

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
**CIVIL APPLICATION NO. 14 OF 2014**

(Coram: Rawal, DCJ & Ibrahim, SCJ)

**BETWEEN**

**HASSAN NYANJE CHARO.....APPLICANT**

**AND**

**KHATIB MWASHETANI.....1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup> RESPONDENT**

**JUMA MUSA.....3<sup>RD</sup> RESPONDENT**

**GIDEON MWANGANGI WAMBUA.....4<sup>TH</sup> RESPONDENT**

**RULING**

**A. BACKGROUND**

**[1]** This is an Application by way of an Originating Motion dated 15<sup>th</sup> April, 2014 seeking leave to appeal to this Court under Article 163(4)(b) of the Constitution. The Applicant filed his application on 17<sup>th</sup> April, 2014 under a certificate of urgency seeking certification by this Court that the intended appeal involves a matter of general public importance.

**[2]** The Application was heard ex-parte under certificate on 17<sup>th</sup> April, 2014 before Ibrahim, SCJ. The matter was certified urgent and ordered that it be heard expeditiously on 7<sup>th</sup> April 2014 by a two Judge Bench.

**[3]** Upon being served with the Application, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a Notice of Preliminary Objection on 5<sup>th</sup> May, 2014. They gave notice of three grounds upon which they opposed the Application:

- 1.) *This Honourable Court has no jurisdiction, in the absence of an Appeal being lodged from the decision of the Court of Appeal in Civil Appeal No. 39 of 2013, to determine the questions set out in the Originating Motion referred to herein above;*
- 2.) *That the Applicant is abusing the process of this Honourable Court in bringing this Application when, in fact, by his own admission there is a ruling pending before the Court of Appeal on the question of certification that the matter is one of and involves general public importance; and*
- 3.) *That it is against public policy and in abuse of the process of the law that a party should file an application precisely in the same terms as one which is pending determination (by delivery of the court's ruling before another court).*

**[4]** When the application came up for inter-parte hearing, the Court directed that the Preliminary Objection be heard upfront.

## **B. SUBMISSIONS**

**[5]** Counsel Mr. Nyamodi, held brief for both Mr. Balala for the 1<sup>st</sup> Respondent and Mr. Khagram for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Court noted that the 4<sup>th</sup> Respondent was not represented at the time of hearing and an Affidavit of Service was not filed. However, Mr. Asige, learned Counsel for the Applicant, showed proof that there was an acknowledgement receipt on the Application on behalf of the 4<sup>th</sup> Respondent. He undertook to file an Affidavit of Service on or before 8<sup>th</sup> May, 2014 at 10.00a.m. The Court was satisfied that the 4<sup>th</sup> Respondent had notice of the hearing and considering that he would not suffer any prejudice if the matter is heard without him, it ordered that the matter proceeds in his absence.

**[6]** Mr. Nyamodi submitted that the substance of this Application was the consolidated Election Petitions No. 4 and No. 9 of 2013 in the High Court at

Mombasa. He contended that the issue of constitutionality of Section 76(1)(a) of the Elections Act was a central issue taken up and argued in this matter before Odunga, J who after the hearing found that Section 76(1)(a) was not unconstitutional. However, the learned judge proceeded to give recommendation to the Attorney General to make the due amendments in the Elections Act. It was on this basis that the Petition in the High Court remained alive.

[7] It was Counsel's submission that, this Court has pronounced itself on the unconstitutionality of Section 76(1)(a) of the Elections Act in ***Hassan Ali Joho & Another vs Suleiman Said Shahbal and Others***, Supreme Court Petition No. 10 of 2013 (***Joho case***); and that recently, in the ***Mary Wambui Munene vs Peter Gichuki King'ara and 2 Others***, Petition no. 7 of 2013 (***Wambui Case***), this Court addressed itself on the applicability of that decision. Hence, Counsel urged this Court to apply the **Wambui decision** to this matter and accordingly hold that the proceedings in the High Court and the Court of Appeal were a nullity, hence this Court lacks jurisdiction to entertain the Application.

[8] Learned Counsel Mr. Asige, for the Applicant, submitted that the preliminary objections raised by the Respondents had been crystallized in the Notice of Preliminary Objection dated 5<sup>th</sup> May, 2014. That the Applicant had notice of only those three grounds in the Notice, which we have already enumerated earlier on in this Ruling. It was his submission then that the preliminary objection should confine itself to the content of the Notice since to introduce issues outside the notice will be an ambush to the Applicant.

[9] Counsel averred that the issue as to whether the petition was filed out of time introduces issues of fact, which the Court ought not to entertain at this stage, in the absence of a Replying Affidavit being filed dealing with such issues. Consequently, the Court should limit itself to the grounds contained in the Notice of Preliminary Objection.

**[10]** He contended that the Court has jurisdiction to grant certification, which precedes the filing or the lodging of an Appeal. Hence the challenge that there is no appeal is not well founded. Counsel submitted that under Article 163(4)(b) of the Constitution and Section 16 of the Supreme Court Act, the Supreme Court or the Court of Appeal can certify that a matter involves matters of general public importance. This is a jurisdiction this Court shares with the Court of Appeal and it is exercised before the appeal is lodged.

**[11]** It was submitted that the Applicant had filed an application for certification in the Court of Appeal under certificate of urgency on 2<sup>nd</sup> December, 2013 but the Court of Appeal declined to certify it as urgent. The Application was heard *inter parte* on 16<sup>th</sup> December, 2014 and on 20<sup>th</sup> December, 2014 the Court of Appeal certified it urgent and directed that a date be taken in the Registry.

**[12]** The Application was set for hearing on 30<sup>th</sup> January, 2014 where the Court of Appeal ordered that it be dispensed off by way of written submissions. Parties were directed to file their submissions and a Ruling date set for 4<sup>th</sup> March, 2014. The Applicant filed his submissions on 12<sup>th</sup> February, 2014 in anticipation of that Ruling but no other party filed their submissions. On 4<sup>th</sup> March, 2014, the delivery of the Ruling was adjourned to 3<sup>rd</sup> April, 2014. On that day, the Court of Appeal instead of giving the Ruling ordered that it will be delivered on notice.

**[13]** Further, Counsel submitted that it was disappointing that a certification application in an electoral matter, filed since 2<sup>nd</sup> December, 2013 was awaiting Ruling on notice. He argued that the Applicant had complied with the requirement that an application for certification should be first filed in Court of Appeal. The Court of Appeal having heard the matter had failed to deliver a Ruling. In election matters, it was stressed, the Constitution is clear that time is of the essence.

**[14]**Counsel contended that in the circumstances of this matter, an Applicant is entitled to come to the Supreme Court for intervention because this Court does have similar jurisdiction under Article 163(4)(b) and Sections 3 and 16 of the Supreme Court Act. Where the Court of Appeal or tribunal has declined or rather not exercised its constitutional or statutory mandate, it was Counsel's submission that the Supreme Court, under Article 163 of the Constitution, Section 3 of the Supreme Court Act and the inherent jurisdiction, should intervene and intercede for justice to be done and seen to be done. Hence the Applicant urged that the objection that there is no appeal has no substance as one requires certification first before he files an appeal.

**[15]**With regard to the ground that the Applicant is abusing court process since there is a Ruling pending before the Court of Appeal, Counsel reiterated that five months have lapsed without the Court of Appeal delivering the Ruling. Hence it is in the interest of justice that such a party, as the Applicant, should go to another level that can grant that prayer, hence his coming to the Supreme Court. Consequently, he contended that there is no abuse of court process but rather the Applicant has come to entrench the due process of court and rule of law. Hence it was Counsel's submission that the Preliminary Objection is untenable, unknown in law and should be dismissed with costs.

### **C. ANALYSIS AND DETERMINATION**

**[16]**The issue before us is the determination of the Notice of Preliminary Objection by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents dated 5<sup>th</sup> May, 2014. Two issues have crystallized for this Court's determination:

- i) *Whether this Court has jurisdiction to entertain the Applicant's Originating Motion dated 15<sup>th</sup> April, 2014; and*

- ii) *Whether the Applicant's application is an abuse of the Court process and is against public policy.*

[17] Before delving into these two issues, we note that Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in his oral submission urged the Court to dismiss the Application on the basis that this Court has already pronounced itself on the effects of unconstitutionality of Section 76(1)(a) of the Elections Act in the **Wambui** case where it has held that the declaration of invalidity of Section 76(1)(a) of the Elections Act applied retrospectively, from the date of commencement of that Act. Consequently, Counsel submitted that Election Petitions No. 4 and No. 9 of 2013 (as consolidated) in the High Court, which necessitated the filing of this present Application were filed out of time and as such this Court lacked jurisdiction to entertain any application flowing from those Election Petitions as those proceedings in the superior courts were a nullity. Counsel for the Applicant in objection stated that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were introducing new issues that were not in the Notice of the Preliminary Objection filed on 5<sup>th</sup> May, 2014.

[18] While a party is at liberty to raise a preliminary objection at any time of the proceedings, in the interest of natural justice and constitutional principle of fair hearing, we agree with Counsel for the Applicant that notice should be given. A preliminary objection founded on an allegation of lack of jurisdiction, like the present one, has the potential of striking out a party's matter, if allowed. Consequently, such a party should be given sufficient notice of an apparent intention to move the Court to have his matter struck out. Hence, we agree with the Counsel for the Applicant that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ought to limit themselves to the grounds contained in the preliminary objection.

**i) *Whether this Court has jurisdiction to entertain the Applicant's Originating Motion dated 15<sup>h</sup> April, 2014.***

[19] Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that, this Court has no jurisdiction to entertain the Applicant's application for certification for leave to appeal in the Supreme Court since the ruling on the same matter is pending in the Court of Appeal. He submitted that the Supreme Court only assumes review jurisdiction after the Court of Appeal has pronounced itself as to whether or not to grant certification for leave. Further, Counsel argued that, if the Applicant must approach this Court in any manner, then he ought to withdraw the application for certification first filed in the Court of Appeal.

[20] In response, Counsel for the Applicant submitted that, the jurisdiction to grant certification for leave is donated by the Constitution both to the Court of Appeal and the Supreme Court. He relied on Article 163(4)(b) of the Constitution which provides that:

**163. (4) Appeals shall lie from the Court of Appeal to the Supreme Court-**

**(a)...**

**(b) in any other case in which *the Supreme Court, or the Court of Appeal*, certifies that a matter of general public importance is involved, subject to clause (5). [Emphasis ours]**

[21] We concur with the Counsel for Applicant that a certification for leave to appeal to the Supreme Court on a matter of general public importance may be granted by either the Court of Appeal or the Supreme Court. As to the jurisdiction of the Court to grant certification for leave, this Court has pronounced itself in the case of *Sum Model Industries Ltd v Industrial and Commercial*

***Development Corporation, Civil Application No. 1 of 2011*** (The Sum Model case), where it held that:

**“This being an application for leave to appeal against a decision of the Court of Appeal, *it would be good practice to originate the application in the Court of Appeal which would be better placed to certify whether a matter of general public importance is involved.* It is the Court of Appeal which has all along been seized of the matter on appeal before it. That Court has had the advantage of assessing the facts and legal arguments placed and advanced before it by the parties. Accordingly, that Court should ideally be afforded the first opportunity to express an opinion as to whether an appeal should lie to the Supreme Court or not. *If the applicant be dissatisfied with the Court of Appeal’s decision in this regard, it is at liberty to seek a review of that decision by this Court as provided for under Article 163(5) of the Constitution.* To allow the Applicant to disregard the Court of Appeal against whose decision it intends to appeal and come directly to this Court in search of a certificate for leave would lead to Abuse of the Process of Court.”** [Emphasis ours]

**[22]** Further Rule 24 of the Supreme Court Rules, 2012 provides:

**24. (1) An application for certification *shall first be made in the court or tribunal it is desired to appeal from.***

**(2) Where the Court of Appeal has certified a matter to be of general public importance, an aggrieved party may apply to the Court for *review* within fourteen days.**

**[Emphasis ours]**

[23] In affirming that the Supreme Court only exercises review jurisdiction with regard to certification for leave, this Court held in the case of *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione*, Application No. 4 of 2012, as follows [paragraph 31]:

**“...The legal framework provided for is that of “review”. Consequently, it is our opinion that where one applies to the Court of Appeal for leave to appeal to the Supreme Court, and the party is not satisfied by the decision of the Court of Appeal, no “appeal” lies. The only course is for the party to apply for “review” of the matter in the Supreme Court....”**

[24] As to the extent of the review jurisdiction, the Court added that [paragraph 33]:

**“...A party may come for review of the decision *granting* leave or *denying* leave. Hence, we hold that certification under Article 163(5) should be *broadly* read as alluding to certification by the Court that a matter of public importance is involved, or is *not* involved....”**

[25] In essence, when approaching the Supreme Court for grant of certification for leave to appeal to the Supreme Court, the Court exercises, not an appellate jurisdiction, but a Review Jurisdiction. This jurisdiction would be exercisable where a party had initially approached the Court of Appeal for certification. Where one is denied leave, then such a person has a right to approach the Supreme Court for review of that decision. Similarly, where leave is granted, an aggrieved party also has a right to approach the Supreme Court for a review of that decision.

[26]The Applicant in this case has not invoked this Court’s Review jurisdiction. His application for certification is still pending in the Court of Appeal. In the **Sum Model** case and the **Hermanus** case, referred to above, this Court has set out the criteria for seeking leave to appeal to the Supreme Court. Further, it is an established principle that the law should be certain, consistent and predictable. The Court’s Rules of Procedure and Directions should also apply indiscriminately to all persons.

[27]This Court having pronounced itself on the procedure where one seeks certification, in the **Sum Models case**, we are bound by it. As a two Judge Bench, we are obliged to follow the laid down principles and are bound by the decisions of this Court. Consequently, until the Court of Appeal has pronounced itself as to whether to grant or deny certification for leave, we are reluctant to assume jurisdiction.

[28]Hence on this ground we decline to assume jurisdiction in this matter.

***ii) Whether the Applicant’s application is an abuse of the Court process and is against public policy.***

[29]The **Black’s Law Dictionary** defines ‘abuse of process’ at **page 11** as:

**“The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process’s scope”**

It includes the deliberate use of the court and court process to settle vendetta, to intimidate, to inflict fear and involves the bringing of matters to Court that have no justiciable cause of action.

[30]We are hesitant to hold that the Applicant’s Application is an abuse of court process. This matter originated from the High Court where there was a justiciable cause of action. It is apparent that the Applicant appreciated the sanctity and hierarchy of courts by proceeding from the High Court to the Court of Appeal first.

**[31]**Courts are financed by the public fund hence; they have to be used and managed so as to enhance good governance. Public policy demands that the rule of law should be enhanced in the invocation of courts' jurisdiction. Litigants should adhere to the procedures established in regard to invocation of courts' jurisdictions. On the other hand, courts have the duty to protect citizens' constitutional rights; provide procedural due processes; give timely determination of matters; and preserve the rule of law. Courts are a cornerstone of our society and litigants' legitimate expectation of timely and expeditious determination of their matters is justified.

**[32]**Even though the Constitution grants this Court jurisdiction to entertain the present application for certification, as correctly argued by the Applicant, considering the pendency of the same application at the Court of Appeal, this Court for the sake of good order and good governance decline the call to entertain the Applicant's Application.

**[33]**We have noted the concerns raised by the Applicant as regards the delay in having the Application at the Court of Appeal determined and we must state that in order to aid in dispensing justice, it is incumbent upon judicial officers and Courts in general to expedite the matters before them. Indeed Article 159(2)(b) of the Constitution provides that justice shall not be delayed. We implore the Court of Appeal to consider the plight of the Applicant herein and render the pending Ruling expeditiously. The situation herein is exacerbated by the fact that Election Petitions by their very nature have timelines that must be conformed with.

**[34]**Accordingly, we uphold the Notice of Preliminary Objection dated 5<sup>th</sup> May, 2014.

### **D. ORDERS**

- i) The Originating Motion dated 15<sup>th</sup> April 2014 in Civil Application No. 14 of 2014 is hereby dismissed.
- ii) Parties to bear their own costs.

Orders accordingly

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of May 2014**

.....  
**K.H RAWAL**  
**DEPUTY CHIEF JUSTICE**  
**AND VICE-PRESIDENT OF**  
**THE SUPREME COURT**

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