



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITUI
ELECTION PETITION APPEAL NO. 3 OF 2017
THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITIONS RULES, 2017

AND

IN THE MATTER OF ELECTION FOR THE MEMBER OF COUNTY ASSEMBLY OF
KYANGWITHYA WEST WARD, KITUI CENTRAL CONSTITUENCY, KITUI COUNTY

ELECTION PETITION NO. 2 OF 2017

BETWEEN

KITAVI SAMMY.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

THE RETURNING OFFICER

MWINGI NORTH CONSTITUENCY.....2ND RESPONDENT

KATUMO BONIFACE KILUNGYA.....3RD RESPONDENT

RULING

1. On the 24th day of **November, 2017** **Kitavi Sammy** appealed against the decision of **Hon. M. Murage Chief Magistrate** who struck out the Election Petition he filed challenging the election results and subsequent declaration of **Katumo Boniface Kilungya** as the Member of the County Assembly, **Kyangwithya West Ward**.

2. On the 5th day of **February, 2018** the 1st and 2nd Respondents approached this Court by way of Notice of Motion seeking orders to strike out the Memorandum of Appeal.

3. The application is premised on grounds that the Appeal was not served upon the 1st and 2nd Respondents in accordance with **Rule 34(5)** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017, (Rules)** having been served on the 13th day of **December, 2017**; the service was done outside the 7 days period mandatorily stipulated by the Rules; the Appeal faults the decision of the Subordinate Court on errors of fact contrary to **Section 75(4)** of the **Elections Act, 2011** and that in the circumstances the Court lacks jurisdiction to entertain the Appeal, therefore it is in the interest of justice that it be struck out.
4. The application is supported by an affidavit sworn by **Phillip Malanga**, an Advocate seized of the matter who deposes *inter alia* that the 1st and 2nd Respondents are parties directly affected by the Appeal but were served on the 20th day after the Appeal was filed.
5. That the grounds of Appeal set out in the Memorandum of Appeal seek to challenge the decision of the Lower Court on the basis of errors of both law and fact which is unethical to the mandatory provisions of **Section 75(4)** of the **Elections Act, 2011** which ousts the jurisdiction of the Court to hear the Appeal.
6. In supporting the application, the 3rd Respondent stated that the Appellant failed to observe the provisions of **Rule 34(5)** of the **Rules, Section 75(4)** of the **Elections Act** and **Rule 34(6)(c)** of the **Rules**.
7. **Cecil Miller Awach**, Learned Counsel for the Appellant filed a Replying Affidavit in response, where he deponed that it is a requirement that parties affected by the Appeal be served within 7 days of filing a Memorandum of Appeal. That failure to serve the 1st and 2nd Respondent was occasioned by his busy schedule in handling a number of Election Petitions upcountry and once he touched base in Nairobi he served the Applicant. That the grounds provided by the 1st and 2nd Respondents do not suffice for the grant of the orders sought and that the delay is excusable as it does not prejudice the Applicant in any way and was served before the Court was gazetted to hear the Appeal, at least 40 days before the matter was listed for directions.
8. Further, that with the enactment of **Article 159** of the **Constitution** Courts strive to sustain rather than strike out pleadings on purely technical grounds.
9. The application was canvassed by way of written submissions. That I have taken into consideration alongside authorities filed and cited.
10. It was the submission of learned Counsel for the Applicant, **Mr. Malanga** that the Memorandum of Appeal was served 20 days after filing instead of the required 7 days. That the Court should interpret Election Rules strictly and not excuse a litigant who fails to comply. He relied on the case of **Rozaah Akinyi Buyu vs. I.E.B.C. & 2 Others (2014) eKLR** where the Court emphasized that fact.
11. He cited the case of **Mukenya Ndunda vs. Crater Automobiles Nbi LTD Civil Application No. 101 of 2014** where it was stated that Courts can indeed excuse certain defaults but it must be explained satisfactorily. He argued that what was stated in the Replying Affidavit was rude and did not amount to an explanation. That the Appeal purports to challenge the Lower Courts errors of fact but not errors of law.
12. **Mr. Mwalimu**, learned Counsel for the 3rd Respondent argued that the Appellant contravened **Rule 34(6)(c)** of the **Rules** and **Section 75(4)** of the **Elections Act**. Therefore there is no competent Appeal. That the Court has not been moved to extend time therefore no satisfactory reason has been given as to why the Appellant was unable to serve the Memorandum of Appeal on time.
13. In response, learned Counsel for the Appellant, **Mr. Cecil Miller Awach** submitted that the 3rd Respondent filed grounds of affirmation which was irregular. That the non compliance with Rules regarding service was in respect of the 1st and 2nd Respondent while the 3rd Respondent was served in time. That justice cannot be served by striking out the Appeal on technicalities. That no prejudice will be

occasioned following the late service as the Respondents were served before the Court was gazetted to hear the Appeal. He cited the case of **Nicholas Kiptoo Arap Korir Salat vs. I.E.B.C. (2013) eKLR** where **Ouko JA in the majority** dismissed a similar application before them. He argued that **Article 159(2)(d)** of the **Constitution** makes it clear that the Courts have to do justice without technicalities. And justice can only be done by having the Appeal heard on merit.

14. In reply, **Mr. Malanga** argued that failure to serve the 1st and 2nd Respondents is fatal to the case.

15. Two substantive issues are in contention herein:

(i) Consequences of non compliance with **Rule 34(5)** of the **Rules**.

(ii) Whether the Appeal filed complies with **Section 75(4)** of the **Elections Act, 2011**.

16. Regarding the first issue, it is indeed admitted that the Rule was flouted by the Appellant. In his submission learned Counsel for the Appellant argues that the 3rd Respondent was served in time but the 1st and 2nd Respondents were not. However, he opined that it was substantial service. That the omission was a technicality that should be overlooked by the Court so as to ensure that justice is served. And this would be done if the Appeal is sustained.

17. **Rule 34(5)** of the **Rules** provides thus:

“(5) 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.”

18. The Memorandum of Appeal was filed on the 24th day of **November, 2017** and served upon the 1st and 2nd Respondents being parties affected by the Appeal on the 13th day of **December, 2017**, these were 20 days after the stipulated time.

19. In the case of **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission and 6 Others (2013) eKLR Ouko JA** while considering the issue of procedural technicalities cited the case of **Abdirahman Abdi** also known as **Abdirahman Muhamed Abdi vs. Safi Petroleum Products LTD and 6 Others Civil Application No. 173 of 2010** where **Omolo, Bosire and Nyamu JJA** 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.....”

20. In considering whether the Appeal should be struck out due to non compliance with Rules of procedure the Court must consider the explanation given and whether it is just to do so. **Rule 5 (1)** of the **Rules** provide thus:

“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”

To exercise the discretion bestowed upon it, the Court must look at the overriding principles stipulated in the Rules. The objective of the Rules is to facilitate a just resolution of the Election Petition (**See Rule 4 of the Rules**). **Election Rules** are however given strict interpretation. In the case of **Tyota Basu & Others vs. Debi Ghosal & Others**, a case of 1982 quoted in the case of **Rozaah Akinyi Buyu vs. Independent Electoral and Boundaries Commission & 2 Others (2014) eKLR**, the Supreme Court of India stated that:

“...An Election petition is not an action at Common Law, nor, in equity. It is a statutory proceedings to which neither the Common Law nor the principles of Equity apply but only those

rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statutory (sic) creating it. Concepts familiar to Common Law and Equity must remain strangers to lection Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matter as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act. There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So the Representation of the People Act has been held to be a complete and self contained code within which must be found any rights claimed in relation to an election or an election dispute.”

Facilitating a just resolution of an Election Petition would call for the Court to ensure justice is done even if technicalities are disregarded. This would mean that the intent and purpose of the substantive law is upheld.

21. In the case of **Raila Odinga & 5 Others vs. I.E.B.C. & Others, SC Petition No. 3 of 2013** the Supreme Court had this to state regarding **Article 159** of the **Constitution**:

“... Our attention has repeatedly been drawn to the provisions of Article 159(2)(d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities. The operative words are the ones we have rendered in bold. The Articles 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 courts of law....”

22. In the Case of **Rozaah Akinyi Buyu (Supra)** where the learned Judge had found that even though service was bad it could be waived as an irregularity, the Court of Appeal Judges stated thus;

“As we have shown, service of the Petition upon the respondents was a fundamental step in electoral process and resolution of disputes arising therefrom. Failure to serve the respondents went to the root of the petition and the Petition could not stand where there was failure to serve the same. The learned Judge was clearly wrong in his holding as he misdirected himself on the law applicable where he found as a fact that the 2nd and 3rd Respondents were not served. That in our view, would dispose of the appeal....”

23. In the circumstances, the Court must interpret the law strictly. In doing so I find that failure to serve the appeal within time was detrimental to the Appellant.

24. The Appellant in seeking what he referred to as a discretionary order explained that the late service was not deliberate as Counsel for the Appellant was handling a number of Election Petitions upcountry and the same was explained to Counsel for the 1st and 2nd Respondents. And that he exercised due diligence and served the Applicant once he touched base in Nairobi.

25. In the case of **Mukenya Ndunda vs. Crater Automobile LTD Civil Appeal No. 101 of 2014** the Court of Appeal stated thus:

“... The power to strike out an appeal or notice of appeal on account of failure by an appellant to follow the rules of procedure requires to be exercised carefully and only in cases where it is shown that a party at fault flagrantly or deliberately or flippantly or recklessly failed to follow the rules.”

26. The Appellant's Counsel failed to establish the allegation that he had other cases in other Courts. Nothing would have been easier than attaching causelists and any other evidence to suggest that indeed he was representing other parties before other Courts.

27. This was a question of service of an Appeal that had been lodged. The principle duty of a Process Server is to serve legal documents on a party to a case. Nothing has been stated to suggest why a Process Server was not retained by the Appellant to discharge the responsibility bestowed upon him of serving the document in issue upon the 1st and 2nd Respondents.

28. The explanation given by the Appellant's Counsel does not fall within the plausibility criterion that would be acceptable to this Court and is therefore dismissed.

29. In the case of **Ayub J. Mwakasi vs. Mwakwere Chirau Ali & 2 Others (2008) eKLR** a persuasive decision, the Court stated that:

"..... If the petition is not properly served upon all the respondents named, then the entire petition will be rendered incompetent."

30. The 3rd Respondent was served within the specified time limit but the 1st and 2nd Respondents were not served within the stipulated timeline. Consequently the Memorandum of appeal was not properly served therefore it was rendered incompetent.

31. The Appellant has been faulted for flouting **Section 75(4)** of the **Elections Act** that 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."

32. It is argued that grounds of appeal set out in the memorandum of appeal seek to challenge the decision of the lower court on the basis of both law and facts contrary to the mandatory provisions of **Section 75 (4) of the Elections Act**. The grounds upon which the Appellant appealed are stated thus:

"1. That the Learned Trial Magistrate erred in law and in fact by making an order that the Appellants Petition be struck out for failing to comply with the Provisions of Rule 8 (1) (c) and 12 1 (c) of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

2. That the learned trial Magistrate erred in law and in fact by imposing on the Appellant punitive and adverse orders without minding to afford the Appellant an opportunity of being heard before arriving at the said orders.

3. That the learned trial magistrate misdirected herself and erred in law and in fact by not appreciating sufficiently or at all the issues at hand, and the point of law raised by the Appellant.

4. The Honourable court failed to consider and ignored the Appellant's pleadings, submissions and authorities filed in the court.

5. That failure by the Honourable Magistrate to observe all the foregoing reasons resulted to injustice".

33. In his submissions, Counsel for the Appellant/Respondent, Mr. Miller was silent on this particular issue.

34. No doubt the appeal challenges the decision of the subordinate court on factoral issues/circumstances.

There is however a ground that refers to actual rules that would be considered to determine how the facts were considered by the court which is a point of law. This particular ground would have been salvaged by ***Rule 5 (1) of the Rules: (Supra)***

35. However, considering the fact that the circumstances that prevailed rendered the appeal incompetent, it must fail. Therefore, the appeal herein is struck out with costs to the Respondents.

36. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of March, 2018.

L. N. MUTENDE

JUDGE