



IN THE COURT OF APPEAL

AT MALINDI

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

ELECTION PETITION APPEAL (APPLICATION NO 4 OF 2018)

BETWEEN

TIMAMY ISSA ABDALLA.....APPELLANT

AND

INDEPENDENT ELECTIONS &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

ADAN ALI MOHAMED.....2ND RESPONDENT

FAHIM YASIN TWAHA.....3RD RESPONDENT

ABDULKARIM ABOUND BWANA.....4TH RESPONDENT

(Being an application to transfer to the Court of Appeal at Nairobi for hearing and determination Election Petition Appeal No 4 of 2018 from the judgment, decree and order of the High Court of Kenya at Malindi (Chepkwony, J.)

in

Election Petition No. 3 of 2017)

RULING OF THE COURT

[1] This is an interlocutory application that sadly should never have escalated to the point of issuing a formal ruling. Learned Senior Counsel Mr. Pheroze Nowrojee may have thought so when he first addressed a letter to the President of the Court of Appeal on 3rd April, 2018 requesting that the above Election Petition Appeal be transferred to Nairobi for hearing and determination. The transfer of the appeal could perhaps have been an administrative action but this being an election petition dispute, may all matters are not only contested but highly emotive. In response to the said letter, the President of the Court directed Senior Counsel Mr. Nowrojee to apply for such orders or directions regarding the transfer of the Election Petition Appeal to Nairobi from the Court seized of the matter at an appropriate time.

[2] It is against the foresaid background that on 2nd May, 2018, Messrs Aboubaker, Mwanakitina &

Company Advocates, who are on record for the appellant filed a Notice of Motion citing several enactments of the law and the rules amongst them **Rules 4(2), 13 and 20 (2) (c)** of the Court of Appeal (Election Petition) Rules, 2017, seeking the said Election Petition Appeal to be transferred from the Court of Appeal Malindi to the Court of Appeal Nairobi for hearing and the file be placed before the President of the Court of Appeal for further directions. This is on the grounds that the appellant has instructed SC Mr. Nowrojee to lead Mr. Yusuf Aboubaker. Mr. Nowrojee is presently of indifferent health having suffered two heart attacks with two angioplasty operations; for that reason he has avoided work related travel for the past eight months to prevent a worsening condition of his health. Further, during the case management conference, **Karanja, JA.** directed the parties to make a formal application as the respondents were not amenable to the informal request.

[3] The Motion was supported by two affidavits sworn by Mr. Nowrojee in which he has given the details of his indifferent health since 1993 and attached copies of a letter by his local physician who also explains that Senior Counsel is due to travel to Mumbai in June, 2018 for a scheduled medical appointment with a doctor who is currently abroad and is expected back in May, 2018. According to Mr. Aboubaker, learned counsel for the applicant, the Court has power to direct where an Appeal is to be heard and such an application can be made informally during the case management as per **Rule 18 (2)** of the Court of Appeal Election Rules. Further the transfer of the Appeal to Nairobi was not likely to occasion any prejudice or injustice to the parties as the appeal can be heard within the time lines set by the Constitution and the Elections Act. Counsel urged us to allow the application in the interest of justice and to enable the applicant be represented by counsel of his choice.

[4] The application was strenuously opposed by Mr. Martin Munyu on behalf of the 1st and 2nd respondents, he relied on the grounds of objection filed on 7th May, 2018. In his address to us, counsel submitted that the doctor's letter attached to the further affidavit of Mr. Nowrojee did not indicate that he was unable to travel to Malindi as in his view it is more cumbersome to travel to India than Malindi. Moreover, there is a letter dated 6th May, 2018 in which Mr. Nowrojee indicated that he had actually travelled to Mombasa for another trial of a matter before the High Court during this month of May. Finally counsel submitted that there are alternatives in a matter such as the present one where parties can file written submissions and rely on them as unlike in the trial Court it is not necessary to consider many court room dynamics such as the demeanour of witnesses. Counsel urged us to dismiss the application.

[5] The application was also opposed by Mr. Kilonzo, learned counsel for the 3rd and 4th respondents. While relying on the replying affidavit by the 3rd respondent, counsel submitted that under the Court of Appeal Election Petition Appeal Rules, the appeal should be heard in the Registry where the same was filed. Counsel was categorical that there is no provision of the law or Rules that gives this Court jurisdiction to transfer an Appeal against the wishes of the respondents; further the Court cannot exercise inherent jurisdiction where there are no good reasons especially to demonstrate that unless the order of transfer is made the applicant will suffer injustice. On prejudice to be suffered by the respondents, counsel stated that an election appeal is not an ordinary suit; it comes hot on the heels of a fierce political contest that affects supporters of a candidate who would like to follow through the proceedings and they would be highly inconvenienced if the appeal was transferred to Nairobi. Counsel pointed out that the applicant was well represented by two counsel and to make even matters better for him, counsel can prepare written submissions and he could address the court via video link, skype or such other technology that advances the administration of justice.

[6] Mr. Kilonzo was very categorical that there is no provision in the Rules or statutes that gives the Court jurisdiction to transfer matters except where parties have consented. To demonstrate the ferocity of his clients objection to this matter being transferred to Nairobi this is what is stated in a pertinent paragraph 5 (e) and (f) of the replying affidavit:-

“That Senior Counsel Pheroze Nowrojee’s application is full of malafides. I know as a fact that he represented the appellant in 2014 in Malindi in Civil Appeal No. 36 of 2013 (2014) e KLR between the appellant herein versus myself and others regarding a similar gubernatorial election petition appeal and I know that he is fully in work related engagements as I have read an article

at page 30 of the Saturday 5th May 2018 Daily Nation Newspaper where on 3rd May, 2018, the Senior Counsel is indicated to have been busy launching his book named “DUKAWALLAS AND OTHER STORIES” at the Goethe Institute Nairobi...

That I believe that the application to transfer this appeal to Nairobi for hearing is disguised attempt of forum shopping as I have been informed by (sic) a lot of my supporters that the appellant herein has been making public announcements while meeting his supporters in Lamu County that he has been promised by some judicial wheeler dealers that his appeal shall succeed if it is transferred to Nairobi where the wheeler dealers have mechanisms of “fixing” the bench of Judges to handle the appeal favourably on his behalf...

[7] We have given a snippet of the application, the supporting affidavits, grounds of opposition, the replying affidavit and submissions by respective counsel. It is common ground that there is no provision in the Court of Appeal Election Petition Appeal Rules, the Court of Appeal Rules or other statutes giving the Court power to transfer an Appeal as sought by the applicant. We however wish to clarify that administratively and with the express consent of the parties appeals are often transferred if the transfer serves the best interests of justice. We say this however with a caveat while bearing in mind that election petitions are *sui generis* matters that are strictly governed by the Constitution, the Election Act and the rules made thereunder. The respondents are completely opposed to the transfer although it is necessary to mention that before the commencement of the hearing, this Court engaged the parties in trying to find a common ground by suggesting that they do consider adopting technology to dispose of the appeal through skype, video link or any other technology that would enable Mr. Nowrowjee address the Court and follow the submissions even remotely. Incidentally, the respondents were amenable to an alternative use of technology but Mr. Aboubaker argued that technology may fail and might be very expensive to his client.

[8] On our part, an application such as this, which is not provided for under the Rules obviously entreats the exercise of the Court’s inherent jurisdiction which is done on case by case basis according to the circumstances of each case as there is no one size fit all. This is underpinned by fundamental principles in the administration of justice as per **Article 159 (2)** of the Constitution and more recently reinforced by the **Court of Appeal Election Petition Appeals Rules 3** which provides for the purposes and objects of the Rules as:-

“The object and purpose of these Rules is to facilitate the just, expeditious and impartial determination of election petition appeals in exercise of the Court’s appellate jurisdiction under Article 164(3) of the Constitution”.

We also need to remind ourselves that in matters involving exercise of discretion no case is precedent to another as each case depends on its own peculiar circumstances as was held in the case of;- **Lindsay Parkinton Ltd vs. Triplain Ltd** [1973] 2 ALL ER 273 at 279:-

“... in matters of discretion no one case can be an authority for another. As Kay L.J. said in Jenkins vs. Bushby “the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.” A discretion necessarily involves a latitude of individual choice according to the particular circumstances and differs from a case where the decision follows ex debito justitiae, once the facts are ascertained.”

[9] Can this Court exercise discretion to allow counsel choose the venue of where his client’s case should be heard? In answering this question we must state that we sympathize with the health condition of Mr. Nowrowjee and appreciate his commitment in offering his services to the applicant. His request for the transfer of the Appeal to Nairobi however, has to be considered within the context of the overriding objectives in the administration of justice, that is, expeditious disposal of matters and impartiality. We also have to consider the objections raised by the respondents and the various alternatives that were put on the table that could facilitate Senior Counsel’s participation in the conduct of the Appeal as lead counsel even remotely. In this case the application was opposed on the grounds that the applicant has alternatives which were recited as-;

1. The applicant is already represented by two other counsel on record who argued this application being Mr Aboubaker and Mr Okoth Odera;

2. Senior counsel could prepare written submissions and rely on them;

3. Senior counsel could also use technology and address the Court remotely via video link, skype or such other technologies that could enable him address the court from Nairobi or whenever else;

4. Election Petition Appeals are time bound and all the Court Stations have organized their calendars and cause lists accordingly and transferring another Appeal may cause delay.

[10] We have considered these grounds of cause ignoring the allegations that the transfer is sought for other sinister motives, although not denied by the applicant, those allegations were not at all substantiated. Also we have taken note that although Mr. Nowrojee has been engaged lately with some litigation before the High Court Mombasa, we accepted the explanations he gave that those matters were fixed way before his health complications. Nonetheless as regards the transfer of the appeal to Nairobi, we are not persuaded the application is one that deserves the exercise of our discretion in its favour. This is because the alternatives available to the applicant would adequately allow Mr. Nowrojee to represent him without having to transfer the Appeal to Nairobi. Also even if the appeal is not transferred, it was not demonstrated to us that the applicant will suffer any injustice. These alternatives, coupled with the fact that the Rules do not provide for transfer of an Appeal and it was not demonstrated the applicant would suffer injustice all lead us to the inescapable conclusion that the application cannot be allowed.

[11] Accordingly, it is dismissed with costs to abide the outcome of the Appeal. For avoidance of doubt, the applicant or indeed any party at their own cost will be at liberty to use technology in their address to Court during the hearing of the Election Petition Appeal.

Dated and delivered at Mombasa this 17th Day of May, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M.K. KOOME

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR