



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

ELECTION PETITION APPEAL NO. 4 OF 2017

BETWEEN

MWAMLOLE TCHAPU MBWANA ..... APPELLANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC) ..... 1<sup>ST</sup> RESPONDENT

KWALE COUNTY RETURNING OFFICER AMINA

HUSSEIN SOUD ..... 2<sup>ND</sup> RESPONDENT

CONSTITUENCY RETURNING OFFICER FOR KINANGO

(CHARO KALUME CHARO)

LUNGALUNGA (SAHA MADZUNGU ISAIAH)

MSAMBWENI (YUSUF ABUBAKAR MOHAMMED)

MATUGA (KASSIM MWAGOMBA KAEMA) ..... 3<sup>RD</sup> RESPONDENT

THE PRESIDING OFFICER AND THE DEPUTY PRESIDING OFFICER,

BARAZA PARK, MATUGA..... 4<sup>TH</sup> RESPONDENT

HON. SALIM MVURYA MGALA ..... 5<sup>TH</sup> RESPONDENT

AND

SULEMAN MWAMLOLE WARRAKAH ..... 1<sup>ST</sup> APPLICANT

MWARAPAYO A. MOHAMED WA-MWACHAI ..... 2<sup>ND</sup> APPLICANT

MATSUDZO HAMISI MWAMREZI ..... 3<sup>RD</sup> APPLICANT

(An appeal from the Ruling of the Election Court at Mombasa (Thande, J.) dated 16<sup>th</sup> November, 2017 in *Election Petition No. 5 of 2017*.)

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RULING OF THE COURT

1. Substitution of parties by its very definition entails replacing/switching an existing party in the proceedings with another. Such substitution may be instigated by a number of reasons namely, where the proceedings are instituted in the name of a wrong person or a wrong person is joined in the proceedings or upon the death of a party. The paramount rationale for substitution of parties is to enable the court to reach an effectual and complete determination of the questions or issues arising in the proceedings. A court's power to allow substitution, if any, is regulated by rules of procedure.
2. We are seized of an application which principally turns on one major issue, that is, whether an appellant who is intent on withdrawing an election petition appeal can be substituted by another person. In other words, can any other person stand in the place of an appellant who no longer wishes to prosecute an appeal? Certainly, the answer to that question lies with the construction of the relevant electoral law and the procedural rules thereunder. Before embarking on that task a brief summary of the salient facts will place the matter in context.
3. Following the general elections held on 8<sup>th</sup> August, 2017 a number of petitions were filed challenging either the outcome of the results or the manner in which some of the elections were conducted. Of relevance is **Election Petition No. 5 of 2017** instituted in the Election Court at Mombasa by the appellant. Citing a plethora of malpractices and irregularities the appellant took issue with the manner in which the gubernatorial elections of Kwale County were conducted. He also opposed the declaration of the 5<sup>th</sup> respondent as the duly elected Governor.
4. In response, the 5<sup>th</sup> respondent raised a preliminary objection as to the competency of the petition which was upheld by the Election Court (**Thande, J.**) in a ruling dated 16<sup>th</sup> November, 2017. The learned Judge struck out the petition on the grounds of non-compliance with **Rules 8(1)(c) & (d)** of the **Election (Parliamentary and County Elections) Petition Rules, 2017 (the Election Petition Rules)** as well as non-joinder of the Deputy Governor who she deemed as a necessary party to the proceedings.
5. Aggrieved with that decision the appellant lodged the appeal before this Court on 15<sup>th</sup> December, 2017 under the provisions of **Section 85A (1)** of the **Elections Act** (the Act). It appears he had a change of heart because on 5<sup>th</sup> February, 2018 he wrote to the Deputy Registrar of the Court notifying him of his intention to withdraw the appeal. He also served the respondents with the notice in accordance with **Rule 96** of the **Court of Appeal Rules**. A few days later, a formal consent dated 8<sup>th</sup> February, 2018 executed by the appellant and respondents was filed before this Court on even date.
6. According to the applicants, on 10<sup>th</sup> February, 2018 the appellant advertised the notice of withdrawal in the Star Newspaper and called upon any person desirous of being substituted in his place to make the necessary application before this Court. However, the appellant denies making the advertisement in question. Be that as it may, the applicants who describe themselves as registered voters of Kwale County filed an application before us pursuant to **Articles 22,23,38,81,159,259(1)** of the **Constitution, Sections 3,3A & 3B** of the **Appellate Jurisdiction Act, Court of Appeal (Election Petition) Rules, 2017 (Election Appeal Rules)** and **Rules 21,22,23 & 24** of the **Election Petition Rules**. They seek to be substituted as appellants and petitioners in this appeal and the election petition respectively.
7. In support of that application each of them swore an affidavit which was more or less a replica of the other. The gist being that they were instrumental in the coordination of numerous meetings all over Kwale County. It is from those meetings that they were able to discern that a majority of the electorate therein were not pleased with the declaration of the 5<sup>th</sup> respondent as the Governor. For the reason that the said declaration did not represent the will of the electorate. As a result, majority of the said electorate, including the applicants, nominated the appellant to file an election petition to challenge the election. After the petition was struck out, the electorate once again nominated the appellant to lodge the appeal herein. They learnt with utter surprise of the appellant's intention to withdraw the appeal from the newspaper advert. He had not sought the approval of the electorate to do so. The applicants as well as the electorate had an interest in the adjudication of the appeal. It was in the interest of justice and fairness for the application to be allowed. The applicants were also ready to abide with any directions of the Court.
8. In opposing the application, the appellant deposed that the same was incompetent, frivolous and an abuse to the court process. Once the consent to withdraw the appeal was filed the said appeal stood automatically withdrawn. Therefore, the application was a non-starter having been filed subsequent to the withdrawal. He never instituted the petition or the appeal in a representative capacity but in his own capacity. Furthermore, the applicants had not established *locus standi* in the appeal.
9. On their part, the 1<sup>st</sup> to 4<sup>th</sup> respondents filed grounds of opposition to the effect that this Court lacks jurisdiction to entertain the application; the applicants have not demonstrated their interest in the appeal; the application is misconceived and does not lie in law.
10. Similarly, the 5<sup>th</sup> respondent deemed the application as hopeless. In his opinion whether the applicants are registered voters; participated in the elections in question; nominated the appellant to file the petition and appeal and represented majority of the voters who were allegedly aggrieved with the outcome of the election results, were all points of contention. He deposed that the advertisement in question did not relate to the appeal herein. This is because the advertisement talked of a notice to withdraw a petition filed on 21<sup>st</sup> November, 2017 and an application to withdraw the petition lodged with the Deputy Registrar on 5<sup>th</sup> February, 2018. Rather, the petition subject of this appeal was not withdrawn but struck out by the Election Court on 16<sup>th</sup> November, 2017.
11. In compliance with the directions issued by this Court on 21<sup>st</sup> March, 2018 the parties to the application filed their respective written submissions and oral highlights thereof were made by the counsel on record. The applicants were represented by Senior Counsel, Mr. Orengo who led Mr. Murambi and Mr. Kinengo. Mr. Ngure appeared for the appellant while Mr. Kitur appeared for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents. The 5<sup>th</sup> respondent was represented by Mr. Mogaka, Mr. Munyao and Mr. Wanyama.
12. Mr. Ngure begun by urging us to mark the appeal as withdrawn as per the appellant's notice. He reiterated that the appellant was not interested in prosecuting the appeal. He also prayed for the release of the security for costs of Kshs.500,000 deposited in this Court by his client. Mr. Kitur and Mr. Mogaka supported the withdrawal by arguing that their respective clients had signed a formal consent to that effect.

