

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ; Tunoi, Ibrahim, Ojwang & Njoki, SCJJ.)

PETITION No.15 OF 2014

–BETWEEN–

BWANA MOHAMED BWANA..... APPELLANT

–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
(Okwengu, Makhandia and Sichale, JJA) dated 8th April, 2014 in
the Election Petition Appeal No. 40 of 2013)*

RULING OF THE COURT

A. BACKGROUND

[1] This is a petition of appeal by Bwana Mohamed Bwana (the appellant) filed in this Court on the 8th May, 2014. The petition arises from a Ruling of the Court of Appeal, that dismissed the appellant’s appeal to that Court.

[2] The facts are that on 23rd October, 2013 the appellant, a voter in Lamu County and who participated in the general elections of 4th March 2013, filed an election petition in the High Court at Malindi being Election Petition No. 7 of 2013. The petition was dismissed by *Muchemi, J* on 23rd September, 2013.

[3] The appellant then appealed to the Court of Appeal on 23rd October, 2013 challenging the Judgment of the High Court, on twenty grounds as contained in the memorandum of appeal.

[4] On 7th November, 2013 the matter was listed for directions but was rescheduled for mention on 20th November, 2013 when it was realized that Mr. Abubakar, learned counsel for the appellant, had not duly served the respondents with the amended record of appeal.

[5] On 20th November, 2013 it was brought to the attention of the Court that the 1st and 2nd respondents had not been served with the original record of appeal, and that the amended record was incomplete. The 3rd respondent complained too, that he was not served with the amended record of appeal, neither had he been served with the original record of appeal. Because of this lack of a proper record of appeal, the respondents had on divers dates prepared and filed applications to strike out the appeal, and the Court directed that they be heard on 28th November, 2013.

[6] On 28th November, 2013 the applications for striking- out were heard, and a Ruling delivered on 14th February, 2014– the Court directing that the record of

appeal be deemed as properly filed, and served on the parties and that the appeal be fixed for a hearing.

[7] On 17th March, 2014 when the matter came up for a hearing, it was noted yet again, that the record of appeal was incomplete. No hearing took place and the matter was adjourned to 27th March, 2014 with directions, *inter alia*, that the appellant prepare and serve a further -amended record of appeal on or before 21st March, 2014.

[8] On 27th March, 2014 counsel for the 3rd respondent signaled to the Court that the further-amended record still had certain anomalies, which counsel for the appellant admitted. At this point learned counsel, Mr. Munyithya jointly with learned counsel, Mr. Khaseke orally sought leave of the Court to raise a preliminary objection on the competency of the appeal—and this was granted. Mr Munyithya raised certain objections: the further-amended record of appeal lacked the certificate of correctness required under Rule 87(5) of the Court of Appeal Rules, 2010; the appeal offends Rule 87(1)(h), on account of the non-certification of the decree; and the evidence of the respondents' eight witnesses was missing from the record.

[9] In a Ruling delivered on 8th April, 2014, *Okwengu, Makhandia and Sichale JJA* upheld the preliminary objection by the respondents, holding that the appeal did not comply with the mandatory provisions of Rule 87(1), with the effect that

the Court lacked jurisdiction to entertain the appeal. It is precisely that Ruling, that led to the appeal now before us.

B. PARTIES' RESPECTIVE CASES

(i) Appellant's Case

[10] Learned counsel, Mr. Abubakar submitted that the Court of Appeal had improperly dismissed his appeal on mere technical grounds, acting on the basis of a preliminary objection raised orally by the respondents. He contended that a similar application was made earlier, being determined on 14th February, 2014, and in which the Court of Appeal had deemed the record as proper: and that on this account, that Court had become *functus officio*, and so the question of the competence of the record of appeal could not be re-visited. Counsel urged that the Appellate Court was now limited to its previous Ruling, and could only direct that the omitted documents be made part of the record.

[11] Counsel submitted that it was an error on the part of the Appellate Judges to elevate Rule 87(1), which is a technical provision, to jurisdictional status, contrary to Article 164 of the Constitution and Section 85A of the Elections Act (which convers jurisdiction upon that Court). He urged that treating the technical defaults of the appellant under Rule 87 as conferring jurisdiction was improper, and had led to a miscarriage of justice.

[12] The appellant submitted, on the basis that no more than a technicality was in issue, that this was the exemplary case for invocation of Article 159 of the Constitution, and Section 3A of the Appellate Jurisdiction Act– which elevate the dictates of substantial justice above justifications resting on technicalities.

[13] Learned counsel urged that it was improper for the Appellate Judges to treat the further- amended record as a new record of appeal.

[14] Conscious of the time-limits under Section 85A of the Elections Act, counsel implored the Court to authorize the filing of a supplementary record of appeal in this Court, as a basis of exercise of the Court’s powers to entertain an appeal, under Section 21 of the Supreme Court Act, 2011.

[15] Was this is a proper appeal under Article 163(4)(a) of the Constitution? Counsel answered in the affirmative: firstly, the memorandum of appeal raised a question of interpretation of Articles 38, 78, 81 and 86 of the Constitution.

Secondly, it was urged that the interpretation of Rule 87(1) as a jurisdictional rather than a technical issue, by the terms of Article 159 of the Constitution, is itself a constitutional question, relating to the Appellate Court’s powers under Article 164, and Section 85A of the Elections Act.

(ii). Respondents’ Cases

[16] The respondents submitted that even in this appeal, the record of appeal was still incomplete, contrary to the Rules, because the further- amended record

of appeal (the subject of dispute herein) had not been annexed as part of the record of appeal filed.

[17] Mr. Munyithya submitted that the appellant had been granted leave on several occasions to regularize his record. For instance on 17th March, 2014, the Court of Appeal adjourned the scheduled hearing to 27th March, 2014 to enable the appellant to file and serve a further- amended record of appeal on or before 21st March, 2014. But on the said 27th March, 2014 it was found that certain documents were still missing from the record.

[18] Learned counsel thus attributed negligence to the appellant's counsel, urging that this scenario was unrelated to preoccupation with technicality in the proceedings before the Court of Appeal.

[19] On the issue whether the Court of Appeal was *functus officio*, and could not consider the competence of the appeal, learned counsel recounted the events before 27th March, 2014. He noted that that the appellant had served a further - amended record of appeal on 25th March, 2014, two days before the hearing, which record still had errors already complained of in the preceding five months. It had become necessary in the circumstances, to invoke the provisions of Rule 104 of the Court of Appeal Rules, for leave to raise an objection regarding the competence of the appeal. Counsel urged that this was a proper way of raising the objection, and nothing barred the Court of Appeal from considering the question once more.

[20] Learned counsel relied on the notice of preliminary objection by the 3rd respondent dated 11th June, 2014 and submitted that the Court lacks jurisdiction to hear this appeal. He urged that the appellant ought to have sought a certification from the Court of Appeal that the matter involves an issue of general public importance; and should the Appellate Court have declined, then an application lay to this Court, under Article 163(4)(b) of the Constitution.

[21] Counsel contested the submission that this Court can hear and determine the appeal under Section 21(1)(b) of the Supreme Court Act, on three grounds. Firstly, the further- amended record of appeal has not been placed before the Court; secondly, this Court cannot usurp the jurisdiction of the Court of Appeal, having regard especially to the time -limitation in Section 85A of Elections Act; and thirdly, this Court is bound to exercise its powers in line with its jurisdiction as specified in the Constitution, especially Article 163(4)(b) thereof. Counsel urged that the appeal had not been determined by the Court of Appeal; and therefore, if this Court now entertains the matter, it will have heard an appeal directly from the High Court.

[22] Learned counsel, Mr. Khaseke, for the 1st and 2nd respondents, too, urged that this Court lacks jurisdiction to hear the appeal, or grant the Orders sought in the petition of appeal. He submitted that this category of appeal falls neither under Article 163(4)(a), nor 163(4)(b) of the Constitution— because the Ruling

that gave rise to this petition arose from a procedural question relating to compliance with the Court of Appeal Rules.

[23] Before the Appellate Court, it was urged, no specific provision of the Constitution was under interpretation or application, and the Court correctly made a finding that it could not consider the matter, for want of jurisdiction, there being no proper record of appeal before it.

[24] Learned counsel contested the appellant's prayer for a declaration that Rule 87(1) is incompatible with Article 159(2) of the Constitution, for the reason that this had not been an issue before the High Court or the Court of Appeal. It is clear that the issue before the Court of Appeal was whether non-compliance with the Rule could be remedied by Article 159 of the Constitution. Counsel urged that the constitutionality of Rule 87(1) was not the premise for the Ruling of 8th April, 2014. A contest to constitutionality, counsel submitted, is a question for the High Court under Article 165(3)(d) of the Constitution, and not for this final appellate Court.

[25] Counsel agreed with Mr. Munyithia's submission that Section 21 of the Supreme Court Act does not confer on this Court jurisdiction to hear an appeal on a matter that has not been determined in substance by the Court of Appeal.

[26] Learned counsel Mr Khaseke, after recounting the history of the matter, submitted that the Ruling of 14th February, 2014 had allowed the appeal to be heard, notwithstanding the fact that the initial record of appeal had not been

served up on the respondents; he urged that the Court of Appeal was *functus officio*, and could not consider the objection as to the competence of the appeal.

[27] Mr. Khaseke expressed agreement with the Court of Appeal, that a new record of appeal ought to have been accompanied by a certificate of correctness. Counsel urged that it was in all respects proper for the Court of Appeal to allow the 3rd respondent to raise objections to the record of appeal, when the matter came up for hearing on 27th March, 2014 as this was the only time such an objection could have been raised, in view of the time of service of the material documents.

C. ISSUES FOR DETERMINATION

[28] We have examined the petition of appeal and the responses, as well as the written and oral submissions; and from these, two main issues emerge as the case on appeal:

(i) whether this Court has jurisdiction to admit and hear this appeal; and

(ii) whether the remedies sought can be granted by this Court

[29] Does the appellant's cause meet the requirements of Article 163(4)(a) of the Constitution? We have to consider whether the Appellate Court's disposal of the dispute before it involved interpretation or application of the Constitution; and to establish whether the petition of appeal specifically contests the findings and

conclusions of that Court, on those constitutional questions. The relevant principle emerges from this Court's decision in ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Limited & Another***, Sup. Ct. Petition No. 3 of 2012 where it is thus stated:

“... the appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)” (emphasis supplied).

[30] From this guideline, we proceed to the next step: to examine the Ruling of 8th April, 2014—the basis of the instant appeal—to apprehend what interpretation or application of the Constitution the Appellate Court exercised, to dispose of the matter before it.

[31] It is clear to us that, the main controversy which *Okwengu, Makhandia* and *Sichale, JJA.* were called upon to determine came by way of an oral preliminary objection, on the eve of the hearing. On that occasion, learned counsel, Mr. Munyithya sought leave to raise a preliminary objection, on the basis that the

appeal was incompetent, for lack of a complete record of appeal. Recording the exact happening of that day, the Court observed:

“On his part Mr. Munyithya pointed out that the further-amended record still manifested missing primary documents. He therefore successfully sought leave to raise a preliminary objection on the competency of the appeal.”

[32] Having allowed counsel to raise the objection, the learned Judges observed as follows:

“After a brief consultation the Court directed that the preliminary objection on jurisdiction be dealt with before hearing of the main appeal.”

[33] Against that background, as we note, Mr. Munyithya then urged his case on three points: (a) that a certificate of correctness earlier filed by the appellant bore no relation to the further-amended record of appeal filed on 21st March, 2014, in contravention of Rule 87(5) of the Court of Appeal Rule; (b), that a decree attached thereto had not been certified, contrary to Rule 87(1)(h); and (c), that certain evidence of the respondents’ eight witnesses was missing from the record.

[34] On these points, the Court’s findings were that: firstly, the appellant had amended his appeal on 4th November, 2013, and had made further amendments on 21st March, 2014 which, unlike a supplementary record, constituted a fresh

record, requiring a certificate of correctness. Secondly, the learned Judges held that the decree filed was not certified, as required by Rule 87(2)(iv). On the claim of incompleteness of the record, the Court ruled that the provisions of Rule 87 could not be circumvented, on the pretext of omissions or default by the Registry. The Appellate Court found that the appellant's advocates had not exercised due diligence, in timeously annexing all relevant parts of the record.

[35] Being thus specific in its terms, the Appellate Court in its Ruling of 8th April, 2014, duly determined the question of the competence of the record of appeal, under Rule 87 of the Court of Appeal Rules. The primary question was whether the governing rules of procedure, specifically Rule 87 of the Rules, had been complied with. And there was a secondary issue, predicated on the primary question, which the learned Judges also ruled upon, namely: whether a failure of compliance with Rule 87 could be cured, or excused by virtue of Article 159 of the Constitution.

[36] In our perception, hardly any constitutional question had arisen before the Court of Appeal on 27th March, 2014, when the objection to the competence of the appeal was raised. A dispute as to whether an appeal filed before a Court meets the requirements of a rule, or other procedural standards, does not transform it into a constitutional question, merely because recourse could have been had to a constitutional provision, in this case, Article 159(2)(d).

[37] In his petition before this Court, the appellant challenges the findings of the Court of Appeal in paragraphs 1- 9 of the Ruling, without demonstrating how any constitutional question has been elicited for our consideration under Article 163(4)(a).

[38] The appellant submitted that the Appellate Court’s jurisdiction is as provided in Article 164 of the Constitution, and as conferred by Section 85A of the Elections Act, 2011, and that, therefore, that Court was wrong in declining jurisdiction to consider the appeal for non-compliance with Rule 87(1) of the Court of Appeal Rules.

[39] Rule 87 prescribes the contents of a record of appeal, such as will render such a cause a competent one before the Court of Appeal. It specifies the requisite documents to form part of the bundle to accompany the memorandum of appeal—all being such material as will enable the Court to make a determination on the issues of law and fact that may be the subject of contest.

[40] In the case of ***Law Society of Kenya v. Centre for Human Rights and Democracy & 12 Others*** Sup. Ct. No. 4 of 2014, this Court held 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.”

[41] Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, ***Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others***, SC. 11/2012, Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:

“A court is competent, that is to say, it has jurisdiction when—

- 1. it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and*
- 2. the subject matter of the case is within its jurisdiction, and no feature in the case prevents the court from exercising its jurisdiction; and*
- 3. the case comes before the court initiated by the (due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction)” (emphasis supplied).***

[42] The foregoing passage sets proper context for the Appellate Court’s Ruling in the instant matter (at page 14) when it properly concluded that, due to non-

compliance with the mandatory provisions of Rule 87(1), it lacked jurisdiction to entertain the appeal.

[43] We understand the learned Judges to have been saying that the omission of the mandatory documents from the record, had the effect of rendering the Court incapable of adjudicating upon the issue placed before it on appeal, as certain conditions set by law had not been met. The Court could not exercise its jurisdiction where lawful, prior requirements had not been fulfilled. That conclusion, by no means, imports the inference that the Court of Appeal misapprehended the constitutional or statutory basis of its powers under Article 164 and Section 85A of the Elections Act.

[44] We find, in conclusion, that the petition of appeal dated 8th May, 2014 incorporates no issue involving constitutional interpretation or application under Article 163(4)(a) of the Constitution. Accordingly, we hold that the Court has no jurisdiction to consider any other issue arising for determination in this appeal.

D. ORDERS

[45] The following Orders, therefore, are in our view inevitable:

- (i) *The Preliminary Objection by the 3rd respondent dated 11th June, 2014 is upheld.***
- (ii) *The petition of appeal dated 8th May, 2014 is dismissed with costs.***

DATED and DELIVERED at NAIROBI this 19th Day of February, 2015.

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K.H. RAWAL

**DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME
COURT**

.....

P. K. TUNOI

JUSTICE OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S.N. NDUNGU

JUSTICE OF THE SUPREME COURT

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

REGISTRAR

SUPREME COURT OF KENYA