



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: AZANGALALA, GATEMBU & KANTAI, JJ.A.)**

**CIVIL APPLICATION NO. 28 OF 2014**

**BETWEEN**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION (I.E.B.C.)..... 1<sup>ST</sup> APPLICANT**

**SILAS ROTICH ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PHILIP MUKUI WASIKE ..... RESPONDENT**

**JAMES LUSWETI MUKWE ..... INTERESTED PARTY**

*(An Application to Strike out Notice of Appeal dated 11<sup>th</sup> October, 2013 and filed on the same date being an Appeal from the Judgment of Honourable Justice Hellen Omondi delivered on the 26<sup>th</sup> day of September, 2013 in the High Court of Kenya at Bungoma*

**in**

**ELECTION PETITION NO. 5 OF 2013**

**\*\*\*\*\***

**RULING OF THE COURT**

This application is principally brought under **Rules 83** and **84** of the Court of Appeal Rules (**“the rules”**) although other provisions of the rules have also been invoked but they deal with the formal requirements of such an application. The application seeks to have the notice of appeal lodged on 11<sup>th</sup> October, 2013 by **Philip Mukui Wasike** (*the respondent*) struck out.

There are two grounds on the face of the application on which the application has been based namely, that the notice of appeal was not lodged in this Court but in the High Court at Bungoma and that since the filing of the same, no record of appeal has been filed at all, at any rate not within six months of the decision sought to be challenged by the respondent.

The application is supported by a short affidavit sworn by **Mohamud Jabane** who depones that he is a Manager of Legal Services of the applicants, Independent Electoral and Boundaries Commission

and **Silas Rotich**. It is deponed in that affidavit that judgment was delivered by **H. Omondi J.**, on 26<sup>th</sup> September, 2013 and the respondent intimated his desire to appeal against the said judgment by lodging a notice of appeal on 11<sup>th</sup> October, 2013 but has since not filed a record of appeal and has given no reason for the failure. Annexed to the affidavit are copies of the judgment and notice of appeal.

The respondent in the Notice of Motion neither responded to the same nor did he attend at the hearing thereof despite having been served, with the Notice of Motion and hearing notice. The Motion therefore proceeded **ex-parte** with Ms **Ngeresa**, learned counsel for the applicants, briefly addressing us on the two grounds for the application.

We have considered the application, the affidavit in support of it and the submissions of counsel together with the law. Having done so, we think the prayer for striking out the notice of appeal is not available to the applicants. We say so, because under the **proviso to rule 84 of the rules**, which was one of the rules invoked by the applicants, an application to strike out a notice or record of appeal should not be brought after the expiry of thirty (**30**) days from the date of service of the notice of appeal or record of appeal. A copy of the notice of appeal exhibited by the applicants to the supporting affidavit shows that they were served with the same through their advocates on 14<sup>th</sup> October, 2013. This application was lodged on 14<sup>th</sup> April, 2014 way after the one month period.

The second ground for seeking the striking out of the notice of appeal was that the same was lodged at Bungoma High Court instead of this Court. **Rule 59 (1)** is invoked as supporting that ground. A plain reading of that rule clearly shows that the applicants are clearly mistaken as the notice of appeal should indeed be lodged with the Registrar of the High court where the decision against which it is desired to appeal was given, which in this case, was Bungoma High Court. The notice of appeal in this case was therefore properly lodged with the Registrar of Bungoma High Court.

The applicants' application was however properly grounded in **rule 83** of the rules which reads:-

***“83. 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 order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”***

In the matter before us, the notice of appeal was lodged on 11<sup>th</sup> October, 2013 and was served upon the applicants on 14<sup>th</sup> October, 2013. Under rule **82 (1)** an appeal should be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged. The notice of appeal herein having been lodged on 11<sup>th</sup> October, 2013, the respondent had until 11<sup>th</sup> April, 2014 to institute his appeal by lodging in quadruplicate a memorandum of appeal, and the record of appeal, the prescribed fee and security for costs of the appeal. We have no evidence that he did so. The applicants are therefore right to complain.

In the premises, applying the provisions of **rule 83** of the rules, the notice of appeal dated and lodged 11<sup>th</sup> October, 2013 is hereby deemed to have been withdrawn. The respondent, Philip Mukui Wasike, shall be liable to pay the costs of the applicants. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2014.**

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**