



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT GARSEN**

**ELECTION PETITION APPEAL NO 1 OF 2018**

**ANTHONY NJOMO MAINA..... APPELLANT /APPLICANT**

**-VERSUS-**

**JANE NJERI KAMANDE..... 1<sup>ST</sup> RESPONDENT**

**PARTY OF DEMOCRATIC UNITY..... 2<sup>ND</sup> RESPONDENT**

**ABDALLA MWAURA CHIKOPHE..... 3<sup>RD</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. This is the petitioner/Applicant's application dated 15/1/2018 seeking the following orders:

- i. THAT** this matter be certified urgent and service thereof be dispensed with in the first instance.
- ii. THAT** leave be granted to **M/s WETABA WERE & ASSOCIATE ADVOCATES** be allowed to come on record in the place of **M/s ABDUL AGONGA & ASSOCIATES** in the representation of **ANTHONY NJOMO MAINA**
- iii. THAT** the Memorandum of Appeal attached herein be deemed as duly filled and served.
- iv. THAT** the court may grant any other orders that it deems fit.
- v. THAT** costs for this application be provided for.

WHICH APPLICATION is based on the following grounds

- i. THAT** the appellant herein wishes to appeal from the decision of the learned Magistrate Njeri Thuku in Lamu Election Petition No. 1 of 2017 Jane Njeri Kamande -versus- Anthony Njomo and 3 others.
- ii. THAT** we have just been instructed to take over the matter since the appeal is yet to be filed by his advocate.

**iii. THAT** we are conscious of the time frame that has been stipulated by the Elections Act on the filling of an appeal and the applicant wishes not to be prejudiced.

**iv. THAT** appellant's appeal stands a good chance of succeeding.

**v. THAT** the respondents herein will not suffer any prejudice if this application is allowed.

**vi. THAT** the advocates on record will also not be prejudiced if representation is changed since they have a clear avenue in the event there are any un cleared issues.

**vii. THAT** this application has been filed in good time.

2. The 1<sup>st</sup> Respondent opposed the application and submitted as follows:

i. The 1<sup>st</sup> Respondent opposes the Application dated 15<sup>th</sup> January, 2018 and seeks the same to be dismissed with costs.

ii. The Constitution of Kenya, Election Act and regulations thereunder have laid down strict timelines to be adhered to in electoral disputes.

iii. The Elections (Parliamentary and County Elections) Petition Rules, 2017 specifically provides the manner of filing, contents and form of a petition. Rule 8 (4) (a) provides that a petition shall be signed by the petitioner or by a person authorised by the petitioner.

iv. It is indisputable that before the election court in EP No. 1 of 2017 LAMU, the 1<sup>st</sup> Respondent who is the Applicant herein was represented by the firm of Abdul Agonga & Associates.

v. From the **notice of motion** before the court dated **15<sup>th</sup> January, 2018** whose **ground number 3** it is clear that the firm of WETABA WERE & ASSOCIATES **had just been Instructed** so as to file an appeal on behalf of the applicant who according to **ground number 2** of the application **was desirous of appealing** against the decision of the election court.

vi. It is clear from paragraph 5 of the supporting affidavit of Anthony Njomo Maina sworn on 15<sup>th</sup> January, 2018 in support of the notice of motion application dated 15<sup>th</sup> January, 2018; no appeal had been filed by the said applicant and that he was seeking for permission to change advocates.

vii. The **Elections (Parliamentary and County Elections) Petition Rules, 2017** provides in **rule 34 (1)** that an appeal from the Resident Magistrate Court under **section 75 (1 A)** shall be in the form of a memorandum appeal and shall be signed in the same manner as a petition. The signing of the petition is provided for under **rule 8 (4) (a)** that a petition shall be signed by the petitioner or by a person authorized by the petitioner.

viii. Consequently in present matter, the counsel who filed the petition for Anthony Njomo Maina had no authority and as the intended appellant did not sign then; the same is incompetent and a nullity.

ix. It is clear from the record that on 23<sup>rd</sup> of January, 2018 an amended memorandum of appeal was lodged which was outside the time stipulated by law and to which no leave was sought and to which there is no jurisdiction to extend time as an appeal under **section 75 (1A)** ought to have been lodged and relevant fees thereto paid within 30 days from the date of the judgment of the election court. There is need for the honourable court to scrutinise the court file so as to establish whether there is payment for two (2) memorandums of appeal on 16<sup>th</sup> January, 2018 by or on behalf of two (2) appellants i.e. **ANTHONY NJOMO MAINA** and **PARTY OF DEMOCRATIC UNITY [PDU]**.

I have carefully considered the submissions by the parties in the Application dated 15/1/2018.

My findings are as follows;

1. In my opinion, order 9 rule 9 of the Civil Procedure Rules does not apply as the same has not been mentioned in the EDR Rules. Each matter is accordingly considered a fresh hearing.
2. I therefore find that it was not necessary for the Applicant to seek leave to come on record. I find that the memorandum of appeal was properly filed and served and I order that the appeal proceeds to hearing on its merits.
3. I also find that Order 50 Rule 4 of the Civil Procedure rules provides that the period between 21<sup>st</sup> of December and 13<sup>th</sup> January the following year (both days included) shall be omitted from any computation of time whether under this rule or any order of the court.
4. I therefore find that the appeal was filed timeously and I accordingly allow the application dated 15<sup>th</sup> January 2018.

The costs to abide the cause.

**Dated, Delivered and Signed Malindi this 23<sup>rd</sup> February, 2018 in the presence of the parties.**

**ASENATH ONGERI**

**JUDGE.**