IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 307 OF 2009

JOHN KOYI WALUKE……..……..……APPELLANT

VERSUS

MOSES MASIKA WETANGULA

ELECTORAL COMMISSION OF KENYA

JAMES KULUBI OMWANGWE KENYA……..……RESPONDENTS

(Appeal from the ruling and order of the High Court of Kenya at Nairobi (Muchemi, J) dated 18th November, 2009
in

H.C.ELEC. PETITION NO. 1 OF 2008)

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RULING OF THE COURT

In a ruling dated and delivered on 18th November, 2009, *Muchemi, J.* allowed application filed by the first respondent in this application before us, ***MOSES MASIKA WETANGULA*** dated 19th October, 2009, reviewed a ruling delivered by Karanja, J earlier on, set it aside and struck out the applicant's petition with costs to be paid to the respondents. The respondent in that application ***JOHN KOYI WALUKE*** felt aggrieved by that decision and sought to appeal against it. He filed notice of appeal on 24th November, 2009 but served it some few (about three) days out of time specified by the Rules of this Court. Nevertheless on 17th December, 2009, based on that notice of appeal, the respondent filed Civil Appeal NO. 13 of 2009 at Eldoret which was registered in Nairobi as Civil Appeal NO. 307 of 2009. He also filed on the same date - 17th December, 2009, a notice of motion dated 16th December,2009 in which he sought three orders namely:-

"1. That this Honourable Court be pleased to extend time within which the Applicant/Appellant herein may serve the notice of appeal filed on 24th November,2009 from the ruling and order of the High Court at Bungoma by Lady Justice Florence Muchemi delivered on 18th November, 2009 in Election Petition No. 1 of 2008 and the record of appeal subsequently filed be deemed to have been

properly filed.

2. That this Honourable Court be pleased to deem the notice of appeal filed by the appellant/Applicant on 24th November, 2009 and served upon the respondents and/or affected parties on the 4th December, 2009 as properly served outside (sic) of time."

On being served with the record of appeal and the application for extension of time, aforementioned, the applicant in this notice of motion before us, moved to court on 19th January, 2010, by way of notice of motion dated 18th January, 2010 and filed on 19th January, 2010 in which he is, through his advocates, seeking two orders namely:-

"1. That the notice of appeal lodged by the 1st respondent on 24th day of November, 2009 be struck out.

2. That the Civil Appeal NO. 13 of 2009 (Eldoret) be struck out with costs."

The application was premised on five grounds namely that:-

"1. The notice of appeal lodged by the 1st respondent on 24th November, 2009 was served on the applicant's advocates on 4th December, 2009 some 3 days out of time.

2. The "order" upon which this appeal is based was not sent to the applicant's advocates for approval.

3. The said "order" does not set out matters necessary for inclusion in such a document being a primary document which cannot be amended now.

4. The regime for lodging a notice of appeal or an appeal in Election Petition matters does not allow for extension of time.

5. The second respondent in the appeal does not exist anymore and despite the said respondent having been substituted in the superior court by the Interim Independent Electoral Commission (I.I.E.C.) the first respondent has not named IIEC in the appeal or the notice of appeal.

The application by the respondent in this application for extension of time came up before a single Judge of this Court, *Visram JA*, on 18th February, 2010 and in a ruling dated and delivered on 2nd March, 2010, the learned single Judge allowed it and ordered that the notice of appeal filed on 24th November, 2009 and served upon the respondent on 4th December, 2009 be deemed to have been served within time. He also ordered the record of appeal which was already filed to be served within 14 days of the date thereof. That however, was not the end of the matter. The first respondent in that application, ***Moses Masika Wetangula*** was not amused. He felt aggrieved and sought a reference to full court. That reference was heard by a full court and a ruling delivered on 2nd July, 2010. The full court, in that lengthy ruling allowed the reference and set aside single Judge's decision. We think that in our decision of the application before us, we need to reproduce pertinent parts of that ruling, particularly the reasons why the full court allowed the reference. It stated inter alia as follows:-

"The issue of untruthful affidavit had been raised before the learned single judge but it appears that he never considered that point. We do not think the learned judge would have granted the application if he had considered the fact that the affidavit in support of the application which was intended to explain the reason for the delay was untruthful. An application seeking exercise of the court's discretion must be supported by an honest explanation. It is a serious matter to mislead the court by untruthful affidavits.

In <u>MZAMIL V. ANSARI</u> (supra) this Court said:-

"In view of these inconsistencies and contradictions with which Mr. Asige's affidavit bristles, we do not think the application for extension of time can succeed. Sufficient reason cannot be established on the basis of an obviously incorrect affidavit."

The application for extension of time was supported by what was obviously incorrect and untruthful affidavit. Whether we should call it an error of principle or a misapprehension of a point of law or a plainly wrong approach, we agree with Mr. Shah that we ought to interfere with the exercise of the discretion of the learned single judge.

Furthermore, it is to be observed that the learned single judge erred in computation of the period of delay as two days. But after excluding date of filing of the notice of appeal which was 24th November, 2009 as per rule 3(a) of the Court of Appeal Rules the notice of appeal was served on 4th December, 2009 which was actually the tenth day, which is three days beyond the stipulated 7 days.

In the result, we allow the Reference, set aside the orders of the single Judge made on 2nd March, 2010 and substitute therefor an order dismissing the notice of motion dated 16th December, 2009."

Thus according to that decision, the appeal filed was buttressed by a notice of appeal which had been served out of time and was thus not a valid notice. The notice of motion dated 18th January, 2010 to which we have alluded herein before seeks as we have cited it above, that the notice of appeal lodged on 24th November, 2009 be struck out and that the Civil Appeal No. 13 of 2009 (Eldoret) which as we have stated was registered at Nairobi Civil registry as Civil Appeal No. 307 of 2009 be struck out with costs to the respondents, on grounds among others, that the notice of appeal is invalidly in the record as it was not served upon the relevant parties within the time that was allowed by the rules and as to the Civil Appeal, it is consequently premised upon a non-existent notice of appeal. Other reasons were cited in the application but before us *Mr. Shah*, the learned counsel for the applicant in the application and who is the respondent in the appeal, urged us to strike out the notice of appeal on the main grounds that as it had been declared to have been served out of time by a full bench of this Court it ceased to exist and as the appeal was anchored on that notice of appeal, the appeal also cannot stand. He further submitted that the second respondent, the defunct Electoral Commission of Kenya (ECK) also does not exist as it was substituted by an order of the High Court, yet the record still cites ECK as the second respondent. *Mr. Wangila*, the learned counsel for the respondent in the notice of motion, who is the appellant, on the other hand urged us to dismiss the application contending that the notice of appeal in the record is valid as all the full court did was to rule on allowing the reference; that the notice of appeal was served out of time but the court did not state it was not a valid notice of appeal particularly as it was filed in time and there was no consequential orders upon the order declaring the service to have been made out of time and no consequential orders were sought either. Further, he submitted, that the fear that the decision of this Court in the application could undermine the full court's decision on reference is misplaced because the circumstances prevailing when reference was allowed are different from the circumstances obtaining now. He urged us to let the appeal go to full hearing.

Mr. Masika, the learned counsel with *Mr. Wangila* submitted that striking out the notice of appeal will occasion miscarriage of justice as this Court is not bound by the decision of the other bench that sat on a reference. Further, he submitted that, this Court must apply the overriding objective principles of dealing with the matter before it and must apply the principles enunciated in ***Article 159*** of the Constitution and deal with this matter without any regard to technicalities but only ensuring that justice is done. He felt that if justice demanded it, we could decide on the validity of the notice of appeal notwithstanding what the court had said in the reference.

We have anxiously considered the application, the affidavits in support of it and the submissions by the learned counsel. The second and third respondents were absent despite service upon them with the relevant hearing notices. We have considered the record, the various authorities to which were referred by the respective counsel. Lastly, we have considered the law, even as we considered those authorities. In our view, that the notice of appeal upon which this appeal is based was filed timeously but was not served within the time required by the rules of the court is no longer a matter of dispute. This Court, differently

constituted had decided on that when it heard a reference. For reasons that the affidavit that sought extension of time to effect service was untruthful and that the notice was served three days out of time and without the permission of the court and not two days as single Judge had found, the extension of time to serve the notice of appeal out of time was refused by a full bench. That issue is no longer available to the parties. It is shut. *Mr. Masika* asked us to use the overriding objective principles as set out in ***Section 3A*** and ***3B*** of the Appellate Jurisdiction Act and shut our eyes to that delay and to ensure that what he call justice is done by allowing the appeal to be heard. That argument is, in our view misplaced. No court, in our mind, can use the overriding objectives to overturn a decision of itself in circumstances obtaining here where to do so would be no more than our sitting on appeal upon our own court. Further, it must be put in mind that one of the reasons why the court sitting on a reference set aside a single Judge's ruling was because the affidavit filed by the applicant in that notice of motion, now the respondent in the application, was untruthful and the single Judge did not consider that aspect. Were we to apply the overriding objective principles, would we endorse lies to support that application for extension of time? Would that be proper? Clearly overriding objectives were not meant to assist dishonest parties. On the contrary they were meant to assist honest parties. We do not see how overriding objectives application would be relevant in this matter at any stage and we cannot apply the principles.

The result is that notice of appeal on record was not served in time as required by law and remains so. An attempt to save the situation failed when this Court allowed reference. That notice of appeal which is not valid for lack of service as required by the rules, is the basis of the Civil Appeal No. 307 of 2009. Can that appeal stand? *Mr. Wangila* submitted that as no consequential orders were sought after the court had declared that the notice was served out of time, that notice still stands valid. In our considered view that would be tantamount to ignoring the realities. The notice of appeal is what denotes jurisdiction to the court to hear the application connected to the appeal and the appeal itself. If it is not properly served, and is thus invalidly in the record, how can the appellant rely on it so as to call up the other party to validly take part in the appeal unless subsequently that omission has been rectified? The answer is, in our view, such a notice of appeal is not valid and as it is not valid, it cannot be the basis of a valid appeal. Our answer in respect of the validity of the application of the overriding objective equally applies to the issue of **Article 159** of the constitution. The issue as to whether the extension of time to serve notice of appeal should be considered at this juncture is no longer before us as it had been decided by the court that heard the reference. Arguments on whether technicalities should have been considered or not were for that court and not for us, as what concerns us, is the issue as to whether that court made a decision on it wrongly or properly is not a matter of technicalities. It is a matter of trite law that we cannot sit on appeal on our own court.

We think we have said enough to indicate that the application must succeed. It is allowed. The notice of appeal filed on 24th November, 2009 is hereby struck out. Further, the Civil Appeal NO. 13 of 2009 (Eldoret) which is now Civil Appeal No. 307 of 2009 is also struck out. Cost to the applicant in this application who is the first respondent in the Appeal.

DATED and DELIVERED at NAIROBI this 16th day of MARCH, 2012.

J.W. ONYANGO OTIENO

……
JUDGE OF APPEAL

M.K. KOOME

……
JUDGE OF APPEAL

K.H. RAWAL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR