Ondari v Mangera & 2 others (Election Petition Civil Application E015 of 2024) [2024] KECA 205 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KECA 205 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

ELECTION PETITION CIVIL APPLICATION E015 OF 2024

JM NGUGI, JA

FEBRUARY 29, 2024

BETWEEN

JOSEPH NYARANGO ONDARI ..... APPLICANT

AND

JOSIAH OBEGI MANGERA ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2ND RESPONDENT

RETURNING OFFICER, BORABU CONSTITUENCY ..... 3RD RESPONDENT

(An Application for Extension of Time to lodge an Appeal as well as to file and serve the Record of Appeal from the Judgment of the High Court of Kenya at Nyamira (Chemitei, J.) dated 6th July, 2023inElection Petition No. E002 of 2023As Consolidated WithNo. E005 of 2023)

RULING

1. At the conclusion of the General Elections held in Kenya on 6th August, 2022, the 1st respondent was declared the duly elected Member of the County Assembly of Esise Ward in Nyamira County by the IEBC.

2. The applicant herein was aggrieved by the declaration. Alleging various electoral malpractices, the applicant filed a petition at the Keroka Principal Magistrate's Court being Election Petition no. E002 of 2022 challenging the election of the 1st respondent. The petition was heard, and in a judgment dated 20th January, 2023, the Court nullified the election of the 1st respondent as the Member of County Assembly, Esise Ward.

3. The 1st respondent was, in turn, aggrieved by that decision of the Magistrate's Court and timeously lodged an appeal before the High Court. The 2nd and 3rd respondents were also aggrieved and filed an appeal at the High Court. In a judgment dated 6th July, 2023, the High Court sitting in Nyamira

(Chemitei J.), the Court found the two appeals meritorious, allowed them as prayed, and declared the 1st respondent as the validly elected member of the County Assembly representing Esise Ward in Nyamira County Assembly. The applicant was also condemned to pay the costs of the appeal.

4. The applicant was aggrieved by the decision of the High Court. He says he instructed his lawyer to appeal against the decision. The advocate filed an appeal dated 12th July, 2023. However, instead of filing it at the Court of Appeal, the advocate filed it at the Supreme Court of Kenya. Having realized their mistake, the advocate attempted to salvage the situation by filing an application dated 25th July, 2023 at the Supreme Court with the twin prayers of seeking the withdrawal of the appeal at the Supreme Court and its simultaneous transfer to the Court of Appeal.

5. The learned Lenaola, SCJ, handled the application as a single judge. In an order dated 8th December, 2023, the learned Judge agreed to the withdrawal of the appeal at the Supreme Court without costs but declined to transfer it to the Court of Appeal citing lack of jurisdiction.

6. The applicant is now before us with the instant application with one substantive prayer for extension of time to file an appeal against the judgment of the High Court delivered on 6th July, 2023. In support of his application, the applicant reiterates the history above and then urges the Court not to penalize him for the mistakes of his advocate. It was his advocate, he says, who filed the appeal in the wrong court. He had initially, he states, thought that the Supreme Court had transferred the file to Kisumu Court of Appeal registry only to realize later that the file was still at the Supreme Court awaiting a formal order. That order finally came on 8th December, 2023 declining the invitation to transfer the filed appeal to the Court of Appeal.

7. The application is expressed to have been brought under Rules 4, 82 and 90 of the *Court of Appeal Rules* and sections 3, 3A and 3(b) of the *Appellate Jurisdiction Act* and Article 159 of *the Constitution*. Of all these, Rule 4 of the *Court of Appeal Rules* is the most relevant. It provides that:

> "The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or of a superior court, for the doing of any act authorized or required by these Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended."

8. There has been a lively discourse, in view of the fact that the timelines for electoral dispute resolution are statutory as opposed to having their provenance in subsidiary legislation, whether courts can extend them upon an application by a party. The argument is that in electoral disputes, time is made to be of the essence by the statute which animates an important constitutional value of timely resolution of electoral disputes. In the present case, I am perfectly willing to endorse the position taken by this Court in *Sumra Irshadali v IEBC & Another* Nairobi Election Appeal 22 of 2018 to the effect that in appropriate cases this Court can extend time if the dictates of justice so require. Even then, this Court would only extend time in electoral disputes in exceptional circumstances given the constitutional value implicated. See *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR.

9. The principles on which this Court may exercise the discretion to extend time under Rule 4 were set out in *Leo Sila Mutiso v Hellen Wangari Mwangi* 2 EA 231 in which it was held as follows:

> "It is now settled that the decision whether to extend the time for appealing is essentially discretionary. It is also well stated that in general the matters which this court takes in to

account in deciding whether to grant an extension of time are, first the length of the delay, secondly the

reasons for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

10. In an election dispute such as the present one, these principles must be seen against the ones framed by the Supreme Court in the *Nicholas Kiptoo Arap Korir Salat Case* (supra). There, the Supreme Court considered and outlined the guiding principles in applications for extension of time as follows:

    i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;

    ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

    iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;

    iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;

    v. Whether there will be any prejudice suffered by the respondents if the extension is granted;

    vi. Whether the application has been brought without undue delay; and

    vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

11. In the present case, the impugned judgment was delivered on 6th July, 2023. The 1st respondent was declared the duly nominated Member of the County Assembly. He, no doubt, took up his position in the Assembly. It is already more than eight months since he did so. This is an important objective factor that looms in the background of the present application. Two other factors ominously jump to the fore. The first one is that however much sympathy one looks at the mistake of counsel to file the appeal at the Supreme Court as opposed to this Court, one cannot escape noting that the Supreme Court categorically informed the applicant that his intended appeal was still birthed and, hence, incapable of being transferred to this Court on 8th December, 2023. It took the applicant another sixty-one (61) days – until 7th February, 2024 – to bring the present application.

12. Even if the Court were to consider the December holidays period (when time is generally tolled for litigation purposes), the sixty-one-day delay is simply inordinate considering that the controversy is an electoral dispute for which *the Constitution* expressly requires timely resolution. Moreover, the applicant has not offered any explanation at all for this delay. He spent quite some ink laying the blame on his previous advocate for filing the appeal in the wrong Court initially; but he nary offers an explanation about the 61-day delay. Considering that appeals to this Court are expected to be filed within seven (7) days, the delay of 61 days is, without question, inordinate and inexcusable.

13. My finding that the delay is inordinate and inexcusable in the circumstances of this case makes it unnecessary for me to engage in the ordinarily perilous endeavor of assessing the chances of success of the appeal. In this case, our jurisprudence is quite categorical that the applicant would be swimming against the tide anyway even if he were to be allowed to bring his appeal.

14. This is because our jurisprudence has stably held that the Court of Appeal has no jurisdiction to entertain a second appeal from the High Court regarding the question of validity of the election of a Member of the County Assembly. In numerous decisions, both the Supreme Court and the Court of Appeal have held that the omission of a provision for a second or further appeal under section 75(4) of the *Elections Act* was deliberate and aimed at ending electoral challenges respecting Members of the County Assembly at the High Court. The plethora of cases in this regard include: plethora of cases including *Hamdia Yaroi Shek Nuri vs. Faith Tumaini Kombe, Amani National Congress & Independent Electoral & Boundaries Commission* [2019] eKLR – a unanimous decision of the Supreme Court; and this Court's decisions in *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others, Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 Others*;

> *Twaher Abdukadirim Mohammed v Mwathethe Adamson Kadenge & 2 Others* [2015 eKLR; *Emmanuel Changawa Kombe (Interested Party) [2018] eKLR; and Mogesi Agnes Bange & 8 Others v IEBC & 12 Others* [2018 eKLR; I*saac Oerri Abiri v Samwel Nyang'au Nyanchama & 2 Others* [2014] eKLR.

15. It is of no utility for the applicant to say that he hopes to persuade the President of the Court of Appeal to form a five- or seven-judge bench to determine the question: the Supreme Court has already pronounced itself on the question in a decision that binds the Court of Appeal in *Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral & Boundaries Commission* [2019] eKLR

16. The upshot is that the application dated 7th February, 2024 is for dismissing, and I hereby do so. The only saving grace for the applicant is that it was not responded to. As such, I assess no costs against the applicant.

17. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF FEBRUARY,2024.

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR