



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**ELECTION PETITION APPEAL NO. 1 OF 2019**

**CORAM: HON. R.E.ABURILI J**

**MAURAY ASEWE OUKO.....APPELLANT**

**VERSUS**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**ANDREW OMWENDE OMOLO.....2<sup>ND</sup> RESPONDENT**

**SIAYA COUNTY PEOPLE WITH**

**DISABILITY NETWORK.....1<sup>ST</sup> INTERESTED PARTY**

**ORANGE DEMOCRATIC MOVEMENT.....2<sup>ND</sup> INTERESTED PARTY**

***(Being an appeal from the entire judgment delivered by the Elections Court Principal Magistrate (Hon J.O.Ongondo) on 7<sup>th</sup> December, 2018 at Siaya in the Election Petition No. 2 of 2017 as consolidated with Election Petition No. 1 of 2017)***

**JUDGMENT**

1. The Appellant herein **MAURAY ASEWE OUKO** approached the Election court vide Election Petition No.2 of 2017. The petition was initially determined vide a Ruling dated 15<sup>th</sup> November 2017 on a preliminary point raised by the 1<sup>st</sup> Respondent **IEBC** through its notice of motion dated 29<sup>th</sup> September 2017,.

2. Aggrieved by the said Ruling, the Appellant herein together with **Judith Akinyi Ajwala**, the appellant in Election Petition Appeal No 2 of 2019 appealed against the said ruling by filling a memorandum of Appeal dated 13<sup>th</sup> December 2017 as was amended vide the memorandum of Appeal dated 5<sup>th</sup> April 2018. That appeal was heard and allowed by this court in the terms set out in the judgment dated 11<sup>th</sup> June 2018 wherein this court directed that the Elections court rehears the election petition on its merits. The court also ordered that each petition be prosecuted separately.

3. The parties returned before Hon Ong'ondo (PM) on the 10<sup>th</sup> August 2018, 23<sup>rd</sup> August 2018 and 28<sup>th</sup> September 2018, 23<sup>rd</sup> August and 28<sup>th</sup> September 2018 for the retrial and they were heard by way of written submissions.

4. In his judgment delivered on 7<sup>th</sup> December, 2018, the election court dismissed the appellant's petition with costs. Aggrieved by that determination, the appellant filed this appeal on 7<sup>th</sup> January 2019 setting out setting out the following grounds of appeal:

***1. That the learned Magistrate by rendering a consolidated judgment acted ultra vires and contrary to the judgment of the Superior Judge in Election Petition Appeal No. 1 of 2017.***

***2. That by rendering a consolidated judgment the learned Magistrate erred in law by going against an express directive by a Superior court while exercising its supervisory powers conferred to it under Article 165(6) of the Constitution thereby muddling the court record which was extremely prejudicial to the appellant.***

***3. The learned Magistrate erred in law and in fact by considering extraneous factors and matters which no party pleaded nor***

*submitted upon during the trial and as a result it led to the violation of the appellant's rights under Article 47, 48 and 50 of the Constitution.*

*4. The learned Magistrate erred in law by failing to consider the petitioner's list of issues and submissions filed thereby arriving at a biased decision.*

*5. The learned magistrate erred in law by anchoring his judgment on the compliance of the PPDT's decision in Complaint No. 380 of 2017 which decision the petitioner ably submitted that it was made without jurisdiction.*

*6. The learned magistrate erred in misapplying the decision in Civil Appeal No 12 of 2018 in Ali Noor Ali v IEBC & 2 others which dealt with contempt and no party pleaded or submitted on the issue of contempt.*

*7. The learned magistrate erred in law in failing to appreciate that the 2<sup>nd</sup> Respondent's nomination was not submitted within 45 days before the General elections as stipulated in the elections laws and regulations and thus denying the petitioner and the general public from challenging the said nomination*

*8. The learned magistrate erred in law by descending in the dispute*

*9. The learned magistrate erred in failing to appreciate that the petitioner/appellant herein is a PWD while condemning her to pay the respondents costs*

*10. The learned magistrate erred in law and in fact by failing to appreciate and consider the election laws, petitioner's petition and submissions on record thereby arriving at a decision which is biased and self-defeating.*

*11. The appellant urged this court to allow the appeal and set aside the judgment of the learned magistrate delivered on 7<sup>th</sup> December, 2018, the Deputy Registrar to avail the lead file for perusal, the court to proceed and determine the petition and costs of this appeal be provided for.*

5. The Respondents IEBC in their written submissions opposing this appeal first and foremost raised a point of law that touches on the jurisdiction of this court to hear and determine this appeal. They contended that this appeal was filed out of time contrary to the stipulations in the Elections Act, that the appeal be filed within 30 days from the date of delivery of judgment in the Elections Court. They also contended that the appeal and record of appeal were served out of time, beyond the timelines stipulated in the Rules. Reliance was placed on **Moses Mwigigi & 14 others v IEBC & 5 others [2016] eKLR; Nicholas Kiptoo Arap Salat v IEBC [2013] e KLR.**

6. The appellant on the other hand maintained that the appeal was filed within 30 days of the date of delivery of judgment in the Elections court. He added that even if the appeal was filed out of time, the delay is curable by application of Article 159(2) (d) of the Constitution which implores the court to administer justice without undue regard to procedural technicalities, and Rule 21 (1) of the Elections (Parliamentary and Election) Petitions Rules, 2017. He relied on the persuasive case **Gerald Iha Thoya v Chiriba Daniel Chai & another [2018] e KLR.**

7. Further, the appellant submitted that as the Elections Act is silent on extension of time, this court should apply the provisions of Order 50 of the Civil Procedure Rules and find that the period between 21<sup>st</sup> December and 13<sup>th</sup> January is excluded in computing time for doing anything that ought to be done within that period.

8. On the objection that the record of appeal was filed out of the stipulated period, the appellant conceded that the appeal was filed on 7<sup>th</sup> January 2019 but was served on the Respondents on the 25<sup>th</sup> January 2019. He urged the court to exercise discretion and apply Article 159(2) (d) of the Constitution and Rule 21(1) of the Elections (Parliamentary and County) Petitions Rules, 2017. He also relied on the **Gerald Iha Thoya decision** (supra).

9. I find it appropriate to first and foremost determine this issue of the appeal being filed out of time because the issue touches on the jurisdiction of this court to hear and determine the appeal herein on merit. Should I find that the appeal was filed out of time and that there can be no extension, then I must down my tools because without jurisdiction, a court of law acts in vain. See **Owners of Motor Vessel "Lilian S" v Caltex Oil (k) Ltd.**

10. Furthermore, it has severally been held that the issue of jurisdiction of a court flows from the Constitution, Statute or Precedent. It is also trite that without jurisdiction a court downs its tools. The Supreme Court of Kenya in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others Supreme Court Civil Application No. 2 of 2011 (UR)** held as follows on the issue of jurisdiction:

*"A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the Court cannot entertain any proceedings."*

11. On whether the appeal was filed out of time and if the answer is in the affirmative, whether the delay is curable, it is not in dispute that this appeal and Appeal No 2 of 2019 were filed on 7<sup>th</sup> January 2019 following the judgment by the Elections court delivered on 7<sup>th</sup> December 2018. Between those two dates are 31 calendar days, exclusive of 7<sup>th</sup> December 2018 and inclusive of 7<sup>th</sup> January, 2019. The Respondents contend that the two appeals were filed outside the statutory period for filing of elections petitions appeals and that such default

is not curable hence the appeals are amenable for striking out.

12. The appellant maintained that the appeal was filed within 30 days of the date of the decision appealed against as stipulated in section 75 (4) of the Elections Act. In addition, the appellant submitted that even if the appeals were filed out of time, the same is curable under Article 159(2) (c) of the Constitution which abhors invocation of procedural technicalities at the altar of substantive justice.

13. In the alternative, the appellant urged the court to find that in the event that the court can exercise its discretion and enlarge the time for filing of the appeal or that the Provisions of Order 50 of the Civil Procedure Rules which stipulate that in computing time, the 21<sup>st</sup> day of December to the thirteenth day of January in the year next following both days inclusive be excluded.

14. The appellant further submitted that albeit the appeal was served on 25<sup>th</sup> January 2019 on all parties directly affected by the appeal which was outside the 7 days stipulated in Rule 35 (5) of the Elections (Parliamentary and County Election) Rules and that albeit the record of appeal was not served on all parties within 21 days of filing of the appeal, Article 159(2) (d) of the Constitution as read with Rule 21 (1) of the Elections (Parliamentary and County Elections Rules) cure the default.

15. There is no doubt that the appeal was filed on 7<sup>th</sup> January 2019 whereas 30 days lapsed on 6<sup>th</sup> January 2019 calculating from 7<sup>th</sup> December, 2018 when the Elections Court rendered the impugned judgment

16. In my humble view, whereas an appeal filed within time but served outside the stipulated period may be cured by enlargement of time to deem the service thereof to have been effected within the statutory stipulations, an appeal must be filed within the 30 Days of the date of delivery of the judgment appealed against, as stipulated in section 75(4) of the Elections Act. In addition, the provisions of the Elections Act being so clear, the appellant cannot invoke the provisions of the Civil Procedure Act and Rules to call for the exercise of this court's discretion in enlarging time. Furthermore, no such application for enlargement of time was ever placed before this court for consideration.

17. It is now settled law that the procedure for filing and service of Election petitions is completely outside the purview of the Civil Procedure Act and Rules. The Elections Act is a comprehensive statute in terms of substantive law and procedural Rules and therefore unless otherwise expressly stated in the Act, the Civil Procedure Act and Rules are inapplicable.

18. Section 80 of the Elections Act provides that an election court may, in the exercise of its jurisdiction, decide all matters that come before it without undue regard to procedural technicalities. This section mirrors Article 159(2) (d) of the Constitution.

19. However, the well-established law is that election petitions **are sui generis** and are guided by the specialized regime of law and as such, the Civil Procedure Act and Rules are not applicable unless expressly provided for. See **Election Petition No. 11 of 1998 Samuel Kamau Macharia & Electoral Commission of Kenya (ECK)** in upholding the decision in **Election Petition No 1 of 1998**. See also **Stephen Kimani Gakenia v Francis Mwangi Kimani & 2 others**.

20. In **Petition No. 23 of 2017 Japheth Muroko & another v IEBC & 3 others [2017]e KLR** the court held:

*“This court has remarked that the Civil Procedure Rules, or any other law for that matter, cannot be brought in Election Petitions to supplement the Act and the Rules....from the set-up of the election petition legal regime right from the Constitution to the Act and Election Petition Rules, this court is of the view that the Civil procedure Act and Rules are excluded. The only place where the Civil Procedure may apply is on witness affidavits. Witnesses give affidavit evidence in election petitions. The process is clearly set out in Rule 18(7) which provides:*

*“The provisions of Order XVIII of the Civil Procedure Rules and Oaths and Statutory Declarations Act shall apply to affidavits under the rule.*

*The current Rules at Rule 12 (14) provide:*

*“The Oaths and Statutory Declarations Act Cap 15 and order 19 of the Civil Procedure Rules, 2010 (LN. No. 151/2010) shall apply to affidavits under these Rules.”*

21. In **Murathe v Macharia [2008]2 KLR 244** it was held:

*“Election petitions are governed by a special self-contained regime and the Civil Procedure Rules were inapplicable except where expressly stated. Moreover, Order 49 Rule 3A of the Civil Procedure Rules was a piece of subsidiary legislation promulgated by the Rules Committee for the purposes of the Civil Procedure Act and under the rules of statutory interpretation, they could not override the express provisions of an Act of Parliament.”*

22. Even assuming that this court retains residual inherent power to enlarge time for filing of the appeal and or that it can enlarge the time stipulated for service of the record of appeal on all parties directly affected by the judgment of the election court, I observe that there is a studious silence on why the appeal was not filed in time since the last day did not fall on a public holiday or on a weekend.

23. In **Lorna Chemutai and 4 others v IEBC and 2 others Kericho High Court Election Petition Appeal No. 1 of 2018[2018]e KLR**, one of the objections taken against the appeal was that the record of appeal was served out of time against Rule 35 (5) of the Elections (Parliamentary and County Elections) Petition Rules, 2018. The court Mumbi J observed:

**“Rule 34 (6) of the EPPCEPR requires that the record of appeal be filed within 21 calendar days. The computation of time is done in accordance with section 57 of the Interpretation and General Provisions Act which provides that in computing time for the purposes of a written law, unless the contrary intention...appears where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.**

**Rule 19 of the EPCPR allows the election court to extend time within which anything under the Rules may be done. It states:**

**“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 elections court, the elections 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.”**

24. On the jurisdiction of the High Court on appeal in election petition appeals to extend time, the court in the above case observed that Rule 34(10) of the Elections Rules provide that:

**“The High Court to which an appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the court from which an 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.”**

25. Nonetheless, the above decision by Mumbi J was dealing with the filing of the record of appeal out of time where the appeal itself was filed within time, unlike in this case where the appeal was filed out of time by one day and the record of appeal too was filed out of time and it is conceded by the appellant.

26. Further, whereas the filing of the record of appeal and service thereof are matters governed by the Rules, the time for filing of the appeal is governed by the Elections Act and there is no provision for enlargement of such time.

27. In **Jeremiah Nyangwara Matoke v IEBC & 2 Others [2018]e KLR**, the Court of Appeal (Githinji, Okwengu and Mohammed JJA) struck out with costs an appeal which had been filed and served out of time by only one day. The Court observed:

**“In Wavinya Ndeti v IEBC & 4 others, this court addressed the issue of extension of time under section 85 A and stated as follows:**

**“[12] The question whether the court has discretion to entertain any appeal filed out of time depends on whether the provisions of section 85 are mandatory or discretionary. The same language in section 85A is used in section 75 (4) of the Act in relation to appeals from the Resident Magistrates’ Court to the High Court. Section 85A deals with substantive and not procedural law. It confers both a right of appeal and jurisdiction to the Court of Appeal. There cannot be any doubt from the language and tenor of section 85A that Parliament intended the provisions to be mandatory. The court has not been given power to extend time.”[Emphasis added]**

28. At paragraph 29 of the above judgment, the Court of Appeal stated:

**“Needless to state that section 85A of the Elections Act that provides that the statutory timeline for the filing of an appeal is a mandatory provision. The appellant failed to file his appeal within the statutory timeline, and therefore failed to comply with the mandatory provision. The consequence of such noncompliance is that the appeal before us is incompetent. Accordingly, we allow the 3<sup>rd</sup> Respondent’s application and strike out the appellant’s Notice of Appeal and record of appeal. In the circumstances, we do not find it necessary to go into the merits of the appeal before us. The upshot of the above is that the appeal is hereby struck out with costs to the respondents.”**

29. Albeit none of the parties to this appeal seriously addressed the court on this issue of filing of the appeal out of time, I find this to be the most important issue for determination because as was stated by the Court of Appeal in the above cited **Jeremiah Nyangwara Matoke v IEBC & 2 Others** case, jurisdiction of an appellate court in election disputes is derived from the Constitution and the Elections Act.

30. In the above case, the Notice of appeal ought to have been filed by 1<sup>st</sup> March 2018 but the appellant filed the same on 2<sup>nd</sup> March 2018, one day out of time, like in the instant case where the appeal ought to have been filed on 6<sup>th</sup> January 2019 but instead it was filed on 7<sup>th</sup> January 2019, following the impugned judgment of 7<sup>th</sup> December, 2018 by the Elections Court. In addition, the record of appeal which ought to have been filed within 30 days was filed on 3<sup>rd</sup> April 2018, 10 days out of time. The court observed that for purposes of section 85A(1)(a) of the Elections Act, the appeal to the Court of Appeal in the cited case was deemed to be filed when the record of appeal is lodged at the Court of Appeal hence the appeal was lodged 10 days out of time. The Court of appeal struck out the appeal for being incompetent as it was filed out of time.

31. Section 75(4) of the Elections Act provides that **“an appeal under subsection 1A shall lie to the High Court on matters of law only and shall be 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.**

32. The above provision is similar to section 85 A of the Elections Act regarding the filing of an appeal from the High Court as an Elections Court to the Court of Appeal.

33. Albeit the Rule 21(1) of the Rules provide that *where any matter is to be done within such time as is prescribed in these Rules or directed by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend or reduce the time within which the thing shall be done with such conditions* as it may consider fit even though the period initially provided or granted may have expired and whereas subsection 2 provides that Subsection (1) does not apply in relation to the period within which a petition is required to be heard and determined, what is clear is that the provision does not refer to the time for filing of appeals because the time stipulated for filing of appeals is not stipulated in the Rules but in section 75(4) of the Elections Act.

34. Therefore, whereas the Elections Rules give discretion to the court to enlarge time, taking into account Article 159 (2) (d) of the Constitution, just as stipulated in section 80 of the Elections Act, the need to observe the timelines set by the Constitution or any other electoral law cannot be sidestepped. The exercise of such discretion is limited to actions that ought to have been taken under the Rules and remains subject to the Constitution and other Electoral laws.

35. The Court of Appeal further elaborated as follows in the **Jeremiah Nyangwara Matoke v IEBC & 2 Others** case, and I concur that Section 35 (1) of the Elections Act stipulates that an appeal from the Magistrates court under section 75 of the Act shall be in the form of a memorandum of appeal which memorandum shall within 14 days from the date of the judgment under subsection 3 be filed at the nearest High Court registry and upon such filing, the memorandum shall be served on all parties directly affected by the appeal within seven days(subsection 5). (6) The appellant shall within 21 days of filing of the memorandum of appeal file a record of appeal.

36. That being the case, this court cannot on its own motion or by way of submission in response to the serious objection by the 1<sup>st</sup> respondent amend the law regarding timelines and grant the appellant the orders sought.

37. In **Moses Mwigigi & 14 others v IEBC & 5 others [2016]e KLR**, the Supreme Court held that the competence of the appeal will be determined by whether the appeal was properly initiated.

38. In **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral & Boundaries Commission & 7 others [2015] eKLR**, it was held that:

***“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdiction prerequisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant’s notice of appeal as having been filed out of time in Silverbrand V County of Los Angeles [2009] 46 Cal. 4th 106, 113 stated inter alia:***

***“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. 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].

39. On whether Article 159(2) (d) of the Constitution cures the filing of an appeal out of time, the Supreme Court of Kenya pronounced itself on the purport and effect of Article 159 of the Constitution in **Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 5 others [2013] eKLR** by stating that:

***“Indeed, this Court has had occasion to remind litigants that Article 159(2)(d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case by case basis.”***

40. The Election Petition Rule 35 (3) (5) and (6) require an appellant who intends to challenge the decision of an elections court (Magistrate’s Court) to file a memorandum of appeal within **fourteen days** of the date of judgment. In addition, the appellant shall, within **seven days** of filing the memorandum of appeal, serve the memorandum of appeal on all parties directly affected by the appeal. The appellant shall then within **twenty one days**, upon filing of memorandum of appeal file a record of appeal which shall contain certain specified documents.

41. In my humble view, the above timelines are amenable for enlargement under section 80 and Rule 21(1) of the Rules and not the timelines given for the filing of the appeal and hearing and determination of the appeal.

42. As was stated by the Supreme Court in the **Samuel Kamau Macharia** (supra) a court’s jurisdiction flows either from the Constitution or from legislation or both and a court can only exercise jurisdiction as conferred by the Constitution or other written law.

43. Courts have made it clear that without an appeal being filed within the stipulated timelines, there is no jurisdiction in the court to hear and determine the appeal. In **Nyutu Peter Kamau v Independent Electoral and Boundaries Commission & 2 others [2018] e KLR**, the Court of Appeal stated citing the decision in **Musa Sirma** case stated:

***“[66] In applying the above holding to the present case, since there was no valid Notice of Appeal filed, it means that there was no proper appeal before the Court of Appeal and all proceedings on appeal were a nullity. The effect thereof is that the Appeal before us must be allowed for that reason only.”***

44. In **Petition 25 of 2018, James Lusweti Mukwe v Independent Electoral and Boundaries Commission & 2 others [2019] e KLR** the Supreme Court faulted the Court of Appeal for exercising discretion to allow the prosecution of an appeal where Notice of Appeal had been filed out of time.

45. I must emphasize that necessary vigor and diligence is required in filing and prosecuting election petitions. Filing of petitions and appeals at the tail end of statutory limitations is not in the best interest of the parties because lapses like the one witnessed in this appeal cannot be remedied.

46. For the above reasons I find and hold that this appeal as filed outside 30 days of the date of judgment in the elections court is incompetent I proceed to strike it out with Costs to the Respondents.

**Dated, signed and delivered in open court at Siaya this 1<sup>st</sup> Day of July 2019.**

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr. Ochanyo Advocate holding brief for Mr. Ochich T.L.O for the Appellant and Mr. Toto for the 1<sup>st</sup> Respondent

Mr. Oduol Advocate holding brief for Mr. Rakewa Advocate for the 2<sup>nd</sup> Respondent

N/A for Interested Parties but all parties present in court

CA: Brenda and Modestar