



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MARAGA, GATEMBU & MURGOR J.J.A

CIVIL APPLICATION NO. 27 OF 2014

BETWEEN

JOYCE WAMALWA RETURNING OFFICER WEBUYE

EAST CONSTITUENCY.....1ST APPLICANT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...2ND APPLICANT

AND

MOSES WANJALA LUKOYE.....1ST RESPONDENT

BERNARD ALFRED WEKESA SAMBU.....2ND RESPONDENT/INTERESTED PARTY

THE FUND MANAGER WEBUYE CONSTITUENCY

DEVELOPMENT FUND.....3RDRESPONDENT/INTERESTED PARTY

(An application to strike out a Notice of Appeal dated 2nd October 2013 in an appeal from the Judgment of the High Court of Kenya at Bungoma by F. Gikonyo J, dated 30th September 2013)

in

HCCC No 171 of 1998)

RULING OF THE COURT

Moses Wanjala Lukoye, the 1st respondent, filed an election petition on 3rd March 2013 against, the 1st and 2nd applicants as well as, Bernard Alfred Wekesa Sambu, the 2nd respondent and the Webuye Constituency Development Fund, the 3rd respondent as Interested Parties.

The allegations in the petition were that, the 3rd respondent had bribed voters in the elections for the

members of Parliament Webuye East Constituency both before and on the voting day, and had also subjected the voters to violence on the voting day. The 1st and 2nd applicants were accused of conducting the elections in an irregular, improper and reckless manner, thus rendering the elections for the member of Parliament for Webuye East Constituency a sham. In the same petition, the Webuye Constituency Fund was alleged to have acted irregularly in processing County Development Fund (CDF) cheques when CDF activities had been suspended during the election period.

Following the hearing of the parties, judgment was on 30th September 2013 entered by F. Gikonyo, J, dismissing the petition with costs on 30th September 2013. The learned judge found that the elections were free and fair, and transparent and that the 1st respondent had not established any instances of irregularities or non-compliance with the electoral laws during the conduct of the elections. The respondent was aggrieved by that decision and filed a notice of appeal.

By way of notice of motion dated 15th April 2014 the applicants herein moved to Court seeking orders that:-

“(a) This Honourable Court be pleased to strike out the Notice of Appeal dated 2nd October 2013;

(b) The costs of and this application be provided for.”

The grounds cited in support of the application were that:-

- 1. Notice of Appeal was not lodged in the Court of Appeal contrary to Rule 59 (1) of the Court of Appeal Rules.**
- 2. There is no Record of Appeal filed within six months of the decision sought to be challenged by the Applicant contrary to Section 85 A of the Elections Act or at all.**

Those grounds were supported by an affidavit sworn by **Mahamud Jabane** the 2nd applicant’s Manager of Legal Services who further deponed that no reasons had been given for failing to file the record of appeal.

Mr. Simiyu, learned counsel for the 1st and 2nd applicants urged us to strike out the Notice of Appeal dated 2nd October 2013, which was served on the advocates for the applicants on 18th October 2013. Counsel submitted that the record of appeal ought to have been filed 60 days after the filing and service of the Notice of Appeal, which would have been by 18th March 2014, but which the respondent had failed to do. No leave of the Court had since been sought to enlarge time to file the record of appeal. As a consequence, the appeal should be considered as withdrawn pursuant to **rule 83** of this Court’s rules.

Mr. Ojuro learned counsel for the 3rd respondent, and also holding brief for Mr. Onsando for the 2nd respondent, did not oppose the application, but requested to be awarded costs.

There was no appearance for Prof. Sifuna, learned counsel for the 1st respondent, despite his having been served with the hearing notice on 16th March 2015.

We have considered the application, the grounds in support of the application, the affidavits and submissions by the learned counsel as well as the law. There is no doubt that a Notice of Appeal was filed in time and on 18th October, 2013 served on the applicants’ counsel. Subsequently, however, no further steps were taken by the respondent to obtain the proceedings and judgment or to file the record of appeal.

Rule 83 of this Court’s rules stipulates,

“If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court

may on its own motion or on application by any party make such an order. The party in default shall be liable to pay costs arising therefrom of any person on whom the notice of appeal was served.”

In the circumstances, having failed to file the record of appeal within the stipulated period, it is evident that the respondent has no interest in appealing against the judgment of the High Court.

Consequently, the Notice of Appeal is deemed to have been withdrawn, the application succeeds with the result that the Notice of Appeal dated 2nd of October 2013 is struck out with costs to the applicants and the 2nd and 3rd respondents. Orders accordingly.

Dated and delivered at Kisumu this 18th day of June 2015.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR