



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: VISRAM, KOOME & ODEK, J.J.A.)
CIVIL APPEAL NO. 18 OF 2013

RICHARD NCHARPI LEIYAGU.....APPELLANT

VERSUS

**INDEPENDENT ELECTORAL AND BOUNDARIES
 COMMISSION..... 1ST RESPONDENT**

ISMAEL HASHIMI.....2ND RESPONDENT

MATHEW KIPEME LEMPURKEL3RD RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nyeri, Wakiaga, J.), delivered on 8th July, 2013)

in

Election Petition No. 4 of 2013)

JUDGMENT OF THE COURT

[1] **RICHARD NCHARPI LEIYAGU**, the appellant, contested for the position for the Member of the National Assembly for the Laikipia North Constituency during the General Elections of 4th March, 2013. **MATHEW KIPEME LEMPURKEL**, the 3rd respondent, was declared the elected Member of Parliament for Laikipia North Constituency and was duly gazetted by the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION**, the 1st respondent, in the Kenya Gazette of 13th March, 2013. Aggrieved by the outcome of the said elections, on or about the 10th April, 2013, the petitioner (appellant) filed a petition before the High Court at Nyeri seeking for an order *inter alia* nullifying the election of the 3rd respondent as Member of Parliament for Laikipia North Constituency.

[2] The Petition was duly served upon the respondents, they filed their responses and a pretrial conference was held on the 22nd May, 2013, before Wakiaga, J., in the presence of all the parties. It was agreed that the hearing or the trial of the Petition was allocated the 10th, 11th, 12th, and 13th June, 2013. Out of those dates the appellant was allocated two days that is the 10th and 11th June, 2013, within which

he was supposed to give his evidence and his witnesses, while the respondents were given the 12th and 13th June, 2013. The dates were agreed upon by the parties and their respective counsel signed the consent order allocating the aforesaid dates.

[3] On the 10th June, 2013, when the petition came up for hearing, the appellant and his counsel were absent. The Judge set aside the matter for some time to allow the appellant and his counsel appear before him; it appears from the record, the learned Judge directed the Court Registry to call the offices of counsel for the appellant and inform them that the petition would proceed for hearing at 12 noon. When the court reconvened and both the appellant and his counsel were absent, the court was moved by counsel for the respondents to dismiss the petition for want of prosecution and also for failure by petitioner to comply with the directions given by court regarding filing of some affidavits, which according to the respondents, were filed outside the agreed time frame.

[4] After hearing the parties the Judge adjourned the petition to the following day that is to the 11th June, 2013. On that day the appellant and his counsel were present in court, they unsuccessfully attempted to give an explanation for their failure to attend court on the 10th June, 2013. The Judge directed that he would first read the ruling which he had prepared and the appellant and his counsel were at liberty thereafter to move the court appropriately. The Judge read the ruling dismissing the petition for failing to comply with the strict timelines as set by the law. In the ruling, the Judge emphasized the need for all the parties to an Election Petition to comply with the strict time lines and reiterated the observations made by the Supreme Court in the case of: **RAILA ODINGA vs INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND ANOTHER; ELECTION PETITION NO. 4 OF 2013**, regarding the 'limited time-span' The Petition was dismissed with costs to the respondents for non-attendance.

[5] In view of that disastrous end of the petition, on 14th June, 2013, the appellant filed a Notice of Motion seeking to set aside the order made on the 11th June, 2013, dismissing his petition. That Motion was brought under several provisions of the law and because several arguments were made regarding the jurisdiction of the court, it is pertinent for us to point out the particular provisions of the law under which the motion was predicated; it was brought under **Articles 50, 159 (2) (d) and (e)** of the **Constitution** and **Sections 80, 1 A and 3 B** of the **Civil Procedure Act, Cap 21, Order 12 Rule 7, Order 45 Rules 1, 2, and 3, and Order 51** of the **Civil Procedure Rules**. The application was founded on the grounds stipulated on the body thereto and supported by the affidavits of **Geoffrey Ngigi**, learned counsel for the appellant.

[6] As would have been expected the application was opposed by the respondents. After considering the rival arguments the Judge dismissed the application for three principal reasons. Firstly, the Judge observed that the court's jurisdiction to determine election petitions is derived from the **Constitution** and the **Elections Act** and that there is no provision in the said law to reinstate a Petition that was dismissed. Secondly, the Judge faulted the appellant for failure to swear an affidavit offering an explanation for his absence in court on the day set for the hearing; and his counsel was also castigated for finding fault in the court registry for not sending a hearing notice notwithstanding the parties' agreement to the date by consent. Lastly, the Judge observed that even if he was wrong in dismissing the application on merit, he would still dismiss the Petition under the provisions of **Section 79 (a)** of the **Elections Act**.

[7] The Judge made the following specific findings:-

(i) "That there is no provision under the Elections Act which allows for setting aside, review and or reinstatement of a dismissed Petition.

(ii) That the Petitioner has not made a case for the exercise of courts inherent power and or discretion to set aside, review and or reinstate the dismissed Petition.

(iii) The application is therefore dismissed with cost to the respondents."

The above is the gravamen of this appeal before us, the appellant listed a total of 16 grounds of appeal but

during the hearing, those grounds were argued under three thematic areas:

1. ***Jurisdiction of the High Court;***
2. ***Exercise of the Judge's discretion to set aside his own orders;***
3. ***Determination of the merit of the Petition before hearing the parties.***

[8] Mr. Mwangi appearing with Mr. Ngigi and Mr. Korir, learned counsel for the appellant, submitted that original and unlimited jurisdiction in both civil and criminal matters is conferred upon the High Court by the Constitution. He faulted the Judge for holding that, since there was no specific provision under the **Elections Act** for a court to set aside its own orders dismissing the petition that the same divested the court of its inherent jurisdiction to ensure access to justice. The petition was set down for hearing on the 10th to 13th June, 2013, but due to an inadvertent mistake, counsel for the appellant and even the appellant himself diarized the hearing as commencing on 11th June, 2013. Counsel apologized for this oversight, and gave a chronology of what happened. Due to the mistake, he received a call from the court registry at 11:30 am on the same day that is 10th June, 2013. However, he was unable to present himself in court by 12 noon owing to the distance between Nyeri and Nairobi where he was. He, nonetheless, made frantic efforts to get a counsel from Nyeri to hold his brief and that also did not bear fruits. The appellant and his counsel were present in court on the 11th June, 2013, which was the second day that was designated for the appellant to present his evidence and his witnesses and he was ready to proceed.

[9] Mr. Mwangi submitted that in the special circumstances of this case, the Judge should have allowed the appellant to proceed with his case on the 11th June, 2013, a day that had been allocated to him and which was within the time frame set by the court. That would not have been prejudicial to any party. Counsel noted that the Judge had reminded himself that the absence of specific provisions to set aside orders in an election petition did not oust the inherent jurisdiction of the court to do justice; however, the Judge proceeded to dismiss the application paradoxically because the court had no jurisdiction to review its own orders and reinstate the petition. He argued that as a result, the appellant was denied a forum to ventilate his grievances and was ousted from the seat of justice. Secondly, the appellant was of the view that it would have been more expedient to file the application before the trial Judge than appealing against the order dismissing the petition before this Court.

[10] Mr Mwangi argued that the veracity of the matters stated in the supporting affidavit were not contested, even though the extract copy of the diary was not included, that was explained, as the matter was diarized in an electronic diary. Moreover, the deponent of the affidavit was available in court, and he could have been cross examined on the depositions. According to Mr. Mwangi, by dismissing the application, the court departed from a long line of precedents set over many years that courts are always reluctant to dismiss a suit and thereby deny a claimant an opportunity to ventilate his or her grievances. He maintained that the application to set aside was brought without undue delay and the appellant's counsel offered cogent reasons for non-attendance on the 10th June, 2013. He submitted that the power to dismiss a suit should be exercised sparingly. See the case of; **D.T. DOBIE & COMPANY KENYA LTD . VS. JOSEPH MBARIA MUCHINA, CA NO. 37 OF 1978**, where this Court stated that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit has shown a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

[11] Regarding the issue of jurisdiction, Mr. Mwangi cited the case of: - **Taylor and Another vs Lawrence, [2002]2 All E.R.** In this case it was observed that although the English Court of Appeal's jurisdiction depends on Statute and it has no original jurisdiction, the Judges drew a distinction between the question as to whether a court has jurisdiction given by statute and the full effect at which it exercises

that jurisdiction which it is undoubtedly given by statute by drawing the following analogy:-

“So for example, a court does not need to be given express power to decide upon the procedure which it wishes to adopt. Such a power is implicit in it being required to determine appeals. It is also important when considering authorities which, it is suggested, are laying down principles as to the jurisdiction of a court, to ascertain whether they are doing more than setting out statements of the current of the court, which can be changed as the requirements of practice change, these powers to determine its own procedure and practice which a court possesses are also referred to as being within the inherent jurisdiction of the court, and when the term ‘inherent jurisdiction’ is used in this sense (as to which see “The Inherent Jurisdiction of the Court of Appeal, as with other courts, has an inherent or implicit jurisdiction.”

[12] The last issue argued by the appellant was regarding the Judges observations that he would have dismissed the petition in any event under the provisions of **Section 79 (a)** of the **Elections Act** which provides;

“Upon receipt of a Petition, an election court shall peruse the Petition-

- a. If it considers that no sufficient ground for granting the relief claimed is disclosed therein may reject the Petition summarily; or*
- b. Fix a date for the trial of the Petition”*

Mr. Mwangi went on to point out that the Judge delved into the merits of the petition, *ex parte* and ordered it dismissed without hearing the petitioner; that the petition was not dismissed summarily after it was filed; parties were invited for a pretrial conference and hearing dates were fixed. Therefore, after fixing the petition for hearing, it was not open for the Judge to return to the above provisions; and as a result the petitioner was denied a hearing.

[13] In opposing this appeal, Mr. Juma learned counsel for the 1st and 2nd respondents, who also argued on behalf of Mr. Kanchory for the 3rd respondent, submitted that the Record of Appeal before the Court was incomplete; the appellant had omitted vital affidavits especially the affidavit sworn by one Michael Michuki which was disowned by the deponent, also the affidavit of the 2nd respondent that was filed in opposition of the application for review; and that failure to include these vital documents rendered the appeal incompetent. For those reasons, Mr. Juma invited us to dismiss the appeal. Mr. Juma added that the Elections Act was enacted pursuant to the provisions of **Article 87** of the **Constitution**. The **Elections Act** is a complete statute with its own rules of procedure on how to govern the electoral disputes and therefore the Judge was right in finding that the Rules of the Civil Procedure Code had no place in an Election Petition; and that there was also no procedure provided for applying to set aside an order dismissing the Petition.

[14] According to the respondents, the appellant should have appealed against the order dismissing the petition. See the case of: - **Ferdinand Ndungu Waititu vs Independent Electoral and Boundaries Commission and others CA No 137 of 2013 (UR 94 of 2013)** in which this Court differently constituted reiterated the overriding objectives of the Election Petition Rules which provide as follows:

“4(1) The overriding objectives of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the election Petitions under the Constitution and the Act.

2. The Court shall, in the exercise of its powers under the Constitution and the Act or in interpretation of any of the provisions in these Rules, seek to give effect to the overriding objectives specified in sub-rule (1).

3. A party to an election Petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of

the court and to comply with the directions and orders of the court.”

[15] In this regard, Mr. Juma submitted firstly, that the hearing dates were fixed by consent and counsel was obligated by law to attend court in furtherance of the overriding objectives. Secondly, the petitioner and his counsel failed to follow the directions and to comply with the orders directing them to file certain affidavits within a set time frame. Lastly, counsel invited us to find that there is no order seeking to set aside the order of the 11th June, 2013, dismissing the petition, thus the appellant is not clear as to what he wants; and that the only option that was available to the appellant was to file an appeal under Section 35 of the Elections Act. Counsel stated that since the appellant failed to appeal against the order of 11th June, 2013, this appeal must be dismissed. On the refusal of the Judge to exercise his discretion in favor of the Petition, Mr. Juma argued that the appellant was not deserving, as he and his counsel deliberately failed to attend court. Even in the application seeking reinstatement of the petition they failed to provide pertinent documents or cogent evidence in support thereto.

[16] We have set out albeit briefly the background of this appeal and the summary of the learned submissions by counsel appearing for the parties. What was before the learned Judge was an election petition that was supposed to be heard, finalized and determined within a period of 6 months which we understand started to run from the 10th of April, 2013. The appellant did not attend court on 10th June, 2013, that being the first day fixed for the hearing of the petition by the consent of all parties. The appellant was however present on the 11th June, 2013, with his witnesses and he was ready to proceed. He and his counsel were also armed with an apology and reasons for their failure to attend court on the 10th June, 2013. The Judge however would hear none of that; he proceeded to read his written ruling dismissing the petition. The issue for determination is whether the Judge was justified in dismissing the application seeking to reinstate the petition.

[17] In dismissing the application seeking to reinstate the petition, it is obvious the Judge was exercising judicial discretion. It is an established principle in our courts as set out in the oft' cited and well-known case of ***Mbogo & another v Shah, EALR 1968 page 13.*** that a Court of Appeal will not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.

[18]. We agree with those noble principles which go further to establish that the court's discretion to set aside an *ex parte* judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the 10th June, 2013 with anxious minds. We have asked ourselves whether failure to attend court on 10th June, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice. The appellant and his counsel failed to attend Court on 10th June, 2013; they, nonetheless, made it to court on 11th June, 2013, and promptly offered an apology and explanation and offered to proceed with the petition on the 11th June, 2013, which date was reserved for the appellant's case.

[19]. In the case of ***Belinda Murai & others vs Amoi Wainaina, [1978] LLR 2782 (CALL) Madan, J.A. (as he then was)*** was at his best legal wit when he

described what constitutes a mistake in the following words:

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of Junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do

whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule...

[20] We are of the view that the learned Judge misapprehended the reasons given for non-attendance which arose as a result of a mistake. In the case of: ***Philip Chemowolo & Another v Augustine Kubede, [1982-88] KAR 103 at 1040 Apalo, J.A.*** (as he then was), posited as follows:

“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

[21]. In this case, the inconvenience caused to the respondents by the delay caused by the petitioner and his counsel’s failure to attend court on the 10th June, 2013, could have been compensated with costs. Also, the appellant’s case could have proceeded for hearing on the 11th June, 2013, and the Judge could at least be justified if he declined to extend further time. We understand the Judge was racing against time; what he described in his ruling as the ‘*tyranny of time*’. However in our view the Judge misapprehended both the time factor and the overriding objective which he cited by dismissing the petition for non-attendance on the 11th June, 2013, in the presence of the appellant, his counsel and witnesses. We are of the view that the Judge should have proceeded to hear the petition on merit. Dismissing the Petition did not advance the overriding objectives in the administration of justice, nor did the court save time. Indeed the court’s time that was fixed for the petition was totally wasted as the court had an opportunity of utilizing the remaining 3 days.

22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.

[23]. Several issues were raised regarding the jurisdiction of the court to order review or reinstatement of an election petition once dismissed. The Judge in his ruling seems to agree that the court had no jurisdiction and at the same time stated that the court had inherent jurisdiction to ensure the ends of justice.

This is what the Judge stated in the ruling:

“This to my mind means that any of constitutional rights available to the Petitioner must be enjoyed within the legal provisions set out in the statute which in this case is the Election Act since Article 87 of the constitution provides that Parliament shall enact legislation to establish mechanism for timely settling of election disputes and as stated in the case of JYOTI BASU supra all rights in respect of election disputes are statutorily given and therefore every Petition must be determined and decided within the statutory provisions contained in the said Act for reinstatement of dismissed Petition and if the legislature intended to give room for revival of any dismissed Petition this would have been enacted therein. The court is therefore put in a straight jacket by statute.”

However the Judge went on to hold that:-

“I have had occasion to state in Election Petition No. 1 of 2013 Nyeri that the express provisions of the Election Act or lack thereof does not oust the inherent jurisdiction of the court to do justice (sic) however that jurisdiction must be exercised only as may be necessary for the end of justice or to prevent abuse of the court process and therefore a look at the background leading to this application is necessary”

[24] In our own appreciation of this appeal, the Judge held that the court had no jurisdiction and in the same breath accepted and rightly so, that the inherent jurisdiction vested in the court was meant to ensure the ends of justice are achieved. Circumstances vary and although the courts are governed by the statutory underpinnings, statutes cannot cover every perceivable situation and make provisions. That is what is described in the **Taylor case (supra)** as implied jurisdiction. For example the **Elections Act** or the regulations made thereunder do not make any express provisions that, once a petition is fixed for hearing and the petitioner fails to attend court on the day of hearing, the petition will be dismissed for non-attendance. This is a general power given to a court to control its own procedure so as to prevent its being used to achieve injustice and also it is a power given to the court in order to maintain its character as a court of justice. By the same analogy the court is given the same powers to set aside its own orders in order to do justice. - See ***Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates, Civil Appl. NAI. 293/09.*** This court differently constituted had the following to say:

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases.”

[25] The other issue that deserves to be mentioned is the observation by the Judge that he would have dismissed the petition anyway under the provisions of **Section 79 (a)** of the **Elections Act**. We agree with counsel for the appellant that this was clearly misdirection. If the Judge intended to dismiss the Petition summarily, he should have done so before calling a pretrial conference and before fixing hearing dates. Having admitted the petition for hearing the order of summary dismissal as provided under **Section 79 (a)** was not available.

[26] The last issue raised was regarding the competency of the appeal that was faulted on two fronts. Firstly, it was argued that the appellant left out some documents and secondly, that there was no prayer seeking to set aside the order of the 11th June, 2013. Whereas we underscore the importance of a party filling a complete Record of Appeal, we are of the view that the respondents too could have filed the documents that were left out; but more importantly the respondents could have applied to strike out the appeal. Raising the issue at the hearing cannot aid the respondents because nowadays pendulums have swung and the courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities. On the second issue, we agree there is no appeal against the order of 11th June, 2013. Nonetheless, the prayer sought is to set aside the order of 8th July, 2013. In our considered view if the order of 8th July, 2013, is set aside, and the application that was dismissed is allowed, it automatically reinstates the petition for hearing. This is how the prayers in the Notice of Motion are worded:

1. ***“The Order of the Honourable Justice Wakiaga made on 11th June, 2013, dismissing the Election Petition dated 9th April, 2013, and filed herein on 10th April, 2013, together with all other consequential orders be reviewed, and set aside.***
2. ***The petition filed herein on 10th April, 2013 be reinstated for hearing.”***

It is, therefore, axiomatic that if that notice of motion was allowed, the petition would have been reinstated. The appeal before us is against the order dismissing that notice of motion and allowing the appeal, automatically reinstates the petition; therefore, nothing substantive turns on that ground.

[27] For the aforesaid reasons the learned Judge was clearly wrong in the exercise of his discretion which resulted in an injustice, the petition could have proceeded for hearing within the same time frame. The appellant was denied a hearing, we have no choice but to allow this appeal as disallowing the appeal would go against the spirit of the overriding objectives and also the provisions of **Article 159** of the **Constitution**. Accordingly, we allow the appeal, set aside the ruling dated 8th July 2013 and substitute

thereto with an order allowing the Notice of Motion filed on 14th June, 2013 in terms of Prayer No. 1 and 2 and direct that **Petition No. 4 of 2013**, be heard on merit before another Judge other than **Wakiaga J.** We however award the costs to the respondents for the application dated 14th June, 2013 in the High Court.

Costs of this appeal to abide the outcome of the Petition.

Dated and Delivered at Nyeri this 20th day of August, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO – ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR