



**Vickins v Okeyo & another (Election Petition Appeal
E001 of 2023) [2023] KEHC 18835 (KLR) (14 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18835 (KLR)

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

KW KIARIE, J

JUNE 14, 2023

BETWEEN

BONDO VICKINS APPELLANT

AND

ONGILI PETER OKEYO 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

RULING

1. There are two applications herein. The first application is dated March 6, 2023. In this application the 1st respondent moved the court by way of notice of motion. The application is premised on sections 1A, 1B and 3B of the *Civil Procedure Act*, cap 21 Laws of Kenya & articles 50 and 159 (2) (d)7 (e) of the *Constitution* of Kenya. He is seeking the following orders:
 - a) That this matter be certified as urgent and hearing date be fixed as priority.[spent]
 - b) That the memorandum of appeal dated February 10, 2023 and February 20, 2023 for the appellant and the 1st respondent respectively be struck out.
 - c) That the election appeal number E001 of 2023; Bondo Vickins v Peter Okeyo Ongili and Independent Electoral and Boundaries commission be struck out forthwith.
 - d) That cost of this application and the entire substantive appeal be provided for.
2. The application was premised on the following grounds:
 - a) The appellants have resorted to fritter time and this is an election petition, a subject of public interest that has a limited period for compliance and determination and which further delay may cause prejudice to the public and court.



- b) That the appellant have displayed an indolent character by delaying the cause of justice; they have failed to comply with the stipulated time in section 35 of *Election Petitions (Parliamentary and County Election) Rules 2017*. [Sic]
 - c) The bizarre motive of the appellant after successfully securing stay of execution is to deny the 1st respondent fruits of his judgment and to clog diary of court with frivolous appeal.
3. The appellant opposed the application and contended that:
- a) That the said application is premature, malicious, vexatious and an abuse of the process of the honorable court.
 - b) That the memorandum of appeal was filed on the February 10, 2023 together with the application for stay of execution and duly served upon the counsel for the 1st respondent.
 - c) That the said application for stay was anchored on the memorandum of appeal dated February 10, 2023.
 - d) That the applicant did not raise any objection on non-service of the memorandum of appeal and proceeded to concede to the prayers therein on the February 23, 2023.
 - e) That there was no inordinate delay on our part to compile and file record of appeal.
4. The 2nd respondent did not oppose the application.
5. Rule 35 of the *Election Petitions (Parliamentary and County Election) Rules 2017* provides as follows:
An appeal from the judgment and decree of the High Court in a petition concerning the membership of the National Assembly, Senate or office of county Governor shall be heard and determined under the *Court of Appeal Rules, 2010*.
6. This rule is inapplicable in this case. Rule 34 is the one applicable in the instant case. It provides:
- (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.
7. Sub rule 6 thereof states:
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.
8. The appeal having been filed on February 10, 2023, the prescribed 21 days elapsed on March 3, 2023. The Supreme Court in *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (petition 5, 3 & 4 of 2013 (Consolidated)) [2013]eKLR while applying article 159 of the *Constitution* at paragraph 218 observed:
The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle



of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. The time-lines for the lodgement of evidence, in a case such as this, the scheme of which is well laid-out in the *Constitution*, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner. Moreover, the *Constitution*, for purposes of interpretation, must be read as one whole: and in this regard, the terms of article 159(2)(d) are not to be held to apply in a manner that ousts the provisions of article 140, as regards the fourteen-day limit within which a petition challenging the election of a President is to be heard and determined.

9. I find that there was a delay of about four days, the interest of justice will militate against striking out of the appeal. The application is therefore dismissed. Costs will abide with the outcome of the appeal.
10. The second application is dated March 9, 2023. It was filed by the appellant and brought by way of notice of motion pursuant to rule 19 of the *Election Petitions (Parliamentary and County Election) rules 2017* and articles 50 and 159 (2) (d) of the *Constitution* of Kenya. The appellant/applicant is seeking the following orders:
 - a) That this matter be certified urgent and be heard expert in the first instance. [Spent]
 - b) The honorable court be pleased to extend the time for filing the record of appeal in the matter and deem the record of appeal filed on the March 7, 2023 as duly filed.
 - c) The honorable court do grant leave to the appellant/applicant to file supplementary record of appeal.
 - d) The costs of this application be in the cause.
11. The 1st respondent opposed the application on ground of noncompliance and failure to annex a certificate of delay. In view of my observation in the application dated March 6, 2023, I will allow the application. Costs shall abide with the outcome of the appeal.

DELIVERED AND SIGNED AT HOMA BAY THIS 14TH DAY OF JUNE 2023

KIARIE WAWERU KIARIE

JUDGE

