



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISC. CIVIL APPLICATION NO. 201 OF 2010**

**THE LOCAL GOVERNMENT ELECTION CAP 265 LAWS OF KENYA AND**  
**REGULATIONS MADE THEREUNDER**

**IN THE MATTER OF THE ELECTION FOR MARKET WARD OF ELDORET NORTH**  
**CONSTITUENCY OF UASIN GISHU DISTRICT**  
**HELD ON THE 27<sup>TH</sup> DECEMBER 2007**

**IN THE MATTER OF THE ELDORET CMCC LOCAL GOVERNMENT INQUIRY NO. 1 OF**  
**2008**

**IN THE MATTER OF THE ELECTION FOR THE MARKET WARD OF ELDORET NORTH**  
**CONSTITUENCY OF UASIN GISHU DISTRICT HELD ON 27<sup>TH</sup> DECEMBER 2007**

**THE ELECTORAL COMMISSION OF KENYA/  
INTERIM INDEPENDENT ELECTORAL COMMISSION.....1<sup>ST</sup> APPLICANT**

**THE RETURNING OFFICER  
ELDORET NORTH CONSTITUENCY.....2<sup>ND</sup> APPLICANT**

**=VERSUS=**

**JANE WANGUI MURIITHI.....1<sup>ST</sup> RESPONDENT**  
**WILLIAM CHEMNGAA KIPTUM.....2<sup>ND</sup> RESPONDENT**

**RULING**

This is an application by way of chamber summons expressed as having been brought under Order XLII Rules 1, 3 and 4 of the Civil Procedure Rules and Sections 3, 3A, 63 (e) and 75 of the Civil Procedure Act. It is by the **Electoral commission of Kenya/Interim Independent Electoral Commission and the Returning Officer – Eldoret North Constituency** who seek leave to appeal against the ruling and/or judgment delivered on 12/5/2010 in Eldoret CMCC Inquiry No. 1 of 2008 – **Jane Wangui Muriithi –vrs- the Electoral Commission and 2 others**. The application is brought on the following grounds:-

- (a) That the applicant has a Constitutional right to seek a

second opinion.

- (b) That leave to appeal against the said ruling is required.
- (c) That the appellant's application for leave to appeal was dismissed on 9/7/2010.
- (d) That the ends of justice shall be met.
- (e) That the intended appeal is not vexatious and/ or an abuse of the process of the court.

There is a supporting affidavit sworn by counsel for the applicants which affidavit merely elaborates the above grounds. Counsel for the 2nd respondent supported the application. The 1<sup>st</sup> respondent opposed the application on the basis of the following grounds of opposition filed by her advocates:

- 1). That the application is an abuse of the process of the court.
- 2). That it does not conform to the provisions of Order XLII of the Civil Procedure Rules.
- 3). That there has been inordinate delay in lodging the application.
- 4). That there is another appeal pending from the same ruling and therefore the applicants shall suffer no prejudice.

The application was argued before me on 26/10/2010 by **Mr. Onyinkwa**, learned counsel for the applicants, **Mr. Ogesa**, learned counsel for the 1st respondent and **Mr. Rotich**, learned counsel for the 2nd respondent. Counsel for the applicants reiterated the averments in the supporting affidavit and the above grounds of the application and counsel for the 2<sup>nd</sup> respondent associated himself with the submissions of counsel for the applicants. On his part, counsel for the 1<sup>st</sup> respondent contended that the court's jurisdiction had not properly been invoked and that in any event there existed another appeal against the same ruling thereby rendering these proceedings superfluous.

It is common ground that the judgment against which the appeal is intended to be made was delivered on 12/5/2010 in Eldoret C.M.C. Civil Inquiry number 1 of 2008. The applicants by their application dated 19/5/2010 then sought leave of the learned Magistrate to appeal against the said judgment. At the time all parties seemed to agree that leave was required. The trial Magistrate did not in fact doubt that leave was required to appeal against his judgment. In his own words:-

**“I have considered the rival submissions. Applications for leave to appeal under section 75 of the Civil Procedure Rules according to the provisions of Order XLII rule 3 are to be made informally or formally by the Court of 1<sup>st</sup> instance but not later than 14 days after the ruling or judgment made.....**

**In any event the 3<sup>rd</sup> respondent in the inquiry**

**who was the substantive loser in the inquiry was granted leave to appeal and has lodged an appeal which is still pending in the High Court. The application before me lacks merit as time to appeal has already lapsed and the court cannot grant orders in vain. I dismiss the application with costs to the respondent”.**

Leave to appeal is governed by Order XLII of the Civil Procedure Rules. The orders from which an appeal lies as of right are listed in sub-rule 11 of Rule (1) of the said order. The proceedings before the learned magistrate are not mentioned in the said sub-rule. Sub-rule 2 would therefore prima facie apply. The sub-rule reads as follows:

**“An appeal shall lie with the leave of the court from any other order made under these rules”**

There is however rule 3 which reads as follows:-

**“3. Nothing in this order shall apply to any**

**application which, as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit”.**

I have not seen the ruling or judgment against which the intended appeal is to be lodged. I cannot therefore determine whether the determination would fall within the purview of the said rule. In the

premises, I will determine this application on the basis that rule 3 of order XLII does not apply. So, an appeal from the order /judgment being appealed against not being covered under Order XLII Rule 1 (1) of the Civil Procedure Rules requires leave. The court's jurisdiction has therefore been properly invoked.

Counsel for the 1<sup>st</sup> respondent further argued that the applicants should have moved the court by way of a Motion on Notice and not by way of a Chamber Summons. He must have had in mind Order L Rule 1 of the Civil Procedure Rules given that order XLII does not prescribe the Procedure by which an application under the rule may be made. I note also that the applicants had also sought a stay of execution, besides the leave, which order under Order XLI may be given in a Notice of Motion. So, is this application incompetent because the wrong mode has been adopted? I think not, the Court of Appeal has settled the issue. In its view, an application should not be defeated because the court has been incorrectly invoked.

With regard to delay, the record shows that the order /judgment intended to be appealed from was delivered on 12/5/2010. The applicants sought leave in the court of first instance by their application dated 19/5/2010. That was a mere 7 days after the said judgment order. The application was then dismissed on 9/7/2010 provoking this application which was lodged on 22/7/2010. That was thirteen (13) days after the dismissal. Order XLII Rule 3 of the Civil Procedure Rules reads as follows:-

**“3. An application for leave to appeal under section 75 of the Act shall, in the first instance, be made to the court making the order sought to be appealed from either informally at the time when the order is made, or within 14 days from the date of such order”**

There is no dispute that the applicants lodged their application before the court of 1<sup>st</sup> instance within fourteen (14) days of the order of that court. This application, having been filed 13 days after the dismissal of the application is in my view timely. That being my view of the matter, I reject the 1<sup>st</sup> respondent's argument that the applicants are guilty of inordinate delay.

The final objection raised by the 1<sup>st</sup> respondent was that because there is another appeal against the same judgment/order pending before the High Court, the applicants shall suffer no prejudice if the leave sought is declined. That objection with respect is clearly misconceived. The pending appeal was not

lodged by the applicants and no order can be made in favour of the applicants if they have not complained.

As none of the grounds of objection have found favour with me, the applicants' application for leave to appeal from the decision of the learned Resident Magistrate in Eldoret CMCC Inquiry No. 1 of 2008 is for allowing as I see no other impediment in its way. The application is accordingly allowed in terms of prayer 3 thereof.

Costs shall be in the appeal to be filed.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF NOVEMBER 2010**

**F. AZANGALALA  
JUDGE**

**Read in the presence of:-**

Loyike Ms holding brief for Onyinkwa for the applicants and Ms Ogesa for the 1<sup>st</sup> respondent.

**F. AZANGALALA  
JUDGE  
23/11/2010**