Case Number:	Civil Appeal 108 of 2008
Date Delivered:	17 Oct 2008
Case Class:	Civil
Court:	Court of Appeal at Eldoret
Case Action:	Ruling
Judge:	Emmanuel Okello O'Kubasu, John walter Onyango Otieno, Erastus Mwaniki Githinji
Citation:	Moses Masika Wetangula v John Koyi Waluke & 2 others [2008] eKLR
Advocates:	-
Case Summary:	.
Court Division:	Civil
History Magistrates:	-
County:	Uasin Gishu
Docket Number:	-
History Docket Number:	Election Petition No. 1 of 2008
Case Outcome:	Appeal struck out
History County:	Bungoma
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 108 OF 2008

MOSES MASIKA WETANGULA …….. APPELLANT

AND

JOHN KOYI WALUKE …….. 1ST RESPONDENT

ELECTORAL COMMISSION OF KENYA ……. 2ND RESPONDENT

JAMES KULUBI OMWANGWE …….. 3RD RESPONDENT

(Appeal from a ruling and order of the High Court of Kenya at Bungoma (Wanjiru Karanja, J) dated 27th May, 2008

in

Election Petition No. 1 of 2008)

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RULING OF THE COURT

Civil Appeal No. 108 of 2008 filed in this Court at Eldoret registry and which is an appeal from the ruling and order of the superior Court (Wanjiru Karanja J.) delivered on 27th May 2008, came up for hearing before us in the morning of 24th September 2008 when our attention was drawn to the order extracted from the same ruling and annexed to the record of appeal purportedly pursuant to **rule 85 (1) (h)** of this Court's Rules. That order was not a certified copy of the order extracted from that ruling. We drew the attention of Mr. Shah, the learned Counsel for the appellant, to that apparent defect and Mr. Shah told us he was aware of that allegation and was prepared to address us on it but required a short adjournment to enable him assemble together his list of authorities before he could fully address us on it. We adjourned the hearing for about half an hour for that purpose.

When the hearing resumed, all counsel i.e. Mr. Shah for the appellant, Mr. Masika for the first respondent and Miss Ateya for the second and third respondents, addressed us at length on that issue. While readily admitting that the order contained in the record of appeal was not certified, Mr. Shah however, raised three issues. The first was that Mr. Masika had no status (*locus standi)* to raise that objection as he did not file an application to strike out the appeal within the required thirty days pursuant to the proviso to **rule 80** of this Court's Rules. The second point he took was that as the appeal emanated from an election petition, the Rules of the Court including **rule 85(1) (h)** do not apply. In support of that contention, Mr. Shah referred us to majority decision of this Court in the case of **Maitha vs. Said and another (1999) 2 EA 181**. He contended that in that case, the majority of the bench made a decision that the rules of the court must give way to the provisions of the Election Act and he went on to state that, in cases of election petitions, **section 3(1)** of the Appellate Jurisdiction Act Chapter 9 Laws of Kenya which donates jurisdiction to this Court does not apply to appeals from election petitions from the superior court. The third point was that in any case, the order contained in the record was an original order dully signed by the deputy registrar of the superior court and so it was not defective and being original itself, it needed not be certified. Miss Ateya associated herself with the arguments advanced by Mr. Shah but stated that as counsel for the first respondent merely drew our attention to the defective order, she was also drawing our attention to the proviso to **rule 80** which provided that an application for striking out an appeal should be brought within 30 days of the service of the record of appeal upon the party seeking striking out of the appeal. She also referred us to **rule 101 (b)** of this Court's Rules. Mr. Masika in response to Mr. Shah's and Miss Ateya's arguments said all he

did was to draw the Court's attention to what he felt was a defect and he did so with the Court's leave. He submitted that the Court of Appeal Rules and particularly **rule 85** of the Court of Appeal Rules was not ousted by the provisions of the Election Act.

We have anxiously considered the able submissions by the three learned counsel. We want to state on the outset that we are not dealing with a preliminary objection as none was raised before us and none could be entertained at that stage when the appeal came up for hearing. Further, we are not dealing with any application for striking out the appeal and we could not entertain such an application as indeed the first respondent did not raise such an application in compliance with the proviso to **rule 80** of this Court's Rules. It is also fair to state here that Mr. Masika never applied for striking out of the appeal neither did he raise a preliminary objection on the appeal. All what happened was that Mr. Masika, with leave of the Court, merely drew our attention to the subject order. Our attention having been drawn to that order, we, *suo moto*, asked Mr. Shah to address us on it if he was ready to do so and he obliged. We made it clear over and over again that we were proceeding on the motion of the Court and not on any application before us. It is thus not proper for the learned counsel to argue that the proviso to **rule 80** had not been complied with, or to argue that the matter came before us by way of a preliminary objection. This matter was raised by the Court on its own as we wanted to be addressed on it first, being a legal matter.

The other point we need to address is the argument by Mr. Shah that the order before us, bearing the original signature of the deputy registrar of the superior court, needed not be certified. With respect, we do not agree with that contention. Before the incorporation of the amendment by way of Legal Notice 101 of 1985, **rule 85(1) (h)** read as follows:

"85.(1) For the purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to the provisions of sub-rule (3) contain copies of the following documents:-

(a) ……

(b) ……

(c) ……...

(d) ……

(e) ……

(f) ……...

(g) ……

(h) the decree or order."

However, vide Legal Notice No. 101 of 1985, the sub-rule was amended by inserting the words "***a certified copy of*** " immediately before the words "**decree or order**" so that as of now, the sub-rule reads:

"(h) a certified copy of the decree or order."

That in effect puts to rest Mr. Shah's argument that since the order had original signature of the deputy registrar, it required no certification. What the rule requires is "**a certified copy of the decree or order**" and it does not state that the original order or decree suffices. Perhaps this was to prevent the possible mischief of the deputy registrar signing a wrong decree or order and the same being used to support an appeal it being that the original extract of an order is always first produced manually. We do not want to hazard any other reason as the matter is clear from the words of the rule and needs no interpretation.

It is thus not in dispute that **rule 85(1) (h)** of the Court of Appeal Rules requires that a certified copy of the decree or order be contained in the record. We may say that by virtue of **rule 85(2A)** that certified copy of the decree or order is a primary document and cannot be introduced by way of a supplementary record of appeal. However, Mr. Shah contends that **rule 85(1) (h)** is not relevant in the appeal before us as this appeal arises from a ruling on an election petition matter before the superior court in which case the Rules of this Court are ousted. He relies, for that proposition, on the majority ruling of this Court in the case of **Maitha vs. Said and another** (supra). That is, in our view, the mainstay of Mr. Shah's submission and we must now turn to it. We have carefully perused that ruling and, with respect, we do agree with the majority ruling in that case. The two learned Judges were plainly right on points of law. The next question we must grapple with is as to whether the learned Judges made any specific ruling that when considering an appeal from the superior court in respect of election petition matters, this Court is not bound by the Rules of the Court. In **Maitha vs. Said and another** case (supra), the Court was faced with a situation where this Court's Rules specifically **rule 81(1)** which states that a civil appeal to this Court shall be instituted within sixty days of the date when the notice of appeal was lodged whereas **section 23(4)** of the National Assembly and Presidential Election Act (Chapter 7) states specifically that an appeal from an election petition in the superior court lies to the Court of Appeal and must be filed within 30 days of the decision. This Court was to decide, in that scenario, as to which law would apply, between the provisions of the National Assembly and Presidential Elections Act (Chapter 7) and the provisions of this Court's Rules as to the time fixed for filing the record of appeal which time could by the same Rules be extended. The majority ruling of the Court was clear that in such a case, the provisions and particularly **section 23(4)** of the National Assembly and Presidential Elections Act would apply. That sounds to us the most logical and proper decision to make in such a situation because clearly an act of Parliament takes precedent over a rule or regulations made by virtue of the powers donated by another Act of Parliament – in this case, rules made under the powers donated by **section 5(1) and (2)** of the Appellate Jurisdiction Act Chapter 9. Our understanding of the decision in **Maitha's** case is that this Court was saying that **rule 81** is of general application in respect of appeals to this Court where no Act specifically spells out the period within which an appeal from the superior court may be lodged, but where an appeal is to be lodged pursuant to a decision against which a period for lodging the appeal is specifically provided for in the Act giving right to appeal, that period specified in that Act must be complied with and the provisions of **rule 81** which is for all appeals with no specific terms rendered in the Act pursuant to which the appeal is to be filed in this Court will take a back seat. We feel buttressed in our approach by what Gicheru J.A (as he then was) said in his ruling which was as follows:

"In appeals from the High Court in original and appellate jurisdiction in civil cases and the matters relating thereto, under rule 74(1) and (2) of the Court of Appeal Rules, hereafter called the Rules, any person who desires to appeal to this Court has to give notice in writing which has to be lodged in duplicate with Registrar of the High Court within fourteen days of the date of the decision against which it is desired to appeal. Where there is no time limit set out by the Act giving the right of appeal to this Court, an appeal to this Court shall be instituted within the period limited by rule 81(1) of the Rules including appeals from the High Court in the exercise of its bankruptcy jurisdiction in respect of which subrule (3) of the aforesaid rule expressly provides for. If, however, the Act giving the right of appeal to this Court has set out the time limit within which such right shall be exercised, failure to comply with such time limit would extinguish the right of appeal to this Court. Indeed, outside that time limit, an appeal would not lie to this Court."

Omolo J.A, in his ruling in effect concurs with Gicheru J.A. (as he then was) that for an appeal from the superior court on election petition matters, **rule 23(4)** which spells the time limited for lodging appeals and which does not provide for extension of such time takes precedent over **rule 81** of this Court's Rules and such appeals are to be filed within that time spelt out in **section 23(4)** of the National Assembly and Presidential Elections Act which is the Act giving the right to appeal to the appellant. There is no suggestion that once the appellant has complied with the provisions of that section and has filed his appeal to this Court within the time stated in that Act, the appellant need not comply with other Rules of this Court or that the Rules of this Court no longer apply to such an appeal. There is no suggestion in that ruling, for example, that an appellant appealing against the decision or ruling from an election petition in the superior court need not file a notice of appeal. In our view, such a suggestion would result into absurdity in so far as there are no separate rules set out for such appeals. Indeed, the appellant in this matter before us was conscious of that need and did file a notice of appeal. In the case of **Lorue Chepkemoi Laboso vs. Anthony Kipkoskei Kimuto and two others – Civil Appeal (Application) No. 172 of 2005**, this Court made it clear that in respect of appeals emanating from the election petitions in the superior court, only **rule 81(1)** of this Court's Rules is ousted by the provisions of **section 23(4)** of the National Assembly and Presidential Elections Act, when it said:

"It is not, with respect, correct as submitted by Mr. Ojienda that there is a conflict between section 23(4) of the

Act and section 3(1) of the Appellate Jurisdiction Act (Cap 9 Laws of Kenya), which provides:

"3(1) ***The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law."***

Section 3(1) merely gives this Court jurisdiction to hear appeals, if such appeals are permitted under any law. ……. It is rule 81(1) of the Court of Appeal made under section 5(1) of the Appellate Jurisdiction Act which seems to be in conflict with section 23(4) of the Act regarding the time within which an appeal should be lodged.

Firstly, section 23(4) of the Act giving right of appeal to the Court of Appeal was introduced in the law from the first time by Statute Law (Repeals and Miscellaneous Amendments) Act No. 10 of 1997 which commenced on 7th November 1997. By the Court of Appeal Rules have (sic) been long in existence.

After section 23(4) was introduced, no special practice and procedure rules were made to regulate appeals to Court of Appeal from decisions of the High Court in election petitions nor did the National Assembly and Presidential Elections Act make the Court of Appeal Rules applicable to such appeals.

It follows that rule 81(1) of the Court of Appeal Rules was not designed to regulate appeals from election petitions. To that extent, rule 81 is not repugnant to section 23(4) of the Act.

Secondly, in the construction of statutes, there is both a strong presumption that Parliament does not make mistakes and that Parliament knows the existing state of the law even in technical matters. (see paragraphs 862 and 887 respectively of Halsbury's Laws England (sic) 4th Edition ……. 44). It must be assumed therefore that when Parliament by section 23(4) limited the period within which to appeal to 30 days, it was aware of the provisions of rule 81(1) of the Court of Appeal Rules.

Thirdly, assuming that rule 81(1) applied, and that it is in conflict with section 23(4), then rule 81(1) being a subsidiary legislation cannot alter, or vary the meaning of section 23(4) which is unambiguous (see paragraph 884 – supra) It is trite law that where there is a conflict between a statute and the rules of procedure, the statute must prevail (see Mwalagaya vs. Bandali [1984] KLR 751."

In our view, **section 23(4)** of the National Assembly and Presidential Elections Act only ousts the application of **rule 81(1)** of the Court of Appeal Rules. There is nothing to suggest that the remaining Court of Appeal Rules do not apply to appeals from the superior court's decisions on election petitions. **Rule 85(1) (h)** therefore applies and the record of appeal must, in our view, contain a certified copy of the decree or order as in this case. The order that was contained in the record of appeal before us was not certified. That document is a primary document as we have stated and thus the record cannot be cured by filing a supplementary record of appeal to include it. That being our view of the matter, the appeal before us is incompetent. It is struck out, but as the matter proceeded on our own motion, we make no order as to costs. Order accordingly.

Dated and delivered at Nairobi this 17th day of October, 2008.

E.O. O'KUBASU

……

JUDGE OF APPEAL

E.M. GITHINJI

……..

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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