



**Independent Electoral & Boundariess Commission v Okeyo & another (Election  
Petition Appeal E003 of 2023) [2023] KEHC 21077 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21077 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT HOMA BAY  
ELECTION PETITION APPEAL E003 OF 2023**

**KW KIARIE, J**

**JULY 31, 2023**

**BETWEEN**

**INDEPENDENT ELECTORAL & BOUNDARIESS COMMISSION APPELLANT**

**AND**

**ONGILI PETER OKEYO ..... 1<sup>ST</sup> RESPONDENT**

**BONDO VICKINS ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the judgment in Oyugis Senior Principal Magistrate's Election  
Petition MC E001 of 2022 by Hon. B.O Omwansa –Senior Principal Magistrate)*

**JUDGMENT**

1. Following the election conducted on the 9<sup>th</sup> August 2022, the 2<sup>nd</sup> respondent herein was announced and declared the duly elected member of County Assembly for West Kasipul ward.
2. The 1<sup>st</sup> respondent being dissatisfied with the outcome of the results of the election, filed Election Petition MC E001 of 2022 in the Senior Principal Magistrates' Court at Oyugis challenging the election of the 2<sup>nd</sup> respondent. In his judgment delivered on 31<sup>st</sup> January 2023, Hon. B.O Omwansa senior principal magistrate nullified the election of the 2<sup>nd</sup> respondent and ordered for fresh election in respect of West Kasipul Ward.
3. The Appellant was aggrieved by the said judgment and filed the appeal herein. The grounds of the appeal are:
  - a. That the learned trial magistrate erred both in fact and in law in failing to find that there was no valid and proper petition including the purported amended petition before the court.
  - b. That the learned trial magistrate erred both in fact and in law in disregarding the doctrine of stare decisis.



- c. That the learned trial magistrate erred both in fact and in law by misdirecting himself on the interpretation of section 83 of the *Elections Act*.
  - d. That the learned trial magistrate erred both in fact and in law by considering matters not pleaded in the petition thus arriving at an erroneous conclusion.
  - e. That the learned trial magistrate erred in law by ordering for scrutiny and recount of votes including in polling stations that had not been pleaded and proceeded to misapply the scrutiny report thereby prejudicing the appellant notwithstanding that all elections materials were readily available including Form 36A.
  - f. That the learned trial magistrate erred in law in by finding that Forms 36A in West Kasipul Constituency substantially complied with statutory and procedural requirements but proceeded to nullify the election of the 2<sup>nd</sup> respondent herein as member of County Assembly for West Kasipul Ward.
  - g. That the learned trial magistrate erred in law by failing to find that the election for member of County Assembly, West Kasipul Ward conducted on the 9<sup>th</sup> August 2022 was held in accordance with *the Constitution, Elections Act* and the regulations [sic].
  - h. That the learned trial magistrate erred in law and misdirected himself in taking into account irrelevant considerations and failed to take into account relevant considerations.
  - i. In all the circumstances the findings of the learned magistrate are unfounded in law or on the basis of the evidence adduced and the circumstances of the case.
4. The appellant urged the court to set aside the said judgment and substitute it with an order dismissing the petition. I was urged to grant costs of this appeal and of the petition to the appellant.
  5. The first respondent was represented by the firm of C. Obiero & Associates. He opposed the appeal on the following grounds:
    - a. That the appeal before court is incompetent.
    - b. That there was a proper petition before the lower court.
    - c. That the learned Magistrate did not consider matters/ stations that were not pleaded.
    - d. That the learned Magistrate did not contradict himself in the judgment.
    - e. That the learned Magistrate directed himself well on the laws and more particularly section 83 of the *Elections Act*.
  6. The second respondent was represented by the firm Ochich TLO & Associates and was in support of the appeal.
  7. Parties sought directions to canvass the appeal by way of written submissions. The directions were given on 18<sup>th</sup> July 2023 and the appellant was directed to file and serve submissions within 3 days and the respondents to do likewise within 3 days of service. All the parties complied.
  8. It was contended that there was no valid and a proper petition before the trial court. This, it was argued, included the purported amended petition.
  9. The issues for determination are:
    - a. Whether the appeal before this court is competent or not;



- b. Whether there was a competent petition in the lower court or not;
  - c. Whether the learned trial magistrate erred in the interpretation of section 83 of the *Elections Act*; and
  - d. Whether the learned magistrate misdirected himself in nullification of the election of the member of County Assembly for West Kasipul Ward.
10. I will, at the onset, address the issue whether the appeal before me is competent or not. The 1<sup>st</sup> respondent argued that it is not. He contended that the appellant filed an incomplete record of appeal for it lacked the decree of the lower court and was also lacking all form 36As and copies of polling stations diaries. The 1<sup>st</sup> respondent relied on the decision in the case of *Bwana Mohammed Bwana vs. Silvano Buko Bonaya & 2others [2015]* eKLR the Supreme Court of Kenya stated as follows:
- 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.
11. The appellant contended that no preliminary objection was raised and the same cannot be raised at the time of hearing of the appeal. This argument was buttressed with the pronouncement of the Court of Appeal in the case of *Moses Masika Wetangula v John Koyi Waluke & 2 others [2008]* eKLR. The Court stated:
- 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.
12. I am equally not dealing with a preliminary objection as none was raised. What is clearly coming out of these two authorities according to my understanding is as follows:
- a. if the requisite bundle of documents is omitted, the appeal is incompetent and defective.
  - b. That what is expected to be in the record of appeal is directed by the law.
  - c. That the court may, suo moto point out such an omission especially if the omission is of a primary document.
  - d. The court, where a preliminary objection has not been raised, will determine the appeal on merits of the materials at its disposal.
13. Rule 34 (6) of the Election Petition Rules provides:
- (6) The appellant shall within twenty-one days of the filing of the memorandum of appeal in accordance to sub-rule (3), file a record of appeal which shall contain the following documents:
    - a) The memorandum of appeal,
    - b) Pleadings of the petition,
    - c) Typed and certified copies of proceedings,
    - d) All affidavits, evidence and documents entered in evidence before the magistrate and



- e) A signed and certified copy of the judgement appealed from and a certified copy of the decree.
14. The purpose of a signed judgment and a decree thereof is for the appellate court to satisfy itself as to the correctness or otherwise of the finding of the court below.
15. Rule 34 (8) provides:  
The election court from which an appeal is preferred shall, upon receiving a notice under sub-rule (7), send the proceedings and all relevant documents relating to the petition to the High Court to which the appeal is preferred.
16. The record of the lower court was received and from the judgment therein, this court can be able to ascertain the findings of the lower court. Ouko, JA (as he then was), in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013]* eKLR observed as follows:  
Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.
17. Article 159(2)(d) of *the Constitution* of provides:  
(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—  
(d) justice shall be administered without undue regard to procedural technicalities; and a certified copy of the decree in the record of appeal and proceed to decide the appeal on merits.  
The omission by the appellant to provide the decree does not, in my view, go to the jurisdiction of the court or the root of the dispute. This will not occasion prejudice or miscarriage of justice to the 1<sup>st</sup> respondent. Ultimately, justice must be dispensed without undue technicality.
18. It was argued by the appellant that the petition was incompetent and ought to have been struck out. It was contended that the amended petition had been filed contrary to law and without leave of the honourable court and was not supported by a valid and or proper affidavit.
19. The 1<sup>st</sup> respondent contended that the impugned amendment of the petition was done within 28 days after the declaration of results. He argued that that the amended petition was filed on 3<sup>rd</sup> September, 2022.
20. Upon my perusal of the record, the amended petition was filed on 3<sup>rd</sup> September 2022. The declaration of the results in respect of West Kasipul Ward was made on the 10<sup>th</sup> August 2022. This is 25 days when both days are included and 23 days if the two days are excluded. The petitioner did not therefore require to seek leave of court to file the amended petition. The petition was therefore properly before the court.
21. The lower court did not base its decision on the impugned affidavit and whether it was valid or not, no prejudice was occasioned to any party.
22. Section 83 of the *Elections Act* provides as follows:



- (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-
  - (a) the election was conducted in accordance with the principles laid down in *the Constitution* and in that written law; and (b) the non-compliance did not substantially affect the result of the election.

- (2) Pursuant to section 72 of the *Interpretation and General Provisions Act* (Cap. 2), a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.

This is the section the learned trial magistrate is accused by the appellant of misinterpreting and misdirecting himself in, to the detriment of the appellant.

23. Before I address the issue as to whether the learned magistrate misdirected himself and misinterpreted this section, I will first address the issue as to whether he made a finding on matters that were not pleaded. It is trite law that parties are bound by their pleadings. The Supreme Court of Kenya in the case of *Independent Electoral and Boundaries Commission & Anor v Stephen Mutinda Mule & 3 others [2014] eKLR* stated:

... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.

24. Though it was contended that Got (God) Agulu polling station was not pleaded in the petition, my perusal of the record confirms that it was and therefore this contention is erroneous. The complaint in respect of this station is captured in the narration and prayers at page 27 of the record of appeal. The appeal cannot therefore turn on this issue.

25. The complaint in respect of Got (God) Agulu reads as follows:

...the petitioner is apprehensive that the discrepancy could have had a far reaching effect on him as the targeted strong contender, this also affected God Agulu polling station where the total votes for the member of parliament was 247, for president [sic] and 269 for members of County Assembly 269 but there was no read spoilt/stray ballot, the ghost voters who only voted for the member of the County Assembly and elected not to vote for other seats leaves a lot that meets the eye.

What I understand the petitioner (1<sup>st</sup> respondent) to be saying is that the valid votes ought to be the same for all elective positions. If there are variations, then the results are suspect.

26. The recount that was done indicate that the total valid votes cast for the MCA position at God Agulu 2 were 273. The 1<sup>st</sup> respondent garnered 29 votes while the 2<sup>nd</sup> respondent garnered 85. The candidate with the highest votes in that station was Ochola Mola Joel who had 120 votes in his favour.

27. The basis on which the 1<sup>st</sup> respondent contends that there were “ghost” voters, was fallacious. It is not always possible to have all votes cast for various positions tally. The differences could be brought about by several factors that may include but not limited to stray ballots, rejected ballots and spoilt ballots. It could not be accurate to compare only two elective positions and make a conclusion. If a party seeks to make an analysis as to why there were discrepancies between different elective positions, the same must be scientific and undertaken by an expert data analyst. This was not done in this case.

28. The learned magistrate erred in relying on the report in respect of God Agulu without inviting all the parties to address the issue brought out by the alleged discrepancies between the counter foils and



total valid votes cast in the polling station. From this report, he concluded that 78 ballot papers were unaccounted for and this formed the basis of his conclusion that it was difficult to tell who won the election for the member of County Assembly, West Kasipul Ward. He nullified the same. This was a misdirection for the petitioner did not prove his allegations. I therefore set aside the decision of the learned magistrate and substitute it with a finding that the 2<sup>nd</sup> respondent herein was validly elected, as announced and declared by the appellant, member of County Assembly for West Kasipul Ward. Consequently, the petition in the lower court is dismissed.

29. Costs in this court and in the lower court to appellant and the 2<sup>nd</sup> respondent. If parties fail to agree on costs, the same shall be taxed by the Deputy Registrar.

**Delivered and signed at Homa Bay this 31st day of July 2023**

**KIARIE WAWERU KIARIE**

**JUDGE**

