



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: P.M. MWILU JA (IN CHAMBERS)

CIVIL APPLICATION NO. 21 OF 2014 (UR 16/2014)

**MR. FIDELIS KITILI KIVAYA, RETURNING OFFICER NJORO
CONSTITUENCY**

INDEPENDENCE ELECTORAL & BOUNDARIES COMMISSION.....1ST APPLICANT

INDEPENDENCE ELECTORAL AND BOUNDARIES COMMISSION...2ND APPLICANT

VERSUS

KARANJA KABAGE1ST RESPONDENT

HON. MR. JOSEPH KIUNA KARIAMBEGU NG'ANG'A.....2ND RESPONDENT

(Being an Application for Leave to file and serve out of time a Notice of Grounds for affirming the decision for reasons other than or additional to those relied upon by the High Court of Kenya at Nakuru by Hon. Justice Anyara Amukule delivered on 11th September, 2013

in

NKR Election Petition No. 12 of 2013

RULING OF THE COURT

1. The 1st and 2nd Applicants by their Notice of Motion dated and filed herein on the 12th February, 2014, seek orders;

“1. **THAT** ----

2. **THAT** ----

3. **THAT** *this Honourable Court extends the time limited by the Rules of the Court to file and serve the Notice of Grounds for affirming the decision for reasons other than or additional to those relied upon by the High Court in terms of the draft Notice annexed hereto and marked, LMKA”.*

4. **THAT ---”**

2. The application is expressed to be premised on the provisions, *inter alia*, of s.3a and 3b of the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules, 2010. That Motion is based on the grounds that on the 4th day of February, 2014 the Supreme Court of Kenya sitting in Nairobi in Petition no. 10 of 2013, **HASSAN ALI JOHO & ANOTHER -VS- SULEIMAN SAID SHABAL & 2 OTHERS, (JOHO)** held that section 76(1) of the Elections Act, 2011 being inconsistent with Article 87(2) of the Constitution was as a result of that inconsistency invalid. That the declaration of results for Member of National Assembly for Njoro Constituency was made on the 6th of March, 2013 and therefore the Petition filed on 10th April, 2013 was filed out of time. That the decision of the Supreme Court was made after the determination of the Petition was made and finally that the application is brought in the interest of justice and to promote the value of precedent in the determination of cases.

3. The affidavit in support of the motion sworn by Lucy Muthoni Kambuni Sc reiterated and reinforced the above grounds.

4. The 2nd Respondent who is the incumbent Member of Parliament for Njoro Constituency swore a Repeating Affidavit in support of the Applicants’ motion stating, amongst other things, that the grounds for affirmation of judgment do not relate to introduction of evidence but rather that the supreme court has merely clarified the apparent conflict between the Constitution and the Election Act, 2011.

5. On his part the 1st Respondent took out a Notice of Preliminary Objection on the grounds that the issue of the Petition having been filed out of time was neither pleaded nor canvassed in the High Court and the same was not considered in that court’s judgment and that this court’s jurisdiction is limited to hearing and determining appeals from the High Court in cases where an appeal lies to it under the provisions of section 85A of the Elections Act.

6. Submitting in support of the Lucy Kambuni Sc stated that this was not a case of adducing additional evidence rather, than bringing the motion was allowed by the provisions of Rule 94 of the Court of Appeal Rules, 2010 and further the Supreme Court had nullified section 76(1) of the Election Act vide the **JOHO case** (supra) and for those reasons time should be extended for the Applicants to file grounds for affirming the High Court judgment. Counsel added that this court has the necessary jurisdiction to hear the motion because the issue it raises is one of law and which can be urged at any time of the proceedings. Counsel added that Limitation could not have been pleaded as it was not initially an issue and that the nullity declared by the Supreme Court took effect retrospectively. Counsel relied on authorities to buttress her submissions.

7. Mr. Njenga learned counsel for the 2nd respondent supporting the applicants’ motion submitted that this court has the jurisdiction to extend time and the reason for delay has been explained and that as soon as the **JOHO case** was determined by the Supreme Court, the instant application was filed timeously.

8. Learned senior counsel Mr. Muite opposing the application submitted that the essence of the motion was not simply to affirm the judgment but to introduce evidence which was not part of the pleadings and evidence at the High Court to show that the Petition was filed out of time. Senior Counsel added that this court’s jurisdiction is limited to considering the issues raised in the pleadings, the evidence led and submissions made in the High Court and on the determination made by that court. He added that the motion missed the point on what instances call for affirmation of judgment and in the present case the judge considered all the issues before him. Adding that limitation is a requirement of law which must be pleaded senior counsel concluded that it is too late in the day to introduce it.

9. Mr. Gathenji learned counsel teaming up with senior counsel Mr. Muite submitted that the present motion would never have been brought had the **JOHO case** not been determined and that in any event the position in law is not settled on whether or not the kind of declaration of statutory nullity made in the **JOHO case** should take effect retrospectively or prospectively. He urged that the court should consider the mischief sought to be addressed.

10. The matter that primarily concerns the court at this stage is simply this; should this court extend time as sought at this stage of the proceedings for the filing of grounds to affirm the High Court judgment? The rest of the other issues raised, such as whether or not the declaration of nullity of **Section 76 (1) of the Election Act** takes effect retrospectively or prospectively are matters for the full bench of the court.

11. The power donated to the court under **rule 4 of the Court's rules** is a discretionally one whose exercise must be judiciously discharged. That power to extend time is intended to assist a party who either by explainable excusable delay or through inadvertence did not do what was required to be done by such party within a prescribed time. In the case, such as the instant one, where it is sought to affirm a judgment, the judge must have based his judgment on certain aspects of evidence and issues raised during the hearing, leaving certain other evidence or issues similarly raised during the hearing of the case to call for this court's intervention. In the exercise of the wide discretion of the court in extending time, the court must take into consideration relevant factors, amongst them the length of delay, the chances of success of the appeal and the extent of prejudice that may be occasioned to the Respondent. That was the case in the authority of **LEO SILA MUTISO V ROSE HELLEN WANGARI MWANGI Civil Appl. No. Nai.255/1997** and also the authority of **AFRICAN AIRLINES INTERNATIONAL LTD. V SOUTHERN AFRICAN TRADE DEVELOPMENT BANK [2003] KLR 14C**.

12. It is common ground that had **JOHO** not been decided when it was, the present motion would not have been brought. There can be no denying the fact that the effect of the motion, were the same to be granted, would be to introduce the issue of limitation. I say introduce because, admittedly the issue of the Petition having been caught by time was not an issue before the High Court, the same having not been pleaded or countered by the opposite side and definitely evidence not having been led on the same. It appears to my judicial mind that granting the motion as prayed is akin to re-opening the Petition to introduce the issue of Limitation after the High Court has made a determination thereby clearly prejudicing the 1st Respondent who would be denied the opportunity to respond to the issue. That in my considered view would gain the applicants undue advantage over the 1st Respondent and as clearly the purport of affirming the judgment is to import the issue of limitation, a matter that arose subsequent to the determination of the court, the proper exercise of judicial discretion would be slow to extend time to allow for the doing of what the motion seeks. As already stated the effect of the Supreme Court decision in the **JOHO case** is not a matter for a single judge's consideration and I leave that to the full bench to deal with as it may. I do not consider that extension of time is a mere formality because precedent requires that the applicant must lay basis to deserve an extension of time.

13. It is a cardinal point of law that pleadings must be precise so that the opponent know what they are up against and this is all the more significant in an adversarial justice system such as ours. And of course parties are bound by their pleadings. In the Petition herein the issue of limitation was not pleaded or canvassed and it is not one of the decisions of the High Court that has come on appeal. This court therefore, in considering whether or not to extend time to do what is sought to be done by the motion, must weigh up the competing interests of the parties before it. Having so weighed such competing interests it is doubtful whether it would be prudent, at this late appeal stage, to extend time to allow for the introduction of what is clearly akin to an amendment of the Petition to introduce pleadings on limitation when the Petition is concluded, that court having pronounced itself with finality on the issues that were placed before it, limitation not having been one of them, and the 1st Respondent not having an opportunity to present his side on the matter. I imagine that there must be a less prejudicial way for the Applicants to achieve that which they hope to achieve through the extension of time which extension I decline to grant for the reasons advanced above.

14. In the result the motion dated and filed herein on 12/02/2014 is refused. Costs will abide the appeal.

Dated and Delivered at Nairobi this 14th day of March, 2014.

P. M. MWILU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR