



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, JA. (IN CHAMBERS))

ELECTION PETITION APPEAL (APPLICATION) NO. 3 OF 2017

IN THE MATTER OF THE ELECTIONS ACT 2014

AND

IN THE MATTER OF ELECTION OFFENCES ACT

AND

IN THE MATTER OF ARTICLES 1, 10, 15, 22, 23, 38, 81, 83, 87 AND 99

OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ELECTION FOR THE MEMBER OF PARLIAMENT FOR BUTERE
CONSTITUTUENCY**

HELD ON 8TH OF AUGUST, 2017

BETWEEN

ANDREW TOBOSO ANYANGA.....APPLICANT/APELLANT

AND

MWALE NICHOLAS SCOTT TINDI.....1ST RESPONDENT

HABIL NANJENDO BUSHURU.....2ND RESPONDENT

RETURNING OFFICER

(BUTERE CONSTITUENCY).....3RD RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (I.E.B.C.).....4TH RESPONDENT

Appeal from the ruling/order of the High Court of Kenya at Kakamega,(Sitati, J.) dated 23rd October,

2017

in

ELECTION PETITION NO. 12 OF 2017)

RULING

[1] The applicant seeks leave to file and serve a notice of appeal out of time. The application is brought under **Rule 2, 3, 4 and 5** of the **Court of Appeal (Election Petition) Rules, 2017, (Election Petition Rules of 2017)**, Article 259 (2) of the Constitution and **section 31** of the **Limitation of Actions Act**. At the hearing of the application, **Mr. Amasakha**, learned counsel for the applicant, made an oral application for leave to amend the application to include **Rule 14** as one of the grounding rules and to include a prayer that:

“Upon granting prayer 2 of the said motion, the notice of appeal dated 15/11/2017 and filed herein on 20/11/2017 and served on the respondents herein on 23/11/2017 be deemed duly filed and served.”

[2] The Election Petition Rules, 2017 do not contain a provision giving power to the Court to give leave to amend. However, **Rule 4 (2)** 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 in so far as they are not inconsistent with these rules.”

Rule 4(1) provides that the Rules apply to the conduct of

“appeals from decisions of the High Court in election petitions and matters relating thereto.”

A notice of appeal which is the subject of the application relates to an appeal. **Rules 16(1) and 44** of the **Court of Appeal Rules, 2010**, gives the Court jurisdiction to give leave to amend any document. Since the oral application for leave to amend has not been opposed by the respective counsel for the respondents and since the amendments are necessary for proper determination of the application, I grant leave to amend in exercise of the court’s direction.

Accordingly, the application is amended in terms sought.

[3] A brief background to the application is necessary. By an election petition dated 7th September, 2017, the High Court, Kakamega, Election Petition No.12 of 2017, the applicant challenged the validity of the election of Nicholas Scott Tindi Mwale (*1st respondent*) as a Member of National Assembly for Butere Constituency in the parliamentary elections held on 8th August, 2017. The Returning Officer, (*Butere Constituency*), the 3rd respondent herein, and the Independent Electoral Commission (*IEBC*), the 4th respondent herein, were joined as 3rd and 4th respondents respectively. The 3rd and 4th respondents filed a Notice of Preliminary Objection to the petition alleging, *inter alia*, that the petition was filed outside the constitutional time lines of 28 days from the date of declaration of results which was on 9th August, 2017. The 3rd and 4th respondents also filed an application for an order, that the petition be struck out or be dismissed on that ground.

Upon hearing the preliminary objection and the application, the High Court made a finding that time started running from 9th August, 2017; that the petition should have been filed at the latest on 6th September, 2017 and that the petition filed a day later on 7th September, 2017 was filed outside the 28 days stipulated by law.

Accordingly, the High Court on 23rd October, 2017 upheld the preliminary objection, allowed the application and struck out the petition with costs.

[4] On the following day, that is on 24th October, 2017, the applicant lodged a notice of appeal pursuant to **Rule 75(1)** of the **Court of Appeal Rules, 2010** which was subsequently served on the respondent's advocates. On 17th November, 2017, the applicant filed Election Appeal No.3 of 2017 and also filed the present application in the appeal on the same day. A fresh notice of appeal dated 15th November, 2017 pursuant to **Rule 6(1)** of the **Election Petition Rules** was filed on the same day.

On 29th November, 2017, the applicant paid a deposit of Kshs.500,000/= as security of the costs of the appeal as required by **Rule 27(1)**.

[5] **Rule 5** of the **Election Petition Rules** provides:

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

Rule 17(1) gives power to the Court to extend or reduce time prescribed by the Rules in the following terms:

“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.”

[6] As rule 35 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provides, appeals to this Court in election matters are governed by the Court of Appeal Rules.

By filing the present application, the applicant concedes that the notice of appeal breaches **Rule 6** of the **Election Petition Rules** which requires that the notice of appeal should be filed within 7 days of the date of the decision appealed from; shall contain the matters specified therein and conform with the prescribed form. However, the applicant instead of waiting for the Court to determine the effect of such breach of rules at the hearing of the appeal, has sought to cure the defect by an application for extension of time. As **Rule 5** provides, the exercise of discretion by the Court in determining the effect of the breach is subject to **Article 159(2) (d)** of the **Constitution** and the need to observe the timelines set by the Constitution, the Elections Act and the Court of Appeal Rules. That, the exercise of discretion is subject to **Article 159(2) (d)** of the Constitution means that, as that Article provides, the Court must be guided by the principle that justice shall be administered without undue regard to procedural technicalities. The exercise of discretion to extend time must of necessity be subject to the same considerations stipulated in **Rule 5**. In addition, the Court should be guided by other public interest factors, such as the political rights of citizens to a free and fair elections (**Article 32(2)**) and the right of citizens to representation in the National Assembly (**Article 95**). The provisions of **section 85A (1)** of the **Elections Act**, that, an appeal lies to this Court on matters of law only is also an important consideration.

Lastly, the other factors which generally guide the Court in the exercise of discretion to extend time applied by this Court in many decisions e.g **Wasike v. Swala [1984] KLR 591** and by the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v The Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR**, such as delay and prejudice, are also relevant guiding principles.

[7] The application is based on the grounds on the body of the application namely, that, the notice of appeal was filed in ignorance of the material facts and or the law; the delay was not deliberate; the mistake of counsel should not be visited on the applicant, the present application has been brought without undue delay and that the respondents will not be unduly prejudiced.

The application is also supported by the written submissions of Mr Amasakha the applicant's counsel in

which he states, amongst many other things, that the appeal raises issues of law.

The application is opposed on the grounds contained in the grounds of opposition filed by the 1st respondent advocates. The 1st respondent states in the grounds of opposition, inter alia, that the appeal filed is a nullity as it was filed before the time to file notice of appeal was extended; the applicant has not laid a basis for extension of time; ignorance of law is not a defence, the applicant is guilty of unreasonable delay, 1st respondent stand to suffer prejudice and that the intended appeal is frivolous.

Mr Busiega, learned counsel for 1st respondent, made oral submissions in support of the grounds of opposition.

The application is also opposed by the 3rd and 4th respondents. Mr Odeck, learned counsel for the 3rd and 4th respondents made oral submissions in Court in opposition of the application. He contended, amongst other things, that the notice of appeal was filed 25 days after the time stipulated by the Rules; that the record of appeal is defective as it was filed out of time and that no sufficient basis has been laid for extension of time.

[8] In Nicholas Kiptoo Arap Korir Salat's case (supra), the Supreme Court said in part;

“By filing an appeal out of time before seeking extension of time and subsequently seeking the court to extend time and recognize such “an appeal” is tantamount to moving the court to remedy an illegality. This Court cannot do.

To file an appeal out of time and seek the court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the court. Such a filing renders the “document” so filed a nullity and of no legal consequence”

Mr Busiega, relying on that message, contends that since the application does not seek extension of time for filing of the record of appeal, the applicant is asking the Court to act in vain and hence the application is incompetent. It is also Mr Odeck's contention that the record of appeal is defective.

[9] Firstly, in Nicholas Kiptoo Arap Korir Salat's case (supra), the Supreme Court was considering an application for extension of time limited for filing a petition to that Court under its rules.

Although the principles for extension of time for filing a petition and for filing a notice of appeal in an election matter are basically the same, this Court's Election Petition Rules are slightly different. Rule 15 prohibits a Registrar from refusing to accept a document on the ground that it is filed out of time and requires the Registrar to merely stamp the document as **“LODGED OUT OF TIME”**.

Rule 16(1) requires the Registrar to maintain an Election Appeals Register and enter particulars of every election petition appeal to the Court. It is clear that a notice of appeal or election petition appeal has to be registered even when it is lodged out of time.

The applicant contends that the appeal was lodged within 30 days stipulated by the Elections Act and by the Rules.

[10] Secondly, it is the election court - that is the full court which has jurisdiction to determine the effect of any breach of the rules and particularly to deal with the appeal.

In the premises, I decline the invitation to make any pre-emptive observations on the appeal already filed. However, I hasten to add that as the rules allow the filing of any document out of time without leave of the Court, the Court has jurisdiction, if it extends time, to validate such a document.

[11] Turning to the merits of the application, I am satisfied that the appeal is competent and not frivolous. **Article 87(2)** of the **Constitution** ordains that an election such as the one in dispute shall be filed within

28 days after the declaration of results by I.E.B.C.

Further, **section 85A** of the **Elections Act** provides that an appeal lies to this Court on matters of law only. The question in the High Court was whether or not the election petition was filed within 28 days, and, specifically the computation of time. The computation of time is a mixed question of fact and law. The facts on which the action in question was taken must be established before the law is applied to the facts.

The computation of time under the Constitution is governed by **Article 259(5); 259(6), 259(7); 259(8)** and **259(9)**.

The High Court made a finding that the election petition was filed one day outside the stipulated 28 days. I am satisfied that the appeal is based on a matter of law – that is the interpretation and the application of **Article 259(5)** of the **Constitution**.

[12] On the question of delay, this is a case where the applicant filed a notice of appeal a day after the impugned decision of the election court and served the notice of appeal timeously. The notice of appeal was however, filed under the wrong provisions of the law. The notice of appeal so filed served the fundamental purpose of a notice of appeal - that is to give the respondents notice that the litigation was not over and that the applicant would appeal against the decision. The notice of appeal is still on record as it has not been struck out. The purpose of the application is to enable the applicant to file a compliant notice. In practical terms, the period of delay should be computed from the time the applicant evinced an intention to appeal and not when he filed a compliant notice though out of time.

The filing of a notice of appeal under the wrong rules is a mere procedural technicality in terms of Article 159(2) (d) of the Constitution which should not deny the applicant a right to file an appeal. The circumstances of this case clearly demonstrate that the applicant’s advocate acted under a genuine mistake of the operative procedural rules. This is excusable as this was a period of transition from the operative general Court of Appeal Rules to specialized Election Petition Rules.

[13] If the application is allowed, the timelines for hearing the election petition will not be greatly affected as the period stipulated for hearing the election petition appeals is six months.

[14] It is not apparent that if the application is allowed, the respondents particularly the 1st respondent, would suffer any undue prejudice occasioned by the delay since a notice of appeal was served immediately after the decision of the election court. The respondents must have arranged their affairs in relation to the impugned election soon after they were served with the non-compliant notice of appeal. Any prejudice that may have been occasioned by this application can adequately be compensated by an award of costs.

[15] I am satisfied that, in the circumstances of this case, the Court should exercise its discretion in favour of allowing the application.

Accordingly, I allow the application and extend time for filing and serving the notice of appeal as prayed.

Consequently, the notice of appeal dated 15th November, 2017, filed on 20th November, 2017 and served on 23rd November, 2017 is deemed to be duly filed and served.

The applicant shall pay the costs of this application to the 1^s, 3rd and 4th respondents.

DATED and delivered at Eldoret this 7th day of December, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR