REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

ELECTION PETITION APPEAL NO. 2 OF 2018

MARGRARET NYATHOGORA.....1ST APPELLANT

LUCY MUGURE WANYITU.....2ND APPELLANT

ELIZABETH NYAGUTHI MWANGI.....3RD APPELLANT

SALOME WAIRIMU KAGO.....4TH APPELLANT

IMMACULATE WAMBUI KABUTHA.....5TH APPELLANT

ALICE MIRIGO MUCHIRI.....6TH APPELLANT

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....1ST RESPONDENT

JUBILLEE PARTY.....2ND RESPONDENT

BETH NYAWIRA KIMAILI.....3RD RESPONDENT

MUTHONI PATRICK MUTAHI.....4TH RESPONDENT

MILICENT CHEROTICH.....5TH RESPONDENT

WAMBUGU THIONGO WILLIAM.....6TH RESPONDENT

MUTHONI ANNE CAROLINE.....7TH RESPONDENT

MARY NDIRITU NYAMBURA.....8TH RESPONDENT

LUCY WAMBUI KARIUKI.....9TH RESPONDENT

GATHUA WANJIKU LILIAN.....10TH RESPONDENT

ELIZABETH WANJIKU MUGO.....11TH RESPONDENT

WANJIKU JULIAH MUKAMI.....12TH RESPONDENT

THUMBI WAIHUNI BEATRICE.....13TH RESPONDENT

KAMAU WAIRIMU ROSE.....14TH RESPONDENT

NDIRITU NDOMO MARY.....15TH RESPONDENT

RULING

On the 3rd April, 2018, the 3rd, 4th, 6th to 15th respondents moved this honourable Court to strike out the appellants' memorandum of appeal dated 14th February, 2018 and filed in court on the same date. The main ground upon which the motion is based is that the appellants are alleged not to have complied with the mandatory requirements of filing the record of appeal within the limitation period. In particular, it is alleged that following Rule 34 (6) of the Elections (Parliamentary & County Elections) Petitions Rules, 2017, the record of appeal ought to have been filed within 21 days of the filing of memorandum of appeal.

The delay in filing the record, so it is been stated, shows that the appellants are not keen on filing and prosecution of the appeal. The delay, in any event, is inexcusable.

The other ground apparent on the face of the motion is that the appellants are out to frustrate the respondents from enjoying the fruits of their judgment and, that the existence of the appeal is prejudicial to their interests. Accordingly, so it has been stated, it is in the interests of justice that the appeal be struck out.

The motion is supported by the respondents' affidavit sworn by the 7th respondent on her own behalf and on behalf of the rest of the applicants mentioned in the application as having filed the motion. The facts are, to a great extent, obvious and undisputed. The appellants filed an appeal against the learned magistrate's judgment in Election Petition No. 2 of 2017; that judgment was delivered on 31st January, 2018.

The appellants were dissatisfied with the learned magistrates' decision and therefore they lodged in this Court a memorandum of appeal on 14th February, 2018. But that is all they did; they never took any other or further step to have the appeal disposed of as required by the Elections (Parliamentary and County Rules Elections) Petitions Rules, Rules 2017. In particular, they did not file the record of appeal within 21 days or at all.

The deponent has also deposed that failure to lodge the record of appeal within time or at all is inexcusable because both the typed and certified copies of the proceedings and the judgment were ready for collection as soon as the judgment was delivered on 31st January, 2018.

Going by their conduct, so the respondents have deposed, the appellants are not keen to prosecute their appeal and is thus in the interests of justice that the appeal be struck out.

In response to the motion the appellants filed a replying affidavit in which they admitted that indeed they have delayed in filing the record of appeal and thus breached the relevant rules; the reason for the delay, so they have sworn, is that they have been unable to put together the documents that would constitute the record of appeal in good time and further, they have been financially constrained. It is their deposition therefore that the delay is not deliberate.

The appellants have further deposed that since this court has the discretion to extend time within which

the record should be filed, they have instructed their counsel to file the necessary application for extension of time. In any event, so they have deposed, the appeal has been admitted for hearing and cannot therefore be rejected summarily.

Having considered the motion, the response thereto and both counsel's submissions, I must start by saying that the determination of Elections Petitions or any appeals arising from the election court is time bound; I reckon it is for this reason that Article 87(1) of the Constitution gives parliament the mandate to enact legislation to establish mechanisms for *timely* settling of election disputes. One such legislation that parliament has come up with is the Elections Act, 2011 which, among other things, specifies that a question as to the validity of the election of a member of a county assembly shall be heard and determined within six months of the date of lodging the petition. (See section 75.1A and (2)). Section 75(4) goes further to state that an appeal against a determination of the magistrates' court in an election petition lies in this Court and must be filed within 30days of the date of the decision appealed from; once so filed, the appeal must be concluded within six months from the date of filing the appeal.

The set timelines are mandatory and the election court has no discretion to extend time within which the petition should be determined; neither does an appellate court have any discretion to extend time within an appeal arising out of such petition can be determined.

It is against this background that the Elections (Parliamentary and County Elections) Petitions Rules, 2017 more or less dictate the conduct of the parties and guide the courts in the processing and management of the election petitions or the appeals that occasionally ensue from the time they are initiated to such time that they are concluded. The time factor is one aspect of this management; it is not in doubt that one of the principle reasons behind the rules is to ensure that the both the petitions and the appeals are managed in such a way that they are determined timeously as envisaged in the letter and the spirit of the Constitution and the Elections Act.

Rule 34 of the rules must be understood in this light; it is elaborate on what an appeal from the magistrates' court to the High Court entails and defines the roles the respective parties should play within a specified time whenever the appeal has been filed. Equally important are the prescribed tasks imposed upon the court from which an appeal is preferred as well as the court to which that appeal is preferred. For better understanding, it is necessary to reproduce the rule in its entirety. It states as follows:

The rule that has been flouted is 34(6). It required of the appellants to file the record of appeal within twenty days of the date of filing the memorandum of appeal. The appellants did not file the record within the stipulated time or at all. The contents of what would have been the appellants' record of appeal are prescribed in Rule 6 (a) to (e) both inclusive; they include, the memorandum of appeal; the pleadings of the petition; typed and certified copies of the proceedings; all the affidavits, evidence and documents entered in evidence before the magistrate; and a signed and certified copy of the judgment appealed from and a certified copy of the decree.

Of all these documents, the only one that the appellants filed is the memorandum of appeal. Putting aside the limitation period within which the appellants should have filed the record of appeal, the practical and obvious question that arises is how this Court can hear and determine the appellants' appeal based on the memorandum of appeal alone; it is virtually impossible. I suppose that the rationale behind rule 34(6) is that the appellate court requires a complete record in order to make an informed decision on the appeal; a complete record in this case is a record that has all the primary documents which have been prescribed in that rule. Without the record, I dare say, there is no appeal proper and the memorandum of appeal filed is, in these circumstances, as good as an appellant's mere intention to appeal.

One thing that is clear is that all the primary documents were always available and accessible to the appellants; as a matter of fact, they were available and accessible to them as soon as the judgment was delivered and the trial court was anxious to make it known to the parties that they could obtain them at the earliest opportunity possible. This being the case, the appellant's explanation that they had difficulties in compiling the record does not hold water. I am also not prepared to accept that funding of the appeal should have been an issue because the fee payable upon the filing of the memorandum of appeal is only

Kshs. 15,000/= which, in my humble view, is a modest sum. I am minded that in his submissions, counsel for the appellants urged that the appellants either did not pay him his fees or were unable to raise it and therefore he could not take any further step in processing and prosecuting their appeal.

With due respect to the learned counsel, the moment he accepted the brief to appeal against the trial court's decision and proceeded to lodge the memorandum of appeal in that regard, he was bound to go the full hog and comply with the rules meant to not only set his clients' appeal in motion but also to sustain it. Once the memorandum of appeal was filed, the train left the station, so to speak, and it was not open to counsel to ignore the rules of the journey because of the baggage of disagreements between him and his clients he had carried along. As counsel will soon realise, non-compliance of the rules at this stage, more often than not, leads to disastrous consequences.

Counsel invoked rule 36(b) of the Rules and Article 159 of the Constitution for the proposition that this Court has the discretion to extend time prescribed by the rules for doing any act. By the same token, he urged that Article 159 of the Constitution gives precedence to substance rather than technicalities in administering justice.

As far as Rule 36(b) is concerned, I understand it to refer to an 'election court' which in this case would be the court before which an election petition is filed. This is implied in the definition of 'election court' in Rule 2 as read with the provision relating to the constitution of that court and its specified roles in Rule 6 of the rules. Even then, Rule 36(b) does not go as far as giving the election court the power to extend time which has otherwise been set by the rules for doing any act. That rule states as follows:

> ***36. Despite any provision in these Rules, the election court may, at any time before or during the hearing, issue any orders of an administrative nature, including—***
>
> ***(a) an order to require written submissions; and***
>
> ***(b) an order prescribing the timelines for certain actions***.

In short, rule 36 does not provide a basis for extension of time in an election court let alone the appellate one.

Be that as it may, extension of time for doing any act where the timeline for doing that particular act has been specified in fairly express and unambiguous terms by the rules is certainly not an administrative order; I take it to be a jurisdictional one instead.

Ordinarily, if there is any need to stretch time in an election court, the applicable rule would be rule 19 which states as follows:

> ***19. (1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.***
>
> ***(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.***

Once again, this rule is specific that it is itself an instrument that is available to an election court rather the appellate one. There is no similar rule that applies to the appellate court.

I would opine that, the absence of any specific rule on extension of time for doing any act in the election appellate court means either of the two things: that the set times are rigid and must be complied with to the letter or, that the appellate court can invoke its inherent jurisdiction and extend time only where it would be lawful do so and if it is in the interests of justice that time should be extended. The second

alternative is more appealing to me and in that regard, my only concern at the moment is whether the appellants' is one such a deserving case.

In considering this question, it is not lost to me that the appellants have not moved this Court with an application of any nature to file the record of appeal out of time. They only raised this issue half-heartedly in response to the applicants' motion. What I am saying is that there is no application for extension of time to file the record of appeal for this court to consider. And even if there was such an application, I doubt I would have exercised my discretion in the appellants' favour if the reasons given for the delay in filing the record of appeal are anything to go by.

Turning to Article 159(2) (d) of the Constitution, all I can say is what that provision of the Constitution says; that justice ought to be administered without undue regard to technicalities. I would not consider failure to file an appeal record as a technicality which this honourable Court, in exercise of its appellate jurisdiction, should overlook; I say so for the simple reason that without the record of appeal, there is no appeal for consideration. I am also not convinced that this article is available to a recalcitrant litigant who has deliberately chosen to trample on the rules that are otherwise calculated to ensure timely determination of his grievances, if any, and, in any event, that justice is not delayed. Neither is it available when all the indications are that the litigant who seeks its protection is someone who has fallen into deep slumber at the expense of prosecuting his cause. Again I doubt that this constitutional provision should be invoked to the advantage of one party to prejudice or detriment of an otherwise innocent party; in other words, Article 159(2) (d) should not be abused to tilt the playing field which should otherwise remain level to the advantage a party and as a consequent, to the disadvantage of his adversary.

Of course this article should be invoked in deserving cases and I, for one, have found it useful and applied it whenever justice of the case so demands. But I am reluctant to employ it in such a case as this where the appellants have just not provided the court with the material upon which it can make a determination but they also appear to be on a mission which, for all intents and purposes, is designed to compromise the timelines within which a determination of their own appeal ought to be made. They cannot be allowed to take advantage of Article 159 of the Constitution to hold the applicants and the appellate court at ransom.

For these reasons I am satisfied that the applicant's application is merited and it is hereby allowed with costs. Accordingly, the appellants' appeal is hereby struck out with costs to the 3rd, 4th, 6th to 15th respondents.

Signed, dated and delivered in open court this 25th day of May, 2018

Ngaah Jairus

JUDGE