

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA AT NAIROBI**  
*(Coram: Maraga, CJ & P; Mwilu, DCJ & V-P; Ibrahim; Wanjala & Njoki, SCJJ)*  
**PETITION NO. 1 OF 2018**

—BETWEEN—

**INSTITUTE FOR SOCIAL  
ACCOUNTABILITY.....1<sup>ST</sup> APPELLANT  
CENTRE FOR ENHANCING DEMOCRACY  
AND GOOD GOVERNANCE.....2<sup>ND</sup> APPELLANT**

—AND—

**NATIONAL ASSEMBLY OF KENYA.....1<sup>ST</sup> RESPONDENT  
THE SENATE .....2<sup>ND</sup> RESPONDENT  
THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT  
CONSTITUENCY DEVELOPMENT FUND BOARD.....4<sup>TH</sup> RESPONDENT**

**COMMISSION FOR THE IMPLEMENTATION OF THE  
CONSTITUTION.....5<sup>TH</sup> RESPONDENT**

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*(Appeal from the Judgment of the Court of Appeal of Kenya at Nairobi (Githinji, Okwengu & G.B.M Kariuki, JJ. A) in Civil Appeal No.92 of 2015 dated 24<sup>th</sup> November, 2017)*

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**RULING OF THE COURT**

***INTRODUCTION***

**[1]** On 8<sup>th</sup> November 2019, we delivered a ruling on the appellants’ Notice of Motion application dated 30<sup>th</sup> January, 2018 and lodged in the Supreme Court Registry on 31<sup>st</sup> January, 2018 allowing the application in the following terms:

*a) The Application dated 30<sup>th</sup> January, 2018 is hereby allowed;*

*b) The Applicant(s) shall file its Supplementary Record of appeal containing the Certified Order of the Court of Appeal and the typed proceedings within 7 days of receipt of those documents; and*

*c) Costs shall be in the cause.*

**[2]** Following the said ruling, the appellants lodged a supplementary record of appeal on 14<sup>th</sup> November 2019 incorporating the order issued by the Court of Appeal; certified proceedings by Honourable Mr. Justice Githinji and Honourable Lady Justice H.M. Okwengu and a copy of the letter dated 4<sup>th</sup> September 2019 to the Deputy Registrar requesting for the exclusion of proceedings by Justice (Rtd) G.B.M. Kariuki from the intended supplementary record of appeal for non-availability and copies of correspondence between the appellants and the Court of Appeal registry.

### ***THE APPLICATIONS***

**[3]** The 4<sup>th</sup> respondent by way of a Notice of Motion application dated 5<sup>th</sup> February 2020 and filed on 7<sup>th</sup> February 2020 now seeks orders to strike out the record of appeal herein for being incomplete and therefore invalid. The application is based on the annexed affidavit of ISAAC O. MIENCHA, Advocate, reiterating the grounds that the record as filed is incomplete; that if relied upon, the incomplete record of appeal will cause miscarriage of justice to the respondents and that the appellants have not made an application, pursuant to **Rule 33(5)** of this Court's Rules to

exclude the proceedings by Justice (Rtd) G.B.M. Kariuki, a fact which they had intimated in their letter of 4<sup>th</sup> September 2019.

[4] On their part, the appellants, under **Rule 33(5)** of this Court's rules filed an application dated 10<sup>th</sup> February, 2020 seeking to exclude from the record of appeal the trial notes of Justice (Rtd) G.B.M. Kariuki. This application is founded on the grounds that the main petition is ready for hearing and parties have filed submissions on it; the appellants have exercised due diligence to get the trial notes by the said retired judge to no avail; that the omission of the proceedings by the said judge cannot be attributed to any fault by the appellants; that the appellants reminded the Deputy Registrar of this Court to mention the matter before the Court to enable the appellants make an oral application under **Rule 33(5)** to which the Honourable Deputy Registrar directed the appellants to file a formal application; and that in any case, the presence of trial notes in a second appeal is not a mandatory requirement under **Rule 33(4)** and their omission is not fatal to the hearing and determination of this matter.

[5] The application is supported by an affidavit sworn on 10<sup>th</sup> February, 2020 by MICHAEL KIOKO MUNGUTI, the Legal Assistant to the appellants' counsel, in which he sets out the efforts he took to follow up the proceedings. He annexes correspondence in support of his assertion. The appellants have further filed submissions in support of the application. They submit that the Court has discretion under **Rule 33(5)** to exclude a document where a matter can sufficiently proceed without the particular document.

### ***APPELLANT'S CASE***

[7] The appellants raise three main grounds to support their argument. First, that the trial notes are not a mandatory requirement under **Rule 33(4)** and their omission is not fatal to the hearing and determination of this matter on the merits (they refer to ***Sammy Kemboi Kipkeu v Bowen David Kangogo & 2 others*** [2018] eKLR and ***Hamida Yaro Shek Nuri v Faith Tumaini Kombe & 2 others*** [2019] eKLR). Second, and in the alternative, that even if the trial notes were compulsory, they are unavailable by no fault of the appellants, despite the appellants' diligent effort spanning the course of two years (they refer to ***Hassan Nyanje Charo v Khatib Mwashetani & 3 others*** [2014] eKLR). And lastly, that the public interest in the constitutionality of the Constituency Development Fund Act and the Fund call for an expeditious hearing of the main appeal on the merits and without undue regard to technicalities of procedure allowing this Court to address the transition from former attempts at decentralization including through the Constituency Development Fund to the current devolved system of governance. The appellants thus invite us to fix an early hearing date for the main appeal which has been pending for far too long.

[8] In addition, and in response to the 4<sup>th</sup> respondent's application to strike out the appeal, the appellants rely on ***Alfred Asidaga Mulima & 2 others (suing as***

*representatives of Ex-East African Airways Staff Welfare Association) v Attorney General & 8 others* [2019] eKLR in which the Court was mindful to exercise favourable discretion to a party who sufficiently explains the omission taking into account the prejudice to be suffered by the other party.

#### ***THE 4<sup>TH</sup> RESPONDENT'S CASE***

[9] The 4<sup>th</sup> respondent filed its submissions on 30<sup>th</sup> April 2020 in support of its application to strike out the appeal for non-compliance with **Rule 33** of the Supreme Court Rules. It submits that the appeal should be struck out for being incomplete for lack of the record of proceedings in the Court of Appeal contrary to **Rule 33(4)**. They rely on *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR which relates to what constitutes a competent appeal before the Supreme Court.

[10] The 4<sup>th</sup> respondent further submits that the appellant did not make any application under **Rule 33(5)** at the time of filing the supplementary record of appeal but instead wrote to the Deputy Registrar of this Court seeking to bring the matter for mention before the bench to enable them make an oral application for exclusion of the proceedings by Justice (Rtd) G.B.M. Kariuki. That the appellants did not pursue this and instead filed the supplementary record and only responded to the 4<sup>th</sup> respondent's application by filing their application for exclusion of Justice (Rtd) G.B.M. Kariuki's proceedings.

#### ***ANALYSIS***

**[11]** Upon considering the two rival applications, the issue that emerges for our determination is *whether or not to exclude the trial notes by Justice (Rtd) G.B.M. Kariuki of the Court of Appeal*. This determination will also address the issue on whether the record of appeal should be struck out as sought by the 4<sup>th</sup> respondent.

**[12]** In considering this issue, we note that our ruling of 8<sup>th</sup> November 2019 allowed the filing of the Supplementary record *within 7 days of receipt of those documents*. Accordingly, the filing of the supplementary record was dependent on the documents being availed by the Court of Appeal. This presupposed that all the documents would have been made available to the appellants at the same time. It turned out otherwise. If we understand the 4<sup>th</sup> respondent correctly, it is his contention that the appellants should not have filed the supplementary record containing documents already received from the Court of Appeal despite our ruling until all the documents were received by them. With respect, this is untenable. We need not belabour the fact that the appellants exercised due diligence and bear no fault in the lack of the said trial notes, a situation that the 4<sup>th</sup> respondent does not challenge.

**[14]** This is compounded by the fact that Justice (Rtd) G.B.M. Kariuki has since retired from public service as a judge of the Court of Appeal. The appellants had as early as 4<sup>th</sup> September 2019 brought to the attention of this Court's Deputy Registrar of the intention to exclude the notes by Justice (Rtd) G.B.M. Kariuki through an oral application. This is a position that was reiterated both in correspondence and when the matter was last mentioned before the Honourable Deputy Registrar who in the

end asked the appellants to make a formal application. **Rule 33(5)** allows for the making of oral applications and the appellants were entitled to that option until otherwise directed, as they were eventually, to file a formal application.

**[15]** In the intervening period, the 4<sup>th</sup> respondent applied to strike out the petition barely a day after the mention before the Deputy Registrar and three days before the appellants could file their formal application under **Rule 33(5)**. We do not think that the application by the 4<sup>th</sup> respondent has been made in good faith under the circumstances considering its timing. The 4<sup>th</sup> respondent had reasonable notice that the appellants faced challenges in obtaining the trial notes of the now retired judge of the Court of Appeal and that they intended to seek court intervention, albeit orally, under **Rule 33(5)**. To allow the action by the 4<sup>th</sup> respondent would be to validate sharp practice of law that this court would not sanction.

**[16]** Further, in considering the nature of the document to be excluded, we are persuaded that the same is so far untraceable. There is no purpose to be served by stalling the appeal and continuing to wait for a document on which nothing might eventually turn. In addition, the judgment by the Court of Appeal, the subject of this appeal, is unanimous and the trial notes by Justice (Rtd) G.B.M. Kariuki are not likely to fundamentally affect the record. We maintain the position we adopted in ***Hamida Yaroi Shek Nuri case*** (supra) thus:

*“[23] It therefore emerges that failure to include the ‘record of proceedings of the Court of Appeal’ in the Record of Appeal does not automatically render the appeal filed before this Court fatal. For if the law contemplates that such*

*an omitted document may be filed later, the same law cannot be said to render a Record of Appeal with that omission outrightly fatal. However, we hasten to add that where a required document lacks in the Record of Appeal, devoid of a sufficient explanation for the omission, is a ground for the striking out of that Record of Appeal.”*

[17] In the ***Alfred Asidaga Mulima case (supra)*** we excused the applicant for a delay occasioned by the Court of Appeal. We are therefore inclined to exercise our discretion under **Rule 33(5)** in favour of the appellants and hasten to add that since the parties have already filed submissions on the substantive appeal and cross appeal, it is imperative that the legal and constitutional questions raised therein be determined on their merits in line with this Court’s mandate without further delay.

#### **DETERMINATION**

[18] The upshot of our findings leads to our making the following Orders:

- a) *The Appellants’ application dated and filed on 10<sup>th</sup> February, 2020 is allowed;*
- b) *Consequently, the 4<sup>th</sup> Respondent’s application dated 5<sup>th</sup> February, 2020 and filed on 7<sup>th</sup> February 2020 is disallowed;*
- c) *Costs shall be in the appeal.*

**DATED and DELIVERED at NAIROBI this 4<sup>th</sup> of August 2020.**

.....  
**D. K. MARAGA**  
**CHIEF JUSTICE & PRESIDENT**  
**OF THE SUPREME COURT**

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

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

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

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

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

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