



IN THE COURT OF APPEAL

AT KISUMU

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

ELECTION PETITION APPEAL NO. 34 OF 2018

BETWEEN

JEREMIAH NYANGWARA MATOKEAPPELLANT

AND

THE INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION (IEBC)1ST RESPONDENT

THE RETURNING OFFICER

BOMACHOGE CONSTITUENCY.....2ND RESPONDENT

ALFAH MIRUKA ONDIEKI.....3RD RESPONDENT

(An appeal from the judgment and order of the High Court of Kenya at Kisii(Okwany, J.) dated 22nd February 2018

in

Election Petition No. 1 of 2017)

JUDGMENT OF THE COURT

[1] In the general elections that were held on 8th August 2017, the appellant, Jeremiah Nyangwara Matoke contested as a candidate for election as Member of National Assembly for Bomachoge Constituency. Following the elections that had attracted fifteen contestants, the Returning Officer of Bomachoge Constituency (2nd Respondent) declared the 3rd respondent Alfa Miruka Ondieki the duly elected candidate having garnered 19,711 votes. The appellant was the closest contender with 4,356 votes.

[2] The appellant who was dissatisfied with the outcome of the election, filed a petition, alleging that there were two sets of results, and that there were irregularities in the statutory Form 34As including, forms not having been signed by the presiding officers or deputy presiding officers and agents, alterations on forms that were not countersigned, forms lacking security features and stamps of the Independent Electoral And Boundaries Commission the (1st respondent) and incorrect tallying of results. The appellant also alleged that the results from the polling stations varied with the results forwarded and announced at the tallying center. He asserted that the impugned election was not conducted in compliance with the Constitution and election laws.

[3] The 1st and 2nd respondents opposed the petition through their joint response that denied the allegations made by the appellant, and maintained that the elections were conducted in accordance with the law. In his response to the petition, the 3rd respondent also denied the appellant's claims, and urged the Court to dismiss the petition and uphold his election.

[4] The petition proceeded to full hearing, and by a judgment delivered on 22nd February 2018, the election court dismissed the petition, and upheld the election of the 3rd respondent as the duly elected Member of National Assembly for Bomachoge Constituency. The appellant was dissatisfied with the findings of the election court hence this appeal. The respondents opposed the appeal.

[5] On 18th April 2018, the 3rd respondent filed a Notice of Motion dated 17th April 2018 seeking orders that the appeal be struck out for the reason that the notice of appeal and the record of appeal were filed and served out of time. The motion was supported by the affidavit of the 3rd respondent, sworn on 17th April 2018. It was brought under the provisions of Articles 87 and 164(3) of the Constitution; and Rules 3, 6(2), 8(5), 8(6), 15(1), 15(2) and 17(1) of the Court of Appeal Election Petition Rules 2017 (hereinafter the **2017 Court Rules**).

[6] The application was opposed through a Replying Affidavit sworn by the appellant on 26th April 2018. The appellant did not contest the dates when the notice and record of appeal were filed and served, but maintained that the documents were filed and served within the stipulated timelines. He asserted that **Rule 35** of the Election (Parliamentary and County Elections) **2017 Petition Rules** (hereinafter **Petition Rules**), provides that an appeal in a petition concerning the membership of the National Assembly, Senate and Governor should be heard and determined under the Court of Appeal Rules, 2010 (hereinafter the **2010 Court Rules**), that the filing and service of the notice of appeal and record of appeal within the timelines set out under the **2010 Court Rules** was proper, and that the application for striking out lacked merit.

[7] Due to the strict timelines in dealing with the election petition appeals, we directed that the application for striking out be heard together with the main appeal. Parties filed and exchanged their respective written submissions, which were highlighted on 25th May 2018. Since the issues raised in the application are actually preliminary issues that impact on the competence of the appeal, it is prudent that we first dispense with the application.

[8] In arguing the motion to strike out the appeal, the 3rd respondent was represented by Mr. Okong'o who highlighted the 3rd respondent's written submissions that were filed on 24th May 2018. Mr Okong'o submitted that from the uncontested dates on which the notice of appeal was filed, that is 2nd March 2018, the notice of appeal was filed eight (8) days after the judgment, and was therefore filed one day outside the timelines set out in law. Counsel faulted the appellant for disregarding the **2017 Court Rules** and relying on section 96 of the Elections Act 2011, which according to counsel was no longer in effect, and the **2010 Court Rules**, which were not applicable.

[9] Mr Okong'o, urged that the **2010 Court Rules** are only applicable where there is no operative provision in the **2017 Court Rules**; that **Rules 75(1), 77(1), 82(1) and 90(1)** of the **2010 Court Rules** relied on by the appellant were inapplicable; and that **Rule 82(1)** of the **2010 Court Rules** was also inapplicable as it was inconsistent with **section 85A** of the Elections Act. In support of this proposition, counsel relied on several authorities including **Wavinya Ndeti v IEBC & 4 others, Civil Appeal No. 323 of 2013; Ferdinand Ndungu Waititu v IEBC & 8 others, Civil Appeal No. 324 of 2013; and John Munuve v Returning Officer Mwingi North Constituency & 2 others, Election Petition Appeal No. 5 of 2018**. He also urged the Court to disregard the **2010 Court Rules** as being inapplicable in the instant appeal since electoral laws were a complete code of statutes. Other decisions relied upon by counsel for the 3rd respondent included **Murathe v Macharia (2008) 2 KLR (EP) 244 at 249; Muiya v Nyagah & 2 Others (2008) 2 KLR (EP) 493 and Maitha v Said & Another (2008) 2 KLR (EP) 337**.

[10] Mr Okong'o urged the Court to find that the late filing and service of the notice of appeal and the record of appeal vitiated the entire appeal. He relied on the holding in **Macfoy v United Africa Co. Ltd. [1961] 3 All ER; Wavinya Ndeti v IEBC & 4 Others (supra); Paul Posh Aborwa v IEBC & 2 Others, Civil Appeal No. 52 of 2013; and Chief Doctor Felix Amadi & Ano. v Independent National Electoral Commission & Others, S.C. Nigeria Appeal No. 476 of 2011**. In addition, counsel argued that failure to file and serve the appeal on time was not a procedural technicality as the question of timelines goes to the jurisdiction of the Court to hear and determine the appeal. In support of this proposition the following several authorities were cited including: **Lemanken Aramat v Harun Meitamei Lempaka & 2 others (2014) eKLR; Samuel Kamau Macharia & Another v KCB & 2 Others, Application No 2 of 2011; and Kakuta Maimati Hamisi v Peris Pesi Tobiko & 2 Others, Civil Appeal No. 154 of 2013**.

[11] The 1st and 2nd respondents did not file any response to the 3rd respondent's motion, but made oral submissions during the hearing, in support of the motion. Mr. Terer, appearing for the 1st and 2nd respondents, submitted that the applicable law was the **2017 Court Rules** which required filing of a notice of appeal within seven days and the filing of a record of appeal within thirty days of the judgment being appealed from.

[12] In opposing the 3rd respondent's motion, the appellant relied on his written submissions dated and filed on 25th May 2018. Mr. Nyaberi who appeared for the appellant and highlighted the written submissions, maintained that the appellant had properly relied on the **2010 Court Rules** which had not been revoked; that **Rule 35** of the **2017 Petition Rules** had not been amended to recognize the **2017 Court Rules**; and therefore, the **2010 Court Rules** remain applicable to election petition appeals and cannot be ousted by Rule 4(1) of the **2017 Court Rules**. Accordingly, Mr Nyaberi asserted that the appellant had complied with the appropriate Rules in filing and serving the appeal.

[13] There is no dispute as to when the notice and record of appeal were filed and served. The issue for determination is whether these documents were filed within the stipulated timelines and if not, what is the consequence of such failure? To determine this question, it is important that we first clarify the question of the applicable procedural Rules governing the election petition appeals lodged in the Court of Appeal.

[14] **Rule 35** of the **Petition Rules 2017** provides as follows:

An appeal from the judgment and decree of the High Court in a petition concerning the membership of the National Assembly, Senate or the office of County Governor shall be heard and determined under the Court of Appeal Rules, 2010.

[15] Rule 35 as quoted above appears to be clear. However, **Rule 4** of the **2017 Court Rules** provides as follows:

(1) These Rules apply to the conduct of appeals from decisions of the High Court in election petitions and matters relating thereto.

(2) 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 in so far as they are not inconsistent with these Rules.

(3) Where there is a conflict between these Rules and the Court of Appeal Rules, 2010 on matters relating to election petition appeals, the provisions of these Rules shall prevail.

(4) A decision of the Court that a provision of one set of the Rules prevails over another set of provisions does not invalidate the latter provision but the latter provision shall be inoperative to the extent of the inconsistency. (Emphasis provided).

[16] On first reading **Rule 35** of the Petition Rules, and **Rule 4** of the **2017 Court Rules** do not appear to be synchronized. However, a careful consideration of these Rules reveal that the **2017 Court Rules** are intended to provide the specific procedure to govern appeals from the High Court to the Court of Appeal on election matters. The **2017 Court Rules** therefore now apply to appeals to this Court emanating from election petitions, while the **2010 Court Rules** remain general rules applicable to all other appeals, and only applicable to election petition appeals in limited situations where the **2017 Court Rules** make no specific provision.

[17] But what do we make of **Rule 35** of the **2017 Petition Rules**? The appellant relied on this provision to justify that he had complied with the law by filing the petition under the **2010 Court Rules**. On his part, the 3rd respondent was of a different view, maintaining that Rule 35 provides an entry point regarding appeals from the High Court, provided that there is no conflict between the **2010 Court Rules** and the **2017 Court Rules**. He argued that in the case of appeals from election petitions the **2017 Court Rules** which provides the procedure for dealing with election matters takes precedence.

[18] The **2017 Court Rules** became operational following gazettelement through Legal Notice No. 114 of 2017. Before the gazettelement of these Rules, election petition appeals, like all appeals before this Court were governed by the **2010 Court Rules**. This is what Rule 35 of the Parliamentary & County Elections Petition Rules 2013 (**the former petition Rules**), that were made through legal notice No. 54 of 2013 applied. The former Petition Rules, were repealed in 2017 through L.N No. 116 of 2017 which brought in the **2017 Petition Rules**. Unfortunately Rule 35 (reproduced at paragraph 14) that provides that election petition appeals would be determined under the **2010 Court Rules** was retained in the **2017 Petition Rules** thereby, creating an apparent contradiction with the **2017 Court Rules**. The retention of Rule 35 in the **2017 Petition Rules**, was in our view, an inadvertent error as it is apparent from Rule 3 of the **2017 Court Rules** that the **2017 Court Rules** were intended “to facilitate the just, expeditious and impartial determination of election petition appeals in exercise of the Court’s appellate jurisdiction.” It could not therefore have been the intention of the Rules Committee and the legislature that the procedure of dealing with appeals from an election court remains as per the general rules provided in the **2010 Court Rules**.

[19] Moreover, contrary to the submissions made by counsel for the 3rd respondent, section 96 of the Elections Act was only slightly amended by Act No. 47 of 2012 but remains in effect. The **2017 Court Rules**, are in accordance with the spirit and purpose of section 96 of the Elections Act that provides for the making of specific Rules to regulate the practice and procedure of elections petitions in the High Court. Thus, the **2017 Court Rules** while providing for specific Rules of procedure governing appeals to this Court in regard to election matters, acknowledged the existence of the **2010 Court Rules**, and provided when they would be applicable in election petition appeals and how conflicts between the new Rules, that is, **2017 Court Rules**, and the **2010 Court Rules** would be resolved. In our view, notwithstanding the retention of Rule 35 in the petition Rules, it is clear that the **2017 Court Rules** were intended to take precedence over the **2010 Court Rules** in election matters. The appellant was evidently in error in grounding his appeal on the **2010 Court Rules**, and going by the timelines provided therein, for the filing of the notice and record of appeal.

[20] The appellant sought refuge in Rule 4(4) of the **2017 Court Rules**, maintaining that this Rule provided a saving clause where a party has complied with other Rules which are in conflict with the **2017 Court Rules**. He urged therefore, that the Court should exercise its discretion by giving directions in a manner that avoids conflicts or inconsistency that may arise by granting him an opportunity to prosecute the appeal.

[21] We have carefully perused the **2010 Court Rules** and the **2017 Court Rules**. In our view, Rule 4 of the **2017 Court Rules** must be read as a whole and in context. Firstly, Rule 4(1) of the **2017 Court Rules** makes it clear that the Rules that govern the conduct of appeals to this Court from the High Court on election petitions is the **2017 Court Rules**. Rule 4(2) of the **2017 Court Rules** gives an entry point for the application of the **2010 Court Rules** in election petition appeals as only where the **2017 Court Rules** do not provide for a particular situation, the purpose being, to address any gap in the **2017 Court Rules**. It is only for this purpose that the **2010 Court Rules** would come to play. The question of a conflict arising in the application of the **2010 Court Rules** therefore, must be read in this context. Furthermore, Rule 4(3) of the **2017 Court Rules** is self-explanatory. Where there is a conflict between the **2017 Court Rules** and the **2010 Court Rules**, the **2017 Court Rules** takes precedence and the provisions of the **2010 Court Rules** become inoperative.

[22] We reiterate what this Court stated in **John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others** (*supra*) that:

“The 2017 Rules are dedicated to election petition appeals in a bid to give meaning to an express and overriding constitutional value, whilst the 2010 rules address all other appeals. The 2017 rules are later in time. But more importantly, rule 4(2) provides that in the event of a conflict between the 2017 rules and the 2010 rules, the 2017 rules shall prevail. It is only when there is no applicable provision in the 2017 rules that the 2010 rules apply in so far as they are not inconsistent with the 2017 rules. In the matter at hand, the 2017 rules require a notice of appeal to be filed within 7 days whilst the 2010 rules require the notice of appeal to be filed with 14 days. We have no hesitation in holding that the 2017 rules must prevail.”

[23] The **2017 Court Rules** are clear on the timelines regarding the filing of election petition appeals, and thus, there is no reason for the application of the **2010 Court Rules**. Under **Rule 6(2)**, of the **2017 Court Rules**, a notice of appeal ought to be filed within seven days of the date of the decision appealed against, and in accordance with **Rule 7** of the **2017 Court Rules**, served within five days of filing. According to **Rule 9(i)**, of the **2017 Court Rules**, the record of appeal ought to be filed within 30 days from the date of the judgment and served within five days of filing.

[24] The appeal before us is against the judgment of the election court which was delivered on 22nd February 2018. Therefore, a notice of appeal ought to have been filed by 1st March 2018. In this case, the notice was filed on 2nd March 2018, a day out of time, and served on 7th March 2018. These are infractions that this Court could have exercised its discretion to deal with. Nevertheless, the memorandum of appeal was filed on 28th March 2018. The **2017 Court Rules** do not provide for the filing of a memorandum of appeal, but provide for the filing of a record of appeal that ought to have been filed within 30 days from 22nd of February 2018. The record of appeal herein was actually filed on 3rd April, 2018 and was therefore filed 10 days out of time. For purposes of section **85A(1)(a)** of the **Elections Act**, an appeal is filed on the date and time when the record of appeal is lodged at the Court of Appeal Registry. Therefore, the appeal was filed ten (10) days out of time.

[25] The timelines for filing of an appeal from the High Court in regard to an election petition is provided for under **Section 85A** 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. (Emphasis provided).

[26] We are alive to the provisions of **Rule 5** which empowers the court to exercise discretion in determining a question of noncompliance with the Rules in regard to timelines as follows:

The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159(2)(d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law.

[27] The exercise of the discretion under Rule 5 is limited to actions that ought to have been taken under the Rules, and remains subject to the Constitution and other electoral laws. This is evident from **Rule 17** which is emphatic on the limit of the exercise of the Court's discretion as follows:

17(1) The Court may, for sufficient reason, extend or reduce the timelines prescribed by these Rules upon such terms and conditions it may deem just and expedient, and a reference in these Rules to any time shall be construed as a reference to that time as extended or reduced.

(2) Sub-rule (1) does not apply to timelines set by the Constitution and the Elections Act, 2011. (emphasis added)

[28] In *Wavinya Ndeti v IEBC & 4 others* (supra), this Court addressed the issue of extension of time under **section 85A** and stated as follows:

“[12] 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 85A 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.”

[29] Needless to state that section 85A of the Elections Act that provides the statutory timeline for the filing of an appeal is a mandatory provision. The appellant failed to file his appeal within the statutory timeline, and therefore, failed to comply with this mandatory provision. The consequence of such non-compliance is that the appeal before us is incompetent. Accordingly, we allow the 3rd respondent's application and strike out the appellant's notice of appeal and record of appeal. In the circumstances, we do not find it necessary to go into the merit of the appeal as there is no competent appeal before us. The upshot of the above is that the appeal is hereby struck out with costs to the respondents.

Those shall be the orders of the Court.

Dated and delivered at Kisumu this 18th day of July, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.