



IN THE COURT OF APPEAL

AT KISUMU

CORAM: J. MOHAMMED, JA. (IN CHAMBERS)

CIVIL APPLICATION NAI NO. 23 OF 2018

BETWEEN

SETH AMBUSINI PANYAKO APPLICANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

THE RETURNING OFFICER KAKAMEGA COUNTY, (GRACE

MARU, (aka Grace C. Ronoh) 2ND RESPONDENT

CLEOPHAS WAKHUNGU MALALAH.....3RD RESPONDENT

(Being an application for leave of the Court to extend/enlarge time to file/lodge the record of appeal, memorandum of appeal arising from the ruling and order of the High Court of Kenya at Kisumu, (T. W. Cherere, J.) dated 20th December, 2017

in

KAKAMEGA ELECTION PETITION NO. 14 OF 2017)

RULING

Background

[1] The applicant, **Seth Ambusini Panyako**, was an unsuccessful contestant for the seat of Member of Senate, Kakamega County in the General Elections that were held in the Country on 8th August, 2017. Dissatisfied with the outcome of the elections, the applicant challenged the election of the successful contestant, **Cleophas Wakhungu Malalah** (the 3rd respondent), in Election Petition No. 014 of 2017 at Kakamega High Court.

[2] By a Notice of Motion dated 17th November, 2017, the 3rd respondent sought that the applicant's Election Petition No. 014 of 2017 be struck out with costs on the ground *inter alia* that the Petition was

fatally defective for want of form and content due to the failure by the Petitioner (the applicant herein) to state the results in compliance with the mandatory provisions of the Elections Act (the Act) and the Elections (Parliamentary and County Elections) Petitions Rules, 2017 (the Rules); that the Petitioner did not deposit security for costs with the Registrar as required by the Act and the Rules and that the Petitioner failed to state the actual final results with precision as required by Rule 8 of the Rules. The learned Judge found and held that the Petition filed by the applicant herein was incurably defective and struck it out with costs. The applicant was ordered to pay costs of Kshs.3 million to the respondents.

[3] Aggrieved by that decision, the applicant filed a notice of appeal on 28th December, 2017. The Notice of appeal was served on the respondents by substituted service by way of an advertisement in The Standard Newspaper on 29th December, 2017.

[4] The applicant filed a Notice of Motion on 5th March, 2018 to this Court seeking an extension of time within which to file and serve the record of appeal and the Memorandum of appeal out of time.

[5] The application is supported by the grounds stated on the motion in the affidavit sworn by the applicant premised on the grounds *inter alia*; that the High Court wrongly dismissed the applicant's petition on the ground that he did not disclose in his petition the results which he was challenging; that upon delivery of the impugned ruling, he filed a Notice of Appeal and applied for typed proceedings, certified ruling and order which were availed on **31st January, 2018** after the statutory time lines for filing and serving the record of appeal had lapsed; that the applicant served the Notice of Appeal by way of advertisement in a National Newspaper in circulation; that he promptly applied for a certificate of delay which was issued on 15th February, 2018; that the court registry delayed in availing the proceedings in time; that failure to file the record of appeal in time was inadvertent; that the order sought will not unduly prejudice the respondents and it is in the interest of justice for the court to grant the applicant leave to file and serve the record of appeal out of time; that the intended appeal is meritorious and raises triable issues which this Court should hear and determine; that the intended appeal has good chances of success; that the application has been filed without unreasonable delay and that if the prayers sought are not granted, the applicant will suffer undue prejudice and irreparable loss. Counsel urged us to allow the application.

[6] The 1st and 2nd respondents opposed the applicant's motion and filed Grounds of Opposition to the applicant's motion contending; that this Court has no jurisdiction to grant the prayers sought; that the time limits prescribed by **section 85A** of the Elections Act are mandatory statutory requirements and the court has no jurisdiction to extend the same; that Rule 14(2) of the Court of Appeal (Election Petition) Rules, 2017, limits the power of this Court on extension of time to the timelines set out in the Constitution and the Elections Act; that it is trite law that a delay in furnishing typed proceedings and other administrative lapses on the part of the court does not excuse failure to comply with the mandatory requirements of **section 85A** of the Elections Act, that the delay is inordinate, unexplained and a complete abuse of the court process; that it would be against the Elections Act to allow the applicant to file the appeal outside the statutory timelines and that the Notice of Motion dated 20th February, 2018 is an abuse of the court process and should be struck out with costs.

[7] The 3rd respondent also filed Grounds of Opposition in which he maintained that the instant notice of motion seeks to defeat the principle of expeditious disposal of Election Petitions as provided under **Article 105(2)** of the Constitution; that the Notice of Appeal intended to be relied on in the instant application is defective on the face of it; that under **Rule 5(a)** of the Court of Appeal (Election Petition) Rules 2017, where a notice of appeal is served by publication in a newspaper as provided under **Sub-rules (3)(b)** and **(4)(c)**, the advertisement is only sufficient if it is in **Form EPA 3** set out in the schedule; that what was printed in the newspaper in this case was in the form of **EPA 1** and not **EPA 3** and as such is fatally defective; that this Court lacks jurisdiction to execute the instant application to extend time to file an appeal and to hear an appeal; that this court lacks jurisdiction to entertain this application; that there is no provision in the Elections Act which allows for the extension of time for filing an appeal; that this Court has no discretion on the matter and the timelines set by the Elections Act are for the purpose of ensuring expeditious disposal of election disputes; that the reasons proffered by the applicant for the delay

are unmerited as the record of appeal could have been filed on provisional basis with the available documents and the applicant could have subsequently obtained leave to file a Supplementary record of appeal; and that the failure to comply with the strict guidelines as to time extinguished the appellant's right of appeal as an appeal cannot lie outside the time set by the Rules regulating election petitions. Counsel urged that the application be dismissed with costs.

Submissions

[8] Hearing of the application proceeded by way of written submissions with brief oral highlighting by the parties' respective counsel. **Mr Jaoko**, learned counsel for the applicant argued the application on behalf of the applicant, while **Mr Bukania** represented the 1st and 2nd respondents and **Mr Malalah** represented the 3rd respondent.

[9] In arguing the appeal, **Mr Jaoko**, submitted that the Notice of Appeal was filed timeously and a letter bespeaking the proceedings was sent to the Deputy Registrar on 21st July, 2017 and served on counsel for the respondents; that a follow up letter was sent to the court on 29th January, 2018; that by a letter dated 31st January, 2018, the Deputy Registrar of the High Court in Kisumu informed counsel for the applicants that the certified copies of proceedings and ruling were ready for collection; that the certified proceedings and ruling were collected on the same date; that by the time the court informed the applicants' counsel that the certified proceedings and ruling were ready, the time for filing the Record of Appeal had lapsed; that the applicant's counsel had been diligent in following up on the proceedings and ruling; that failure by the Court Registry to avail proceedings in time is excusable and is beyond the applicant's control. Counsel relied on the authorities of **Nicholas Kiptoo Arap Salat Vs IEBC & 7 Others [2014] eKLR** and **Abdirahman Abdi** also known as **Abdi Rahman Muhumed Abdi Vs Safi Petroleum Products Ltd & 6 Others Civil Application No Nai 173 of 2010**.

[10] **Mr Bukania**, learned counsel for the 1st and 2nd respondents relied on his written submissions, grounds of opposition and list of authorities and opposed the applicant's motion on the ground that this Court does not have jurisdiction to extend time for the applicant to file the appeal out of time and that **section 85A** of the Elections Act is coached in mandatory terms. Counsel relied on **section 85A (a)** of the Elections Act in support of his proposition.

Counsel relied on the case of **Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR and Evans Odhiambo Kidero Vs Ferdinand Ndung'u Waititu and 4 Others (2014) eKLR**, Supreme Court Petition No. 18 of 2014.

[11] Mr Malala, learned counsel for the 3rd respondent relied on the 3rd respondent's written submissions, grounds of opposition and list of authorities. Counsel submitted that they oppose the application and associated himself with the submissions made by counsel for the 1st & 2nd respondents. Counsel referred to **section 85A (a)** of the Elections Act which stipulates that appeals from the Election court to this Court should be filed within thirty (30) days; that this is a statutory timeline and this Court therefore has no jurisdiction to extend time. In support of this position; counsel relied on the case of **Martha Vs Said & Another – Civil Appeal No. 292 of 1998 (200) 2KLR (EP 33)** where the court by majority rejected the argument that the Court of Appeal Rules applied in election petition appeals.

Counsel further submitted that the applicant has a duty to be vigilant and that after receiving the proceedings from the High Court registry the applicant waited a further 28 days before filing the instant application for extension of time; that the notice of appeal was in the wrong format and service of the same was therefore deficient. Counsel relied on **Rule 15(5)** of the Court of Appeal (Election Petition) Rules which provides for the format of the advert for substituted service which the applicant did not comply with.

[12] It was counsel's further submission that **Rule 15 (1)** of the Court of Appeal (Election Petition) Appeal Rules provide that the Notice of Appeal should be served on parties within 5 days; that in the instant application the Notice of Appeal was filed outside the mandatory time lines. Counsel referred to

section 85(a) of the Election Act that appeals to this Court are only on matters of law; counsel submitted that the instant application is premised on issues of fact and not on issues of law and the application should therefore be dismissed with costs for the above reasons.

Determination

[13] I have carefully considered the application, the submissions, the authorities cited and the law.

Section 85A (a) of the Elections Act is pertinent in this application and provides as follows;

“(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be-

a) filed within thirty days of the decision of the High Court; and

b) heard and determined within six months of the filing of the appeal.

(2) An appeal under subsection (1) shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.” (Emphasis added)

[14] It is not disputed that the notice of appeal dated 21st December, 2017 was filed by the applicant on 28th December, 2017.

Section 85A (a) provides that an appeal from the High Court in an Election Petition concerning members of the National Assembly, Senate or the Office of the County Governor shall be filed in this Court **within 30 days of the impugned decision**. This is a strict statutory timeline. Since the applicant’s notice of appeal was filed on 28th December, 2017, the applicant ought to have filed his appeal by 27th January, 2018. To date the applicant has not filed any record of appeal. This effectively means that there is no appeal before this Court.

[15] In the case of **Wavinya Ndeti Vs. IEBC & 4 Others [2014] eKLR** this Court pronounced itself as follows:-

“The question whether the Court has discretion to entertain any appeal filed out of time depends on whether the provisions of section 85A are mandatory or discretionary. The same language in section 85A is used in section 75(4) of the Act in relation to appeals from the Resident Magistrate’s court to the High court. Section 85(A) deals with substantive and not procedural law. It confers both a right of appeal and jurisdiction to the Court of Appeal. There cannot be any doubt from the language and tenor of section 85A that Parliament intended the provisions to be mandatory. The Court has not been given power to extend time.”

[16] We are guided by the case of **Lemanken Aramat Vs. Harun Meitamei Lempaka & 2 Others [2014] eKLR**, where the Supreme Court addressed the issue of timelines in Election Petitions and rendered itself thus:-

“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.”

[17] Further, in **Evans Odhiambo Kidero 4 Others Vs. Ferdinand Ndung’u Waititu & 4 Others 2014 eKLR**, the Supreme Court while 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 appellant herein is a nullity for all purposes.”

[18] From the above enunciation of the law, it is clear that an appeal from the High Court to this Court in election petitions has to be filed within thirty (30) days as stipulated by **section 85A (a)** of the Elections Act.

[19] As recently stated by Sichale, JA in the case of **Jane Wambui Mwaura Vs The IEBC & 2 Others**, Civil Application No. 18 of 2018 (UR 13/2018);-

“The import and tenor of the decisions of this Court is that section 85A (1a) is cast in stone and there is no provision for enlargement of time.”

[20] Accordingly, I find that this Court has no jurisdiction to extend time for the filing of an appeal from the High Court in Election Petition appeals concerning membership of the Senate.

[21] In the circumstances, the motion dated 20th February, 2018 fails and is dismissed with costs.

Dated and delivered in Kisumu this 21st day of June, 2018.

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR