



**Ongiro v Independent Electoral & Boundaries Commission & another;
Orange Democratic Movement Party (Interested Party) (Election Petition
Appeal E001 of 2022) [2023] KEHC 1402 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1402 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
ELECTION PETITION APPEAL E001 OF 2022**

KW KIARIE, J

MARCH 2, 2023

BETWEEN

NAOMI AUMA ONGIRO APPELLANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

ONG'ONDO ZAKAYO OKUMA 2ND RESPONDENT

AND

ORANGE DEMOCRATIC MOVEMENT PARTY INTERESTED PARTY

RULING

1. Ong'ondo Zakayo Okuma the 2nd respondent herein filed an application dated January 19, 2023 in which he is seeking the following orders:
 - a. That the memorandum of appeal filed herein be struck out for being fatally defective and incompetent.
 - b. That the costs of this application be provided.
2. The application was premised on the following grounds:
 - a. That the impugned ruling of the trial court was delivered on November 23, 2022 striking out the petition for being res judicata.
 - b. That the appellant herein instituted the instant appeal on the December 7, 2022 vide memorandum of appeal dated December 4, 2022.



- c. That the memorandum of appeal herein though filed on time was not served upon the 2nd respondent within the statutory 7 days from the date of filing.
 - d. That the appellant failed, ignored and/or neglected to serve the instant memorandum of appeal within the statutory period of 7 days as provided for under Rule 34 sub Rule 5 of the *Elections (Parliamentary and County Elections) Petition Rule 2017*.
 - e. That the appellant further ignored and/or neglected to file the record of appeal as stipulated under Rule 6 of the *Elections (Parliamentary and County Elections) Petition Rule, 2017*.
 - f. That the appellant further failed, ignored and/or neglected to file an application seeking leave to serve the memorandum of appeal out of time of the lapse of 7 days as provided for in law.
 - g. That the failure to serve the memorandum of appeal within the statutory timeliness or seek leave to serve the memorandum of appeal out of time was deliberate and intended to cause an injustice upon the 2nd respondent/ applicant.
 - h. That unless the orders sought are granted, the 2nd respondent/applicant stands to suffer irreparable damage and loss.
 - i. That it is in the interest of justice that the application herein is allowed.
3. The appellant/respondent opposed the petition on the following grounds:
- a. That all the respondents were properly served with the court documents at the right time within the timelines indicated in the law.
 - b. That the necessary payments were made on December 20, 2022 requesting for the certified typed proceedings, ruling and certified order; it was only until January 16, 2023, when the said court registry indicated that the typed proceedings and the certified copy of the ruling were ready for collection.
 - c. That the court was requested to furnish a certificate of delay.
 - d. It is in the interest of justice that the appeal be heard and determined on merit.
4. The issues for determination are therefore as follows:
- a. Whether the memorandum of appeal was served within the stipulated time; and
 - b. If there was noncompliance with timeframe, what is the effect?
 - c. Whether the appellant failed to file the record of appeal within the stipulated timelines.
5. Rule 34 (5) of the *Elections (Parliamentary and County Elections) Petition Rules, 2017* provides as follows:
- 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 memorandum of appeal dated December 4, 2022 was filed in court on December 7, 2022. The latest date for service upon the respondents was December 14, 2022.
7. According to the applicant, the memorandum of appeal was not served within the stipulated timelines. The applicant has, however, not indicated when the same was served. The appellant on the other hand



has contended that she served all the respondents herein on December 10, 2022 through their last known email addresses.

8. In the affidavit of service filed on February 28, 2023, there is an attachment from Gmail which shows that the respondents were served on December 10, 2022 with the Notice of appeal and the memorandum of appeal. Without any evidence to the contrary, I find that the appellant complied with Rule 34 (5) of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017.
9. The applicant contended that the appellant failed to file the record of appeal as stipulated under Rule 34 (6) of the *Elections (Parliamentary and County Elections) Petition Rules* 2017. The Rule provides:
 - 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 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 certified copy of the decree.
10. Though the appellant has blamed the trial court for the delay, the letter she has produced as proof that she applied for a certificate of delay does not help much. It does not bear the postal address of the court that it was addressed to nor is there any receipt stamp to authenticate the claim. No communication from Oyugis court was attached to show that the delay was on the part of the court.
11. I therefore find that the appellant failed to comply with Rule 34 (6) of the *Elections (Parliamentary and County Elections) Petition Rules* 2017. Had there been a demonstration that the delay was occasioned by the failure of the court to supply proceedings, then this could have been sufficient reason for the court to find that the noncompliance was caused by another party.
12. Strict observance of timelines in election petitions is very crucial for these petitions have very strict timeframes within which to be concluded.
13. The upshot of the foregoing is that the appeal must be struck out with costs to the second respondent for noncompliance

DELIVERED AND SIGNED AT NYAMIRA THIS 2ND DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

