IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLI NO. 280 OF 2008 (UR 182/2008)

MOSES MASIKA WETANGULA ……..……. APPLICANT

AND

JOHN KOYI WALUKE ……. 1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA…..……. 2ND RESPONDENT

JAMES KULUBI OMWANGWE ……..…… 3RD RESPONDENT

(Application for extension of time to file and serve Notice of Appeal and Record of Appeal out of time in an appeal from the ruling of the High Court of Kenya at Bungoma (Wanjiru Karanja, J.) dated 27th May, 2008

in

Election Petition No. 1 of 2008)

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R U L I N G

This is an application by way of Notice of Motion expressed to be brought

"Under Rule 4 and 42 of the Court of Appeal Rules, Cap. 9 of the Laws of Kenya and section 59 of the Interpretation and General Provision Act Chapter 21 Laws of Kenya And all other enabling provisions of the law of Kenya."

In this application the applicant, ***MOSES MASIKA WETANGULA***, seeks the following orders:-

"1. THAT this Honourable Court do grant leave to the applicant to lodge afresh a Notice of Appeal against the decision of Wanjiru Karanja J. delivered on 27th May, 2008, within a time frame as the Hon Judge may deem fit.

2. THAT this Honourable Court do grant leave to the applicant to lodge afresh record of appeal to include a certified copy of the order appealed against within a time frame as the Hon. Judge may deem fit.

3. THAT for the sake of saving costs the Hon. Judge be pleased to order that the record of appeal in this Hon. Court's Civil Appeal No. 5 later assigned No. 108 of 2008 be re-used so far as applicable."

The application was brought on the following grounds:-

"1. The 1st Respondent filed an Election Petition (Election Petition No. 1 of 2008) against the applicant on 10th January, 2008.

2. The applicant filed a notice of motion dated 31st March, 2008 to strike out the petition against the applicant on the grounds that:-

(a) The Petition was not personally served upon the 1st respondent as per the provisions of section 20 of the National Assembly and Presidential Elections Act.

(b) No effort or at all was made to personally effect service on the 1st respondent.

(c) Request for particulars was served upon the petitioner on 4th March, 2008.

(d) The Court gave an order on 13th March, 2008 that the 1st respondent be served with particulars within 10 days.

(e) That the particulars were not served as directed by the Hon. Court.

(f) The petitioner has not complied with the Court Order dated 13th March, 2008 and has refused, ignored and/or neglected to provide the 1st Respondent with particulars.

3. The said application was heard by the superior court and a ruling delivered on 27th May, 2008 by Hon. Lady Justice Wanjiru Karanja.

4. The Hon. Lady Justice Wanjiru Karanja dismissed the applicant's application to strike out the 1st respondent's petition.

5. The applicant being dissatisfied with the said ruling of Hon. Lady Justice Wanjiru Karanja delivered on 27th May, 2008 filed Notice of Appeal on 28th May, 2008 and subsequently filed Civil Appeal No. 5 later assigned No. 108 of 2008 on 10th June, 2008.

6. The applicant's Civil Appeal No. 108 of 2008 was heard by the Court of Appeal on 24th September, 2008.

7. The Court of Appeal delivered its ruling on the applicant's appeal on 17th October, 2008 wherein the Court on its own motion struck out the applicant's appeal.

8. The appeal was struck out on the ground that the Record of Appeal contained an original order instead of a certified copy contrary to the Court of Appeal Rules.

9. The omission of not annexing a certified copy of the order appealed against was an inadvertent mistake on the part of Counsel for the applicant.

10. The applicant ought not to be punished for the inadvertent mistake of his advocate.

11. The applicant has filed this application promptly and with speed without any delay whatsoever.

12. In the interest of justice it is only fair that the applicant's appeal be heard on merit."

In addition to the foregoing there was a supporting affidavit sworn by the applicant.

This application came up for hearing before me on *13th November, 2008* when Mr. A.B. Shah *(a retired Judge of Appeal)* appeared with Mr. M. Mubea for the applicant while Mr. A.S. Masika appeared for the 1st respondent. The 2nd and 3rd respondents were represented by Miss C.R.T. Ateya.

In his submissions, Mr. Shah started by stating that the ruling of the superior court was delivered on *27th May, 2008* and a notice of appeal filed on *28th May, 2008*. The record of appeal was lodged on *10th June, 2008* so that the appeal was lodged within the prescribed period. When the appeal came up for hearing before this Court in Eldoret on *24th September, 2008*, the Court *suo moto* took the issue that the order appealed from was not certified and for that reason the appeal was struck out by this Court's ruling delivered on *17th October, 2008*. This application for extension of time was filed on *21st October, 2008*.

I should at this juncture state that if this was normal civil proceedings there can be no doubt the applicant would be entitled to an extension of time since the appeal was struck out on *17th October, 2008* and only few days later i.e. *21st October, 2008* this application was filed – and it must be remembered that *20th October, 2008* was a public holiday ***(Kenyatta Day)***. But here we are not dealing with ordinary civil proceedings. We are dealing with matters relating to an election petition.

In his further submissions, Mr. Shah stated that they had admitted that it was a bona fide mistake on their part when they filed the appeal without checking and making sure that the order appealed from had been certified.

On his part, Mr. Masika vehemently opposed this application. He pointed out that time was limited by the Act – the ***National Assembly and Presidential Elections Act (Cap. 7 Laws of Kenya)***. Mr. Masika conceded that ***rule 4*** of this Court's Rules was applicable but he added that the rule must be read together with the Act. It is for that reason that he submitted that this application was incompetent and ought to be dismissed as the right of appeal had been extinguished.

Miss Ateya, on her part, did not oppose the application. She associated herself with the submissions of Mr. Shah.

The background to this application appears fairly straightforward. The applicant herein was declared a Member of Parliament for Sirisia Constituency pursuant to General Elections held on *27th December, 2007*. The 1st respondent herein ***JOHN KOYI WALUKE,*** was a Parliamentary Candidate in the Sirisia Constituency during the said elections. He was not satisfied with the result as announced in which the applicant was declared the winner. Consequently the 1st respondent filed an election petition in the High Court of Kenya at Bungoma being ***Election Petition No. 1 of 2008***. In that Election Petition the applicant herein was named as the 1st respondent and before the petition could be listed for hearing he filed a notice of motion seeking an order from the superior court to the effect that the petition be struck out on the following grounds:-

"1. The petition was not personally served upon the 1st respondent as per the provisions of section 20 of the National Assembly and Presidential Elections Act.

2. No effort or at all was made to personally effect service on the 1st respondent.

3. Request for particulars was served upon the petitioner on 4th March, 2008.

4. The court gave order on 13th March, 2008 that 1st respondent be served with particulars within 10 days.

5. That no particulars have been served to date.

6. The petitioner has not complied with the court order dated 13th March, 2008 and has refused, ignored and/or neglected to provide the 1st respondent with particulars.

7. It is in the interest of justice that the application be allowed.

8. The application is made in good faith."

The ***Electoral Commission of Kenya*** was named as the 2nd Respondent while ***James Kulubi Omwange*** was named as the 3rd Respondent. The 3rd respondent also took out a notice of motion seeking the striking out of the petition on the ground that he was not personally served as required by the provisions of the ***National Assembly and Presidential Election Act***. The two motions were heard together and in a reserved ruling delivered at Bungoma on *27th May, 2008* the learned Judge of the superior court (Karanja, J.) dismissed the applicant's application. Being aggrieved by that ruling, the applicant filed a notice of appeal on *28th May, 2008* as already stated earlier in this ruling. The appeal was lodged on *10th June, 2008*. The appeal was therefore lodged within the prescribed period. ***Section 23(4)*** of the ***National Assembly and Presidential Elections Act (Cap.7)*** provides:-

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

From what has been stated so far it is not in dispute that the applicant lodged his appeal within the prescribed period. But that appeal was struck out by this Court in its ruling delivered on *17th October, 2008*. The applicant has now come to this court seeking extension of time in which to file a notice of appeal and lodge a record of appeal. In this Court's ruling delivered on *17th October, 2008* the Court stated, inter alia:-

"In our view, section 23(4) of the National Assembly and Presidential Elections Act only ousts the application of rule 81(1) of the Court of Appeal Rules. There is nothing to suggest that the remaining Court of Appeal Rules do not apply to appeals from the superior court's decisions on election petitions. Rule 85(1) (h) therefore applies and the record of appeal must, in our view, contain a certified copy of the decree or order as in this case. The order that was contained in the record of appeal before us was not certified. That document is a primary document as we have stated and thus the record cannot be cured by filing a supplementary record of appeal to include it. 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."

In view of the foregoing I am satisfied that ***rule 4*** of this Court's Rules is applicable. But I am fortified in so saying by the provision of ***section 59*** of the ***Interpretation and General Provision Act (Cap 2 Laws of Kenya)*** which provides:-

"Where in a written law a time is prescribed for doing an act or taking a proceeding, and power is given to a court or other authority to extend that time, then, unless a contrary intention appears, the power may be exercised by the court or other authority although the application for extension is not made until after the expiration of the time prescribed."

In view of the foregoing, the principles to be applied are those stated by this Court when dealing with applications under ***Rule 4*** of the Court's Rules. In ***PATEL V. WAWERU & 2 OTHERS [2003] KLR 361 at pp. 361-363*** this Court had the following to say in respect of ***rule 4*** of this Court's Rules:-

"This is a matter in which the learned single judge was called upon to exercise his unfettered discretion under rule 4 of the Rules of this Court. All that the applicant was required to do was to place sufficient material before the learned single judge explaining the reason for what was clearly an inordinate delay. How does a single judge exercise his discretion? In ***LEO SILA MUTISO V. ROSE HELLEN WANGARI MWANGI – Civil Application NO. NAI 251 OF 1997****, this Court stated:-*

"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this Court takes into account in decided (sic) whether to grant an extension of time are first the length of the delay. Secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly the degree of prejudice to the respondent if the application is granted."

It is to be observed that in an application under ***rule 4*** of this Court's Rules the Court has unfettered discretion. What has led to this application is the fact that counsel for the applicant made a mistake by filing the record of appeal without checking whether the order appealed from had been certified. It was that simple mistake that led to the applicant's appeal being struck out. But the applicant's counsel now says that they have put their house in order and they should be allowed to lodge the correct documents, nay a certified document. In that regard there is abundant authority of this Court that the mistakes by counsel are not a reason for denying an otherwise deserving applicant of a favourable exercise of discretion. The most memorable pronouncement in that regard was by Madan J.A. (as he then was) in ***MURAI V. MURAI (No.4) [1982] KLR 38*** where he said:-

"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate. It is known that courts of justice themselves make mistakes which is politically referred to as erring, in their interpretation of laws and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is all done in the interest of justice."

And in ***MURAI V. MURAI (No. 3) [1982] KLR 33 at p. 37*** Law JA said:-

"In all the circumstances, I allow this application and extend time for filing the intended appeal by 7 (seven) days from today. The record of appeal used in the former appeal (No. 46 of 1977) shall be the record in the intended appeal supplemented by the inclusion of a copy of the formal order and of new or further grounds of appeal. The costs of this application will be the respondent's costs in the appeal in any event as the applicants are being granted a substantial indulgence in circumstances for which the respondent is in no way responsible."

I think I have said enough in this ruling. However what I wish to emphasize is that the applicant herein had already successfully appealed to this Court within the time prescribed by ***section 23(4)*** of the ***National Assembly and Presidential Elections Act (Cap.7)***. In other words he had arrived in the Court of Appeal. His appeal was however struck out not on merits but on a technical point that his advocate forgot to include a certified copy of order appealed from. It is my view that the applicant has placed sufficient material before me to enable me exercise my discretion in his favour. And in a bid to expedite the matter, I would borrow from LAW JA's expression in ***MURAI V. MURAI (No. 3)*** (supra) and hence I allow this application and extend time for filing the notice of appeal by ***7 (seven)*** days from the date hereof. I further order that the record of appeal be lodged within ***7 days*** from the date the notice of appeal is filed. The record of appeal used in the former appeal *(Civil Appeal No. 108 of 2008)* shall be the record in the intended appeal supplemented by the inclusion of a copy of a certified copy of the order appealed from. The costs of this application will be the respondents' costs in the appeal in any event as the applicant is being granted a substantial indulgence in the circumstances for which the respondents are in no way responsible.

Dated and delivered at NAIROBI this 21st day of November, 2008.

E.O. O'KUBASU

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR