



Case Number:	Petition 8 of 2014
Date Delivered:	22 Jul 2015
Case Class:	Civil
Court:	Supreme Court of Kenya
Case Action:	Ruling
Judge:	Kalpana Hasmukhrai Rawal, Jackton Boma Ojwang, Mohammed Khadhar Ibrahim, Smokin C Wanjala, Susanna Njoki Ndungu
Citation:	Patricia Cherotich Sawe v Independent Electoral & Boundaries Commission(IEBC) & 4 others [2015] eKLR
Advocates:	Mr Ndettoh for the Appellant Ms Nyaga for the 1st Respondent Mr Oluoch for the 2nd, 3rd 4th & 5th Respondents
Case Summary:	<p style="text-align: center;"><u>Supreme Court emphasizes that not all procedural deficiencies can be remedied by article 159 of the Constitution of Kenya 2010</u></p> <p style="text-align: center;">Sawe v Interim Independent and Boundaries Commission and 3 others</p> <p style="text-align: center;">Supreme Court of Kenya</p> <p style="text-align: center;">Petition No. 8 of 2014</p> <p style="text-align: center;">KH Rawal DCJ & Vice-P, SC Wanjala, M K Ibrahim, J B Ojwang & N Ndungu, SCJJ</p> <p style="text-align: center;">July 22nd, 2015</p> <p style="text-align: center;">Reported by Andrew Halonyere and Maxwell Mwangi Maina</p> <p>Brief Facts</p>

The appellant contested the Appellate Court's Judgment which struck out her appeal on grounds that no evidence had been laid before the IEBC Tribunal or the High Court, to demonstrate that the nomination of the 3rd respondent was contrary to the Constitution and neither had the appellant demonstrated that she was wrongfully left out of the nomination list by her political party, or that a person who was not a URP member had been nominated.

The respondents filed a notice of Preliminary Objection to contest the petition on grounds that it was defective and incompetent for want of compliance with rule 31 (1) and (2) of the Supreme Court Rules, 2012 and sections 15 (1), (2) & (3) and the Court had no jurisdiction to entertain the appeal or petition filed.

Issues

- i. Whether article 159(2) (d) of the Constitution could be used to cure procedural deficiencies specially where the procedural question was a jurisdictional prerequisite.
- ii. What was the basis for deeming a Notice of Appeal duly filed?
- iii. What are the powers of the Registrar of the Supreme Court, with regard to joinder of parties?

Civil practice and Procedure- notice of appeal- notice of appeal filed out of time- notice of appeal filed in the wrong forum- whether the appellant's Petition of Appeal was properly before the Court- Supreme Court Act, 2011, section 15

Civil Practice & procedure- extension of time- application to extend time- courts discretion where there was no formal application to extend time- broad base principle on electoral matters on timelines- what was the basis for deeming the Notice of Appeal duly filed- whether the appellant's Petition of Appeal was properly before the Court- Supreme Court Act 2011 section & 15 (1), (2) & (3); Supreme Court Rules, Rule 53

Civil Practice & Procedure- powers of the Registrar- powers of the Registrar on joinder of

parties - what was the extent of the powers of the Registrar of the Supreme Court, with regard to joinder of parties-Supreme Court Act, 2011 section 9 (2)

Constitution of Kenya, 2010

Article 159(2)

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

- a. justice shall be done to all irrespective of status;
- b. justice shall not be delayed;
- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- d. justice shall be administered without undue regard to procedural technicalities; and
- e. the purpose and principles of this Constitution shall be protected and promoted

Supreme Court Act, 2011

Section 9 (2)

“The Registrar and other officers appointed shall exercise such powers and perform such duties as may be conferred upon them upon directions of the Court, the rules of court and the directions of the Chief Justice.”

Supreme Court Rules, 2012

Rules, 33(1)

‘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”

Held

1. The 1st ‘Notice of Appeal was mistakenly filed in the High Court Registry and such notice therefore failed to meet one of the requirements for a proper Notice of Appeal in the terms of rule 31(1) of the Supreme Court Rules, 2012. The Notice of Appeal contemplated under rule 31(1) should have been filed in the Court of Appeal Registry.
2. The appellant had failed to comply with rule 31(1) of the Supreme Court Rules and consequently had no *locus* to proceed and file a ‘petition of appeal’. Since the prescribed fourteen day period had lapsed; an application ought to have been made for extension of time to file a Notice of Appeal out of time.
3. The law prescribed the forum for filing Notices of Appeal and therefore, a Notice of Appeal needed to show on its face, the Registry where it was filed. The delay in filing the first Notice of Appeal was occasioned by the mistake of filing it in the wrong Registry. Where the law provided for the time within which something ought to be done, if that time lapsed, one needed to first seek extension of that time before [one] could proceed to do that which the law required. The appellant ought to have sought extension of time to file a proper Notice of Appeal; for by the time he was filing the 2nd Notice of Appeal, the fourteen-day period within which such a notice ought to have been filed, had lapsed. Such an extension must have the leave of the Court.
4. Article 159(2) (d) of the Constitution was not a panacea for all procedural shortfalls. Not all procedural deficiencies could be remedied by article 159; and such was clearly the case, where the procedural step in question was a jurisdictional prerequisite.
5. Rule 53, provided for rules on extension of time to file a Notice of Appeal and since there was no such application, it was requisite in the circumstances to apply a

broad-based principle regarding electoral matters, which the Court had pronounced in other cases that on account of the large public interest in electoral matters, all petitions in that regard ought to take into account the prescribed timelines.

6. Section 9 (2) of the Supreme Court Rules, required the Registrar and officers of the Court to exercise powers and perform such duties as may be conferred upon them upon directions of the Court, the rules of court and the directions of the Chief Justice. The Registrar had granted the petitioner leave to amend the petition, and enjoin the 3rd, 4th & 5th respondents as parties.

7. The rules of the court expressly vested certain powers in the Registrar and such powers, by clear intent, were for preparatory arrangements ahead of formal determinations and directions entailing merits-by the Judges. Decisions that affected the substantive course of cases such as joinder of parties, or consolidation of causes were certainly, not for ministerial action by administrative personnel. The appellant's contention that she had secured joinder of parties by the Registrar's hand was incompatible with the law and could not be allowed.

The Notice of Preliminary Objection upheld.

The Petition of Appeal and the amended Petition of Appeal struck out.

The appellant shall bear the respondents' costs in this application.

Court Division:	Civil
History Magistrates:	-

County:	Nairobi
Docket Number:	-
History Docket Number:	Civil Appeal Cause No. 178 of 2013
Case Outcome:	Notice of Preliminary Objection dated 10th September, 2014 upheld, Petition of Appeal dated 10th March, 2014 and the amended Petition of Appeal dated 19th August, 2014 struck out
History County:	Nairobi
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Rawal, DCJ & V.P; Ibrahim; Ojwang; Wanjala and Njoki, SCJJ)

PETITION NO. 8 OF 2014

BETWEEN

**PATRICIA CHEROTICH
SAWE**

.....**APPELLANT**

AND

1. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

**UNITED REPUBLICAN PARTY (URP).....2ND
RESPONDENT**

**ROSE KISAMA.....3RD
RESPONDENT**

**MAUMCHELAGAT.....4TH
RESPONDENT**

**CHERUIYOT MARITIM.....5TH
RESPONDENT**

[Being an Appeal from the Judgment and Orders of the Court of Appeal sitting at Nairobi in Civil Appeal Cause No. 178 of 2013 (Karanja, Kiage & Kairu JJA) dated 7th February, 2014]

RULING

A. INTRODUCTION

[1]The substantive matter before the Court is a petition of appeal dated 10th March, 2014, together with an amended petition dated 30th July, 2014. The appellant seeks to contest the Appellate Court's Judgment, which struck out her appeal on grounds that no evidence had been laid before the IEBC Tribunal, or the High Court, to demonstrate that the nomination of the 3rd respondent was contrary to the Constitution; and neither had the appellant demonstrated that she was wrongfully left out of the nomination list by her political party, or that a person who was not a URP member had been nominated.

[2] The appellant seeks Orders as follows:

- (i) that the Judgment in Civil Appeal No. 178 of 2013 be set aside;
- (ii) that the Court do order for a revocation of the nominations of the 3rd, 4th & 5th respondents, as the members of Uasin Gishu County Assembly;
- (iii) that the Court do issue an Order of *mandamus* against the 1st respondent, compelling it to gazette the name of the appellant as the 2nd respondent's *bona fide*, Gender top- up, elected member of Uasin Gishu County Assembly.

