



**Kerubo v United Democratic Alliance & another; Independent Electoral  
& Boundaries Commission (Interested Party) (Election Petition Appeal  
E009 of 2023) [2023] KEHC 19031 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19031 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
ELECTION PETITION APPEAL E009 OF 2023**

**WA OKWANY, J**

**JUNE 15, 2023**

**BETWEEN**

**MOKAYA MARTHA KERUBO ..... APPELLANT**

**AND**

**UNITED DEMOCRATIC ALLIANCE ..... 1<sup>ST</sup> RESPONDENT**

**NYAMANGA DORIS MAGOMA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION . INTERESTED  
PARTY**

**RULING**

**Background**

1. The Lower Court rendered its judgment in Nyamira CM Election Petition No. E002 of 2022 on 2<sup>nd</sup> March 2023. Dissatisfied with the said judgment, the Appellant herein filed the instant Appeal through the Memorandum of Appeal dated 16<sup>th</sup> March 2023.
2. When the appeal came up before this court for directions on 26<sup>th</sup> April 2023, Mr. Kariuki, advocate appearing for the Appellant informed the Court that he was yet to file the Record of Appeal. He requested for 14 days to enable him to file the Record of Appeal. The request was not opposed by the Respondents and was granted with a rider that the matter be mentioned on 15<sup>th</sup> May 2023 to confirm the filing of the record. On 15<sup>th</sup> May 2023, Mr. Njiru appeared for the Appellant and informed the Court that the Record of Appeal was yet to be filed. He requested the court to grant him 3 days to file the Record of Appeal thereby precipitating objections and protests by the Respondents' advocates on record. After hearing the oral submissions on the Preliminary Objection (PO) this Court directed



the 2<sup>nd</sup> Respondent to file a formal Application. Directions were then issued that the Preliminary Objection be canvassed by way of written submissions.

### **Preliminary Objection**

3. This ruling is in respect to the 2<sup>nd</sup> Respondents Notice of Preliminary Objection dated 16<sup>th</sup> May 2023 wherein the 2<sup>nd</sup> Respondent listed the following grounds: -
  1. That Article 87 (1) of the Constitution mandated Parliament to enact legislation for the timely settling of electoral disputes.
  2. That the Elections Act, Section 75 (4) (a) provides that an appeal like the appeal herein shall be filed within 30 days.
  3. That further, to regulate the practise and procedure of the High Court with respect to the filing and trial of election matters, the Rules Committee pursuant to Section 96 of the Elections Act made the relevant rules.
  4. That Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules 2017, herein the Rules, provides the manner and procedure of filing appeals from the Resident's Magistrate Court.
  5. That, well within time, the Appellant filed and served their Memorandum of Appeal within the 30 days as provided by law.
  6. That the Appellant failed to file the Record of Appeal within 21 days of filing the Memorandum of Appeal pursuant to Rule 34 (6).
  7. That the matter was mentioned on the 26<sup>th</sup> of April 2023 for directions when the parties failed to take directions since the Appellant had not filed their Record of Appeal.
  8. That with leave of the Court, the Appellant was allowed to file and serve the Record of Appeal by the 15<sup>th</sup> of May 2023.
  9. That the Appellant failed to file and serve by the 15<sup>th</sup> of May 2023 as ordered by the Court.
  10. That 42 days later, the Record of Appeal has not been filed and the Appellant has not sought leave to file the same.
  11. That no reason has been offered for the delay to file the Record of Appeal.
  12. That it is the objective of the Rules to facilitate the just, expeditious, proportionate, and affordable resolution of election petitions as provided for in Rule 4 (1).
  13. That it is therefore just and proportionate that the Memorandum of Appeal is dismissed.
4. The Appellant opposed the PO through the Replying Affidavit dated 30<sup>th</sup> May 2023 wherein she avers that even though she filed the Memorandum of Appeal on 31<sup>st</sup> March 2023 her advocates on record received the certified copies of the proceedings and judgment much later on 18<sup>th</sup> May 2023 thereby causing the delay in filing the Record of Appeal. She explained that the delay was not intentional and attributed it to the delay, by court, in supplying her advocates with the typed proceedings and judgment.
5. The PO was canvassed by way of written submissions.



## Submissions

### 1<sup>st</sup> Respondent's Submissions

6. The 1<sup>st</sup> Respondent submitted that the Appellant ought to have filed the Record of Appeal by 21<sup>st</sup> April 2023 and had not filed the same as at 26<sup>th</sup> April 2023 when the matter first came up for mention for directions. According to the 1<sup>st</sup> Respondent, the Appellant was already 5 days late in filing the Record as at the date of the first mention.
7. It was submitted that the Court indulged the Appellant by granting her leave to file the Record of Appeal by 15<sup>th</sup> May 2023 which was an additional 18 days but that she failed to comply with the orders. It was submitted that failure to file the Record of Appeal on time was an outright violation of Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 (hereinafter “the Election Petition Rules”). The 1<sup>st</sup> Respondent added that no plausible reasons were advanced for the delay. The 1<sup>st</sup> Respondent cited the decision in *Jeremiah Nyangwara Matoke vs. IEBC & 2 Others (2013)* eKLR where the Court highlighted the 21 days’ time frame for filing the Record of Appeal.
8. It was also submitted that Rule 34 (6) of the Election Petition Rules is couched in mandatory terms and that whereas Article 159 (2) of *the Constitution* allows the Court to exercise its discretion and enlarge time in the interests of justice, the need to observe the strict timelines could not be sidestepped. For this argument Counsel cited the Supreme Court decision in *Raila Odinga & 5 Others vs. Independent Electoral & Boundaries Commission and 5 Others (2013)* eKLR where it was held that Article 159 (2) is only applicable on a case-by-case basis. The Respondent argued that the issue of time is not a technical one as envisaged by Article 159 (2) and that if the Appellant was truly desirous of having the appeal heard, she could have filed the Record of Appeal by 21<sup>st</sup> April 2023. Reference was made to the case of *Moses Mwigigi & 14 Others vs. IEBC & 5 Others (2016)* eKLR where the Supreme Court held that the competence of an appeal will be determined by whether it was properly initiated and the case of *Nicholas Kiptoo Arap Salat vs. Independent Electoral and Boundaries Commission and 6 Others (2013)* where the Supreme Court held that courts cannot aid the bending of Rules in favour of one side as it unfairly harms the innocent party who abides by the Rules.
9. It was further submitted that election petitions are specialized proceedings that are governed by specialized provisions of *the Constitution*, electoral laws and regulations which dictate strict timelines. It was submitted that a court lacks jurisdiction where an appeal is filed outside the stipulated timelines.

### 2<sup>nd</sup> Respondent's Submissions

10. Regarding the constitutional timelines, the 2<sup>nd</sup> Respondent submitted that that Article 87 (1) of *the Constitution* provides for the timely resolution of election disputes and that Rule 34 of the Election Petition Rules, provides, in mandatory terms, that a Record of Appeal should be filed within 21 days of filing the Memorandum of Appeal. It was submitted that Article 159 (2) of *the Constitution* cannot aid parties who have scant respect for the Rules and who fail to comply with them. Reference was made to the cases of *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014)* eKLR where the Supreme Court explained the import of the provisions of Article 87 (1) and *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others (2013)* eKLR where the principles governing the courts in considering an application to extend the statutory timelines were discussed.
11. On the court’s discretion to extend time, it was submitted that Rule 4 of the Election Petition Rules provides for the overriding objectives of the Rules, and that in exercising its discretion, the court ought



to balance the interests of both parties. Reliance was placed on the Supreme Court case of *Hassan Nyanje Charo vs. Khatib Mwashetani & 3 Others, Supreme Court Application 15 of 2015 (2014)* eKLR and *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others (2013)* eKLR where the Court outlined the principles governing extension of time.

### **The Interested Party's Submissions**

12. The Interested Party reiterated that Rule 34 (6) of the Election Petition Rules is couched in mandatory terms and that the Appellant cannot hide behind Article 159 (2) of *the Constitution* which requires the court to focus on substantive justice as opposed to procedural technicalities. In this regard the Interested Party cited the decision in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others (2014)* eKLR and *Raila Odinga & 5 Others vs. Independent Electoral & Boundaries Commission and 5 Others (2013)* eKLR.
13. On jurisdiction, it was submitted that the Court's jurisdiction is derived from *the Constitution* and statute and that since the Appellant had grossly violated the same, the court ought to down its tools as it had no mandate to act on the Appeal.
14. The Appellant had not filed any submission as at the time that this court was writing this ruling. I will therefore consider the averments made in the Replying Affidavit in determining the Application.

### **Analysis and Determination**

15. I have carefully considered the PO, the Appellant's Replying Affidavit and the parties' respective submissions. I find that the main issue for determination is whether the Preliminary Objection is merited.
16. Section 34 of the Elections (Parliamentary and County Election) Petition Rules, 2017 stipulates as follows on the timelines for filing appeals to this court.
  34. Appeals from Resident Magistrate's Court.
    1. An appeal from a Resident Magistrate's Court under section 75 (1A) of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition.
    2. The memorandum of appeal under sub-rule (1) shall concisely set out under distinct heads the grounds of appeal without any argument or narrative from the judgment appealed from and the grounds shall be numbered consecutively.
    3. The memorandum of appeal under sub-rule (1) shall be filed at the nearest High Court registry within thirty days from the date of the judgment.
    4. The appellant shall, upon filing the memorandum of appeal in accordance with sub-rule (3), pay the fees prescribed in the Second Schedule.
    5. 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 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.
7. On the filing of the memorandum of appeal in accordance with sub-rule (3), the registrar of the court to which the appeal is preferred shall, within seven days, send a notice of appeal to the election court from whose decree the appeal is preferred.
  8. The election court from which an appeal is preferred shall, upon receiving a notice under sub-rule (7), send the proceedings and all relevant documents relating to the petition to the High Court to which the appeal is preferred.
  9. The High Court to which the appeal is preferred shall, within thirty days of lodging the memorandum of appeal in accordance with sub-rule (5), fix a date for:
    - a. the giving of directions including directions as to the manner in which evidence and exhibits may be presented; and
    - b. the hearing of the appeal.
  10. The High Court to which the appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.
  11. An appeal filed under sub-rule (1) shall be heard and determined within three months of the date of lodging the appeal.
17. What constitutes a Preliminary Objection was discussed in the case of Mukisa Biscuits Manufacturing Ltd vs. West End Distributors (1969) EA 696 as follows: -

“---a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

Sir Charles Newbold, P. went on further to state: -

“a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.



18. Similarly, in *Nitin Properties Ltd vs. Singh Kalsi & another* [1995] eKLR the Court of Appeal stated as follows:

“ A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

19. In the present case, it was not contested that the Appellant did not file the Record of Appeal within the 21 days period granted under Rules 34 (6) of the Election Petition Rules. It is also noteworthy that when the appeal first came up before this court for directions on 26<sup>th</sup> April 2023, the Appellant sought the leave of this court to be granted 14 days to file the Record of Appeal. The Respondents did not oppose the prayer for extension of time after which the matter was adjourned to 15<sup>th</sup> May 2023.

20. When the matter came up for further mention on 15<sup>th</sup> May 2023, the Appellant had still not filed the Record of Appeal. She requested for a further extension of time, by 3 days, to file the Record. This second request for the extension of time precipitated the filing of the Preliminary Objection that is the subject of this ruling.

21. This court takes cognizance of the overriding objective of the Elections Petition Rules which is to the effect that electoral disputes be determined in a timely and expeditious manner. Rule 4 specifically provides that: -

4. The Objective of the Rules

1. The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections petitions.
2. An election court shall, in the exercise of its powers under *the Constitution* and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1).

22. It is trite that all electoral disputes must be determined within the stipulated timeframes. The Court is however, under Rule 19 of the said Rules and Article 159 (2) of *the Constitution* granted the discretion to extend the statutory timelines on a case-by-case basis in order to ensure that justice is done to the parties. The said Rule stipulates as follows: -

19. Extension and Reduction of Time

1. Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.
2. Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined.

23. As I have already stated in this ruling, the Appellant filed the Memorandum of Appeal on 31<sup>st</sup> March 2023 and was, under the Rules, expected to file the Record of Appeal on or before 21<sup>st</sup> April 2023. As at 26<sup>th</sup> April 2023, when the appeal first came up for directions, the Record had still not been filed thus necessitating a 14 days extension of such time, at the Appellant’s request. It turns out that when the matter came up for mention on 15<sup>th</sup> May 2023, at least 5 days after the 14 days extension of time, the Record had still not been filed. On the said date, the Appellant asked for a further extension of time for



3 more days thus precipitating the present objection. It is noteworthy that the Record of Appeal was filed on 23<sup>rd</sup> May 2023, without leave, long after the expiry of the initial extension period of 14 days and the further 3 days that the Appellant requested for of 15<sup>th</sup> May 2023. This means that the Record was filed 32 days after the expiry of the 21 days period provided for under the Rules.

24. The Appellant attributed the delay in filing the Record to an alleged delay, by the Lower Court, in supplying her with the certified copies of the proceedings and judgment. The Appellant averred that the certified copies of proceedings and judgment were supplied to her on 18<sup>th</sup> May 2023.
25. A perusal of the Lower Court record however reveals that judgment and proceedings were duly certified on 14<sup>th</sup> March 2023, 7 days after the delivery of the impugned judgment. As I have already stated in this ruling, the Memorandum of Appeal was filed on 31<sup>st</sup> March 2023. I note that a certified copy of the Lower Court judgment was filed alongside the Memorandum of Appeal. This means that as at the time of filing the Memorandum of Appeal, the Appellant's counsel had already been issued with the certified copies of the proceedings and judgment.
26. I therefore find that the Appellant's assertion that the Lower Court delayed in supplying her with the said proceedings and judgment to be far from the truth. Moreover, the Appellant did not furnish this court with any proof, by way of a Certificate of Delay, to show that the delay was occasioned by the court. It is also noteworthy that at no time did the Appellant raise the issue of the alleged delay, by the Lower Court, in supplying her with the proceedings on the two occasions when the matter came up for mention. My finding is that the Appellant is not truthful when shifting the blame for the delay to the court.
27. It is trite that a party who comes to the court of equity seeking the exercise of the court's discretionary powers, must come with clean hands. It is also trite that the discretionary powers must be exercised judiciously and only in the most deserving cases. In the circumstances of this case and having regard to the above narration of the sequence of events that preceded the late filing of the Record of Appeal, without leave, I am not persuaded that the Appellant deserves the extension of time sought. In a nutshell, I find the delay in filing the Record was not only inordinate but was also not satisfactorily explained. I find that there is merit in the Preliminary Objection.
28. I find guidance in the decision in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR where it was held: -

“This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;



6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

29. It is my finding that the Appellant did not discharge the burden of laying the basis for the extension of time. In addition to the above findings, this Court notes that the Appellant did not take advantage of the 14 days extension she was initially granted to file the Record of Appeal and now wants to have a second bite at the cherry. This Court is not persuaded that the Appellant acted diligently and in good faith in pursuing this Appeal as can be seen in her repeated tardiness in filing the requisite documents within the prescribed timelines.

30. This Court is vested with jurisdiction by Article 87 of *the Constitution* and Section 75 (4) (a) of the *Elections Act* grants this court the jurisdiction to hear and determine appeals from the magistrates courts. The said provisions stipulate as follows: -

Article 87 - Electoral disputes

1. Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
2. Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.
3. Service of a petition may be direct or by advertisement in a newspaper with national circulation.

The *Elections Act* No. 24 of 2011

75.

4. An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be –
  - (a) filed within thirty days of the decision of the Magistrate's Court; and
  - (b) heard and determined within six months from the date of filing of the appeal.

31. The question which arises is whether this court has the jurisdiction to entertain the appeal having arrived at the finding that the PO is merited and that the Appellant has not made out a case for the extension of time within which to file the Record of Appeal. It is trite that jurisdiction is everything without which a court cannot make any further step in a matter. This was the principle enunciated in the celebrated case of Owners of the Motor Vessel “Lillian S” (1989) 1 KLR, where the Court held: -

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

32. A court can also not arrogate to itself jurisdiction that is over and above that which is stipulated by the law. (See Supreme Court in Samuel Kamau Macharia and Another vs Kenya Commercial Bank



and 2 Others [2012] eKLR). Election petitions are considered ‘special’ in nature as the court derives its jurisdiction from both *the Constitution* and Statute. In the case of Tyota Basu & Others vs. Debi Ghosal & Others 26<sup>th</sup> February 1982, the Supreme Court of India, pronounced itself on Indian electoral legislation (Representation of the People Act, 1951), and held as follows:-

“....An Election petition is not an action at Common Law, nor, in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory (sic) creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket.” (Emphasis added).

33. In *Lemanken Aramat vs. Harun Meitamei Lempaka & 2 Others [2014]* eKLR the court held 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”. (Emphasis added).

34. Similarly, the Supreme Court in California in *Silverbrand vs. County of Los Angeles* (2009) 46 Cal. 4<sup>th</sup> 106, 113 reversed the decision by the Court of Appeal to dismiss the appellant’s notice of appeal for being filed out of time, but concurred with it at part II of the judgment where it stated thus:-

“As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. ‘Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.’ (Sic) The purpose of this requirement is to promote the finality of judgments by forcing the losing party to take an appeal expeditiously or not at all.” (Emphasis added).

35. Flowing from the above authorities, I find that this court lacks the jurisdiction to entertain this appeal as the Appellant was unable to provide plausible reasons for the delay in complying with the timelines set for the filing of the requisite appeal documents. I find that the repeated failure by the Appellant to file the Record of Appeal within the stipulated timelines paints her as an indolent litigant who does not deserve the exercise of the court’s discretion in her favour. In the absence of a properly filed Record of Appeal, I find that the instant appeal incompetent thus stripping the court of the jurisdiction to entertain it. I hasten to add that it was incumbent upon the Appellant to aggressively pursue the appeal and file the Record of Appeal on time. I find that failure to comply with the strict timelines, without a justifiable cause, renders the subsequent appeal incompetent.

36. In conclusion I find that the Preliminary Objection raised by the 2<sup>nd</sup> Respondent is merited and I therefore uphold it. The Record of Appeal filed out of time without leave is hereby struck out. Consequently, I find that the instant Appeal is incompetent and is similarly struck out.



37. I make no orders as to costs in view of the fact that the Appeal did not proceed to full hearing.

**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS  
15<sup>TH</sup> DAY OF JUNE 2023.**

**W. A. OKWANY**

**JUDGE**

