



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MUSINGA & M'INOTI, JJ.A)

CIVIL APPEAL NO. 159 OF 2013

BETWEEN

CHARLES KAMUREN APPELLANT

AND

GRACE JELAGAT KIPCHOIM 1ST RESPONDENT

MARTIN KITUYI WEKESA 2ND RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION3RD RESPONDENT

(Being an appeal from the Decision/Ruling of the High Court of Kenya at Eldoret (Achode, J.) dated 17th June, 2013

in

H.C. Election Petition No. 1 of 2013)

JUDGMENT OF THE COURT

1. This appeal arises from a ruling delivered by Achode, J. on the 17th day of June, 2013. In the said ruling the court determined four applications that had, by consent, been consolidated and heard together. The applications were as follows:
 - a. *Application dated 10th May, 2013 filed by the 1st respondent seeking an order to strike out the petition for late service.*
 - b. *Application dated 14th May, 2013 filed by the 2nd and 3rd respondents to strike out the petition for non-compliance with rule 10 (1) (c) and (d) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter referred to as “the Petition Rules”).*
 - c. *Application dated 21st May, 2013 filed by the petitioner seeking extension of time to effect*

service of the petition.

d. *Application dated 14th May, 2013 by the petitioner seeking leave to amend the petition.*

2. In respect of the first application, the 1st respondent argued that the petitioner failed to serve the petition within the stipulated period of 15 days in terms of the provisions of **Section 76 (1) (a)** of the **Elections Act**. The 1st respondent swore an affidavit and deponed, *inter alia*, that the petitioner purported to have served her by way of an advertisement in “**The Standard**” newspaper of 6th May, 2013. That was outside the statutory period provided for under **Section 76(1) (a)** of the **Elections Act** which reads as follows:

“A petition –

(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation.”

3. The petitioner did not contest that the petition was served out of time but contended that the 1st respondent had failed to comply with **rule 7** of the **Petition Rules** which states as follows:

“7 (1) A person elected may, at any time after the election, file at the office of the Registrar a notice, in writing, signed by the person or on the person’s behalf –

- a. *appointing an advocate to act, in case there should be a petition against the person; or*
- b. *stating the intention to act in person.*

2. *The person giving notice under sub-rule (1) shall*

give an address in Kenya at which notices addressed to the person may be served.

(3) Where no service is given by the person elected in accordance with sub-rule (1), all notices and proceedings may be served by leaving them at the office of the Registrar.”

4. The petitioner further contended that the process server made several attempts to effect personal service upon the 1st respondent and when he failed to trace her, an advertisement was placed in “**The Standard**” newspaper as aforesaid.

5. The petitioner further argued that by dint of the provisions of the **rule 14 (3)** as read with **rule 14 (1)**, the respondent could not be granted audience by the court for the reason that she had not filed a response to the petition as at the date of filing the application seeking to strike out the petition. The said rules state as follows:

“14. (1) Upon being served with an election petition under rule 13, the Respondent may oppose the petition by filing and serving a response within a period of not more than fourteen days upon service of the petition.

(2)

(3) A Respondent who has not filed a response as provided under this rule shall not be allowed to appear or act as a party against the petition in any proceedings.”

6. The record of appeal shows that the 1st respondent filed a response to the petition on 15th May, 2013.

7. In the second application by 2nd and 3rd respondents, the entire petition was challenged as being defective in that the petitioner enumerated inaccurate results of each candidate which the applicants contended were not the true results that were announced by 2nd respondent. **Rule 10 (1) (c)** states that:

“An election petition filed under rule 8, shall state-

3. the results of the election, if any, and the manner in which it has been declared.”

8. In response to that application, the petitioner stated that failure to indicate the results being contested and the date the results were declared was an omission which could not be a ground for striking out the petition. He further argued that **rule 10** cannot override **Article 159** of the **Constitution of Kenya, 2010** and that such defect could be cured by filing a supplementary affidavit.

9. We now turn to the third application by the petitioner seeking extension of time to effect service of the petition. The application was filed under **Articles 105, 159 and 163** of the **Constitution, Sections 80 (1) (b) and 96A** of the **Elections Act** and **rules 4, 13 and 14 (3)** of the **Petition Rules**. The petitioner admitted that the petition had been served out of time but contended that under **rule 20** of the **Petition Rules**, the election court had jurisdiction to extend the time for effecting service. In other words, in the context of the matter that was before court, the petitioner wanted the petition to be deemed as having been duly served in time, arguing that no prejudice had been occasioned to the 1st respondent by the late service of the same.

10. In response, the respondents contended that the election court lacked jurisdiction to extend time for service of the petition because the time for such service is stipulated under **Section 76 (1) (a)** of the **Elections Act**.

11. Regarding the fourth application by the petitioner seeking leave to amend the petition, the petitioner stated that the application was necessitated by the discovery of further evidence of electoral malpractices that had not been cited in the petition. He argued that the intended amendments were occasioned by the 2nd respondent's refusal to surrender information as ordered by the court on 6th April, 2013. Further, the petitioner contended, there was secret re-tallying of the election results which had narrowed down the margin between the votes cast for him and those for the 1st respondent to three from three polling stations.

12. In response to that application, the 2nd and 3rd respondents contended that the petitioner was seeking to introduce a new prayer and in any event, the application was time barred. They cited **Section 76 (4)** of the **Elections Act** which states as follows:

“(4) A petition filed in time may, for the purpose of questioning a return or an election upon an allegation of an election offence, be amended with the leave of the election court within which the petition questioning the return of that election upon that ground may be presented.”

13. In its ruling, in respect of the application challenging the petition for non-compliance with **rule 10 (1) (c) and (d)**, the election court held that it was not correct that the petitioner had not particularized the results he was contesting. The petitioner had stated the results, whether or not they were the correct ones was a different matter altogether. In any event, the trial judge added, the question as to whether the results cited by the petitioner were the exact ones that had been declared was a matter of fact that could only be ascertained by way of evidence. Further, the court observed, although the petitioner did not indicate the date when the results were declared by the 2nd respondent but had only stated the date they were gazetted that did not render the petition fatally defective and therefore dismissed that application.

14. Regarding the petitioner's application to amend the petition, the court held that it had no jurisdiction to do so since the application had been brought outside the twenty eight days' period that is allowed for presenting an election petition. Consequently, the court dismissed the application.

15. As to whether the court had power to extend time within which an election petition can be served, the court held that:

“a)rule 7 of the Election Rules does not absolve a person who has filed an election petition from effecting service upon a respondent.”

The court considered the provision of **section 76 (1) (a)** of the **Elections Act** and held that the applicable period of service of an election petition is fifteen days from the date of its presentation because the Petition Rules cannot override the express provisions of the statute. Consequently, the judge held that as the period for service is limited by the Act, the court did not have jurisdiction to extend time. She added that **rule 20** of the **Election Rules** could only be applicable in respect of any matter that is required to be done in the Rules or by the court.

16. Having come to the conclusion that the petition was served out of time and the court lacked jurisdiction to extend the period of service, the election court struck out the entire petition with costs to the respondent.

17. Being aggrieved by that decision, the appellant preferred an appeal to this Court and raised fifteen grounds as follows:

“1. The Honourable learned trial judge erred in law and in fact by refusing to decide the case before her citing lack of jurisdiction when the same was conferred by the Constitution of Kenya, 2010.

2. The Honourable learned trial judge erred in law and in fact by reaching a wrong finding of law that it had no power under the Act to extend time of service and or validate already effected service by advertisement in the Newspaper whereas the same was conferred by the Act and the Rules.

3. The Honourable learned trial judge erred in law and in fact by failing to interpret the law progressively and thereby reached a wrong decision that has gone against the spirit of the Constitution of Kenya, 2010 and other progressive laws enacted thereafter.

4. The Honourable learned trial judge erred in law and in fact by ignoring the Petitioner’s submissions on Rule 14 of The Election (Parliamentary and County) Petition Rules 2013 and thereby wrongly gave audience to the 1st Respondent who had not properly appeared.

5. The Honourable learned trial judge erred in law and in fact by paying undue (sic) to technicalities regard to which approach severely limited her mind in appreciating the unique facts of the case and thereby reached an oppressive decision that defeated the ends of justice intended to be safeguarded by the Constitution.

6. The Honourable learned trial judge erred in law by failing to make a finding on whether or not the Respondents would be prejudiced had she allowed the Petition to proceed.

7. The Honourable learned trial judge erred in law and in fact by treating the Election Act 2011 as regulating a different and parallel election apart from the Rules 2013 and thereby misdirected herself on the law and reached a wrong conclusion that the Act and Rules apply to the facts independent of each other.

8. The Honourable learned trial judge erred in law and in fact by failing to appreciate and apply Section 76 of The Elections Act 2011 to the facts and come

(sic) conclusion on the evidence that the thrust of the Petition was against the 2nd and 3rd Respondents who had filed a Response admitting the prayers the Petition an irregularities whereby she was blinded and failed to reach a just decision in the circumstances.(sic)

9. *The Honourable learned trial judge erred in law and in fact by failing to appreciate the dictates of the law as enshrined in the Constitution of Kenya, 2010 Section 80 of misled her the Election Act, 2011, and the Elections (Parliamentary and County) Petition Rules 2013, Rules 4, 5 and 20 thereof and thereby treated them in isolation of each other an approach that totally misled her.(sic)*

10. *The Honourable learned trial judge erred in law and in fact by failing to appreciate the fact that convenience and fairness leaned in favour of dismissing both the Respondents' applications on grounds that there was delay as all the Respondent (sic) had filed their Response.*

11. *The Honourable learned trial judge erred in law and in fact by reaching a decision that would allow clearly admitted irregularities of the 2nd and 3rd Respondents to go unpunished which mischief reliance (sic) intended to be cured by Article 159 (2) (d) of The Constitution of Kenya, 2010 and Section 80 of the Elections Act 2011.*

12. *The Honourable learned trial judge erred in law and in fact by failing to give effect to section 84 of The Elections Act 2011 which dictate (sic) that costs follow the event when she awarded costs to the 2nd and 3rd respondents yet they had not succeeded.*

13. *The Honourable learned trial Judge misdirected herself on the law which led her to misunderstand the case before her whereby she misapprehended the facts and in the process reached a wrong decision in the circumstances of this case.*

14. *The Honourable learned trial judge erred in Law by failing to give reasons why proper service upon the 2nd and 3rd Respondents took secondary place as the reason for dismissal of the Appeal was solely late service upon the 1st Respondent.*

15. *The Honourable learned trial judge erred in law by failing to appreciate cases relied upon by the Petitioner and heavily relied on those relied upon by the Respondents whose "Ratio decidendi" was out of context on the special facts of the Petition."*

18. The 2nd and 3rd respondents also filed a cross appeal contending that the learned trial judge erred in law and in fact by failing to hold that the petitioner's petition was fatally incompetent for failing to state the results as envisioned in **rule 10 (1) (c) and (d) of the Petition Rules**. However, the 2nd and 3rd respondents stated that the cross appeal would only require to be determined in the event the appeal is allowed. But if the appeal is not allowed then there would be no need to determine the cross appeal.

19. Before the hearing of this appeal commenced, this Court gave directions that parties do file their respective written submissions and thereafter be allocated a limited period of time to highlight the same. Those directions were fully complied with.

20. **Mr. Wasuna**, learned counsel who held brief for **Mr. Kadima** for the appellant, submitted that the appeal basically turns on the question whether the learned trial judge ought to have extended time for the

appellant to serve the petition as prayed. He took issue with the learned judge's finding that the election court did not have jurisdiction to do so. He submitted that the jurisdiction and power of the election court is traceable to the Constitution as well as the Elections Act. He added that **Article 165** of the **Constitution** gives the High Court unlimited jurisdiction in civil and criminal matters that come before it while **Article 105** of the **Constitution** provides the High Court with additional power as an election court. In his view, therefore, the court has inherent and express powers, including power to extend time to comply with various provisions specified in the Elections Acts unless expressly and directly prohibited from so doing by the Constitution or statute.

21. Mr. Wasuna further submitted that **rule 20** of the **Petition Rules** gives the election court unfettered discretion to extend time and criticized the trial court for failing to hold that the election court had power to extend time under the said rule. He added that timelines are not intended to cause a court to decide matters in haste at the expense of substantial justice to all the parties.

22. Regarding ground 4, the petitioner submitted that the 1st respondent should not have been granted audience to argue the application seeking to strike out the petition because no response to the petition had been filed by 10th May, 2013 when the said application was lodged. He pointed out that the trial court failed to make a finding on that issue, yet the issue had been raised before it.

23. **Mr. Gicheru** for the 1st respondent started his submissions by arguing a preliminary issue to the effect that under **rule 35** of the **Petition Rules**, this Court has no jurisdiction to hear the appellant's entire appeal as it arose out of an interlocutory application. The said rule provides as follows:

“35. An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules.”

In his view, the application for striking out the petition did not give rise to any judgment, only a ruling, and it follows therefore that the same was not appealable. He added that a judgment or a decree ordinarily connotes a decision arrived at after a court has heard evidence and submissions, which was not the case in this appeal. Counsel cited this Court's decision in **FERNINARD NDUNGU WAITITU vs. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 8 OTHERS; Civil Application No. 137 of 2013.**

24. Regarding the petitioner's failure to serve the petition within the specified period of time, Mr. Gicheru submitted that the High Court has no power to extend the time for service of an election petition and cited the provisions of **Section 76 (1)** of the **Elections Act**. He further submitted that **rule 20** of the **Petition Rules** could not afford the petitioner any relief. The rule states as follows:

“Where any matter is to be done within such time as provided for in these Rules or granted by the court, the court may, for purposes of ensuring that no injustice is done to any party, extend the time within which the thing shall be done with such conditions as it may consider fit even though the period initially provided or granted may have expired.”

Counsel submitted that **rule 20** is only applicable for purposes of extending time where the period of time in question is provided for in the Petition Rules or where such time is granted to a party by an order of court.

25. Mr. Gicheru raised a peculiar argument regarding the provisions of **Section 105 (2)** of the **Constitution** which stipulates that a question as to whether a person has been validly elected as a member of parliament shall be heard and determined within six months of the date of lodging the petition. He pointed out that the petition by the appellant was filed on 8th April, 2013 and the period of six months lapsed on 8th October, 2013. Consequently, even if the appeal were to be allowed, the stipulated period of hearing and determining the election petition has already lapsed and the court cannot extend that period.

26. **Mr. Limo** and **Mr. Yego** for the 2nd and 3rd respondents supported the submissions by Mr. Gicheru. They fortified their respective clients' earlier submissions that the entire petition was a non-starter because it violated the provisions of **rule 10 (1) and (3)** of the **Petition Rules**.

27. We have carefully perused the entire record of appeal and considered all the submissions on record. We think the issue of this Court's jurisdiction to hear and determine this appeal must be disposed of first. In the case of **OWNERS OF THE MOTOR VESSEL "LILIAN "S". vs. CALTEX OIL (KENYA) LIMITED [1989] KLR 1**, this Court held that where the issue of jurisdiction is raised, the same must be determined first since jurisdiction is everything and without it the court cannot take any further step.

28. There is no dispute that the ruling that gave rise to this appeal finally disposed of the entire petition since the petition was struck out. Although Mr. Gicheru cited the provisions of **rule 35** of the **Petition Rules**, to the extent that the ruling was final in nature, we believe that counsel misinterpreted the said rule. The rule stipulates that an appeal from the **judgment** and **decree** of the High Court to this Court shall be governed by the Court of Appeal Rules. "**Decree**" means "**the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question**"

See **Section 2** of the **Civil Procedure Act**.

29. The correct position as espoused by this Court in **FERNINARD NDUNG'U WAITITU vs. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 8 OTHERS (Supra)** is that before the final determination of an election petition, a party cannot prefer an appeal to this Court against an interlocutory order, ruling or direction by the High Court. A party aggrieved by such an interlocutory ruling must await the final judgment or determination of the petition then file an appeal against any finding of the court that he is aggrieved by, whether interlocutory or otherwise. **BLACK'S LAW DICTIONARY** defines an interlocutory order as an "**interim or temporary**" order, "**not constituting a final resolution of the whole controversy**".

30. The ruling delivered on 17th June, 2013 finally resolved the electoral dispute in question as far as the proceedings before that court were concerned. We find and hold that it was not an interlocutory ruling and, consequently, the appeal is rightly before this Court. The Court has jurisdiction to hear and determine the appeal.

31. We now turn to the gravamen of this appeal and that is, whether the learned judge erred in law in holding that the High Court had no power to extend the time for serving an election petition and proceeding to strike out the petition for late service. What is the lawful period of serving an election petition that is seeking determination as to whether a person was validly elected as a member of parliament? The answer to that question is found in **Section 76 (1) (a)** which we have already cited. The section stipulates that the period is "**within fifteen days of presentation**" of the petition. There is certainly some contradiction brought about by **rule 13 (1)** of the **Petition Rules** which states that the petition should be served "**within fourteen days of filing of the petition**".

32. Canons of interpretation of statute dictate that where there is a conflict between the provisions of an Act of Parliament and subsidiary legislation, the provisions of the Act must prevail. In addition, under **Section 31 (b)** of the **Interpretation and General Provisions Act, Cap 2**, no subsidiary legislation shall be inconsistent with the provisions of an Act. That in essence means that the provisions of **Section 76 (1) (a)** of the **Elections Act** as relate to the time for service of an election petition override the provisions of **rule 13 (1)** of the **Petition Rules**. We believe that there was an oversight on the part of the Rules Committee in providing a period of fourteen days in the Rules.

33. The time frames stipulated under **Section 76 (1) (a) of the Election Act** are peremptory and an election court has no power to vary them. A petition must be filed within twenty eight days after the date

of publication of the results and should also be served within fifteen days of presentation of the petition. We agree with the learned trial judge that **rule 20** only provides for extension of time for matters whose time is prescribed by the Rules or by the court but not those prescribed by the Act.

34. In **KIBAKI v MOI [2005] E.A. 115**, this Court held that an election petition must be served within the time prescribed for such service by statute and that where the petitioner had not served the petition within such time, the petition was incurably defective and was for striking out. This Court rejects the invitation by the petitioner's counsel to hold that by dint of the provisions of **Article 159 (2) (d)** of the **Constitution** which requires that justice be administered without undue regard to procedural technicalities, failure to serve the petition within the statutory period ought to have been treated as a procedural lapse and extend time of service as sought. In **RAILA ODINGA v THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS, Supreme Court Petition No. 5 of 2013**, the Court held that:

“The provisions of Article 159 (2) (d) were never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.”

35. We must emphasize that the time frame for hearing and determining a petition such as the one that was before the trial court is fixed by **Article 105 (2)** of the **Constitution**. Further, **Article 87 (1)** of the **Constitution** mandated Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes, hence, the **Elections Act No. 24 of 2011**. Consequently, parties to such disputes must ensure that they comply with the statutory time frames set by the Elections Act and the Rules made thereunder.

36. **Article 87 (3)** of the **Constitution** stipulates that service of a petition may be direct or by an advertisement in a newspaper with national circulation. That mode of service is further stipulated under **Section 77 (2)** of the **Elections Act** and **rule 13 (2)** of the **Petition Rules**. The petitioner did not have to waste time looking for 1st respondent to effect personal service upon her. As pointed out by Mr. Gicheru, it is evident that the advertisement that was belatedly placed in “**The Standard**” newspaper was prepared by the petitioner's counsel and dated 20th April, 2013 but it was not published until 6th May, 2013. The petitioner can only blame himself for the said delay.

37. The petitioner contended that the 1st respondent should not have been granted audience to argue the application for striking out the petition because she had not filed a response to the petition as required under **rule 14 (1) and (3) of the Petition Rules**. The response is required to be filed within a period of “**not more than fourteen days upon service of the petition.**” Since the petition was served on 6th May, 2013, the 1st respondent had upto 20th May, 2013 to file the response but the same was filed on 15th May, 2013, five days earlier. However, the application to strike out the petition had been filed on 10th May, 2013. The application, which was consolidated with 4 others, was heard on 3rd June, 2013. The 1st respondent fully complied with the provisions of **Rules 14 (1) and (3)** and the petitioner's contention that counsel should not have been given audience is without any basis.

38. Turning to **Article 105** of the **Constitution** which requires the High Court to hear and determine an election petition as to whether a person has been validly elected as a member of parliament or whether a seat of such a member has become vacant, within a period of six months of the date of lodging the petition, we are of the considered view that where such a petition had been struck out and an appeal against such an order this Court finds that the petition ought not to have been struck out, the Court has power to direct the High Court to hear and determine the petition, even if the six months' period stipulated under **Article 105** has lapsed. In such an instance, it cannot be argued that the constitutional period for hearing and determining the petition has already lapsed. The period of six months shall begin to run from the date of delivery of the judgment by the appellate Court. It would occasion great injustice if a successful appellant, (that is, one whose election petition is found to have been wrongfully struck out), were to be denied the right to be heard simply because the appeal is determined after six months from the date the petition was lodged.

39. In interpreting **Article 105** of the **Constitution** and indeed any other provision of the Constitution, the court must do so in a manner that promotes its purposes, values and principles and advances the rule of law. See **Article 259 (1)** of the **Constitution**.

40. However, in this appeal, we find and hold that the learned trial judge cannot be faulted for allowing the 1st respondent's application to strike out the petition for late service. For reasons stated above, the petition was struck out in accordance with the law. The appeal is lacking in merit and is dismissed in its entirety. The appellant shall bear the costs of the appeal. Having come to that conclusion it will be superfluous for us to consider the cross appeal.

Dated and delivered at Nairobi this 20TH day of DECEMBER, 2013.

R.N. NAMBUYE

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR