



**Gathoni v Independent Electoral & Boundaries Commission & 4 others (Election Petition Appeal E001 of 2023) [2024] KEHC 4667 (KLR) (17 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4667 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
ELECTION PETITION APPEAL E001 OF 2023**

**AK NDUNG’U, J**

**APRIL 17, 2024**

**BETWEEN**

**NDUNGU ESTHER GATHONI ..... APPELLANT**

**AND**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1<sup>ST</sup> RESPONDENT**

**UNITED DEMOCRATIC ALLIANCE PARTY ..... 2<sup>ND</sup> RESPONDENT**

**KIHIKA CAROLINE WANJIKU ..... 3<sup>RD</sup> RESPONDENT**

**MURIUKI MARY GATHONI ..... 4<sup>TH</sup> RESPONDENT**

**THE CLERK, LAIKIPIA COUNTY ASSEMBLY ..... 5<sup>TH</sup> RESPONDENT**

*(Appeal from original Decree in Nanyuki Chief Magistrate’s Election Petition No E001 of 2022 – Kithinji A.R, CM)*

**RULING**

1. The Appellant/Applicant herein Ndungu Esther Gathoni, was the petitioner in the election court below in Nanyuki Chief Magistrate’s Election Petition No E001 of 2022. By her petition therein, the Applicant challenged her removal from UDA Party Laikipia County Member of County Assembly (gender top up). The election court delivered its judgement on 15<sup>th</sup> February, 2023 and dismissed the petition with costs to the Respondents herein.
2. Being dissatisfied with the entire judgment, the Appellant filed a memorandum of appeal dated 13/03/2023. On 12/05/2023, the Appellant filed a notice of motion application dated 04/05/2023 seeking leave of this court to enlarge time within which she may file the record of appeal and supplementary record of appeal and that the annexed record of appeal and supplementary record of



- appeal be deemed as duly filed subject to payment of court fees. The application was however dismissed and the appeal was struck out by this court vide a ruling dated 13/07/2023.
3. On 25/09/2023, the 1<sup>st</sup> Respondent's counsel informed the court that the 1<sup>st</sup> Respondent wished to proceed with the cross-appeal and sought for 7 days to file the record of appeal. This court allowed the 1<sup>st</sup> Respondent to address it on the propriety of the cross appeal. The 1<sup>st</sup> Respondent filed submissions dated 23/10/2023. The Appellant did not participate in these proceedings. The 5<sup>th</sup> respondent filed submissions dated 30/10/2023 whilst the 3<sup>rd</sup> Respondent opted not to file any submissions. The 2<sup>nd</sup> Respondent and the 4<sup>th</sup> Respondent did not file any submissions.
  4. Counsel on record for the 1<sup>st</sup> Respondent argued that the Appellant filed an appeal on 14/03/2023 whereas the 1<sup>st</sup> Respondent filed the cross appeal on 14/03/2023 within the 30 days prescribed under Section 75(4) of the *Elections Act*. The 1<sup>st</sup> Respondent further relied on the record of appeal that had been filed by the Appellant which it believed to have been filed within timelines and therefore, failure by the Appellant to comply with strict timelines should not be visited upon the 1<sup>st</sup> Respondent which had the honest belief that the record of appeal was properly filed.
  5. It was further submitted that the 1<sup>st</sup> Respondent has a justifiable appeal since the cross appeal seeks to challenge part of the decision of the magistrate's court which has far reaching effects to the law and procedure especially on nominations in county assemblies as the lower court decision was to the effect that the 1<sup>st</sup> Respondent was to nominate 2 more persons to the County Assembly one being nominated under the marginalized category and the other under the gender top-up category.
  6. That that decision will have adverse effects in that it will mean that a court of law can increase the number of persons to be nominated by IEBC beyond the legal limit provided under Section 36(7) and 36(8) of the *Elections Act*; the increase in the number of persons to be nominated means that there will be disproportionate representation in county assemblies because some counties will have more nominated persons than others; the decision defeats the general principles of electoral system specifically fair representation and equality of votes as provided under Article 81(d) of the *Constitution* and that the increase in number will lead to an absurdity since salaries and allowances for such extra number is not provided for.
  7. Further, the decision was made without an application by the 5<sup>th</sup> Respondent to have the additional nominations as the trial court relied on the submissions of the 5<sup>th</sup> Respondent which were not based on any pleadings and which were filed out of time.
  8. The 5<sup>th</sup> Respondent on the other hand argued that since the court struck out the Appellant's application for enlargement of time to file a record of appeal and the appeal was struck out, it means that there is no record of appeal. Further, Section 75(4)(b) of the *Elections Act* prescribe timelines within which an appeal ought to have been heard and determined being 6 months which the court has no jurisdiction to extend as was held in *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* (2014) eKLR. The 6-months period has since lapsed and therefore, this court lacks jurisdiction to entertain the cross appeal. Reliance was placed on the case of *Hon. Martha Wangari Karua v The Independent Electoral and Boundaries Commission & 3 others* (2018) eKLR where the Court of Appeal held that the proceedings before the High Court subsequent to the expiry of the 6 months after the election petition was lodged was a nullity.
  9. The 5<sup>th</sup> respondent further argued that the 1<sup>st</sup> Respondent was indolent and their argument that they had an honest belief that the record of appeal filed by the Appellant was proper is an absurdity. That the 1<sup>st</sup> Respondent had 21 days in accordance with Rule 34(6) of the Elections (Parliamentary and County Elections) Rules 2017 to file the record of appeal and having filed the cross appeal on 14/03/2023, a



period exceeding 7 months has lapsed. The period set by the aforesaid rules is mandatory and failure to comply with the same means that there is no cross appeal capable of being canvassed before this court.

10. Counsel submitted that the 1<sup>st</sup> Respondent's application is indirectly seeking for review of the ruling of this court by inviting this court to find that its cross appeal is properly on record. Further allowing the 1<sup>st</sup> Respondent to rely on the record of appeal that this court refused to admit will amount to review of the ruling as the court will admit a record of appeal that had been rejected.
11. The uncontested fact is that the appeal herein was struck out by this court vide its ruling dated 13/7/23. In dismissing the application for extension of time and admission of further documents, the court stated;

“I have considered the Applicant's application, the responses filed by the Respondents and the submissions and the only issue for determination is whether this court should grant leave to the Applicant to file the record of appeal out of time.

The starting point is Rule 34 of the *Elections (Parliamentary and County) Petition Rules, 2017* (the Rules). The memorandum of appeal herein was filed on 14/03/2023 from the date of the judgment which was delivered on 15/02/2023 in compliance with Rule 34(3), the filing of the same was done within the required timelines of 30 days. Sub rule 6 provide as follows;

“The appellant shall, within twenty-one days of the filing of the memorandum 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 the 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 certificated copy of the decree.”

The proviso to Rule 34(6) above stipulates that an appellant shall within twenty-one days upon filing of memorandum of appeal file a record of appeal which shall contain certain specified documents. The Appellant had up to 04/04/2023 to file the record of appeal. The record of appeal has a court receiving stamp of 04/05/2023 meaning it was filed outside the 21 days stipulated under the Rules and without the leave of this court. The current application was filed on 12/05/2023.

Timelines for filing election disputes are well provided under the electoral laws and the *Constitution*.

Addressing this question, the Supreme Court in *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* [2014] eKLR stated that:-

“.. the electoral process, and the electoral dispute-resolution mechanism in Kenya, is marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the *Constitution* and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the



jurisdiction of the Court. This recognition is already well recorded in this Court's decisions in the Joho case and the Mary Wambui case".

12. The 1<sup>st</sup> Respondent seeks to sustain the Cross Appeal filed in this appeal. It is stated that to avoid the duplication of documents, the 2<sup>nd</sup> Respondent relied on the record filed by the Appellant which it honestly believed to have been filed within the timelines prescribed under Rule 34(6) of the [Elections \(Parliamentary and County Elections\) Rules 2017](#).
13. It is urged that the failure by the Appellant to comply with the timelines should not be visited on the 1<sup>st</sup> Respondent which had the honest believe that the Record of appeal was properly filed. It is added for good measure that the 1<sup>st</sup> Respondent did not oppose the application by the Appellant to extend time save for the aspect relating to inclusion of additional documents.
14. The 1<sup>st</sup> Respondent goes on to make arguments on what I consider the merits of the intended Cross Appeal with special emphasis on the adverse effects that the lower court's decision will have on the law on nominations in County Assemblies.
15. The arguments by the 1<sup>st</sup> Respondent may look attractive but they ignore 2 important facts; Firstly, that the timelines in Election petitions are cast in stone. The Supreme Court has stated this in no uncertain terms in [Lemanken Aramat v Harun Meitamei Lempaka & 2 Others](#) (*supra*) (See also [Hon Martha Wangari Karua v The Independent Electoral and Boundaries Commission & 3 Others](#) [2018] eKLR).
16. Secondly, that the obligation to meet the timelines prescribed in Rules 34(3) and 34(6) of the [Elections \(Parliamentary and County Elections\) Rules 2017](#) applies to all parties in an election petition with the 1<sup>st</sup> Respondent being no exception.
17. It is thus a lame argument for the 1<sup>st</sup> Respondent to posit that it had an honest belief that the Appellant had filed their appeal in time. If the 1<sup>st</sup> Respondent had any grouse with the Election Court's decision at the lower court, it did not have to wait for another party to file an appeal so that they could file a Cross Appeal. The 1<sup>st</sup> Respondent had a legal right of appeal like any other party and nothing stopped it from filing an appeal in time.
18. The 1<sup>st</sup> Respondent seeks to ride on an appeal that was filed out of time, an appeal that has already been struck out for that reason. The cross appeal is filed out of time too and no amount of honest belief in the actions of the Appellant can resuscitate it.
19. In essence, the request to the court to sustain the Cross Appeal is a disguised application for review from the back door or indeed an appeal against the decision of this court striking out the Appeal herein.
20. It is my finding that no appeal was filed in the prescribed timelines in this matter and secondly the timelines for hearing such an appeal is long lapsed.
21. With the result that the Cross Appeal herein is unsustainable. The same is struck out with no orders as to costs.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 17<sup>TH</sup> DAY OF APRIL 2024.**

**A.K.NDUNG'U**

**JUDGE**

