



IN THE COURT OF APPEAL

AT KISII

(CORAM: GITHINJI, ONYANGO OTIENO & MUSINGA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 39 OF 2013

BETWEEN

ZACHARIA OKOTH OBADO..... APPLICANT/RESPONDENT

VERSUS

EDWARD AKONG'O OYUGI.....1ST RESPONDENT/APPELLANT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

JAIRUS OBAGA.....3RD RESPONDENT

(An Application to strike out the Supplementary Record of Appeal, the Further Supplementary Record of Appeal and/or set aside orders issued by the Deputy Registrar, Court of appeal

in

Election Petition No. 3 OF 2013)

RULING OF THE COURT

This application is made by **Zacharia Okoth Obado**, the 3rd respondent in the appeal. He seeks orders that the supplementary record of appeal and the further supplementary record of appeal filed by the appellant, **Edward Akongo Oyugi** be struck out. He further seeks an order that the order of Deputy Registrar of this Court dated 19th November, 2013 giving leave to the appellant to file a supplementary record of appeal be set aside.

The applicant was declared as the duly elected Governor for Migori County after the General Elections held on 4th March, 2013. Thereafter the appellant, who was also a candidate, filed Election Petition No. 3 of 2013 in the High Court at Kisii seeking various reliefs including a declaration that the applicant was not duly elected as the Governor for Migori County and a declaration that he, the appellant, was the validly elected Governor for Migori County.

On 13th June 2013 and in the course of the hearing the petition, the Election Court (**E. A. Maina, J.**) made orders and directed, *inter alia*:

- a. **That the Deputy Registrar shall examine and do a re-tally of votes cast for each candidate in all the polling stations in the 8 constituencies in Gubernatorial election for Migori County. For the avoidance of doubt a re-tally of all the form 35S and form 36S.**
- b. **That there be a scrutiny and recount of the votes cast in the gubernatorial election in the following polling stations: -**
 - i. **Ombo polling station stream 1 Suna west constituency**
 - ii. **Kengariso polling station (No. 076) in Kuria West Constituency.**
- c. **That the re-tally, scrutiny and recount herein above shall be done within fourteen (14) days starting Wednesday the 19th day of June, 2013. To that extent the Independent Electoral and Boundaries Commission shall resubmit all the forms 35S and 36S to the Deputy Registrar and the ballot boxes for the said polling stations by close of day on Tuesday 18th June, 2013.**
- d. **That the Deputy Registrar shall at the end of the fourteen (14) days, make a report of her findings which report shall constitute part of the proceedings in this petition...**
- e. ...
- f. ...
- g. ...”

The Deputy Registrar (**P. Mayova esq.**) carried out the exercise on various dates and made a record of proceedings on each day. At the end of the exercise, typed proceedings were applied for but the Deputy Registrar declined to make an order saying that the exercise was being carried out for the Judge and the application for proceedings should be made before the Judge. It appears that the issue was not pursued.

The Deputy Registrar ultimately prepared a comprehensive typed report which has been made part of the record of appeal. The Election Court ultimately dismissed the petition on 5th September, 2013 precipitating the filing of the appeal on 4th October, 2013.

By a letter dated 16th September, 2013 the appellant’s advocates applied to the Deputy Registrar for typed and certified copies of the proceedings during scrutiny/recount, examination and re-tallying exercise which were duly supplied. Subsequently the appellant filed an application under **Rule 88 and 92(3)** of the Court of Appeal Rules 2010 (**Rules**) for leave to file a supplementary record of appeal out of time to incorporate the proceedings before the Deputy Registrar of the High Court. The application was opposed by the present applicant who filed a replying affidavit and also by the 1st and 2nd respondents in the appeal. However, the Deputy Registrar (**Adika, esq.**) allowed the application and leave was granted. The appellant subsequently filed the supplementary record of appeal on 19th November, 2013 and further supplementary record of appeal on 25th November, 2013. While the supplementary record contains the notes of the proceedings before the Deputy Registrar, the further supplementary record contains the tabulated results made by the Deputy Registrar after the examination and re-tallying of forms 35S and 36S in various polling stations. The application is brought under **sections 3, 3A, and 3B** of Appellate Jurisdiction Act (that is under the overriding objective principle), **Rules 47, 84** of the Rules and **section 85A** of the Elections Act. It is apparently based on the following grounds namely: that the Deputy Registrar erred in finding that the proceedings were directly relevant for proper determination of the appeal; that the High Court did not direct that the proceedings before the Deputy Registrar should form part of the proceedings in the petition; that neither the parties nor the Election Court relied on the proceedings; that the supplementary record introduces new proceedings and untested averments which

were never before the court and which would be prejudicial to the applicant.

The application is supported by the 1st and 2nd respondents in the appeal but it is opposed by the appellant mainly on the grounds that the Court does not have jurisdiction to review an order made by Deputy Registrar under Rule 88 of the Rules; that the proceedings in the supplementary records were part of the proceedings in the petition and that the supplementary records are relevant. The respective counsel have made submissions in support of the respective grounds.

Mr. Obondi, learned counsel for the 1st and 2nd respondents in the appeal in particular submitted that the notes made by Deputy Registrar of the High Court were not formal judicial proceedings and that the notes will introduce new evidence which respondents had no opportunity to correct.

It is convenient to deal with the issue of jurisdiction first. As Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules 2013 (LN. No. 54 of 2013) provides, appeals from judgment and decree of the High Court are governed by the Court of Appeal Rules. It is submitted by **Mr. Mwenesi**, learned counsel for the appellant, in essence, that the full Court has no jurisdiction to review the decision of the Deputy Registrar. As Mr. Mwenesi correctly submitted, this is not an application to strike out the record of appeal under rule 84 of the Rules. Rather the applicant is aggrieved by the order of the Deputy Registrar of this Court granting leave to file a supplementary record. Rule 88 which the appellant invoked and which the Deputy Registrar relied on states:

“When a document referred to in Rule 87(1) and (2) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in the supplementary record of appeal filed under Rule 92(3) and thereafter with leave of the Deputy Registrar on application”

Rule 92(3) referred to allows an appellant to lodge a supplementary record of appeal at any time. **Rules 87(1)** in particular specifies the documents which should be contained in a record of appeal where the appeal is from the High Court in its original jurisdiction, which documents include trial judge’s notes at the hearing and such other documents as may be necessary for the proper determination of the appeal including any interlocutory proceedings which may be directly relevant.

However, as Rule 87(1) stipulates, the specified documents required to be contained in the record of appeal can be excluded from the record of appeal if a Judge or Registrar of the High Court on application by a party has directed that any such document or part of the document should be excluded from the record. Further, according to proviso to Rule 87(1), even parts of trial judge’s notes should be excluded from the record if they are not relevant to the matters in controversy in the appeal. Thus the import of Rules 88, 87(1) and 92(3) is that an appellant is free to file a supplementary record of appeal at any time but if the documents specified in Rule 87(1) and which have not been excluded by the Judge or Registrar of the High Court from the record are omitted from the record, the appellant has a right to file a supplementary record to include them within fifteen days of the lodging of the record without leave but requires leave of the Deputy Registrar to file the supplementary record of the specified documents after the expiry of the fifteen days. Rule 88 gives the discretion to the Deputy Registrar to allow the filing of supplementary record of the specified documents after the expiry of the specified time. It seems from the Rules that the judgment as to whether the documents should form part of the supplementary record is left to the appellant, subject to control of the Court and the role of the Deputy Registrar is merely to decide whether or not to allow the supplementary record to be filed out of time. The question whether the documents are relevant to matters in controversy in the appeal or whether they introduce fresh evidence or raise legal issues only, is a judicial decision for the Court which is outside the province of the Deputy Registrar.

The Deputy Registrar in exercise of his discretion extended time for lodging the supplementary record. The Rules do not provide for a reference to full Court of the discretionary order of the deputy registrar nor empower the full Court to review such a decision. It follows, therefore, that the application in as much as it is made independently of the appeal and before a bench which is not hearing the appeal, is grossly incompetent.

The complaints that the applicant and the 1st and 2nd respondents in the appeal has raised about the supplementary records of appeal, can be raised at the hearing of the appeal. It is the Court hearing the appeal which is best suited to decide whether the notes of the Deputy Registrar of the High Court were part of the election petition proceedings or whether they were excluded by the Election Court from the proceedings. It is also the Court hearing the appeal which is best suited to decide whether the supplementary records introduce new evidence, whether they raise legal issues, and whether they are relevant to the matters in controversy in the appeal. As **Rule 104** of the Rules stipulates, at the hearing of the appeal, a party cannot without leave of the Court argue any ground not specified in the memorandum of appeal. Further, the Court cannot admit additional evidence without leave. Thus, the complaints now raised are premature as they can be properly addressed in the context of the appeal at the hearing and if found to be valid, the Court would make appropriate orders.

For those reasons the application is dismissed with costs to the 1st respondent.

DATED and DELIVERED at Nairobi this 7th day of February, 2014.

E. M. GITHINJI

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

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