



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA, AT NAIROBI**

**ELECTION PETITION APPEAL NO. 49 OF 2017**

**GEOFFREY KING'ANGI MUTURI .....APPELLANT**

**VERSUS**

**PETER KAMAU NYUTU ..... 1<sup>ST</sup> RESPONDENT**

**JUBILEE PARTY .....2<sup>ND</sup> RESPONDENT**

**RULING**

The 1<sup>st</sup> Respondent raised a Preliminary Objection on two issues.

On the 1<sup>st</sup> issue, the 1<sup>st</sup> Respondent sought to know the stand of the 2<sup>nd</sup> Respondent in this matter i.e. whether it supported the Appellant or 1<sup>st</sup> Respondent. That if it supported the Appellant, counsel should address the Court on this before the 1<sup>st</sup> Respondent so that if he raised any new issues, counsel for the 1<sup>st</sup> Respondent would be able to respond accordingly.

**Mr. Macharia** responded that he was before the Court not to support any party but to state the law, since the Rules of Procedure were clear.

My direction to this was that no party would be allowed to introduce new matters not already before the Court while making their submissions. It would not be prudent for this Court to ask Mr. Macharia which party the 2<sup>nd</sup> Respondent supported in order to reorganize the order of making submissions.

In respect of the 2<sup>nd</sup> issue, what I got the 1<sup>st</sup> Respondent to be complaining about was that the record of appeal was incomplete, because it did not have the decree and proceedings. He cited Section 40 (2) of the Political Party Dispute Tribunal Act, Section 1A and 1B Civil Procedure Act, Section 79B (iv) Civil Procedure Act and submitted that Article 159 (2) (d) of the Constitution cannot save the Appellant as the Rules are clear. He also cited the Court of Appeal of ***Nicholas Kiptoo Arap Korir Salat –vs- IEBC and Winfred Lesan Civil Appeal Application No. 228 of 13*** and ***Salama Beach Hotel Ltd. –vs- Mario Rossi, Civil Appeal No. 10 of 2015 (Court of Appeal)***, to support his position.

**Mr. Ndegwa** seemed to be suggesting that the Court cannot under whatever circumstances call for the lower Court record before a proper record has been filed.

In response, Mr. Macharia referred to Section 41 (4) PPDT Act, Order 42 Rules 13 and 15 of the Procedure Rules and submitted that there was nothing to stop the Court from calling for any documents required from the lower Court once an appeal has been lodged.

**Mr. Mutuma** for the Appellant relied on Article 159 (2) (d) of the Constitution and submitted that what was being raised were technicalities.

In operationalizing Section 79 B Civil Procedure Act, Order 42 Civil Procedure Rules has been entrenched to specifically deal with appeals. Order 42 Rule 13 Civil Procedure Rules deals with directions before the hearing of an appeal. It sets out timelines.

Given the circumstances, this Court and parties find themselves, in relation to election nominations there is **no way** these timelines can be complied with. Justice demands that parties who have filed appeals be heard and their appeals be determined before the time runs out. We are dealing with special circumstances and we do not have the luxury of time as were the parties in the two cases cited by the 1<sup>st</sup> Respondent. Order 42 Rule 15 Civil Procedure Rules provides;

***“(1) When a memorandum of appeal is lodged the court to which such appeal is preferred shall send notice of the appeal to the court from whose decree the appeal is preferred.***

***(2) The court receiving such notice shall send with all practicable dispatch all material papers in the suit, or such papers as may be specially called for by the court to which such appeal is preferred.***

***(3) Either party may on application and upon payment of the requisite charges obtain copies of any such papers as aforesaid.”***

This Court in the present circumstances cannot be faulted for calling for the original record to be availed for yesterday’s hearing. The PPDT in this case complied with Order 42 Rule 15 (2) Civil Procedure Rules in availing the file.

Article 159 (2) (d) of the Constituent provides ***“In exercising judicial authority, the courts and tribunals shall be guided by the following principles;***

***(d) Justice shall be administered without undue regard to procedural technicalities”.***

It is common knowledge that the PPDT has been operating under undue pressure due to the many matters filed before it. In this case, the filing of the decree and proceedings which are barely three (3) pages may have been overlooked. The original record has the proceedings and the decree. In fact, besides the directions, there were no proceedings before the Tribunal. The parties before it only filed written submissions and a Judgment was rendered. This Court does not wish to dwell on technicalities but the real substantive matter. The Memorandum of Appeal has been lodged and served together with a record of appeal minus the decree and proceedings.

I therefore direct the Appellant to file and serve a Supplementary record of appeal containing the proceedings and decree within the next 1½ hours. Service to be through any acceptable means.

Parties to appear before this Court at 1.30 pm for hearing of the Appeal.

**Delivered, signed and dated this 22<sup>nd</sup> day of May 2017 at NAIROBI**

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**HEDWIG I. ONG’UDI**

**HIGH COURT JUDGE**