



REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA**  
**AT NAIROBI**

**Civil Appeal 254 of 2008**

**MOSES NYAMBEGA.....APPELLANT**

**AND**

**LAWRENCE TATIYIA SEMPELE.....RESPONDENT**

**(Appeal from the ruling of the High Court of Kenya at Kisii ( Mohammed K. Ibrahim, J) in Election Petition No 4 of 2008 and in the matter of the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya, Parliamentary and Presidential Regulations, the National Assembly (Election Petition) Rules, the Election Offences Act, Chapter 66 Laws of Kenya dated 7<sup>th</sup> November 2008 And in the matter of The Parliamentary Election for Kitutu Masaba Constituency**

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**RULING OF THE COURT**

Civil Appeal No. 254 of 2008 filed in this Court at Kisumu registry on 4<sup>th</sup> December 2008 seeks to challenge the ruling and order of the superior court (Ibrahim, J) delivered on 7<sup>th</sup> November, 2008 at Kisii. The appeal came up for hearing before us on 1<sup>st</sup> October, 2009. In this appeal the appellant is one **MOSE NYAMBEGA** while the respondent is one **LAWRENCE TATIYIA SEMPELE**. But it is to be observed that these were not the only parties in the superior court, since the dispute relates to an Election Petition pursuant to the National Assembly and Presidential Elections Act (Cap 7 Laws of Kenya) and Parliamentary and Presidential Regulations the National Assembly (Election Petition) Rules and the Election Offences Act (Cap 66 Laws of Kenya) in respect of Kitutu Masaba Constituency. In the superior court **MOSE NYAMBEGA** was the Petitioner while **WALTER ENOCK NYAMBATI OSEBE** was the 1<sup>st</sup> respondent, **LAWRENCE T. SEMPELE** (Returning Officer) the 2<sup>nd</sup> respondent and the Electoral Commission of Kenya was the 3<sup>rd</sup> respondent.

The respondent herein who was the 2<sup>nd</sup> respondent in the Election Petition in the superior court filed an application seeking an order that the petition in the superior court be struck out on the ground that the petition had not been served upon him (2<sup>nd</sup> respondent). That is the application that was placed before Ibrahim J. for determination. It is to be noted that Mr. Ongoya with Mr. Murugu appeared for the petitioner while Mr. Omwenga with Mr. Maosa appeared for the 1<sup>st</sup> respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Mr. Orora. After lengthy submissions on that application to strike out the appeal the learned Judge reserved his ruling which he delivered on 7<sup>th</sup> November 2008. In concluding his ruling the learned Judge stated:-

**“In all, the Petitioner did not serve the 2<sup>nd</sup> respondent with the petition as required in law. The**

**petition dated 22<sup>nd</sup> January, 2008 is therefore hereby struck out. There shall be no order as to costs in respect of the application herein due to the inordinate delay in bringing it and the applicant's lack of candour. However, the Petitioner shall pay the costs of the petition to the respondents respectively."**

Being aggrieved by the foregoing the appellant herein, through his advocates, filed a notice of appeal indicating his intention to appeal against that ruling of the superior court. That is the appeal that came up for hearing before us on 1<sup>st</sup> October, 2009, as already stated.

We wish to mention that although the appeal had only one appellant (Mose Nyambega) and one respondent (Lawrence Tatiya Sempele) the parties who had appeared in the superior court but left out in this appeal were fully represented by counsel. So that Mr A.B. Shah with Mr. T. N. Maosa and Mr J. Omwenga appeared for Walter Enock Nyambati Osebe who was the 1<sup>st</sup> respondent in the superior court, while Mr. F. .N. Orora who appeared for the respondent herein also appeared for the Electoral Commission of Kenya which was the 3<sup>rd</sup> respondent in the superior court.

We drew the attention of counsel appearing to the apparent defect in the appeal in that not all the parties in the superior court had been included in this appeal. Counsel appearing then addressed us on that issue. Mr. Orora who appeared for the respondent herein was of the view that the other parties like the Electoral Commission of Kenya and the victorious party in the Election Petition ought to have been made parties to this appeal.

Mr Ongoya for the appellant acknowledged the defect but went on to seek leave to amend the appeal.

Although Mr. Ongoya thought that he could salvage his client by seeking leave to amend the record of appeal, we think, the problem goes to the root of this appeal. This Court's jurisdiction to entertain an appeal is rooted on the notice of appeal. **Rule 76(1)** of the Court of Appeal Rules provides that:-

**"An intending appellant, shall before or within seven days after lodging notice of appeal serve copies thereof on all persons directly affected by the appeal"**

In view of the foregoing, it was imperative to serve copies of notice of appeal on all persons directly affected by the appeal.

In **DANIEL ODINDO WAGA V NABIL HASSAN – (2009) e KLR** this Court, in dealing with a similar situation, said:-

**"The phrase "directly affected by the appeal" does not have a technical meaning. It is a question of fact whether a party shall or shall not be affected by the outcome of an appeal. The test we think, must be whether if the appeal were to succeed, the result will adversely affect that party."**

In the present appeal were the appeal to succeed the result would certainly adversely affect **WALTER ENOCK NYAMBATI OSEBE** who was declared the winner of the election in Kitutu Masaba Constituency which election is being challenged. It is to be observed that the said **Walter Enock Nyambati Osebe** is not a party to this appeal and yet he is one man who is to be directly affected by the outcome of this appeal. The named respondent, Lawrence T. Sempele was the returning Officer appointed by the Electoral Commission of Kenya. In the present appeal the Electoral Commission of Kenya and/or its successor is not a party to this appeal. These were parties directly affected by the appeal and a notice of appeal (or a copy thereof) ought to have been served upon them. A notice of appeal is a primary document under **rule 85 (1)** of this Court's Rules and thus the record cannot be cured by filing a supplementary record of appeal to include it as remotely suggested by Mr. Ongoya. That being our view of the matter the appeal before us is incompetent. It is struck out, but as the matter proceeded on our own motion, we make no order as to costs. Order accordingly.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of October, 2009.**

**E. O. O’KUBASU**

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**JUDGE OF APPEAL**

**D.K.S. AGANYANYA**

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**JUDGE OF APPEAL**

**J. G. NYAMU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**