REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 76 OF 2013

PAUL KURENYI LESHUEL……..……APPELLANT

VRESUS

EPHANTUS KARIITHI MWANGI……..1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES c

COMMISSION……2ND RESPONDENT

(Being an appeal against judgment and decree in Nanyuki Chief Magistrates' Court Election Petition No. 1 of 2013 (Hon. V.K. Kiptoon delivered on 5th September, 2013)

JUDGMENT

The appeal herein arises out of a successful election petition by the 1st respondent challenging the election of the appellant as a member of the County Assembly for Mukogodo East Ward in the General Elections held on 4th March, 2013. According to the appellant, the magistrates' court before which the petition was heard determined that the elections for the representation of that particular ward were not transparent, free and fair; accordingly it nullified the elections and held that the appellant was not validly elected.

The appellant appealed to this court challenging the decision of the magistrates' court; in the memorandum of appeal filed in court on 30th September, 2013, the appellant also indicated that besides the court's judgment, he is also appealing against several rulings which appear to me to have been delivered on several interlocutory applications within the main petition. I would think that if the appellant was aggrieved with any of the orders issued by the court in the course of the trial, his grievances should be taken up in a single appeal against the final determination of the court; I will not, therefore, deliver separate decisions on each of the orders issued as if there are separate and distinct appeals against each of those orders but consider the judgment delivered by the court as a culmination of the events, including the applications out of which these orders arose, that constituted the entire trial. In any event, under **section 75(A)** of the **Elections Act, 2011,** which provides for appeals against decisions of the resident magistrates' courts in election petitions, it is only appeals against final rather than interlocutory decisions that are envisaged.

Directions were taken before my predecessor in the matter, Hon. Mr Justice Wakiaga on 31st January, 2014 to the effect that the record was in order and that the appeal was to be disposed of by way of written submissions; parties eventually filed and exchanged their written submissions.

After considering the submissions one fundamental legal issue pops up which, in my humble view, should be disposed of as a preliminary point; this issue relates to the competency (or lack thereof) of the appeal.

It can be bifurcated into two limbs the first of which is whether the appeal was filed within the limitation period while the second limb is concerned with the legal effect of the omission from the record the decree appealed from. The answers to these questions go the appellate jurisdiction of this court and thus it is only appropriate that they should dealt with at the preliminary stage; a *fortiori*, the resolution of both or any these questions may very well dispose of this appeal.

Time of filing appeals:

At page 427 of the appeal record, it is apparent that the decision appealed against was delivered on 5th July, 2013; the next page, however reflect the date of 5th September, 2013 as the date of the delivery of the judgment. The record of the proceedings sheds some light on which of the two dates judgment must have been delivered; it shows that the judgment was to be delivered on 5th September, 2013 and therefore this latter date must be the date material to this appeal. If that is agreed, it follows that the appeal was filed at least twenty-four (24) days after the judgment was delivered. The question then is, whether the appeal was filed within the limitation period for filing of appeals arising out of election petitions in the magistrates' court. I am of the view that there is no better place to find the correct answer than from the law itself; the relevant provision is **section 75** of the **Elections Act, 2011** whose relevant parts provide as follows:-

75. County election petitions

> ***(1) …***
>
> ***(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.***
>
> ***(2) …***
>
> ***(3) …***
>
> ***(a) …***
>
> ***(b) …***
>
> ***(c) …***
>
> ***(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—***
>
> ***(a) 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.***

It is clear that the appeal from the resident magistrates' court to the High Court should be filed within thirty days of the date of judgment; the appellant's appeal was filed within this period and the argument by the 1st respondent's counsel that the appeal was filed out of time is does not find any basis in Act. Counsel cited **rule 34 (2)** of the **Elections (Parliamentary and County Elections) Petition Rules, Legal Notice No. 54 of 2013**, which provides that the memorandum of appeal should be filed within fourteen days from the date of the judgment. The rule appears to be in conflict with the express provisions of **section 75** of the **Act** but since those **Elections Petitions Rules** are only legislation subsidiary to the Act, the latter prevails.

The omission of the decree from the record:

Rule 34. (5) of the said the **Elections (Parliamentary and County Elections) Petition Rules, 2013** is

categorical that within twenty one days of the date of filing the memorandum of appeal, the appellant must file a record of appeal and that record must contain the following documents:-

a. memorandum of appeal;
b. pleadings;
c. typed and certified copies of the proceedings
d. all affidavits, evidence and documents put in evidence before the magistrate; and
e. ***signed and certified copy of the judgment appealed from and a certified copy of the decree***. (Underlining mine).

It appears that the judgment in the record was not signed as required by the rules. Of crucial importance, however, is the fact that the record does not contain a certified copy of the decree or any form of decree for that matter. A decree in an election petition would ordinarily constitute the declaration of whether or not the appellant was validly elected; in this case it is the appellant's position that he was declared not to have been validly elected. For purposes of this appeal that formal declaration of the outcome of the petition is a mandatory document without which no valid appeal lies. In the absence of this formal declaration or the decree, the appeal is incompetent and fatally defective.

I have carefully considered the appellant's submissions and nowhere in those submissions has he addressed the absence of this vital document from his record; I would take it that he has no plausible answer, and I doubt any exists, for this fatal omission.

The Court of Appeal (Kneller, Hancox JJA & Platt Ag as they then were) in **Civil Appeal No. 7 of 1983, Municipal Council of Kitale versus Fedha (1983) eKLR** held that failure to include the decree appealed from in the record of appeal rendered the appeal incompetent. The judges went further to state that the omission could not even be cured by including the decree in a supplementary record because, in their view, a supplementary record cannot comprise the documents which ought to have been included in the original record in the first place.

While the judges in the ***Municipal Council of Kitale case*** may have had the provisions of the **Civil Procedure Act** and the Rules made thereunder in mind, the same principle that informed their decision in that case applies with equal force to an appeal against a decision from an election court; the decree appealed from is as relevant and necessary in an appeal arising from an election petition as much as it is in any other appeal arising from ordinary civil suit.

One may ask why so much importance is attached to this document; the answer appears to me to be that an appellate court can only uphold or overturn what has been demonstrated to exist. As far as election petitions are concerned, it must be demonstrated that an order or a declaration has formally been made by the election petition court under **section 75** of the **Elections Act**. And I should think this is the reason why **rule 34. (5)** is couched in mandatory terms that the record of appeal *shall* contain the decree appealed from.

Much as this requirement is contained in the rules, it is not, in my humble view, a requirement that can merely be dismissed as a procedural technicality that may be swept under the carpet; the question whether or not there is indeed an appeal which calls for the appellate court to exercise its jurisdiction in that respect goes to the root of the appeal itself for without an appeal, properly so called, any attempt to invoke and exercise that jurisdiction would be in vain.

For the reasons I have set forth, I am inclined to strike out this appeal; it is so struck out with costs to the first respondent. The second respondent does not deserve any costs for the simple reason that it associated itself with the appeal most probably because it managed the elections that are alleged to have been nullified. It is so ordered.

Dated, signed and delivered in open court this 8th day of May, 2015

Ngaah Jairus

JUDGE