

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Coram: Ibrahim and Ojwang, SCJJ)
CIVIL APPLICATION NO 2 OF 2014

-BETWEEN-

1. NAOMI WANGECHI GITONGA 2. HANNAH WARUKIRA KABUI 3. ANN NYAMBURA WANG'OMBE 4. LEAH MUMBI NJOROGI	}	 APPLICANTS
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-AND-

1. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC) 2. ROSE WAIRIMU KAMAU 3. SALOME WAIRIMU KAGO 4. ELIZABETH MUTHONI WANJAU 5. MARY MUTHONI NJERU	}	 RESPONDENTS
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(An application for extension of time to file a Notice of Appeal against the Judgment and Orders of the Court of Appeal in Nairobi Civil Appeal No 169 of 2013, Rose Wairimu Kamau & Others v The IEBC (Maraga, Mwera and J. Mohammed JJ.A) dated 8th November, 2013)

RULING

I. INTRODUCTION

[1] The matter before this Court is an application for extension of time within which to file a Notice of Appeal. The said Notice of Appeal is for the purpose of appealing against the judgment and orders of the Court of Appeal in ***Rose Wairimu Kamau and Others v IEBC***, Nairobi Civil

Appeal No. 169 of 2013. The applicants filed this application on 13th February, 2014 under a certificate of urgency accompanied by a supporting affidavit, a Notice of Motion and an affidavit in support of the Notice of Motion.

II. BACKGROUND

[2] This application originates from the actions of the 2nd to 5th respondents, who filed a petition in the High Court (***Petition No. 236 of 2013***) challenging the decision of the Independent Electoral and Boundaries Commission (IEBC). They contended that although they were members of TNA and their names were appearing on the initial TNA list, the IEBC gazetted names of other persons who appeared on the TNA list but were not registered with TNA. They contended that IEBC's action was in contravention of the Constitution, the Elections Act, 2011 (Act No. 24 of 2011) and the Elections Rules. They contended that the IEBC had ignored the constitutional requirement of regional balance. The High Court (Ngugi, Majanja and Korir, JJ) dismissed the Petition on 12th July 2013.

[3] The respondents were dissatisfied with the High Court's decision, and filed an appeal at the Court of Appeal. The Court of Appeal, in ***Rose Wairimu Kamau and 3 Others v IEBC***, Civil Appeal No. 169 of 2013 (Maraga, Mwera and Mohammed, JJA) in a decision dated 8th November, 2013 allowed their appeal and set aside the TNA nomination for the Nyeri

County Representatives. The Court of Appeal found that the nominations were done too late, and that the High Court and the IEBC were not to blame as they were short of time. The Court of Appeal also made the following orders:

“1. THAT TNA shall within 15 days of the date hereof submit to the IEBC a proper party list;

“2. THAT the IEBC shall in turn gazette the nominees within 7 days of receipt of the list;

“3. THAT each party bears its own costs of the appeal.”

- [4] In reaching its decision, the Court of Appeal agreed with the High Court’s decision in ***National Gender and Equality Commission v the IEBC and Others***, Petition No. 147 of 2013; [2013] eKLR. In this decision, the High Court had held that once nominees to Parliament and County Assemblies have been gazetted, any challenge to their membership must be by way of an election petition. However, the applicants have proceeded on a different basis: the complaint was lodged with the IEBC, and then a constitutional petition was filed in the High Court *before* the nominees were gazetted.

III. THE APPLICATION

- [5] It is on record that the applicants were not at first aggrieved by the decision of the Court of Appeal, and at no time did they show any intention of

appealing therefrom. However, on 13th February, 2014, they filed a Notice of Motion supported by an affidavit under certificate of urgency, seeking *extension of time to file a Notice of Appeal* against the judgment and orders of the Court of Appeal. They founded their application on the following grounds:

*“a) THAT the applicants are gravely aggrieved by the judgement of the Court of Appeal dated and delivered on 8th November, 2013 in **Rose Wairimu Kamau and Others vs IEBC**, Nairobi High Court Civil Appeal No. 169 of 2013, and they have a right to appeal as of right as per Article 163 (4) (a) of the Constitution.*

“b) THAT though the applicants are not aggrieved by the judgement of 8th November, 2013 to the extent that it quashed the nomination of representatives of the National Alliance (TNA) Party to the Nyeri County Assembly, nominated vide Gazette No. 9794 of 2013, the IEBC and the TNA party have implemented the judgement in such a way that the applicants cannot secure substantive justice and effective remedy without appealing against the same.

“c) THAT by the time that judgement of 8th November, 2013 was implemented, the 14 days period of lodging a Notice of Appeal to the Supreme Court had expired, and therefore it is necessary and prudent for the Supreme Court to extend the period of lodging the Notice of Appeal.

“d) THAT the applicants have lodged an election petition with the Nyeri Resident Magistrate, challenging the nomination of members of the Nyeri County Assembly and Gazette Notice No. 15096 published in the Kenya Gazette dated 29th November, 2013. The

election petition must be concluded within 6 months, and thus it is important for the application to be heard and determined before the hearing date of the petition

“e) The relief sought will uphold the letter and spirit of Articles 27, 38, 163 (4) (a) and 259 of the Constitution and the rule of law.”

[6] As the matter was filed under certificate of urgency, it came up before a one-judge Bench on 14th February, 2014; and Ibrahim SCJ. observed that time was of the essence, in view of the time-lines set for the disposal of election disputes in the Court of Appeal and the Supreme Court. He made an order certifying the matter as urgent, and set it down for hearing *inter partes* on 25th February, 2014 before a two-judge Bench. He referred the file to the Chief Justice and/or the Deputy Chief Justice to constitute a Bench, and further ordered that the application and the order be served upon the respondents within three working days.

[7] The matter was heard *inter partes* on 25th February, 2014.

IV. SUBMISSIONS BY THE PARTIES

(a) Submissions by the Applicants

[8] The applicants were represented by learned counsel, Mr. Kibe Mungai, who submitted that they were seeking extension of time to file a Notice of Appeal at the Court of Appeal. He submitted that the earlier appeal before the Court of Appeal (***Civil Appeal No. 169 of 2013***) had been against

the decision of the High Court in relation to the *enforcement of fundamental rights*; but now, the applicants had a right to appeal *as of right*, by the terms of Article 163 (4) (a) of the Constitution.

[9] Mr. Mungai submitted that under Rule 30 of the Supreme Court Rules (now Rule 31 of the Supreme Court Rules, 2012), an aggrieved party may file a Notice of Appeal *within 14 days of the judgement or ruling*. He urged that in this instance, on the 8th of November, 2013 the Court of Appeal had nullified and set aside the TNA nominations for the Nyeri County Assembly, and ordered certain things to be done, for purposes of implementation of the decision, namely: TNA to submit to the IEBC a proper party-list within 15 days; and IEBC to gazette the nominees within 7 days of receipt of the list.

[10] Counsel submitted that although TNA and IEBC attempted to comply with the orders, they *secured a result that was inconsistent with the Court of Appeal's judgement*, and with the law. Mr. Mungai urged that they failed to comply with the orders, firstly, by generating a new list without going through the proper nomination process; and secondly, after the names were generated on the new list, the names of the applicants were removed, and additional names were added. This meant, it was submitted, that the IEBC amended a previous *Gazette* notice, to remove and replace the names

of the applicants, despite the fact that the Court of Appeal had nullified the entire Nyeri list.

[11] Mr. Mungai submitted that he was conscious of the fact that the Court of Appeal is the proper forum to deal with any non-compliance with its orders. However, he submitted that the applicants' fundamental grievance is that, as it turns out, the decision of the Court of Appeal, on the merits, was wrong as a matter of law; and the problem arose in the first place, from the decision being wrong in law; and secondly, from the mode of implementation. He submitted as an example, that the decision had ordered that the list be generated within 15 days. However, under the TNA Constitution, 15 days is shorter than the period of time allowed for nominations. Consequently, the question that only the Supreme Court can answer is *whether the Court of Appeal was right or wrong under the law*. He urged that this was the primary issue, and the implementation issue was secondary.

[12] Mr. Mungai submitted that because the names had already been gazetted, it would be difficult to deal with incorrect implementation of the Court of Appeal decision through the election petition already filed at the Magistrate's Court.

[13] Learned counsel submitted that there is a direct line of appeal against the Court of Appeal's decision: Article 27 of the Constitution dealing with

equality and freedom from discrimination, and Article 27 (1) stipulating as follows:

“Every person is equal before the law and has the right to equal protection and equal benefit of the law.”

- [14] Counsel noted that the foregoing constitutional provision protects *any person who suffers a loss*, and gives protection under the law through the *right of appeal*. He submitted that Rule 53 of the Supreme Court Rules, 2012 envisages that the Court has the authority to extend time if it is justifiable. Rule 53 thus provides:

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

- [15] However, Mr. Mungai conceded that his clients were lay litigants, and at the time of delivery of the judgement they did not make the best decisions. He urged that there are no circumstances indicating that an extension of time to file the Notice of Appeal will be prejudicial to any party. He noted that the *Court of Appeal’s decision requiring enforcement of the law contrary to the TNA Constitution*, and resulting in the removal of the the IEBC supervisory function over nominations, could be rectified by the Supreme Court without prejudicing the IEBC.

- [16] Counsel urged that the Court of Appeal’s decision violated the applicants’ rights under Article 38 of the Constitution. Article 38 (3)(c) provides as

follows:

“Every adult citizen has the right, without unreasonable restrictions –

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.”

Mr. Mungai submitted that the Supreme Court is the final court in matters of interpretation and enforcement of the Bill of Rights, as in this instance, where the Court of Appeal has made a decision violating the fundamental rights of the applicants.

[17] Finally, counsel submitted that the application was filed in good time. He was referring to the time-lines for the Nyeri election petition, in respect of which the matter is to be lodged within 6 months from the date the petition was filed, that is, 24th December, 2013.

[18] In response to the respondent’s submissions, Mr. Mungai urged that the applicants needed to file the election petition within 28 days of the *Gazette* notice dated 29th November, 2013. They indeed filed the election petition on 24th December, 2013 to beat the deadline; and he submitted that the Courts were on vacation between 21st December, 2013 and 6th January, 2014. Counsel responded to the respondent’s submissions on the issue of delay in filing, by stating that there was no prejudice if the matter were to be filed in December 2013, January 2014 or February 2014 – so long as the

intended appeal was still challenging the *Gazette* notice issued after the judgement. Mr. Mungai submitted that, as to the claim that the matter will prejudice the functioning of the County Assembly, the working of the Assembly is not dependent on its composition; it is dependent on whether the members of the Assembly are properly discharging their duties.

(b) Submissions by the 1st Respondent

- [19] Learned counsel for the 1st Respondent, Ms. Kambuni, submitted that the applicants had sought to invoke the Supreme Court's jurisdiction under Article 163 (4)(a) of the Constitution, yet such jurisdiction did not lie, in light of a variance between ground (c) of the application and the supporting affidavit evidence of Ann Nyambura Wang'ombe. This variance signalled that the applicants were impugning the implementation of the Court of Appeal's decision, rather than the decision itself.
- [20] The learned Senior Counsel submitted that if the fault was with the *decision*, then the applicants must give *reasons for delay* in lodging an appeal. She submitted that the applicants had *agreed to go through the nomination exercise*, in the hope of getting nominated by TNA; and when they were not nominated, they came back to the Courts; had they been dissatisfied with the Court of Appeal's decision they would not have waited for the 15 days, for TNA to go through the exercise of compiling a list, and then continue waiting for the IEBC to gazette the names in the new list.

Counsel submitted that the appeal jurisdiction is being invoked, while the Court of Appeal has not made a decision regarding *the implementation of its orders*.

[21] Learned counsel submitted that in her opinion, there are lacunas in the law, with regard to the procedure available where a party is aggrieved with *the implementation of the Court of Appeal's decision*. The uncertainty is, whether to go back to the Court of Appeal and complain about the implementation process, or move the *High Court*. Counsel submitted that the aggrieved parties should be able to approach the Court of Appeal and, if they insist that their rights have been infringed, then they should move the High Court.

[22] In response to the argument that the applicants were unable to file a Notice of Appeal in time because of the implementation time-lines given by the Court of Appeal, counsel submitted that the decision was given on 8th November, 2013; and TNA then had *15 days* to provide a proper list to the IEBC. This meant that the IEBC should have been given the list on or before *25th November, 2013*. The IEBC was then required to gazette the list *on or before 2nd December, 2013*. Counsel noted that, by the affidavit of Anne Nyambura Wang'ombe, the IEBC gazetted the list *on 29th November, 2013*, which was in fact before the 2nd December, 2013 deadline. Counsel raised a question as to the applicants not filing a petition in *December 2013, January 2014 or February 2014*. Counsel urged that the only

explanation to the delay would be that the applicants were forum-shopping – and that this explains the filing of an election petition at the Nyeri Resident Magistrates Court, while also filing this application for *extension of time to file a Notice of Appeal at the Court of Appeal*. Ms. Kambuni submitted that at the Resident Magistrate’s Court, the applicants are seeking orders to quash the *Gazette* notice of 17th July, 2013 containing the initial list of nominees; and they are also seeking declarations under Articles 90 and 177 of the Constitution. Counsel submitted that though the applicants had yet to file a petition of appeal, the orders being sought before the Magistrate’s Court are similar to the orders being sought at the Supreme Court.

[23] Learned counsel submitted that the County Assembly stood to suffer prejudice: for the initial nominees were removed by the Court of Appeal, and now there is a new lot of nominees only recently gazetted, and such instability is destined to affect the proper functioning of the Assembly.

[24] Counsel submitted that the application before the Court was bad in law, and should be disallowed.

V. ISSUES FOR DETERMINATION

[25] In deciding whether or not to allow the application before the Court, the following issues arise for determination:

- i) Whether the Supreme Court has the power to extend time within which to file a Notice of Appeal at the Court of Appeal, for an intended appeal to the Supreme Court?
- ii) If yes, what are the considerations for granting such an extension?
- iii) If the Supreme Court were to grant an extension of time in this matter, what are the orders available to this Court to make?
- iv) What remedies are available for a party aggrieved by the *implementation* of the Court of Appeal's decision?

VI. DOES IT FALL WITHIN THE SUPREME COURT'S JURISDICTION TO EXTEND TIME FOR AN APPEAL FROM THE COURT OF APPEAL?

[26] Under the Constitution, an appellant may proceed from the Court of Appeal to the Supreme Court in well-specified circumstances: where the complaint in question has been certified as entailing a matter of general public importance or where such a complaint involves the interpretation or application of the Constitution [Article 163 (4)]. The relevant principles applicable to each case are now well settled through case law: ***Malcolm Bell v. Daniel Toroitich arap Moi and Another***, Sup. Ct. Appl. No. 1 of 2013; ***Hermanus Phillipus Steyn v. Giovanni Gneccchi-Ruscione***, Sup. Ct. Appl. No. 4 of 2012 [2013] eKLR.

[27] Although the Court of Appeal has the first opportunity when it determines a matter, to certify or decline to certify it for further appeal in the Supreme Court, the Supreme Court has the competence to reconsider the Court of Appeal's decision on such certification or non-certification.

[28] From a chain of consistent decisions of the Supreme Court, it is already quite clear that, other than in those cases in which there is an appeal as of right beyond the Court of Appeal, it is only after a scrupulous scrutiny, that this Court will admit a case to this last forum of appeal. This Court is guided by a basic principle which has been set out in ***Peter Ngoge v. Francis Ole Kaparo and Five Others***, Sup. Ct. Pet. No. 2 of 2012 [2012] eKLR, as follows:

“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.”

[29] Although the applicants perceive their grievance as entailing the application of the Constitution and, therefore, as a matter in respect of which an appeal to the Supreme Court lies by virtue of Article 163(4)(a) of the Constitution, the true question now before this Court is the failure to comply with time-limits before the Court of Appeal – a matter of procedural arrangements which, but for good cause, falls squarely within the jurisdiction of the Court of Appeal.

[30] On the side of the respondents, doubts have been expressed as to whether the application truly raises a matter of *interpretation or application of the*

Constitution, as contemplated under Article 163(4)(a) of the Constitution: in particular as the affidavit evidence is not clear as to the wrong sought to be redressed; is it *an error of law* on the part of the Court of Appeal? Or is it merely a dissatisfaction with the manner in which clear orders of the Court of Appeal had been implemented? And did such lack of clarity as to the real grievance, then occasion the failure to comply with the prescribed time-limits for lodging an appeal? With such uncertainty, learned Senior Counsel, Ms. Kambuni doubted that there was an issue of constitutional import placed before the Supreme Court in exercise of its proper jurisdiction.

[31] It is apparent to us that meritorious questions of constitutional import inviting interpretation or application, and which therefore fall to the jurisdiction of this Court for purposes of appeal, will readily beckon – but it is not the case here. The applicants’ case is that the Court of Appeal had been in error, by making orders that were inconsistent with the *constitution of a political party*, the TNA: with the consequence that IEBC which has responsibility for the conduct of elections, was disempowered in its supervision of the political party and, as a result, faulty implementation of that Court’s orders took place, compromising the applicants’ political rights. We find no merit in this submission, as it is clear to us that a Court order based on foundations of evidence, submissions and judicial reasoning, bears the *force of law* which lies on a higher plane of authority than the informal regime of a political party’s constitution. Besides, the case mounted on such reasoning, in our view, is marked

by a significant degree of remoteness from the vital commitment established for the Supreme Court under Article 163(4) of the Constitution. Such is not a basis for this Court to assume jurisdiction. We are guided on this question by the principle in the *Peter Ngoge* case [para.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.”

VII DETERMINATION

[32] Accordingly, we hereby decline to assume jurisdiction in this matter; and we disallow the application that we extend time to file a Notice of Appeal in respect of orders made by the Court of Appeal.

[33] ***Orders accordingly.***

[34] The applicants shall bear the costs of this application.

DATED and DELIVERED at NAIROBI this 18th day of March, 2014.

M.K. IBRAHIM

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

JUSTICE OF THE SUPREME COURT

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

**REGISTRAR
SUPREME COURT OF KENYA**