



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: SICHALE, J.A. (IN CHAMBERS))

CIVIL APPEAL (APPLICATION) NO. 22 OF 2013

BETWEEN

NAOMI NAMSI SHABANAPPLICANT

AND

1. HON. BASIL CRITICOS

2. THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION

3. ISAIAH SAHA MADZUNGURESPONDENTS

(BEING AN APPLICATION FOR EXTENSION OF TIME FOR SERVICE OF THE NOTICE OF APPEAL FILED ON 30TH MAY, 2013 ARISING FROM THE RULING AND ORDER OF THE HIGH COURT OF KENYA AT MOMBASA (OCHIENG, J.) DATED 23RD MAY, 2013

IN

H.C. ELECTION PETITION NO. 3 OF 2013)

RULING

The applicant herein **Naomi Namsi Shaban** filed a notice of motion application on 26th June, 2013 seeking orders *inter alia*, for an extension of time for service of the notice of appeal. The application was supported by the affidavit of **Naomi Namsi Shaban** sworn on 17th June, 2013. Briefly, she deponed that she was dissatisfied with the decision of **Ochieng, J.** who having found that the 1st respondent's Petition was in violation of *Article 87(2)* of the Constitution, failed to dismiss the petition; that she instructed the firm of **M/s Nyakundi & Company Advocates** to prefer an appeal who did so on 30th May, 2013; that the said notice of appeal was not served within 7 days as required by law and that the inadvertence was occasioned by pressure of work on the part of **Yusuf Aboubakar Advocates** of Mombasa who failed to remit the notice to the firm of M/s Nyakundi & Company Advocates in Nairobi in good time.

In a replying affidavit dated 22nd July, 2013, **Mr. Tengo Madara** Advocate on behalf of the 3rd respondent deponed that the notice of appeal was served upon him on 11th July, 2013 the High Court decision having been made on 23rd May, 2013 and the notice of appeal having been filed on 30th May,

2013.

When the application came up for hearing before me, Mr. Aboubakar for the applicant asked that the notice of appeal filed outside the stipulated period, be deemed to have been duly filed.

Mr. Lubullelah on behalf of the 1st and 2nd respondents drew the Court's attention to the fact that the Election Petition had been fully heard and was pending judgment.

On his part, **Mr. Tengo** for the 3rd respondent vehemently opposed the application. He submitted that the applicant had not demonstrated sufficient reasons for allowing an extension of time to file the notice of appeal out of time as there was no proof of the heavy workload on the part of Aboubakar Advocate and neither had the applicant exhibited a letter from Aboubakar Advocate forwarding the notice of appeal to Mr. Nyukundi, Advocate in Nairobi

Rule 77(1) of the Court of Appeal Rules provides that:

“77(1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies hereof on all persons directly affected by the appeal.”

In the particular circumstances of this case, the notice of appeal was clearly served outside the seven (7) days. However, **Rule 4** of this Court's Rules gives the Court discretionary power to extend time, on such terms as it thinks just.

On my part, I find that at the time the application came up for hearing before me, the Election Petition in Mombasa had already been concluded and was pending for judgment. Besides, in the case of **Hassan Ali Joho & Anor vs Suleiman Said Shahbal & 2 Others - Civil Appeal No. 12 of 2013** this Court found that the provisions of **Section 76** of the Elections Act are not unconstitutional. The applicant herein intends to challenge the constitutionality or unconstitutionality of the said provision of the Constitution, a matter which this Court has already made a pronouncement on. There is also **C.A. No. 16 of 2013 Jared Odoyo Okello vs IEBC & 3 Others** consolidated with **C.A. No. 19 of 2013 Joel Omagwa Onyancha vs Eng. Peter Kimori Maranga & 3 Others** wherein a five Judge bench held that

“... to protect and uphold the clear constitutional principles and values among others timeliness, issues that arise in interlocutory determinations must be canvassed on appeal after the final determination of the election court.”

For this reason, I decline to allow the application which is hereby dismissed. As for costs, and given the unchartered grounds being pursued by litigants in election petitions, I direct that each party shall bear their own costs.

Dated and delivered at Malindi this 22nd day of October, 2013

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

REGISTRAR