



Independent Electoral & Boundaries Commission & another v Abdalla & 2 others (Petition 20 of 2018) [2018] KESC 65 (KLR) (5 October 2018) (Ruling)

Independent Electoral & Boundaries Commission & another v Albeity Hassan Abdalla & 2 others [2018]eKLR

Neutral citation: [2018] KESC 65 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 20 OF 2018**

**DK MARAGA, CJ, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ
OCTOBER 5, 2018**

BETWEEN

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
PETITIONER**

MOHAMED ADAN ALI 2ND PETITIONER

AND

ALBEITY HASSAN ABDALLA 1ST RESPONDENT

HON. ANUAR LOITIPTIP 2ND RESPONDENT

WIPER DEMOCRATIC MOVEMENT 3RD RESPONDENT

Circumstances in which the Supreme Court would allow for consolidation of appeals filed at the Supreme Court.

Reported by Beryl Ikamari

***Civil Practice & Procedure** - consolidation of appeals - consolidation of appeals before the Supreme Court - where two different petitions were filed at the Supreme Court in relation to the same cause of action to challenge a Court of Appeal judgment - whether the Supreme Court would exercise its discretion and allow the two petitions to be consolidated - Supreme Court Rules 2012, rule 14.*

***Evidence Law** - admission of additional evidence - admission of additional evidence at the Supreme Court - considerations of the Supreme Court in admitting additional evidence - whether the Supreme Court would allow the filing of a Supplementary Record of Appeal filed for purposes of tendering additional evidence - Supreme Court Rules 2012, rule 18(3)(c).*



Brief facts

The Court of Appeal delivered a judgment on July 12, 2018, in which it nullified the election of the 2nd respondent as the Senator for Lamu County. The applicants were aggrieved by that decision and they filed an appeal at the Supreme Court in which they sought the setting aside of the orders of the Court of Appeal. The 2nd respondent also filed an appeal at the Supreme Court seeking the setting aside of those orders.

The applicants filed a Notice of Motion wherein they sought the consolidation of the two appeals, namely Petition No 20 of 2018 and Petition No 18 of 2018. They also sought orders for them to be exempted from including in their Record of Appeal documents that were included in Petition No 18 of 2018 except for such other documents as the court could direct and they also sought leave to file a Supplementary Record of Appeal to include Form 38A for Kiangwe Primary School polling station as evidence.

Issues

- i. When would the Supreme Court order for appeals pending before it to be consolidated and for a single Record of Appeal to be used?
- ii. Whether the Supreme Court would allow an application for admission of additional evidence.

Held

1. The two petitions should be consolidated. The petitions would be consolidated in exercise of the Supreme Court's discretion provided for in rule 14 of the Supreme Court Rules, 2012.
2. Since the two petitions stemmed from the same cause of action and the same judgment of the Court of Appeal, the use of a single Record of Appeal was pragmatic. In that way duplicity would be avoided and the hearing of the consolidated matters would be expedited.
3. The Supreme Court set down principles for consideration in determining an application for admission of additional evidence. The applicant did not meet the threshold for such admission.

Application partly allowed.

Orders

1. *Petition No. 18 of 2018 and Petition No. 20 of 2018 were consolidated with Petition No. 18 of 2018 being the lead file.*
2. *The applicants, Independent Electoral and Boundaries Commission and Mohamed Adan Ali, were exempted from including in their Record of Appeal those documents already included in the Record of Appeal filed in Petition No. 18 of 2018.*
3. *The application for leave to file and serve a Supplementary Record of Appeal including the Form 38A for Kiangwe Primary school polling station was disallowed.*
4. *Costs of the application shall abide the Appeal.*

Citations

Statutes

1. Constitution of Kenya, 2010
2. Elections Act
3. Evidence Act

Advocates

None mentioned

RULING

1. On July 12, 2018 the Court of Appeal at Malindi delivered judgment in Election Petition Appeal No. 2 of 2018 in which it nullified the election of the 2nd Respondent, Hon. Anuar Loitiptip as the Senator for Lamu County. The Applicants herein were aggrieved by that decision and on 6th August 2018 filed



- an appeal to this Court: Petition No. 20 of 2018 in which they seek the setting aside of the Court of Appeal decision and a declaration that the election conducted for the Lamu County Senator was free, fair and credible in accordance with the Constitution, the Elections Act and other relevant laws.
2. It is not only the Applicants who are aggrieved by the Court of Appeal decision. The 2nd Respondent, Hon. Anuar Loitiptip being also aggrieved had already moved to this Court on 24th July 2018 and filed an appeal, being Petition No. 18 of 2018 in which he also seeks the setting aside of the Court of Appeal decision. Both appeals are pending hearing and determination by this Honourable Court.
 3. The Applicants have now moved this Court via this Notice of Motion Application dated 3rd August 2018 in which they seek the following orders:
 1. That this application be certified as urgent and that the same be heard ex-parte in the first instance. (spent)
 2. That there be a consolidation of the present Petition with Petition No. 18 of 2018 for hearing and final determination.
 3. That the Petitioners be exempted from including in their Record of Appeal those documents already included in Petition No. 18 of 2018 save for such other documents as this Court may direct.
 4. That leave be and is hereby granted to the Petitioners to lodge a Supplementary Record of Appeal to include the Form 38A for Kiangwe Primary School polling station as further evidence before this Honourable Court.
 5. That costs of this application be costs in the cause.
 4. We have perused the grounds in the application and the Supporting Affidavit of the 2nd Applicant, Mohamed Adan Ali sworn on 3rd August 2018. We have also considered the Applicants' Written Submissions dated 3rd August, 2018 and filed on 6th August 2018 together with the List of Authorities and Digest of Cases. It is submitted inter alia that Rule 14 of the Supreme Court Rules, 2012 allows for consolidation of petitions arising from the same judgment where the issues raised are similar. That Rule 33(5) allows this Court to exclude any document from the Record of Appeal; while Rule 18 allows the Court to take additional evidence. They also urge that a central issue of alleged over-voting at Kiangwe Primary School polling station is key to the determination of the Appeal pending before this Court, hence the need to avail the Form 38A, the primary document, for that polling station for a just determination of that issue by this Honourable Court.
 5. We have also considered the 1st Respondent's Replying Affidavit sworn on 20th August 2018 together with his Written Submissions and List of Authorities filed on the even date. He opposes the prayer for consolidation and in its place submits that Petition No. 18 of 2018 be tried as a test case. The prayer to produce the Form 38A in issue is also opposed on the basis that at the High Court, the 1st Respondent filed an application seeking the production of all Forms 38As in respect of the impugned election but the Applicants opposed it. He also sought orders of scrutiny which the Applicants opposed. He therefore urges that having been denied an opportunity at the High Court to use the same in prosecution of his case, it should now not be produced in the Supreme Court.
 6. It is further urged that pursuant to section 120 of Evidence Act (General Estoppel), the Applicants are estopped from seeking to produce the said Form 35A having not produced it in the High Court. The 1st Respondent also questions the veracity of the Form 38A sought to be produced and submits that allowing its production will delay the hearing of the appeal contrary to Articles 87(1) and 159(2) (d) of the Constitution.



7. Finally, he urges that the Applicants were custodians of the Forms 38A and had an opportunity to produce it but chose not to. He cites the case of Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 others [2014] eKLR and submits that the Court considered an application to adduce additional evidence and dismissed it holding that the discretion to allow additional evidence has to be exercised judiciously given that time is of the essence in finalizing electoral disputes.
8. During the mention of this matter before the Deputy Registrar of the Court on 13th August 2018, counsel for the 2nd Respondent, Mr. Binyenya Benjamin indicated that he was not opposed to the application.
9. Having considered the rival submissions of the parties, we are of the unanimous decision that the two petitions should be consolidated. While the 1st Respondent opposes consolidation, he invokes the same Rule 14 and argues for trial of Petition No. 18 of 2018 as the test case. Following our decision in Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR, we are inclined to exercise our discretion under Rule 14 in favour for consolidation. Having allowed consolidation, we are also of the opinion that as the two petitions stream from the same cause of action and the same judgment of the Court of Appeal, the use of a single set of Record of Appeal is pragmatic. This will avoid duplicity and expedite the hearing of the consolidated matters. Hence this prayer is also allowed.
10. As regards the prayer for leave to file a Supplementary Record of Appeal including Form 38A for Kiangwe Primary School polling station, we have noted the opposition of the 1st Respondent. Recently, this Court in an application for additional evidence in Petition 7 of 2018, Hon. Mohammed Abdi Mohamad vs Ahmed Abdullahi Mohammed & others (unreported) set down principles for consideration in determining an application for admission of additional evidence. We find the Applicants' prayer has not met the requisite threshold for such admission.
11. The upshot is that we allow the application in the following terms only:
 1. Petition No. 18 of 2018 and Petition No. 20 of 2018 are hereby consolidated with Petition No. 18 of 2018 being the lead file.
 2. The Applicants, Independent Electoral and Boundaries Commission and Mohamed Adan Ali, are hereby exempted from including in their Record of Appeal those documents already included in the Record of Appeal filed in Petition No. 18 of 2018.
 3. The application for leave to file and serve a Supplementary Record of Appeal including the Form 38A for Kiangwe Primary school polling station is disallowed.
 4. Costs of this application shall abide the appeal.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF OCTOBER, 2018

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D.K. MARAGA

CHIEF JUSTICE & PRESIDENT JUSTICE OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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J.B. OJWANG



JUSTICE OF THE SUPREME COURT

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S.C. WANJALA

JUSTICE OF THE SUPREME COURT

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N. S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true Copy of the original

REGISTRAR

SUPREME COURT OF KENYA

