



REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL (APPLICATION) NO. 26 OF 2010

BETWEEN

MAHAMUD MUHUMED SIRAT APPLICANT/1ST RESPONDENT

AND

ALI HASSAN ABDIRAHMAN 1ST RESPONDENT/APPELLANT

IBRAHIM HISH ADAN (RETURNING OFFICER)2ND RESPONDENT

THE INTERIM INDEPENDENT ELECTORAL COMMISSION3RD RESPONDENT

(Application to strike out Civil Appeal No. 26 of 2010 and the Record of Appeal lodged on the 17th February, 2010 and the Notice of Appeal lodged on 27th January, 2010 from the Ruling and Order of the High Court of Kenya at Nairobi (Kimaru, J.) dated 22nd January, 2010

in

H.C.ELECTION PETITION NO. 15 OF 2008)

RULING OF THE COURT

This is an application by way of notice of motion expressed as having been brought “***Under Rule 80 And 85(1) (C) and (D) of the Court of Appeal Rules and Section 34 of The Advocates Act, Cap.16 of the Laws of Kenya***”, in which the applicant, **MAHAMUD MUHUMED SIRAT** seeks the following orders:-

- “1. THAT the Record of Appeal filed herein on the 17th February, 2010 be struck out.**
- 2. THAT the costs of this application and the appeal be awarded to the Applicant.”**

The application is brought on the following grounds:-

- “a) THAT the Record of Appeal dated 17th February, 2010 is materially, fatally and incurably defective.***
- b) THAT the Record of Appeal does not include Primary Documents as provided under Rule 85(1), (c) and (d) of the Court of Appeal Rules.***
- c) THAT the Record of Appeal excludes material pleadings, affidavits in evidence and exhibits that are before the superior court.***
- d) THAT the exclusion of the said documents renders the Record of Appeal incurably defective, and the Appeal incompetent in limine.***
- e) THAT the Notice of Appeal dated 27th January 2010 is materially, fatally and incurably defective.***
- f) THAT the Notice of Appeal contravenes Section 34 of the Advocates Act.***
- (g) THAT the Notice of Appeal is signed by an unqualified person.***
- h) THAT the Notice of Appeal was filed out of time.***
- i) THAT the appellant did not seek extension of time to file the Notice of Appeal out of time.”***

When this application came up for hearing before us on 18th May, 2010, Ms. Kethi Kilonzo appeared for the applicant, while Mr. E. Wetangula, appeared for the respondent and also held brief for Mr. Ong’ada for 2nd and 3rd respondents. There were two main grounds argued by Ms. Kilonzo and these were that the notice of appeal was defective in that it was signed by the 1st respondent in person rather than his advocate; and the second ground was that the record of appeal had excluded primary documents. It was Ms. Kilonzo’s contention that the 1st respondent having appointed an advocate to act for him, he (1st respondent) became unqualified person to file or sign legal pleadings in his name.

As regards the second ground, Ms. Kilonzo sought to rely on what the applicant deponed to in paragraph 6 of the supporting affidavit which was as follows:-

“6. THAT I am advised by my advocates, advise (sic) I verily believe to be true and correct that the following exhibits and documents produced in the Superior Court as evidence have not been produced, namely:-

- i) A copy of my submissions in reply to the 1st Respondent’s Notice of Motion Application dated 9th November, 2009. These submissions are referred to in the ruling at page 295 and 296 of the Record of Appeal.***
- ii) A copy of affidavit of evidence sworn on the 30th of April, 2008 by me in the superior court produced as Exhibit No. 3 and referred to in the proceedings of the election petition at page 353 of the Record of Appeal.***
- iii) Certified copies of the Presidential and Parliamentary Election results of Wajir South Constituency produced as Exhibit No. 1A and B in the Election Petition at page 349 of the Record of Appeal.***
- iv) A certified copy of the Gazette Notice No. 11030 of the 9th November, 2007 in which the 2nd Respondent was gazetted as the returning officer and produced as Exhibit No. 2B at page 350 of the Record of Appeal.”***

In view of the foregoing, it was submitted that the record of appeal was incurably defective and hence this application seeking an order that the said record of appeal be struck out with costs to the applicant.

In response to the foregoing submissions, Mr. Wetangula contended that there were no grounds for striking out the record of appeal. As regards the issue of the 1st respondent signing the notice of appeal, Mr. Wetangula referred to **Rule 74(6)** of this Court's Rules which provides that a notice of appeal can be signed either by the appellant or on his behalf and hence the 1st respondent was perfectly entitled to sign the notice of appeal in person.

As regards the documents referred to as primary documents, Mr. Wetangula submitted that as the appeal was from an interlocutory application and not the petition itself, these documents were not necessary for the purposes of an interlocutory appeal. He pointed out that the issue before the superior court was the nationality of the applicant where no oral evidence was given. In Mr. Wetangula's view, the documents referred to were not primary documents.

As already stated elsewhere in this ruling, there were only two grounds in support of the application to strike out the record of appeal. The first ground was that the notice of appeal was signed by the 1st respondent in person and yet he was not an advocate. The answer to this ground is in **rule 74(6)** of this Court's Rules which provides:-

“A notice of appeal shall be substantially in the Form D in the First Schedule hereto and shall be signed by or on behalf of the appellant.”

Hence, a notice of appeal shall be signed by or on behalf of the appellant. The 1st respondent as the appellant in the intended appeal was therefore perfectly entitled to sign the notice of appeal. We therefore find no merit in the first ground in support of this application.

As regards the issue of primary documents, we have been reminded that the intended appeal is from an interlocutory application relating to the nationality of the applicant. Hence this not being an appeal on the determination of the petition, the 1st respondent did not have to include all the documents. We agree with Mr. Wetangula's submission that the documents referred to were not primary documents for the purposes of this appeal.

Sections 3A and 3B of the Appellate Jurisdiction Act (Cap. 9 Laws of Kenya) provides:-

“3A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the appeals governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) An advocate in an appeal presented to the Court is under a duty to assist the Court to further the overriding objective and, to that effect, to participate in the processes of the Court and to comply with directions and orders of the Court.

3B (1) For the purpose of furthering the overriding objective specified in section 3A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

- (a) the just determination of the proceedings;*
- (b) the efficient use of the available judicial and administrative resources;*
- (c) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and*

(d) the use of suitable technology.”

In view of the foregoing and what we have already stated earlier we are satisfied that this application lacks merit and we order that the same be and is hereby dismissed with costs.

Dated and delivered at NAIROBI this 11th day of June, 2010.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

.....

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