IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. (APPLICATION) 228 OF 2013

BETWEEN

NICHOLAS KIPTOO ARAP KORIR SALAT.....APPELLANT/ RESPONDENT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT/APPLICANT

WILFRED ROTTICH LESAN.....2ND RESPONDENT

ROBERT SIOLEI, RETURNING OFFICER, BOMET COUNTY.....3RD RESPONDENT/APPLICANT

KENNEDY OCHANYO.....4TH RESPONDENT/APPLICANT

WILFRED WAINAINA.....5TH RESPONDENT/APPLICANT

PATRICK WANYAMA.....6TH RESPONDENT/APPLICANT

MARK MANZO.....8TH RESPONDENT/APPLICANT

(An application to strike out the notice of appeal and record of appeal under Rules 77 and 84 of the Court of Appeal Rules 2010.

in

HC. ELECTION PETITION NO. 1 OF 2013)

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RULING OF OUKO J.A

The principal issue in the instant application is the effect of the alleged failure by the appellant, Nicholas Kiptoo Arap Korir Salat, to comply with **Rule 77** of the Court of Appeal Rules, which provides:-

> **"77. (1) An intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal:"**

I must clarify at this early stage that the Court of Appeal Rules are applicable in applications arising from election petitions on the force of Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 which provides that:-

> **"35. An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules."**

Any person who desires to appeal to this Court from the decision of the High Court is by dint of **Rule 75** required to give notice by lodging such a notice in writing with the Registrar of the High Court within 14 days of the date of the decision against which it is desired to appeal.

While still on this, it is appropriate to quote **Rule 82** (institution of appeals) which stipulates that:-

> **"82. (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –**

a. **a memorandum of appeal, in quadruplicate;**

b. **the record of appeal, in quadruplicate;**

c. **the prescribed fee; and**

d. **security for the costs of the appeal."**

However, appeals arising from election petitions in the High Court are, in terms of **Section 85A (a)** and **(b)** of the Elections Act to be filed within thirty days of the decision of the High Court and heard and determined within six months of the filing of the appeal.

Rule 84 under which the present application is grounded requires that:-

> "**84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."**

It is common ground that the High Court *(Muchelule, J)* delivered the judgment in which he dismissed the appellant's petition on **19th August 2013**.

The appellant immediately within 3 days on **22nd August 2013** lodged a notice of appeal. Within 11 days from the date of the judgment, on **30th August 2013** the record of appeal was filed. The record of appeal was subsequently served on the applicants on **3rd September 2013**, 15 days from the date of the judgment.

From this, it ought to be clear that although both the notice of appeal and the record of appeal were lodged timeously and further that the latter was served within the stipulated time there is no unanimity on the service of the notice of appeal on the respondents. While the applicant maintain that up to the time

this application was being argued they had not been served, the respondents for their part argue that the notice of appeal was part of the record of appeal which the applicants have admitted having been served with on 3rd September 2013. If that be the case, the applicants contend, then that service is in violation of **Rule 77 (1)** aforesaid, as service was effected 12 days instead of 7 days after lodging the notice of appeal.

For the respondents, it was argued that there was no service at all as the rules do not envisage the notice of appeal to be served simultaneously with the record of appeal. The question to be considered is whether the notice of appeal and, by necessary inference, the appeal itself ought to be struck out for the reasons that the notice of appeal was not served on the respondents.

The power to strike out pleadings, and in the process deprive a party of the opportunity to present his case has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in the clearest of cases. Yet the period prior to 2010, when the overriding objective principle and the Constitution were promulgated, striking out of pleadings, as demonstrated by the cases cited by the respondents, for reasons that were purely technical was the rule rather than the exception. And this Court perfected it. This is demonstrated by the brief (1/4 page) decisions cited by the respondents in **Augustino Mwai V. Okumu Ndede,** Nbi Civil Appeal No. 42 of 1995, **Joseph Kinoti V. Aniceta Ndeti** Nbi Civil Appeal No. 130 of 1995 and **Samuel Wakaba V. Bamburi Portland Cement** Civil Appeal No. 130 of 1995, all decided between 1995 and 1997.

Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

The general trend, following the enactment of **Sections 1A and 1B** of the Civil Procedure Act, **Sections 3A and 3B** of the Appellate Jurisdiction Act and **Article 159** of the Constitution, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds as will shortly be demonstrated.

This trend has now been adopted by recent legislations and procedural rules. S**ection 80 (1) (d)** of the Elections Act, Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 are some of such development. This appears also to be the general direction in many other jurisdictions. For instance, England and Wales, where it originated, in Uganda and many other African states.

In the Nigerian case of **Dr. Chris Nwebueze Ngige V. Peter Obi and 436 Others** [2006] Vol. 18 WRN 33 the Court of Appeal in that country emphasized the need to sustain, rather than strike out pleadings in election matters in the following words:-

> **"Election petitions are by their nature peculiar from the point of view of public policy. It is, therefore, the duty of the court to endevour to hear them without allowing technicalities to unduly fetter their jurisdiction."**

In considering an application for striking out an election petition or an appeal arising from an election petition, the court concerned must bear in mind the fact that an election petition is not a matter in which the only persons interested are the candidates who competed against each other in the elections. The public are substantially interested in its outcome and that is an essential part of the democratic process. For instance, in this matter 115,931 citizens who voted for the 2nd respondent and 98,036 who voted the appellant are entitled to a fair judicial process in the determination of the election dispute all the way to this Court.

In modern times, the courts do not apply or enforce the words of statute or rules but their objects, purposes and spirit or core values. The mischief rule of construction is much the same as the spirit of a statute or rules of procedure. **Rule 77** of the Court of Appeal Rules cannot limit or override the provisions of **Article 164 (3)** of the Constitution, **Section 3** of the Appellate Jurisdiction Act and **Section 85A** of the Elections Act which vests in this Court the power to hear appeals from the High Court. It certainly could not have been the intention of the Rules Committee that that be the result of applying **Rule 77.** I reiterate what the Court said in **Githere V. Kimungu** [1976 – 1985] E.A. 101, that:-

> **"……..the relation of rules of practice to the administration of justice is intended to be that of a handmaiden rather than a mistress and that the court should not be too far bound and tied by the rules, which are intended as general rules of practice, as to be compelled to do that which will cause injustice in a particular case."**

Essentially the rules remain subservient to the Constitution and statutes. **Article 159 (2) (d)** of the Constitution, **Section 14 (6)** of the Supreme Court Act, **Section 3A** and **3B** of the Appellate Jurisdiction Act, **Sections 1A and 1B** of the Civil Procedure Act and **Section 80 (1) (d)** of the Elections Act place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that the courts today abhor technicalities in the dispensation of justice.

I will demonstrate this paradigm shift by citing three recent decisions of this Court. In **Abdirahman Abdi also known as Abdirahman Muhumed Abdi V. Safi Petroleum Products Ltd. & 6 others,** Civil Application No. Nai. 173 of 2010 where a notice of appeal was served on the respondent out of time and without leave of the court, upon being asked to strike it out, the Court (Omolo, Bosire and Nyamu JJ.A) observed that:-

> **"The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice……**
>
> **In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of Sections 3A and 3B of the Appellate Jurisdiction Act, Cap 9 Laws of Kenya, and later, Article 159 (2) (d) of the Constitution of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2) (d) of the Constitution makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."**

Abok James Odera t/a A.J. Odera & Associates V. John Patrick Machira t/a Machira & Co. Advocates, Civil Appeal No. 161 of 1999 was an appeal raising, *inter alia,* the question whether a record of appeal not containing Memorandum of Appeal, as required by **Rule 82 (1) (a)** of the Court of Appeal Rules, was competent. In answer to this, the Court (Githinji, Nambuye & Koome, JJ.A) in one of the most comprehensive review of case law on the application of the overriding objective principle stated the law in this area as it is today. Because of its importance and relevance to the application before us, I will reproduce it in extensor as follows:-

> **"The complaint on lack of inclusion of the memorandum of appeal as a primary document in the record of appeal is genuine. We also wish to confirm that the defects noted in the**

notice of appeal on which this appeal is premised, were not cured as advised by this court in its rulings of 20th April, 2000 and 24th May, 2002.

The question we have to ask ourselves is whether we can take refuge under the oxygen rule enshrined in section 3A and 3B of the Appellate Jurisdiction Act (Supra) which underpins the overriding objective principle introduced in the appellate jurisdiction in 2009, long after the appeal subject of this Judgment had been filed in order to breathe life into an otherwise incurably defective appeal as per the contention of the respondent.

On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. (*See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)*; The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of *Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009);* that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of *Kariuki (Supra);* that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of *Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009)*; that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of *Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004*); that the overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are "

2*" compliant (see the case of *Hunter Trading Company Limited versus ELF Oil Kenya Limited, Civil Application No. Nai 6 of 2010 (UR3 (2010);* that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of *Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR).* And, lastly, that the "*O

2*" principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of *Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR)62 of 2010.

On the basis of the above assessment of principles of case law, we find it perfectly in order to invoke these principles and apply them to the rival arguments herein to breathe life into this appeal, for purposes of ameliorating the harshness of the consequences of the appellants' non compliance with this court's directive in the ruling of 20th April, 2000 and 24th May, 2002, with regard to the appellants failure to cure the defect in the notice of appeal on the basis of which the appeal is premised and secondly excuse the appellants failure to include the memorandum of appearance (sic), a primary document in the record of appeal.

Our reasons for finding so, are that case law interpreting application of the overriding objective principles to appellate litigation, illustrated above tend to indicate clearly that these were applied in proceedings filed before sections 3A and

3B (Supra) came into force. On this footing they are applicable to this litigation not withstanding that this appeal was filed long before the said sections 3A and 3B (Supra) came into effect. A ruling in favour of sustaining the appeal will therefore be in line with the overriding objective principle because if the appeal is struck out on account of incompetence, the striking out order will not finally determine the issues in controversy as between the parties. It will simply restore the parties to the pre-appeal stage before the alleged offending notice of appeal was filed. The net effect of this restoration will be that the appellant will be at liberty to reinitiate the appellate process afresh, premised on a form D compliant notice of appeal. Such an action is likely to lead to a delay in the disposal of the real issues in controversy as between the appellant and the respondent. There will also be considerable costs to be borne by both parties both for these proceedings and the proceedings to be reinitiated. This will also result in the clogging of the justice system as the reinitiated appeal will have to be re-presented to this same Court based on the same set of facts and as soon as it is presented it will start competing for time for disposal.

It is our considered opinion that, such a move will not guarantee justice and fairness to the parties on equal arms (footing) considering that the defect in the notice of appeal is not misleading as found by this Court in the two rulings of 20th day of April, 2000 and 24th day of May, 2002. This is borne out by the fact that the respondent has not pointed out any prejudice or injustice he may have suffered as a result of the said defect in the notice of appeal, as the case the respondent is expected to meet herein, is clearly set out in the grounds of appeal contained in the memorandum of appeal contained in the record of appeal, served on the respondent."

In **Joseph Kiangoi V. Waruru Wachira & 2 others,** Civil Appeal (Application) No. 130/2008 the Court, (Onyango Otieno, Aganyanya and Nyamu JJ.A) reiterated that failure to serve a notice of appeal cannot be a ground for striking out.

"The cure would come about because in the circumstances justice is to be found in sustaining the appeal for it to be heard on merit instead of striking it out on a technicality. Indeed, in our view, there cannot be a better case for the invocation of the overriding objective principle than this case. Courts should, in our view, lean more towards sustaining appeals rather than striking them out as far as is practicable and fair. …… the substantive aspect of sustain the appeal must in the interest of justice override the procedural rule requiring the striking out of the notice of appeal and the record……"

See also **Ayub Murumba Kakai V. Town Clerk of Webuye County Council,** Civil Appeal No. 107 of 2009.

It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why the Constitution and other statutes that promote substantive justice deliberately use the phrase that justice be done without *"undue regard"* to procedural technicalities.

In the circumstances of this appeal, it is common ground that the notice of appeal and the record of appeal were lodged within the time prescribed by the rules. The record of appeal was similarly served within the time allowed. The only sticking point is the service of the notice of appeal on the respondents within 7 days as required by **Rule 77.**

It is noted also that the record of appeal that was admittedly served upon the respondents on 3rd September, 2013, only 13 days from the date of the judgment contained a copy of the notice of appeal. It can be said that if the notice of appeal was lodged on 22nd August 2013 and the respondents learnt about the appeal on 3rd September, 2013, there was delay of only four days. In my view, and in the circumstances of this appeal, I find that there was substantial compliance with the rules.

It must also be noted that an appeal, by dint of **Rule 82 (1)** reproduced at the beginning of this ruling, is instituted by lodging in the registry, various documents listed thereunder, 60 days from the date when the notice of appeal was lodged, and not by serving upon the respondent, the notice of appeal. The failure to serve the respondents within 7 days did not occasion to them any real prejudice.

The contention by the 1st, 3rd to 8th respondents that they were *"startled", "unsettled"* and *"ambushed"* cannot amount to a prejudice warranting the striking out of this appeal. There is no evidence that there was intentional or contumelious default on the part of the appellant. For their inconvenience the respondents can be compensated in costs. The period of delay before the respondents were made aware of the appeal was not inordinate; there was no risk of failure of fair trial of the appeal. The proportionality of the sanction of striking out of the entire appeal for the reason only of non-service is unconscionable and unjustified. The invitation to strike the appeal out is, in a manner of speaking, a case of killing a fly with a sledge hammer.

In the circumstances, I find no merit in the application dated 23rd September, 2013 which I accordingly dismiss. I award costs to the applicants in this application as well as the 2nd respondent in the appeal.

Dated at Nairobi this 22nd day of November 2013.

W. OUKO

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

RULING OF KIAGE J.A.

The central issue in the application before us is whether, in the face of an application to strike out an appeal for non-compliance with mandatory procedural rules, the Court can, in the absence of a plausible or any explanation by the party in default, turn a blind eye and excuse the default.

I think not.

It is not in dispute that the appellant herein filed a notice of appeal in the High Court in time and even proceeded to file the appeal itself with time to spare. It is also not in dispute that he did not serve the said notice of appeal upon any of the respondents. In fact, he made no effort to serve. Not even after the record of appeal was received under protest for precisely that reason. Not even after the application before us for striking out the appeal for non-service of the notice of appeal. And no attempt was made to regularize the situation by way of an application under our **Rule 4** to extend time for the filing of the notice of appeal.

All the respondents save the second have filed the Notice of Motion dated 23rd September 2013 in exercise of their undoubted right under **Rule 84** to seek to strike out the notice of appeal for being incompetent. It is incompetent quite beyond question because, whereas under **Rule 77** of the Court of Appeal Rules the appellant was required to serve it upon all persons directly afted by the appeal within seven days after it was lodged, he did not do so. The applicants contend that service is an "essential step" within the meaning and intendment of **Rule 84** of the Court of Appeal Rules failing to take which, and within the prescribed time, invites a striking out.

Now, the notice of appeal herein having been filed or lodged on 22.8.13, the appellant was under the light and by no means burdensome duty to serve it on the respondents by latest 29.8.13. He did not do so and had not done so as at the time this application was filed and later argued. This much has been stated on the face of the motion and deposed to in the supporting affidavit of **Robert Shunet** which he swore on his own and on behalf of his co-applicants.

In opposing the application, the appellant swore a replying affidavit on 27th September 2013. It is a bold and defiant affidavit: It accuses the applicants of attempting to frustrate the hearing of the appeal; of not taking the appeal seriously; of being misguided and not doing due diligence to go through the record of appeal where, at the back page, they would have discovered the notice of appeal; of bringing a frivolous and vexatious application that is a waste of this Court's precious time under a misdirection and misinterpretations of the relevant law; as well as of lack of assiduity and obvious indolence in the way they were handling the appeal.

Other than those vituperative and pejorative broadsides against the applicants, the appellant uses the occasion of the replying affidavit to make a number of sweeping legal arguments, including that there is no legal requirement that a notice of appeal be served as a single document separate from the record of appeal; that **Rule 77** of the Court of Appeal Rules is in-applicable to the appeal sought to be struck out since it is not a civil appeal but a special proceeding as it emanates from an election petition governed by the **Elections Act** and the Rules made thereunder; and finally that the law only required him to file an appeal within 30 days and that he would therefore not accede to the applicants' attempt to wrongfully impose upon him an obligation to file (or serve) a notice of appeal when the law governing election petitions does not impose such an obligation.

Affidavits are not the proper vehicle by which parties should make legal arguments. Affidavits should be confined to facts within the deponent's knowledge and which he can prove. One's opinion as to what the law is, or ought to be, is not the proper subject of affidavits and it is imperative that those who draw affidavits, in the context of litigation especially, bear this in mind and so reserve matters of law to written submissions. One need only look at **Order 19** of the **Civil Procedure Rules, 2010** to see the importance of keeping the distinctions a live;

> ***"Rule 3(1): Affidavits shall be confined to such facts as the deponent is able of his own knowledge, to prove:***
>
> ***Provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information or belief showing the sources and grounds whereof.***
>
> ***(2) The costs of every affidavit which unnecessarily sets forth matters of hearsay or argumentative matter … shall … be paid by the party filing the same."***

The applicants through their learned counsel, **Mr. Yego**, succinctly argued before us that no service was made of the notice of appeal and that, even were it to be assumed for a moment that service of the record of appeal also effectively included service of the notice of appeal contained therein, such service would have been out of time. Counsel argued that the **Elections Act** has neither substituted or supplanted the **Court of Appeal Rules** which apply fully to the case before us. To them, service or the failure thereof is not a mere technicality but rather a binding command going to the substance of the appeal. Issue was taken with the applicant's failure to seek or obtain dispensation from this Court upon discovery of his default. It was therefore disentitled to this Court's favourable discretion. It was urged that neither **Article**

159 of the Constitution nor the ***'oxygen principles'*** in **Section 3A** and **3B** of the ***Appellate Jurisdiction Act*** could be seen as a panacea to aid a party who flagrantly violates the Rules of Court. Counsel contended that the appellant's defaults rendered his appeal incompetent and not curable by an order of costs to the applicants. Justice looks at both sides of the Highway and must be administered in accordance with the law and no court should encourage the disobedience of its rules out of sympathy for the defaulting party, for that amounts to caprice. At the expiry of the time limited for the filing and service of the notice of appeal the appellants heaved a sigh of relief knowing this litigation was at end, it was submitted, and it does not avail the appellant to argue that the renewed anxiety is not sufficient prejudice and, at any rate, absence of prejudice, per se, could not be a legitimate excuse for non-observance of rules. Mr. Arusei, who appeared with Mr. Lillan for the 2nd respondent associated himself with those submissions.

In opposition to the application **Mr. Koceyo**, who appeared with **Ms. Kilonzo** for the appellant, essentially repeated the legal arguments contained in the replying affidavit. He posited that the electoral law required that appeals from the High Court be filed within 30 days and be determined within 6 months. He asserted that there is no requirement for an appellant in an election matter to file a notice of appeal, adding that the notice here was filed out of an exercise of caution. Counsel further submitted that the Court of Appeal Rules, where they contradicted the Elections Act, must give way to the latter.

Counsel on both sides cited a number of authorities.

It seems clear to me that a notice of appeal is a critical documents which signifies a party's or a person's intention to appeal from a decision of a court from which an appeal lies to this Court. Rule 75 is couched in mandatory terms as follows;

> ***"75(1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court."***
>
> (Emphasis ours)

That provision falls under Part 4 of the Rules titled 'Civil Appeals' and applies ***"only to appeals from superior courts acting in original and appellate jurisdiction in civil cases and the matters relating thereto."***

It is rather sophistic for the appellant to argue that the appeal before this Court, being "a special, election appeal" is not a civil appeal. The appellant himself has titled his record of appeal as **"Civil Appeal No. 228 of 2013**." All appeals to this Court, other than criminal appeals (which fall under part III of the Rules and are initiated by a notice of appeal under Rule 59) are by definition civil appeals. It therefore does not matter whether the subject matter is admiralty, contract, electoral, judicial review matrimonial or whatever else. They are all, without exception, **civil appeals** and **part 4** of the Court of Appeal Rules applies to them.

In the architecture of our **Rules**, the notice of appeal occupies a central foundation place without which there can be no appeal. It is a jurisdictional document. In lodging the notice of appeal at the High Court, the appellant was without doubt acting in obedience to **Rule 77**, not merely playing it safe as was suggested to us by counsel. At any rate; that same caution that led the appellant to lodge the notice of appeal should logically have extended to service of the same on the respondents to this appeal, the applicants herein, by dint of **Rule 77(1).** Service is of course at the very core of the adversarial enterprise and is an emanation of the natural justice dictate that no party should be condemned unheard. Nor should he be ambushed by a record of appeal the notice whereof he had not been served with. An appellant who fails, omits or refuses to effect service of a notice of appeal can no more get away with it than would one who fails to serve a record of appeal. Both stand in such grave defaults that, absent proper and satisfactory explanation, their appeals shall be struck out on application. under **Rule 84**.

As I have indicated herein, the appellant did not make even a feeble pretence to explain his default and seek this Court's indulgence whether by application for extension of time or even in answer to the

application before us. Instead, the appellant has exhibited uncommon bravado in the face of a serious challenge to the validity of his appeal. He has resorted to a rather intemperate condenscending, and unwarranted attack on the applicants for filing this application. I understand the appellant to be telling the applicants;

> **"What is your complaint? I am under no duty to file a notice of appeal any way! And if you so badly want to see the notice of appeal, why don't you peruse the record of appeal more diligently and carefully for then you will find that there is a notice of appeal at the back page of it. No law says I should file and serve a notice of appeal as a separate document, you know …."**

One gets the distinct impression from the record that the appellant, though aware of his default has resorted not only to diversionary blame, but a veritable taunt at the applicants *"Mta-do."*

I am not in the least persuaded that **Article 159** of the **Constitution** and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.

I have carefully perused the authorities cited for us by Mr. K'oceyo but I do not think, with respect to counsel, that they provide such authority that should cause us to excuse his client's default in the circumstances of this case where no excuse or explanation is offered, and where the appellant still believes himself justified in not effecting service. In both the recent election appeals that counsel cited to us (**PETER GICHUKI KINGARA Vs. IEBC & 2 OTHERS** Civil Appeal No. 23 off 2013 – Nyeri; and **FERDINARD N. WAITITU Vs. IEBC & 8 OTHERS,** Civil Appl. 137 of 2013) whereas this Court did acknowledge the special timelines imposed by the Elections Act in electoral litigation, no-where was it suggested that the **Court of Appeal Rules,** with regard to filing and service of notices of appeal, were in-applicable. The case of **JOSEPH KIANGOI Vs. WACHIRA WARURU & 2 OTHERS** [2010]eKLR is also clearly distinguishable because it dealt with the question whether the non-service of a notice of appeal on a party who was not directly affected by the appeal, and who on evidence, was known to have-long relocated out of jurisdiction; was fatal to the appeal. The Court there considered the efforts at service and the explanations given by the appellant before sparing the appeal from striking out. In the matter before us, both effort and explanation are lacking.

The Supreme Court decision of **SHABBIR ALI JOSAB Vs. ANAAR OSMAN GAMRAI** (Civil Appl. 1 of 2013) is also not helpful to the appellant. The learned judges of that court were not at all diminishing the importance of rules. The main reason why they did not accede to the preliminary objection that had been raised against the appeal was that there was a compelling factor for the preservation of the appeal so as to have that court pronounce on a question of jurisprudential moment of first impression entailing a matter of general public importance. That court itself stated that it was guided by rules and regulations which it urged all parties to follow as **"they guide the court and the parties in obtaining justice."** At any rate the considerations when dealing with a preliminary objection are different from those to be had in mind in deciding the application before us.

While not espousing a dry, lifeless and uncritical obeisance to rules at the expense of substantive justice, I am not prepared to hold that parties can simply wave the Constitution and the **oxygen principles** in the **Act** hoping thereby to obliterate their defaults and cure the incompetencies and defaults of their appeals. I readily agree with this Court sitting in Kisumu (Omolo, Githinji and Visram JJ.A) in **DISHON**

OCHIENG Vs. S.D.A. CHURCH, KODIAGA Civil Appeal (Application) No. 333 of 2010 where, faced with an application to strike out a record of appeal served late (4 days) they granted it, stating;

> ***"These facts [of late service] are not in dispute, and Mr. B.O. Odeny, learned counsel for the respondents, while admitting the delay, simply relied on Art 159 of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act to cure the omission.***
>
> ***We agree with Mr. I.E. N. Okero, learned counsel for the applicant, that these provision of the law would not help the respondent [to] circumvent the Rules of the Court."***

This Court, differently constituted, has spoken on numerous occasions post-2010 on the need for parties to respect rules and not to imagine that they can flout them with impunity. In **HUNTER TRADING COMPANY LTD Vs. ELF OIL KENYA LTD** Civil Appl. Nai 6 of 2010, the Court reiterated the need to guard against arbitrariness and uncertainty when applying the O2 principle and insisted that rules and precedents that are O2 compliant must be fully complied with to maintain consistency and certainty. It warned that **"if improperly invoked the O2 principle could easily become an unruly horse"**. It is our duty to tame it by application of sound judicial principles.

In **RAMJI DEVJI VEKARIA Vs. JOSEPH OYULA**, Eldoret Civil Appeal (Application) No. 154 of 2010, this Court (Waki, Onyango Otieno and Visram JJ.A) rejected an invitation by counsel to invoke their Section 3A and 3B discretion to save an incompetent appeal as follows;

> ***"This is an omission that goes to the root of the Rules i.e. whether a party can file an appeal out of time and without leave of the court. To invoke the provision of Sections 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the Court, even when they have been violated with impunity. Sections 3A and 3B were not meant for that."*** (My emphasis)

The learned judges quoted a passage from yet another bench of this Court in **CITY CHEMIST (NBI) & ANOR Vs. ORIENTAL COMMERCIAL BANK**, Civil Appl. Nai 30-2 of 2008, with which I, too, am in full agreement;

> ***"That however is not to say that the new thinking totally uproots well-established principles or precedents in the exercise of discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."*** (My emphasis)

I am fully convinced that, on the authorities, this Court has been quite consistent on the validity, utility and binding force of the **Rules**. It has never been the practice that sympathy with an appellant on account of the importance of the subject matter of an appeal would, of and in itself, save an incompetent appeal. I would take the view, rather, that the greater the importance of a particular appeal, the more the care and scrupulous attention an appellant should take to ensure compliance with the **Rules**. This Court must be seen to maintain that consistency.

I am also sure that where, as here, the omission is flagrant and obvious and the appellant's attitude to his defaults bold and cavalier, the duty of this Court, as with all other courts, is to let the law and the rules take their course. The circumstances of this case provide a text book example of an appeal that is for striking out with costs, and I would so order. To hold otherwise would amount to declaring, Rule 84 superfluous or invalid; when would it ever be invoked if not in a case as plain as this?

As the majority stands persuaded to save this appeal however, the orders that shall issue are as proposed

by Ouko J.A.

Dated and delivered at Nairobi this 22nd day of November, 2013.

P. O. KIAGE

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JUDGE OF APPEAL

RULING OF J. MOHAMMED, JA

I read in draft form the ruling prepared by Ouko, JA. I agree with him fully and I have nothing useful to add.

Accordingly, the application shall be dismissed with costs to the respondents as proposed by Ouko, JA.

Dated and delivered at Nairobi this 22nd day of November 2013.

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR