

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
AT NAIROBI

(Coram: Maraga, CJ & P, Ibrahim, Ojwang & Wanjala & Njoki SCJJ)

PETITION (APPLICATION) NO. 18 OF 2018

-BETWEEN-

HON. ANUAR LOITIPTIP APPLICANT

-AND-

**THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION 1ST RESPONDENT**

MOHAMED DAN ALI 2ND RESPONDENT

ALBEITY HASSAN ABDALLA 3RD RESPONDENT

RULING

[1] Following the 8th August, 2017 general elections, the Applicant, Hon. Anuar Loitiptip, was declared the duly elected Senator for Lamu County. His election was unsuccessfully challenged in the High Court by the 3rd Respondent. Aggrieved by the High Court decision, the 3rd Respondent moved to the Court of Appeal on appeal. In a judgment delivered on 12th July, 2018, the Court of Appeal allowed the appeal with the consequence that the Applicant's election as Senator for Lamu County was nullified and a fresh election ordered.

[2] Aggrieved by that nullification by the Court of Appeal, the Applicant moved to this Court and filed a Notice of Motion application seeking stay orders against the execution of the Court of Appeal decision pending the hearing and determination of the appeal. He subsequently, filed his appeal on 24th July 2018.

The stay application was granted by the Court in a ruling delivered on 1st August, 2018.

[3] During the pendency of the appeal before this Court, on 6th September 2018, the Applicant filed this Notice of Motion application dated 4th September, 2018 in which he seeks the following orders re-produced verbatim:

- 1. This application be certified as urgent (spent).**
- 2. The time for filing a Supplementary Record of Appeal under the provisions of the Supreme Court Rules, 2012 be enlarged.**
- 3. The Supplementary Record of Appeal dated the 14th day of August, 2018 and filed on the 15th day of August, 2018 be deemed to be properly filed and served on the Respondents' advocates on record.**
- 4. The costs of this Application be provided for.**

[4] We have perused the grounds in the body of the application and the Supporting Affidavit sworn on 4th September, 2018 by counsel for the Applicant, Mr. Binyenya Benjamin. The crux of the affidavit is that the appeal (including the Record of Appeal) was filed and served within the prescribed time under the Supreme Court Rules, 2012. That inadvertently however, counsel for the Appellant/Applicant forgot to include the '*Submissions of the Parties at the Court of Appeal*' in the Record of Appeal. That further, under the applicable Court of Appeal Rules, it is the substantially successful party who is tasked with preparing a draft order for approval by other parties within fourteen (14) days from date of judgement. The Applicant submits that the 3rd Respondent was the successful party in the Court of Appeal but by 14th August, 2018 he had not prepared the draft order. Consequently, the Applicant's counsel was forced to prepare the same, which was approved by counsel for other parties on the same day.

[5] It is subsequently thereto that approval of the draft order by parties that on 15th August, 2018, the Applicant filed a Supplementary Record of Appeal dated 14th August 2018 which includes: *the Parties Submissions at the Court of Appeal, a letter dated the 14th day of August, 2018 by the Applicant's Advocates on record to the firm of Aboubakar, Mwanakitina & Co. Advocates and a certified copy of the Court of Appeal order in Malindi Election Petition Appeal No. 2 of 2018*. He prays that this Supplementary Record of Appeal be deemed as properly filed and served. We have also considered the Applicant's Written Submissions dated 4th September 2018 and filed on 6th September 2018 wherein: the Applicant reiterates the averments in the supporting affidavit and urges that Rule 33(6) of the Court Rules envisages a situation where a party is allowed to make an application for leave to file a supplementary record of appeal.

[6] He also submits that pursuant to sections 3(a) and 21(3) of the Supreme Court Act and Rule 53 of the Court Rules, the Court has jurisdiction to extend time so as to determine the real question in dispute in the appeal before it. He relies on this Court's decision in ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others*** [2014] eKLR and submits it was held that "*this Court will apply Article 159 of the Constitution, in order to render substantive justice*".

[7] During the mention of the Application before the Deputy Registrar of the Court on 10th September, 2018, Mr. Tiego, Counsel for the 1st and 2nd Respondents indicated that they were not opposed to the application. Hence they filed no document in response to the application.

[8] The 3rd Respondent opposed the application via his Grounds of Objection, Written Submissions and List of Authorities all filed on 12th September 2018. The crux of his Grounds of Objection is that Rule 33(4)(d) of the Court Rules provides that a certified decree or order is one of the documents contained in the record of appeal. That where the same is omitted, then pursuant to Rule 33(6), within

fifteen (15) days of lodging of the Record of Appeal, the document may be included in a Supplementary Record of Appeal without leave. However, he submits that the Applicant did not utilize this opportunity to cure his omission. Hence the Record of Appeal is incompetent and should be struck off.

[9] It is also urged that the Court has no jurisdiction to grant leave to file a Supplementary Record of Appeal out of time in an Election Petition Appeal because pursuant to Article 87(1) of the Constitution, there is enacted legislation on timely settling of electoral disputes and that time cannot be extended by the Court. He submits that Rule 33(6) is jurisdictional and failure to comply with it is fatal to the Record of Appeal and the petition. The 3rd Respondent reiterates the content of the Grounds in Opposition to the application, particularly on the timely settling of electoral disputes in his Written Submissions.

[10] We have considered the Application and the tenor of the rival submissions of the parties. First, as regards the 3rd Respondent's submission that this Court lacks jurisdiction to extend the time or grant leave to file a Supplementary Record of Appeal under Rule 33(6) of the Court Rules, we reiterate our jurisprudence in the ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** [2014] eKLR where we held that under Rule 53, the Court is empowered to extend the time for doing anything provided for in the Rules, which Rules also include Rule 33(6). It is perplexing for the 3rd Respondent to submit that extension of the time to file the Supplementary Record of Appeal will infringe on the timely disposal of the election petition appeal. He has not demonstrated how that will be. In fact the appeal has already been set up for hearing.

[11] The insinuation that the application of Rule 33(6) in election matters would offend Article 87(1) of the Constitution cannot stand and is not convincing. In any event, the documents sought to be allowed by way of the Supplementary Record

of Appeal are already in the possession of the 3rd Respondent and he was privy to them from the Court of Appeal. It is not any new evidence being introduced.

[12] We have also considered that the appeal in this matter having been filed on 24th July 2018, the Applicant had until 8th August 2018 to file a Supplementary Record of Appeal without leave. But could he have done so? The Applicant has set out the reasons why he could not, particularly that one of the omitted documents, the order, had not been prepared by the 3rd Respondent. We are inclined to accept the Applicant's explanation since the 3rd Respondent has not responded to it, hence it remains unrebutted. The Applicant's counsel is also candid enough to admit an inadvertent omission to include Parties' submissions in the Court of Appeal in the Record of Appeal he filed in this Court. Again, the 3rd Respondent makes no response to this. The 3rd Respondent also fails to outline any prejudice that will be occasioned to him if the extension is granted and the Supplementary Record of Appeal filed.

[13] Consequently, we are inclined to allow the application which we hereby do allow in the following terms:

- (i) The Notice of Motion dated 4th September, 2018 is hereby allowed.**
- (ii) Time for filing a Supplementary Record of Appeal under Rule 33(6) of the Rules is enlarged; and as a consequence:**
- (iii) The Supplementary Record of Appeal dated 14th August 2018 and filed on 15th August 2018 is deemed properly filed and served on the Respondent's advocates on record.**
- (iv) Costs of this application shall abide the appeal.**

DATED and DELIVERED at NAIROBI this 5th Day of October, 2018

.....
D.K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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

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

.....
S.C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

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

REGISTRAR
SUPREME COURT OF KENYA