13. Rising on his feet, Senior Counsel Mr. Orenge, submitted that citizens of this country exercise their sovereign will through elections. **Article 38(2)** as read with **Article 81** of the **Constitution** left no doubt that every citizen has a constitutional right to participate in a free and fair elections. Any person falling within **Article 22(1) & (2)** of the **Constitution** could seek the enforcement of that right. The Article stipulates that:

**“1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**

**2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-**

- a. a person acting on behalf of another person who cannot act in their own name;**
- b. a person acting as a member of, or in the interest of, a group or class of persons;**
- c. a person acting in the public interest; or**
- d. an association acting in the interest of one or more of its members.”**

It was in recognition of that right of enforcement that the Rules Committee at **Rule 24(1)** of the **Election Petition Rules** stipulate:

**“At the hearing of the application for the withdrawal of a petition; a person who is qualified to be a petitioner in respect of the election to which the petition relates may apply to the election court to be substituted as the petitioner in place of the petitioner who has applied to withdraw the petition.”**

14. Noting the absence of a similar provision under the **Court of Appeal (Election Petition) Rules, 2017 (the Appeal Petition Rules)**, senior counsel suggested that the procedure applicable in the Election Court should apply *mutatis mutandis* to this Court. In the alternative, the lacuna ought to be addressed in line with **Article 22(4)** of the **Constitution** which provides:-

**“The absence of rules contemplated in clause (3) does not limit the right of any person to commence court proceedings under this Article, and to have the matter heard and determined by a court.”**

15. There was no doubt that this Court had the requisite jurisdiction as donated under **Articles 164(3)(a) & 22(4)** of the **Constitution** and **Section 85A(1)** of the Act to entertain the application.

16. Mr. Simiyu argued that Courts had in several decisions taken cognizance that electoral disputes are in *rem* and not in *personam*. Setting out a few of them, he referred us to High Court’s decision in **Kamunyu & Others vs. AG & Others [2007] 1 EA 116** which was quoted by Oyiengo, J. in **David K Ole Nkedainye & 2 Others vs. Joseph Jama Ole Lenku & 4 other [2017] eKLR**. The High Court in Kamunyu case expressed:-

**“In a suit seeking judgment in rem, that is judgment applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for Judgment which is effective against the whole world. In other words, in the present case, the applicants when successful in the suit obtain judgment, which is effective against the whole world but does not confer benefits upon the whole world”.**

17. He also made reference to **Abdikhaim Osman Mohammed & another vs. Independent Electoral and Boundaries Commission & 2 others [2014] eKLR** wherein this Court held:-

**“The learned trial judge further got the legal basis right when he stated that electoral disputes involve not only the parties to a petition but also the electorate in the concerned electoral area and that they are therefore matters of great public importance and interest.”**

By parity of reasoning an appeal from such proceedings is an appeal *in rem*. Therefore, the applicants are entitled to be admitted in the appeal.

18. Further, electoral disputes being *sui generis* in nature could not be withdrawn without leave of the Court. The rationale behind it is to prevent collusion between parties to withdraw a petition to the detriment of voters. By way of emphasis, the applicants relied on the case of **Bijayawanda Patwak vs. Satrug-Hna Saha AIR 1963 S.C. 1566 AT 1569**, where the Supreme Court of India pronounced itself as follows:-

**“The Petitioner in an Election Petition has not (sic) an absolute right to withdraw it, nor has the respondent the absolute right to withdraw from opposing the petition in certain circumstances. The basis for this special provisions as to withdrawal of election petitions is to be found in the well-established principle that an election petition is not a matter in which the only persons interested are candidates who strove against each other at the election. The Public of the constituency also is substantially interested in it, as election is an essential part of the democratic process. That is why provision is made in election law circumscribing the right of the parties thereto to withdraw. Another reason for such provision is that the citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free not vitiated by corrupt or illegal practices. That is why provision is made for substituting any elector who might have filed the petition in**

**order to preserve the party of election”**

19. In any event, the applicants qualified as intended appellants within the meaning of *Section 2* of the *Court of Appeal Rules*. Buttressing that line of argument, counsel made reference to this Court’s decision in *Joseph Limo & 86 others vs. Ann Merz- Civil Application No. 295 of 1998 (unreported)* wherein Omollo, J.A (as he then was) described an appellant as:-

**“... any person... who is aggrieved by the decision or part of the decision of a superior court and is or are therefore appealing in the case.”**

20. Mr. Simiyu went on to state that the consent in question had not complied with *Rule 96(3)* of the *Court of Appeal Rules* which requires such a consent to be executed by all the parties. The applicants are parties to the proceedings hence their consent was required. Besides, for the consent to take effect, it needed to be adopted as an order of the Court which it had not.

21. We also understood the applicants to argue that the security for costs deposited by the appellant in both the Election Court and this Court should not be released so as to satisfy costs which may become payable upon the conclusion of the application, appeal and even the petition. It is on those grounds that we were urged to allow the application.

22. Opposing the application, Mr. Kitur argued that the procedural rules governing election petition appeals in this Court are the *Election Appeal Rules* and the *Court of Appeal Rules* which are a complete code. Conceding that there were no provisions with regard to withdrawal of election petition appeals under the *Election Appeal Rules* he stated that by virtue of *Rule 4(2)* thereof the *Court of Appeal Rules* comes into play. *Rule 96* of the *Court of Appeal Rules* delineates the procedure of withdrawing an appeal before this Court.

23. As far as counsel was concerned, the consent had been signed by the parties to the appeal. Parties to an appeal are generated from their participation in the Election Court. By their own admission the applicants did not participate in the Election Court. Consequently, there was no requirement for the applicants to execute the consent in question. Further, filing of the consent divested this Court of the power to make any substantive orders save for an order under *Rule 96(3)* striking out the appeal herein from the list of pending appeals. It followed that this Court lacked jurisdiction to entertain the application which was filed subsequent to the consent of withdrawal.

24. In totality, the rules of procedure applicable to this Court do not provide for substitution of parties in an election petition appeal. Electoral disputes being *sui generis* in nature could only be determined within the confines of the self-contained electoral laws. To that extent, counsel cited this Court’s decision in *Ferdinand Ndung’u Waititu vs. Independent Electoral & Boundaries Commission & 8 others [2014] eKLR*. Thus, this Court could not accede to the applicants’ invitation to invoke the *Election Petition Rules* which were clearly inapplicable to the appeal. To do so would be tantamount to the Court donating to itself jurisdiction it does not have. In support of that argument counsel relied on the Supreme Court’s decision in *Samuel Kamua Macharia & Another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR*.

25. Relying on this Court’s decision in *Centre for Rights Education and Awareness & 2 others vs. John Harun Mwau & 6 Others [2012] eKLR*, Mr. Kitur urged us to take caution against applying an open door policy by allowing any person to appeal against the decision of the Election Court in the guise of public interest litigation. In particular, he referred to the sentiments of *Githinji, J.A* that:-

**“It may be argued that, as a matter of public policy, the Court should freely allow any person to appeal against a decision from the High Court arising from public interest petition for prevention of contravention of the Constitution although he was not a party to the petition in the High Court. Firstly, a right of appeal would have to be given by law. Secondly, such an open - door policy would offend against the same public policy as it would not only prolong litigation but would, also, affect the orderly administration of justice, and overstretch judicial resources. Moreover, public policy being an “unruly horse” may yield undesirable consequences that might clog the Court.”**

26. He also relied on the observations *Maraga, J.A.* (as he then was):

**“The issues usually raised in public interest litigations affect many and sometimes all Kenyans. Let as many as possible of the people affected litigate such issues in courts with original jurisdiction. If anyone feels, as we are being told in this case, that there is an aspect of the matter that was not properly addressed, and which can properly be the subject of appeal, let him team up with the parties in the appeal to urge it. To allow any affected people or those purporting to be affected to join in such litigations at the appeal stage, the appellate courts will, in my humble view, not only be usurping original jurisdiction as such people will always come up with new issues, but they will also facilitate the clogging of the system by allowing themselves to be burdened with repetitious material and thus delaying finalization of cases.”**

27. Reading from the same script as Mr. Kitur, Mr. Mogaka and Mr. Wanyama submitted along similar lines. Placing reliance on the Supreme Court’s decision in *Hassan Ali Joho & Another vs. Suleiman Said Shabhal & 2 others [2014] eKLR*, Mr. Mogaka contended that in case of conflict between the *Election Petition Appeal Rules* and *Court of Appeal Rules*, the latter prevails. He reiterated that there was no provision for substitution of an appellant either in the Act or the rules governing the procedure of this Court. Substitution is only provided under *Rule 99* of the *Court of Appeal Rules* in case of death of an appellant or respondent. According to him, an application to substitute a petitioner could only be made in the Election Court where a petitioner has made an application to withdraw the petition which was not the case here.

28. Stressing the centrality of timelines in the adjudication of electoral disputes, Mr. Wanyama asked us to resist the applicants’ attempt to invoke public interest to revive the dispute which was otherwise dead. Expounding further, he argued that the adjudication time frame for the petition which was filed before the Election Court on 6<sup>th</sup> September, 2017 lapsed on 7<sup>th</sup> March, 2018. Even if the Court was minded to refer the matter back to the Election Court its jurisdiction to entertain the same had been exhausted. In that regard, we were referred to the

Supreme Court's decision in *Hon. Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others [2014] eKLR*. Besides, the Court has no jurisdiction to extend time limited by the Constitution and Statute.

29. On jurisdiction, Mr. Mogaka's position was that we are restricted to matters of law with respect to the Election Court's ruling dated 16<sup>th</sup> November, 2017. Even if in the unlikely event this Court was persuaded that the applicants had made a case of substitution, it could not issue the orders sought. Perhaps, the most it could do is make recommendations for the legislature to address the legislative gap.

30. In a brief rejoinder, Mr. Simiyu urged that the application herein was not academic. Relying on *Ann Waiguru & Another vs. Martha Wangari Karua & 2 others [2018] eKLR*, counsel argued that the Supreme Court allowed extra time to the Election Court to hear the dispute therein. To him, there was no need to set aside the consent by the parties.

31. We have considered the record, submissions by counsel and the law. Electoral law being *sui generis* in nature is subject to strict interpretation. This much was restated by this bench in a more recent decision in *Mbaraka Issa Kombe vs. Independent Electoral and Boundaries Commission & 2 others- Election Petition Appeal No. 3 of 2017 (unreported)*. In our own words we observed:-

**“It is trite that electoral law is a special jurisdiction whose interpretation is strictly confined within the parameters of the Constitution and relevant electoral statutes ...”**

32. Bearing the foregoing in mind, the answer to the pertinent issue herein lies with the interpretation of the relevant electoral provisions. We remind ourselves that the cardinal rule for construction of statute is to discover the intention of the legislator. See *Halsbury's Laws of England, 4<sup>th</sup> Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372*.

33. The intention can be identified through a number of factors. In *Cusack vs. Harrow London Borough Council (2013) 4 ALL ER 97*, the Supreme Court observed:-

**“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”**  
[Emphasis added]

34. Applying the foregoing principles, which are equally relevant in the interpretation of subsidiary legislation, we find that the applicable procedural rules in an appeal from the Election Court are the *Election Appeal Rules* and the *Court of Appeal Rules*. Our position is reinforced by a close reading of *Rule 4(1)* of the *Election Appeal Rules* which stipulates:

**“These Rules apply to the conduct of appeals from decisions of the High Court in election petitions and matters relating thereto.”**

Additionally, **sub rule 2** thereof invokes the application of Part IV of the *Court of Appeal Rules* which relates to Civil Appeals. The sub rule reads:-

**“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.”**

35. The parties herein rightly observed that there is no provision either in the *Election Appeal Rules* or the *Court of Appeal Rules* with respect to substitution of an appellant who wishes to withdraw an appeal. In point of fact the only provision close to that regard is the substitution of a party upon his/her demise. See *Rule 99* of the *Court of Appeal Rules*. Consequently, can this Court import the provisions of *Rule 24* of the *Election Petition Rules* as suggested by the applicants?

36. We think not. Firstly, *Rule 3* of the *Election Petition Rules*, in our view, clearly stipulates that the said rules apply to election petitions filed in the Election Court relating to the election of members of Parliament, county governors and members of county assemblies. Secondly, taking into account that the Rules Committee made the *Election Petition Rules* and *Election Appeal Rules* more or less at the same time, we find that the omission of such a provision in the *Election Appeal Rules* was deliberate. Likewise, we do not think it was the Rules Committee's intention for *Article 22(4)* of the *Constitution* which relates to the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013*, popularly known as the Mutunga Rules to be applicable. We take guidance from the sentiments of *Potter, J.A* in *Ngobit Estate Limited vs. Carnegie [1982] KLR* that:

**“The function of the judiciary is to interpret the statute law, not to make it... It is the duty of the judge to apply such law as it stands.”**

As it stands there is no rule which sustains or justifies the application before us.

37. Even if we were to find that we had jurisdiction to allow the substitution sought, still the applicants' application would fall by the wayside. *Rule 96* of the *Court of Appeal Rules* which sets out the procedure of withdrawal of an appeal delineates in part that:-

1. An appellant may at anytime after instituting his appeal and before the appeal is called on for hearing lodge in the appropriate registry notice in writing that he intends to withdraw the appeal.

2. The appellant shall within seven days after lodging the notice of withdrawal, serve copies thereof on each respondent who has complied with the requirements of rule 79.

**3. If all the parties to the appeal consent to the withdrawal of the appeal the appellant shall file, in the appropriate registry, a consent letter signed by the parties or their advocates and thereupon the appeal shall be struck out of the list of pending appeals.**

4. If all the parties to the appeal do not consent to the withdrawal of the appeal, the appellant may before the conclusion of its hearing apply for leave to withdraw the appeal...” [Emphasis added]

38. From the record, it is clear that the appellant complied with the foregoing provisions to the letter. Right from the point of informing the Deputy Registrar of his intention to withdraw the appeal on 5<sup>th</sup> February, 2018, service of the notice to the respondents up to filing of the consent on 8<sup>th</sup> February, 2018. Contrary to the submissions made on behalf of the applicants we find that leave of this Court is not required where parties consent to withdrawal of an appeal. As per **Rule 96(4)** leave is only sought in the event the parties disagree on the same. Our interpretation is informed by **Hill vs. William Hill (Park Lane) Ltd. [1949] AC 530**, wherein **Viscount Simon** at page 546 stated as follows:-

**“When the legislature enacts a particular phrase in a statute the presumption is that it is saying something which has not been said immediately before. The rule that a meaning should, if possible, be given to every word in the statute implies that, unless there is good reason to the contrary, the words add something which had not been said immediately before.”**

39. What is more, the applicants were not parties to the appeal which explains why they filed the current application. We agree with the respondents that once the consent was filed the appeal stood withdrawn. The Registrar was simply required to strike the appeal out from the list of pending appeals. Accordingly, the appeal had ceased to exist by the time the application for substitution was made.

40. Ultimately, we find that the application lacks merit and is hereby dismissed with costs to the appellant and respondents. We hereby strike out his appeal from the list of pending appeals in this Court and direct that the security for costs be refunded to the appellant.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of May, 2018**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**