



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 27 OF 2009**

**BENARD CHEGE.....APPLICANT**

**AND**

**1. CLEMENT KUNGU WAIBARA**

**2. CHARLES MARARO NJOROGE**

**3. ELECTORAL COMMISSION OF KENYA.....RESPONDENTS**

**CONSOLIDATED WITH**

**CIVIL APPEAL (APPLICATION) NO 142 OF 2009**

**CLEMENT KUNGU WAIBARA.....APPELLANT/1ST RESPONDENT**

**AND**

**1. PETER KAMAU NJERI.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**2. CHARLES MARARO NJOROGE.....2<sup>ND</sup> RESPONDENT**

**3. ELECTORAL COMMISSION OF KENYA.....3<sup>RD</sup> RESPONDENT**

**(Application for striking out a notice of appeal on an intended appeal from the ruling and order of the High Court of Kenya at Nairobi (Lady Justice Wendoh) dated 26<sup>th</sup> September, 2009**

**in**

**Election Petition No. 24 of 2008**

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**RULING OF THE COURT**

These two applications have been consolidated and were heard together for convenient disposal.

The two motions though lodged on different dates are both expressed to be brought under **rules 80** and **42** of the Court of Appeal Rules and they seek an order to strike out the notice of appeal and the record of appeal filed in Civil Appeal No. 142 of 2009, or in otherwise, the appeal itself on the ground

that it was not filed within the time stipulated by law.

Pursuant to the Presidential and Parliamentary General Elections held on 27<sup>th</sup> December 2007 the 1<sup>st</sup> respondent, Clement Kungu Waibara, was declared the winner for Gatundu North Constituency. On 24<sup>th</sup> January 2008, Peter Kamau Njeri, a registered voter filed Election Petition No. 24 of 2008 before the Election Court on various grounds of election malpractices, particularly bribery of and undue influence of voters, seeking an order to declare the election of the 1<sup>st</sup> respondent as null and void.

However, on 26<sup>th</sup> September 2008 Wendoh, J allowed Peter Kamau Njeri to withdraw from being the petitioner and substituted him with the applicant, Bernard Chege, as the new petitioner. The 1<sup>st</sup> respondent being aggrieved filed a notice of appeal on 3<sup>rd</sup> October 2008 and subsequently an appeal being Civil Appeal No. 100 of 2009. That appeal was by consent withdrawn on 2<sup>nd</sup> July, 2009 on account of certain defects which are not of any relevance to the application now before us. Immediately thereafter, the 1<sup>st</sup> respondent on 6<sup>th</sup> July 2009, filed Civil Appeal No. 142 of 2009 incorporating the same notice of appeal. This appeal is the subject of this application.

As soon as the applications were called out Mr. Odera, learned counsel for the 1<sup>st</sup> respondent, pointed out to us that the two consolidated applications are incompetent and ought to be struck out in that they were instituted outside the 30 days period limited by **rule 80** of the Court of Appeal Rules. The record of appeal shows that the appeal was lodged on 6<sup>th</sup> July 2009 while the application was filed on 27<sup>th</sup> November 2009 obviously outside the period limited by the Rules. Both Mr. Wetangula and Mr. Mukuria learned counsel for the respondents concede. We would agree. Consequently the two applications are struck out with costs to the appellant.

It is common ground that the said appeal was filed about ten (10) months after the ruling the subject matter of the appeal was made. This was, of course, outside the 30 days period limited by **section 23(4)** of the National Assembly and Presidential Elections Act. This breach is frankly admitted by Mr. Odera learned counsel for the 1<sup>st</sup> respondent. However, he avers that by dint of the provisions of **rule 81** of the Court of Appeal Rules time did not start to run against him until he had collected the proceedings; and in this regard, he is armed with a Certificate of Delay confirming that he collected the proceedings on 7<sup>th</sup> May, 2009. He contended, therefore, that the appeal was lodged within the time prescribed by the Court of Appeal Rules.

This submission is erroneous. This Court has firmly established that an appeal from the decision of an Election court must be lodged within 30 days from the date of the decision made and that there is no provision giving jurisdiction to either the Election court or this Court to extend the 30 days statutory limitation period. Further, this Court has held that **Section 3(1)** of the Appellate Jurisdiction Act would be of no assistance to an appellant; and also, the rules made under the said Act. See **Maitha v Said & Another [2008] 2 KLR (EP) 337** and **William Maina Kamanda v Margaret Wanjiru Kariuki & 2 Others Civil Appeal No. 221 of 2008**. The holding in the two decisions is applicable herein and we adopt it.

Clearly, the appellant's (1<sup>st</sup> respondent's) right of appeal to this Court under **section 23(4)** of the Act (Cap 7) aforesaid having been extinguished this appeal is incompetent and cannot be entertained. Accordingly, we allow the two applications and order that Civil Appeal No. 142 of 2009 be and is hereby struck out with costs to the applicant, Bernard Chege and the 2<sup>nd</sup> respondent, Peter Kamau Njeri.

Though the two applications have been struck out, it is not open to any party to complain since the Court on its own could have acted *suo moto* and arrived at the conclusions we have now reached.

We make no order as to costs.

These shall be our orders in these two consolidated applications.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of MARCH, 2010.**

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**J.W. ONYANGO OTIENO**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**