



IN THE COURT OF APPEAL

AT MOMBASA

CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL/APPLICATION NO. 45 OF 2013

BETWEEN

BOY JUMA BOY

RASHID SHOUD COUNTY RETURNING OFFICER, KWALE COUNTY,

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION APPLICANTS

AND

MWAMLOLE TCHAPPU MBWANA

KALIMBO NAVEED MWAEGA RESPONDENTS

*(An appeal from judgment and orders of the High Court of Kenya at Mombasa (Ochieng, J.)
dated 27th September, 2013*

in

Election P.No.45 of 2013)

RULING OF THE COURT

[1] During the elections held on 4th March, 2011 **Boy Juma Boy** (hereinafter referred as the applicant), who had vied for the position of Senator for Kwale County was declared validly elected for the position. Two voters **Mwamlole Tchappu Mbwana** and **Kalimbo Naveed Mwaega** (hereinafter referred to as the respondents), who were dissatisfied with the outcome of the elections lodged a petition before the High Court at Mombasa challenging the outcome of the elections. On 27th September, 2013, the High Court (**Ochieng, J.**) delivered a judgment in which it dismissed the petition and issued a certificate confirming the validity of the election of the applicant as the Senator for Kwale County.

[2] Being aggrieved by that judgment the respondents lodged a memorandum of appeal in the Registry of this Court at Mombasa on 28th October, 2013. The applicant has now moved this Court by way of Notice of motion dated 22nd November, 2013 seeking to have the memorandum of appeal dated 28th

October, 2013 and the entire record of appeal filed on 28th October, 2013 struck out on grounds that the respondents had not applied for certified copies of proceedings and judgment, or served or delivered copies thereof to the applicant as required by law. Further that the respondents have not included a certificate of records, notice of appeal, application for certified copies of proceedings, judgment, or certified decree in their record of appeal as required by law.

[3] Thus it is submitted that the appeal is incompetent as the applicant has failed to comply with the mandatory requirement of **rule 87** of the Court of Appeal Rules; and that the applicant has not complied with **rule 35** of the Elections (Parliamentary and County Elections) Petition Rules 2013 as read with **rule 74, 75, 76** and **77** of the Court of Appeal rules which makes the filing of a Notice of appeal mandatory. It is argued that the jurisdiction of this Court has not been properly invoked and this is a substantive defect that goes to the root of the whole appeal.

[4] **Mr Kadima** counsel who canvassed the application for the applicant, relied on the Supreme Court decision in **Petition Nos 6 and 7 of 2013 consolidated. The Board of Governors Moi High School Kabarak vs Malcolm Bell & Anor.** He submitted that the Court only has discretion where a procedural step has been missed and not in a situation such as that obtaining before us where there is a substantive omission. He urged the Court to strike out the appeal as being incompetent.

[5] Learned counsel **Mr Koech** who appeared for the respondents urged the Court not to strike out the appeal maintaining that it would be a draconian action inimical to justice. He relied on the Constitution of Kenya, 2010 for his submission that the Court should give precedence to substance over form. He conceded that no notice of appeal was filed or served but maintained that a Court has inherent jurisdiction under the Oxygen Principle to revive the appeal. He explained that the failure to file the Notice of appeal was due to an oversight by the counsel who was earlier handling the matter on behalf of the respondent. He relied on **Abok James Odera t/a A. J. Odera and Associates vs John Patrick Machira Civil Appeal No. 45 of 2013,** and urged the Court to revive the appeal because of the public interest involved in the issues raised in the appeal.

[6] We have considered this application and submissions which have been made before us. It is not disputed that the respondents did not file a notice of appeal nor was the applicant ever served with any notice of appeal. Thus **rule 75** of the Court of Appeal rules which provides for the filing of a notice of appeal within 14 days of a decision appealed against, and **rule 77** of the Court of Appeal rules which provides for such notice to be served within seven days after lodging the appeal, were not complied with. These are mandatory provisions which the respondents were under obligation to comply with. Indeed the jurisdiction of this Court as an appellate court can only be triggered through the filing of the notice of appeal. In the absence of such notice the Court has no proper basis upon which its jurisdiction can be anchored.

[7] The respondents situation has been further aggravated by the failure to include a certified copy of the decree or order sought to be appealed against. This is a primary document the omission of which as was held in **Municipal Council of Kitale vs Fedha (1983) KLR 307** is a substantive defect which renders the appeal incompetent.

[8] In addition no good reason has been given for these serious omissions. Instead the respondents' counsel merely made a feeble attempt to pass the back to the respondents' former counsel. He did not even make any efforts to seek leave of the court to file the missing documents out of time. The attempt to seek refuge under **section 3A** and **3B** of the Appellate Jurisdiction Act (The Oxygen Principles) cannot hold as these rules are intended to facilitate the just expeditious and timely disposal of appeals. They are not intended to assist an indolent litigant. Nor can the respondents rely on the negligence or mistake of his counsel.

[9] For all the aforesaid reasons we come to the conclusion that this application must succeed. Accordingly we strike out the notice of appeal and the entire record of appeal which was filed by the respondents. We award costs to the applicant. Those shall be the orders of the Court.

Dated and delivered at Mombasa this 14th day of February, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR