



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NYAMIRA

ELECTION PETITION APPEAL CASE NO.1 OF 2018

DAMARIS NYARANGI MOONI.....PETITIONER

VERSUS

WAFULA W. CHEBUKATI CHAIRMAN IEBC.....1ST RESPONDENT

THE I.E.B.C.....2ND RESPONDENT

IRENE NYAKERARIO MAYAKA.....3RD RESPONDENT

CLERK NYAMIRA COUNTY ASSEMBLY.....4TH RESPONDENT

RULING

Before me for determination is the 3rd Respondent's application in the notice of motion dated 6th April 2018 brought under Order 50 Rule 6 of the Civil Procedure Rules and Sections 1, 1A, 3 and 3A of the Civil Procedure Act which seeks orders that-

1. That the honourable court be pleased to enlarge time within which the Applicant is to file her cross- appeal and do deem the draft appeal annexed hereto as properly filed save for filing costs.
2. Any other relief be granted as the court may deem just and expedient.
3. Costs of this application be in the cause.

The application is premised on grounds inter alia, that the delay in filing the appeal occurred because the file could not be traced in the registry; that the delay is not inordinate; that only one limb of the judgement is appealed from and further that there shall be no prejudice to the Respondent herein should the orders be granted.

The application is supported by an affidavit sworn on 6th April 2018 by one Julius Kereu in which he deposes that he received copies of the memorandum of Appeal from Nyaberi Advocate on 26th March 2018 but his efforts to file the same were thwarted as the file could not be located in the registry.

The application is vehemently opposed on grounds that the same as drafted and filed in court is misconceived, mischievous and an abuse of the court process, that the same offends the mandatory provisions of the Elections Act 2011 and the Rules thereto; that it is mounted with ulterior motives to defeat the ends of justice and that it is an afterthought. Further that the applicant is guilty of laches and the application ought to be dismissed with costs.

The application was canvassed orally. Mr. Ochoki, learned Advocate for the 3rd Respondent/Applicant, submitted that the orders sought are discretionary; that the cause of the delay is that this file had been transferred to Kisii High Court and could not be traced and that this application was made timeously. He contended that it was brought only seven days out of time. He urged this court to allow the application as the Appellant/Respondent stands to suffer no prejudice.

Mr. Nyambati learned Advocate for the Appellant who is the respondent in the application, opposed the application and submitted that there is no explanation for the delay as the affidavit in support of the application is sworn by a busy body who has not disclosed his capacity to swear the affidavit and that the provisions of the Elections Act are couched in mandatory terms. He submitted that there is no provision for cross appeals. He pointed out that the judgment herein was delivered on 28th February 2018 yet in the grounds for the application it is alleged it was delivered on 20th February 2018.

In reply Mr. Ochoki alleged that anyone with knowledge of facts may swear an affidavit and that what is in the supporting affidavit is what transpired. As to the term cross appeal he submitted that it is referred to as such only because there is an appeal. He also submitted that Rule 19 of the Elections Petition Rules, provides for enlargement of time and that it is therefore not correct that there is no provision for extension of time.

The 1st, 2nd and 4th Respondents do not oppose the application.

This application is brought under the wrong provisions of the law as the Civil Procedure Rules do not apply to elections petitions or appeals. Appeals to the High court are provided for under **Section 75 of the Elections Act** while the procedure for filing the same is provided in Rule 34 of the Elections (Parliamentary and County Elections) Petitions Rules 2017. In **Andrew Toboso Anyanga –V- Mwale Nicholas Scott Tindi & 3 Others Election Petition Appeal (Application) No.3 of 2017 [2017] eKLR** Githinji, JA, grappled with a similar issue while dealing with a defective Notice of Appeal and held as follows:-

“[12]The filing of a notice of appeal under the wrong rules is a mere procedural technicality in terms of Article 159 (2) (d) of the Constitution which should not deny the applicant a right to file an appeal.

The circumstances of this case clearly demonstrate that the applicant’s advocate acted under a genuine mistake of the operative procedural rules. This is excusable as this was a period of transition from the operative general Court of Appeal Rules to specialized Election Petition Rules.”

Whereas there is nothing to suggest that the Advocate for the applicant herein acted under a similar mistake this court is prepared to overlook the procedural technicality in the spirit of **Article 159 (2) (d)** of the Constitution and find that the application is competent despite citation of the wrong provisions of the law.

As for the merits, again the issue of enlargement of time within which to file an appeal is not novel. The court of Appeal dealt with similar applications in **Andrew Tobaso Anyanga –V- Mwale Nicholas Scott Tindi & 3 Others [2017] eKLR** (Election Petition Appeal (Application No.3 of 2017) and also in **Munuve Mati –V- Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission and Paul Musyimi Nzengu [2018] eKLR** and in both cases allowed the applications. In the Munuve Mati case the court held:-

“24. There is no dispute that the appellant did not file and serve the appeal within the period prescribed by the 2017 rules. Decisions of this Court abound where it has been held that the prescribed timelines as regards electoral disputes resolution must be strictly adhered to. (see for example Charles Kamuren –v- Grace Jelegat Kipchoim & 2 Others [2015] eKLR). We agree with those decisions particularly given the constitutional and statutory demand for timely resolution of disputes. Nevertheless, the 2017 rules themselves now expressly confer on us discretion to determine the effect of any failure to comply with the rules, taking into account the fact the justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timelines.

25. In this case there is clear noncompliance with the rules, but we have before us the record of appeal and we perceive it is possible to determine the appeal without any further infraction on the set timelines.

We have considered the effect of the appellant’s failure to file the notice of appeal within 7 days and to serve the same within the prescribe period. No evidence has been adduced that any party has been prejudiced by on-compliance with the 2017 rules, which we have noted. The three objects of the 2017 rules, namely just, impartial, and expeditious determination of appeals, which we agree must be given equal consideration, do not stand to be compromised if we hear the appeal on merits. We bear in mind that in Raila Amolo Odinga & Another –v- Independent Electoral ad Boundaries Commission & 2 Others [2017] eKLR the Supreme Court also declined to strike out documents filed or served out of time Supreme Court (Presidential Election Petition) Rules 2017.”

Whereas in this case we are not dealing with a Notice of Appeal but with the actual appeal I too I am minded of Rule 5 of the Election Petition Rules 2017 as well as the power vested in this court under Rule 19 of the Rules which at subrule 2 only precludes enlargement of time in relation to filing and hearing of petitions but not appeals. The application herein seeks to enlarge time to file an appeal on the issue of costs only and the applicant has given a plausible explanation for the delay in filing the appeal. I am not persuaded that allowing the application will affect the timelines for hearing of the appeal on the merits of judgment of the election court and there is also nothing to suggest that the appellant shall suffer prejudice that cannot be compensated by an award of costs should the application be allowed.

Accordingly the application is allowed. The memorandum of Appeal filed shall be deemed to be duly filed subject only to the 3rd Respondent/Applicant paying the fees prescribed under **Rule 34 (4) of the Election Petition Rules 2017**. The 3rd Respondent /Applicant shall bear the costs of this application. It is so ordered.

Dated and delivered at Nyamira High Court this 17th day of May 2018.

E. N. MAINA

JUDGE

In presence of:

Mr. Ondari for Respondent/Appellant

M/S Moguche for Nyaberi for 3rd Respondent

Court clerk Mobisa.