



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A)

ELECTION PETITION CIVIL APPEAL NO. 36 OF 2018

IN THE MATTER OF NOMINATIONS OF THE MEMBERS

OF COUNTY ASSEMBLY FOR MIGORI COUNTY

BETWEEN

MARTHLIDA AUMA OLOO.....APPELLANT

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT.....2ND RESPONDENT

PHILISTER ATIENO.....3RD RESPONDENT

JAMES OTIENO OCHIENG RUKU.....4TH RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya

at Migori, (A.C. Mrima, J.) delivered on the 7th June, 2018

IN THE MATTER OF HIGH COURT OF KENYA AT MIGORI

in

Election Petition Appeal No. 5 of 2018)

RULING OF THE COURT

[1] Following the General Elections held on 8th August, 2017, the Independent Electoral and Boundaries Commission (IEBC) published Gazette Notice No. 8380 on 28th August, 2017 which, *inter alia*, indicated that **Philister Atieno, the 3rd respondent** in this appeal was validly nominated to the County Assembly of Migori to represent persons with disabilities.

In publishing the Gazette Notice, the IEBC was exercising powers conferred to it by the Constitution and the various electoral laws including regulations. By the Gazette Notice, the 3rd respondent was in essence elected as a member of the County Assembly of Migori through the party list as provided by **Article 90(1)** and **177(1) (c)** of the Constitution and other electoral laws to represent persons with disabilities.

[2] The appellant in this appeal, being a person with disabilities, was aggrieved by the nomination and filed **Election Petition No. 8 of 2017** in the Chief Magistrates' Court at Migori contending that the 3rd respondent was not validly elected as a nominated member of the County Assembly of Migori to represent persons with disabilities. She sought various declaratory orders, and, in addition an order nullifying the

election of the 3rd respondent and an order to direct IEBC to allocate the seat to **James Otieno Ochieng Ruku**, the 4th respondent in the appeal.

The petition was heard by the Election Court (**Hon. R.K. Langat**) a Senior Resident Magistrate (SRM) who dismissed the petition on 4th January, 2018.

[3] Aggrieved by the judgment of the SRM, the appellant filed **Election Petition Appeal No. 5 of 2018** in the High Court at Migori on grounds of errors of law and fact in the decision. However, by a judgment dated 7th June, 2018, the Election Court (**A.C. Mrima, J.**) dismissed the appeal with costs which judgment precipitated the instant appeal.

[4] By an application dated 23rd July, 2018, filed in the appeal, the 3rd respondent seeks an order that the appeal be struck out on the grounds that:-

“(1) No appeal lies to this Court from the judgment appealed against.

(2) The court has no jurisdiction to entertain the appeal.

(3) The appeal is bad in law and incurably defective.”

The application is supported by the affidavit of the 3rd respondent in which she states that: the appeal is a second appeal on an election petition concerning election of a member of a County Assembly; under the provisions of the Constitution, the Elections Act and relevant judicial authority no second appeal lies to this Court from the decision of the High Court in its appellate jurisdiction over the matter and that the Court does not have jurisdiction to entertain the appeal.

In her replying affidavit, the appellant depones *inter alia* that the right to appeal to this Court is a constitutional right under **Article 164(3)** of the Constitution; and that neither **Section 85A** of the Elections Act nor any other law bars the appellant from appealing to this Court if the subject matter of the appeal is the validity of the election of a Member of the County Assembly.

[5] The application was heard together with the appeal in view of the strict time lines set by the electoral law for determination of election petition appeals. However, the jurisdictional question should be determined first, for, if a second appeal does not lie, the Court would not have jurisdiction to determine the substantive appeal.

[6] The relevant constitutional and statutory provisions relating to election disputes are as hereunder.

Article 87(1) of the Constitution provides:-

“**Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.**”

Article 105(1) of the Constitution provides:-

“(1) **The High Court shall hear and determine any question whether –**

(a) **a person has been validly elected as a member of Parliament;**

or

(b) **the seat of a member has become vacant.**

(2)

and **Article 105 (3)** provides:

“**Parliament shall enact legislation to give effect to this Article.**”

Section 75(1A) of the Election Act (*Act*) provides:-

“**A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate’s Court designated by the Chief Justice.**”

Further, **Section 75(4)** of the Act provides:-

“**An appeal under Section (1A) shall lie to the High Court on matters of law only ...**”

Section 85A (1) of the Act provides in part:-

“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 High Court on matters of law only...”

Lastly, Article 164(3) of the Constitution provides:-

“The Court of Appeal shall have jurisdiction to hear appeals from-

(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament.”

[7] In support of the application, Mr. Ayieko, learned counsel for the 3rd respondent, relied mainly on two decisions of this Court namely: Isaac Oerri Abiri v. Samuel Nyangau Nyanchama & 2 others [2014] eKLR and Hamdia Yaro Sheikh Nuri v. Faith Tumaini Kombe & 2 others [2018] eKLR.

In the first case this, Court upheld a preliminary objection to the jurisdiction of the Court to entertain a second appeal challenging the validity of an election of a Member of a County Assembly in the following terms:-

“In the end we must and do now uphold the preliminary objection raised by the 1st respondent. We find and hold that no appeal lies to this Court from the decision of the High Court in an appeal made under Section 75(4) of the Elections Act. The appeal is incompetent and we order it struck out with costs to the respondent.”

In the second case, the Court again held that it has no jurisdiction to hear and determine a second appeal relating to the nomination of a Member of a County Assembly. On her part, Wanjiku Thiongo, learned counsel for the appellant submitted, among other things, that, neither Article 164(3) of the Constitution nor Section 85A of the Elections Act limit the jurisdiction of the Court, nor is there an ouster clause ousting the jurisdiction of the Court to entertain an appeal relating to the validity of an election of a Member of County Assembly.

[8] While judgment in this appeal was pending, the President of the Court empanelled a five Judge Bench in Nairobi Election Petition Appeal – (Application) No. Nai 261 of 2018 - Mohammed Ali Sheikh v. Abdi Wahab Sheikh and 5 others (Mohammed Ali Sheikh's case) to determine the very jurisdictional question, that is, whether a second appeal lies and whether this Court has jurisdiction to hear a second appeal from the judgment of the High Court in its appellate jurisdiction for election of a Member of a County Assembly.

In that case, the Court was considering an application to strike out a notice of appeal and a preliminary objection challenging the jurisdiction of the Court to hear and determine a second appeal relating to the validity of an election of a Member of a County Assembly.

[9] In Mohammed Ali Sheikh's case, (*supra*) the applicant relied on the previous decisions of this Court in Isaac Oerri Obiri v. Samuel Nyangau Nyanchama & 2 others, (*supra*); Hamdia Yaro Sheikh Nuri v. Faith Tumaini Kombe & 2 others (*supra*) and Joel Nyabuto Omwenga & 2 others v. Independent Electoral and Boundaries Commission & Another [2014] eKLR to show that a second appeal did not lie and that the Court lacked jurisdiction.

On behalf of the respondents in the application, it was contended in that application, *inter alia*, that Article 164(3) conferred jurisdiction on the Court of Appeal; that the jurisdiction of the Court is no longer premised on a right of appeal donated by another statute; that the Constitution gives a right of access to justice and a right to institute court proceedings to every person; that Section 85A of the Elections Act is discriminatory and should not be equated to a constitutional provision; that the drafters' silence as to the right of a second appeal in Section 85A of the Act does not indicate that there is no right of appeal. It was also contended on behalf of the respondents that the previous decisions of the Court were made *per incurium* and the Court should depart from its previous decisions.

[10] On 19th December, 2018, the Court delivered a unanimous ruling in essence that the previous decision of the Court that there is no second appeal in election petitions concerning Membership of County Assembly were not *per incurium*; that there is no right of second appeal and the Court has no jurisdiction to hear a second appeal.

[11] In arriving at its decision, the expanded court in Mohammed Ali Sheikh's case extensively and incisively considered the relevant constitutional and statutory provisions relating to the jurisdictional question including the matters raised by the 1st appellant's counsel in opposition to the instant application.

Thus, this Court has consistently determined that a second appeal does not lie from the High Court in its appellate jurisdiction concerning the validity of an election of a Member of County Assembly and that the Court lacks jurisdiction to hear such an appeal. The appellant's counsel has not raised any new matter that has not already been considered in the previous decisions of this Court.

[12] Accordingly, the Notice of Motion dated 23rd July, 2018 is allowed with costs to the respondent against the appellant with the result that **Election Petition No. 36 of 2018** is struck out with costs to the 1st, 2nd and 3rd respondents. The 4th respondent who is a beneficiary of the appeal is not entitled to costs.

It is so ordered.

Dated and delivered at Kisumu this 24th day of January, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR