



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CORAM: D.S MAJANJA J.

ELECTION PETITION APPEAL NO. 1 OF 2018

BETWEEN

DAMARIS NYARANGI MOUNI.....APPELLANT/APPLICANT

AND

WAFULA W. CHEBUKATI.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

IRENE NYAKERARIO MAYAKA.....3RD RESPONDENT

CLERK NYAMIRA COUNTY

ASSEMBLY.....4TH RESPONDENT

RULING

1. The Notice of Motion before the court today is dated 28th March 2019. It is made primarily under **Order 45 Rule 1 of the Civil Procedure Rules** and it seeks;

[4] THAT this Honourable Court be pleased to review and aside the orders of Hon. Justice E.N. Maina made on 14th July 2019.

2. When the application came up for hearing, I directed counsel for the appellant to address me on the issue of jurisdiction because the following facts are uncontested. First, this appeal arises from a judgment and decree in **Nyamira Magistrate's Court Election Petition No. 3 of 2017** in which the Election court dismissed the petition filed by the appellant challenging the nomination of the 3rd respondent as a member of the Nyamira County Assembly. The dismissal of the petition paved way for the 3rd respondent to be sworn in as a Member of the County Assembly.

3. Second, the appellant then appealed to this court and by a judgment dated 19th July 2018, Maina J., dismissed the appeal. The appellant moved to the Court of Appeal at Kisumu in **KSM CA Election Petition Appeal No. 40 of 2018**. The Court of Appeal struck out that appeal by a judgment dated 14th February 2019 for want of jurisdiction.

4. I agree with counsel for the appellant that an Election Court has inherent jurisdiction to review its own orders in the course of proceedings (see **Richard Ncharpi Leiyagu v IEBC and 2 Others NYR CA Civil Appeal No. 18 of 2013 [2013] eKLR** and **Godfrey Masaba v IEBC and 2 Others BGM HC No. 8 of 2013 [2013] eKLR**). This case is however different because the Court of Appeal has already dealt with the matter by striking out the appeal from the decree that is now sought to be reviewed by the appellant.

5. **Order 45** of the **Civil Procedure Rules**, which is relied on by the appellant, provides as follows:

(45) (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.

6. Under **Order 45(1)(a)** aforesaid, the appellant is required to exercise election whether to appeal or apply for review. In this case, the appellant exercised her right of appeal, filed an appeal and the appeal was determined by striking out therefore foreclosing any avenue of review before this court.

7. Even assuming I was wrong on the applicability of **Order 45** of the **Civil Procedure Rules**, I hold the process of determination of election petitions is time limited by reason of **Article 87(1)** of the Constitution which requires that, “*Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*” This imperative is enacted in **section 75(2)** of the **Elections Act** which requires the Magistrates Court to determine the petition within 6 months of lodging the petition. Further, under **section 85A(1)** of the **Elections Act**, the High Court shall determine appeals from the Magistrates Court within 6 months of lodging the appeal. In both instances the final determination cannot be re-opened by review of other orders that would extend the time for determination for the election dispute outside the statutory timelines. The High Court having finalized its duty under the **Elections Act** by dismissing the appeal, it cannot be called upon to review its own appellate decree in a manner that would contravene the timelines set of statute and the Constitution.

8. I agree with the objection by counsel for the 3rd respondent that the application is incompetent as it filed by advocates who are not properly on record. The appellant was represented by the firm of **G. M. Nyambati and Company Advocates**. Since there was a judgment on record, the firm of **O’Kubasu and Munene Advocates** neither sought nor obtained leave to come on record on behalf of the appellant under **Order 9 Rule 9** of the **Civil Procedure Rules**.

9. For the reasons I have stated above, I strike out the Notice of Motion dated 28th March 2019.

DATED and DELIVERED in KISII this 16th day of APRIL 2019.

D.S MAJANJA

JUDGE

Ms Nyangasi instructed by the O’Kubasu and Munene Advocates for the appellant

Mr Ochoki instructed by Ombeta and Associates Advocates for the 3rd respondent

Ms. Michoma, Advocates instructed by the 4th respondent.