



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA AT NAIROBI**

*(Coram: Mwilu, DCJ & VP, Ibrahim, Wanjala, Lenaola, & Ouko SCJJ)*

**PETITION (APPLICATION) NO. E015 OF 2023**

–BETWEEN–

**COUNTY ASSEMBLY OF MIGORI..... APPELLANT**

–AND–

**ISAAC ALUOCH POLO ALUOCHIER.....1<sup>ST</sup> RESPONDENT**

**VINCENCIA AWINO KIONGE.....2<sup>ND</sup> RESPONDENT**

**CHARLES OWINO LIKOWA..... 3<sup>RD</sup> RESPONDENT**

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*(Being applications seeking review and setting aside of the ruling and order of the Supreme Court (Koome, CJ & P, Ibrahim, Wanjala, Lenaola & Ouko, SCJ) dated 27<sup>th</sup> October 2023 and to place in abeyance the hearing of motion dated 1<sup>st</sup> November 2023)*

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**Representation:**

Mr. Okong'o for the appellant  
*(Okong'o, Wandago & Company Advocates)*

Mr. Isaac Aluoch Polo Aluochier acting in person

Ms. Aron for the 2<sup>nd</sup> respondent  
*(Agnes Awuor, Advocate)*

Mr. Omondi for the 3<sup>rd</sup> respondent  
*(Omondi Abande & Company Advocates)*

## **RULING OF THE COURT**

[1] Before the Court are two distinct yet interconnected Motions brought by the parties for determination. The first is by the appellant, County Assembly of Migori, seeking review and setting aside of the ruling and order of the Supreme Court (*Koome, CJ & P, Ibrahim, Wanjala, Lenaola & Ouko, SCJ*) dated 27<sup>th</sup> October 2023. The second is by the 3<sup>rd</sup> respondent, Charles Owino Likowa, seeking orders to keep in abeyance the hearing and determination of the Motion dated 1<sup>st</sup> November 2023; and

[2] UPON perusing the Motion dated 1<sup>st</sup> November 2023 premised on Articles 163 (4) (a) and 159 (2)(d) of the Constitution, Sections 3, 3A, 15A, 21 (4), 21A, and 23 (2B) (d) of the Supreme Court Act, 2011, Rules 3(1), (2) (3) (5), 28 (5) and 31 of the Supreme Court Rules, 2020 seeking review and setting aside of this Court's ruling and order striking out the petition as alluded to herein above; and

[3] UPON considering the grounds in support of the Motion and the averments contained in the supporting affidavit sworn by **Hon. Edward Ouma Ooro**, a member of the County Assembly of Migori and the Leader of the Majority Party, Orange Democratic Party, wherein he *inter alia* contends that; there exists an error apparent on the face of the record of proceedings to warrant review, variation and setting aside the order striking out the petition dated 12<sup>th</sup> June 2023; the appellant was never heard by the Court as required under Section 23(2B) (d) of the Supreme Court Act; the Court struck out the petition *suo moto* without any challenge as to the competence of the petition from any party; the ruling and order striking out the petition was as a result of misrepresentation of facts on the part of the Court that the petition was premature; the petition, the notice of appeal were properly lodged without the reasons of the Court of Appeal judgment as the same had not yet been given; the omission to include reasons of the Court of Appeal judgment was not to be blamed on the appellant to warrant striking out its petition; the Court

has jurisdiction to review any of its judgments, ruling or orders in exceptional circumstance to meet the ends of justice; and

**[4] NOTING** the appellant's submissions dated 1<sup>st</sup> November 2023 and rejoinder submissions dated 22<sup>nd</sup> November 2023 where it reiterates the contents of its supporting affidavit and further submits that; the petition was competent as it was lodged as per the rules; there exists exceptional circumstances and an error apparent on the face of the record to warrant review, variation and setting aside the order striking out of the appeal dated 12<sup>th</sup> June 2023; in formulating the appeal, the appeal was filed on a provisional basis pending the issuances of reasons by the Court of Appeal; striking out of the appeal and leaving the notice of appeal, record of appeal, the appellant's submissions and responses by the respondents creates confusion whether the same was summarily rejected; and

**[5] FURTHER NOTING** the 1<sup>st</sup> respondent's response dated 2<sup>nd</sup> November 2023 in support of the Motion wherein he urges that; the petition and the cross-appeal ought not to have been struck out; the Court should be consistent in its determinations; every person has a right to a fair and public hearing and conversely the Court has a duty to guarantee the right to a fair hearing; if the Court is unwilling to grant parties fair hearing, the parties can opt out of the system and refer the matter to an arbitral tribunal and the Court should promote ADR; and

**[6] ALSO NOTING** the 2<sup>nd</sup> respondent's replying affidavit sworn by **Vincencia Awino Kionge**, the Clerk County Assembly of Migori, in support of the Motion, wherein she faults the Court for striking out the petition *suo moto*; challenges the cross-appeal and the supplementary record of appeal for introducing new evidence before this Court without an application or order allowing such an action; avers that the petition was struck out without breach of any substantive or procedural laws by the appellant; that no law imposes on any person who wishes to appeal against a decision of the Court of Appeal to wait for and include reasons for the

judgment in the record of appeal; the appellant waited for reasons for the Judgment of the Court of Appeal for 4 months before instituting the appeal; the rules and practice directions impose stringent timelines which if not complied with, a prospective appellant stands a risk of being locked out of his appeal; and

[7] **FURTHER NOTING** the 2<sup>nd</sup> respondent's submissions dated 14<sup>th</sup> November 2023 wherein he reiterates the contents of the replying affidavit and further submits that; the Court has jurisdiction to review and/or set aside its own decisions in exceptional circumstances as per Rule 28 (5) of the Supreme Court Rules, 2020; even in the absence of reasons for the judgment of the Court of Appeal, it was still possible for the appellant to identify constitutional questions to be put to the Court for determination as was held by this Court in **Richard Nyagaka Tongi v Chris Munga N Bichage & 2 others** SC, Petition No 17 of 2014, [2015] eKLR; in its ruling of 27<sup>th</sup> October 2023, the Court departed from the precedent set in **Richard Nyagaka Tongi v Chris Munga N Bichage & 2 others (supra)**; striking out the petition and any other pleading should only be resorted to in the clearest of cases; the appellant has been deprived of the right to appeal as well as the right to a fair hearing; and

[8] **ALSO NOTING** the 3<sup>rd</sup> respondent's replying affidavit in support of the Motion sworn by **Charles Owino Likowa**, the Speaker of Migori County wherein he avers that; in the case of **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others**, SC Civil Application No. 35 of 2014[2015] eKLR this Court held that reasons are not mandatory for lodging a further appeal to the Court; the decision the appellant seeks to review has sent the signal that filing an appeal without full text of the appellate court judgment is fatal to such as an appeal; the inconsistency in the decisions of the Court does not promote the principle under Article 163 (7) of the Constitution; striking out of the petition is likely to lead to unnecessary delay in determining the real dispute between the parties; and

[9] **FURTHERMORE NOTING** the 3<sup>rd</sup> respondent's submissions dated 14<sup>th</sup> November 2023 wherein herein he reiterates the contents of his replying affidavit and further submits that; vide a ruling on 27<sup>th</sup> October 2023, this Court struck out the appellant's petition in violation of the right of access to justice under Article 48 of the Constitution and Section 3 (e) of the Supreme Court Act; the Court's *suo moto* striking out the petition was an oversight and a manifest error apparent on the record; in line with the reasoning adopted by this Court in ***Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others( supra)*** the petition was properly lodged, therefore the Court ought to consider the appeal and render itself on all the substantive issues raised; it is in the interest of justice that the parties to a dispute are accorded a fair hearing; and

[10] **TAKING INTO ACCOUNT** the 3<sup>rd</sup> respondent's Motion dated 24<sup>th</sup> November 2023 brought under Articles 163 (4) (a), 25 (c), 50 (1), 159 (2) (d) of the Constitution, Sections 3, 3A, and 21 (2) of the Supreme Court Act, 2011 and Rules 3(1), (2), (4) (5), 31 and 32 of the Supreme Court Rules, 2020 seeking orders that the Court ought to keep in abeyance and withhold the hearing and determination of the Motion dated 1<sup>st</sup> November 2023 and leave to file its supplementary record to include reasons for the judgment of the Court of Appeal when given; and

[11] **CONSIDERING** the grounds in support of the application and the averments contained in the supporting affidavit sworn by ***Charles Owino Likowa***, the Speaker County Assembly of Migori wherein he contends that; the Court of Appeal was yet to give reasons for its judgment dated 26<sup>th</sup> May 2023; the time to lodge the appeal started running immediately after the judgment; it is not a mandatory requirement to include reasons for the judgment when lodging an appeal; there is need for the Court to settle the issue of validity of such an appeal; being the apex court, the Court ought to frown from deciding disputes on technicalities without hearing parties on merit; and

[12] **ALSO CONSIDERING** the 3<sup>rd</sup> respondent's submissions dated 24<sup>th</sup> November 2023 and rejoinder submissions dated 3<sup>rd</sup> January 2023 wherein he reiterates the contents of his grounds in support of his Motion and supporting affidavit and further submits that; the jurisdiction of the Court is invoked and proceedings commenced, first under Rule 36 of the Supreme Court Rules, by filing a notice of appeal within fourteen days from the date of the judgment or ruling; a notice of appeal is a primary document to be filed whether or not the subject matter under appeal is that which requires leave; notice of appeal is a jurisdictional prerequisite as was held by this Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, SC Appl. No. 16 of 2014 [2014] eKLR; and

[13] **FURTHER NOTING** the 1<sup>st</sup> respondent's response dated 26<sup>th</sup> November 2023 where he states that; in striking out the petition, the Court acted outside the law and without legal foundation denying the appellant the right to fair hearing under Article 50 (1) of the Constitution; he is apprehensive that the Court may decline to hear the Motion dated 1<sup>st</sup> November 2023 due to the absence of reasons for the judgment of the Court of Appeal; the Motion dated 1<sup>st</sup> November 2023 should be held in abeyance; parties be given leave to file as part of the supplementary record, the reasons for the judgment of the Court of Appeal; the Court contravened Article 27 (1) of the Constitution by striking out the appeal in this instance while in the past it upheld such appeals; and

[14] **ALSO NOTING** the appellant's replying affidavit sworn by *Edward Ouma Ooro*, the Majority Party Leader Of the County Assembly of Migori, and submissions dated 4<sup>th</sup> December 2024 wherein it reiterates its averments above and further add that the Court placed a heavy premium on the yet-to-be-delivered reasons for the judgment of the Court Appeal in striking out the appeal; it is important to stay in abeyance the Motion dated 1<sup>st</sup> November 2023 pending the reasons for judgment of the Court of Appeal; and

[15] Having considered the applications, responses, and submissions before us, WE NOW OPINE as follows:

- i. This Court's power to review its own decision is well settled in the cases of ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** SC Petition (App) No 4 of 2012; [2013] eKLR and ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 others***; SC Petition No 6 of 2014, [2017] eKLR wherein we found that, as a general rule, the Supreme Court has neither jurisdiction to sit on appeal over its own decisions, nor to review its decisions, other than in the manner contemplated by Section 21(A) of the Supreme Court Act, that is;
  - a) *the judgment, ruling, or order, is obtained, by fraud or deceit;*
  - b) *the judgment, ruling, or order, is a nullity, such as, when the Court itself was not competent;*
  - c) *the Court was misled into giving judgment, ruling, or order, under a mistaken belief that the parties had consented thereto;*
  - d) *the judgment or ruling was rendered, on the basis of a repealed law, or as a result of, a deliberately concealed statutory provision.*
- ii. Applying the above principles to the instant case, it is our view that the appellant has not attempted to demonstrate that the impugned ruling was obtained by fraud or deceit. The appellant has also failed to demonstrate that the ruling was a nullity as it was rendered on the basis of a repealed law, or that the Court itself was not competent. It is in addition clear from the appellant's case before us that it did not prove that the Court was misled into giving the ruling under the mistaken belief that the parties had consented to such an order/ruling.

- iii. Consequently, it is our considered view that the Motion dated 1<sup>st</sup> November 2023 does not fall within the parameters enunciated in **Fredrick Otieno Outa's case (supra)** and therefore the Motion is one for dismissal for those reasons alone subject to what we shall state below.
- iv. What then should we find on the contention that this Court has ignored its previous decisions on the question whether reasons for the decision being challenged ought to be provided before an appeal can be properly lodged before the Court and that in striking out the appeal, parties were denied the right to fair hearing and access to justice? Specifically, do the **Fahim Yasin Twaha case (supra)** and **Richard Nyagaka Tong'i case (supra)** decisions bind us and should we apply them as submitted by the parties? It must be understood from the outset that this Court is not bound by its previous decisions as is the law under Article 163(7) of the Constitution. Nevertheless, we recognize that the maintaining of consistent decisions is the cornerstone of any judicial system.
- v. It should also be noted that the law/rules applicable at the time of rendering the decisions in **Fahim Yasin Twaha case (supra)** and **Richard Nyagaka Tong'i case (supra)** was the Supreme Court Rules, 2012 which provided as follows:

*“For purposes of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub-rule (3) and shall further contain the following documents relating to the appeal in the first appellate court—*

- 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”.*

vi. Given the provisions of the law/rules at that time, the decisions in ***Fahim Yasin Twaha case (supra)*** and ***Richard Nyagaka Tong’i case (supra)*** were correct that it was not mandatory to include reasons for judgment in the record of appeal.

vii. However, the Supreme Court Rules, 2020, which amended the 2012 Rules, made it mandatory for the judgment/ruling of the Court of Appeal to be included in the record of appeal. Rule 40 (1) of the Supreme Court Rules, 2020 provides as follows:

*“(1) For the purpose of instituting an appeal from a Court of Appeal decision, **the record of appeal shall entail—***

*(a) a certificate, if any, certifying the matter as of general public importance;*

*(b) **the judgment or ruling of the Court of Appeal being appealed from;***

*(c) a judgment or ruling of the High Court or a court of equal status; and*

*(d) the relevant pleadings required to determine the appeal.”*

viii. Therefore, in accordance with the provisions of Rule 40 (1) of the Supreme Court Rules, 2020 this Court in ***Jimi Wanjigi v Chebukati & 2 others*** (SC, Application 6 (E012) of 2022) [2022] KESC 40 (KLR) and in our Ruling in the instant matter delivered on 27<sup>th</sup> October 2023, found it mandatory to include reasons for the judgment of the Court of Appeal for an appeal to be deemed to be properly lodged.

- ix. Consequently, we emphasize that, only by looking to the reasons given by the appellate court can this Court properly interrogate its jurisdiction to hear and determine any appeal before it. Without such reasons, the court would be blindly acting on interlocutory applications such as the ones filed by parties in the present case. In the circumstances, and bearing in mind that no reasons for the judgment of the Court of Appeal have been availed to us, we are constrained to dismiss the Motion dated 1<sup>st</sup> November 2023.
- x. From the foregoing, it is important for any party approaching the Court to do so accordance with Rule 40 (1) of the Supreme Court Rules, 2020 and to be conversant with jurisprudential developments in the Court. In any case, a party is not barred from approaching the Court once the Court of Appeal has availed the reasons for the judgment the party seeks to appeal against.
- xi. In any event, once the petition of appeal and the cross-appeal in the instant matter were struck out, all subsequent pleadings lack a basis to stand on.
- xii. From the foregoing and having dismissed the Motion dated 1<sup>st</sup> November 2023, it, therefore, follows that the Motion dated 24<sup>th</sup> November 2023 seeking a stay or abeyance of the latter and leave to file a supplementary record of appeal cannot stand and, is also dismissed.
- xiii. On costs, this Court in ***Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 others***, SC. Petition No. 4 of 2012; [2013] eKLR settled that costs follow the event and that the Court may in appropriate cases exercise discretion and decide otherwise. Given that the Court has dismissed both applications before it, we find it judicious for each party to bear its costs.

