



REPUBLIC OF KENYA



**Garama v Karisa & 3 others (Election Petition Appeal (Application)
1 of 2023) [2023] KECA 924 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 924 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
ELECTION PETITION APPEAL (APPLICATION) 1 OF 2023
SG KAIRU, GV ODUNGA & JW LESSIT, JJA
JULY 28, 2023**

BETWEEN

KOMBE HARRISON GARAMA APPELLANT

AND

KENGA STANLEY KARISA 1ST RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

**AMINA ABUBAKAR SENG (MAGARINI CONSTITUENCY RETURNING
OFFICER) 3RD RESPONDENT**

MICHAEL THOYAH KINGI 4TH RESPONDENT

(An application that the notice of appeal be struck out with costs; that the supplementary record of appeal be expunged or be struck out with costs; and that the appeal from the judgment of the High Court of Kenya at Malindi (Mabeya, J.) dated 3rd March 2023 in Malindi Election Petition No. E001 of 2022 be struck out with costs)

RULING

1. In a judgment delivered on 3rd March 2023 in Malindi Election Petition No. E001 of 2022, the High Court at Malindi (Mabeya, J.) allowed a petition by the 1st respondent, Kenga Stanley Karisa, (the applicant in the present application dated 5th April 2023) and found that the Member of the National Assembly election for Magarini Constituency was not conducted in accordance with *the Constitution* and the law and that the massive errors, irregularities and illegalities committed by Independent Electoral and Boundaries Commission (IEBC) and Amina Abubaker Seng, the Returning Officer, the 2nd and 3rd respondents respectively, in the conduct of the election affected the validity and results of the election and declared that election null and void and that, Kombe Harrison Garama, the appellant



- herein (a respondent in the present application) was not validly elected as the Member of the National Assembly for Magarini Constituency. The High Court ordered that a certificate to that effect shall issue forthwith, and that IEBC should therefore proceed to conduct a by election as required under the law.
2. Aggrieved by that judgment, the appellant, Kombe Harrison Garama, intending to appeal against the same, filed a notice of appeal dated 9th March 2023 and lodged in Court on 10th March 2023. Subsequently, the appellant filed the record of appeal dated 30th March 2023 and a supplementary record of appeal dated 3rd April 2023.
 3. By his application the subject of this Ruling dated 5th April 2023, the applicant, Kenga Stanley Karisa, invoking Article 87(1) of *the Constitution*, Sections 85(A)(1)(a) of the *Elections Act* No. 24 of 2011, Rules 6, 8, 9, 17(2) and 19 of the *Court of Appeal (Election Petition) Rules*, 2017 seeks Orders that: the Notice of Appeal dated 9th March 2023 and filed in court on 10th March 2023 be struck out with costs; that the supplementary record of appeal dated and filed on 3rd April 2023 be expunged or be struck out with costs; and that the appeal be struck out with costs.
 4. The grounds on which those orders are sought are set out on the face of the application and in the supporting affidavit of the applicant sworn on 5th April 2023. The grounds are that: the notice of appeal was filed out of time without the court's sanction; is incompetent and fatally defective; is not a valid and legal notice of appeal as prescribed by law; that the record of appeal does not contain all documents prescribed in law and is incomplete and deficient for non-compliance with the mandatory provisions of the law; that the supplementary record of appeal dated 3rd April 2023 was filed outside the timelines prescribed by law; that the record does not contain proceedings of the High Court; that the appeal does not lie in law; and that the defects are incurable under Article 159 of *the Constitution*.
 5. In his replying affidavit sworn on 5th April 2023, the appellant Harrison Garama Kombe deposed that contrary to the applicant's claim, the notice of appeal was filed seven days after the delivery of the judgment in line with Rule 6 of the *Court of Appeal (Election Petition Rules)* 2017; that the claims that the notice and the record of appeal are defective are baseless; that Rule 8(5) of the *Court of Appeal (Election Petition Rules)* 2017 allows for filing of a supplementary record within 7 days of filing of the record of appeal in the event the High Court fails to avail all documents required under Rule 8(1) of those Rules; that owing to the failure by the High Court to avail certified proceedings and decree on time, the appellant filed his record of appeal on 31st March 2023 and the supplementary record three days later once the proceedings and decree had been made available and that the proceedings are contained in the supplementary record.
 6. At a pre-hearing conference held on 17th April 2023, the Court directed, with the concurrence of the parties, that the applicant's present application dated 5th April 2023 seeking orders for striking out of the appeal be subsumed in and heard together with the appeal. Directions were also given, with which all parties complied, regarding the filing and service of written submissions and the hearing date was fixed for 12th June 2023.
 7. During the hearing on 12th June 2023, the parties were represented by learned counsel. Mr. Gikandi, Mr. Wakwaya and Mr. Ometa appeared for the appellant. Mr. Bwire appeared with Mr. Gichaba for the 1st respondent/applicant. Mr. Momanyi appeared for the 2nd and 3rd respondents. Mr. Bwire also held brief for Mr. Busiega for the 4th respondent.
 8. Orally highlighting the written submissions dated 15th May 2023 in support of the application, Mr. Bwire and Mr. Gichaba submitted, on the strength of the decision of this Court in *Abdikadir Farah Mohammed & another v Independent Electoral and Boundaries Commission & 3 others* [2018] eKLR, that a valid notice of appeal is a pre-requisite jurisdictional document without which the jurisdiction



of the court is ousted; that Rule 6(2) of the [Court of Appeal \(Election Petition Rules\) 2017](#) requires that a notice of appeal shall be filed within seven days of the date of the decision appealed against; that in this case the notice of appeal was filed after seven days having been filed on 10th March 2023; that in election dispute resolution mechanisms, there are no exempted days, and time under Rule 6(2) began to run on the date judgment of the High Court was delivered; that under the Chief Justice’s Guidelines to Facilitate Management of Electoral Dispute Resolution dated 26th August 2022, all filing in election petitions is online on any day of the week; and that the last day on which a notice of appeal should have been filed was 9th March 2023; that the notice of appeal in this case is a day late which runs afoul of Rule 6(2) of the [Court of Appeal \(Election Petition Rules\) 2017](#).

9. Counsel for the applicant submitted further that under Section 85A of the [Elections Act](#), an appeal to this Court should be confined to matters of law; that the appellant’s notice of appeal in this case is an omnibus notice of appeal as the expressed intention is to challenge “the entire decision” of the High Court and such notice cannot qualify as a valid notice of appeal. In support, the decision in [Abdikadir Farah Mohammed & another v. Independent Electoral and Boundaries Commission & 3 others](#) (above) was cited.
10. Counsel further faulted the notice of appeal for introducing “a new party by the name Kombe Harrison Garama as the 4th respondent”; and that no such person participated in the proceedings before the High Court. It was submitted that for a court to have jurisdiction over a matter, proper parties must be identified.
11. The other ground on which counsel urged that the appeal should be struck out is that the record of appeal filed on 31st March 2023 does not contain a certified copy of the decree as required under Rule 8(1)(h) of the [Court of Appeal \(Election Petition Rules\) 2017](#). The decision of this Court in the case of [Moses Masika Wetangula v John Koyi Waluke & 2 others](#) [2008] eKLR was cited in support.
12. Regarding the supplementary record of appeal, counsel submitted that the same was filed and served outside the timelines set out in Article 87(1) of [the Constitution](#) and Section 85A of the [Elections Act](#) as the same was filed beyond the 30 days set out under Section 85A of the [Elections Act](#). The decision of the Court in [Abdikadir Farah Mohammed & another v. Independent Electoral and Boundaries Commission & 3 others](#) (above) was again cited in support.
13. Other decisions cited for the proposition that failure to file the appeal within the prescribed timelines is fatal, include [Jeremiah Nyangwara Matoke v. Independent Electoral and Boundaries Commission & 2 others](#) [2018] eKLR; and the Supreme Court decision in [Nicholas Kiptoo Korir Arap Salat v Independent Electoral and Boundaries Commission & 7 others](#) [2014] eKLR. It was urged that Rule 8(5) of the [Court of Appeal \(Election Petition Rules\) 2017](#) does not, and cannot, being a subsidiary legislation, extend time for filing of the record of appeal beyond the timelines stipulated under [the Constitution](#) and the [Elections Act](#). In support of that proposition, the Supreme Court decision in [Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu](#) [2014] eKLR was cited.
14. Counsel concluded by submitting that the notice of appeal filed is a nullity; that the record of appealed filed on 31st March 2023 lacks an essential and mandatory document; that the supplementary record of appeal was filed out of time; and that for those reasons this Court lacks jurisdiction to proceed to hear and determine the appeal.
15. Mr. Gikandi and Mr. Wakwaya, in highlighting the appellant’s written submissions dated 23rd May 2023 in opposition to the application submitted that Rule 6 of the [Court of Appeal \(Election Petition Rules\) 2017](#) requires filing of a notice of appeal within 7 days of the judgment of the High Court; that in this case the notice was filed on 10th March 2023 which was within the stipulated period. It was



submitted that in computing time, the first day is excluded and that the notice of appeal as well as the record and supplementary record of appeal were filed within the stipulated period.

16. It was submitted that Section 57(b) of the *Interpretation and General Provisions Act* provides that computation of time will exclude non-working days and that where the last day for filing is a non-working day, the period is to include the immediate next working day. The decision of the Court in *Evans Nabwera Taracha v Independent Electoral and Boundaries Commission (IEBC) & 2 others* [2018] eKLR and the case of *John Lokitare Lodinyo v. Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR were cited in support.
17. Regarding the complaint that the notice of appeal is defective, it was submitted that unlike the circumstances in the case of *Lesirma Simeon Saimanga v. Independent Electoral and Boundaries Commission & 7 others* [2018] eKLR where the court found a notice of appeal to be irregular on account of omitting grounds of appeal, the notice of appeal in this case does contain the grounds challenging the decision of the High Court. It was urged that the grounds set out in the notice of appeal in the present case raise matters of law within the parameters of the decision of the Supreme Court in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others* [2014] eKLR as the court is called upon to evaluate the conclusions reached by the High Court against the evidence on record and to interpret the law.
18. As to the complaint that the record of appeal does not contain the proceedings and decree and that the supplementary record of appeal was filed without leave, counsel submitted that the record of appeal was filed within 30 days of the decision of the High Court in accordance with Rule 8 of the *Court of Appeal (Election Petition Rules)* 2017; that under Rule 8(5) of those rules, provision is made for the filing of supplementary record 7 days after filing of the record of appeal and that the appellant complied with the same in that the supplementary record was filed within 3 days of filing the record of appeal which record was filed within 30 days of the decision of the High Court.
19. Citing Article 159 of *the Constitution* and the decisions in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR and *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] eKLR it was submitted that the law does not allow technicalities to overrun substantive justice and that the application should be dismissed with costs.
20. The 2nd and 3rd respondent, IEBC and the Returning Officer opposed the application. Their written submissions dated 18th May 2023 as orally highlighted by learned counsel replicate the arguments put forth by the appellant as set out above and it is unnecessary, for the avoidance of repetition, to regurgitate the same here.
21. We have considered the application, the affidavits, grounds of opposition and the rival submissions, written and oral, by learned counsel. Three issues emerge. The first is whether the appellant's notice of appeal was filed out of time. The second is whether the notice of appeal is incompetent on account of being an "omnibus notice" and on account of introducing an "unknown party". The third issue is whether the record of appeal is incompetent on account of omission to include the proceedings of the High Court and the decree.
Related to that is the question whether the supplementary record of appeal is properly on record.
22. We start with the question whether the notice of appeal was filed out of time. The *Court of Appeal (Election Petition Rules)* 2017 which by dint of Rule 4 thereof applies to the conduct of appeals from decisions of the High Court in election petitions and matters relating thereto provides in Rule 6(1) thereof that a person who desires to appeal to the Court shall file a notice of appeal which shall be lodged in duplicate in the registry of the Court.



23. Rule 6(2) provides that “a notice of appeal shall be filed within seven days of the date of the decision appealed against.” The judgment of the High Court in this case was delivered on 3rd March 2023. There is no dispute that the notice of appeal in this case was filed on 10th March 2023. The applicant contends, as already indicated, that the last day of filing the notice of appeal should have been 9th March 2023. It is contended for the applicant that in computing the seven days, time began to run the 3rd March 2023. The counter argument is that time began to run on 4th March 2023, the day after delivery of judgment and that Sundays, public holidays and all official non-working days are excluded under Section 57 of the *Interpretation and General Provisions Act*.
24. The *Court of Appeal (Election Petition Rules)* 2017 do not contain provision on computation of time. However, Section 57 of the *Interpretation and General Provisions Act* on computation of time provides that in computing time for the purposes of a written law, unless the contrary intention appears, the period of days from the happening of an event or doing an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done. Moreover, Rule 4(2) the *Court of Appeal (Election Petition Rules)* 2017 provides that “where there is no applicable provision in these Rules, the provisions of the *Court of Appeal Rules, 2010* relating to civil appeals shall apply to an election petition appeal in so far as they are not inconsistent with these Rules.” Rule 3(a) of Court of Appeal Rules, 2010 on computation of time, in line with Section 57 of the *Interpretation and General Provisions Act*, provides that a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act, or thing is done.
25. Based on those provisions we are persuaded that the date on which the judgment of the High Court was delivered, namely, 3rd March 2023 is excluded in computation of the 7 days prescribed in Rule 6(2). Consequently, 7 days from Saturday 4th March 2023 lapsed on 10th March 2023. We conclude therefore that the notice of appeal was filed within the time prescribed under Rule 6(2) of the *Court of Appeal (Election Petition Rules)* 2017. There is no merit in the complaint that the notice of appeal is out of time.
26. Next is the complaint that the notice of appeal is defective and incompetent on grounds that it is an “omnibus notice”. If we understood the applicant’s grievance correctly, it is that to the extent that the appellant expresses in the notice of appeal an intention to challenge the “whole decision,” the same runs afoul of Section 85A of the *Elections Act* which limits the jurisdiction of this Court to matters of law. The appellant’s notice of appeal reads in relevant part as follows:
- “Take Notice that Kombe Harrison Garama, the appellant herein, being aggrieved with the decision of the Honourable Justice A. Mabeya FCI Arb delivered at Malindi on the 3rd March 2023 intends to appeal against the whole of the said decision on the following grounds:”
27. Eleven separate grounds of appeal are then enumerated. We discern no defect in the notice of appeal on account of the intimation that the appellant “intends to appeal against the whole of the said decision...”. It accords with Rule 6(3)(a) of the *Court of Appeal (Election Petition Rules)* 2017 which provides that a notice of appeal shall “specify whether all or part of the judgment” is being appealed.
28. The eleven grounds of appeal set out in the notice of appeal include complaints that learned Judge reduced the standard of proof required in election petitions; that the Judge erred in his interpretation of Articles 81 and 86 of *the Constitution* and Sections 82 and 83 of the *Elections Act*; imposed obligations not recognized by law; made determinations on matters not pleaded. These in our view are matters of law within the ambit of Section 85A of the *Elections Act* and fall within the parameters set out by the Supreme Court in *Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others* (above). There is accordingly no merit in this complaint.



29. We next deal with the complaint that the record of appeal does not contain the proceedings of the High Court and the decree. We will deal with this alongside the complaint that the supplementary record of appeal containing the said proceedings and decree, is out of time. Rule 8 of the *Court of Appeal (Election Petition Rules)* 2017 deals with the contents of the record of appeal which should include the trial judge’s notes of the hearing and a certified copy of the decree or order as correctly indicated by the applicant. However, Rule 8(5) provides that:

“Where the High Court does not avail any of the documents required under sub rule (1), the appellants may proceed to file the record of appeal and a supplementary record of appeal within seven days thereafter.”

30. In his replying affidavit sworn on 5th April 2023, the appellant deposed, and this has not been controverted, that the High failed to avail the certified proceedings and decree in time, and that once the same were made available, a supplementary record of appeal was filed three days after filing of the record of appeal. The record of appeal contains numerous letters addressed to the Deputy Registrar of the High Court at Malindi by the advocates for the appellant, the last of which is dated 31st March 2023, requesting the Deputy Registrar to urgently make the proceedings available. Indeed, the proceedings contained in the supplementary record of appeal show that the same were certified as a true copy of the original by the Deputy Registrar of the High Court on 31st March 2023 whilst the decree was certified on 3rd April 2023. Consequently, the supplementary record of appeal was filed within the prescribed period. There is, therefore, no merit in this complaint.

31. The last complaint, which conjures in one’s mind the expression “clutching at straws”, is that an unknown party, Kombe Harrison Garama, is named as the 4th respondent in the notice of appeal. There is no doubt who the parties in the petition before the High Court were. Kenga Stanley Karisa, the 1st respondent herein was the petitioner. The 2nd and 3rd respondents herein, namely, Independent Electoral and Boundaries Commission and Amina Abubakar Seng (Magarini Constituency Returning Officer) respectively, were the 1st and 2nd respondents in the High Court, while the appellant herein, Kombe Harrison Garama, was the 3rd respondent before the High Court. The inclusion of the appellant’s name as the 4th respondent in the notice of appeal cannot be anything but inadvertence, which mistake, is notably not repeated in the record of appeal in which the parties are properly indicated, and the 4th respondent correctly named as Michael Thoyah Kingi. We are unable to discern any prejudice, and none has been shown, that the applicant may have suffered on account of the mistake.

32. All in all, the application fails and is hereby dismissed with costs to the appellant and to the 2nd and 3rd respondents.

33. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL



G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

