



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

ELECTION PETITION APPEAL NO. 3 OF 2013

SHARIFF ABDULKADIR ABDEREHMAN.....APPELLANT

VERSUS

ABDALLAH CHIKOPHE.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION2ND RESPONDENT

MANASE SAMWEL GUYO.....3RD RESPONDENT

RULING

The applications

1. Before me are two applications brought as a challenge to the appeal herein. The first was filed by the 1st and 2nd Respondents on 26th November, 2013. It seeks to strike out the appeal on grounds *inter alia* that:

“1. The appeal herein is fatally defective for being filed out of time and further failure to comply with the law regarding service of appeals.

3.The appeal if allowed will further subvert the constitution and election laws.

4.The appeal is against the legitimate expectation of both the public and the respondents herein and will prejudice them irreparably.

10.The above notwithstanding the appeal was filed by a firm of advocates that is not on record for the appellant and or not properly on record.”

- The Notice of Motion is expressed to be brought under Article 87(1) of the Constitution and Rule 34 of The Elections (Parliamentary and County Elections) Petition Rules. It is supported by the affidavit sworn by Abdallah Chikophe (1st Respondent) on his own behalf and on behalf of the 2nd Respondent. The affidavit expands upon the grounds on the face of the Notice of Motion.
- The second Notice of Motion was filed by the 3rd Respondent on 3rd December, 2013 and seeks the same orders as the first application. In addition to Article 87(1) of the Constitution and Rule 34 of the The Elections (Parliamentary and County Elections) Petition Rules, the applicant invokes Order 9 rule 9 of the Civil Procedure Rules. With regard to the latter grounds 1 and 2 state:

“1. The appeal is fatally defective for being filed contrary to Order 9 rule 9 of the Civil Procedure Rules.

2. That upon delivery of judgment in election petition number 1 of 2013 in Garsen no leave was granted for the firm of Richard O. & Company Advocates to come on record for the appellant neither was there any consent filed and adopted by the honourable court allowing the said firm to be properly on record for the appellant.” (sic)

- The remainder of the grounds repeat grounds in the first Notice of Motion. The 1st Respondent swore an affidavit in support of the 2nd Notice of Motion emphasizing *inter alia* grounds 1, 2 and 3 of his Notice of Motion.

The arguments

- Both Notices of Motion were argued simultaneously before me on 18th December, 2013, after the Respondent filed grounds of opposition on the 17th December, 2013. The brief grounds are as follows:

“1. THAT the applications are bad in law and with no legal basis at all. The appeal was filed within the time limit provided by the law.

2. THAT the firm of Richard O. & Co. Advocates upon seeking leave of court. The same having been granted by Hon. Shikanda sitting in Malindi. We shall rely upon the lower court proceedings. (sic)

3. THAT the applications are frivolous, vexatious and otherwise an abuse of the court process.

4. THAT no prejudice has been disclosed by the respondents on their grounds on the two applications.”

- The oral arguments of the parties took cue from their written filings and depositions. In summary, the respondents present a three pronged objection to the appeal filed herein by the appellant vide the memorandum of appeal date stamped 6th September, 2013. These are that:

a)the appeal is incompetent having been filed outside the time allowed under Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (the Rules).

b) the said appeal was not served on the respondent within the period stipulated under the Rules.

c)the firm of Richard O. & Co. Advocates presently appearing for the appellant do not have the requisite leave and are therefore not properly on record.

While the 1st Respondent openly cited Order 9 Rule 9 of the Civil Procedure Rules the 2nd and 3rd Respondents were seemingly not as bold, and for good reason, as will soon become evident.

- What is the appellant’s response? In sequence, the appellant’s assertions are to the effect that the Elections Act does not set a time limit for the filing of an appeal and that even the period prescribed under Rule 34 of the Rules is a procedural technicality, whose breach is curable by Article 159(2) (d) of the Constitution. Secondly, on the question of change of legal representation that the Elections Act is silent, but that in any event the firm of Richard O. & Co. Advocates was granted leave by Shikanda, Ag. Senior Resident Magistrate in the Lower court on 4th September, 2013 to come on record. Finally, the appellant argued that the respondents have not demonstrated what prejudice they stand to suffer if the appeal is allowed proceed to hearing on merit.
- In replying, the respondents contended that the question of time limits stipulated for filing and

serving appeals is not a technicality and further that Rule 34 is couched in mandatory terms. The respondents cited several authorities in support of their respective submissions including:

- **Patrick Ngeta Kimanzi vs Marcus Mutua Muuluvu & 2 Others Machakos Election Petition No. 8 of 2013**
- **Raila Odinga & Others vs IEBC & 3 Others Election Petition No. 5 of [2013] eKLR**
- **Dobson Chiro Mwachunga vs IEBC & 2 Others Malindi Election Petition No. 16 of 2013**

Issues for determination

9. Four issues, in my considered view, fall to be determined with regard to the two Notices of Motion. These are:

- Whether or not the appeal was filed out of time without leave
- Whether or not the appeal was served on time.
- Whether or not the firm of Richard O. and Co. Advocates is properly on record.
- Whether default in respect of 1, 2, 3 above renders the appeal defective and liable for striking out.

The Law

10. The law governing election disputes is the Elections Act which was enacted under the provisions of Article 87 (1) of the Constitution which states:

“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”

Appeals emanating from the magistrate courts with regard to election petitions are filed in the High Court by dint of Section 75(4) of the Elections Act. Rule 34 makes further provision thereto.

11. There is sufficient legal authority for the proposition that disputes emanating from the electoral process are governed by the Elections Act. In **John Michael Njenga Mututho vs Jayne Njeri Wanjiku Kihara & 2 Others Nakuru Court of Appeal, Civil Appeal No. 102 of 2008** the Court of Appeal stated:

“Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is at issue. Each minute counts.”

In **Esposito Franco vs Amason Kingi Joffa & Two others [2010] eKLR** the Court of Appeal had this to say:

“What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the Court observed in Karume’s Case.”

Whether the appeal was filed out of time

12. On the question of the time limit for the filing of appeals, there is a patent inconsistency between Rule 34(3) upon which the respondents stake their application and Section 75(4) (b) of the parent Act (i.e 14 days visa-a-vis 30 days respectively). The latter must therefore take precedence. The judgment in the Magistrate’s Court was rendered on 16th August, 2013. The memorandum of appeal, being the format prescribed by Rule 34(1) for lodging an appeal was filed on 6th September, 2013. Thus the filing was within the thirty days stipulated by Section 75(4) (b) of the Elections Act. Nothing

therefore turns on the first objection raised to the appeal by the respondents.

Whether or not the appeal was served on time

13. Regarding the issue of service, it is not in dispute that the appellant did not serve the respondents within the period prescribed by Rule 34(5) of the Rules. Rule 34(5) states:-

“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 has not countered the assertion by the 3rd respondent that he was served with the memorandum of appeal on 29th October, 2013 – almost two months since the filing. As for the 1st and 2nd respondents, the parties only became aware of the existence of the appeal when served with a mention notice issued by this court on 4th November, 2013.

14. Service is a key spoke in the wheels of administration of justice in election disputes. So vital is the element that it is captured in Article 87(3) of the Constitution as follows:

“Service of a petition may be direct or by advertisement in a newspaper with national circulation.”

This provision no doubt was intended to settle once and for all the lingering question of what constituted proper service that had in the past proved a legal minefield for many hapless petitioner pursuing elusive respondents for service.

15. As Majanja J. observed in the **Patrick Ngeta Kimanzi** Case:

“Although the regime of service of election petitions has been liberalized, the requirement of service was not dispensed with. Service of the petition is still a requirement under the Constitution, the Act and the Rules. Without service, the opposite party is denied the opportunity to defend the case. Service is an integral element of the fundamental right to a fair hearing which is underpinned by the well known rules of natural justice...Elementary justice demands that a person be given full information on the case against him and given a reasonable opportunity to present a response”

(See also **Kumbatha Naomi Cidi vs County Returning Officer, Kilifi and others Malindi EP No. 13 of 2013 (UR)**).

Timely service is critical for the timely resolution of disputes as anticipated in Article 87 of the Constitution, the Act and Rules (See **Dobson Chiro Mwachunga vs IEBC and two others (2013) eKLR**)

16. Although the foregoing decisions dealt with non-service of petitions, the rationale therein also holds true for appeals filed in election disputes. It cannot therefore lie in the mouth of a party who has failed completely to serve another party “directly, affected by the appeal”, in this case the 1st and 2nd respondents, to assert that service is a matter of procedural technicality curable by Article 159(2) (d) of the Constitution. The 3rd respondent was served almost two months late.

17. The wording of Rule 34(5) is couched in mandatory terms. So too is the wording of Rule 34(6) which states:

“The appellant shall, within twenty one days, upon filing of memorandum of appeal file a record of appeal which shall contain the following documents–

- memorandum of appeal;

- **pleadings;**
- **typed and certified copies of the proceedings;**
- **all affidavits, evidence and documents put in evidence before the magistrate;**
- **signed and certified copy of the judgment appealed from and a certified copy of the decree”**

18. The record of appeal in this case was filed on 14th November, 2013, some 60 odd days since the filing of the memorandum of appeal. Coincidentally that is the issue date of the second court notice under Rule 34(9) to parties. Absent the record of appeal, the appeal cannot be heard as the former constitutes the judgment, the pleadings and proceedings of the court appealed from. Technically speaking the memorandum of appeal is a mere shell without the record of appeal. The appellant’s delay and non compliance, militates against the letter and spirit of the Constitution and electoral law.

Effect of non-compliance

19. Compliance through service and other requirements prescribe in Rule 34 are not procedural requirements. As Majanja J. succinctly pointed out in the **Kimanzi** Case:

“Service of the petition is not a mere procedural requirement that can be dispensed with but is a mandatory requirement ...it is service that triggers all the other steps (in the cause) it is not a mere technicality that can be swept aside by an application of the provisions of Article 159(2) (d) of the Constitution) and the overriding objective set out in rules 4 and 5 of the Rules.”

Muchemi J. in the **Kumbatha** Case went further to state that:

“Any pleading filed and not served on the opposite party has no legal force. It cannot be dealt with by the court and no lawful order can be drawn from it. It is my considered opinion that this petition (pleading) is a petition that never was.”

Similar sentiments were echoed by Githua J. in **Mohamed Odha Maro v the County Returning officer, Tana River and Others, Malindi EP No. 15 of 2013 (UR)**.

The learned judges proceeded to strike out the offending pleadings in the respective cases.

20. I agree with the learned judges, and with the respondents’ counsel, in this case that the legal path concerning the present situation is well beaten and any unjustified departure therefrom can only result in unnecessary uncertainty in established precedent. More significantly, the respondents who have been prejudiced by non-service will be further prejudiced by being compelled, within the remaining statutory period to accommodate a clearly indolent appellant, in order to beat the constitutional deadline of six months. Not to mention the voters who elected the 3rd respondent and indeed all the voters of Kipini East Ward. These matters are sufficient to dispose of the two Notices of Motion which are the subject of this ruling. The appeal herein is for striking out.

Whether the firm of Richard O. & Company Advocates is properly on record

21. A further issue has arisen however with regard to whether the firm of Richard O. and Co. Advocates is properly on record. The 3rd respondent relied on Order 9 rule 9 of the Civil Procedure Rules to argue that it was not. While I am not prepared to find that the said order applies to election disputes, it is apparent that there exists a lacuna in the Rules in this regard. However, the principle behind the provision of Order 9 rule 9 of the Civil Procedure Rules is a reasonable one. It was designed to give notice to previous advocates and those of opposite parties of the entry of a new advocate on the record.

22. The mischief sought to be cured by this rule was the wily conduct of litigants who dropped their counsels without notice after judgment, primarily to avoid making good their instructions. I cannot

see that this protection is any less important in an election petition. Over and above this, I think that the notice of change of advocate is even more critical in electoral disputes where service and other steps are strictly time bound.

23. That the appellant herein purported to obtain an ex parte order for leave before a Magistrate's Court not gazetted for purposes of the Lower Court proceedings and thereafter failed to serve the respondents is further illustration of the covert manner he seems to have adopted in the prosecution of his appeal. There is no place for tardiness or stealthy conduct by any litigant in the new electoral regime. Suffice to say that even if Order 9 rule 9 of the Civil Procedure Rules were applicable in this dispute, the leave obtained by the appellant before Shikanda Ag. Senior

Resident Magistrate on 5th September, 2013 is itself defective and of no consequence, having been issued ex parte contrary to the provisions of Order 9 rule 9(a) of the Civil Procedure Rules.

Determination

24. For all the reasons outlined above, I find that the subject appeal is defective and must be struck out with costs to the respondents. It is so ordered.

Delivered and signed at Malindi this **11th** day of **February, 2014** in the presence of Mr. Oduor for 3rd Respondent and holding brief for Mr. Juma for 1st and 2nd Respondents, Miss Mwanja holding brief for Mr. Otara for the appellant.

Court clerk – Samwel.

C. W. Meoli

JUDGE

MISS MWANIA – We seek certified copies of ruling.

C. W. Meoli

JUDGE

COURT – To be supplied.

C. W. Meoli

JUDGE