



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: G. B. M. KARIUKI, KIAGE & M'INOTI, JJ.A.)**

**CIVIL APPEAL NO. 191 OF 2013**

**BETWEEN**

**PATRICK NGETA KIMANZI..... APPELLANT**

**AND**

**MARCUS MUTUAL MULUVI..... 1<sup>ST</sup> RESPONDENT**

**ALICE KIMANI (RETURNING OFFICER)..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

***(Being an appeal from the ruling and order of the election Court (High Court at Machakos) (D. MAJANJA, J.) delivered on 17<sup>th</sup> June 2013***

***in***

**ELECTION NO.8 OF 2013)**

**\*\*\*\*\***

**RULING OF THE COURT**

The Petitioner, Patrick Ngeta Kimanzi, was a voter in the parliamentary elections for Kitui East Constituency held on the 4<sup>th</sup> March 2013. The first respondent, Marcus Mutua Muluvi, was one of the candidates in the elections while Alice Kimani, the 2<sup>nd</sup> respondent was the returning officer. The 1<sup>st</sup> respondent was declared by the Independent Electoral and Boundaries Commission (IEBC), the 3<sup>rd</sup> respondent, to be the successful candidate with a total number of 8,243 votes against the runner-up, Mulaimu Musuvya, who had 7,366 votes. The other seven candidates who took part in the election had votes ranging from 223 to 4,549.

On 10.04.2013, the petitioner filed in the High Court at Machakos Election Petition No. 8 of 2013 challenging the election of the 1<sup>st</sup> respondent. Under Section 78(2)(b) of the Elections Act, 2011 the petitioner was required to deposit Ksh.500,000/= being security for costs not more than ten days after presentation of the petition. He did not. Section 78 (3) of the Elections Act, 2011 provides that

***“where a petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the respondent may apply to the election Court for an order to dismiss the petition and for the payment of the respondent’s costs.”***

The record of appeal shows that the 1<sup>st</sup> respondent moved the election court by a notice of motion dated 13<sup>th</sup> May 2013 seeking, inter alia, to strike out the petition by the appellant for want of compliance with the provisions of the Elections Act, 2011 including Section 78(3) of the Act. Three days later, the petitioner filed a notice of motion dated 16<sup>th</sup> May 2013 seeking an order for enlargement of time by seven days within which to deposit the sum of shs.500,000/= towards security for costs.

The learned trial Judge, D. S. Majanja, heard and determined the two applications and on 17.6.2013 struck out the Petition and awarded costs of the petition and of the application to the 1<sup>st</sup> respondent and costs of the petition only to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

It is against that decision by the Election Court in Election Petition No.8 of 2013 that the appellant appealed to this Court on 12.08.2013 putting forward 22 grounds of appeal which we need not set out as the hearing of the appeal was preceded by the hearing of the 1<sup>st</sup> respondent’s notice of motion dated 11.09.2013 seeking to strike out the appeal and this ruling relates to the said application and has determined the appeal.

On 11<sup>th</sup> September 2013, Marcus Mutual Muluvi, the 1<sup>st</sup> respondent in the appeal, presented in this Court an application by notice of motion seeking orders that the appeal be struck out and costs of the application and of the appeal be paid by the appellant to the 1<sup>st</sup> respondent. The application was made on the grounds stated on the face of the notice of motion which included the contention that the appeal is founded on questions of facts which are framed for determination when no appeal lies on questions of fact and secondly that the appeal was filed outside the statutory period.

In the affidavit sworn by the 1<sup>st</sup> respondent on 11.09.2013 in support of motion, the latter averred that as the decision appealed from was rendered on 17.06.2013, and as the record of appeal was filed on 12.08.2013, the appeal was clearly filed out of time as the Elections Act 2011 required appeals to be filed within 30 days of the decision.

The appellant did not file a replying affidavit in opposition to the application.

When the appeal came up for hearing before us on 3<sup>rd</sup> October 2013, the appellant’s counsel sought adjournment which was resisted by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. After giving the matter due consideration, and the attention of the Court having been drawn to the 1<sup>st</sup> respondent’s notice of motion dated 11.09.2013 seeking to strike out the appeal, we ordered that the notice of motion be heard on priority.

On 14.11.2013, the 1<sup>st</sup> respondent’s notice of motion dated 11.09.2013 came up for hearing before us. The appellant was represented by both learned counsel Mr. A. B. Shah and Mr. Jackson Omwenga while the 1<sup>st</sup> respondent was represented by both learned counsel Mr. Elisha Z. Ongoya and Mr. Morris M. Kimuli. Learned counsel Mr. Morris M. Kimuli also held brief for Ms Anne Wambugu for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Mr. Ongoya urged the court to strike out the appeal firstly on the ground that it was filed out of time and secondly because it was predicated on issues of fact when the law requires such appeal to be only on issues of law.

On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and in support of the notice of motion, learned counsel Mr. Kimuli associated himself with the submissions of Mr. Ongoya and urged us to strike out the appeal.

Mr. Shah for the appellant conceded that the appeal was filed out of time. He however contended that ground No.19 in the memorandum of appeal raised an issue of law, to wit, service. He left the issue of costs at the discretion of the Court.

We have perused the record of appeal and given due consideration to the submissions made by the learned counsel who appeared before us for the parties. Mr. Shah has conceded that the appeal was filed out of time and we need not belabour the point because that disposes of the appeal. We observe that Section 85(a) of the Elections Act, 2011 required the appeal to be filed within 30 days. The Section provides:-

***“85A an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be—***

***a. filed within thirty days of the decisions of the High Court;***

***and***

***(b) heard and determined within six months of the filing of***

***the appeal.”***

The ruling and order appealed from in Machakos Election Petition No. 8 of 2013 was delivered on 17.6.2013. The appellant filed the appeal on 12.08.2013. The period for lodging appeal expired in July 2013 and clearly the appeal was filed out of time. In **Maitha vs Said and Another**, (1999) 2 EA 181, this Court held that S.23(4) of the repealed National Assembly and Presidential Elections Act, which like S.85 A of the Elections Act stipulated the period within which an appeal from the decision of the election court should be filed, was mandatory and that upon the lapse of the stipulated time, the right of appeal automatically lapsed. And in **Charles Kamweru Vs Grace Jelagat Kipchoru & 2 others (CA No.159 of 2013)** (unreported) this Court in an opinion rendered on 20<sup>th</sup> December 2013, held that the time frames set by the Elections Act for filing and service of election petitions are peremptory and do not admit variations. Mr. Shah was correct in conceding the appeal on this point. There is therefore no competent appeal before us.

In the absence of a competent appeal, we find it unnecessary to delve into the question as to whether the appeal was founded on issues of facts as contended by counsel for the 1<sup>st</sup> respondent because the point has been rendered academic.

In the result, we hereby strike out the appeal and order that the costs of the application and of the appeal shall be paid by the appellant to the 1<sup>st</sup> respondent but the 2<sup>nd</sup> and 3<sup>rd</sup> respondents shall be entitled to costs only on the appeal and unless agreed on the costs shall be taxed by the Registrar of this Court.

**Dated and delivered at Nairobi this 21<sup>st</sup> day of February 2014.**

**G. B. M. KARIUKI**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

**REGISTRAR**



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)