



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M.GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

ELECTION PETITION APPEAL APPLICATION NO. 6 OF 2017

BETWEEN

VINCENT KEMOSI MOGAKA.....APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, WEST

MUGIRANGO CONSTITUENCY.....2ND RESPONDENT

STEPHEN M. MOGAKA.....3RD RESPONDENT

(Being an application to strike out Notice of Appeal dated 21st December, 2017 from the Ruling of the High Court of Kenya at Nyamira, (J.A. Makau, J.) dated 14th day of December, 2017

in

PETITION NO. 2 OF 2017)

RULING OF THE COURT

[1] This is an application dated 10th January, 2018 for an order that the Notice of Appeal dated 21st December, 2017 and filed by **Stephen M. Mogaka**, the 3rd respondent herein through his advocates **M/S Musyoki Mogaka & Co. Advocates** be struck out on the grounds that the notice of appeal was not served within the prescribed time, and, further that the 3rd respondent has failed to deposit Shs.500,000/= as security for costs.

The respondents including the 3rd respondent herein did not attend the hearing of the application although served with the hearing notice.

[2] While the application was pending for a Ruling, the Court on its own motion issued a notice dated 16th May, 2018 to show cause why the same notice of appeal should not be struck out as no appeal has been filed within the 30 days stipulated by **section 85A (1) (a)** of the Elections Act. The Notice to show cause came for hearing today. The appellant's advocates M/S Musyoki Mogaka and Co. Advocates did not attend court although served with a hearing notice.

However, the 3rd respondent's advocate has filed a notice to withdraw the notice of appeal dated 18th June, 2018.

[3] **Mr. Mogikoyo** for the applicant, Vincent Kemosi Mogaka applies that the notice of appeal be struck out pursuant to the application dated 10th January, 2018.

[4] This is a case where the 3rd respondent filed a notice of appeal signifying an intention to appeal against the decision of the Election Court delivered on 14th December, 2017. However, the intended appellant did not file any appeal within the 30 days stipulated by section 85A (1) (a) of the Elections Act as read with Rule 8(5) of the Court of Appeal (Election Petition) Rules, 2017. The 3rd respondent has instead filed a notice to withdraw the notice of appeal well outside the stipulated 30 days. If no appeal is filed within the stipulated 30 days, the notice of appeal is deemed to be withdrawn by virtue of Rule 83 of the Court of Appeal Rules.

[5] In the premises, the appropriate order is to strike out the notice of appeal, albeit not for the reasons stated in the application, but for the more determinative reason that no competent appeal can be filed as the 30 days limited for the filing of the appeal has lapsed.

[6] Consequently, the notice of motion dated 10th January, 2018 is allowed to the extent, and we order, that the notice of appeal dated 21st December, 2017 and filed in Court on the same day be and hereby struck out for the reason that no appeal was filed within the statutorily stipulated 30 days.

The 3rd respondent Stephen M. Mogaka shall pay costs of the application to the respondents.

Dated and Delivered at Kisumu this 19th day of June, 2018.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR