



IN THE COURT OF APPEAL

AT KISUMU

(CORAM:GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

ELECTION PETITION CIVIL APPEAL NO. 30 OF 2018

IN THE MATTER OF ELECTION FOR THE MEMBER OF NATIONAL ASSEMBLY – LIKUYANI CONSTITUENCY

BETWEEN

EVANS NABWERA TARACHA.....APPELLANT

AND

INDEPENDENT ELECTORAL &

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

ENOCK GICHABA OTARA, THE RETURNING

OFFICER, LIKUYANI CONSTITUENCY.....2<sup>ND</sup> RESPONDENT

ENOCK WAMALWA KIBUNGUCHY.....3<sup>RD</sup> RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega, (J. Mulwa, J.) delivered on the 2<sup>nd</sup> March, 2018*

IN THE MATTER OF HIGH COURT OF KENYA AT KAKAMEGA

*in*

**Election Petition No. 5 of 2017)**

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JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the election court (**Janet Mulwa, J.**) dated 2<sup>nd</sup> March, 2018 dismissing the appellant's election petition seeking the invalidation of the election of **Enock Wamalwa Kibunguchy, (3<sup>rd</sup> respondent herein)** as member of the National Assembly for Likuyani Constituency, Kakamega County. The broad grounds of the petition were that the election was not conducted in accordance with the Constitution and Elections Act and that it was marred with electoral irregularities.

[2] The appellant, and the 3<sup>rd</sup> respondent were among the twelve candidates who stood for the election which was held on 8<sup>th</sup> August, 2017. On 10<sup>th</sup> August, 2017, **Enock Gichaba Otara, the Constituency Returning Officer (2<sup>nd</sup> respondent herein)** declared the 3<sup>rd</sup> respondent as the duly elected member of the National Assembly having garnered 15,810 votes. The appellant was second having garnered 14,901 votes.

[3] It is not contested that the appellant filed a Notice of Appeal on 7<sup>th</sup> March, 2018, signifying an intention to appeal against the judgment of the election court although the 1<sup>st</sup> and 2<sup>nd</sup> respondents contend that it was filed in the High Court. The record of appeal was ultimately filed by the appellant on 5<sup>th</sup> April, 2018, through the firm of **Mose Nyambega & Company Advocates**. On 18<sup>th</sup> April, 2018, the firm of **Ngire Aduol & Associates** filed a Notice of change of Advocates indicating that the firm of advocates was henceforth acting for the appellant.

[4] On 17<sup>th</sup> April, 2018, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a notice of motion seeking an order that the appeal be struck out on the main ground that it was filed outside the 30 days stipulated by **section 85A** of the Election Act as read with **Rule 9** of the Court of Appeal (*Election Petition*) Rules, 2017 (*Court Rules, 2017*). In addition, the 1<sup>st</sup> and 2<sup>nd</sup> respondents sought the record of appeal to be struck out as incompetent for the omission to include a certified copy of the decree and judgment of the election court. On his part, the 3<sup>rd</sup> respondent filed a notice of motion on 18<sup>th</sup> April, 2018 for an order that the record of appeal be struck out for having been filed and served out of time.

At the pre-hearing conference held on 20<sup>th</sup> April, 2018 pursuant to **Rule 18** of the Court Rules, 2017, the Court directed that the two applications be argued and determined within the appeal. Accordingly, the applications and the appeal were heard together.

[5] Nevertheless, since the applications raise the issue of the jurisdiction of the court to entertain the appeal, the issue of jurisdiction should be determined at the outset. This is in accordance with the principle stated by Nyarangi, JA. in **Owners of Motor Vessel "Lilian S" v. Caltex Oil (K) Limited [1989] KLR 1.**

[6] **Article 87(1)** of the Constitution provides:-

**“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”**

The Elections Act No 24 of 2011 provides in **section 85A**:

**“(1) An appeal from the High Court in an election petition concerning membership of National Assembly, Senate or the office of the 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.”**

Further, **Rule 9(1)** of the Court Rules, 2017 provides:-

**“The record of appeal shall be filed within thirty days from the date of the judgment of the High Court.”**

Although **Rule 17(1)** of the Court Rules, 2017 gives the Court discretion to extend or reduce time prescribed by the rules, **Rule 17(2)** provides:-

**“Sub-rule (1) does not apply to timelines set by the Constitution and the Election Act, 2011.”**

[7] The judgment of the election court appealed from was delivered on 2<sup>nd</sup> March, 2018. The present appeal was filed on 5<sup>th</sup> April, 2018. The Elections Act and the Court Rules, 2017 do not provide for computation of time.

In that case, **section 57** of the **Interpretation and General Provisions Act** applies. That section provides:-

**“In computing time for purposes of any written law, unless the contrary intention appears –**

**(a) A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;**

**(b) If the last day of the period is a Sunday or a public holiday or an official non-working day (which are in this section referred to as excluded days), the period shall include the next following day not being an excluded day;**

**(c) Where an act or proceedings is directed or allowed to be done or taken on a certain day, then, if that day happens to be an excluded day, the act or proceedings shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**

**(d) Where an act or proceedings is directed or allowed to be done or taken within any time not exceeding six days excluded days shall not be reckoned in the computation of time.**

**Rule 4(2)** of the Court Rules, 2017 provides:-

**“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 so far as they are not inconsistent with these Rules.”**

**Rule 3** of the Court of Appeal Rules, 2010 has imported, word for word, the principles of computation of time under a written law stipulated in **section 57(a) to (d)** of the **Interpretation and General Provisions Act**.

However, as Rule 3 of the Court of Appeal Rules, 2010 expressly states, the rules applies to:

**“Any period of time fixed by these Rules or by any decision of the Court for doing an act ....”**

[8] **Rule 3** of the Court of Appeal Rules, 2010 is obviously applicable in election petition appeals to computation of time prescribed by the Court Rules, 2017 but it does not apply to the computation of time prescribed by the Constitution and by the Election Act. Incidentally, **Article 259** of the Constitution provides the manner in which the time prescribed by the Constitution should be computed. The fact that **Rule 9(1)** of Court Rules, 2017 provides that the record of appeal should be filed within thirty days from the date of the judgment of the High Court does not mean that the time for filing election petition appeals is governed by the Rules. That Rule merely reiterates and echoes the provisions of **section 85A (1) (a)** of the Elections Act.

The correct legal position is that the time for filing an election petition appeal is prescribed by statute, that is **section 85A (1) (a)** of the Election Act and that it is **section 57** of the **Interpretation and General Provisions Act** which applies to the computation of time prescribed by **section 85A (1) (a)** of the Elections Act and not Rule 3 of the Court of Appeal Rules, 2010.

[9] In the instant appeal, the thirty days stipulated by **section 85A (1) (a)** expired on 1<sup>st</sup> April, 2018 which was Easter Sunday. The following day, 2<sup>nd</sup> April, 2018 was Easter Monday. Both are excluded days for purposes of computation of time.

The appeal should have been filed by Tuesday, 3<sup>rd</sup> April, 2018. It was filed on 5<sup>th</sup> April, 2018, two days outside the statutory period. It is evident that the appeal was filed outside the thirty days stipulated by **section 85A (1) (a)** of the Elections Act. That fact is conceded by **Terry Ngire**, the learned counsel for the appellant.

[10] However, the appellant’s counsel blamed the previous counsel for the appellant and submitted, in essence, that the Court should determine the appeal on the merits as Article 159 (2) (d) of the Constitution requires a court to administer substantive justice and without undue regard to procedural technicalities.

[11] Both **Mr. Edmond Wesonga**, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and **Mr. Peter Wena**, learned counsel for the 3<sup>rd</sup> respondent submitted, amongst other things, that constitutional and statutory timelines in electoral disputes are nonnegotiable and cannot be extended; that the time for filing an appeal goes to the jurisdiction of the Court to entertain the appeal; the appellant’s right of appeal was extinguished when he failed to file the appeal within the prescribed thirty days and, that, Article 159 (2) (d) of the Constitution does not apply as the issue raised is not an issue of procedural compliance.

[12] The principles which apply to constitutional and statutory timelines in relation to electoral disputes are now hackneyed. They have been stated by this Court and the Supreme Court in several decisions which have been cited by the respective counsel for the respondents. It is not necessary to cite all the authorities or to restate all the principles herein. The respondents cited the decisions of this Court in **Wavinya Ndeti v. Independent Electoral & Boundaries Commission (IEBC) & 4 others [2014] eKLR (Wavinya Ndeti)**; **Ferdinand Ndungu Waititu v. Independent Electoral & Boundaries Commission, IEBC & 8 Others [2015] eKLR** and the Supreme Court decisions in **Evans Odhiambo Kidero v. Ferdinand Ndungu Waititu and others** – Supreme Court Petition No. 8 of 2014 (consolidated with Petition No. 20 of 2014); **Wavinya Ndeti v. Independent Electoral & Boundaries Commission (IEBC) & 4 Others [2015] eKLR (Wavinya Ndeti – Supreme Court decision)**, **Gitirau Peter Munyav. Dickson Mwenda Kithinji & 2 Others [2014] eKLR** and **Lemankenu Aramat v. Harun Meitamei Lempaka & 2 Others [2014] eKLR (Aramat’s case)**.

[13] There is no doubt that pursuant to the interpretation of **section 85A (1) (a)** of the Elections Act, the requirement that an appeal to this Court should be filed within thirty days of the decision of the election court is a mandatory requirement. Further, as stated by this Court in **Wavinya Ndeti** and affirmed in *Wavinya Ndeti - Supreme Court decision*, **section 85A (1) (a)** having been sanctioned by the Constitution, the constitutional principles of access to justice and fair hearing do not affect the statutory time limitation in **section 85A (1) (a)**.

Furthermore, according to the decision of the Supreme Court in **Aramat’s case**, the provisions of Article 159 of the Constitution do not apply to the statutory time lines as it is not an issue of procedural compliance.

[14] From the above analysis, it is evident that the “*appeal*” filed outside the mandatory prescribed time, is not an appeal as contemplated by law and the Court has no jurisdiction to entertain it. We so find.

That being our decision, it is not necessary to consider the second ground of the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ application, that is, whether the record of appeal is competent for failure to include the requisite documents or even to consider the merits of the “*appeal*”.

[15] For the foregoing reasons, the respective applications of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the application of the 3<sup>rd</sup> respondent are allowed with the result that the appeal is struck out with costs to the respondents.

We so order.

**Dated and delivered at Kisumu this 18<sup>th</sup> day of July, 2018.**

**E. M. GITHINJI**

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*JUDGE OF APPEAL*

*H. M. OKWENGU*

.....

*JUDGE OF APPEAL*

*J. MOHAMMED*

.....

*JUDGE OF APPEAL*

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

**DEPUTY REGISTRAR**