



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION APPEAL NO. 2 OF 2018

ALEXANDER KHAMASI MULIMIAPPELLANT/RESPONDENT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT/APPLICANT

AMANI NATIONAL CONGRESS2ND RESPONDENT

THE COUNTY ASSEMBLY OF KAKAMEGA3RD RESPONDENT

RULING

1. The appellant/respondent herein filed this appeal after his election petition at the Chief Magistrates' Court Kakamega was dismissed with costs to the 1st and 2nd respondents. Upon filing and serving the appeal, the 1st Respondent, the Independent Electoral and Boundaries Commission, filed a notice of motion dated 10th April 2018 seeking for orders that:

(1) the appeal herein be struck out for non-compliance with the provisions of the law.

(2) the costs of the application be met by the appellant.

2. The application is supported by grounds on the face thereof and the supporting affidavit of an employee of the 1st respondent one Salome Oyugi.

The grounds in support of the application are, first, that the appellant did not serve the 1st respondent with the memorandum of appeal within 7 days of the

filing of the appeal as required by Rule 34(5) of the **Elections (Parliamentary and County Elections)Petition Rules 2017** (herein referred to as the **Election Petition Rules**), and secondly that the record of appeal does not contain all the pleadings that were placed before the lower court in violation of the provisions of Rule 35(6) of the **Election Petition Rules**, specifically: a certified copy of the proceedings, signed copy of the judgment, a decree, 1st respondent's supplementary affidavit, 1st respondent's submissions and 2nd respondent's submissions.

3. The application was also supported by written submissions of the advocates for the 1st respondent/applicant(IEBC) and those of the 2nd respondent, **Amani National Congress**.

4. The application was opposed by the appellant vide his grounds of opposition dated 18th April 2018 and filed in court on 19th April 2018 on the grounds that:-

(a) The grounds stated in the notice of motion and the supporting affidavit cannot be a basis for striking out the appeal.

(b) The application runs contra to the spirit and objective of Article 159 of the Constitution and Rule 4 of the Election Rules.

(c) The application is mischievous, in bad faith, is frivolous and aimed at fettering the expeditious and just hearing of the appeal.

Admission-

5. The memorandum of appeal was filed on 2nd March 2018. It should therefore have been served by 9th March 2018. The appellant admits that

the memorandum of appeal was served on the 14th March 2018 which was 5 days outside the stipulated time of service of 7 days.

The appellant further admits that the record of appeal does not contain the full record of appeal as contested by the 1st respondent.

Submissions:

Submissions by the 1st respondent/applicant:-

6. The advocates for the 1st respondent, **Sing'oei, Murkomen & Sigei Advocates**, submitted that the Elections Act and the **Elections petition Rules 2017** were passed by Parliament pursuant to Article 87(2) of the Constitution that confers upon parliament the power to establish mechanisms for the timely settlement of election disputes. That any party who fails to comply with the Elections Act and rules made there-under has in effect failed to comply with the dictates of the constitution. That the expeditious resolution of election disputes is an overriding constitutional principle as recognised by the Supreme Court in **Ali Hassan Joho & Another Vs Suleiman Said Shahbal & Others(2014) eKLR**. That in the present case the appellant did not serve the memorandum of appeal within the stipulated 7 days of the filing of the appeal. That there is no excuse given for the delay. That the record of appeal does not contain the signed and certified copy of the judgment, the decree, certified copy of the proceedings, the 1st respondent's supplementary affidavit, the 1st and 2nd respondent's submission and the 2nd respondent's amended response. Therefore that the record of appeal is incomplete and does not conform with the record in the lower court.

7. The advocates further submitted that failure to annex a certified copy of the decree invalidates the entire appeal as was held by the Court of Appeal in **Boy Juma Boy & Others Vs Mwamlole Tchappu Mbwana & Another(2014) eKLR**. That the defects cannot be cured as the rules do not provide for any amendment of the record.

8. The advocates cited High Court decisions in the cases of **Martha Wangari Karua & Another Vs Independent Electoral and Boundaries Commission and 3 Others(2017) eKLR** and **Mbaraka Issa Kombo Vs Independent Electoral & Boundaries Commission & Others(2017) eKLR** where it was held that failure to comply with the election rules invalidates an election.

Submissions by 2nd respondent:

9. The advocates for the 2nd respondent, **Mukele Ngacho & Co. Advocates**, similarly submitted that compliance with the election rules is mandatory. That the appellant has not given any substantial reason as to why he failed to include the documents he omitted in the record of appeal. That the appellant has not made any effort to rectify the situation and is thereby undeserving of the court's discretion. The advocates relied on **Jimmy Mkala Kazungu Vs IEBC & 2 Others(2017) eKLR** and **Boy Juma Boy & 2 Others Vs Mwamlole Tchappu Mbwana & Ano.(Supra)** to support their submission that compliance with the election rules is mandatory.

10. The advocates further submitted that failure to comply with the mandatory provisions of the rules cannot be cured by **Article 159(2)(d)** of the Constitution since the appellant has not given sufficient reasons for the failure and has not attempted to remedy the same.

Submissions by the appellant:-

11. The advocates for the appellant, **Emily & associates Advocates** submitted that the late service of the memorandum of appeal by a few days is a procedural technicality that does not go to the root of the appeal. That the delay was unintended as has been explained in the affidavit of service of Kyalo Mumina. Further that the court has power to extend or limit time as provided under **Rule 19** of the **Elections Rules** as well as Section 59 of the **Interpretation and General Provisions Act** Cap 2. That the exercise of such powers should not be fettered by rules of procedure. The appellant relied on the decision of **Chitebwe J in Twaher Abdulkarim Mohammed Vs Mwatethe Adamson Kadenge & 2 Others(2015) eKLR** where the judge held that:

“The difference of time between 19/12/2014 and 8/7/2015 is quite minimal to make in a contentious issue. Had that matter been raised during the directions stage, this court could have exercised its powers under Rule 20 of the Elections Petition Rules and extend the time of service. More still, section 59 of the Interpretation and General Provisions Act, Cap 2, allows the court to extend time even if the application to extend time is made after the expiry of the allowed period. What is important is to focus on the overriding objective of the rules as per Rule 4 which is to facilitate a fair and affordable dispute resolution.”

12. The advocates further submitted that failure to include the indicated documents in the record of appeal cannot be a ground for striking out the appeal for the reason that such documents are already before the court by virtue of **Rule 34(8)** of the Elections Rules and that no prejudice has been suffered by the applicant warranting the striking out of the appeal. That the same documents can still be presented to the court by way of a supplementary record of appeal.

13. The advocates submitted that Article 159(2) (d) of the constitution calls for courts to strive to sustain rather than strike out pleadings purely on technical grounds. That the rules are subservient to the constitution and statutes hence the primary objective should be substantive justice as opposed to undue regard to procedural technicalities. The advocates cited rule 5(1) of the Election Rules that provides that **“the effect of any failure to comply with the rules shall be determined at the court's discretion in accordance with the provisions of Article 159(2) (d) of the constitution”**

The advocates relied on the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission & 6 Others(2014) Eklr** where the Court of Appeal held that striking out of pleadings ought to be employed as a last result and only in the clearest of the cases.

The Applicable law:-

14. The application is made under **Section 75** of the **Elections Act, 2011** and

Rule 34(6) of the **Elections Petition Rules, 2017**. Rule 34(5) of the Elections

Rules provides that:

“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”.

Rule 34(6) provides that:

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 pleadings;**
- (d) all affidavits, evidence and documents entered in Evidence before the magistrate, and**
- (e) the judgement appealed from and a certified copy of the decree.**

Rule 4 Provides that:

- (1) The objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolution of election disputes.**
- (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)**

ANALYSIS AND DETERMINATION

15. The starting point is Article 159(2)(d) of the constitution that requires courts to administer justice without undue regard to procedural technicalities. Pursuant to the provisions of that article, section 80(d) of the Elections Act, 2011, requires an election court to decide all matters that come before it without undue regard to technicalities. Rule 5 of the Elections Rules 2017, states that the effect of any failure to comply with the rules shall be determined at the court’s discretion in accordance with the provisions of Article 159(2) (d) of the constitution

16. It is not in dispute that the appellant served the memorandum of appeal 5 days late contrary to the provisions of Rule 34(5) of the Election Rules that requires the memorandum to be served within 7 days of the filing of the same. Further, there is no dispute that the record of appeal is not complete as it does not contain all the required documents as stipulated by Rule 34(6) of the Elections Rules. The question then is whether the appeal should be struck out for non compliance with the provisions of the Elections Rules.

Question of Rules of Procedure Versus Substantive justice:-

17. It is to be recognised that election petitions are special disputes that are governed by the provisions of the constitution, the Elections Act, 2011 and Elections Petition Rules, 2017. Compliance with the provisions of the Act and the rules is of utmost importance. The question that the courts have grappled with in recent years is whether the election rules are mandatory and whether non-compliance with the rules should lead to a petition being struck out.

18. There has been two schools of thought on the issue. One school of thought has been that the provisions of the election rules are mandatory and that non- compliance should lead to a petition being struck out. This view was held in such High Court decisions as in **Amina Hassan Ahmed Vs Returning Officer Mandera County & two Others(2013) eKLR**, **Jimmy Mkala Kazungu Vs Independent Electoral and Boundaries Commission & two others(2017) eKLR**, **Mbaraka Issa Kombo V Independent Electoral Commission and 3 Others (2017) eKLR** and **Martha Wangari Karua Vs Independent Electoral and Boundaries Commission & 3 others (2017) eKLR** where the courts struck out the petitions as being incurably defective for non compliance with Rule 8(1) (c) of the Elections Rules and held that the rules of procedure in electoral disputes are not mere technical procedural requirements but go to the root and substance of the matters prescribed thereupon.

19. On the other hand there are some High Court decisions that have held the view that failure to comply with the election rules is not fatal to

the petition and that a court can excuse the infraction. Examples are High Court decisions in **Caroline Mwelu Mwandiku Vs Patrick Mweru Musimba & 2 Others(2013) eKLR**, **Washington Jakoyo Midiwo Vs Independent Electoral and Boundaries Commission and 2 Others(2017) eKLR**, **Shukra Hussein Gure Vs Independent Electoral and Boundaries Commission & 2 Others(2017) eKLR** and **Samuel Kazungu Kambi V Independent Electoral & Boundaries Commission and 3 Others (2017) eKLR** where the respective High Court judges declined to strike out the petitions for failure to comply with the provisions of the elections rules and held the view that the petitions ought to be determined on merits.

20. The issue of rules of procedure versus substantive justice has been addressed by the Court of Appeal in several cases. In **Boy Juma Boy and 2 Others V Mwamlole Tchapu Mbwana and Another (2014) eKLR** where a notice of appeal was not served in accordance with the Court of Appeal rules, the court stated that the rules were mandatory and that the respondent was obligated to comply with them. The court consequently struck out the appeal for failure to serve the notice of appeal within the stipulated time.

21. In the case of **Nicholas Kiptoo Arap Korir Salat Vs Independent Electoral and Boundaries Commission and 6 Others (Supra)** where the appellant in the case had not served the notice of appeal on the respondents within 7 days as required by the Court of Appeal Rules Ouko, JA was of a contrary view and in a majority judgment held that:

The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness

I reiterate what the court said in Githere V Kimungu(1976-1985) E.A 101, that:-

“... the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case”.

Essentially the rules remain subservient to the Constitution and statutes. Article 159(2) (d) of the constitution, Section 14(6) of the Supreme Court Act, Section 3A and 3B of the Appellate Jurisdiction Act, Section 1A and 1B of the Civil Procedure Act and Section 80(1) (d) of the Elections Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.

It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities”.

22. More recently the issue has been addressed by the Court of Appeal in **Hon. Martha Wangari Karua Vs The independent Electoral and Boundaries Commission & 3 Others(2018) eKLR** where court reviewed the conflicting decisions from the High Court on interpretation of rules of procedure in respect to rule 8(1) of the Elections Rules. The court agreed with the sentiments expressed by Ouko JA in the **Nicholas Salat** case and endorsed the view that summary dismissal of petitions could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action or where the procedural infraction goes to the root of the dispute. Further that courts should endeavour to sustain a petition so that the issues in dispute are determined on merits. The court rendered itself thus:-

There is a positivist school of thought on the issue. One of the leading judgement in this school of thought was rendered by Koril J in the case of **Samwel Kazungu Kambi & Another Vs Independent Electoral and Boundaries Commission and 3 Others(2017) eKLR who held the view that whereas there is need for strict compliance with the laws and rules governing the resolution of election dispute, the court ought to be mindful that the current constitution dispensation requires substantive justice to be done and that unless an election petition is so hopelessly defective and cannot communicate all the complaints and prayers of the petitioner, the court shall ensure that the petition is heard and determined on merit.**

As stated herein above, Maina J in **Jakoyo Midiwo case was of similar view as that of Koril, J. On our part, we entirely agree and endorse the position taken by the two learned judges. We say so because our current constitutional dispensation leans towards determination of disputes on merit. Therefore, taking into consideration our historical background which is replete with determination of disputes on technicalities, and now the legal underpinning provisions of superiority of our constitution value system, we think that the route taken by the learned judges to dismiss petitions on technicalities that do not affect the jurisdiction is not a reflection or manifestation of our current jurisprudence and justice system.**

In deed one could go so far to say the superiority of the constitutional value system is the central premise or foundation of our 2010 constitution. The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of the constitution implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence.

The jurisprudence from our courts in interpretation of the constitution has been to avoid summary dismissal of petitions and that power could only be exercised as a last resort where the petition is demonstrated to be hopeless or disclosing no reasonable cause of action”

23. While commenting on the equivalent of rule 8(1) (c) after the 2013 general elections, Kimondo J. in **William Kinyanyi Onyango V Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR** stated that:-

“In my considered opinion, the petition Rules 2013 were meant to be handmaidens, not mistresses of justice. Fundamentally, they remain subservient to the Elections Act 2011 and the constitution. Section 80(1) (d) of the Elections Act 2011 enjoins the court to determine all matters without undue regard to technicalities. Rules 4 and 5 of the Petition Rules 2013 have in turn imported the philosophy of the overriding objective of the court to do substantial justice. Certainly, Article 159 of the constitution would frown upon a narrow and strict interpretation of the rule that may occasion serious injustice. This is not to say that procedural rules will not apply in all cases, only that the court must guard against them trumping substantive justice...”

24. I think that the two Court of Appeal decisions in the **Nicholas Salat case** and **Martha Karua case** have, in my view, stated the correct law as regards procedural law viz a viz substantive justice. The principles which emerge from the written and case law are that:-

- (1) It is of utmost importance for parties in an election petition to comply with election rules.
- (2) The provisions of the constitution and the Elections Act override those of the election rules.
- (3) where there is non-conformity with the election rules, an election court has discretion to excuse the infraction.
- (4) The court could only dismiss a case for non-conformity with the rules when the infraction complained of has caused prejudice to the other party.
- (5) In that case it must be demonstrated that the infraction complained of goes to the root of the dispute that is before the court.
- (6) The court can dismiss a case for non-conformity with the election rules in a proper case.
- (7) The court should place substantive justice over procedural considerations especially where the infraction is curable.
- (8) Striking out an election petition is a draconian measure that should be employed sparingly and as a last resort.

25. Where in an election petition a party fails to comply with the elections rules, the court is required to determine the issue at its own discretion in accordance with the provisions of Article 159(2) (d) of the constitution. Such exercise of judicial discretion should aim at doing justice to the parties as was held by the Court of Appeal in **Alex Wainaina t/a John Commercial Agencies Vs Janson Mwangi Wanjihia (2015) eKLR**, where the court held that:-

The principles governing the exercise of judicial discretion were set out by Ringera JA(as he then was) in the case of Gathiaka & Vs Nduriri(2004)Eklr 67. These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the court, that is to do justice to the parties before it.

26. Applying the above stated principles in this case, it is clear that the memorandum of appeal was served on the 1st respondent a few days late. The 1st respondent has not shown that he suffered any prejudice by the late service of the memorandum of appeal. The infraction of 5 days late was not inordinate and is excusable.

27. The record of appeal is not complete as it does not contain all the documents as required by Rule 34(6) of the Election Petition rules. This however is not a valid ground for striking out the petition as the documents that are not in the record of appeal are deemed to be before the court by dint of the provisions of Rule 34(8) of the Election Rules that provide that:-

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.

That then cures the defect of the documents that are not in the record of appeal.

28. I have perused the appeal. The same raises serious issues. I find that this is not a proper case for striking out on the basis of failure to comply with the provisions of the Elections Rules. The failure to do so is a procedural technicality that does not go to the merits of the appeal. There are no serious defects in the appeal that call for its striking out. As noted above, striking out of a case should only be done as a last resort and only in the clearest of the cases. It is the dictate of our constitution that rules of procedure should not be elevated above the requirement of doing substantive justice to parties who come before our courts. The respondents in the appeal will not suffer any prejudice

by the matter proceedings to full hearing. The appellant on the other hand will suffer untold prejudice if the matter is struck out on a technicality in that the issues he complains of will remain unheard. The court has to bear in mind that the objective of the election petition rules is to facilitate the just and expeditious resolution of election disputes. It is not just and proportionate for the petition to be struck out for failure to comply with minor rules of procedure. In the facts of the case the court is called upon to accord precedence to substance over form so as to save the appeal so that it can be determined on merits. After all, rules are handmaidens and not mistresses of justice.

29. In the foregoing and for the above said reasons, there are no meritorious grounds for striking out the appeal. The notice of motion dated 10th April 2018 is thereby dismissed with costs to the appellant/respondent to be paid by the 1st respondent/ applicant.

Delivered, dated and signed at Kakamega this 10th day of May 2018

J. NJAGI

JUDGE

In the presence of:

Ngome Holding Brief for Rono.....for 1st Respondent/Applicant

Otieno Holding brief for Miss Khadenyi.....Appellant/Respondent

Ngome.....for 2nd Respondent

Ruto.....Court Assistant

Parties absent