



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL (ELECTION) APPEAL NO. 2 OF 2018

HAFID MAALIM IBRAHIM.....APPELLANT

VERSUS

ECONOMIC FREEDOM PARTY.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...2ND RESPONDENT

ISSACK DAHIR ABDI.....3RD RESPONDENT

HALIMA BILLOW OMAR.....4TH RESPONDENT

RULING

On 5th March 2018 by consent of all counsel of the parties wherein Mr. Nyaberi was present for the appellant and Mr. Wachira was present for the 2nd respondent and held brief for counsel for the 1st, 3rd, and 4th respondents it was recorded as follows-

1. By consent the record of appeal filed is deemed to be proper, subject to the court registry calling for the Mandera trial court file.
2. By consent the appeal will proceed through filing and highlighting written submissions. The appellant has 14 days from today to file and serve written submissions, and the respondents 14 days from service to file and serve their written submissions. The appellant will have 7 days from service of respondents written submissions to file supplementary submissions.
3. Highlighting on 12/4/2018.

Instead of complying with the above consent however counsel for the appellants on 20th March 2018 after filing written submissions to the appeal filed an application by way of Notice of Motion under section 1,1A,3,3A of the Civil Procedure Act(Cap.21) and Order 42 rule 13 of the Civil Procedure Rules and Article 159(2) of the Constitution of Kenya 2010 seeking that the appellant's record of appeal dated 19th March 2017 (should be 2018) and filed on 20th March be deemed as properly filed, and any other orders the court may deem just and fair.

On 6th April 2018 counsel for the 2nd respondent filed grounds of opposition to the application in the following terms-

1. The application is premised on the wrong provisions of the law.
2. The court does not have jurisdiction to entertain the appeal.
3. The memorandum of appeal has been filed out of time.
4. The record of appeal has been filed out of time.
5. The affidavit to the application is misleading.
6. The application if granted will be prejudicial to the 2nd respondent.

Counsel for the 2nd respondent also filed a notice of preliminary objection under section 75(4) and Rule 35(3) and (6) (a) of the Elections (Parliamentary and County) Petition Rules 2017 stating that the record of appeal was incomplete as it did conform to the mandatory provision of the rules, and that consequently this court did not have jurisdiction to hear the appeal filed.

Counsel for the 1st, 3rd and 4th on the other hand on 5th April 2018 filed a notice of preliminary objection to the application and the record of appeal dated 6th February 2018 under the following grounds-

1. That this court lacks jurisdiction to entertain the appeal.
2. That the appeal is incompetent, fatally and incurably defective for offending the salient and mandatory provisions of Rule 34(6) of the Elections (Parliamentary and County Elections) Petition Rules.
3. That the is incompetent and fatally defective since the law does not recognize amendments of a record of appeal and/ or extension of time to file a record of appeal under section 75(4) of the Elections Act and Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules.
4. That election petitions are sui generis and are guided by the specialized regime of the law. The provisions of the law cited by the appellant do not support the nature of the application being made. The Civil Procedure Rules are not applicable unless expressly provided for.
5. The application is misconceived and lacking in merit. It is an ingenious attempt to advance a cause whose doors have been shut. To allow the application will amount to amending the law to extend the time for filing, hearing and determination the petition/ appeal in violation of Rules 19(2) and 34(6) and (11) of the Elections (Parliamentary and County Elections) Petition Rules 2017 and section 75(4) of the Elections Act wherein the discretion of the court cannot come to his aid.
6. The application is misleading and the applicant is dishonest and undeserving of any court's favours for dishonestly misleading the court that the amended record of appeal dated 19th March 2018 was only intended to introduce a record of appeal sixty (60) days after the judgment had been delivered by the subordinate court.
7. That the application and the appeal are incompetent, bad in law, misconceived and an abuse of the court's process whereas they seek to introduce an appeal through the back door.

Counsel for the parties argued the application and objections orally on the 12th April 2018 which was the scheduled date for hearing the appeal. All submissions having been considered, this is an application requesting this court to exercise its discretionary jurisdiction.

I will start by saying that the Civil Procedure Act and Rules do not apply to election petitions and appeals which are governed by the special provisions of the Elections Act and Rules unless specifically so provided. However even where Elections Act and Rules are silent, the court seized of the matter can make decisions and give directions that serve the broader interests of administering substantive justice under Article 159(2) of the Constitution of Kenya 2010.

The present application for amendment of the record of appeal will fail for the following reasons. First, it was recorded in court by consent that the previous record of appeal was properly filed and on record and a date for hearing of the appeal and the mode of hearing agreed. Appellant's counsel who brought the present application has not indicated any change of position or even discussions held between counsels before filing the application. A consent being in the nature of a contract cannot be changed at the unilateral decision of one party.

Secondly, directions had already been given by the court in the appeal before the application for amendment of the record of appeal was filed. In my view the taking of directions which is a statutory requirement in election appeals marks the closure of all pleadings. In my view amendments if any to the documents or bundle of documents to be relied upon in the appeal should have been dealt with at directions stage. It cannot be dealt after directions have been given.

The third reason why the application for amendment of the record of appeal to be relied upon will fail is the strict statutory timelines set for hearing and determination of election appeals. Such amendments if allowed after directions are given will definitely affect the responses of the respondents precipitating possible delays in disposal of the appeal in addition to prejudicing the respondents who will be required to respond to issues which they did not anticipate in the original record of appeal from this new ambush.

I thus dismiss the application and the appeal will proceed only on the original record of appeal filed by the appellant. Appeal will be heard this May 2018. Costs will follow the determination.

Dated and delivered at Garissa this 15th May 2018.

George Dulu

JUDGE