



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**ELECTION PETITION APPEAL NO. 3 OF 2018**

**BETWEEN**

**ELVIS ANYIMBO SICHENGA.....APPELLANT**

**AND**

**ORANGE DEMOCRATIC MOVEMENT.....1<sup>ST</sup> RESPONDENT**

**MAUREEN ONGACHI AMUNGA.....2<sup>ND</sup> RESPONDENT**

**LUCY KEMUNTO GICHANA.....3<sup>RD</sup> RESPONDENT**

**IEBC.....4<sup>TH</sup> RESPONDENT**

**COUNTY ASSEMBLY OF VIHIGA.....5<sup>TH</sup> RESPONDENT**

**(Being an Appeal from the ruling in Election Petition No. 15 of [2017] at the Chief Magistrate's Court at Kakamega delivered on the 8<sup>th</sup> day of February, 2018.)**

**RULING**

**The Application**

1. The application before me is the Notice of Motion dated 18<sup>th</sup> April, 2018. The application which is brought under the provisions of Article 87(1) of the Constitution, Rule 34(1), 34(5), 34(6)(e) and 8(4)(a) of the Elections (Parliamentary and County Election) Petition Rules 2017 seeks orders for striking out of the appeal together with costs of the application as well as those of the appeal.

2. The grounds in support of the application are as follow:-

*(i) There was no service effected upon the 2<sup>nd</sup> Respondent contrary to Article 87(1) of the Constitution, Rule 34(5) and Rule 10(3) of the Elections (Parliamentary and County Elections) Petition Rules, 2017*

*(ii) The appellant has failed to file a certified copy of the decree appealed from contrary to rule 34(6)(e) of the Elections (Parliamentary and County Elections) Petition Rules, 2017*

*(iii) The Memorandum of Appeal filed is totally defective for want of signature by the appellant or by a person duly authorized by the appellant contrary to Rule 34(1) as read together with Rule 8(4) (a) of the Elections (Parliamentary and County Elections ) Petition Rules 2017.*

*(iv) The Record of Appeal does not reflect a true copy of the record in the subordinate court.*

3. The application is further premised on the supporting affidavit of the applicant herein MAUREEN ONGACHI AMUNGA sworn on 18<sup>th</sup> April, 2018. The content of the supporting affidavit is a replica of the four grounds set out on the face of the application.

**The Response to the application**

4. The Replying Affidavit which is dated 30<sup>th</sup> April, 2018 is sworn by the appellant Elvis Anyimbo Sichenga. The appellant explains in

detail the reasons for non-compliance with some of the provisions of the law and avers that the omissions highlighted by the applicant are mere technicalities which are curable under the provisions of Article 159 of the Constitution, Rule 5 of the Elections (Parliamentary and County Elections) Petition Rules 2017 (hereafter referred to as the Election Petition Rules) as well as Section 80(1) of the Elections Act, 2011. The appellant also contends at paragraph 13 of his replying affidavit that there is no requirement either under rule 34 or Rule 8 of the Petition Rules that he personally signs the Memorandum of Appeal. The appellant urges the court to dismiss the application with costs and allow the appeal to proceed to full hearing on the merits.

**The cited Provisions of the Law**

5. To place this application in context, it is imperative that the relevant provisions of the law relied upon by the applicant be set out verbatim. First is Article 87(1) of the Constitution which states:-

“ 87(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”

Rule 34 of the Election Petition Rules provides as follows:-

**“34 Appeals from Resident Magistrate’s Court**

(1) An Appeal from a Resident Magistrate’s Court under Section 75(1A) of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition.

(2) .....

(3) .....

(4) .....

(5) The appellant shall within seven days of the 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.,

(6) The appellant shall within twenty one days of the filing of the memorandum of appeal in accordance to sub-rule (3) file a record of appeal which shall contain the following documents.

- (a) the memorandum of appeal;
- (b) pleadings of the petition;
- (c) typed and certified copies of proceedings;
- (d) all affidavits, evidence and documents entered in evidence before the magistrate ; and
- (e) a signed and certified copy of the judgment appealed from and a certified copy of the decree.

6. Rule 8 of the Elections Petition Rules, makes provision for contents and form of a petition and Rule8(4)(a) thereof reads:-

“ 8(4) The petition shall-

- (a) be signed by the petitioner or by a person authorized by the petitioner
- (b) .....
- (c) .....

7. It is on the basis of the above provisions of the law that the applicant seeks to have the appeal herein struck out with costs.

**Background**

8. This case arose from the decision of the Orange Democratic Movement (ODM) who is the 1<sup>st</sup> Respondent in this appeal to give the 2<sup>nd</sup> Respondent/Applicant and the 3<sup>rd</sup> Respondent the final Nomination Certificates as Members of the Vihiga County Assembly. Being aggrieved by the said decision the appellant herein instituted election petition No. 15 of 2017 before the Chief Magistrate’s Court at Kakamega seeking orders to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein from assuming office as members of Vihiga County Assembly, and to compel the 1<sup>st</sup> Respondent herein to issue a new list of Nominees to include the appellant herein. The appellant’s argument in the lower court was that he had been denied his rightful final nomination inspite of the fact the he had been gazetted by the Independent Electoral and Boundaries Commission (IEBC), the 4<sup>th</sup> Respondent herein.

9. The appellant then moved the court by way of a Notice of Motion dated 19<sup>th</sup> September, 2017 under Certificate of Urgency which application was supported by the appellant's own affidavit together with annexures attached thereto.

10. There was a series of other applications filed before the trial court, culminating in the 2<sup>nd</sup> Respondent's Notice of Motion dated 14<sup>th</sup> December, 2017. The applicant sought to strike out the petition on grounds that the petition-

*(a) was contrary to the provisions of article 87(3) of the constitution of Kenya, as read with section 77(2) of the elections act 2011 as read with rule 10(1) (a) and (b) of the elections (parliamentary and county elections) petitions (amendment) rules 2017, namely that service was not effected upon the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.*

*(b) offends the mandatory requirements of rule 12 of the election (parliamentary and county elections ) petition (amendment) Rules 2017*

*(c) was an abuse of court process as the witness signatures were falsified.*

11. From the record, Election Petition No. 15 of 2017 was initially filed as a constitutional reference before the High Court in Kisumu before it was transferred to Kakamega for adjudication.

12. In addition to the 2<sup>nd</sup> Respondent's Notice of Motion dated 14<sup>th</sup> December, 2017, the 2<sup>nd</sup> Respondent also filed a preliminary Objection (P.O) of same date on grounds that the trial court had no jurisdiction to hear and determine the petition and on the further ground that the petition contravened Rule 12 of the Elections Petitions Rules 2017 and also on the ground that the petition offended the mandatory provisions of Article 87(3) of the Constitution, Section 77(2) of the Elections Act 2011 and Rule 10(1) (a) and (b) of the Elections Petition Rules 2017 for want of service.

13. The 3<sup>rd</sup> Respondent also filed a P.O. challenging the jurisdiction of the trial court and raised two other grounds:- that the 3<sup>rd</sup> Respondent was not served with the petition within the prescribed period and further that the petition did not comply with the provisions of the Elections Act.

14. The 4<sup>th</sup> Respondent also raised a P.O dated 16<sup>th</sup> December, 2017 challenging the jurisdiction of the trial Court in light of the provisions of Article 88(4)(e) of the Constitution, Sections 74(1), 75(1)(A) of the Elections Act, 2011 as well as Section 39 of the Political Parties Act. The 4<sup>th</sup> respondent also contended in its P.O that the petition was time barred, was incompetent and legally untenable in view of the provisions of Articles 87(2),88(4)( e) Sections 74 and 75 of the Elections Act as well as Regulation 99(2) of the Elections (General) Regulations 2012. The 4<sup>th</sup> Respondent also contended that he petition was incompetent for lack of security.

15. After carefully hearing and analyzing all the submissions on the various P.O's and upon consideration of relevant law and precedent the learned trial court reached the conclusion that the petition had in fact been withdrawn and not transferred to Kakamega as alleged by the appellant. On the issue of jurisdiction, the court found that it had the requisite jurisdiction to hear and determine the matter in hand.

16. The learned trial court also made a finding that the petition before it was not supported by affidavit as required by the mandatory legal provisions under the Elections Act 2011, thereby contravening Rule 12 of the Elections Petition Rules 2017, thus rendering the petition fatally defective. The trial court also found that there had been no proper service of court documents and that this was a violation of Article 87(3) of the Constitution as well as Section 77(2) of the Elections Act, 2011.

17. In effect the trial court upheld all the P.O's and allowed the Notice of Motion dated 14<sup>th</sup> December, 2017 by striking out/dismissing the petition in its entirety with costs to the respondents

### **The Appeal**

18. It is the above ruling that gave rise to the instant appeal. The Memorandum of Appeal dated 8<sup>th</sup> March, 2018 raises 14 grounds. As the court is dealing with preliminary issues at this stage, it is not necessary to set out the 14 grounds in detail.

19. The appellant prays that the appeal be allowed and that the ruling of the Senior Resident Magistrate delivered on 15<sup>th</sup> February, 2018 vide Petition No. 15 of 2017 be vacated and set aside and be substituted with an order allowing the appellant's petition and or the consequential decree be set aside and the petitioner's petition be heard. The appellant also prays for such other orders as this Honourable Court may deem fit to grant as well as costs of the appeal.

### **Submissions, Analysis and Determination**

20. From the earliest indications, the duel in the instant application is between the 2<sup>nd</sup> Respondent/Applicant and the appellant. Submissions were therefore received from the two combatants. The 2<sup>nd</sup> Respondent's submissions were filed on 3<sup>rd</sup> April, 2018 while those of the appellant were filed on 28<sup>th</sup> March, 2018. Counsel for the parties highlighted the submissions during the hearing of the application on 5<sup>th</sup> May, 2018. The highlight of the applicant's submissions is that the applicant was not served with both the Memorandum of Appeal and the Record of Appeal. This allegation was alluded to at paragraphs 2-15 of the applicant's supporting affidavit. The applicant contended that failure to effect service within the stipulated time was contrary to the provisions of rule 34(5) of the Elections Petitions Rules which require that service be effected within seven (7) days.

21. It was also submitted that service effected through the newspaper advertisement on 15<sup>th</sup> March, 2018 was no service at all since the

purported advertisement did not answer to the requirements for service through a newspaper, namely that the required size of 10X10cm was not met. It was also submitted that the font of the purported newspaper advertisement fell far below the set standard under Rule 10(3)(Supra) and that in any event the advertisement was not carried in the Nation Newspaper but in the Standard Newspaper of 14<sup>th</sup> March, 2018. Rule 10(3) of the Elections Petition Rules stipulates that “Where a petition is served in accordance with sub-rule 1(b) and 2(c) the advertisement shall comply with these rules if the advertisement is-

(a) in form 3 set out in the first schedule

(b) of at least font size twelve and

(c) captured in dimensions of not less than ten centimeters by ten centimeters.

22. The applicant therefore submitted that the appellant’s failure to effect service within the stipulated time and in accordance with the rules as regards newspaper advertisement is fatal to the petition which should be struck out as against the applicant.

23. In response, to the issue of service, the appellant submitted that service was effected in accordance with the provisions of the Constitution, the Elections Act and the Elections Petition Rules. The Appellant added that due diligence was exercised by the appellant’s process server in trying to effect service. Regarding service by way of Newspaper advertisement, the appellant submitted that since the Constitution does not specify the font size any font would do and that in this regard, the applicant was properly served through the impugned advertisement which appeared in the standard newspaper of 14<sup>th</sup> March, 2018. It was further submitted that the payment receipt for the advert being annexure EASAAA4 clearly indicated that the size of the advertisement paid for was 10 X 1 which the appellant interpreted to mean 10 X 10 cm though the actual advertisement was 10X6cm. The appellant urged the court not to hold the appellant liable for failure to serve.

24. The issue that arises here is whether there was service upon the applicant as required by the law. In my considered view, there was no service, inspite of the fact that attempts were made to serve the 2<sup>nd</sup> applicant. As regards service by newspaper advertisement on which the appellants hoped to rely to confirm service, there is no doubt, the appellant needed to comply with all the three conditions set out under Rule 10(3) of the Elections Petition Rules (Supra). It should be noted here that because of the special nature of election petitions and the strict timelines that parties must comply with the sections of the law as well as the rules are couched in mandatory terms. In this case, the appellant has admitted that the purported service upon the applicant through the newspaper did not comply with the set standards and on this ground alone, the application would succeed, and I so find. It is not enough, in my considered view for the applicant to run for refuge in Constitutional provisions when the basics required of him have not been complied with the appellant has admitted as much.

25. In any event, the courts have pronounced themselves very clearly that where service upon a party is not effected, be it personally or otherwise, the petition to which the service relates is a nullity and must be struck out. For this proposition, see the case of **Aluodo Florence Akinyi – vs – IEBC and 3 others – Kisumu HC Election Petition No. 4 of 2017 in which Majanja J** made reference to the Court of Appeal decision in **Kisumu Civil Appeal No. 40 of 2013 Rozaah Akinyi Buyu – vs – IEBC & 2 others** in which the Court of Appeal said the following this on the issue of service:

*“As we have shown, service upon the respondents was a fundamental step in the electoral process and resolution of disputes arising therefrom. Failure to serve the petition upon the respondents went to the root of the petition and the petition could not stand where there was failure to serve the same.”*

I am in full agreement with the Court of Appeal on the issue of service.

26. In the same vain, and despite the principle that courts should strike out pleadings only as a last resort, I find that failure to serve the appeal upon the applicant automatically exposes the appeal to being struck out. I further hold and find that the small print and small size of the newspaper advertisement was intentional whose sole purpose in my humble view, was to deny the applicant the opportunity of mounting a defence within the stipulated time frame.

27. The second point on which the applicant submitted was the applicant’s contention that he appeal is fatally defective by reason of the appellant’s failure to extract and annex to the petition a certified copy of the decree appealed from. The applicant, through her counsel, Mr. W. Ochuka of W.O.O Ochuka & Company Advocates, submitted that without a copy of the certified decree, the Record of Appeal as filed was incomplete and fatally defective for failure to comply with the provisions of Rule 34(6)(e) of the Elections Petition Rules. I have already alluded to the said provisions which require an appellant to file a Record of Appeal within twenty one days of filing the Memorandum of Appeal which Record of Appeal shall, among other documents contain a signed and certified copy of the judgment appealed and a certified copy of the decree.

28. It is not contested that a certified copy of the decree is missing from the Record of Appeal. However, the appellant relying on the provisions of Rule 34(7) of the Elections Petition Rules submitted that nothing in the said rule requires an appellant to mention the specific order appealed from, and that even if there was any such requirement, the failure to make mention of or indicate any of such orders would not per se render the Record of Appeal fatally defective, given the provisions of Rule 5(1) of the Elections Petition Rules. For avoidance of doubt, the above cited rules read as follows;

*“ 34(7) On the filing of the memorandum of appeal in accordance with sub-rule (3), the registrar of the court to which the appeal is preferred shall, within seven days, send a notice of appeal to the election court from whose decree the appeal is preferred.*

*5(1) The effect of any failure to comply with these Rules shall be determined at the Court’s discretion in accordance with the provisions of Article 159(2)(d) of the Constitution.”*

29. Article 159(2) of the Constitution behoves courts, in exercising judicial authority to be guided by the following -

- (a) .....
- (b) .....
- (c) .....
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) .....

30. In my view, the above constitutional provision was intended to breathe life into an otherwise dead pleading, with regard to matters such as errors of drafting and matters generally related to the form of the pleading and not the substance thereof. Taking the totality of the rival submissions in this application into consideration, I am of the view that the appellant's reliance on Rule 34(7) is totally misplaced and has nothing to do with the complaint raised by the applicant herein. A certified copy of the decree appealed from is a critical part of the Record of Appeal without which the Record of Appeal is incomplete and therefore prejudicial to the respondent(s) in an appeal.

31. Granted, Rule 5(1) gives the court wide discretion in dealing with omissions by an appellant in compiling the Record of Appeal. But as stated earlier an omission that goes to the root of a matter ceases to be a mere technicality, and that is why Rule 34(6) of the Elections Petition Rules gives an appellant a whole twenty one days after filing of the memorandum of Appeal to put the requisite documents together before filing the Record of Appeal. As has been stated by courts, Article 159(2)(d) is not a panacea for all drafting ills, and in exercising its discretion under Rule 5(1) of the Elections Petition Rules, the Court must do so judiciously and not whimsically.

32. What then am I saying about the failure by the appellant to attach a certified copy of the decree appealed from? I am saying that that omission is not a mere technicality for if it were so, the drafters of the rules would not have made its attachment a mandatory requirement. I am therefore satisfied that the applicant has satisfied this court that the said omission is fatal to the petition and I so find.

33. The third issue raised by the applicant in her submissions is that the memorandum of appeal is defective for want of signature by the appellant. For this submission reliance was placed on Rule 34(1) as read with Rule 8(4)(a) of the Elections Petitions Rules (supra). It was submitted that when a pleading is not signed, there is no knowing whose pleading it is as no one owns it.

34. The mistake pointed out by the applicant is admitted by the appellant as is clear from a reading of paragraph 13 of his Replying Affidavit at which he depones:-

*“THAT, I urge the court under Section 80(1) of the Elections Act that the court is to decide all matters before it without due regard to technicalities, as the courts have a philosophy of the overriding objective of the court to do substantive justice as the stated matter would be raised in the main appeal and not through an interlocutory application and affidavit and that I would be denied the opportunity to raise the same and rebut. FURTHER THERE IS NO PROVISION UNDER RULE(S) 34 and 8 THAT REQUIRES ME TO SIGN THE MEMO OF APPEAL AS ITS IN THE CORRECT FORM as the record of appeal is proper before this court and the 2<sup>nd</sup> respondent's application should be dismissed with costs and we proceed to the main appeal.”(sic).*

35. To put the appellant's averments into perspective, it is necessary to look at Section 80(1) of the Elections Act 2011. The Section deals with the powers of an election court which include:-

- summoning and swearing of witnesses;
- compelling the attendance of any person as a witness in the matter at hand;
- examining a witness who is compelled to attend or any other person who has not been called as a witness
- deciding all matters that come before it without undue regard to technicalities.

36. Though the appellant did not clearly say so, I think that his argument touching on the missing signature is anchored in Section 80(1)(d) of the Elections Act, 2011, which is similar in substance to Article 159(2)(d) of the Constitution.

37. The applicant submitted that Rule 34(1) of the Petition Rules requires that an appeal from a Resident Magistrate's court under Section 75(1A) of the Act shall be in the form of a Memorandum of Appeal and shall be signed in the same manner as a petition. The signing of a petition is provided for under rule 8(4)(a) of the Elections Petition Rules to the effect that the same shall be signed by a petitioner or by a person authorized by the petitioner.

38. From all the above, there is no hiding the fact that the appellant was required both under the Elections Act, 2011 and the Elections Petition Rules to sign the Memorandum of Appeal either personally or through his authorized agent. He did not do so, and this contravention when added to the other contraventions discussed earlier, weighs heavily against the appellant. The only signature on the Memorandum of Appeal is that of the advocates who draw the memorandum, of appeal. This signature is not sufficient in the circumstances, I find that the contravention complained of goes far beyond being a mere technicality and stands out as a matter of substance which adversely affects the propriety of the appeal as a whole, and Article 159(2)(d) of the Constitution or Section 80(1)(d) of the Elections Act cannot offer any relief to the appellant. These and other omissions appear to form a consistent thread not only in this appeal but throughout the pleadings before the

trial court. The omissions are inexcusable. In any event the provisions of Article 159(2)(d) of the Constitution do not provide a blanket for every season, and each case must be considered on its own merits.

**Conclusion**

39. Having reached the conclusions above, namely that there was no proper service of the court papers on the applicant, that the appellant failed to annex to the Record of Appeal a certified copy of the judgment or decree appealed from and finally that the lack of signature of the appellant or his authorized agent to the appeal is fatal to the appeal for lack of ownership of the memorandum of Appeal, I have no choice but to conclude that the applicant's Notice of Motion dated 18<sup>th</sup> April, 2018 is meritorious. I accordingly allow the same and make the following final orders:-

1. The Notice of Motion dated 18<sup>th</sup> April, 2018 be and is hereby allowed.
2. The appellant's appeal dated 8<sup>th</sup> March, 2018 and filed in Court on 9<sup>th</sup> March, 2018 be and is hereby struck out in its entirety.
3. The appellant shall bear the costs of this appeal, which costs may be agreed or taxed by the Deputy Registrar of this Honourable Court.

It is so ordered

**Ruling delivered, dated and signed in Open Court at Kakamega this...24<sup>th</sup> .....day of.....May.....2018**

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

.....Mr. Osabwa(Came in at 9.35am).....for Appellant

.....N/A.....for 1<sup>st</sup> Respondent

.....Mr. Ochuka (present).....for 2<sup>nd</sup> Respondent

.....Mr. Fwaya holding brief for Mr. Momanyi.....for 3<sup>rd</sup> respondent

.....M/S Z.K. Yego(absent).....for 4<sup>th</sup> Respondent

.....Polycap Mukabwa.....Court Assistant