



REPUBLIC OF KENYA



**Maina v Macharia & 5 others (Application E035 of 2023)
[2023] KESC 97 (KLR) (10 November 2023) (Ruling)**

Neutral citation: [2023] KESC 97 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
APPLICATION E035 OF 2023**

**MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, I LENAOLA & W OUKO, SCJJ
NOVEMBER 10, 2023**

BETWEEN

AMOS MWAGO MAINA APPLICANT

AND

PETER WAIHENYA MACHARIA 1ST RESPONDENT

STANLEY KYALO MULI 2ND RESPONDENT

SAMUEL NDUHIU MACHARIA 3RD RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
RESPONDENT**

**MILLIAM W GACHIHI, THE CONSTITUENCY RETURNING OFFICER,
STAREHE 5TH RESPONDENT**

**ALBERT GOGO, THE COUNTY RETURNING OFFICER, NAIROBI
CITY 6TH RESPONDENT**

(Being an application for withdrawal of the Notice of Appeal)

The Supreme Court deems as withdrawn a notice of appeal for default in filing an appeal within the prescribed timeline after filing the notice of appeal

The application sought for orders that the notice of appeal lodged by the 1st, 2nd and 3rd respondents at the Court of Appeal be deemed to have been withdrawn. The instant court noted that rule 38 of the Supreme Court Rules, 2020 stipulated that an appeal to the court shall be filed within 30 days of the date of filing the notice of appeal, where the appeal was as of right; or 30 days after the grant of certification, where such certification was required. The court further noted that the 1st, 2nd and 3rd respondents had defaulted in filing their appeal within the prescribed timeline after filing their notice of appeal. The court ordered that the notice of appeal be deemed to have been withdrawn.

Reported by Kakai Toili



Civil Practice and Procedure – appeals – appeals to the Supreme Court – timelines for filing an appeal to the Supreme Court - what was the effect of default in filing an appeal to the Supreme Court within the prescribed timeline after filing a notice of appeal without justification -, rules 36 and 38.

Brief facts

The application sought for orders that the notice of appeal lodged by the 1st, 2nd and 3rd respondents at the Court of Appeal regarding Court of Appeal at Nairobi Election Petition Appeals Nos E006, E005 and E009 of 2023 be deemed to have been withdrawn and that the 1st, 2nd and 3rd respondents be ordered to pay the costs relating to the notice of appeal and the costs of the application. The applicant contended that; his election as the Member of the National Assembly Starehe Constituency was challenged by the 1st, 2nd and 3rd respondents in the High Court and was dismissed thus leading to the 1st, 2nd and 3rd respondents filing election petition appeals at the Court of Appeal. The Court of Appeal dismissed the appeal following which the 1st, 2nd and 3rd respondents lodged a notice of appeal on August 8, 2023 but had not yet filed their petition and record of appeal before the instant court.

The applicant submitted that the 1st, 2nd and 3rd respondents had failed to comply with rule 38 of the by not instituting their appeal within 30 days of the date of filing the notice of appeal where the appeal was as of right, which lapsed on September 7, 2023. The applicant further submitted that he was unaware of any application filed by the 1st, 2nd and 3rd respondents for certification of the intended appeal as a matter of general public importance and thus prayed that it would be in the interest of justice that the notice of appeal be formally deemed as withdrawn and he be awarded costs.

Issues

What was the effect of default in filing an appeal to the Supreme Court within the prescribed timeline after filing a notice of appeal without justification?

Held

1. Rule 38 of the stipulated that an appeal to the court shall be filed within 30 days of the date of filing the notice of appeal, where the appeal was as of right; or 30 days after the grant of certification, where such certification was required. Rule 36(4) of the made it optional to file a notice of appeal either before or after certification in a matter of general public importance.
2. The 1st, 2nd and 3rd respondents indicated their intention to invoke the court's jurisdiction under article 163(4)(b) of the of Kenya, 2010 (the Constitution). That involved certifying their intended appeal as a matter of general public importance. Though they submitted that they filed their notice of appeal before obtaining certification rendering the application premature, the 1st, 2nd and 3rd respondents had not provided any evidence to support their assertion considering that the assertion was vehemently opposed on grounds that the application for certification was non-existent.
3. The 1st, 2nd and 3rd respondents had defaulted in filing their appeal within the prescribed timeline after filing their notice of appeal. The 1st, 2nd, and 3rd respondents had also not provided any justification for the continued existence of the notice of appeal on the court's record beyond the period permitted by rules 36 and 38 of the .At any rate, if the 1st, 2nd and 3rd respondents pursued their application for certification before the Court of Appeal and succeeded, they had sufficient time to move the court under the relevant rule.
4. Costs followed the event. Under rule 46(2) of the , the party in default in instituting the appeal shall be liable to pay the costs arising. There was no reason to deny the respondents costs as prayed.

Application allowed.

Orders

- i. *The notice of appeal dated August 8, 2023 lodged by the 1st, 2nd and 3rd respondents in the first instance at the Court of Appeal even date regarding Court of Appeal at Nairobi Election Petition Appeals Nos E006, E005 and E009 of 2023 was deemed to have been withdrawn.*



- ii. *The 1st, 2nd and 3rd respondents to bear the costs hereof.*

Citations

Cases

1. Kabuito Contractors Ltd v Attorney General (Civil Application E025 of 2023; [2023] KESC 89 (KLR)) — Explained
2. Mae Properties Limited v Joseph Kibe & another (Civil Appeal 201 of 2016; [2017] eKLR) — Explained
3. Rai & 3 others v Rai & 4 others (SC Petition No. 4 of 2012; [2014] eKLR) — Explained
4. Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others (Application 3 (E008) of 2022; [2022] KESC 25 (KLR)) — Explained

Statutes

1. Constitution of Kenya, 2010 — article 163(4)(b) — Interpreted
2. Court of Appeal Rules 2010 (Cap 9 Sub Leg) — rule 83 — Interpreted
3. Supreme Court Rules, 2020 (Act No 7 of 2011) — rule 31, 38, 46 — Interpreted

Advocates

None mentioned

RULING

Representation:

Mr. Gachuiiri h/b for Mr. Ongoya for the applicant (Ongoya & Wambola Advocates)

Ms. Martha h/b for Mr. Osundwa for the 1st, 2nd & 3rd respondents (Osundwa & Company Advocates)

Mr. Diro & Mr. Moriasi for the 4th, 5th & 6th respondents (Diro Advocates LLP)

1. Upon perusing the notice of motion by the applicant dated September 19, 2023 and filed on September 21, 2023 pursuant to rules 31, 38 and 46 of the *Supreme Court Rules, 2020* seeking orders;
 1. That the notice of appeal dated 8/08/2023 lodged by the 1st, 2nd and 3rd respondents in the first instance at the Court of Appeal on 8th August 2023 regarding Court of Appeal at Nairobi Election Petition Appeals Nos E006, E005 and E009 of 2023 be deemed to have been withdrawn.
 2. That the 1st, 2nd and 3rd respondents be ordered to pay the costs relating to the said notice of appeal and the costs of this application; and
2. Upon considering the grounds on the face of the application and the averments contained in the supporting and supplementary Affidavits both sworn by Amos Mwago Maina on September 19, 2023 and October 17, 2023, respectively, wherein the applicant contends that; his election as the Member of the National ASsembly Starehe Constituency held on August 9, 2022 was challenged by the 1st, 2nd and 3rd respondents in High Court Election Petition No. E001 of 2022; and that on March 7, 2023 the court dismissed the petition and upheld his election leading to the 1st, 2nd and 3rd respondents filing Election Petition Appeals Nos E005, E006 and E009 of 2023 at the Court of Appeal respectively, which were consolidated and heard together; on July 28, 2023 the Court of Appeal dismissed the appeal following which the 1st, 2nd and 3rd respondents lodged a notice of appeal on August 8, 2023 but have not yet filed their petition and record of appeal before this court; and



3. Upon considering the applicant's submissions dated September 19, 2023 and filed on September 21, 2023 and supplementary submissions dated and filed on October 19, 2023 wherein the applicant submits that the 1st, 2nd and 3rd respondents have failed to comply with rule 38 of the *Supreme Court Rules, 2020* by not instituting their appeal within 30 days of the date of filing the notice of appeal where the appeal is as of right, which lapsed on September 7, 2023; the applicant is unaware of any application filed by the 1st, 2nd and 3rd respondents for certification of the intended appeal as a matter of general public importance relying on the Court of Appeal decision in *Mae Properties Limited v Joseph Kibe & another* [2017] eKLR; and the applicant further asserts that the court considered rule 83 of the *Court of Appeal Rules 2010* which is *in pari materia* to rule 46 of the *Supreme Court Rules, 2020*, and prays that it would be in the interest of justice that the notice of appeal be formally deemed as withdrawn and he be awarded costs; and
4. Upon considering the replying affidavit sworn by the 2nd respondent on October 4, 2023 and the 1st, 2nd and 3rd respondents' written submissions dated October 6, 2023 and filed on October 16, 2023 wherein they oppose the application on grounds that: being aggrieved by the decision of the appellate court, their advocates pursuing a certification of this matter as a matter of general public importance; although rule 38 of the *Supreme Court Rules* makes proviso that an appeal to this court shall be filed within 30 days, this application is premature since time under rule 46 of the *Supreme Court Rules* is tabulated from when the matter is certified to clothe this court with the requisite jurisdiction and no such certification has since been granted; and
5. Further considering the 1st, 2nd and 3rd respondents' arguments that in view of the fact that they have a right to appeal, it is only fair that they be allowed to ventilate their appeal since, as concerned citizens and residents of Starehe constituency, they stand to suffer irreparable loss and damage as the election fell short of being simple, accurate, verifiable, secure, accountable and transparent thus infringing on their democratic right to free and fair elections; the orders sought by the applicant are an infringement of their constitutional right to a fair hearing and their right of appeal; that they have an arguable appeal that would be rendered nugatory and they stand to suffer grave prejudice whereas no prejudice will be occasioned by the applicant if they are allowed to file their appeal as envisioned by the law as the delay herein is not inordinate or so great as to be inexcusable; subsequently, it would be in the best interest of justice that this court disallows the instant application and grants them leave to appeal; and
6. Noting the 4th, 5th and 6th respondents' grounds in support of the application dated October 5, 2023 and filed on October 19, 2023 and the submissions dated October 5, 2023 and filed on October 19, 2023 wherein they principally reiterate the applicant's averments further affirming that the 1st, 2nd and 3rd respondents have not adduced any evidence indicating steps taken to file their appeal or certification; and
7. Having therefore considered the application, responses thereto and submissions before us, We now opine as follows:
 - i. Rule 38 of the *Supreme Court Rules 2020* stipulates that an appeal to this court shall be filed within 30 days of the date of filing the notice of appeal, where the appeal is as of right; or 30 days after the grant of certification, where such certification is required. As we enunciated in *Arvind Shah & 7 others vs Mombasa Bricks & Tiles Ltd & 5 others*; SC Application No.3 (E008) of 2022, rule 36(4) makes it optional to file a notice of appeal either before or after certification in a matter of general public importance.
 - ii. In the application before us, the 1st, 2nd and 3rd respondents indicate their intention to invoke this court's jurisdiction under article 163 (4) (b) of the *Constitution*. This involves certifying



their intended appeal as a matter of general public importance. Though they submit that they filed their notice of appeal before obtaining certification rendering the application premature, the 1st, 2nd and 3rd respondents have not provided any evidence to support their assertion considering that the said assertion is vehemently opposed on grounds that the application for certification is non-existent.

iii. Rule 46 of the Supreme Court Rules provides:

- “(1) Where a party has lodged a notice of appeal, but fails to institute the appeal within the prescribed time, the notice of Appeal shall be deemed to have been withdrawn, and the court may on its own motion, or on application by any party, make such orders as may be necessary.
- (2) The party in default shall be liable to pay the costs arising, to any person upon whom the notice of appeal was served.”

We are satisfied that the 1st, 2nd and 3rd respondents have defaulted in filing their appeal within the prescribed timeline after filing their notice of appeal. The 1st, 2nd, and 3rd respondents have also not provided any justification for the continued existence of the notice of appeal on this court’s record beyond the period permitted by rules 36 and 38 of the Supreme Court Rules.

- iv. At any rate, as we enunciated in Kabuito Contractors Ltd v the Attorney General; SC Civil Application No E025 of 2023, if the 1st, 2nd and 3rd respondents pursue their application for certification before the Court of Appeal and succeed, they have sufficient time to move this court under the relevant rule.
- v. On the issue of costs, bearing in mind that costs follow the event as enunciated in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR and rule 46 (2) that the party in default in instituting the appeal shall be liable to pay the costs arising; we see no reason to deny the respondents costs as prayed.

8. Consequently, and for the reasons aforesaid, we make the following orders:

- i. The notice of motion dated September 19, 2023 *and* filed on 21st September, 2023 be and is hereby allowed.
- ii. The notice of appeal dated August 8, 2023 lodged by the 1st, 2nd and 3rd respondents in the first instance at the Court of Appeal even date regarding Court of Appeal at Nairobi Election Petition Appeals Nos E006, E005 and E009 of 2023 be and is hereby deemed to have been withdrawn.
- iii. The 1st, 2nd and 3rd respondents shall bear the costs hereof.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

M. K. IBRAHIM

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JUSTICE OF THE SUPREME COURT

I. LENAOLA

.....

JUSTICE OF THE SUPREME COURT

W. OUKO

.....

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

