



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: HANNAH OKWENGU, JA. (IN CHAMBERS))

CIVIL APPLICATION NO. 30 OF 2018 (UR NO. 13 OF 2018)

BETWEEN

JOSEPH MAKILAP KIPKOROS.....APPLICANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARES COMMISSION.....1ST RESPONDENT

JOSEPH LEBOO MASINDET.....2ND RESPONDENT

WILLIAM CHEPTUMO KIPKORIR.....3RD RESPONDENT

(Application for extension of time within which to file and serve a Notice of Appeal and a Record of Appeal and in the alternative an application to amend the Notice of Appeal arising from the judgment and orders of the High Court of Kenya at Kabarnet, (Muriithi, J.) dated 5th March, 2018

in

ELECTION PETITION NO. 2 OF 2018)

RULING

[1] The applicant, **Joseph Makilap Kipkoros**, was an unsuccessful contestant for the seat of Baringo North Constituency in the general elections that were held in the country on the 8th August, 2017. Being dissatisfied with the outcome of the elections, the applicant challenged the election of the successful contestant, **William Kiptumo Kipkorir**, in Election Petition No. 2 of 2017 at Kabarnet High Court. His petition was heard and dismissed on 5th March, 2018, and he was ordered to pay the respondent's costs of Kshs.2 million.

[2] Being aggrieved by the order for costs, the applicant lodged a notice of appeal in the High Court of Kenya at Kabarnet registry, on 9th March, 2018. On 15th March, 2018, the notice of appeal was served on the 1st respondent, Independent Electoral Boundaries Commission, the 2nd respondent, Joseph Leboo Masindet and the 3rd respondent, William Cheptumo Kipkorir.

[3] The applicant has now moved this Court by way of a Notice of Motion dated 5th April, 2018, seeking an order for extension of time within which to file and serve the notice of appeal and the record of appeal, or in the alternative; that he be granted leave to amend the notice of appeal already filed in the High court at Kabarnet.

[4] The application is supported by grounds stated on the motion and an affidavit sworn by Gordon Ogolla, the applicant's counsel. In a nutshell, counsel depones that the applicant had erroneously filed the notice of appeal in accordance with the Court of Appeal Rules, 2010, (2010 Rules) that requires that a notice of appeal be filed within fourteen (14) days from the date of judgment, and a record of appeal filed within sixty (60) days from the date of filing the notice of appeal; that he has since discovered that, the Court of Appeal (Election Petition) Rules, 2017, (2017 Rules) provides that a notice of appeal against the judgment of an Election Court should be filed within seven (7) days from the date of judgment and the record of appeal within thirty (30) days from the date of filing the notice.

[5] The applicant draws the Court's attention to Rule 35 of Elections (Parliamentary and County Elections) Petition Rules, 2017, that states that an appeal from the judgment and decree of the High Court in a petition concerning the membership of the National Assembly, Senate, or office of County Governor is to be heard and determined under the 2010 Rules. The applicant pleads that the confusion arose from the multiplicity of rules governing the election petition appeals and that the Court should exercise its discretion under Rule 5 of the 2017 Rules to sort out the confusion by granting the applicant the required leave.

[6] The 1st and 2nd respondent opposed the applicant's motion through a replying affidavit sworn by the 2nd respondent in which it was deponed that the notice of appeal lodged by the applicant was not properly filed as the same was not lodged in the main registry or sub-registry of the Court of Appeal nor did the applicant deposit any security as required under Rule 27 of the 2017 Rules.

[7] The 3rd respondent also opposed the applicant's motion through an affidavit in which he maintained that the appeal should have been filed within thirty (30) days of the judgment; that the timeline being one provided by the Constitution, and the Statute are strict time lines; that the Court cannot extend the time lines by relying on subsidiary legislation; and that in any case the applicant's motion was defective as no memorandum or record of appeal was annexed.

[8] Hearing of the application proceeded by way of written submissions that were orally highlighted by the parties' respective counsel. Mr. Langat, who was holding brief for Mr. Ogolla, argued the application on behalf of the applicant, while Mr. Magare and Mr. Tororey represented the 1st and 2nd respondents, and Mr. Kanjama represented the 3rd respondent.

[9] In arguing the appeal, Mr. Langat submitted that the notice of appeal was erroneously filed under Rule 75 of the 2010 Rules, instead of being filed under the 2017 Rules; that the failure to file the notice under the appropriate Rules was mistake of counsel that should not be visited on the client; that if time was extended, the respondents would not be prejudiced as the intended appeal was on the issue of costs only; that the notice of appeal was timeously filed; that the mistake by counsel in filing the notice in the wrong forum is a technicality that can be cured by the provisions of Article 159 of the Constitution; and that the applicant should not be denied his right of appeal. Counsel relied on the authorities of ***John Munuve Mati vs Returning Officer, Mwingi North Constituency & 2 Others, [2018] eKLR***; and ***Andrew Toboso Anyanga vs Mwale Nicholas Scott Tindi & 3 Others [2017] eKLR***.

[10] On his part Mr. Magare, counsel for the 1st and 2nd respondents, dismissed the applicant's motion as lacking seriousness. He pointed out that the draft notice of appeal exhibited by the applicant, had not met the requirements of Rule 6 of the 2017 Rules, as it fails to indicate what aspects the applicant intends to appeal against; that no attempt was made to explain why the record of appeal was not filed; that Rule 18(2) of the 2017 Rules, envisages a situation where no appeal has been filed within thirty (30) days, hence this Court's discretion is restricted. The Court was urged to dismiss the application.

[11] Mr. Kanjama, counsel for the 3rd respondent, highlighting the written submissions drew a distinction between delay in filing a notice of appeal and delay in filing a record of appeal. He submitted that section 85A of the Election Act stipulates that appeals from the Election Court to the Court of Appeal should be filed within thirty (30) days; that this timeline is a statutory timeline whose origin is Article 87(1) of the Constitution that empowers Parliament to enact legislation to establish mechanisms for timely settlement of electoral disputes. In support of this position, counsel cited the Supreme Court cases of *Mary Wambui Munene vs Peter Gichuki Kingara & 2 Others [2014] eKLR*; and *Andrew Toboso Anyanga (Supra)*.

[12] Mr. Kanjama maintained that the provisions of section 85A should be strictly followed as filing of appeals out of time was not a procedural matter that was capable of being salvaged by Article 159 of the Constitution. As regards the attempt to lay the blame on the counsel for the mistake in filing the notice of appeal under the wrong statute, Mr. Kanjama, urged the Court to reject that argument as ignorance of the law is not a defence.

[13] I have given careful consideration to this application, the submissions and the authorities cited. Rule 6 of the 2017 Rules, requires that a person who wishes to appeal against an election petition files a notice of appeal within seven (7) days from the date of the judgment. Rule 6(3) of the 2017 Rules, provides that the notice of appeal shall in separate numbered paragraphs:

- “(a) specify whether all or part of the judgment is being appealed and, if a part, which part;**
- (b) identify the source of the right of appeal and the basis for the jurisdiction of the Court to determine the appeal;**
- (c) precisely set out the grounds of the appeal;**
- (d) concisely state the relief sought;**
- (e) 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**
- (f) contain a request that the appeal be set down for hearing in the appropriate registry.”**

[14] It is not disputed that the notice of appeal that was filed by the applicant on 9th March, 2018, did not comply with the 2017 Rules. First, the notice was filed in the High Court instead of a registry of the Court of Appeal; secondly, the notice did not contain the particulars stated in Rule 6(3) of the 2017 Rules. The applicant has in fact conceded that the notice was filed under section 75 of the 2010 Rules. Therefore it is evident that the notice of appeal is defective.

[15] In *John Munuve Mati vs Returning Officer, Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR*, this Court (differently constituted), dealt with a similar situation as the present case where the applicant had sought extension of time for filing and serving the notice of appeal, and for an order to deem the notice of appeal duly filed and served. In granting the application the Court stated, *inter alia*, as follows:

***“23. As to the appellant’s (sic) the contention that in the event of a conflict between the 2010 rules and the 2017 rules, the former must prevail, we are equally unpersuaded. The 2017 rules are dedicated to election petition appeals in a bid to give meaning to an express and overriding constitutional value, whilst the 2010 rules address all other appeals. The 2017 rules are later in time. But more importantly, rule 4(2) provides that in the event of a conflict between the 2017 rules and the 2010 rules, the 2017 rules shall prevail. It is only when there is no applicable provision in the 2017 rules that the 2010 rules apply in so far as they are not inconstant with the 2017 rules. In the matter at hand, the 2017 rules require a notice of appeal to be filed within 7 days whilst the 2010 rules require the notice of appeal to be filed within 14 days. We have no hesitation in holding that the 2017 rules must prevail.*”**

24. ...Nevertheless decision of this Court abound where it has been held that the prescribed timelines as regards electoral disputes resolution must be strictly adhered to ... 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 that justice must be administered without undue regard to procedural technicalities, balanced against the need to observe prescribed timelines.”

[16] In **Andrew Toboso Anyanga vs Mwale Nicholas Scott Tindi & 3 Others [2016]** eKLR, Githinji, JA, sitting as a single judge, granted an application for extension of time for filing and serving a notice of appeal that had been similarly been filed under the 2010 Rules instead of the 2017 Rules. It is apparent that unlike the statutory timelines, the Court has discretion to extend the timelines provided by the Rules. That discretion must as usual be exercised judicially taking into account the peculiar circumstances. For instance in both **John Munuve Mati vs Returning Officer, Mwingi North & Others (Supra)**; and **Andrew Toboso Anyanga vs Mwale Nicholas Scott Tindi & 3 Others (Supra)**, one factor that the learned judge’s took into account in exercising their discretion was the fact that the applicant had already filed a record of appeal.

[17] In the present application the applicant has not filed a record of appeal to date. To that extend his position is distinguished from the cases cited above. The failure to file a record of appeal also poses a bigger problem. The Elections Act No. 24 of 2011 provides that an appeal from the High Court in an Election Petition concerning members of the National Assembly, Senate or the Office of County Governor, shall be filed within thirty (30) days of the decision of the High Court. This is indeed a strict statutory timeline bearing in mind that the same section provides that the appeal must be heard and determined within six (6) months from the date of filing of the appeal. Since the applicant’s notice of appeal was filed on 9th March, 2018, the applicant ought to have filed his appeal by 8th April, 2018. To date the applicant has not filed any record of appeal. Effectively, this means that there is no appeal before the Court.

[18] In **Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014]** eKLR, the Supreme Court addressing the issue of timelines stated as follows:

“Those who filed election petitions outside the 28 day requirement of the Constitution cannot, in our perception, avoid the consequence of their dilatoriness; for it is the prescribed time-frame, that opens the jurisdiction of the Courts. And this being such an elemental constitutional requirement, it stands out by itself, irrespective of the averments made by parties in their pleadings. To this question, the general discretion provided for in Article 159 would not apply, as this is not an ordinary issue of procedural compliance.”

[19] In **Evans Odhiambo Kidero & 4 Others vs Ferdinand Ndungu Waititu & 4 Others [2014]** eKLR, the Supreme Court

again addressing the issue of failure to meet the timeline for filing the appeal, stated as follows:

“[96] Consequently, and in view of our appraisal of the law, we hold that the learned Judges of Appeal erred in law by admitting, and determining an incompetent appeal, the same having been filed out of the time prescribed by the peremptory provisions of section 85A (a) of the Elections Act as read with Article 87(1) of the Constitution. In so doing, the Court of Appeal acted without jurisdiction. In the circumstances, the majority judgment annulling the election of the first appellants herein is a nullity for all purposes.”

[20] It is evident that, although the court has the discretion to extend the timelines provided in the 2017 Rules, that discretion cannot be used to go contrary to the express statutory provisions and the clear intention of the Constitution expressed in Article 87 as timely settlement of electoral dispute. Therefore, although I appreciate the confusion that may have arisen in the application of the 2017 Rules, I have no jurisdiction to extend time provided under section 85A of the Election Act for filing the appeal. Without the record of appeal having been filed within the thirty (30) day statutory timeline, granting the

application for extension of time to file or amend the notice of appeal would be an exercise in futility as time cannot be extended for the applicant to file the record of appeal.

[21] For this reason, I do not find it appropriate to exercise my discretion in the applicant's favour. Accordingly, the motion fails and is accordingly dismissed with costs.

Dated and delivered at Kisumu this 26th day of April, 2018.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.