



REPUBLIC OF KENYA



KENYA LAW
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Murage v Independent Electoral & Boundaries Commission & 3 others (Election Petition Appeal E001 of 2023) [2023] KEHC 21396 (KLR) (Civ) (31 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

ELECTION PETITION APPEAL E001 OF 2023

AA VISRAM, J

JULY 31, 2023

BETWEEN

GRACE WAKUTHII MURAGE APPELLANT

AND

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

THE JUBILEE PARTY 2ND RESPONDENT

BABU JULIANA MUGURE 3RD RESPONDENT

NYANDARUA COUNTY ASSEMBLY 4TH RESPONDENT

(Being an appeal from the Judgment of H.O. Barasa SPM delivered on 23rd January, 2023 in Engineer Election Petition No. E002 of 2022)

JUDGMENT

1. The appeal herein challenges the decision of the lower court upholding the declaration of the 3rd Respondent as the nominated member of Nyandarua County Assembly vide the judgment of H.O. Barasa SPM delivered on 23rd January, 2023 in Engineer Election Petition No. E002 of 2022.
2. The Appellant filed its Memorandum of Appeal dated 31st January, 2023 and lodged the same in court on 15th February, 2023, seeking to set aside the lower court's judgment on various grounds, including:- that the 3rd Respondent was not qualified to be a member of the County Assembly; that her name had not appeared on the publication made by the 1st Respondent on 27th July 2022; and that the Appellant had been discriminated against. The grounds are set out in the Appellant's Memorandum of Appeal and the same form part of the record.



3. In opposition to the appeal, the 3rd and 4th Respondents filed a Notice of Motion Application dated 26th April, 2023 (“the Application”) seeking to strike out the Record of Appeal dated 16th March, 2023 and filed in court on 24th March, 2023 on various grounds set out below.
4. On 27th March, 2023 during the course of pre-trial directions, in order to ensure that the hearing of the Application would not prejudice the limited time available to determine the appeal (6 months from form the date of filing), this court directed that the Application would form part of the opposition to the substantive appeal.
5. The parties filed their respective written submissions in relation to the Application and the main appeal. The Appellants’ submissions are dated 2nd May, 2023; the 3rd and 4th Respondents’ submissions are dated 2nd June, 2023; the 1st Respondent’s submissions are dated 4th May, 2023.
6. As per my directions issued on 27th March, 2023, and for good order, I will first consider the interlocutory Application which raises a jurisdictional question based on whether or not the Appellant has complied with the applicable timelines, and various rules. Moreover, jurisdiction is everything; without jurisdiction, the court has no power to make any further step and must down its tools. See *The Owners of the Motor Vessel Lilian ‘S’ vs Caltex Kenya Ltd* [1989] KLR 1.
7. The Application sought the following orders: -
 - i. That this Honourable Court be pleased to strike out the Record of Appeal dated 16th March, 2023 and filed in court on the 24th of March, 2023.
 - ii. That the costs of this application and incidentals therefrom be awarded to the Applicants.
8. The Application is premised on the grounds on the face of the Application and the further grounds set out in the supporting affidavit of Mr. Lawrence Macharia Karanja, sworn on 26th April, 2023.
9. Mr. Karanja deposed that the judgment of the lower court was delivered on 23rd January, 2023, in Election Petition No. E002 of 2023. The decree was subsequently issued on 21st March, 2023, and the Appellant filed her Memorandum of Appeal dated 31st January, 2023, on February 15th, 2023.
10. He deposed that the Appellant failed to serve the 3rd and 4th Respondents within 7 days as was required by law, following the filing of the Memorandum of Appeal. He averred that he learned of the appeal for the first time when the Respondents were served with the Record of Appeal on 18th April, 2023.
11. He deposed that the Appellant had gone into slumber and filed her Record of Appeal on 24th March, 2023, which was thirty-seven (37) days after the filing of the Memorandum of Appeal, which was beyond the 21 day limit provided for by the law.
12. He deposed that further to the delay, the Appellant had not attached a signed and certified copy of the judgment and decree to the Record of Appeal which is a mandatory requirement.
13. In opposition to the Application, the Appellant filed a replying affidavit sworn by Ms. Grace Wakuthi Murage on 2nd May, 2023.
14. She deposed that the Applicants’ application was fatally defective on the basis that it had been moved under the wrong provisions of the law. Further, that the Elections Petitions Rules 2017, grant this court unfettered discretion in matters pertaining to election petition compliance, and any failure to comply with the said Rules are a matter for the court’s determination, subject to the provisions of Article 159 (2) (d) of *the Constitution*.



15. She deposed that her advocates had requested typed and certified copies of the proceedings and the judgment from the Deputy Registrar, Engineer Law Courts, but the same were not availed until 22nd March, 2023.
16. In support of the Application, the 1st Respondent filed a replying affidavit sworn by Mr. Chrispine Owiye on 4th May, 2023.
17. He deposed that the 1st Respondent had never been served with the Memorandum of Appeal at any time. It received a complete record via e-mail on 19th April, 2023, for the first time, 64 days after the trial court's delivery of the judgment.
18. The Applicants (3rd and 4th Respondents) thereafter sought leave of the court, which was duly granted to file a supplementary affidavit. The same was sworn by Mr. Karanja on 5th June, 2023.
19. He deposed that after carrying out investigations, he had discovered that the Appellant's Memorandum of Appeal dated 31st January, 2023, and submitted to the court on 15th February, 2023, was a forgery. He stated that the stamp evidencing receipt on the said document purporting to belong to the law firm on record for the 3rd and 4th Respondents was a fake, and did not belong to his law firm.
20. He averred that the Appellant had unlawfully and illegally purported to mislead the court in relation to service of the Memorandum of Appeal and its receipt thereof, by the 3rd and 4th Respondent. He contended that no service had ever been effected and this court ought to strike out the Memorandum of Appeal.

The Applicants' submissions

21. The Applicants submitted that the Appellant failed to file the Record of Appeal within 21 days (from the date of filing the Memorandum of Appeal) as is required by Rule 34 sub-rule 6 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 ("the Rules"). The Appellant filed its Memorandum of Appeal on 15th February, 2023 and thereafter filed its record on 24th March, 2023, which was beyond the 21 days.
22. Further, that Rule 34 sub-rule 6(e) of the Rules provides that the Record of Appeal must contain a signed and certified copy of the judgment appealed from and a certified copy of the decree. The Appellant had failed to comply with the above rule. Accordingly, the same ought to be struck out. They relied on the decisions of the High Court in Paul Kurenyi Leshuel v Ephantus Kariithi Mwangi & another [2015] eKLR and Cosmos Limited & another v Kenya Revenue Authority [2019] eKLR.
23. The Applicants contended that the above rules relating to timelines are not mere technicalities capable of being cured under Article 159 of *the Constitution*. In support of the above argument, they relied on the decisions of the Court of Appeal in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR and Lemanken Aramat v Harun Meitamei Lempanka & 2 others [2014] eKLR.

1st Respondent's submissions

24. The 1st Respondent's submissions were similar to those of the 3rd and 4th Respondents and need not be replicated in full. In short, it contended that the Appellant had failed to comply with the Rules stated above and accordingly, the appeal ought to be struck out. It relied on the decision of the Supreme Court in Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others, Supreme Court Petition No. 18 of 2014.



The Appellant's submissions

25. The Appellant relied on Article 159(2) (d) of *the Constitution* as read together with Rule 5 of the Rules for the proposition that this court has unfettered discretion in matters pertaining to compliance with timelines in election petitions Rule 5 of the Rules reads as follows:-

“the effect of any failure to comply with these Rules shall be a matter for determination at the Court’s discretion subject to the provisions of Article 159 (2) (d) of *the Constitution*.”

26. The Appellant relied solely on the above Rule in support of its argument that failure to comply with any of the rules was not fatal to the Appellant’s appeal.

Analysis and Determination

27. I have considered the rival submissions of the parties, the facts, and the applicable law. The issues for determination are as follows:-

- a. Whether the Record of Appeal was filed within the required timeframe?
- b. Whether the failure to include a Certified Copy of the Decree and Judgment renders the Petition Incompetent?

28. It is not disputed that the Memorandum of Appeal was filed on the 15th of February, 2023 and the Record of Appeal was filed on 24th of March 2023, which is 38 days later. Based on the Rule 34 sub-rule 6 of the Rules, the Appellant ought to have filed her Record of Appeal within 21 days of filing the Memorandum of Appeal. The last day she could have filed was on 8th March, 2023. This was not done.

29. The next question is whether or not this court has the power to extend timelines prescribed under *the Constitution* and the *Elections Act*, 2011? The simple answer to that question, is a resounding no. It is settled law that timelines relating to filing and service of election petitions and appeals from decisions of election courts are inflexible and inextensible. See generally: Lemanken Aramat v Harun Meitamei Lempaka & 2 Others, Supreme Court Petition No. 5 of 2014; Mary Wambui Munene v Peter Gichuki King’ara & 2 Others, Supreme Court Petition No. 7 of 2014; Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung’u Waititu & 4 Others, Supreme Court Petition No. 18 of 2014; and Martha Wangari Karua v IEBC & 3 Others, Supreme Court Petition No. 3 of 2019.

30. The above point has been made over and over again, and is based on the rationale that timelines in electoral disputes underpin the ability of the people to exercise their sovereign rights under Article 1 of *the Constitution*. Moreover, the constitutional requirement for timely resolution of electoral disputes is enshrined in Article 87(1) of *the Constitution*. Finally, in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*, Supreme Court Petition No. 2B of 2014, the Supreme Court explained the historical context and rationale for the strict enforcement of electoral dispute resolution timelines in the following terms:-

This provision [i.e., Article 87(1) of *the Constitution*] must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment...It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in [the] name of which elections are decreed and conducted, should not be held captive to endless litigation.



31. Based on the various authorities as cited above, to my mind, timelines set out in the Rules and Act do not fall under the category of mere procedural technicalities ordinarily subject to Article 159(2) (d) of *the Constitution*. The said timelines are substantive provisions that go to the heart of the court's jurisdiction to entertain the matter, and must, of necessity, be complied with.

32. Further to the above, and closely related to the question of whether the Appellant's failure to attach a signed and certified copy of the judgment and the decree pursuant to Rule 34 (6) of the Rules is fatal, I am guided by the decision of the Supreme Court in Zachariah Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR where the court stated as follows:-

“We have discussed the application of Article 159 already (See the Law Society case above). In Raila Odinga v. I.E.B.C & others (2013) eKLR, this Court observed further: “Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

33. I am further guided by the decision of the Court of Appeal relating to the applicability of Article 159 of *the Constitution* to rules of procedure as enunciated in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR in the following terms:-

“... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines...”

34. Based on the law as set out above, I do not think that Article 159 was intended to apply to circumstances such as the present one. I am therefore of the view that the Appellant ought to have complied with Section 75(4) of the Act and Rule 34 (6) of Rules. Her failure to do so is incurable.

35. Based on the reasons as set out above, I am satisfied that this court not only lacks jurisdiction to extend the timelines set out in the Act and the Rules, but also lacks jurisdiction to hear and determine the present appeal for the reasons stated above. Having found the above, it would not be appropriate for this court to address the various grounds set out in the main appeal. Accordingly, I find that that appeal is incompetently before this court and the same is hereby struck out with costs to the Respondents.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 31ST DAY OF JULY 2023

ALEEM VISRAM

JUDGE

In the presence of;

.....for the Appellant

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd Respondent



.....for the 4th Respondent

