

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Ibrahim, Ojwang, SCJJ.)

CIVIL APPLICATION No.20 OF 2014

**IN THE MATTER OF THE MATTER OF AN APPLICATION FOR LEAVE TO
FILE RECORD OF APPEAL WITHOUT NECESSARY DOCUMENTATION IN
THE FIRST INSTANCE**

AND

**IN THE MATTER OF APPLICATION FOR GRANT OF CERTIFICATION AND
LEAVE TO APPEAL TO THE SUPREME COURT**

BETWEEN

BWANA MOHAMED BWANA..... APPLICANT

AND

SILVANO BUKO BONAYA.....1st RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

SHAKILA ABDALLA MOHAMED.....3RDRESPONDENT

*(An appeal from the ruling of the Court of Appeal at Malindi dated
8th April, 2014 in the Election Petition Appeal No. 40 of 2013)*

RULING

A. INTRODUCTION

[1] This is an application by way of Notice of Motion dated 8th May, 2014 under certificate of urgency seeking Orders from this Court to:

- 1) Certify this application as urgent and for service to be dispensed with in the first instance.

- 2) Allow the applicant to file the record of appeal without the Court of Appeal judges' notes and; the certified copy of the order of the Court of Appeal.
- 3) Allow the applicant to file the documents in 2 above by way of supplementary Record of Appeal upon receipt of the same from the Court of Appeal.
- 4) Direct that the intended appeal raises issues of interpretation of the Constitution and can be filed directly to this Court without seeking leave or certification.
- 5) To urge this application directly to this Court if certification is required without first filing in the Court of Appeal.
- 6) Certify the proposed appeal as one involving a matter of general public importance.
- 7) Allow costs of and incidental to this application abide the results of the said appeal.

[2] The applicant has filed a petition of appeal, *Petition No.15 of 2014*, dated 9th May, 2014, seeking to set aside the order the Court of Appeal dated 8th April 2014 in *Civil Appeal No. 40 of 2013*.

[3] The brief background to this matter is that the applicant herein was a voter in Lamu County in the General Elections held on 4th March, 2013. He challenged the validity of the 3rd respondent's election as the Lamu County Women Representative in Malindi High Court Election *Petition No. 7 of 2013*. Muchemi J. determined that that the 3rd respondent was indeed validly elected as the Lamu County Women Representative. Aggrieved by that decision, he preferred an appeal to the Court of Appeal. The Court of

Appeal dismissed the matter before hearing in on its merits. It upheld the respondents' preliminary objection that it did not have jurisdiction to hear the appeal, based on the mandatory provisions of Rule 87 (1) of the Court of Appeal Rules, in view of the incompleteness of the record. Malcontent with that decision, he now seeks this Court's intervention.

[4] On 12th May, 2014, Ibrahim SCJ having heard Counsel Mr. Aboubakar for the applicant, certified this application urgent. After directing the applicant to serve both the application and petition by 16th May, 2014 and allowing the respondent to file and serve their grounds of opposition if any, by 20th May, 2014, he ordered the parties to appear before a two-judge bench for an *inter partes* hearing for 21st May, 2014.

[5] During the *inter partes* hearing, Counsel for the applicant made an oral application to amend the title of his matter from '*An intended Civil Appeal No. 20 of 2014*' to '*Application No. 20 of 2014*'. This was not opposed by Counsels for the respondents and the Court granted the amendment to the title to remove the words "intended civil appeal" and read as '*Application 20 of 2014*'. As the petition filed by the applicant was petition *15 No. of 2014*, the Court directed that the Notice of Motion was an interlocutory application within petition *No. 15 of 2014*. Counsel for the applicant also abandoned prayers 4-6 on the basis that they were preemptive.

[6] The applicant's case, simply put, is that he is seeking leave to file a supplementary record of appeal to the record of appeal. This supplementary record of appeal will contain the Court of Appeal

judges' notes and the certified copy of the Order of the Court of Appeal which the applicant has not yet obtained. Counsel submitted that Rule 33(6) of the Supreme Court Rules allowed them to file a supplementary record of appeal without leave of the Court within 15 days of the lodging of the record of appeal. He contended that they anticipated that the said documents could not be filed within 15 days as provided by the Rules. He submitted that as the record of appeal was lodged on 9th May 2014 and the 15 days will lapse on the 24th May 2014. Further, that the settling of terms is set for 3rd June, 2014 and the 15 days will have lapsed by that time. Counsel further submitted that the notice of appeal was filed on 10th April, 2014 and the Rules provided for the filing of the petition and record of appeal within 30 days from the date of filing the notice of appeal. He contended that the 30 day period expired on 10th May, 2014.

[7] Mr. Khaseke for the 1st and 2nd respondent submitted that what the applicant was seeking at this juncture was speculative and premature as he could not seek leave to file documents that were not ready. Counsel contended that the appellant sought leave for an open ended period; he was not clear or certain on when he would file the supplementary record. He contended that based on the Supreme Court Rules, 2012, an appellant was required to file a supplementary record of appeal without the leave of the Court 30 days of the lodgement of the appeal. He submitted that in accordance to the period provided for in the Rules, the time frame expires on 9th of June 2014. As such, the applicant will still be within time to file a supplementary record of appeal without requiring the leave of the court. Counsel contended that even if it went beyond that, he would still be at

liberty to seek the leave of the Court. He concluded that it was not the opportune time for the Court to hear the applicant's prayer.

[8] Counsel for the 3rd respondent, Mr. Munyithya was also of the view that prayers 2 and 3 were not necessary at this stage and he adopted the position of his colleague Mr. Kaseke in that respect. Counsel also submitted that there were two reasons why this prayer was unavailable to the applicant. Firstly because the applicant should have invoked the provisions of Rule 53 of the Supreme Court Rules for extension of time for filing his record of appeal if he did not have all the documents at the time of lodging the petition and the record of appeal. He contended that once the applicant filed a defective record of appeal, he could not appear before the court and ask for leave to file a supplementary record of appeal. He submitted that this court has pronounced itself on this aspect in *the Law Society of Kenya v Centre for Human Rights and Democracy & 12 others* 2014 (eKLR). He contended that despite the law being categorical on the procedure to be followed, Counsel had gone astray the legal path. He contended that in the absence of an explanation for this, this prayer was thus not available.

[9] Counsel contended that the second reason why this prayer was unavailable was that there was the assumption that the petition filed on the 9th of May, 2014 satisfied the conditions of Article 163(4)(b) of the Constitution. Counsel contended that it did not thus *petition 15 No. of 2014* which was the basis of this motion was filed without jurisdiction. He contended that it was not upon an applicant to judge for themselves that a

petition falls under Article 163(4) (b); this could only be certified by the court.

[10] Counsel submitted that counsel for the applicant was silent on what issue of constitutional application or interpretation was before this court. Counsel contended that the only issue which emanated from the Court of Appeal was the interpretation of Article 159 (2) (d). Counsel contended that the issue as to whether this provision deals with substantive or procedural law has already been determined by this Court in the ***Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 others*** 2013 (eKLR) (Raila Odinga decision). Counsel therefore submitted that as this was the route of the petition, it would serve no purpose to grant this prayer. Counsel contended that the application before the Court was fatally defective and that the appeal itself could not stand. He therefore urged the court to strike out petition, dismiss application with costs.

[11] In response, Counsel for the applicant contended that Rule 53 of the Supreme Court Rules only applied if an applicant has filed within 30 days. Counsel contended that it was incorrect to state that they required an extension of time. Counsel submitted that they were before the Court due to the urgency of the appeal in case they were unable to get the documents on time-the 15 days granted under Rule 33(6). On the issue of Article 159 of the Constitution, he contended that this was premature at this stage and Counsel for the respondent could only raise it at the hearing of the appeal. This notwithstanding, he asserted that Counsel for the respondent had already admitted that Article 159 was an issue for interpretation at the

Court of Appeal and this fell squarely within the dictates of Article 163 (4) (a) and the supreme Court could now determine whether the Court of Appeal correctly applied the ***Raila Odinga*** decision.

B. ISSUES FOR DETERMINATION

[12] Upon perusing the pleadings of the parties and upon hearing counsel for the parties we have extracted the following issues for determination:

- (i) Whether the applicant is within the statutory timelines.
- (ii) Whether this Court can extend time while the applicant is still within time.

B. ANALYSIS

Statutory timelines on filing appeals in election disputes

[13] The judgement of the High Court was delivered on 23rd September, 2013. The applicant being dissatisfied with that decision filed an appeal at the Court of Appeal Malindi on 23rd October 2013. A perusal of the record and a closer reading of the Court of Appeal ruling delivered on 8th April 2014 reveal that the record of appeal filed by the applicant was incomplete. It is clear that a complete record of appeal was not filed by the applicant despite being given several opportunities by the Court to do so. It is also clear that Counsel for the respondents raised a preliminary objection seeking to strike out the appeal on the ground that it was incompetent since the decree of the High Court in the record was not certified as required by Rule 87(1) of the Court of Appeal Rules, 2010.

[14] Upon hearing submissions of counsel for all parties on the preliminary objection, the Court of Appeal delivered its ruling on 8th April, 2014. It held that it lacked jurisdiction to entertain the appeal since the failure by the appellant to include a certified decree was fatal to the appeal in view of the fact that a decree is a primary document that could not be included in the record by way of a supplementary record of appeal. The applicant then filed a notice of appeal at the Court of Appeal Malindi on 10th April, 2014 signifying his intention to appeal against the ruling of the Court of Appeal (H.M. Okwengu, A. Makhandia and F. Sichale JJA) dated 8th April 2014.

[15] Article 87(1) of the Constitution provides that *Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes*. Article 105(2) of the Constitution stipulates that the High Court shall hear and determine an election petition within six months of the date of filing. Article 105(3) of the Constitution provides that Parliament shall enact legislation to give full effect to this Article. The framers of the Constitution intended that election disputes be determined within the shortest time possible without undue delay.

[16] Section 85A of the Elections Act, 2011 requires that an appeal from the High Court on Election Petitions be filed within 30 days of the judgement of the High Court. It further requires that the Court of Appeal hears and determines that appeal within 6 months from the date of filing. The appeal in this matter was filed at the Court of Appeal at Malindi on 23rd October, 2013. Computing time on the basis of the timelines set in the Elections Act, 2011 the Court of Appeal had 6 months within which to determine the appeal filed before it starting from 23rd October 2013. In this regard, the

time within which the Court of Appeal had to hear and determine the appeal lapsed on 23rd April, 2013. Not even an application for extension of time as the one filed before us has the aptitude to resuscitate that mandate of the Court of Appeal which has already expired.

[17]The appellant has failed to comply with statutory timelines on filing of an appeal in this electoral dispute. It is incumbent upon an aggrieved party to see to it that Constitutional and statutory timeline have been complied with despite any challenges that he may encounter in the filing as well as the prosecution of his matter whether at the trial Court or on appeal especially if it is evident that by exercise of due diligence he is able to overcome such challenges. We are not convinced that the appellant exercised due diligence in ensuring that his record of appeal at the Court of Appeal was complete neither are we persuaded that he was diligent in prosecuting his appeal.

Prerequisites of filing an appeal at the Supreme Court

[18]For a competent appeal to lie before this Court it must comply with the provisions of Rule 33(1) of the Supreme Court Rules, 2012 which provides that:

An appeal to the Court shall be instituted by lodging in the registry within thirty days of the date of filing of the notice of appeal—

- (a) a petition of appeal;***
- (b) a record of appeal; and***
- (c) the prescribed fee.***

Rule 33(2), (3) and (4) further provide for the specific documents that must be contained in the record of appeal for it to be complete.

[19] This Court has pronounced itself on what an appeal is in the case of ***Law Society of Kenya versus Centre for Human Rights and Democracy & Others***, Supreme Court Petition 14 of 2013. This Court held at paragraph 36, that:

The use of the word ‘shall’ in Rule 33(1) suggests the mandatory nature of the rule, requiring strict adherence to the components of the rule. Thus, a strict reading of rule 33(1) leads to the conclusion that an appeal comprises the Petition of Appeal, the Record of Appeal, and the prescribed fee.

It further held, at paragraph 38 and 39, that:

The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it.

[39] If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine “the appeal” on the basis of these two, such

an appeal would be incomplete and hence incompetent. Indeed this is the gist of Rule 33(1) of the Supreme Court Rules.

Rule 33(6) provides that:

Where a document referred to in sub-rules (3) and (4) is omitted from the record of appeal the appellant may within fifteen days of lodging the record of appeal, without leave, include the document in a supplementary record of appeal.

Rule 53 is also instructive on extension of time. It stipulates that:

The Court may extend the time limited by these Rules, or by any decision of the Court.

[20] It is evident that, pursuant to Rule 33(6) the applicant is still within time to file a supplementary record of appeal without leave of the Court. We find that this is not the appropriate time to apply for extension of time since time is still running. A party seeking extension of time to file an appeal pursuant to Rule 33 can only do upon expiry of the prescribed time. This Court will not extend time before expiry of the stipulated time.

[21] We also note that this matter was not heard on its merits by the Court of Appeal. We have pronounced ourselves on the issue of this Court's

jurisdiction in ***Peter Oduor Ngoge versus Hon. Ole Kaparo & 5 Others***, Supreme Court Petition 2 of 2012 at paragraph 29 and 30 where we stated that:

[29]...The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals. In the instant case, it will be perverse for this Court to assume a jurisdiction which, by law, is reposed in the Court of Appeal, and which that Court has duly exercised and exhausted.

[30] In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.

[22] Consequently, if we were to entertain this application and subsequently hear the intended appeal we would, in effect be usurping the jurisdiction of the Court of Appeal. It would also be tantamount to hearing

an appeal that has not gone through the chain of Courts in the Constitutional set-up. This will not do.

D. ORDERS

Upon considering the application and after hearing the representations of Counsel we make the following orders:

1. The application dated 8th May, 2014 is hereby dismissed.
2. The applicant shall bear the costs of this application.

DATED and DELIVERED at NAIROBI this 28th day of May, 2014.

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J.B. OJWANG
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA