



REPUBLIC OF KENYA



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**Gitene v Omweri & 2 others (Election Petition Appeal
1 of 2023) [2023] KEHC 19154 (KLR) (24 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 19154 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
ELECTION PETITION APPEAL 1 OF 2023**

MS SHARIFF, J

APRIL 24, 2023

BETWEEN

HON VINCENT ONYANDO GITENE APPELLANT

AND

AMOS MOKAYA OMWERI 1ST RESPONDENT

DAVID KIPKEMOI CHEROP 2ND RESPONDENT

**INDEPENDENT ELECTORAL BOUNDARIES COMMISSION (IEBC) 3RD
RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon P.K. Mutai (SRM) delivered at
Kisii in Chief Magistrate's Court Election Petition No 1 of 2022 on 20th December 2022)*

RULING

Introduction

1. In his Notice of Motion dated 17th February 2023 and filed on 21st February 2023, the Appellant herein sought for orders that his Memorandum of Appeal filed herein be deemed to have been filed within time and that he be granted leave to file the Decree from the Trial Court out of the stipulated time and the Decree annexed to his application herein be deemed as duly filed.
2. He swore an Affidavit on 20th February 2023 in support of his said application. He averred that both the Memorandum of Appeal and the Record of Appeal herein were filed within time but that there was an inadvertent omission on the part of his Advocates to include a certified copy of the Decree from the Judgment appealed against. He asserted that the omission to include the Decree in the Record of Appeal was an oversight on the part of his Advocates owing to the rush to beat the stipulated time frames set out in the relevant law and rules.



3. He asserted that there were several gazetted holidays between 20th December 2022 and 4th January 2023 which ought to be taken into account when computing time for filing and service of the Memorandum and Record of Appeal. He stated that he was desirous of prosecuting his appeal to its conclusion and in line with the provisions of *the Constitution* of Kenya, 2010 and the relevant laws made thereunder and that he stood to suffer irreparably if the orders sought were not granted as his appeal would have been decided on the technicalities as opposed to merit.
4. He contended that the omissions on the part of his Advocates ought not be visited on him to his detriment and that his application would not occasion any prejudice or delay the hearing of the appeal as the Respondents had not filed their responses nor have directions on the conduct of the main appeal taken out.
5. He further averred that his application had been made without unreasonable/inordinate delay. He added that it was in the interest of justice that his application be allowed to enable the court achieve its onerous task of giving effect to the overriding objectives under the relevant law and *the Constitution*.
6. On 27th February 2023, the 1st Respondent swore a Replying Affidavit in opposition to the Appellant's application. The same was filed on even date. He averred that the instant application was frivolous, without merit, incompetent, marred with falsehoods, non-disclosure of material facts, fatally defective and ought to be dismissed at the first instance.
7. He asserted that Judgment was delivered on 20th December 2022 and that the Appellant never applied for stay of execution. He further pointed out that the Appellant filed an application for stay of execution on 7th February 2023 which he later abandoned and filed this instant application. It was his contention that the Appellant was guilty of laches and that he had delayed filing this application since the Judgment had been delivered more than two (2) months back.
8. He averred that the Appellant's appeal was an abuse of the court process, a sham, lacking in merit, an afterthought intended to forestall execution of the Decree and to deny him the fruits of his Judgment. He termed the said delay as inordinate and inexcusable and termed it a classic case of an appellant who had lost interest in the case. He pointed out that the Appellant had offered no reason for its delay in filing his application in good time. He asserted that he stood to suffer loss or prejudice should this application be allowed.
9. In their Notice of Preliminary Objection dated 1st March 2023 and filed on 2nd March 2023, the 2nd and 3rd Respondent raised an objection in opposition to the said application seeking to have the Memorandum of Appeal herein dated 3rd January 2023, the Record of Appeal dated 12th January 2023 and the instant application struck out with costs. They asserted that the Memorandum of Appeal herein was fatally defective incompetent and bad in law as it raised matters of fact contrary to Section 75(4) of the *Elections Act*, 2011 and that the same was served out of time contrary to the provisions of Rule 35(5) of the Elections (Parliamentary and County Elections Petitions) Rules, 2017.
10. They further contended that the Appeal against the Ruling delivered on 3rd November 2022 by Hon. P. K. Mutai (SRM) on the Notice of Motion Application dated 22nd September 2022 seeking scrutiny and recount was out of time pursuant to Section 75(4) of the *Elections Act* and Rules 35(1) of the Elections (Parliamentary and County Elections Petitions) Rules. They added that the Record of Appeal dated 12th January 2023 was fatally defective, incompetent and bad in law as it lacked the mandatory documents including certified copies of the Judgment and Decree dated 20th December 2022 contrary to Rule 35(6) of the Elections (County and Parliamentary Elections Petitions) Rules.



11. On 1st March 2023, the 2nd Respondent also swore a Replying Affidavit in opposition to the Appellant's application on his behalf and on behalf of the 3rd Respondent. The same was filed on 2nd March 2023. They averred that after the delivery of the Judgment appealed against herein, the Trial Court readily issued copies of the Judgment and the Decree dated 20th December 2022 to the parties. They pointed out that being dissatisfied with the said Judgment, on 4th January 2023, the Appellant filed his Memorandum of Appeal dated 3rd January 2022 (sic).
12. They stated that the Appellant proceeded to file its Record of Appeal on 20th January 2023 bereft of a certified copy of the Judgment and Decree dated 20th December 2022. They pointed out that that was contrary to the provisions of Rule 35(6)(e) of the Elections (Parliamentary and County Elections) Rules, 2017 despite copies of the same having been issued to the parties.
13. They asserted that despite filing the Memorandum of Appeal on 4th January 2023, the Appellant proceeded to serve the same alongside the Record of Appeal on 24th January 2023 contrary to the mandatory stipulations under Rule 35(5) of the Act which establishes that the Appellant shall serve the Memorandum of Appeal upon all the parties directly affected by the appeal within seven (7) days.
14. It was their contention that Election Petitions have strict timelines, procedures and guidelines upon which each party is required to comply with. They stated that the Appellant's failure to include certified copies of the Judgment and Decree in his Record of Appeal was deliberate and intentional and his application was therefore an afterthought which was aimed at hoodwinking this court from striking this appeal out in its entirety.
15. They were emphatic that the Appellant's Record of Appeal was not only defective but was also an abuse and a waste of the court as the appeal was aimed at denying the Respondents their awards. They pointed out that the Appellant was guilty of laches and was undeserving of the orders sought. They added that his application lacked merit, was misconceived, baseless, legally untenable and fatally defective and did not lay any basis for the inclusion of the Decree out of time when the Appellant had it in his possession all along.
16. Samson Nyagaka, the Appellant's Advocate swore a Replying Affidavit on behalf of the Appellant on 20th March 2023 in response to the 2nd and 3rd Respondents' Notice of Preliminary Objection. The same was filed on 21st March 2023.
17. The Appellant averred that his Appeal did not raise issues of facts but purely of law and had followed the law as stipulated and that he had not offended Section 75(4) of the Election Act 2011. He asserted that the Memorandum of Appeal was filed and served within the required time.
18. He argued that his appeal on scrutiny and recount fell within the mandate and purview of the intended appeal and that the appeal raised points of law which were arguable and therefore had a chance of success. He pointed out that the certified Decree that was not obtained on time and that was what formed the basis of his application dated 17th February 2023. He urged the court to dismiss the 2nd and 3rd Respondent's Notice of Preliminary Objection.
19. The Appellant's Written Submissions were dated 20th March 2023 and filed on 6th April 2023. The 1st Respondent's Written Submissions were dated 4th March 2023 and filed on 31st March 2023 while those of the 2nd and 3rd Respondent were dated 4th April 2023 and filed on 5th April 2023. This Ruling is based on the said Written Submissions which parties relied upon in their entirety.



LEGAL ANALYSIS

20. It appeared to this court that the issues that were in contention were whether or not the Appeal herein should be struck out on the following grounds:-
21. Having said so, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Memorandum of Appeal herein was filed and served within the timelines that were prescribed in Rule 35(5) of the Elections (Parliamentary and County Elections Petitions) Rules.
 - b. Whether or not the failure to include a Certified Copy of the Decree and Judgment rendered the Appellant's appeal incompetent.
 - c. Whether or not the Memorandum of Appeal raised points of facts contrary to Section 74(4) of the *Elections Act*.
22. The court therefore found it prudent to Appellant was emphatic that its Appeal was on matters of law as provided address the said issues under the following distinct and separate heads.

I. TIME OF FILING THE APPEAL

23. The 1st Respondent invoked Section 75G of the *Civil Procedure Act* and submitted that the Memorandum of Appeal herein was filed after the thirty (30) days period stipulated in the aforesaid Section and that the Appellant had not demonstrated any good reason for the said delay.
24. The 2nd and 3rd Respondents invoked Section 75 of the Election Act and reiterated the court's decision in the cases of Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014] eKLR, Charles Kamuren vs Grace Jelagat Kipchoim & 2 Others [2013] eKLR and William Kinyanyi Onyango & 2 Others vs Independent Electoral and Boundaries Commission & 3 Others [2014] eKLR where the common thread was that an appeal from a decision of the subordinate court had to be lodged within thirty (30) days.
25. It was their contention that a perusal of the Memorandum of Appeal revealed that apart from challenging the Judgment of the Trial Court dated 20th December 2022 the Appellant was also appealing against the Ruling of the Trial Court delivered on 2nd November 2022 on his application for recount and scrutiny wherein he prayed that the said Ruling be set aside and an order for scrutiny in terms of the application dated 28th September 2022 be allowed. It was their case that the said appeal against the aforesaid Ruling was way out of time and should not be entertained by this court.
26. Section 75(4) of the *Elections Act* provides thus:
 4. An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—
 - a. filed within thirty days of the decision of the Magistrate's Court; and
 - b. heard and determined within six months from the date of filing of the appeal.”
27. Notably, from the reading of his Memorandum of Appeal, it was clear that the Appellant was challenging the Trial Court's Judgment of 20th December 2022 and the Ruling of 3rd November 2022. The Memorandum of Appeal herein was filed on 4th January 2023. This meant that the appeal challenging the Ruling of 3rd November 2022 and Judgment of 20th December 2022 was filed within time.



28. In view of the strict timelines, appellate courts have discouraged the filing of appeals on interlocutory applications. The practise that has prevailed and/or emerged in previous cycles of hearing election petitions has been that the aggrieved party files its appeal on all issues that arose during trial to be determined in one (1) appeal. The Appellant could not therefore be faulted for having filed the points of law that emanated from the Ruling of 3rd November 2022 as the same may have had an effect and/or impact on the overall decision that was delivered by the Learned Trial Magistrate. It was for this court to determine whether the relevance of the decision of the Learned Trial Magistrate in this regard at the time of determining the Appeal herein.

II. Scope Of Matters That Were Raised In The Appeal

29. The Appellant submitted that the Memorandum of Appeal raised issues of law and as such the 2nd and 3rd Respondents' Preliminary Objection was merely used to derail the court from its main objective.
30. The 2nd and 3rd Respondents submitted that the Memorandum of Appeal dated 3rd January 2023 raised matters purely of fact and did not disclose any single matter of law and therefore contravened the mandatory requirement stipulated under Section 75 of the *Elections Act*. In that regard, they placed reliance on the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others cited with approval in William Kinyanyi Onyango & 2 Others vs Independent Electoral and Boundaries Commission & 3 Others (Supra) where it was held that a petition which requires the appellate court to re-examine the probative value of the evidence tendered at the trial court, or invites the court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted.
31. The Respondents argued that the grounds of appeal that were set out in the Memorandum of Appeal sought to challenge the decision of the Learned Trial Magistrate on the basis of facts contrary to the mandatory provisions of Section 75 (4) of the *Elections Act*.
32. Although the Appellant argued that his grounds of appeal were strictly on points of law, it was apparent that the appeal challenged the decision of the subordinate court on factoral issues/circumstances. There were, however, grounds that referred to actual rules that would be considered to determine how the facts were considered by the court which was a point of law. It was this court's considered view that the grounds on points of law and points of fact were intertwined and hence the grounds could be salvaged by Rule 5 (1) of the Elections (Parliamentary and County Elections Petitions) Rules for hearing of the Appeal on merit.
33. Indeed, the determination of whether the grounds of appeal were pure points of law or facts was purely under the purview of the appeal and such a question could not be determined at a preliminary stage of this appeal. In the event the court was to find that the Appeal was based on facts, it will dismiss the appeal. It would not be prudent to enquire into the merits or otherwise of the grounds of the appeal at this interlocutory stage.

III. Failure To Annex Judgment And Decree

34. Generally, the Respondents argued that the appeal should be struck out as the Appellant did not include a certified copy of the decree, in the Record of Appeal.
35. The 1st Respondent cited Order 42 Rule 2 and Rule 13 (4)(f) of the Civil Procedure Rules, 2010 and placed reliance on the cases of Lawrence Nguthiru Riccardshaw vs George Ndirangu (2012) Nyeri High Court Civil Appeal No 103 of 2012(eKLR citation not given), Lucas Otieno Masaye vs Lucia Olewe Kidi [2022]eKLR, Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013]eKLR



- among other cases where the common thread was failure to attach a certified copy of the decree or order appealed against was not merely a procedural requirement but that the same could render an appeal fatally defective.
36. He submitted that failure to attach a certified copy of the decree rendered the Appeal herein fatally defective. He urged the court to strike out the Appellant's appeal with costs to the Respondents as costs follow events as was held in the case of *Benedeta Wanjiku Kimani vs Changwon Cheboi & Another* [2013] eKLR.
 37. The 2nd and 3rd Respondents submitted that the present application for leave to annex the certified copy of the decree was filed on 17th February 2023 which was about one (1) month from the date of filing the Record of Appeal. They asserted that the delay in filing the said application was inordinate and the Appellant had not explained the reasons behind it.
 38. They further submitted that the Decree that the Appellant annexed in his supporting Affidavit was not certified as stipulated under the Rules. They invoked Rule 34 (6) of the Elections (Parliamentary and County Elections Petitions) Rules and argued that the filing of a certified copy of the Judgment and Decree was a mandatory and failure to file the same rendered the Appeal incompetent and defective.
 39. They were categorical that the Appellant's application only sought to admit the annexed Decree to the Record of Appeal but did not pray to file a certified copy of the Judgment and a certified copy of the Decree. They asserted that in the circumstances, even if the application was to be allowed the order would not cure the defect on the Record of Appeal which was that it did not contain a certified copy of the Judgment and a certified copy of the Decree.
 40. In that respect, they relied on the case of *Paul Kurenyi Leshuel vs Ephantua Kariithi Mwangi & Another* [2015] eKLR where it was held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent.
 41. They were emphatic that the failure by the Appellant to include a certified copy of the Judgment and a certified copy of the decree of the Trial Court in the Record of Appeal was not a procedural technicality that can be cured by Article 159(2)(d) of *the Constitution* of Kenya. In this respect, they relied on the case of *Apungu Arthur Kibira vs Independent Electoral and Boundaries Commission & 2 Others* [2018] eKLR where it was held that Article 159 (2)(d) was not a panacea for all procedural infractions and was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.
 42. They further placed reliance on the case of *Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others* [2014]eKLR where the court set out the principles to be considered in determining whether or not to grant extension of time as follows; extension of time is not a right but an equitable remedy available to a deserving party and the discretion of the court, a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court, it is a consideration to make on a case to case basis, delay should be explained to the satisfaction of court, whether prejudice would be suffered by the respondent if granted, whether the application has been brought without undue delay and whether in election petitions, public interest should be a consideration for extending time.
 43. It was their case that there were grave omissions and commissions relating to the Memorandum of Appeal and Record of Appeal which rendered both documents incompetent and defective. They urged the court to allow their Notice of Preliminary Objection as prayed.
 44. On the other hand, the Appellant submitted that the court had power to extend time within which to file a certified copy of the judgment and decree in its Supplementary Record of Appeal. He invoked



- Article 159(2)(d) of *the Constitution* of Kenya, 2010 that provides that justice shall be administered without undue regard to technicalities and urged the court to allow him file a Supplementary Record of Appeal and annex the Decree.
45. In this regard, he relied on the case of John Munuve Mati vs Returning Officer Mwingi North Constituency & 2 Others [2018]eKLR where it was held that although prescribed timelines as regards electoral dispute resolution must be strictly adhered to, the 2017 Rules now expressly conferred on courts the discretion to determine the effect of any failure to comply with the Rules, taking into account the fact that justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timelines.
 46. He further placed reliance on the case of Lorna Chemutai & 4 Others vs Independent Elections & Boundaries Commission & 2 Others [2018] eKLR where it was held that failure to include the decree was not fatal omission and the court has the discretion to extend time for the appellant to comply with the provisions of Rule 34. He invoked Rule 35(6) of the Election (Parliamentary and County Petition) Rules and urged this court to exercise its discretion and allow him to file certified copy of the Decree and deem the Record of Appeal and the Memorandum of Appeal as having been duly filed within time.
 47. Notably, Rule 34 (6) of the Election (Parliamentary and County Election Petition) Rules requires that the Record of Appeal should contain a signed and certified copy of the judgment appealed from and a certified copy of the decree as was held in the case of Twaher Abdulkarim Mohamed vs Mwathethe Admson Kadenge & 2 Others [2015] eKLR. The court therein relied on the provisions of Article 159(2)(d) of *the Constitution* of Kenya and acknowledged that there could be no decree without a judgment from where the grounds of appeal could be ascertained from. It also observed that striking out of records of appeal was expensive because once a record was struck out, one could still file another appeal.
 48. In the case of Richard Ncharpi Leiyagu vs Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR, the Court of Appeal pronounced itself on the issue of an incomplete record of appeal and stated that whereas it was important for parties to file a complete record of appeal, courts had shifted towards addressing substantive justice without giving technicalities prominence.
 49. Notably, Rule 5 (1) of the Elections (Parliamentary and County Elections Petition) Rules, 2017 provide as follows:-

“The effect of any failure to comply with these Rules shall be determined at the Court’s discretion in accordance with the provision of Article 159 (2) (d) of *the Constitution*”
 50. To exercise the discretion bestowed upon it, the Court must look at the overriding principles stipulated in the Rules. This court was inclined to follow the approach in the above-mentioned cases with respect to an incomplete record of appeal. *The Constitution* of Kenya underscores the importance of substantive justice by overlooking procedural technicalities particularly in a case such as is before this court where there is non-compliance with a requirement in the Rules for inclusion of a document that is already in the record of the court. Accordingly, it was this court’s finding that failure to include the decree was not a fatal omission. Justice, in my view, lies in granting the Appellants time within which to comply with the provisions of Rule 34.
 51. In the circumstances foregoing, it was this court’s considered view that the Appellant be given an opportunity to be heard as provided for under Article 50 (1) of *the Constitution* of Kenya as this would not prejudice the Respondents in any way as the appeal was still in its preliminary stage and no directions had been taken as to the hearing of the said appeal.



IV. Service Of The Record Of Appeal

52. The 1st Respondent invoked Rule 34(5) of the Elections (Parliament and County Election Petitions) Rules and argued that service was the act that drew the attention of the opposite party to the existence of a case. He asserted that where there was no service the other party was deemed not to be aware of the case. He added that proceeding with such a case would prejudice the party not served and that where the law allows, the remedy lay in affording the unserved party an opportunity to come on board.
53. He was emphatic that service was a key spoke in the administration of justice in election disputes and was captured in Article 87(3) of *the Constitution* of Kenya. In this regard, he relied on the case of Patrick Ngeta Kimanzi (sic) where it was held that service is an integral element of the fundamental right to a fair hearing which is underpinned by the well-known rules of natural justice.
54. He invoked Rule 34(5), Rule 34(6) and Rule 82 (sic) and placed reliance on the case of Charles Wanjohi Wathuku vs Githinji Ngure & Another [2016] eKLR where it was held that timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that court processes dispense justice in a timely, just, efficient and cost-effective manner. He contended that the Memorandum of Appeal was served out of time and the same ought to be strike out.
55. The 2nd and 3rd Respondents invoked Rule 35 (5) of the Elections (Parliamentary and County Election Petitions) Rules and contended that the Memorandum of Appeal herein was duly filed on 3rd January 2023 in line with Rule 35(1) of the Elections (County and Parliamentary) Petitions Rules, 2017 and that the Appellant proceeded to pay the sum of Kshs 25,000/= on 4th January 2023 in compliance with Rule 35(4) of the Rules but that he waited until 24th January 2023 to serve the said Memorandum of Appeal which was a whopping thirteen (13) days from the date that he was supposed to serve.
56. They asserted that no explanation had been provided by the Appellant for the inordinate delay in serving the Memorandum of Appeal and that although he alleged to have served the Memorandum of Appeal on 4th January 2023, he did not adduce any document to prove that assertion. They pointed out that on their part, they had attached the received page of the Record of Appeal containing the Memorandum of Appeal which clearly showed that the same was received on 24th January 2023. They were therefore emphatic that the Appellant was guilty of laches and this court ought not to entertain his indolence.
57. In that regard, they placed reliance on the case of Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others (Supra) quoted in Apungu Arthur Kibira vs Independent Electoral and Boundaries Commission & 2 Others (Supra) where it was held that the jurisdiction of the court to hear and determine electoral disputes is inherently tied to the issue of time and a breach of this strict scheme of time removes the dispute from the jurisdiction of the court.
58. They also cited the case of Charles Kamuren vs Grace Jelagat Kipchoim & 2 Others (Supra) where it was held that an election petition must be served within the time prescribed for such service by statute and where the petitioner had not served the petition within such time the petition was incurably defective and was for striking out. They urged the court to strike out the Memorandum of Appeal herein for being served out of time with no reasons supplied for the delay.
59. They were categorical that time was an utmost essence in election petitions for reasons that this court was bound by the six (6) month time period which to hear and determine the same and that an election dispute is a public interest affecting members of the public who in this case were Voters of Nyatieko Ward who were highly prejudiced by the omission on the part of the Appellant.



60. They added that the said voters deserved to have their political will respected and the Trial Court having declared the 1st Respondent the rightful winner of the Member of County Assembly (MCA), Nyatieko Ward they were prejudiced by the pendency of this Appeal.
61. On his part, the Appellant pointed out that he served the Respondents with his Record of Appeal on 4th January 2023 as stipulated in Rule 35(5) of the Elections (Parliamentary and County Election Petition) Rules.
62. Rule 34(5) of the Elections (Parliamentary and County Election Petition) Rules provides that:-
- “The appellant shall, within seven days of filing of the memorandum of appeal in accordance with sub-rule (3), serve the memorandum of appeal on all parties directly affected by the appeal.
63. As has been seen hereinabove, the court can invoke the provisions of Article 159(2)(d) of *the Constitution* of Kenya that mandate courts to administer justice without undue regard to procedural technicalities to remedy a failure to comply with any act so as to do substantive justice pursuant to the provisions of Rule 5 (1) of the Elections (Parliamentary and County Elections Petition) Rules.
64. In the case of Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission and 6 Others (Supra) while considering the issue of procedural technicalities the court had this to state:
- “The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....”
65. In view of the fact that the Memorandum of Appeal was filed on the 4th January 2023, the same ought to have been served upon the Respondents herein on 11th January 2023. A perusal of the Affidavit of Service of David Nyangáu that was sworn on 27th January 2023 and filed on 30th January 2023 showed that contrary to his assertions, the Appellant served his Record of Appeal upon the Respondents on 24th January 2023. This was nine (9) days outside the time prescribed in the law.
66. Having said so, while this court was not excusing the failure by the Appellant to serve his Record of Appeal on time, it took judicial notice that most law firms were closed during this time slowly down court processes. Even so, even if law firms were opened during that time, a delay of nine (9) days outside the stipulated time could not be said to have been inordinate more so because the Appeal had already been filed on time.
67. It was therefore this court’s considered view that the failure to serve the Record of Appeal was a technicality that did not go into the root of the Appeal herein and should be overlooked by the court to ensure that substantive justice was served by having the Appeal heard and determined on merit.

Disposition

68. For the forgoing reasons, the upshot of this court’s decision was that the 2nd and 3rd Respondents’ Preliminary Objection dated 1st March 2023 and filed on 2nd March 2023 was not merited and the same be and is hereby dismissed. The effect of this is that the Appellant’s Notice of Motion application dated 17th February 2023 and filed on 21st February 2023 was merited and the same be and is hereby allowed in the following terms:-
1. The Appellant be and is hereby granted leave to file and serve a Supplementary Record of Appeal to complete the record in accordance with Rule 34 of the Elections (Parliamentary and



County Elections Petition) Rules within the seven (7) days from the date of this Ruling, being 2nd May 2023.

2. The Appellant be and is hereby direct to file and serve its Written Submissions by 2nd May 2023.
 3. The Respondents be and are hereby directed to filed and serve their respective Written Submissions by 9th May 2023.
 4. Matter will be mentioned on 12th June 2023 to confirm compliance and to give a Judgment date. For the avoidance of doubt, in view of the strict time lines for hearing and determining election petitions, in the event the said Written Submissions will not be filed within the prescribed periods hereinabove, the court will proceed to give a judgment date based on the documentation that will be on the court file by those specific dates. Parties are therefore urged to pay particular attention to these directions.
 5. Cost of the present application will be in the cause.
69. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED and DELIVERED at KISUMU this 24th day of April 2023

M.S. SHARIF

JUDGE

