



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, MUSINGA & MURGOR, J.J.A.)**

**ELECTION PETITION APPEAL NO. 6 OF 2018**

**BETWEEN**

**ABDIRAHMAN ADAN ABDIKADIR.....APPELLANT**

**ADOW MOHAMMED ABIKAR.....CROSS-APPELLANT (APPLICANT)**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**COUNTY RETURNING OFFICER.....2<sup>ND</sup> RESPONDENT**

**ABDULLAHI IBRAHIM ALI.....3<sup>RD</sup> RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya*

*at Nairobi (Mwongo, PJ.) dated 31<sup>st</sup> January, 2018*

*in*

*Election Petition Nos. 13 & 16 of 2017)*

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**RULING OF THE COURT**

1. In the contest for the position of Senator, Wajir County, during the last general election held on 8<sup>th</sup> August, 2017, **Abdullahi Ibrahim Ali (the 3<sup>rd</sup> respondent)**, of **Jubilee Party** was declared the winner, having garnered 35,393 votes. **Abdirahman Adan Abdikadir (the appellant)**, of **Orange Democratic Movement** party got 19,096 votes, and **Adow Mohammed Abikar (the applicant)** of **Kenya African National Union party** managed 26,769 votes.
2. The appellant and the applicant were dissatisfied with the conduct and outcome of the elections and each filed a petition against the 3<sup>rd</sup> respondent.
3. The two petitions, Nos. 13 and 16 of 2017, were consolidated and heard together. In a judgment delivered by Mwongo, PJ. on 31<sup>st</sup> January, 2018, both petitions were dismissed with costs.
4. Once again, the appellant and the applicant were aggrieved by the said judgment and each of them filed a notice of appeal. The appellant's notice of appeal was the first one. The applicant was served with the appellant's notice of appeal on 7<sup>th</sup> February, 2018. On the same day the applicant filed his notice of appeal.
5. The appellant filed the record of appeal on 1<sup>st</sup> March, 2018. He also deposited a sum of Kshs.500,000/= as security for costs of the appeal

in terms of **rule 27(1)** of **The Court of Appeal (Election Petition) Rules, 2017** (the Court's Election Petition Rules).

6. On the other hand, the applicant neither filed a record of appeal nor deposited any security for costs. **Rule 9(1)** of this **Court's Election Petition Rules** requires that the record of appeal be filed within thirty days from the date of the judgment of the High Court.

7. On 8<sup>th</sup> March, 2018, the applicant filed a notice of cross appeal and on 20<sup>th</sup> March, 2018 the applicant also filed an application under **rule 77(1)** of this **Court's Rules**, **rule 2** of this **Court's Election Petition Rules**, and **Section 3A** of the **Civil Procedure Act**. In the said application, the applicant sought two substantive prayers as follows:

**"1. ....;**

**2. THAT leave be granted to ADOW MOHAMMED ABIKAR the Applicant herein, to be enjoined as an Interested Party and affected party in the Appeal;**

**3. THAT upon being granted leave the Intended Interested and affected Party hereby be and is allowed leave to file and serve its cross-Appeal, written submissions and any other relevant documents to the aforesaid Appeal."**

8. Before the application could be set down for hearing, on 23<sup>rd</sup> March, 2018 the appellant filed a notice of withdrawal of the appeal pursuant to **rule 4(2)** of this **Court's Election Petition Rules** and **rules 68, 81 and 96** of the **Court's Rules**.

9. Prior to the filing of the applicant's application aforesaid and the filing of the notice of withdrawal of the appeal, the court had given directions regarding disposal of the appeal. The directions were given on 15<sup>th</sup> March, 2018 in the presence of advocates for the appellant and the three respondents. There is no indication as to whether the applicant's advocates had been served with any notice to attend court for directions. It is also doubtful whether the court's attention was drawn to the applicant's application because the directions did not make any reference to the application. The court directed, *inter alia*, that the appeal be canvassed by way of written submissions and the same be orally highlighted on 25<sup>th</sup> April, 2018.

10. When the appeal came up for highlighting of the written submissions on the aforesaid date, **Mr. Abdihakim**, learned counsel for the appellant, told the court that the appellant, having filed the notice of withdrawal of the appeal as aforesaid, was no longer pursuing the appeal. He urged the Court to mark the appeal as withdrawn with no order as to costs.

11. Both **Mr. Kubai** and **Mr. Karani**, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, had no objection to the withdrawal of the appeal with no order as to costs.

12. **Mr. Issa**, learned counsel for the 3<sup>rd</sup> respondent, also had no objection to the withdrawal of the appeal. But as to costs of the appeal, he left the issue to the court to determine as it deemed fit.

13. **Mr. Omwanza**, learned counsel for the applicant, told the Court that his client wished to take over the appeal under **rule 97(1)** of this **Court's Rules** as read with **rules 2 and 10** of the **Court's Petition Rules**. He urged the court to allow the applicant's oral application.

14. The appellant's advocate as well as the respondents' advocates opposed the applicant's plea to take over the appeal. Mr. Issa narrated the background of the appeal as earlier set out herein. He submitted that the applicant had not been cited as a respondent in the appeal and could not therefore seek refuge under the provisions of **rule 10** of this **Court's Election Petition Rules** to take over the appeal as sought. He added that the applicant, having filed a notice of appeal, but having failed to file a record of appeal and deposit security for costs, he should not be allowed to pig ride on the appellant's appeal. In his view, the applicant was a stranger to the proceedings.

15. In reply, Mr. Omwanza submitted that the applicant was served with a notice of appeal and the record of appeal by the appellant. Having been so served, he filed a notice of cross appeal on 8<sup>th</sup> March, 2018. Counsel stated that the applicant did not see the need to file a record of appeal, since the appellant had already filed one. He also conceded that the applicant had not put in the required security for costs; but indicated that the applicant is prepared to deposit the same, if so ordered.

16. We have considered the issue of withdrawal of the appeal as well as the applicant's application dated 20<sup>th</sup> March, 2018. This court's Election Petition Rules do not contain any specific provision regarding withdrawal of appeals. However, **rule 4(2)** thereof stipulates that where there is no applicable provision in the Rules, the provisions of the Court of Appeal Rules, 2010 relating to civil appeals shall apply to an election petition in so far as there is no inconsistency with the Petition Rules. We must therefore revert to the Court's Rules.

17. **Rule 96(1)** permits an appellant at any time after instituting an appeal and before it is called out for hearing to lodge in the appropriate registry a notice in writing intimating his intention to withdraw the appeal. Under **sub-rule (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. This is the case here. Despite the fact that the appellant filed and served the notice of withdrawal of the appeal two days before its scheduled date of hearing, the applicant objected to its withdrawal but the respondents welcomed it.

18. According to the 3<sup>rd</sup> respondent, the applicant is not even a party to the appeal and has no capacity to object to its withdrawal, leave alone being allowed to take over the appeal, if leave to withdraw it is granted.

19. Mr. Omwanza submitted that under **rule 2** of this **Court's Election Petition Rules** a “**respondent**” includes “**any person on whom a notice of appeal has been served...**”, and since the applicant had been served with both a notice of appeal and the record of appeal, he is respondent and therefore a party to the appeal, hence has capacity to object to its withdrawal.

20. There is no dispute that the applicant was served with both the notice of appeal and the record of appeal. He is therefore a respondent. And being a respondent, the applicant has filed a notice of cross appeal under

**rule 10(1)** of this **Court's Petition Rules** which provides as follows:

*“10.(1) A respondent who desires to contend at the hearing of an appeal that the decision of the High Court or any part thereof should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect, specifying the grounds of his contention and the nature of the order which he proposes to ask the Court to make, as the case may be.”*

21. This Court should not stand on the way of an appellant who has lost interest in his own appeal and wishes to withdraw it. Equally, respondents cannot force an unwilling appellant to continue with an appeal; at best they can only seek costs of the appeal. In the circumstances, we hereby grant leave to the appellant to withdraw his appeal with no order as to costs in favour of the respondents and the applicant.

22. Turning to the applicant's application, although he filed and served the notice of appeal in time, the applicant did not file a record of appeal. The applicant, having lodged his notice of appeal subsequent to the lodgment of the appellant's notice of appeal, under **rule 80(1)** of this **Court's Rules** the applicant became a respondent and was therefore under no obligation to file a record of appeal, more so, where the appellant had already filed one.

The rule provides as follows:

*“80. (1) Where two or more parties have given notice of appeal from the same decision, the second and all subsequent notices to be lodged shall be deemed to be notices of address for service within the meaning of rule 79 and the party or parties giving those notices shall be respondents in the appeal.”*

23. The applicant's notice of appeal must therefore be deemed to be a notice of address of service. But now that the appellant has withdrawn his appeal, the applicant ought to be allowed to proceed with his cross appeal, having filed the same on 8<sup>th</sup> March, 2018.

24. In the circumstances, we hereby make the following orders regarding the applicant's application dated 20<sup>th</sup> March, 2018.

*(a) The applicant, ADOW MOHAMMED ABIKAR, shall be the appellant in terms of the notice of cross appeal dated 8<sup>th</sup> March, 2018. Consequently, he should deposit a sum of Kshs.500,000/= being security for costs in terms of rule 27(1) of this Court's Election Petition Rules. That ought to be done within the next ten (10) days from the date of this ruling.*

*(b) The respondents should file and serve their written submissions in response to the appellant's submissions filed on 27<sup>th</sup> March, 2018 within ten (10) days from the date hereof.*

*(c) The appellant shall be at liberty to file a reply to the respondent's submissions within four (4) days from the date of service of the respondent's submissions.*

*(d) The costs of the appellant's application dated 20<sup>th</sup> March, 2018 shall abide the outcome of the appeal.*

*(e) This appeal shall be heard on 20<sup>th</sup> June, 2018.*

Dated and delivered at Nairobi this 11<sup>th</sup> day of May, 2018.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**