



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KANTAI, J.A. (IN CHAMBERS))

ELECTION PETITION APPLICATION NO. 137 OF 2018

BETWEEN

**IN THE MATTER OF ELECTIONS FOR MEMBER OF NATIONAL ASSEMBLY, EMURUA
DIKIRR CONSTITUENCY**

AND

IN THE MATTER OF NAROK HIGH COURT ELECTION PETITION NO. 2 OF 2017

DAVID KIPSANG KETER.....APPELLANT/APPLICANT

VERSUS

JOHANA KIPYEGON NGENO.....1ST RESPONDENT

LILIAN OKOTH, CONSTITUENCY RETURNING

OFFICER EMURUA DIKIRR CONSTITUENCY.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

(Application for leave to file and serve record of appeal out of time against the judgment of the High Court of Kenya at Narok (Bwonwonga, J.) delivered on 7th January, 2018

in

Election Petition No. 2 of 2017)

RULING

The Motion on Notice dated 3rd May, 2018 is said to be brought under **rule 4(2) (3)** and **rule 5** of the **Court of Appeal (Election Petition) Rules 2017** and **Article 159** of the **Constitution** and all enabling provisions of the law. It is prayed that leave be granted to the applicant **David Kipsang Keter** to file and serve record of appeal out of time. Further that the court admit record of appeal out of time and the court

grants any other orders it may deem fit.

In the grounds set out in support of the motion it is said that judgment of the High Court of Kenya at Narok was delivered on 7th February, 2018; that the applicant filed notice of appeal on 22nd February, 2018 (the date is wrongly stated in the motion to be 22nd April, 2018) which the applicant says is within the period provided under **Section 85A of the Elections Act**; that on 20th February, 2018 the applicant's lawyers wrote to the Deputy Registrar of the High Court expressing an intention to appeal the judgment of that court and sought copies of proceedings and judgment; that judgment and proceedings were mandatory for preparing and filing record of appeal as provided under **rule 8 of the said rules**; that there were challenges in obtaining proceedings; that the appeal was not filed on time because of the applicant facing challenges with the Court Registry at Narok; that delay was not inordinate and was not contributed by the applicant; that there is Certificate of Delay issued by that court indicating reasons for delay; that interests of justice require that the application be allowed and that the people of **Emurua Dikirr Constituency** will suffer prejudice if leave is not granted. Finally, that the respondents will suffer no prejudice if the application is granted and the intended appeal heard on the merits.

The supporting affidavit of the applicant repeats the matters summarised in the grounds and it is not necessary to repeat them here.

The 1st respondent **Johana Kipyegon Ngeno** who was elected as Member of Parliament for **Emurua Dikirr Constituency** in the national elections held on 8th August, 2017 in a replying affidavit to oppose the motion says amongst other things that the intended appeal cannot lie as it was not initiated in accordance with mandatory provisions of law and that it is untenable and contravenes provisions of the law; that a notice of appeal which is not filed within seven days of the judgment of the High Court is incompetent and cannot initiate an appeal; that the notice filed does not conform to mandatory requirements of law because it was lodged in the registry of the High Court and not the registry of this Court; that it does not conform with **rule (5)** and the form set out in the schedule and that failure to adhere to procedure makes the intended appeal untenable.

The 2nd and 3rd respondents respectively **Lilian Okoth (Constituency Returning Officer Emurua Dikirr Constituency)** and the **Independent Electoral and Boundaries Commission** did not file affidavits for or against the motion.

When the motion was called for hearing before me on 16th May, 2018 Miss Kaburu learned counsel appeared for the applicant while learned counsel **Mr. Bosek Kimutai** appeared for the 1st respondent and **Mr. Adams Chelule** appeared for the 2nd and 3rd respondents.

In submissions before me Ms. Kaburu stated that the applicant desired to appeal against the judgment of the High Court delivered on 7th February, 2018 but that typed proceedings and judgment were not delivered to the applicant by the registry of the High Court on time. She referred to various letters written by her law firm to that court. Learned counsel pointed out to me that the notice of appeal was filed at the High Court of Kenya in Narok on 22nd February, 2018 and a Certificate of Delay was issued by that court certifying the time taken to prepare the proceedings. Learned counsel urged me to be guided by the discretion donated by **rule 5 of the Court of Appeal (Election Petition) Rules 2017** and the provisions of **Article 159 (2) (d) of the Constitution of Kenya, 2010**. According to learned counsel the Supreme Court in the case of ***Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR*** held that extension of time is an equitable remedy which should be granted in appropriate cases. Finally that the intended appeal raises issues of public interest and is of great concern to the constituents of Emurua Dikirr Constituency and the intended appeal should therefore be heard.

Mr. Bosek in opposing the motion relied on the replying affidavit of the 1st respondent. According to counsel the **Elections Act** and the rules made thereunder did not allow for extension of time. He challenged the notice of appeal filed at the High Court at Narok stating that it could not initiate an appeal as it was not a proper document as required in law. According to him he could not challenge that notice as required by **rule 84 of the Court of Appeal Rules** because it was not a document before this court. In any

event, continued counsel, there was no application before me to try to cure that document. According to learned counsel that document was dated 14th February, 2018 which was seven days after judgment was delivered and that was evidence that the applicant's advocate had instructions to file an appeal within time.

Mr. Chelule, learned counsel for 2nd and 3rd respondents, adopted Mr. Bosek's submissions and submitted that the document called a notice of appeal was filed out of time.

Both Miss Kaburu and Mr. Chelule referred me to a **rule 14(2) of the Court of Appeal (Election Petition) Rules 2017** which, according to them, gave me discretion to extend time. I have not found such rule. It is possible that learned counsel were looking at draft rules which were not enacted. The appropriate rules were published as **Legal Notice No. 114 as Gazette Notice 105 on 28th July, 2017 in Vol CXIX**. Learned counsel should take note of this so that they do not misread the law.

In a brief reply Miss Kaburu submitted that I had the discretion to extend time. According to counsel the motion should not be dismissed on what she considered a technicality. Finally that the interests of justice and the interests of people of that constituency dictated that the application be allowed.

The principles that ordinarily govern grant of leave or refusal to extend time are well known as were discussed by this court in the case of *Fakir Mohammed v Joseph Mugambi and 2 Others Civil Application No. 332 of 2014 (ur)* cited in the case of *Wachiuri Wahome v Festus Gatheru Wahome and 6 Others [2016] eKLR*. They include the period of delay, the reason for delay, the chances of the appeal succeeding, amongst other factors set out in the said cases.

It seems to me that those principles do not apply to matters election because the Constitution, the Elections Act and the Court of Appeal (Election Petition) Rules 2017 create a special jurisdiction for courts dealing with petitions, appeals or applications relating to election matters.

The position here is that judgment intended to be appealed was delivered on 7th February, 2018. The document which the applicant calls "notice of appeal" has a court stamp of the High Court of Kenya at Narok of 22nd February, 2018 which according to the applicant was within time allowed by the rules for filing a notice of appeal. Mr. Bosek submits that even if the document was valid it would still be out of time.

It would appear to me that learned counsel for the 1st respondent is right in that submission. **Rule 6(2) of the Court of Appeal (Election Petition) Rules 2017** requires in mandatory terms that a notice of appeal be filed within 7 days of the date of the decision appealed against. Judgment of High Court having been delivered on 7th February, 2018 a notice of appeal should have been filed within 7 days. That was not done and learned counsel for the applicant is, with respect, wrong in the submission that the notice was filed on time according with the rules.

But in the motion before me it would appear that there are other issues that I must address because they go into the substance and root of the intended appeal.

Rule 2 of the said rules defines "Court" to mean Court of Appeal and defines "registry" to mean the registry of this Court and includes a sub-registry. A "notice of appeal" is a notice which is filed as prescribed by **rule 6**.

The document which is titled "notice of appeal" which is on page 25 of the record of the motion is headed:

"REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

THE ELECTIONS ACT 2011 PETITION NO. 2 OF 2017".

It is lodged with the Deputy Registrar of the High Court of Kenya at Narok on 22nd February, 2018. That notice does not comply with the requirements of **rule 6** of the rules because it was filed outside of the required seven days and was filed at the High Court of Kenya at Narok instead of being filed in this Court as required. In any event the applicant requests me to extend time to file a record of appeal out of time. **Section 85A** of the **Elections Act** requires that an appeal arising from a judgment in an election petition shall be filed within 30 days. The Supreme Court of Kenya in **Evans Odhiambo Kidero and 4 others v Ferdinand Ndung'u Waititu and 4 Others [2014] eKLR** citing this Court's decision in **Ferdinand Ndung'u Waititu v Independent Electoral and Boundaries Commission and 8 others Civil Appeal No. 137 of 2013** held that timeliness set by the Constitution and the Elections Act are neither negotiable nor extendable by any court.

The Supreme Court of Kenya in **Mary Wambui Munene v Peter Gichuki Kingara and 2 Others Supreme Court Petition No. 7 of 2014** was categorical on the imperatives of timelines demanded by the Constitution in the settlement of the election disputes. The same court in that matter declared the constitutional basis of **Section 85A** of the Elections Act stating that it was neither a legislative accident nor a routine legal prescription.

On the place of the Elections Act and the rules made thereunder the Supreme Court had this to say in **Fredrick Otieno Outa v Jared Odoyo Okelo and 4 Others Surpeme Court Petition No. 10 of 2014:**

“On this account, it makes in our perception, eminent sense that the ordinary rules of procedure, in their full tenure and effect, tend to be ill-suited to the effectuation of substantive aspects of the Elections Act and the rules made thereunder. It is clear to us, for instance, that rule 35 of the Election Petition Rules, in so far as it makes the Court of Appeal rules applicable to appeals in election - dispute matters, is to be construed on a supplement to and not a substitute to - the provisions of the Elections Act. We would state, for the avoidance of doubt, that the importation of the Court of Appeal Rules in the conduct of the electoral appeals via rule 35 of the Election Petition rules, cannot oust the clear provisions of Section 85A of the Elections Act.”

In any event under **rule 4** of the **Court of Appeal (Election Petition) Rules 2017** the said rules take precedence over the **Court of Appeal Rules 2010** where there is inconsistency in the rules.

The applicant was required to file a notice of appeal in this court within seven days of the judgment of 7th February, 2018. He did not do so. He was required under **Section 85A** of the **Elections Act** to file an appeal within 30 days of the date of judgment. Again he did not do so.

The factual position here and the legal provisions and case law that I have cited cannot allow me to exercise any discretion in favour of the applicant to extend time to file an appeal out of time. The motion fails and I dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 25th day of May, 2018.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR