st May 2024 and in the alternative, an order allowing the Petition of Appeal dated 1st August 2023; and
- [2] **UPON** reading the grounds on the face of the application, the supporting affidavit dated 6th June 2024 sworn by **Harrison Garama Kombe**, and the written submissions dated 11th June 2024 and filed on 13th June 2024 wherein the applicant submits that this Court, in the impugned judgment, misapplied the disjunctive test set in ***Raila Odinga & 6 others vs. William Ruto & 10 Others***, Presidential Election Petition E005 of 2022 (Consolidated with Presidential Election Petition Nos. E001, E002, E003, E004, E007 & E008 of 2022); the Court did not specifically state the place of scrutiny *vis a vis* burden of proof where allegations of election malpractice are made, creating a precedence that the results of a scrutiny exercise are to be disregarded and should have no effect on allegations of election malpractice; the Court did not state which of the two grounds under Section 83 of the Elections Act was proved by the 1st respondent to warrant overturning of the election; and that the impugned judgment was obtained through misrepresentation of facts.
- [3] **FURTHER NOTING** that the applicant has outlined the alleged instances of misrepresentation in ten (10) polling stations within Magarini Constituency in Kilifi County and urges that his application has met the test for review under Section 21A of the Supreme Court Act because the findings by the two superior courts below as well as this court were based on misrepresentation and deceit by the 1st respondent and where the deceit and misrepresentation did not originate from the 1st respondent, the courts' findings were based on non-

existent claims and documents, warranting the invocation of this Court's jurisdiction to review its decision; and

[4] **CONSIDERING** that the 2nd and 3rd Respondents indicated to the Court on 5th July 2024 that they support the application and have consequently not filed any formal response to it; and

[5] **UPON** reading the 1st respondent's grounds of opposition and submissions both dated 29th June 2024 and filed on 8th July 2024 wherein he submits that this Court lacks jurisdiction to entertain the application as it does not fall within the purview of Section 21 (a) of the Supreme Court Act; the grounds in support of the Motion are a replica of the petition and submissions in support thereof, which the court dealt with at length in its judgment; the issues of alleged irregularities and illegalities of the election result for Magarini Constituency during the 2022 general election were dealt with in great detail when this Court delivered its verdict; the court rendered itself on the question of opening the ballot papers at the tallying centre, and even went further to refer to and apply the test in *IEBC v. Maina Kiai & 5 others*; Civil Appeal 105 of 2017; [2017] eKLR (the *Maina Kiai Case*); and

[6] **NOTING** the further submission by the 1st respondent that the application is a camouflaged appeal of this Court's decision delivered on 31st May 2024 and is also an abuse of the court process meant to delay the process of conducting a by-election for Magarini Constituency which has already commenced because the contested seat was declared vacant by the Speaker of the National Assembly vide Gazette Notice No. 7207 of 10th May 2024; the application does not meet the threshold in *Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others* S.C. Petition No. 6 of 2014 [2017] eKLR and that it is a classic case of forum shopping seeking to forestall the implementation of the orders of this Court as the applicant, through his campaign manager and proxies, filed the suit at the High Court in Malindi being *Jackline Kabibi Juma & 2 Others vs Attorney General & Others* Malindi H.C. Pet No. E007 of 2024 seeking orders to stop the conduct of the by- election for Magarini Constituency; and

- [7] UPON also considering the Replying Affidavit dated 1st July 2024 and sworn by **Michael Thoyah Kingi**, the 4th respondent herein, averring that the application is incurably defective as it discloses no ground for review; and that the application is a disguised appeal which seeks to reopen and relitigate matters already determined with finality by this Court;
- [8] **FURTHERMORE NOTING** that the applicant's submissions on the alleged misrepresentation of facts by this Court revolve around the Court's appreciation of the record and in particular its analysis of the scrutiny exercise conducted by the trial court and the resultant report on the exercise, its finding on transparency of the process specifically the reopening of the ballot boxes and whether the standard of proof was met in establishing the veracity of the allegations in the ten (10) named polling stations i.e. **Adimaye, Kaemebeni, Shomela, Kadzuhoni, Kinyaule, Mekatilili, Malindi G.K. Prison, Kayadagamra, Vuga, Kibaoni and Mapimo Youth Polytechnic**; and
- [9] **BEARING IN MIND** the decision of this Court in ***Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others (supra)*** and its inherent powers, under Section 21 A of the Supreme Court Act as read with Rule 28 (5) of the Supreme Court Rules, wherein this Court, may, upon application by a party, or on its own motion, review its own decision where: (a) the judgment, ruling, or order, was obtained, by fraud, deceit or misrepresentation of facts; (b) the judgment, ruling, or order, is a nullity by virtue of being made by a court which was not competent; (c) the Court was misled into giving judgment, ruling or order, under a belief that the parties had consented; or (d) the judgment, ruling or order was rendered, on the basis of a repealed law, or as a result of a deliberate concealment of a statutory provision; and
- [10] Having considered the totality of the application, submissions put forth, we **NOW OPINE** as follows:
- i. The general rule is that once this Court delivers a judgment, it becomes *functus officio* and such a judgment stands until it is departed from in a future case or reviewed based on exceptional circumstances as delineated under Section 21A of the Supreme Court

Act and Rule 28 (5) of the Supreme Court Rules. The Court in ***Fredrick Otieno Outa*** also specifically warned that an application for review is not meant to afford a party an opportunity to appeal, or relitigate its case. See also ***Hon. Mike Mbuvi Sonko versus The Clerk, County Assembly of Nairobi City & 11 Others*** SC Petition (Application) No. 11 (e008) of 2022, and ***Member of Parliament Balambala Constituency v Abdi & 7 others*** SC Petition 21 (E023) of 2020 [2023] KESC 80.

- ii. On the disjunctive application of Section 83 of the Elections Act, the Court, in its judgment aforesaid, analysed the ***Raila 2017 & Raila 2022*** decisions, the long history of the ‘disjunctive and conjunctive debate’ and the legislative reforms arising therefrom at paragraphs 72-82. At paragraph 77 of the judgment, the Court noted that the amendments to Section 83 of the Elections Act were brought about by the Elections Laws Amendment Bill 2017. It concluded at paragraph 82 that *‘the test to be applied in Section 83 is a disjunctive one and not a conjunctive one as argued by the appellant’*. The amendment to Section 83 was not therefore singly, an analysis of the ***Raila 2017*** decision, as urged by the applicant but the subject of legislative reforms leading up to the ***Raila 2022*** which reaffirmed the current construction of Section 83. The Court ultimately held that proof of either of the two limbs under Section 83 of the Election Act is sufficient to nullify an election.
- iii. As to the standard of proof in an election dispute, the impugned decision at paragraph 87 reiterated that in an allegation of an election offence or quasi-criminal conduct, the proof expected is one that is beyond reasonable doubt. In any other case, the standard has been set at an intermediate level, being higher than balance of probabilities but lower than beyond reasonable doubt.
- iv. On the alleged misrepresentation of facts, the Court, in its judgment, first cautioned itself that the duty to re-evaluate evidence is a function

of the first appellate court and at paragraph 97 stated instances where it will entertain a question of fact. At paragraphs 22, 25 and 90 of the judgment, the Court undertook a summarized reproduction of facts of the case as recorded by the courts below, and did not in any way introduce new facts to the dispute; further, the Court referred to the **Maina Kiai Case** as well as **Ahmed Abdullahi Mohamed & Anor v. Hon Mohamed Abdi Mohamed & 2 Others** Election Petition No. 14 of 2017 and made a finding at paragraph 100 that the results declared at the polling station are final because that is the true locus of the vote and where the verification exercise of votes is done.

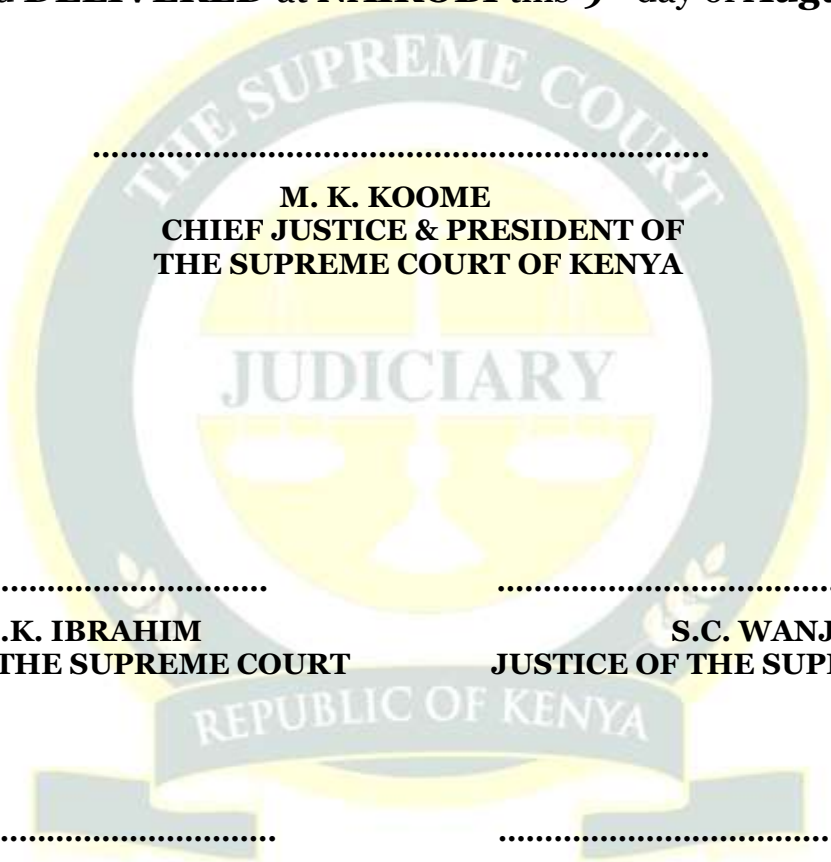
- v. On the scrutiny report, the Court at paragraph 108 appreciated that the scrutiny exercise and resultant report was one of the factual considerations the 1st respondent took into account in arguing his case but that did not preclude him from presenting and relying on other pieces of evidence to illustrate the fact that the election in question did not conform with constitutional and legal imperatives; and this finding does not in any way create a precedence that scrutiny results are to be disregarded and have no effect on allegations of election malpractice as alleged by the applicant.
- vi. Lastly, on the grounds under Section 83 of the Elections Act proved by the 1st respondent to warrant overturning of the election, the Court was categorical in paragraph 111 that the same was satisfied on both limbs of Section 83 of the Elections Act.
- vii. In view of the foregoing, we find and in agreement with the 1st respondent that, the application is an appeal disguised as a Motion for review and does not fall within the confines of the parameters in the **Fredrick Otieno Outa Case** as set out above and must be therefore be dismissed.
- viii. On costs, we are convinced that the Motion is a clear abuse of the court process and the applicant must bear the consequences of its filing and dismissal. He must therefore pay the costs thereof.

[11] FOR THE AFORESTATED REASONS we make the following final orders:

- i. *The Notice of Motion dated 6th June 2024 and filed on 13th June 2024 is hereby dismissed; and*
- ii. *The applicant shall bear the 1st and 4th Respondents' costs.*

[12] Orders accordingly.

DATED and DELIVERED at NAIROBI this 9th day of August, 2024.



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

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

.....
S.C. WANJALA
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

