



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI NO. 99 OF 2008**

**STEPHEN KINYANJUI MBURU ..... APPLICANT**

**AND**

**SIMON RUBIRU GAKUHA ..... 1<sup>ST</sup> RESPONDENT**

**ELECTORAL COMMISSION OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**WAITHAKA MWANGI K. .... 3<sup>RD</sup> RESPONDENT**

*(Application for leave to extend the time to file and serve the Record of Appeal from the Ruling/Order of the High Court of Kenya at Nyeri (Ransley, J) dated 13<sup>th</sup> July, 2005*

**In**

**H.C. Election Petition No. 1 of 2003**

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**RULING**

**Stephen Kinyanjui Mburu**, the applicant herein, was apparently a candidate in the 2002 general elections for the Kinangop Constituency Parliamentary seat. He was defeated in that contest by **Waithaka Mwangi K.**, the third respondent herein. The applicant was dissatisfied by the manner of his defeat, and he filed an Election Petition No. 1 of 2003. That petition was struck out by the then Mr. Justice Ransley on 13<sup>th</sup> July, 2005. The applicant has always wanted to appeal against the order striking out his petition. He filed a notice of appeal on 22<sup>nd</sup> July, 2005 and applied for proceedings and the order striking out the petition. According to the applicant he was supplied with the proceedings on 11<sup>th</sup> July, 2007 and a certificate of delay was also supplied to him on 13<sup>th</sup> July, 2007. For some reason of his own, the applicant, instead of filing the appeal, chose to file an application for extension of time to file a record of appeal out of the prescribed time. That application came up for hearing before Bosire, J.A on 12<sup>th</sup> March, 2008. The motion was struck out. The applicant then filed the present motion on 20<sup>th</sup> May, 2008. Mr. Mutuli, learned counsel for the applicant, told me that from 12<sup>th</sup> March, 2008 when the first motion was struck out to the 20<sup>th</sup> May, 2008 when the present one was filed was a period of sixty nine (69) days. No explanation at all was given in the supporting affidavit as to why that delay was allowed to occur.

Be that as it may, in the present motion which is brought under **Rule 4** of the Court’s Rules, the applicant

is asking me to be pleased:-

**“(a) to extend the time within which the Applicant may file and serve his Record of Appeal;**

**and**

**(b) to grant to the Applicant a period of Forty (sic) Five (45) Days to file the Record of Appeal and to effect service within seven (7) days of such filing.”**

Under **Rule 4** which forms the basis of this motion a single Judge of the Court can extend time but the limits within which the extension may be done are also prescribed in the said rule. The rule provides:-

**“The Court may, on such terms as it thinks just, by order extend the time LIMITED BY THESE RULES or BY ANY DECISION OF THE COURT OR OF A SUPERIOR COURT, for the doing of any act authorized or required by these Rules whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.”**

It is clear from this provision that the Court can only extend a time if that time:-

(a) is limited by the Rules;

or (b) is limited by an order of the Court itself or an order of the superior court.

An example of (a) is the time within which to file a notice of appeal which is limited by **Rule 74 (1)** to fourteen days from the date of the decision. The Court or a member of the Court would have no difficulty extending such time. An example of (b) would be where the Court or the superior court orders that some act be done within a stated period; if the act is not done within the period so prescribed by the Court or the superior court, the Court or a member of the Court would have power to extend the time which was prescribed by the Court's order. These are the limits within which the Court operates to extend the time.

Election petitions are, however, dealt with or provided for under the Constitution of Kenya and under the National Assembly and Presidential Elections Act, **Chapter 7** of the laws of Kenya, the Act hereinafter. In **section 23 (4)** of the Act, it is provided that:-

**“Subject to subsection (5), an appeal shall lie to the Court of Appeal from any decision of an election court, whether the decision be interlocutory or final WITHIN THIRTY DAYS of the decision.”**

**Sub-section (5)** to which the above provision is subject merely provides that an appeal involving the election of the President shall be heard by a bench of five Judges of Appeal.

One thing is absolutely clear from **section 23 (4)** of the Act; an appeal from the decision of an election court must be filed within thirty days from the date of the decision. That period is not prescribed

**“--- by these Rules {i.e. the Court of Appeal Rules} or by any decision of the Court or the superior court -----.”**

The period is prescribed by a statute, namely the National Assembly and Presidential Elections Act.

So that even by the time the applicant was filing his first motion for extension of time which Bosire, J.A struck out the period of thirty days had long gone since the decision of Ransley, J was made way back on 13<sup>th</sup> July, 2005. I doubt whether Bosire, J.A could have extended the time as had been applied for because **Rule 4** of the Court's Rules cannot oust the provisions of **section 23 (4)** of the Act; that must be the reason why the Court stated in **KIBAKI VS. MOI [2003] 1 EA 115** at pg. 129:-

**“As we pointed out earlier, the conflict being considered in the case above [i.e. MAITHA VS. HEMED [1998] LLR 854 [(AK)] was between section 23 (3) (sic) of the Act which provides that an appeal to the**

*Court of Appeal must be lodged within 30 days from the decision against which the appeal is brought, and the Rules of the Court of Appeal. Rule 74 (1) of the Court of Appeal Rules provides for the giving of a notice of appeal within 14 days from the date of the decision while Rule 81 (1) provides that the appeal is to be lodged within 60 days from the date of lodging the notice of appeal. The appeal by Maitha, as we pointed out earlier, was lodged outside the 30 days but within the 60 days. The majority of the Court – Gicheru & Omolo, J.J.A - had no difficulty in holding that the appeal was incompetent and there was no question of attempting to reconcile the provisions of section 23 (4) of the Act with those of the Court of Appeal Rules. The Court of Appeal Rules were in conflict with the provisions of the statute and they (the Rules) had to give way to the plain words of section 23 (4). -----.”*

Of course, in the present matter, I am asked to extend time, but if I am to do so, the time I must extend is the thirty (30) days prescribed under **section 23 (4)** of the Act. The Act itself does not provide for extension of time and even **section 59** of the Interpretation and General Provisions Act, **Cap 2** Laws of Kenya, cannot be of any help to the applicant. That section states:-

*“Where in a written law a time is prescribed for doing an act or taking a proceedings, 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.”*

Two things are clear from a plain reading of that section. One, the written law has prescribed a time within which an act or thing is to be done. Two, the court or other authority extending the time has been given power to do so. Who or what can give the court or the authority power to extend the time? It can only be the written law.

**Section 23 (4)** of the Act, or as far as I am aware, any other section, does not confer on the Court the power to extend time. That must be why the applicant resorted to **Rule 4** of the Court’s Rules. For reasons which I have pointed out the Court cannot extend the 30 days prescribed under **section 23 (4)** of the Act using the provisions of **Rule 4**.

In the case of **DICKSON DANIEL KARABA VS. JOHN NGATA KARIUKI & TWO OTHERS**, Civil Appeal No. 125 of 2008 (unreported) Bosire, J.A extended time within which the notice of appeal had to be served. The notice of appeal had been filed within time but had been served out of time. The decision against which the appeal had been brought was made at Nyeri on 28<sup>th</sup> May, 2008 and the record of appeal was lodged in the Court on 26<sup>th</sup> June, 2008, i.e. within the thirty days prescribed by **section 23 (4)** of the Act. There was, accordingly no issue of extending time within which to lodge the record of appeal. If that had been the case, totally different issues would have arisen. But the time within which to file the notice of appeal or serve the same are issues purely covered by the Court’s Rules and there are no equivalent provisions either in the Act or the rules made pursuant to the Act which specifically deal with those matters. I am aware Bosire, J.A’ s order extending time to serve the notice of appeal is pending under a reference to the full Court and I shall say no more on the issue.

However, in the matter before me, I have no doubt that I have no jurisdiction to enlarge the time within which to lodge the record of appeal. I cannot use the provisions of **Rule 4** to over-ride the provisions of **section 23 (4)** of the Act.

Even if I were to deal with the matter on merits I would have refused to extend the time. First as was rightly pointed out by counsel for the respondents, even if the intended appeal were to be filed and it was successful, the consequent order would be that the petition be reinstated for hearing. That would merely be an academic exercise because another general election has taken place and neither the applicant, nor his rival the 3<sup>rd</sup> respondent is a member of Parliament. The hearing of the election petition would, in all the circumstances, be an exercise in futility.

Next, there was the unexplained delay of some 69 days from 12<sup>th</sup> March, 2008 when the first motion was

struck out to 20<sup>th</sup> May, 2008 when the present one was filed. I would have refused to exercise my discretion in favour of the applicant because of that inordinate and unexplained delay. But as it is I hold that I have no jurisdiction to extend time in the manner sought by the applicant and that being the view I take of the matter, the applicant's notice of motion dated 12<sup>th</sup> May, 2008 and lodged in Court on 20<sup>th</sup> May, 2008 must fail. I order that it be and is hereby struck out as I have no jurisdiction to make the orders the applicant seeks from me. I award the costs of the struck out motion to the respondents. Those shall be my orders on the matter.

Dated and delivered at Nairobi this 21<sup>st</sup> day of November, 2008

**R.S.C. OMOLO**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR.**