[3] In response to the appellant's petition of appeal, the 2nd, 3rd, 4th & 5th respondents filed a Notice of Preliminary Objection, dated 10th September, 2014, contesting the petition on the grounds that:

- (i) it was defective and incompetent, for want of compliance with the provisions of Rule 31(1)&(2) of the Supreme Court Rules, 2012;
- (ii) it does not comply with Sections 15(1), (2) & (3) and 16 of the Supreme Court Act, 2011;
- (iii) it does not comply with Rule 33(1) of the Supreme Court Rules; 2012.
- (iv) the Court has no jurisdiction to entertain the appeal and or petition; filed;
- (v) the petition is an abuse of Court process, and ought to be struck out with costs to the 3rd, 4th and 5th respondents.

[4] On 2nd March, 2015, when the matter came up for hearing, the Court directed that the preliminary objection be canvassed and dispensed with, prior to any possible hearing of the appeal. The objection, therefore, is the subject of this Ruling.

[5]The appellant was represented by learned counsel, Mr. Ndettoh, while learned counsel, Ms. Nyaga appeared for the 1st respondent; and learned counsel, Mr. Oluoch, appeared for the 2nd, 3rd 4th and 5th respondents.

B. SUBMISSIONS FOR THE PARTIES

i. **2nd, 3rd 4th and 5th Respondents**

[6] Mr. Oluoch, canvassing the preliminary objection, submitted that the petition of appeal does not comply with Rule 31 of the Supreme Court Rules, 2012, which provides:

“(1) A person who intends to appeal to the Court shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the court or with the tribunal it is desired to appeal from”.

[7] Counsel submitted that since the Court of Appeal's Judgment was delivered on 7th February, 2014, the Notice of Appeal on record, dated 12th March, 2014 and filed on the same day, was filed out of time " as the 14 days prescribed by the Rules had expired on 21st February, 2013. On that basis, it was urged that the Court lacks jurisdiction to hear and determine the appeal.

[8] Counsel further submitted that there was no application before the Court, by the appellant, seeking extension of time to file a Notice of Appeal under Rule 53 of the Supreme Court Rules. He contested the casual approach by the appellant's counsel, orally seeking the Court's discretion to extend time for filing the Notice of Appeal, or deeming the Notice of Appeal to have been properly filed. Counsel invoked the decisions of this Court in **Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others**, Petition No. 18 & 20 of 2014; and **Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others**, Supreme Court Petition No.7 of 2014 " where the timelines set by the Constitution and the Elections Act were held to be neither negotiable, nor extendable as a bare formality.

[9] Counsel submitted that, as the Notice of Appeal was required to be filed in the Court of Appeal Registry, and not the High Court Registry, the Notice of Appeal dated 12th February, 2014 and filed in the High Court Registry, was not a proper Notice of Appeal within the meaning of Rule 31(1) of the Supreme Court Rules: and consequently, the appellant had not properly invoked the jurisdiction of the Supreme Court.

[10] Counsel submitted that a Notice of Appeal, once duly filed, ought to be served within 7, days upon all persons affected. Yet the 3rd, 4th& 5th respondents had not been served with the Notice of Appeal, until much later when they were enjoined as parties.

[11] Counsel also contested the manner in which the joinder of parties (to include the 3rd, 4th& 5th respondents) had been affected. He urged that the Court records do not show whether the joinder, and the amendment to the Petition were done with the leave of the Court. Counsel submitted that the powers of the Registrar are limited, and do not include allowing joinder of parties.

[12] For effect, learned counsel urged that, even if the joinder of parties had been affected with the leave of the Court, it would be compromised by the fact that the character of the appellant's case has kept mutating, as it proceeded from the High Court, to the Court of Appeal, and to the Supreme Court. His example in this respect is that the 3rd, 4th& 5th respondents were parties in the High Court, but not in the Court of Appeal" and now, the appellant seeks to have them as parties in the Supreme Court.

ii. **1st Respondent**

[13] Such was also the stand of learned counsel, Ms. Nyaga' who submitted that this Court is not one of original jurisdiction, and should not hear the 3rd, 4th and 5th respondents who were not parties at the Court of Appeal.

[14] Counsel invoked this Court's decision in **Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others**, Application No. 15 of 2014, which held that timelines in filing documents was a vital element in the dispensation of justice. She also relied on **Nicholas Kiptoo Arap Korir Salat v. the Independent Electoral and Boundaries Commission & 7 Others**, Application No. 16 of 2014, where this Court held that a document filed in Court out of time, but without leave of the Court, carries no status in law.

iii. **Appellant**

[15] Learned counsel, Mr. Ndettoh conceded that the Notice of Appeal dated 12th March, 2014 was not filed within the stipulated timeline, but contended there were special circumstances occasioning delay. He submitted that the Notice of was lodged on 13th February, 2014, though mistakenly filed in the High Court Registry. He said it was upon the recommendation of the Registrar of the Court of Appeal, that a second Notice of Appeal (dated 12th March, 2014) was filed in the Court of Appeal Registry.

[16] Counsel obtained this Court's consent to exercise its discretion under Rule 53 of the Supreme Court Rules, and deem the Notice of Appeal of 12th March, 2014 as duly filed. He relied on **Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others**, Application No. 12 of 2014 where this Court had held that it had the power to cure a document filed out of time, if persuaded that the delay was not inordinate, and that there were special circumstances leading to the delay.

[17] With regard to the issue of joinder of parties, counsel submitted that he had made an oral application before the Registrar, and had been allowed joinder. In addition, counsel urged, his amended petition dated 19th August, 2014 also sought to enjoin the 3rd, 4th & 5th respondents, as parties. He conceded, however, that he had not filed a formal application seeking leave to file the amended petition, or to enjoin more respondents. Learned counsel considered it important for the 3rd, 4th & 5th respondents to be included as parties, as they would be adversely affected by the Orders of the Court.

[18] Counsel contested the proposition that the petition had mutated over time; he urged that the appellant had been consistent in disputing the nomination list, at the IEBC Tribunal, the High Court, the Court of Appeal, and now the Supreme Court. He invoked the principles in Article 259 of the constitution, urging the Court to dispense justice without being constrained by procedural technicalities.

C. ISSUES FOR DETERMINATION

[19] The following two issues emerge for determination:

(i) *whether the appellant's Petition of Appeal is properly before this Court. Is there a basis for deeming the Notice of Appeal duly filed"*

(ii) *what is the extent of the powers of the Registrar of the Supreme Court, with regard to joinder of parties"*

D. ANALYSIS

[20] It is not in doubt that the Notice of Appeal dated 12th March, 2014 was filed out of time. The Judgment of the Court of Appeal was delivered on 7th February, 2014; and so, the Notice of Appeal ought to have been filed within 14, days as from the date of the Judgment (Rule 31(1) of the Supreme Court Rules, 2012). Counsel for the appellant admitted filing the Notice of Appeal out of time, but pleaded extenuation founded on some mistake that was beyond his control.

[21] For a competent appeal to lie before this Court, it must comply with the terms 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"[emphasis supplied].

[22] The Notice of Appeal is a pre-requisite for filing any Petition of appeal in this Court. Rule 31(1) of the Supreme Court Rules, 2012 thus provides:

*"A person who intends to appeal to the Court **shall file a notice of appeal within fourteen days from the date of judgment or ruling, in Form B set out in the First Schedule, with the Registrar of the Court or with the tribunal it is desired to appeal from"** [emphasis supplied].*

[23] The two requirements for filing a Notice of Appeal, in the context of this case, are:

(a) the Notice of Appeal must be filed within 14 days from the date of the Judgment; and (b) it is to be filed in the Court or Tribunal which the litigant desires to appeal from" in this case, the *Court of Appeal*.

[24] Counsel for the appellant indicated that the 1st 'Notice of Appeal' dated 12th February, 2014 was mistakenly filed in the High Court Registry on 13th February, 2014; and such notice, therefore, failed to meet one of the requirements for a proper Notice of Appeal, in the terms of Rule 31(1) of the Supreme Court Rules, 2012. The Notice of Appeal contemplated under Rule 31(1) should have been filed in the Court of Appeal Registry.

[25] Now while the second Notice of Appeal, dated 12th March, 2014 was properly filed in the Court of Appeal Registry, it failed to meet all the ingredients of a proper Notice of Appeal, as prescribed under the Rules: it was filed outside the 14- day period specified under Rule 31(1) of the Supreme Court Rules, 2012.

[26] On the face of the record, therefore, the appellant failed to comply with Rule 31(1) of the Supreme Court Rules; and consequently, he had no *locus* to proceed to file a 'petition of appeal' in this Court. As the prescribed fourteen –day period had lapsed, an application ought to have been made for extension of time to file a Notice of Appeal out of time.

[27] Counsel for the appellant submitted that, upon discovering the said mistake, he consulted the Registrar of the Court of Appeal who advised him to file another Notice of Appeal in the Court of Appeal Registry.

[28] What is the objective purpose of the Notice of Appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short, or delayed. It signals the intention to pursue an appeal. It is only fair that the parties, in the light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process: "litigation must come to an end".

[29] In this case the appellant submitted that the delay in filing the Notice of Appeal was occasioned by the mistake of filing the first 'Notice of Appeal' in the wrong Registry. The law prescribes the forum for filing such a Notice of Appeal. How could such a mistake have occurred, in view of the fact that, once a Notice of Appeal is received in a Court Registry, and upon payment of the requisite fees, the Registry staff append a receipt- stamp on all copies submitted, and the Registrar signs and embosses the Court seal on them, with copies handed back for service. Thus, a Notice of Appeal must show on its face it once filed, the Registry where it was filed.

[30] In the case of **Nicholas Kiptoo Arap Korir Salat v. The Independent Electoral and Boundaries Commission & 7 Others**, Application No. 16 of 2014, the Court emphasised that, "where the law provides for the time within which something ought to be done, if that time lapses, one needs to first seek extension of that time before [one] can proceed to do that which the law requires." Thus, the appellant ought to have sought extension of time to file a proper Notice of Appeal; for by the time he was filing the 2nd Notice of Appeal, the fourteen-day period within which such a notice ought to have been filed, had lapsed. Such an extension must have the leave of the Court.

[31] Although the appellant involves the principal of the prevalence of substance over form, this Court did signal in **Law Society of Kenya v. The Centre for Human Rights & Democracy & 12 Others**, Petition No. 14 of 2013, that "Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls." Not all procedural deficiencies can be remedied by Article 159; and such is clearly the case, where the procedural step in question is a jurisdictional prerequisite.

[32] We take note that counsel for the appellant has invoked this Court's discretion under Rule 53, seeking extension of time to file a Notice of Appeal, or that we deem the Notice of Appeal dated 12th March, 2014 to be properly filed. The respondents contest such exercise of discretion, on ground that there is no formal application in that regard. It is true indeed, that there is no such application. It is requisite, in the circumstances, to apply a broad-based principle regarding electoral matters, which this Court has pronounced in other cases: on account of the large public interest in electoral matters, all petitions in that regards, ought to take into account the prescribed timelines.

[33] While, in our opinion, the foregoing principle readily disposed of the questions herein, it is necessary to advert to a secondary point – namely, extent of the powers of the Court's Registrar. The appellant submitted that the Registrar had granted her leave to amend the petition, as well as join the 3rd, 4th & 5th respondents as parties; and this was through the appellant's counsel making an oral application during one of the mentions for directions.

[34] Section 9 (2) of the Supreme Court Act, 2011 thus provides:

"The Registrar and other officers appointed shall exercise such powers and perform such duties as may be conferred upon them upon directions of the Court, the rules of court and the directions of the Chief Justice."

[35] The Supreme Court Rules, 2012 expressly vest certain powers in the Registrar; and such powers, by clear intent, are for preparatory arrangements ahead of formal determinations and directions entailing

merits-by the Judges. Decisions that affect the substantive course of cases"such as joinder of parties, or consolidation of causes"are certainly, not for ministerial action by administrative personnel. So in this instance, the appellant's contention that she had secured joinder of parties by the Registrar's hand, is incompatible with the law, and accordingly, is disallowed.

E. ORDERS

[36] In the light of the foregoing analysis of fact, law and submissions, we will make Orders as follow:

- (a) *The Notice of Preliminary Objection dated 10th September, 2014 is upheld.*
- (b) *The Petition of Appeal dated 10th March, 2014 and the amended Petition of Appeal dated 19th August, 2014 are hereby struck out.*
- (c) *The appellant shall bear the respondents' costs in this application.*

DATED and DELIVERED at NAIROBI this 22nd day of July 2015

.....

K. H. RAWAL
DEPUTY CHIEF JUSTICE &
VICE-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

.....

N. S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true

Copy of the original.

REGISTRAR

SUPREME COURT OF KENYA



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