



Farah v Independent Electoral and Boundaries Commission (IEBC) & 2 others (Election Petition Appeal E007 of 2023) [2023] KECA 1024 (KLR) (14 July 2023) (Ruling)

Neutral citation: [2023] KECA 1024 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL E007 OF 2023
HA OMONDI, KI LAIBUTA & GWN MACHARIA, JJA
JULY 14, 2023**

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE ELECTION OF
MEMBER OF NATIONAL ASSEMBLY FOR MANDERA NORTH CONSTITUENCY
IN THE MATTER OF GARISSA ELECTION PETITION NO. E001 OF 2022**

BETWEEN

BARDAD MOHAMED FARAH APPELLANT

AND

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

**THE RETURNING OFFICER, MANDERA NORTH CONSTITUENCY 2ND
RESPONDENT**

ABDULLAIH BASHIR SHEIKH 3RD RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi
(Gitari, J.) dated 3rd March 2023 in Election Petition No. E001 of 2022)*

RULING

1. In the general elections held in August 2022, the 1st respondent, the Independent Electoral and Boundaries Commission (IEBC) conducted elections for Mandera North Constituency where the appellant (Bardad Mohamed Farah) and the 3rd respondent (Abdullaih Bashir Sheikh) contested the seat of Member of the National Assembly. The 2nd respondent, the Returning Officer, Mandera North Constituency, declared the 3rd respondent as the winner with 9,214 votes, and that the appellant had garnered 6,999 votes.
2. Aggrieved by the outcome, the appellant filed a petition at the High Court challenging the results announced by the 2nd respondent, on the basis that the elections were not free and fair as they were



conducted in a manner contrary to the principles outlined under article 81 of the Constitution and section 39 of the Election Act and Regulations, which included inter alia, deliberate manipulation of KIEMS Kits by various presiding officers; deployment of the complementary identification system to facilitate irregular ballot marking, stuffing and exaggerated voter turnout in favour of the 3rd respondent; unilateral alteration of certain polling stations and removal of election materials to other polling stations by the 1st and 2nd respondents; voter bribery and undue influence instigated by the 3rd respondent and aided by various presiding officers and the 2nd respondent; ferrying of voters to various polling stations; and that the 1st and 2nd respondents, alongside the Mandera County security apparatus, meting out violence on agents and candidates whenever objections were raised regarding the election process.

3. The appellant urged this court to make an order for the delivery of all the election materials, including all the ballot materials, all forms, all Polling Station Diaries and KIEMS Kits with respect to the election; a recount, re-tally and verification of all the polling stations within Mandera North Constituency; alternatively that the declared result of the election be rendered invalid, null and void; that the 3rd respondent be held to have violated sections 9 – 12 of the Elections Offences Act and be held to be lacking in personal integrity, character and suitability to hold public office; order do issue that the 1st respondent conducts a fresh parliamentary election for Mandera North Constituency; and costs.
4. The respondents opposed the application, with the 1st and 2nd respondents contending that the petitioner did not present a set of results other than what was declared and announced by the respondents; that the orders sought are wide in scope and not within the ambit of the original petition; that no sufficient basis had been laid out to warrant the orders sought, that the petitioner was not specific as to the particular polling station, with respect to the alleged malpractices, thus rendering that limb of the prayers speculative; that the few incidences where there were challenges in the use of KIEMS Kits were remedied by use of legally laid down procedures before resorting to use of manual registers to identify voters; and that the 3rd respondent won the elections fairly, and with a clear margin.
5. The trial Judge found that there was a basis for partial scrutiny and recount in the listed polling stations, but that there was no basis to order scrutiny, recount and re-tallying in all polling stations in the entire constituency; that the allegation of manipulation of the KIEMS Kits was rebutted by the scrutiny report; and that there was no evidence to support the allegations of voter bribery, ferrying of voters, or eruption of violence in any of the polling stations. Ultimately, the court held that there were no irregularities or illegalities that substantially impacted the results announced by the 2nd respondent and, accordingly, the elections were substantially conducted in a free, fair, transparent, and credible manner, and in accordance with the Constitution and the electoral laws. In view of the foregoing, the trial court dismissed the appellant's petitions with costs to the respondents.
6. The appellant challenges the decision on 17 grounds of appeal, the main issues being scrutiny and/or recount; and that the costs awarded were manifestly disproportionate, unreasonable and excessively high.
7. Opposing the appeal, the 1st - 3rd respondents raised two separate but similar preliminary objections, each urging us to strike out the Memorandum of Appeal on the grounds that the appeal is incompetent, having been filed out of time. They submitted that section 85A of the Elections Act and rule 9(1) of the Court of Appeal [Election Petition] Rules, 2017 require that an appeal from the high court in such an election petition be filed within 30 days of the decision of the high court.
8. The 3rd respondent contends that the appeal is an abuse of the court process, having been filed on April 10, 2023, seven (7) days out of time from the date the impugned judgment was delivered. The judgment having been delivered on March 3, 2023. Therefore, failure to comply with the timelines



extinguished the right to appeal as the language and tenor of section 85 of the [Elections Act](#) is couched in mandatory terms, and does not give room for this Court to extend time. In support of this position, the 3rd respondent draws from this Court’s pronouncements in the case of [John Munuve Mati v Returning Officer, Mwingi North Constituency & 2 others](#) [2018] eKLR where the Court stated:

“By dint of section 85A of the [Elections Act](#), an election petition appeal must be filed within 30 days from the date of the judgment of the high court and heard and determined within 6 months from the date it was filed. This commitment to timely resolution of election disputes stems directly from the [Constitution](#) where article 87 specifically mandates Parliament to enact legislation to establish mechanisms for timely settlement of electoral disputes. We believe that it was that appreciation that informed the decision of the rules committee to promulgate dedicated court of appeal rules to specifically regulate the filing of election petition appeals.”

9. We are urged to find that this court lacks jurisdiction to hear and determine the appeal, and that the appeal should be dismissed in limine.
10. It is further argued that we should not even entertain the inclination towards extending time. The respondents relied on this Court’s decision in the case of [Wavinya Ndeti v IEBC & 4 others](#) [2014] eKLR, where the Court addressed the issue of extension of time under section 85 A and stated 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 85 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 magistrates’ 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.”

11. In addition to the foregoing, the 3rd respondent also drew our attention to the distinction between timelines for filing appeals under the [Court of Appeal Rules](#) and the appeals filed under the [Court of Appeal \[Election Petition\] Rules](#) as was enunciated in the [Munuve Mati case](#) (*supra*).
12. The appellant acknowledges that, indeed, the judgment in the high court was rendered on March 3, 2023, and that the record of appeal was filed on April 10, 2023. However, the appellant maintained that, notwithstanding, it was still within the 30 days timeline provided under section 85A of the [Elections Act](#).

The appellant further contends that, by March 10, 2023, this appeal was already filed and a case number assigned to the appellant, who had lodged the notice of appeal as well as paid for security for costs. In this regard, the appellant submits that the definition of filing an appeal is to be regarded as the date on which the record of appeal is filed, and by counting calendar days in the normal manner; and that the last day the record of appeal ought to have been filed was on April 4, 2023. (if time is computed to include public holidays and Sundays the respondent’s objections would be sustainable).
13. Counsel for the appellant argued that reprieve is offered under section 57 of the [Interpretation and General Provisions Act](#), (Cap 2), which excludes Sundays and public holidays in the computation of time. On the other hand the appellant concedes that the [Court of Appeal \(Elections Petition\) Rules](#),



2017 (2017 Rules) do not make provision in regard to computation of time, but urges us to adopt the approach stipulated under rule 4 of the 2017 Rules, which allows this court to apply the Court of Appeal Rules, (2022 Rules), where there is no applicable provision in relation to election petition appeals. In addition, counsel submitted that we must make a bold step and take recourse in rule 3 of the 2022 Court of Appeal Rules, which are a mirror provision to section 57 of the Interpretation and General Provisions Act in the computation of time to exclude all Sundays between 3rd March and 4th April, 2023 as well as the period between April 7 - 10, 2023, and find that the instant appeal was filed in time. In support of this contention, counsel urged the Court to find succor in the case of John Lokitare Lodinyo v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR.

The appellant maintains the position that the notice of appeal dated March 10, 2023 was filed within the 30 days period, and that he had made a request to be supplied with the proceedings, certified copy of the Judgment as well as the decree in timely but that these copies were later availed only between April 14 - 19, 2023, after several protestations and the high court only availed copies of proceedings between April 14 - 19, 2023 after several protestations by the appellant.

14. The appellant seeks refuge in the pronouncements of this Court in Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] eKLR where Kiage, JA., while acknowledging that there can be no competent appeal until the four items are lodged within the time stipulated namely:

- (a) A memorandum of appeal, in quadruplicate,
- (b) The record of appeal, in quadruplicate
- (c) The prescribed fee; and
- (d) Security for costs of the appeal and, yet, in his considered view:

“... when reckoning the days, be they the sixty past notice of appeal for all appeals generally, or any shorter period as may be specified by a special Act of Parliament, the days so certified are excluded, as indeed they must. Such exclusion is not in any way offensive, violative or subversive of the statute that sets time limits. It is a common-sensical and pragmatic rule borne of practical day- to -day experience which has shown that the proceedings do delay. That may end some day when proceedings can be prepared and availed real time or contemporaneously but before that happens, the certified days must be excluded.

The letter requesting proceedings herein was written within time and copied to all the respondents and advocates. It made clear to the registrar of the High Court that the proceedings were required for purposes of appeal. The appellant did enough to trigger the exclusionary element in the proviso to Rule 82 and he was required to do no more. The high court registrar knew and must be presumed to have known that what was at stake was a time-bound election appeal. He needed no reminding. At any rate, the forty-nine days certified are in no wise inordinate. The certificate has not been impeached and in fidelity to law, I would exclude the said days with the result that the appeal before us was lodged within the time contemplated by the Elections Act and is therefore competent.

In arriving at this conclusion, I have not engaged in an exercise of time extension at all. I have merely performed a computation in much the same way I would rule that if the last day for the filing of the appeal had fallen on a Sunday or a public holiday, the appeal could properly and efficaciously be filed on the next following day so long



as that too, is not a public holiday or a Sunday which could push it further back. In short, the 30 days are not to be computed in a manner that would lead to absurdity.

Before I part with this issue, I would add that the right of appeal is an integral element of access to justice and the right to fair hearing under our constitutional order. There is nothing to suggest that Parliament in enacting Section 85A of the *Elections Act* intended to curtail or render illusory the very right of appeal it was legislating. Nor could it without running afoul the *Constitution*. As a court we must be vigilant not to adopt a construction of the provision that would render it nugatory and afford opportunity to mischief makers to frustrate intended appellants? Attempt at obtaining proceedings from the high court in time, thereby locking them out of appeal. I am persuaded that this is a sound and entirely reasonable approach for I am loathe to think that substantive justice can, consistently with good sense, be sacrificed at the guillotine of time. We are doers of Justice not mere keepers of time.”

15. Whereas we respect this very eloquently reasoned approach by the learned Judge, we, cannot ignore the pronouncements of the Supreme Court in *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR which stated thus:

“Those who filed election petitions outside the 28-day requirement of the *Constitution* cannot avoid the consequences of their dilatoriness; for it is the prescribed timeframe that opens the jurisdiction of the courts...”

See also *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others* [2014] eKLR where the Supreme Court stated:

“... We hold that the Judges of Appeal erred in law by admitting and determining an incompetent appeal, the same having been filed out of time prescribed by the pre-emptory provisions of section 85A, and in so doing the Court of Appeal acted without jurisdiction.”

16. We are of the considered view that the timelines are clearly set, and that what constitutes a complete record of appeal is also well laid out under rule 9 (1) of the *Court of Appeal (Elections Petition) Rules*, 2017. We take note that these rules do not make provision in regard to computation of time, but hasten to add that election petitions are sui generis, and that, where the *Rules* make no provision in that regard, then the fallback statute is, in our view, not section 57 of the *Interpretation and General Provisions Act*, but section 85 A of the *Elections Act*, which provides:

85A. 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- filed within thirty days of the decisions of the high court;

17. We can only echo the language and tenor in the *Munuve Mati case* (*supra*) when considering the suggested applicability of the *Court of Appeal Rules* that:

“The ... rules regulate the filing of all appeals in this Court. In general appeals, there is no serious time constraint. Parties have as many as 14 days to file a notice of appeal and 60 days thereafter to file the record of appeal. Where a party has applied for proceedings and complied with rule 82, the record of appeal can be filed even three or five years later so long



as there is a certificate of delay. That luxury is not available in an election petition appeal. By dint of section 85A of the *Elections Act*, an election petition appeal must be filed within 30 days from the date of the judgment of the High Court and heard and determined within 6 months from the date it was filed. This commitment to timely resolution of election disputes stems directly from the *Constitution* where article 87 specifically mandates Parliament to enact legislation to establish mechanisms for timely settlement of electoral disputes. We believe that it was that appreciation that informed the decision of the Rules Committee to promulgate dedicated *Court of Appeal rules* to specifically regulate the filing of election petition appeals.”

22. We must also point out that the object of the *2017 Rules*, which the appellant emphasized, is not restricted only to just and impartial determination of election petition appeals. Expeditionary determination of those appeals, which the appellant did not advert to, is equally an important object of the rules, which cannot be glossed over in the manner that the appellant invites us to do.”
18. This is only fortified by the echo in *Wavinya Ndeti (supra)*, that the language and tenor of the provision, when read alongside the constitutional time frames set for determination of electoral disputes, indeed leaves no wriggle room to second guess the significance of giving a strict meaning to the computation of time, each ticktock of the clock’s hand, waves the ominous threat of rendering an election court bereft of jurisdiction. It is a little late in the day to pretend to reinvent the manner of computation, or even to depart from what really constitutes a complete record of appeal. We have no doubt in our minds that the High Court delivered its judgment on March 3, 2023, and the appeal was filed on April 10, 2023, seven days late.
19. It is clear to us that an appeal from the high court has to be filed within 30 days as stipulated by section 85A of the *Elections Act*. As recently stated in *Jane Wambui Mwaura v IEBC & 2 others*, Civil Application No. 18 of 2018 (UR 13/2018:
- “The import and tenor of the decisions of this court is that Section 85A (1a) is cast in stone and there is no provision for enlargement of time.”
20. Enough said, reinventing the wheel is not an available option to us, and the upshot of the foregoing is that the preliminary objections raised are merited, and are hereby sustained. Consequently, we find that the appeal herein is incompetent and is hereby struck out with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

G. W. NGENYE MACHARIA

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

