



Michael v Orange Democratic Movement Party & 3 others (Election Petition Appeal E001 of 2023) [2023] KECA 533 (KLR) (12 May 2023) (Ruling)

Neutral citation: [2023] KECA 533 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL E001 OF 2023
A ALI-ARONI, JM MATIVO & PM GACHOKA, JJA
MAY 12, 2023**

BETWEEN

NJELEKELA ASHURA MICHAEL APPELLANT

AND

ORANGE DEMOCRATIC MOVEMENT PARTY 1ST RESPONDENT

CATHERINE MUMA 2ND RESPONDENT

CRYSTAL KAGEHI ASIGE 3RD RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
RESPONDENT**

(Being an appeal from the Judgment of the High Court of Kenya at Milimani - Nairobi (Ndung'u, J.) dated 20th December, 2022 in Election Petition E002 of 2022)

RULING

1. A brief synopsis of the factual matrix which triggered the appellant's appeal dated 13th January, 2023 and the appellant's application dated 27th January, 2023 is necessary so as to put the diametrically opposed arguments presented by the parties in support of their respective positions into proper context.

Fortunately for us, the facts of the case are substantially common ground or uncontested.

2. In summation, the applicant is a member of a political party known as the Orange Democratic Movement Party (the party). Prior to the 2022 general elections, the applicant's name was among those in the party list submitted to the 4th respondent, that is the Independent Electoral and Boundaries Commission (the IEBC) under Article 90 of the Constitution for nomination to the Senate representing special interests.



3. However, the IEBC returned the party list to the ODM for want of compliance with Constitution. Thereafter, the party re-submitted a fresh list to the IEBC excluding the appellant's name. Aggrieved by the omission, the appellant filed a complaint at the Political Parties Disputes Tribunal (the PPDT) being complaint Number E130 of 2022. In the said complaint, the appellant prayed for a declaration that the decision to omit his name amounted to an adverse administrative action; that the decision be set aside; and an order compelling the party to reinstate her name.
4. By a judgment dated 9th September, 2022 the PPDT dismissed the appellant's claim for failure to exhaust the party's internal dispute resolution mechanism before approaching the PPDT. Undeterred, the appellant filed Nairobi High Court Election Petition No. E002 of 2022 seeking:
 - (i) a declaration that the said decision amounts to an adverse administrative decision, which requires written reasons.
 - (ii) an order setting aside the decision.
 - iii. the party be directed to reinstate her name in the party list.
 - iii. the court declares him as a duly elected Senator as per the said nomination.
 - (v) any other order the court deems just in the circumstances, and,
 - (vi) costs of the Petition.
5. The 3rd respondent filed a notice of a preliminary objection dated 17th October, 2022 inter alia objecting to the court's jurisdiction on grounds that-
 - (i) The matter was res judicata having been determined by the PPDT.
 - (ii) The dispute fell within the jurisdiction of the PPDT by dint of section 40 of the Political Parties Act.
 - (iii) The appellant ought to have appealed against the decision of the PPDT as opposed to an election petition.
6. Vide a ruling dated 20th December, 2022, the High Court (Ndungu, J.) upheld the preliminary objection and dismissed the appellant's election petition. The learned judge held that it is not open to a party to approach the PPDT or the IEBC, have the matter determined and then attempt to have a second bite at the cherry through an election petition. The learned judge held that the available legal mechanism to such a party is an appeal to the High Court sitting as a judicial review court or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of Constitution. The learned judge awarded costs of Kshs. 100,000/= to the 3rd respondent.
7. Aggrieved by the above ruling, the appellant filed a notice of appeal on 31st December, 2022 and subsequently filed a record of appeal on 27th January, 2023 which was accompanied by a notice of motion of even date: The application is anchored on the provisions of Rules 8 (2), 9 (1), & 25 of the Court of Appeal (Election Petition) Rules, 2017 (the Election Petition Rules). The applicant seeks orders:
 - a. Spent
 - b. That the notice of appeal filed on the 31st of December, 2022 be admitted as duly filed as part of the court record.
 - c. The record of appeal filed on 27th of January, 2023 be admitted as duly filed as part of the court record.



- d. This Court be pleased to do away with a certified copy of the order in view of the certified copy of the Ruling as required by the regulations.
 - e. This Court be pleased to order the security for costs paid at the High Court be re-allocated as security for costs for purposes of this appeal.
 - f. Costs of the application be in the cause.
8. Briefly, the grounds in support of the application are-
- (a) the appellant's counsel formally applied for typed proceedings, order, and a certified copy of the ruling and paid for the same.
 - (b) counsel was supplied with uncertified copies on 22nd December, 2022.
 - (c) counsel prepared a notice of appeal, which he managed to upload into the e-filing system of the High Court of Kenya on 26th December, 2022.
 - (d) the copy uploaded lacked the place for signing by the Deputy Registrar, and, the appellant's advocate was required to file afresh notice of appeal which he did on 29th December, 2022 and lodged it at the Court of Appeal registry on 31st December, 2022 but he was advised to forward it by way of e-mail.
 - (e) the delay in filing the notice of appeal and the appeal is not deliberate nor was it due to ignorance.
9. Conscious of the strict timelines governing hearing and determination of election petition appeals prescribed in Rule 23 of the [Election Petition Rules](#), this Court directed that the application be heard together with the main appeal. Parties filed and exchanged their respective written submissions on the application and the appeal, which they highlighted orally on 14th March, 2023. Because the nature of the application is such that its determination has the potential of locking or opening the door for the main appeal, it is only prudent that we determine the application first.
10. The application is opposed by the 3rd respondent vide her replying affidavit sworn on 24th February 2023. It is also opposed by the 4th respondent *vide* the replying affidavit of Chrispine Owiye, its Director, Legal and Public Affairs, sworn on 24th February, 2023 and also the 4th respondent's notice of preliminary objection dated 23rd February, 2023. The 1st and 2nd respondent did not file any response to the application but during hearing, Ms. Mumbi stated that she relied on the 4th respondent's submissions. In response to the notice of preliminary objection, the appellant filed a replying affidavit sworn on 24th February, 2023.
11. In his submissions, the appellant's counsel Mr. Manyara argued that the delay in filing the notice of appeal was not inordinate since it was filed two days after the lapse of the 7 days provided under the rules. Counsel attributed the delay in filing the record of appeal to the High Court registry staff and the High Court, Deputy Registrar. To buttress his argument, counsel referred to a series of e-mails and letters to the Deputy Registrar to demonstrate the efforts made to obtain the documents required to prepare the record of appeal. Further, counsel maintained that he ultimately obtained the proceedings on 26th January, 2023.
12. Mr. Manyara reiterated that the respondents were served with the notice of appeal via email on 28th January, 2023 and therefore, any objection to the notice of appeal ought to have been made on or before 4th February, 2023 in accordance with Rule 19 (2) of the [Election Petition Rules](#).



13. Mr. Manyara further submitted that the security for costs deposited in the High Court ought to be utilized as the security for costs for the instant appeal because the appellant is indigent and a person living with disability. He urged this Court to exercise its jurisdiction under Rule 5 of the [Election Petition Rules](#).
14. Mr. Asige learned counsel for the 3rd respondent in opposition submitted that Rules 6(4) and 8 (5) of the [Election Petition Rules](#) provides for filing of the required documents even before receiving extracted orders, certified documents, or any other documents from the court. He argued that the appellant did not serve the documents upon the respondents contrary to Rule 84. 2. of the [Court of Appeal Rules, 2022](#), and that the record of appeal bears no certification of correctness as mandated by Rule 8 (5) of the [Election Petition Rules](#).
15. Mr. Asige's also submitted that the appellant has not shown sufficient reasons for the Court to enlarge the time and therefore she does not merit this court's discretion under Rule 17 (1) of [Election Petition Rules](#). Further, the extension if allowed will be prejudicial to the 3rd respondent and the persons she serves.
16. On security for costs, Mr. Asige submitted that Rule 27 (1) & (2) of the [Election Petition Rules](#) provides that an appeal of this nature shall be accompanied by a deposit of security for costs in the sum of Kshs.500,000/=, failure to which, this Court may dismiss the appeal with costs to the respondent(s). Further, counsel argued that there is no provision in the rules for utilizing security for costs deposited in another court or in other suits, and in any event, the High Court awarded the 3rd respondent costs of Kshs.100,000/- to be recovered from the deposit held in the High Court which is yet to be disbursed.
17. Ms. Chamia, learned counsel for the 4th respondent rehashed the grounds raised in the notice of preliminary objection dated 23rd February, 2023 namely-
 - (i) This Court lacks jurisdiction to entertain the appeal since the notice of appeal was not filed within 7 days after delivery of the judgment being appealed against.
 - (ii) The record of appeal dated 27th January, 2023 was also not filed within the stipulated time.
 - (iii) The appellant has failed to deposit security for costs as required under Rule 27 (1) & (2). Counsel submitted that the appellant's appeal is incurably defective, and it is not arguable because it raises no reasonable grounds of law or fact because it challenges exercise of jurisdiction by the Superior Court, which this Court can only interfere with if it is established that there exists an obvious error of judgment.
18. First, we will address the jurisdictional objection cited by the 4th respondent; that the notice of appeal and the record of appeal were filed out of time. Countering this argument, the appellant argued that the preliminary objection is belated and offends Rule 19 (2) of the [Court of Appeal \(Election Petition\) Rules, 2017](#) which provides:
 1. A person affected by an election petition appeal may, within seven days from the date of service of the notice of appeal or record of appeal, as the case may be, apply to the Court to strike out the notice or the record of appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the time prescribed by these Rules.
 2. Where no application is filed within the period stipulated under sub-Rule (1), a person may not raise the issue later.



19. Jurisdiction, a *mantra* in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A court of law is vested with jurisdiction to hear a matter when-
- (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another.
 - (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction, and
 - (c) the case comes before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The above three ingredients must co-exist in order to infuse jurisdiction in a court. Where a court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity. (See this Court’s decision in the [National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 Others](#), Civil Appeal No. 656 of 2022.
20. An objection on jurisdiction can be raised at any point in time and the minute such objection is raised the court ought to consider the same before embarking on the merits of the matter before it. In the words of this Court in [Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others](#) (2013) eKLR:
- “So central and determinative is the question of jurisdiction that it is at once fundamental and over- arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive, determinative, and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.”
21. Primarily, a notice of appeal is the basis, foundation and backbone of every appeal and where it is found to be defective or incompetent, the Court of Appeal has the power to strike it out or to discontinue any purported appeal for which there is no Notice of Appeal. The Supreme Court in [Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 others](#) (2014) eKLR stated:
- “A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdiction prerequisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant’s notice of appeal as having been filed out of time in *Silverbrand v County of Los Angeles* (2009) 46 Cal. 4th 106, 113 stated *inter alia*:
- As noted by the Court of Appeal the filing of a timely notice of appeal is a jurisdictional prerequisite unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal. The purpose of this requirement is to promote the finality of judgments by forcing the losing party to take an appeal expeditiously or not at all.” [Emphasis added].



22. This Court in *Boy Juma Boy & 2 others v Mwamlole Tchappu Mbwana & Another* 2014 eKLR held that:

“... The jurisdiction of this court as an appellate court can only be triggered through the filing of the notice of appeal. In the absence of such notice the court has no proper basis upon which its jurisdiction can be anchored.”

23. Simple computation of time shows that the 4th respondent’s preliminary objection was not filed within 7 days of service of either the notice of appeal or the record of appeal. It was filed after 26 days of service. Therefore, the 4th respondent’s preliminary objection is incompetent by virtue of Rule 19 (1) of the *Election Petition Rules*. As a result, the 4th respondent’s preliminary objection is hereby dismissed. (See *William Mwangi Nguruki v Barclays Bank of Kenya Ltd* [2014] eKLR).

24. Next, we will address the appellant’s plea for enlargement of time to file her notice of appeal and record of appeal and that the filed documents be deemed as properly filed. The starting point in considering this request is Rule 6 of the *Election Petition Rules* which provides:

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- (1) A person who desires to appeal to the court shall file a notice of appeal, which shall be lodged in quadruplicate in the registry.
2. A notice of appeal shall be filed within seven days of the date of the decision appealed against.
3. A notice of appeal shall be in separate numbered paragraphs and shall –
 - a. Specify whether all or part of the judgment is being appealed and, if part which part;
 - b. Provide the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice; and
 - c. Contain a request that the appeal be set down for hearing in the appropriate registry.
4. It shall not be necessary that the decree or order be extracted before lodging a notice of appeal.
5. A notice of appeal shall be substantially in the Form EPA 1 set out in the schedule and shall be signed by or on behalf of the appellant.

25. Enlargement of time within which to file a notice of appeal is not a novel issue. This Court dealt with similar applications in *Andrew Tobaso Anyanga v Mwale Nicholas Scott Tindi & 3 others* (2017) eKLR (Election Petition Appeal (Application) No.3 of 2017) and also in *Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral and Boundaries Commission and Paul Musyimi Nzengu* (2018) eKLR and in both cases allowed the applications. In the *Munuve Mati case* this Court held:

“24. There is no dispute that the appellant did not file and serve the appeal within the period prescribed by the 2017 rules. Decisions of this Court abound where it has been held that the prescribed timelines as regards electoral disputes resolution must be strictly adhered to. (see for example *Charles Kamuren*



v Grace Jelegat Kipchoim & 2 Others (2015) eKLR). We agree with those decisions particularly given the constitutional and statutory demand for timely resolution of disputes. Nevertheless, the 2017 rules themselves now expressly confer on us discretion to determine the effect of any failure to comply with the rules, taking into account the fact the justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timelines.

25. In this case there is clear noncompliance with the rules, but we have before us the record of appeal and we perceive it is possible to determine the appeal without any further infraction on the set timelines.

We have considered the effect of the appellant's failure to file the notice of appeal within 7 days and to serve the same within the prescribe period. No evidence has been adduced that any party has been prejudiced by non-compliance with the 2017 rules, which we have noted. The three objects of the 2017 rules, namely just, impartial, and expeditious determination of appeals, which we agree must be given equal consideration, do not stand to be compromised if we hear the appeal on merits. We bear in mind that in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR the Supreme Court also declined to strike out documents filed or served out of time *Supreme Court (Presidential Election Petition) Rules* 2017.”

26. The Supreme Court in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* (2014) eKLR in refusing to strike out a notice of appeal on grounds that the same had not been served in accordance with the rules stated:

“(43) Informed by the role that the notice of appeal plays, it is our considered opinion that such a document ought to be filed first before the appeal. However, while the rules require that it be served, to allow the respondent(s) to file an address of service, and the address of service then to be contained in the record of appeal, the lack of that address of service does not warrant striking out of the appeal. We add that the nature of the instant matter, which is urgent and constitutionally time - bound, is one of those exceptional cases where this Court will apply Article 159 of Constitution, in order to render substantive justice. It is also our view that Article 163(4) (a) of *Constitution* gives the appellant a ‘right’ to come to Court when seeking a constitutional interpretation and/or application. Such a right should not be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced” (Emphasis added).

27. Similarly, this Court in *John Munuve Mati v Returning Officer of Mwingi North Constituency & Others*, Nairobi Election Petition Appeal No. 5 of 2018 expressed itself as follows:

“...noting that it is at the discretion of this Court to determine the effect of non-compliance with Rules, we have considered the effect of the Appellant's failure to file the notice of appeal within seven days as required by Rule 6 (2). No evidence was adduced that any party has been prejudiced by non-compliance with Rules 6 (2) and 6 (5) of the *Court of Appeal (Election Petition) Rules*. Guided by the need to ensure that justice is administered without undue



regard to technicalities, we hereby exercise our discretion and decline to strike out the notice of appeal dated 13th January, 2018.”

28. The respondent’s contestation is that the notice of appeal was filed in contravention of Rule 6. Indeed, the appellant admits filing the notice of appeal two days after the stipulated time had lapsed and it is on that basis that the appellant invokes the discretionary jurisdiction of this Court under Rule 5 of the Election Petition Rules. Under Rule 6 (2), a notice of appeal ought to be filed within 7 days of the date of the decision appealed against, and in accordance with Rule 7, it must be served within 5 days of filing. Adherence to strict timelines is at the heart of electoral disputes. Indeed, the Supreme Court has stressed the need for adherence to the strict timelines in several decisions. In Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others S.C. Petition No. 2B of 2014; (2014) eKLR the court stated that:

“(136) And we returned to the timelines theme in the recent Munya case (at paragraph 62):

“Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about ‘timelines and timeliness’, was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in name of which elections are decreed and conducted, should not be held captive to endless litigation” [emphasis supplied].

29. The effect of non-compliance with Rule 6 (2) can best be determined on a case-by-case basis guided by the overriding objectives in the administration of justice, which emphasizes substantive justice. Rule 5 enjoins this Court, while exercising its discretion to pay regard to the overriding objective and the constitutional timelines for resolution of electoral disputes. Nevertheless, just like any other judicial discretion, it ought not to be exercised capriciously or arbitrarily but judiciously. Rule 5 stipulates:

The effect of any failure to comply with these Rules shall be a matter for determination at the court’s discretion subject to the provisions of Article 159(2) (d) of Constitution and the need to observe the timelines set by Constitution or any other electoral law.

30. The rationale behind the establishment of mechanisms for timely settling of electoral disputes was well captured by this Court in Mbaraka Issa Kombe v Independent Electoral and Boundaries Commission (IEBC) & 2 others (2018) eKLR. The long and short of it being that elections or the electoral process should not be held captive to endless litigation, that is, electoral dispute resolution should be timely. This means that while the court exercises its discretion under Rule 5, it should be careful not to upset constitutional timelines.

31. In Mbaraka Issa Kombe v Independent Electoral and Boundaries Commission and 2 others (*supra*) this Court asserted what it has said time and again that rules of procedure are meant to be handmaidens



of justice and should not be elevated to the status of mistresses of justice. The court further went on to state as follows: -

“In totality, the Election Court will have to look into the nature of the non-compliance, that is, does it go to the jurisdiction of the court? Does it go to the root of the dispute? Does it occasion prejudice to the other party?”

32. We have considered the respective submissions. We are satisfied that the two-day delay is not inordinate and that the appellant has sufficiently explained the delay. We are persuaded that the notice of appeal was filed within 7 days i.e. on 26th December, 2022. However, the notice of appeal was rejected by the registry for lack of a place where the Deputy Registrar could sign as required and by the time the appellant was notified of the anomaly, the 7 days had already lapsed. On the other hand, the respondents have not demonstrated what prejudice they will suffer if the notice of appeal is admitted as duly filed. In the interest of justice and with a view of giving the appellant her day in court, we find and hold that the notice of appeal dated 24th December, 2022 and lodged on 29th December, 2022 is hereby admitted as duly filed.
33. On the second limb, which is, the record of appeal was filed out of time contrary to Rule 9 (1), we note that the timelines for filing of an appeal from the High Court in regard to an election petition is provided under section 85A of the [Elections Act](#) as follows:
 1. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be—
 - a. filed within thirty days of the decision of the High Court; and
 - b. heard and determined within six months of the filing of the appeal.
34. Similarly, Rule 9 (1) requires the record of appeal to be filed within 30 days from the date of the judgment of the High Court. It is noteworthy that the record of appeal was filed on 28th January, 2023, 8 days out of time. For purposes of section 85 A(1)(a) of the [Elections Act](#), an appeal is filed on the date and time when the record of appeal is lodged at the Court of Appeal Registry. The explanation proffered by the appellant is that the delay in being furnished with certified copies of the proceedings and ruling of the High Court by the court resulted in the delay in filing the record of appeal. The appellant indeed wrote several letters and e-mails to the Deputy Registrar complaining about the delay in furnishing him with the certified copies of proceedings and ruling of the High Court. In response to that explanation, the 3rd respondent relied on Rule 8 (5) which allows the appellant to file a record of appeal using the uncertified documents within the 30 days and later on file a supplementary record of appeal 7 days thereafter.
35. The question is whether this Court can exercise its discretion in favour of the appellant since the appellant has demonstrated that the delay in filing the record of appeal was not by intentional, as demonstrated by the correspondence between the Deputy Registrar, High Court and the appellant’s counsel. Granted, the delay in filing the record of appeal is attributed to inability to obtain the certified copies of the proceedings and the ruling of the High Court. Nevertheless, we are in consonance with the submissions by the 3rd respondent that it was not mandatory for the appellant to obtain certified copies from the High Court registry in order to file a record of appeal. It is important to note that Rule 8 (5) waives the necessity of obtaining certified copies of proceedings and any other document for the purposes of filling a record of appeal before this Court. From the foregoing, we find that the delay by the High Court registry to furnish the appellant with certified documents was inconsequential.



The upshot of the foregoing is that the delay in filing the record of appeal remains unexplained. This is because all along the appellant was at liberty to file a record of appeal comprising of uncertified document as prescribed under Rule 8 (5). The appellant has not explained what prevented her from reaping the benefits of such a clear provision of the law. It is evident that the appellant is guilty of inaction. Filing an appeal within a period of limitation is the rule and condonation of delay is an exception.

36. The Supreme Court in [Lemanken Aramat v Harun Meitamei Lempaka & 2 others](#) (2014) eKLR was persuaded by the decision of the Nigerian Supreme Court in the case of *Chief Doctor Felix Amadi & Another v Independent National Electoral Commission (INEC) & Others* S.C. of Nigeria Appeal No. 476 of 2011 where it was held that:

“138. ... There is no room for the exercise of any discretion in relation to the allotted time. Everything needed to deliver the judgment must be done and the judgment delivered within sixty (60) days of the date of delivery of judgment on appeal... The appeal in question has lapsed by one day as at 7th December 2011 when the same was listed for hearing. That means that as at that date the appeal had ceased to exist in law and could therefore not have been heard – it was dead in the eyes of the law and [Constitution](#)”

37. Guided by the foregoing authorities, we are of the view that the exercise of the discretion under Rule 5 is limited to actions that ought to have been taken under the [Rules](#), and remains subject to [Constitution](#) and other electoral laws. This is manifest from Rule 17 of the [Election Petition Rules](#), which is emphatic on the limit of the exercise of the court’s discretion as follows:

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- (1) The court may, for sufficient reason, extend or reduce the timelines prescribed by these Rules upon such terms and conditions it may deem just and expedient, and a reference in these Rules to any time shall be construed as a reference to that time as extended or reduced.
- (2) Sub-Rule (1) does not apply to timelines set by [Constitution](#) and the [Elections Act, 2011](#). (Emphasis added)

38. We also are persuaded by the dictum in [Wavinya Ndeti v IEBC & 4 others](#), Civil Appeal No. 323 of 2013 in which this Court addressed the issue of extension of time under section 85A as follows:

“(12) The question whether the court has discretion to entertain any appeal filed out of time depends on whether the provisions of section 85A are mandatory or discretionary. The same language in section 85A is used in section 75(4) of the Act in relation to appeals from the Resident Magistrate’s Court to the High Court. Section 85A deals with substantive and not procedural law. It confers both a right of appeal and jurisdiction to the Court of Appeal. There cannot be any doubt from the language and tenor of section 85A that Parliament intended the provisions to be mandatory. The court has not been given power to extend time.”

39. The appellant in that appeal (Wavinya Ndeti) dissatisfied by the aforementioned verdict, filed a petition in the Supreme Court based on the grounds, *inter alia*, that Article 159 (1) and (2) of [Constitution](#) were violated and her right to just and fair trial under Article 25(1) and 50(1) of [Constitution](#) were violated.



The Supreme Court in *Wavinya Ndeti v Independent Electoral & Boundaries Commission (IEBC) & 4 others* (2015) eKLR in allowing a preliminary objection to the petition said at paragraph 43:

“The Court of Appeal has itself noted that Section 85A(a) of the *Elections Act* having been sanctioned by *Constitution* could not be inconsistent with the right of access to justice and fair hearing. That court’s judgment focused on the interpretation of section 85A of the Election Act, the Election Rules and the Court of Appeal Rules, and on clarifying the jurisdiction of the Court of Appeal to extend time in matters of election petition appeals. The Appellate Court’s holding in this regard has been reaffirmed repeatedly in our decisions cited above.”

40. It is unmistakably clear that section 85A of the *Elections Act* provides that the statutory timeline for the filing of an appeal is a mandatory provision. The appellant failed to file her appeal within the statutory timeline; as a result, she failed to comply with a mandatory provision of the law. The consequence of such non-compliance is that the appeal before us is incompetent. Accordingly, we strike out the appellant’s record of appeal.
41. Having struck out the appellant’s appeal, we do not find it necessary to consider the issue of security for costs or even delve into the merits of the main appeal, which stands struck out by virtue of the above findings. The upshot of the above is that the appeal is hereby struck out with costs to the 3rd and 4th respondents capped at Kshs.200,000/= for each respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2023.

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

