



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 221 OF 2008

WILLIAM MAINA KAMANDA APPLICANT/RESPONDENT

AND

MARGARET WANJIRU KARIUKI

MANASSEH MUGASIA

ELECTORAL COMMISSION OF KENYA RESPONDENTS/APPELLANTS

(Application to strike out the record of appeal filed in the Court of Appeal on

23rd October, 2008 appealing from the ruling and order of the High

Court of Kenya at Nairobi (Kihara J.) dated 22nd September, 2008

in

ELECTION PETITION NO. 5 OF 2008)

RULING OF THE COURT

This ruling is in respect of two applications which were heard together.

The first application which was filed by **William Maina Kamande** (first applicant) on 29th October, 2008 seeks an order that the *Civil Appeal No. 221 of 2008* be struck out on the ground that it was not filed within 30 days from the date of the decision appealed from in contravention of **Section 23 (4)** of the *National Assembly and Presidential Elections Act*. The second application which is made under the inherent jurisdiction of the Court was filed by **Margaret Wanjiru Kariuki** (second applicant) two days later on 31st October, 2008 for three orders, namely:

- 1. To confirm that Nairobi Civil Appeal Number 221 of 2008 was filed within time limited and in the alternative;**

2. Court be pleased to extend time for filing the appeal herein by a period of 1 day.
3. That the appeal filed as Civil Appeal No. 221 of 2008 be deemed properly and accordingly filed.

It is expedient to give a synopsis of the proceedings which gave rise to the two applications at the outset.

The two applicants were among several candidates who vied for Starehe Parliamentary seat in the 2007, *Presidential and Parliamentary General Election* held on 27th December, 2007. On 30th December, 2007 the 2nd applicant was declared the winner with 29,496 votes. The first applicant was second with 28,601 votes. Thereafter, the first applicant filed an *Election Petition No. 5 of 2008* before the Election Court on the ground of electoral malpractices seeking, among other reliefs, an order for scrutiny and recount of all the votes recorded as having been cast; a declaration that the election of the second applicant was null and void and for a declaration that the first applicant was duly elected as a member of parliament for Starehe constituency.

The hearing of the petition commenced on 27th May, 2008. However, before the fifth witness completed his evidence, the first applicant filed a notice of motion seeking an order for scrutiny and a re-count of all the votes before the closure of the first applicant's case. The application which was contested was however allowed by the Election Court after full hearing on 22nd September, 2008. The second applicant being aggrieved by the order for a scrutiny and re-count of the votes filed a notice of appeal and subsequently *Civil Application No. Nai. 266 of 2008* seeking a stay of execution of the decision of Election Court until the hearing and determination of an intended appeal.

The application for stay of execution was allowed by this Court differently constituted on 21st November, 2008. We are, however, informed that the hearing of the petition in respect of the other reliefs is currently going on. The second applicant ultimately filed *Civil Appeal No. 221 of 2008* against the order for scrutiny and re-count of the votes which appeal was endorsed by the registry as having been lodged on 23rd October, 2008.

The appeal already lodged is an interlocutory appeal and **Section 23 (4)** of the *National Assembly and Presidential Elections Act*, provides:

“Subject to subsection (5) appeal shall lie to the Court of Appeal from any decision of any election court, whether the decision be interlocutory or final, within thirty days of the decision”.

Subsection (5) referred to is not relevant as it merely provides that an appeal concerning the nomination or election of the President should be heard by five judges.

The application to strike out the appeal is brought on the basis that the appeal was lodged out of time by one day on 23rd October, 2008. If the day on which the ruling of the superior court was delivered (i.e. 22nd September, 2008) is excluded from computing time for purposes of **Section 23 (4)** of the Act, as **Section 57 (a)** of the *Interpretation and General Clauses Act* provides, then the 30 days for lodging an appeal expired on 22nd October, 2008. This is conceded by the second applicant's counsel save that he asserts that the appeal was indeed lodged on 22nd October, 2008 and not on 23rd October, 2008 as endorsed on the record of appeal.

There is no provision in law giving jurisdiction to either the Election Court or this Court to extend the 30 days statutory limitation period (see ***Maitha vs. Said and Another*** [1972] EA 181). It is for that reason that the second applicant at the hearing abandoned the second prayer which seeks the extension of time.

Mr. Chacha Odera has sworn a replying affidavit to the first application. He deposes in paragraph 7 to 15, thus:

“7. THAT I prepared the record of appeal and the same was ready for filing late afternoon of 22nd October, 2008.

8. THAT at around 3.15 p.m. on 22nd October 2008 I released to my clerk Mr. Anthony Keli one set of two volumes of the entire record of appeal containing 931 pages for photocopying, binding and filing in court.

9. THAT concurrently, I released to him two cheques drawn in favour of the Deputy Registrar of the Court in respect of filing fees and service fees and security for costs which volumes were received by the said registry.

10. THAT I am advised by my said clerk which information I believe to be true that at 4.50 p.m. on 22.10.08 he was at the Court of Appeal registry and presented for filing 5 sets of volume 1 of the record of appeal and 7 sets of volume 2 of the record of appeal.

11. THAT I am further advised by the said clerk which advise I believe to be true that the court retained all the copies presented to them for filing and requested him to get two more sets of volume 1 of the record of appeal.

12. THAT I am advised by Mr. Keli that he went back to the place the remaining two volumes were being bound, collected them and returned to the registry at about 5.45 p.m. just as the registry was closing whereupon he was told to come back the next day with the said remaining 2 sets of volume 1 of the record of appeal. The Court registry had meanwhile retained in their possession the five sets of volume 1 and seven sets of volume 2 of the record of appeal and assigned the appeal as Civil Appeal No. 221 of 2008.

13. THAT I am further advised by Mr. Keli that on 23rd October 2008 in compliance with the instructions, he presented the remaining 2 sets of volume 1 of the record of appeal whereupon the registry date stamped all the copies of the record of appeal, 23rd October 2008 in spite of the fact that at least five complete sets of the record of appeal had been presented for filing and retained by the Registry on 22nd October 2008.

14. THAT upon realizing the date stamp of 23rd October 2008, I wrote to the court on 24th October, seeking clarification (annexed hereto and marked as “D” is a copy of the said letter).

15. THAT I am of the considered view that the record of appeal was presented for filing on 22nd October 2008 and that is the date that the court ought to have date stamped the record”.

The letter dated 24th October, 2008 referred to in paragraph 14 above is annexed to the affidavit.

It is convenient at this stage to refer to relevant Rules of this Court. **Rule 9 (3)** requires that every civil appeal should be given a serial number which should be allotted as soon as the memorandum of appeal is received. **Rule 10** enjoins the registrar to endorse any document filed at the registry forthwith showing the date and time when it was so lodged. **Rule 12 (1)** prohibits the registrar of this Court from rejecting a document filed at the registry out of time and provides that such document should be marked as “*Lodged out of time*” and the person filing it be informed of such endorsement. **Rule 13** provides the manner of preparing such documents and **Rule 13 (3)** in particular provides in part:

“..... in every civil appeal the memorandum of appeal together with the record of appeal, shall be bound in book form with a cover of stout paper and may be in more volumes than one, and the title of the appeal shall appear on the cover”.

Rule 14 (1) gives the registrar discretion to reject any document which does not comply with **Rule 13**. **Rule 14 (2)** which is in mandatory terms gives power to registrar to refuse to accept any document tendered without required fees unless the fees has been previously waived or the party relieved from

paying fees by an order of the Court. **Rule 14 (4)** provides:

“Any person who is dissatisfied with a decision of the registrar or of the registrar of the superior court rejecting any document under the powers conferred by this rule may require the matter to be referred to a Judge for his decision. An application under this sub-rule may be made informally at the time when the decision is given or in writing within seven days thereafter”.

By **Rule 81 (1)** a civil appeal “*shall be instituted*” by lodging a memorandum of appeal in quadruplicate; the record of appeal in quadruplicate; the payment of prescribed fees and security for costs of the appeal. Lastly, **Rule 103 (1)** provides:

“The fees payable on lodging any document shall be payable at the time when the document is lodged”.

It is explicit from **Rule 81 (1)** that to institute a civil appeal the appellant is only required to lodge at the Court of Appeal registry or sub registry a memorandum of appeal in quadruplicate; a record of appeal in quadruplicate; and to pay the prescribed fees and security for costs. The rules enjoin the registrar to endorse both the memorandum of appeal and the record of appeal immediately they are lodged and the required fees and security for costs paid showing the date and time when they were lodged.

In this case, the Deputy Registrar has endorsed on the record of appeal which is in two volumes that it was lodged on 23rd October, 2008. The Deputy Registrar has further endorsed on the memorandum of appeal that it was lodged in the registry on the 23rd October, 2008. Furthermore, the copies of the receipts in the registry copy of the record of appeal indicate that both the filing fees and the deposit for security for costs were made on 23rd October, 2008.

Mr. Kilukumi, learned counsel for the first applicant contended, among other things, that the registrar is an administrative officer of the Court; that the date indicated by the registrar as the date of lodging the appeal should be taken as correct; that this Court has not before ignored the date stamp endorsed by the registrar; that re-opening the decision of the registrar will create uncertainty in computation of time and that the rules do not authorize the filing of the record of appeal in “*installments*”.

Mr. Chacha Odera, learned counsel for the second applicant on the other hand, submitted, inter alia, that the decision of the registrar must be in accordance with the rules; that no party should be blamed for an omission by the registrar; that the registrar should have accepted the documents presented on 22nd October, 2008 and mark the two sets presented on 23rd October, 2008 as lodged out of time and that it was not open to the registrar to refuse to accept the documents even if the copies were less than required.

The second applicant in essence contends that since the registrar wrongly refused to accept her documents presented to the registry for filing on the 22nd October, 2008, the appeal which is endorsed as having been instituted on the following day should be deemed to have been lodged on 22nd October, 2008. The registrar’s decision whether or not to accept documents lodged at the registry is a ministerial decision made on behalf of the Court. Since the rules give a discretion to registrar to decide whether or not any document presented for filing should be accepted, a judge before to whom the decision of the registrar may be referred pursuant to **Rule 14 (4)** should not interfere with the decision unless it is proved by concrete evidence that the discretion was wrongly exercised. Moreover, where as here the registrar has endorsed the record of appeal and memorandum as having been lodged on a specified date and proceeded to register the appeal, give it a serial number and has in addition issued fees receipts bearing that date, there is a rebuttable presumption in our view, that the appeal was instituted at the date and time so endorsed.

Furthermore, owing to the uncertainty that a reversal of the decision of the registrar would cause, not only would strong rebuttal evidence be required but also it would only in rare occasions that decision of registrar would be reversed.

The second application was filed on 31st October, 2008. By the application the second applicant seeks orders confirming that *Civil Appeal No. 221 of 2008* was filed within time limited, and, in the alternative, an order that the appeal be deemed to have been properly and accordingly filed. The second prayer for extension of time for filing the appeal has already been withdrawn.

The remedy provided by **Rule 14 (4)** where the registrar has refused to accept any document is an application either informally at the time the decision is given or in writing within seven days thereafter. We think that since the decision of the registrar is administrative rather than judicial, it does not call for a judicial determination by the full court as we have been called upon to do. Rather, the second applicant should have referred the decision of the registrar to a Judge as envisaged by **Rule 14 (4)** which she failed to do. Secondly, even if the application is treated as an application under rule 14 (4) it would still be incompetent as it was filed outside the stipulated 7 days without leave.

It has also come to light in the course of perusing the 4th copy of the record of appeal (registry file) to verify the date the fees and security for costs receipts were issued that the Deputy Registrar, indeed, investigated the complaint against the registry as contained in the second applicant's letter dated 24th October, 2008 and that by a letter dated 20th November, 2008 the Deputy Registrar replied to the second applicant's advocates as follows:

“M/s. Oraro & Co.

Advocates

ACK Garden House

3rd Floor, Wing C

First Ngong Avenue

P. O. Box 51236 – 00200

NAIROBI.

Thank you for your letter Ref GOO/6391 dated 24th October 2008 in the above appeal.

According to the information I have gathered, your clerk came to the registry on 22nd October 2008, at 5.00 p.m., just as the registry was closing and requested that he be allowed to file two copies of the above record and thereafter he be allowed to bring the following day the remaining copies or in the alternative he be given fifteen minutes to bring all the records for filing.

He was informed that the registry cannot accept some records while the others would be brought the following day. He was however given fifteen minutes as he had requested so as to bring all the records of appeal.

He made calls on his mobile phone and then left the registry and came back at 5.15 p.m. He requested for a further fifteen minutes and he was told that if the records are not received by 5.30 p.m. the registry will have to close and he will have to file the following day. At 5.45 p.m. he had not shown up and the registry had to close for the day.

The following day all the records were brought with a request from your office that the records be stamped with the previous day's date stamp, but the registry obviously and correctly in my view declined but had to stamp the correct date when the above appeal was filed and paid for which is 23rd October 2008.

It is therefore clear the records of appeal were not presented at the registry in the manner stated by

your clerk. In fact the registry went out of its way to give time to him to bring all the record for filing but by 5.45 p.m. he had not come back. This is further confirmed by the fact that if there was any dispute of any kind it would have been referred to me immediately by yourself or by my registry.

T. S. LUVUGA

DEPUTY REGISTRAR”.

The second applicant’s advocates did, not quite regrettably, disclose to the Court that the Deputy Registrar replied to the letter disputing the information given to them by their clerk Anthony Keli as to what transpired at the registry on the late afternoon of 22nd October, 2008.

Furthermore, most of the material facts deposed to by Chacha Odera in the replying affidavit as to what transpired are not within his personal knowledge. The facts deposed to were given to him by their clerk. There is no explanation why Anthony Keli did not file a replying affidavit. The result is that we do not have the best evidence from the second applicant. It is not our duty to resolve the conflicting versions of what transpired at the registry nor do we have sufficient material on which we can make a determination one way or the other. Had the second applicant required that the matter be referred to a judge pursuant to **Rule 14 (4)** no doubt the judge would have investigated the dispute and arrived at a decision. Suffice to say in this dispute that the facts on which the second applicant relies for the assertion that the appeal was lodged on 22nd October, 2008 are seriously contested by the Deputy Registrar and do not disprove the decision of the Deputy Registrar that the appeal was instituted on 23rd October, 2008.

For those reasons, the application dated 29th October, 2009 for striking out the record of appeal is allowed. Accordingly, the record of appeal in *Civil Appeal No. 221 of 2008* is struck out with costs to the first applicant. We further order that the second application dated 30th October, 2008 which bears the same serial number as the first application and filed by the second applicant on 31st October 2008 be and is hereby dismissed with costs to the respondent (i.e. first applicant).

Dated and delivered at Nairobi this 2nd day of February, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

J. G. NYAMU

.....

JUDGE OF APPEAL

I certify that this a
true copy of the original.

DEPUTY RESTRAR