



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & J. MOHAMMED, JJ. A)

CIVIL APPLICATION NO. SUP 4 OF 2014 (UR 4/2014)

BETWEEN

THOMAS MALINDA MUSAU.....1ST APPLICANT

STEPHEN NDAMBUKI MULI.....2ND APPLICANT

JOHN NTHULI MAKENZI.....3RD APPLICANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

LEONARD OKEMWA (RETURNING OFFICER).....2ND RESPONDENT

STEPHEN MUTINDA MULE.....3RD RESPONDENT

(An Application to seek leave to appeal to the Supreme Court of Kenya

against the judgment of the Court of Appeal at Nairobi (G.B.M. Kariuki,

Kiage & M'Inoti, J.J.A) delivered on 31st January, 2014 in Civil Appeal No. 219 of 2013)

RULING OF THE COURT

1. **Thomas Malinda Musau, Stephen Ndambuki Muli and John Nthuli Makenzi**, (the applicants) have moved this Court by way of a Notice of Motion dated 6th February, 2014 for leave to appeal to the Supreme Court against the judgment of this Court delivered on 31st January, 2014. The motion is said to be premised on **Article 163(4)(b) of the Constitution**.

2. In the said judgment, this Court (G.B.M. Kariuki, P. O. Kiage & K. M'Inoti, J.J.A) allowed the appeal mounted by the 1st and 2nd respondents herein, in which the High Court nullified the election of Stephen Mutinda Mule (1st respondent in the Appeal) as a member of the National Assembly for Matungulu Constituency. The Court also ordered the three applicants herein to pay the appellant and Stephen Mutinda Mule (1st respondent in the appeal) costs of the appeal and of the petition at the High Court.

3. These orders do not appear to have settled well with the applicants and so on 6th February, 2014 they moved to this Court under certificate of urgency seeking the order we have referred to earlier. The application is predicated on grounds *inter alia*, that this Court had found that the learned Judge of the High Court had determined the petition on the basis of matters not properly before her and “*to that extent, she committed a reversible error, and the appeal succeeds on that score*”. Despite making that finding, the court had proceeded to allow the appeal and condemn the applicants herein to pay costs. The applicants reiterate that election petitions are “*matters of public interest and goes beyond prejudice caused to the applicants to that of the public at large*”.

4. The motion is supported by an affidavit sworn by the 1st applicant on 6th February 2014, in which he reiterates the grounds on the face of the application but adds that the learned Judges’ decision sets a bad precedent that affect not just the applicants but any other future election petitions as the decision was in disregard of **Rule 33 of the Election Petition Rules**. The 1st applicant also deposes that he will suffer

“irreparable loss and damages” if he remains condemned to pay costs of the Appeal and before the High Court as ordered by this Court. We hasten to point out here that condemnation to pay costs is a personal dilemma that does not transcend beyond the applicants’ personal financial implications and would not propel him to the Supreme Court, however unjust it may appear to him to be.

5. The Application is opposed by the 3rd respondent, Stephen Mutinda Mule, through his replying affidavit sworn on 22nd November, 2018. According to Mr. Mutinda, the application is incompetent and ought to be struck out for failure to comply with **Rule 31 of the Supreme Court Rules 2012** which is couched in mandatory terms. The 3rd respondent further deposes that the application does not raise any matters of general public importance as the applicants seek interpretation and/or application of **Rule 33 of the Election (Parliamentary and County Elections) Petitions Rule 2013**, which is a subsidiary legislation and which interpretation was a preserve of the Election Court.

He further states that Rules and regulations are subject to amendments and change at any time and are usually amended from time to time and may change from one election to another, and the Court’s interpretation of **Rule 33** as requested may not necessarily have any bearing on subsequent elections, and such interpretation is not a matter of Public Importance to be referred to the Supreme Court. He urged the Court to dismiss the Notice of Motion saying that he has subsequently contested and won the seat in two elections, the latest one being in 2017, and the issues raised by the applicants herein have therefore been overtaken by

6. The application was canvassed by way of written submissions filed by the applicants’ counsel on 31st January, 2019 and also by way of oral highlights at the plenary hearing before us. Parties also filed lists of authorities in support of their respective positions.

7. On the issue of competence of the application, the appellant quotes **Rule 31 of the Supreme Court Rules**, but his interpretation of the same differs from that of the respondent. We hold the view that the interpretation of that provision is the fundament on which this application rests. We shall advert to that issue shortly. At the plenary hearing, Mr. Laichena, learned counsel for the applicant reiterated the contents of his submissions. He stated that the learned Judge failed to consider **Rule 33 of the Elections Act** on scrutiny. He submitted that they will be seeking the Supreme Court’s interpretation on Section 33 of the Elections Act. He also faulted the learned Judge for condemning the applicant to pay costs. On the issue of costs, it goes without saying that costs are at the discretion of the Court, which discretion is exercised depending on the circumstances of each case. In our view exercise of discretion cannot be subject of interpretation or determination by the Supreme Court, we leave that issue at that.

8. On his part, Mr. Kiugu, learned counsel for the respondents relied on the replying affidavit filed on 23rd November, 2018 and his list of authorities. He maintained that the application is incompetent for failure to comply with Rule 31 of the Supreme Court Rules 2012 and is therefore for striking out. For this proposition, he relied on the case of **Nicholas Salat vs IEBC & 7 Others [2014] eKLR**. Counsel submitted further that the applicant has not demonstrated any issue of General Public Importance. In conclusion, he told the court that the matter has been overtaken by events as two other elections have been held subsequent to the election forming the subject of the petition before the High Court which is the genesis of this application. The 3rd respondent has emerged winner in both elections. He urged us to dismiss the application with costs.

9. We cannot discuss the competency or otherwise of this motion without delving into the realm of jurisdiction. In the famous words of Nyarangi JA in the *locus classicus* case of owners of **Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1**.

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...

...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

We need to determine as a starting point whether we have jurisdiction to entertain this application. Our jurisdiction to hear applications or appeals from the High Court and the courts of equal status or tribunals as envisaged under **Article 164(3)** is derived from a Notice of Appeal which is filed before the court from which the appeal emanates (other than in election petitions) and transmitted to this Court from that court. Similarly, by extrapolation, our jurisdiction to hear matters pertaining to the Supreme Court, is derived from **Rule 31 of the Supreme Court Rules 2012**, which provides as follows:-

31(1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the court or with the tribunal, it is desired to appeal from.

(2) Where an appeal lies only on a certificate that a matter of general public importance is involved, it shall not be necessary to obtain such certification before lodging the notice of appeal.

(3) Upon receipt of the notice of appeal of the court or tribunal against whose decision it is intended to appeal, the court or tribunal shall transmit a copy of the notice to the Registrar.

In this case, the appellant concedes that he has not filed any Notice of Appeal to the Supreme Court. The only issue, in our view, is determining the correct interpretation of **Section 31 of the Supreme Court Rules** which we have cited earlier in full. Is it the interpretation attributed to the applicant or the one given by the respondent?

10. The section is very clear and we cannot see any ambiguity in it. For purposes of clarity however, the section is a prescription of what one needs to do if they intend to move the Supreme Court on a matter emanating from the Court of Appeal. Just as is the case when a party wants to move to the Court of Appeal is enjoined by law to do, the first step is to file a Notice of Appeal. The Notice of Appeal is what gives the intending appellant ‘legs’ to move to the appellate Court. The only exception of course is where a party fails to file the Notice of Appeal

within the prescribed time and has to move to the court for extension of time. That is not the case here.

11. **Rule 31** in very simple straightforward language compels an intending appellant to file the Notice of Appeal within 14 days of delivery of the judgment or ruling he/she intends to appeal against. **Section 31(2)** does not in any way exempt a person relying on certification from this Court from filing a Notice of Appeal. All it says is that a party relying on a certificate that the matter in question is of general public importance, needs not get the certification before filing the Notice of Appeal. In other words, a party can file the Notice of Appeal and then come to the Court of Appeal for certification. Nowhere does **Section 31(2)** say that a party should come for certification and then file the Notice of Appeal.

In the **Nicholas Kiptoo Case** (Supra) the Supreme Court pronounces itself as follows:-

“Suffice it to say that under the current Court Rules, one need not seek and get certification before filing a Notice of Appeal. 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 jurisdictional pre-requisite.” (Emphasis supplied)

Section 31(1) is couched in mandatory terms. It requires a person who intends to appeal to that court to file a Notice of Appeal within 14 days of the impugned judgment/ruling. If certification is necessary as in the matter before us, then the person intending to appeal can come to this Court in an application such as the present one. In absence of the Notice of Appeal filed before the Supreme Court, this Court lacks jurisdiction to entertain an application for certification.

12. As stated earlier, jurisdiction is everything and without it, we cannot proceed even one step forward. Our finding is that we have no jurisdiction to hear and determine the application before us, in absence of compliance with **Section 31(1) of the Supreme Court Rules**. That being so, we need not get into the issue as to whether the application meets the threshold of certifying a matter as one of General Public Importance as set down in the case of **Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscione [2013] eKLR**.

13. This application is incompetent and we dismiss it with costs to the 3rd respondent.

Dated and delivered at Nairobi this 22nd day of May, 2020.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR