



REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION NO. MSA 33 OF 2013

BETWEEN

HON. BASIL CRITICOS.....APPLICANT

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

ISAIAH SAHA MADZUNGU.....2ND RESPONDENT

NAOMI NAMSI SHABAN.....3RD RESPONDENT

(An application for extension of time to lodge the appeal against the judgment of the High Court of Kenya at Mombasa Ochieng J) dated 27th September, 2013 in Election Petition No. 3 of 2013)

RULING OF THE COURT

[1] The applicant **Hon. Basil Criticos** was one of the unsuccessful contestants for the position of member of National Assembly for Taveta Constituency during the national general elections held on 4th March 2013. He challenged the election of **Naomi Namsi Shaban** (hereinafter referred to as 3rd respondent), in the High Court at Mombasa in Election Petition Number 3 of 2013. On 27th September 2013, the High Court (**Ochieng J**) dismissed the petition and declared the 3rd respondent validly elected.

[2] On 9th October 2013 the applicant filed a notice of appeal against the judgment of the election court. On 4th December 2013 the applicant filed a Notice of Motion dated 25th November 2013, which motion was certified urgent on the 11th December 2013. The motion is brought under **Article 159** of the Constitution of Kenya, **sections 3(A) & 3(B)** of the Appellate Jurisdiction Act, and **Rules 4, 47 & 82** of the Court of Appeal Rules. It seeks orders for extension of time for the filing of the applicant's appeal against the judgment of the Election Court delivered on 27th September 2013 in Mombasa Election Petition No. 3 of 2013. In support of the motion the applicant relies on his affidavit and that of his counsel, as well as grounds that have been stated on the body of the motion.

[3] The applicant explains that he filed a notice of appeal on the 9th October 2013 and applied for copies of the proceedings on the same day; and that despite reminders from the applicant's counsel, the proceedings were not availed to the applicant until after 22nd November 2013 when the court informed the applicant's counsel that the proceedings were ready for collection. The applicant has exhibited a draft

memorandum of appeal to demonstrate that he has an arguable appeal. He reiterates that the delay in filing his appeal was caused by the delay in obtaining proceedings from the court.

[4] **Mr. Allen Gichuhi**, counsel for the applicant has sworn a supplementary affidavit to which he has annexed a certificate of delay signed by the Registrar of the court, which shows that the period from 9th October, to 2nd December 2013 was required for the preparation and delivery of the proceedings, and should therefore be excluded from the computation of time. Counsel has also filed skeletal submissions in which he argues that the Constitution does not impose any time limit on the Court of Appeal for determination of an appeal arising out of an election petition. He maintains that the Court of Appeal Rules governs matters concerning appeals from the High Court. He contends that the court has unfettered discretion in considering applications for extensions of time. In this regard counsel cited **Mwangi vs Kenya Airways Limited [2003] KLR 486;** and **Daima Bank Limited (in liquidation) vs Prof. David Ndetei [2010] eKLR 18.**

[5] Counsel further relied on **Republic vs Public Procurement Administrative Review Board & Another Ex parte Selex Sistemi Integrati [2008] eKLR** for the proposition that the right of access to court granted by the Constitution, and the jurisdiction of the court to hear parties cannot be taken away by time limit ouster clauses. Finally, counsel pointed out that the Constitution does not limit the time for the Court of Appeal to determine appeals arising from election petitions and that **section 85(A)** of the Elections Act 2011, that limits the time for filing of appeals from the election petitions, is *ultra vires* **Articles 159 and 164** of the Constitution. The court was urged to allow the application so as to determine whether the elections were conducted in a free, fair and transparent manner.

[6] On 6th December 2013, the 3rd respondent filed a Notice of Motion under **Rule 83** of the Court of Appeal Rules 2010 seeking to have the Notice of Appeal filed by the Applicant deemed to have been withdrawn. This was in light of the fact that the applicant had failed to file an appeal within the time stipulated by the law. That motion remains pending to date. Not surprisingly, the 3rd respondent also filed a replying affidavit to the applicant's Notice of Motion for the extension of time, in which she objected to the motion maintaining that the proceedings were actually available to the applicant much earlier than stated, and that the law does not allow for extension of time for lodging of an appeal in regard to election petitions.

[7] The **Independent Electoral and Boundaries Commission** and **Isaiah Saha Madzungu** (the 1st and 2nd respondent), also filed submissions through their counsel opposing the application for the extension of time. It was argued in the submissions that **section 85A** of the Elections Act 2011, is a provision that governs appeals from the election court to the Court of Appeal; that the provision provides for appeals to be filed within 30 days; and that there is no provision for the extension of time for filing an appeal. In support of that submission **Josiah Tariya Kipelian Ole Koros vs David Ole Nkediye & others (Petition No. 6 of 2013)** was relied upon.

[8] Counsel further submitted that the applicant had not met the conditions for extension of time. He relied on **Nyeri Wholesalers Limited vs Katsuri Limited (Civil Appeal No. 261 of 2010)UR** for the proposition that the decision whether or not to extend time for appeal is discretionary but that there are factors that the court has to take into account such as the reasons for the delay, the length of the delay, and the chances of success of the appeal.

[9] I have heard and considered the motion, which came to me for consideration as a single Judge under **Rule 53 (1)** of the Court of Appeal Rules. I have also carefully considered the rival submissions that have been filed by the parties and the authorities cited. The first issue that needs consideration is the law under which such an application is to be dealt with. The intended appeal originates from an election petition and therefore the jurisdiction of the court in this matter is determined by the Constitution, as read with the Election Act and Rules.

[10] In this regard I reiterate what this court recently stated in **Timamy Issa Abdalla vs Swaleh Imu & 3 Others, Civil Appeal No. 26 of 2013:**

“...The Constitution of Kenya 2010 that establishes the Court of Appeal under **Article 164(1)** grants it jurisdiction under **Article 164(3)** as follows:

“164.

(3) The court of appeal has jurisdiction to hear appeals from-

(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament.”

Therefore the Court of Appeal has a general jurisdiction to hear and determine appeals. Whereas the Constitution has not provided any limitation to this general jurisdiction, it has provided a window for the scope of the exercise of the jurisdiction to be limited by statute. **Article 164 (3)** of the Constitution has to be read together with the **Appellate Jurisdiction Act Cap 9** which is a statute specifically enacted to confer jurisdiction on the Court of Appeal. Section 3(1) of this Act states as follows:

“3. Jurisdiction of Court of Appeal

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies in the Court of Appeal under law.”

The Appellate Jurisdiction Act has introduced one qualification for the exercise of the court’s jurisdiction, that is, that the law must specifically provide for the right of appeal. Indeed both the Constitution and the Appellate Jurisdiction Act envisages an Act of Parliament giving a specific right of appeal and the scope of that right. As regards, appeals arising from election petitions, the Court of Appeal is empowered to hear such appeals by dint of **section 85A** of the Elections Act 2011...”

[11] In my considered view the argument that **section 85A** of the Elections Act is *ultra vires* the Constitution, is an argument that cannot hold, as **section 85A** is simply complimentary. That section provides a right of appeal to the Court of Appeal from the judgment of the election court, and does not in any way take away the authority of the Court to hear appeals under **Article 164** of the Constitution. It should further be noted that the general jurisdiction to hear appeals, which is conferred on the Court by **Article 164** of the Constitution is distinct from a right of appeal, which is not automatic but is conferred through specific legislation, which in this case is the Elections Act.

[12] Thus under **section 85A** of the Elections Act, the right to a hearing in regard to an appeal from an election petition is tied to the timelines provided in that Act. In this way the right to a hearing is appropriately balanced with the public interest of expeditious disposal of electoral disputes. This is as it should be, for one party may have brought an appeal, but the outcome affects the interest of the public whose right to representation is in a limbo during the pendency of the appeal. As regards **Article 159** of the Constitution, it merely vests judicial authority in the courts and provides for the principles under which the authority of the court is to be exercised. **Section 85A** of the Election Act does not in any way derogate from these principles. Indeed by providing for a specific period for determination of the appeals, the provision ensures *inter alia* that justice shall not be delayed.

[13] It is noteworthy that although **Article 105(1)** of the Constitution provides that the High Court shall determine within six months of the lodging of a petition, any dispute regarding whether any person has been validly elected as a Member of Parliament or whether the seat of a member has become vacant, there is no equivalent provision in the Constitution for the period within which appeals from such petitions should be determined. **Section 85A (a) & (b)** of the Elections Act appears to address this lacuna as it provides that such appeals must be filed within 30 days of the decisions of the High Court, and heard and determined within six months of filing the appeal. Of importance is **Rule 35** of Elections (Parliamentary

and County Elections) Petition Rules 2013 that provides that Appeals from the judgment and decree of the High Court are to be governed by the Court of Appeal Rules. This presents an immediate challenge to this motion as **Rule 82** of the Court of Appeal Rules provides that an appeal must be filed within 60 days from the date of filing the notice of appeal. The apparent inconsistency must be resolved by following the provisions of the substantive legislation, as it prevails over the Rules, which are subsidiary legislation. Thus in accordance with **section 85A** of the Elections Act, the applicant had 30 days from 27th September 2013 (when the judgment of the election court was delivered), within which to file his appeal.

[14] Since the applicant has not filed his appeal, within the 30 days provided under **section 85A** of the Elections Act, the next issue is whether time can be extended to enable the applicant to file the appeal. **Rules 4** of the Court of Appeal Rules, provides for the extension of time in the following terms:

“...the court may on such terms as it thinks just, by order, extend the time limited by these rules or by any decision of the court or of a superior court for the doing of any act authorized or required by these rules whether before or after the doing of the act and a reference in these rules to any such time shall be construed as a reference to that time as extended...”. (Emphasis added)

[15] A plain reading of this Rule shows that it does not provide for extension of time in regard to time limited by another statute, therefore, the applicant cannot get any help from **Rule 4** of the Court of Appeal Rules. There is no other rule that provides for extension of time. Indeed, the Election’s Act and Rules has provided specific timelines and clear guidelines. There is no room for extension of time as there is a specific period within which the appeal must be determined. The omission to provide for extension of time is therefore not accidental but is a deliberate move, which cannot be countered by the exercise of the Courts inherent jurisdiction or the application of the oxygen principle. Indeed an interpretation adopting the strict timelines is consistent with the spirit of the Constitution as reflected by **Article 87** that advocates for timely settlements of electoral disputes.

[16] It is evident that the applicant has been rather economical with the truth. Although he blames the court for delaying in availing the proceedings to him, the proceedings were available at least by 22nd of November 2013. Surprisingly, the certificate of delay obtained by the Applicant indicates that the period “9th October, to 2nd December 2013” was necessary for the preparation of the proceedings. It is obvious that the certificate does not reflect the correct position. If the applicant was advised that the proceedings were ready by 22nd November 2013, why did it take another 10 days for the applicant to obtain the proceedings? Given the strict timelines, this delay that was crucial ought to have been explained.

[17] Be that as it may this application does not fall within the purview of **Rule 4** of the Court Rules, nor does the Court have powers to extend the time provided under **section 85A** of the Elections Act for filing the appeal. The motion therefore fails and is accordingly rejected.

Dated at Malindi this 21st day of February, 2014

H.M. OKWENGU

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR