



**Osman v Galma & 3 others (Election Petition Appeal
E001 of 2023) [2023] KEHC 20921 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20921 (KLR)

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

**JN NJAGI, J
JULY 12, 2023**

BETWEEN

ARARU SADIA OSMAN APPELLANT

AND

GOLICHA SADIA GALMA 1ST RESPONDENT

**THE INDEPENDENT ELECTROAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

THE UNITED DEMOCRATIC ALLIANCE 3RD RESPONDENT

**THE CLERK OF THE COUNTY ASSEMBLY OF MARSABIT 4TH
RESPONDENT**

RULING

1. This ruling is in respect to two applications:

- (1) The 1st Respondent’s application dated 18th May 2023 seeking to strike out the appeal herein for lack of security for costs and failure to file Record of Appeal within the provided timelines, and
- (2) The Appellant’s application dated 24th May 2023 seeking leave of the court to file the Record of Appeal out of time and for the court to give directions on the deposit of security of costs on an appeal from subordinate court.

Both applications were opposed and were heard simultaneously.

2. The brief background facts of the two applications are that the Appellant filed a Memorandum of Appeal with this court on the 15th March 2023 appealing against the judgment of Hon. Christine Wekesa, Senior Principal Magistrate, in Marsabit Chief Magistrate’s Court Election Petition No. E001



of 2022. The Appellant was required under Rule 34 (6) of the Elections (Parliamentary and County) Petitions Rule, 2017 to file the Record of Appeal within 21 days after filing the Memorandum of Appeal. The Appellant did not comply with those time lines. After the expiry of the 21 days the court granted her a further 21 days to file the same but she never did so. The 1st Respondent thereupon filed the application dated 18th May 2023 seeking to strike out the appeal for failure to comply with the express provisions of the law and with the orders of this court and secondly for failure to deposit security for costs with the court since the lodging of the appeal.

3. In response to the above said application the Appellant filed the application dated 24th May 2023 seeking leave of the court to file the Record of Appeal out of time and for the court to give directions on the deposit of security for costs on an appeal from subordinate court. The application was based on the grounds that counsel for the appellant had applied to the election court to be supplied with copies of proceedings on the date of delivery of the judgment on the 1st March 2023. That there was delay in supplying the same and her counsel followed up the matter with a letter dated 6th April 2023. The same were not supplied. That the proceedings were prepared and certified on 17th May 2023 and supplied to her counsel on 23rd May 2023 together with a certificate of delay of even date. The appellant annexed to the application the letter dated 6th April 2023, the certificate of delay and a proposed Record of Appeal. She contended that the delay in filing the Record of Appeal was occasioned by the failure of the election court to issue her with a copy of proceedings and judgment on time.
4. In regard to deposit for costs the Appellant says that section 78 of the *Elections Act* 2011 does not provide direction on how and how much security for costs is to be deposited on appeal in relation to an appeal from the subordinate court challenging the election or nomination of member of county assembly. That the Registrar of the High Court did not direct him to avail or deposit security for costs at the time of filing the appeal. However, that she is ready and willing to deposit the same as shall be directed by this court.
5. The Appellant further contends that no prejudice has been suffered by the Respondents on account of failure to file the Record of Appeal or security.
6. The application dated 24th May 2023 was opposed by the 1st Respondent vide her replying affidavit sworn on 31st May 2023. The 1st Respondent deposes that the delay in filing the Record of Appeal was intentional as it could not have taken such an inordinate period to have proceedings typed and certified had the appellant been diligent in prosecuting her intended appeal. That the letter dated 6th April 2023 is doubtful for the reason that it is handwritten and not typed on the law firm's letterhead nor lodged through the e-filing portal as per practice directions in handling of all election petitions. That the document titled certificate of delay is not a certificate of delay for the same ought to be in a letter addressed to all the parties.
7. The 1st Respondent further says that the Appellant failed to intentionally deposit the security for costs and no efforts were made to remedy the situation two and a half months after the memorandum of appeal was lodged with the registry but is now attempting to shift the blame to the honourable court.
8. The applications were canvassed by way of written submissions.

Submissions for the Appellant

9. The advocates for the Appellant, Maingi Kamau & Co Advocates, submitted that this court has the power and discretion to extend the time-frame for filing the subject record of appeal. They cited Rule 19 of the Elections (Parliamentary and County) Petitions Rules 2017 which allows the election court to extend time within which anything under the rules may be done for the purpose of ensuring that



injustice is not done to any party. The Appellant cited the case of Lorna Chemutai & 4 others v Independent Electoral & Boundaries Commission & 2 others [2018] eKLR where the election court allowed an application to file the record of appeal out of time and placed its decision on the above said rule and the dictates of justice.

10. The Appellant also made reliance on the decision in the case of John Munuve Mati v Returning officer Mwingi North Constituency & 2 others (2018) eKLR where the Court of Appeal considered the question whether non-compliance with timelines occasioned any prejudice to any of the parties and consequently exercised its discretion to extend time for filing and serving the Notice of Appeal. The court stated that:

“24. There is no dispute that the appellant did not file and serve the notice of appeal within the period prescribed by the 2017 rules. Decisions of this Court abound where it has been held that the prescribed timelines as regards electoral dispute resolution must be strictly adhered to. (See for example Charles Kamuren v Grace Jelagat Kipchoim & 2 Others [2015] eKLR). We agree with those decisions particularly given the constitutional and statutory demand for timely resolution of disputes. Nevertheless, the 2017 rules themselves now expressly confer on us discretion to determine the effect of any failure to comply with the rules, taking into account the fact that justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timelines.”

11. The Appellant made further reliance on the Supreme Court decision in the case of Mawathe Julius Musili v Independent Electoral and & Boundaries Commission & another (2018) eKLR where the Supreme Court upheld the Court of Appeal decision for not dismissing a supplementary record of appeal which was filed out of time though noting that the Court of Appeal (Election Petition) Rules, 2017 did not have express statutory timeline for filing a supplementary record of appeal.
12. It was submitted that the delay in filing the record of appeal was not deliberate but inadvertent as the Appellant was unable to obtain the proceedings and a certified copy of proceedings on time.
13. On the failure to deposit security for costs, the Appellant submitted that failure to do so does not render the appeal incompetent as the issue is not provided for in law. That section 78(1) of the [Elections Act](#) which was relied upon by the 1st Respondent provides for costs during hearing of petitions and not on appeals. Similarly, that section 35 of the Elections Petitions Rules 2017 is silent on the issue of costs upon appeals of petitions from the lower court to the High Court. In this regard the Appellant relied on the decision in the case of Lorna Chemutai (supra) where it was held that:

53. In my view, and noting the absence of express provisions in the Rules requiring the deposit of security for costs in appeals in election petitions, I believe the court is left with the discretion to balance the competing rights of the parties: the right of a party to seek justice in an appellate process, and the right of a successful party in the court of first instance to be assured that it will receive payment of such costs as may be awarded in the event that the appeal is unsuccessful.

54. In the present case, the appellants argue that they wanted to utilise the deposit for security for costs in the lower court as security for costs in this appeal. However, noting that they were the unsuccessful party in that case, utilising such deposit would leave the costs of the successful party in that litigation unsecured. It has not been indicated if, and how much, was awarded in respect of costs in that matter.



55. Accordingly, while I am of the view that the appeal should not be struck out for failure to make a deposit as security for costs, I believe that the appellants must be required to deposit an appropriate amount in respect of the appeal.

14. The appellants further cited the decision in the case of *Odongo Victor Robert v Independent Electoral & Boundaries Commission & 2 others* [2018] eKLR where it was held that:

(11) All the foregoing cases referred to election petitions rather than appeals. Section 78 of the Election Act provides for deposit of security for costs in petition, and not appeals (see, *Joel N. Omwenga & others –vs- IEBC & others* (supra). The provision was apparently not intended to apply “Mutatis mutandis” to appeals arising from the election petitions. Otherwise the *Elections act* would have clearly indicated as much.

15. The Appellant also cited the Court of Appeal decision in *Lydia Mathia v Naisula Lesuuda & another* [2013] eKLR where the court held that section 78 of the *Elections Act* does not make provision for payment of costs in election appeals but is only confined to payment of deposit by petitioners in election petitions.

The Appellant urged the court to allow her application.

1st Respondent`s submissions

16. The 1st Respondent through the firm of Wangira Okoba & Co. Advocates, submitted that section 78 of the *Elections Act* 2011 and Rule 13(1) of the Elections (Parliamentary and County) Petitions Rules, 2017 make it mandatory for a petitioner in an election appeal to deposit security for costs. That the operative phrase is “shall deposit security”. Further that section 78 grants the court the residual power to strike out the appeal for failure to deposit security.

17. On failure to file the record of appeal, counsel for the 1st respondent submitted that Rule 19 of the Petitions Rules grants the court the power to extend the time for filing the record of appeal which the court did on the 30/3/2023. That on the 26/8/2022 the Chief Justice issued Practice Directions being Guidelines to facilitate management of electoral dispute resolution, Re:CJ/172 wherein it was stated that:

1. All election related disputes across the country shall be filed online on the e-filing platform... and thereafter proceed through the Case Tracking System.

18. Counsel submitted that the guidelines required parties to file all their pleadings electronically. That the Appellant’s letter dated 6/4/2023 was not filed electronically as required by the law and is thus of no probative value in the proceedings herein.

19. It was submitted that the Appellant failed to ensure that the record of appeal was placed before the court in time. That she is in contempt of court for failing to comply with the order of the court to file the record of appeal in the extended time of 21 days. Therefore, that the application is an afterthought made after the 1st respondent sought to strike out the appeal. The 1st respondent stressed the importance of time in hearing and determination of election petitions and cited the case of *Lemanken Aramat vs Harun Meitamei Lempaka and 2 Others* (2014) eKLR where the Supreme Court stated as follows:

“ 69. We have to note that the electoral process, and the electoral dispute resolution mechanism in Kenya, are 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 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.

20. 21. The 1st Respondent urged the court not to indulge the appellant further for having abused the court's discretionary power of extending the time required for filing the record of appeal and for failing to deposit security.

Analysis and Determination

21. I have considered the grounds adduced in support of the two applications, the grounds in opposition thereto, the pleadings and the submissions by the respective advocates for the parties. The issues for determination are whether the court should strike out the Appellant's appeal for failure to file the record of appeal within the required time and for failure to deposit security for costs. Conversely, the issue is whether the court should allow the application for extending time to file the record of appeal out of time and whether the court should order the appellant to deposit security for costs. I will consider the two issues separately.

Failure to file record of appeal within time*

22. The 1st respondent argued that the Appellant failed to file the record of appeal within the statutory period of 21 days and another 21 days granted to her by the court. That the application for extension of time was an afterthought after the 1st respondent filed an application to strike out the appeal. That the Appellant does not deserve the extension of time having failed to do so in the time extended to her by the court.
23. Counsel for the Appellant on the other hand argued that failure to file the record of appeal within time was occasioned by the election court which failed to supply her with copies of proceedings and judgment within time and the extended time despite requests to supply the same. It was further argued that failure to file the record of appeal within time is not fatal to the appeal as extension of time is allowed by Rule 19 of the Elections (Parliamentary and County) Petitions Rules 2017. Counsel cited several cases where courts granted extension of time for non-compliance with election rules.
24. Rule 19 of the Elections (Parliamentary and County) Petitions Rules 2017 provides as follows:
- “19(1) where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election 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 and determined.
25. This Rule therefore gives an election court the power to extend time within which an act is required to be done under the Rules. The rule is meant to ensure that no injustice is done in an election petition for failure to comply with the rules.
26. Rule 34(6) of the said Rules require the record of appeal to be filed within 21 days of the filing of memorandum of appeal. By the time the 1st Respondent filed the application dated 18th May 2023 the Appellant had not filed the record of appeal for a period of over two months. This was even after the



court had extended the time for filing the same for another period of 21 days. The question is whether the infraction was fatal to the appeal and whether the court can still extend the time to file the record of appeal.

27. The effect of failure to comply with the subject Rules or any order of the court made in an election petition is stated in Rule 5 to be as follows:

“ 5.

- (1) The effect of any failure to comply with these Rules shall be determined at the Court’s discretion in accordance with the provisions of Article 159(2)(d) of *the Constitution*.
- (2) A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and, for that purpose, to participate in the processes of the election court and to comply with the directions and orders of the election court.”

28. Article 159(2)(d) of *the Constitution* of Kenya 2010 provides: -

“ 159.

- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles: -
 - (d) justice shall be administered without undue regard to procedural technicalities; and.....”

29. Arising from these provisions, it is clear that an election court has unfettered discretion to extend time of doing something required to be done under the Rules. The court has to consider the interests of justice when deciding whether or not to grant an application for extending time. Like every exercise of judicial discretion, the decision has to be done judicially. “Judicial discretion” is defined in Black’s Law Dictionary, 9th Edition, to mean:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

30. The Supreme Court in the case of *Raila Odinga & 5 Others V IEBC & 3 Others 2013 (eKLR)*, set out what the court has to consider in a case for extension of time: -

- (a) “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.
- (b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.
- (c) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.
- (d) Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court.



- (e) Whether there will be any prejudice suffered by the Respondents if the extension is not granted.
- (f) Whether the application has been brought without undue delay and
- (g) Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

31. I have considered the law and the principles set above. The Appellant herein has given an explanation as to why she failed to file the record of appeal on time. She produced a certificate of delay showing that it is the court that delayed in supplying her with copies of proceedings and judgment. I am satisfied with the explanation. The failure to file the record of appeal was thus not deliberate. The appeal being one arising from an election petition, the court has to consider whether it is in the public interest to dismiss the application or to sustain it. Public interest would favour the appeal proceeding to its logical conclusion instead of it being dismissed on a technicality.

32. The High Court in the Lorna Chemutai case (supra) exercised its discretion in an election appeal case and allowed an application to file a record of appeal out of time. The Court of Appeal in the case of John Munuve (supra) similarly exercised its discretion to extend time of filing of a notice of appeal out of time. I am inclined to follow these decisions in this matter and grant the appellant an extension of time for filing the record of appeal.

Failure to deposit security of costs

33. Counsel for the 1st respondent submitted that section 78 of the *Elections Act*, 2011 and Rule 13(1) of the Elections (Parliamentary and County) Petitions Rules, 2017 make it mandatory for an appellant in an election appeal to deposit security for costs. The Appellant on the other hand submitted that the section is silent on whether an appellant for the position of member of county assembly should deposit security for costs.

34. Section 78 of the *Elections Act*, 2011 provides as follows:

“

“1. A petitioner shall deposit security for the payment of costs that may become payable by the petitioner not more than ten days after the presentation of a petition under this part.

(2) A person who presents a petition to challenge an election shall deposit-

- (a)
- (b)
- (c) one hundred thousand shillings, in the case of a petition against a member of a county assembly.

(3) Where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election court for an order to dismiss the petition and for the payment of the respondent’s costs;

The section has been interpreted in several decisions of the High Court and the Court of Appeal to mean that it is not applicable in election appeals. The Court of Appeal in the



case of *Lydia Mathia v Naisula Lesuud & Another* [2013] eKLR noted that there was no express provision in the said Act or Rules for security for costs in election appeals. The court observed as follows:-

“9. It is indisputable from the wording of section 78 of the Act as a whole and from the definition of a “petition” and “Election Court” in section 2 of the Act as well as from the provisions of the relevant election petitions rules, that the deposit for security for costs is solely confined to election petitions filed in an Election Court.....To import the provisions of section 78 as a general rule regarding provisions of security for costs in election disputes including appeals to Court of Appeal is tantamount to legislating which is not the function of the Court. It may well be that Parliament deliberately avoided legislating on deposit for security for costs in the appeals in the Court of Appeal as an election petition is quite distinct from an appeal. An appeal is confined to matters of law while an election petition involves, in many cases, a mass of factual evidence. By providing for a relatively large and a mandatory deposit for security of costs the Parliament intended, among other things, to filter out frivolous petitions.”

35. This position was followed by Mumbi Ngugi J. in *Lorna Chemutai* case (supra) and by J.R. Karanja J in *Odongo Victor Robert v Independent Electoral and Boundaries Commission & 2 others* (supra). I will add my voice to those cases and hold that there is no requirement under section 78 of the *Elections Act*, 2011 for an appellant in an election petition to deposit security for costs since the section is silent on the issue. The submission by Mr.Okoba that the section is mandatory even in appeals is not the correct legal position.

36. An election court has discretion to extend time to deposit security for costs. In the case of *Samwel Kazungu Kambi & Another v Nelly Ilongo County Returning Officer, Kilifi County & 3 Others* [2017] eKLR, the court was of the view that as long as cogent reasons were given, a court could exercise its discretion and permit the payment of security for costs. The court stated as follows:-

“My understanding is that an election petition can be revived, with the leave of the court, upon payment of the security deposit so long as the period for hearing the petition has not lapsed. Nothing would have been easier for Parliament than to use the language used in Section 96 in Section 78 if the intention was to completely take away the discretion of an election court to enlarge time. I therefore agree with Edward M. Muriithi, J that if sufficient cause is shown, an election court has jurisdiction to extend the time for depositing security for costs in an election petition.”

37. In *Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others* (2013) eKLR, Muriithi J. was of the view that the court has discretion under section 78 of the *Elections Act*, 2011 to extend time for deposit of costs in an election petition. In my view similar principles would apply when considering whether or not to order deposit for costs be paid in an election appeal. This becomes of critical importance when the rationale for payment of costs is taken into consideration.

38. The rationale for deposit of security for costs was stated in the case of in the case of *Patrick Ngeta Kimanzi* to be that: -

“Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground



for all the parties involved, in this case, the proportionality of the right of the petitioner to access justice vis-à-vis the respondent's right to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him. (see Harit Sheth Advocate v Shamas Charania – Nairobi Court of Appeal, Civil Appeal No.68 of 2008 [2010] eKLR.”

39. Thus, security for costs are meant to compensate the respondent in the event that he is awarded costs. Though there is no requirement for an appellant for member of county assembly to make deposit for security of costs, it is the view of this court that it is necessary in this matter for the court to make orders for deposit for security for costs. The respondents will not suffer any prejudice if such orders are made. If anything, the orders will be to their advantage. In the Lorna Chemutai case stated above the court ordered the appellant to deposit security for costs. In view of the foregoing, the application by the 1st respondent for dismissal of the appeal for failure to deposit security for costs is declined. Instead, I make the following orders:

- (1) That the proposed record of appeal filed herein shall, upon payment of the requisite fees, be deemed to be duly filed and shall form part of the record of the court.
- (2) That the Appellant makes a deposit for security for costs in the sum of Ksh.100,000/- within 3 working days from the date hereof failure to which the appeal shall stand dismissed.
- (3). Since it is the election court that delayed in supplying copies of proceedings and judgment to the appellant so as to enable her file the record of appeal, I order the costs of the two applications to abide by the outcome of the appeal.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 12TH JULY 2023

J. N. NJAGI

JUDGE

In the presence of:

Mr. Mwendani together with Mr. Behailu for Appellant

Mr. Wakoko for 1st Respondent

Mr. Akatch H/B for Mr. Abdulhakim for 2nd Respondent

Miss Kurgat H/B for Dr. Kamotho for 3rd Respondent

Court Assistant - Amina

30 days R/A.

