



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT ELECTION APPEAL NO. 1 OF 2018**

**ALMAS ISSACK MOHAMED.....APPELLANT**

**VERSUS**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION...1<sup>ST</sup> RESPONDENT**

**AMUL KER KASSIM.....2<sup>ND</sup> RESPONDENT**

**AMRAN ADAN ABDAIRAHMAN.....3<sup>RD</sup> RESPONDENT**

**ZAMZAM ABDULLAHI ALI.....4<sup>TH</sup> RESPONDENT**

**ECONOMIC FREEDOM PARTY (EFP).....INTERESTED PARTY**

**RULING**

1. The Appellant, Almas Issack Mohamed filed a Petition in the Magistrates' Court challenging the election of the 2<sup>nd</sup> Respondent Amul Ker Kassim; the 3<sup>rd</sup> Respondent Amran Adan Abdairahman and the 4<sup>th</sup> Respondent Zamzam Abdullahi Ali as members of the County Assembly Manderu County.

2. During the hearing of the Petition, the trial magistrate on 15<sup>th</sup> December, 2017 delivered a ruling striking out a supplementary affidavit filed by the Appellant. The Appellant was aggrieved by the said ruling and filed the appeal herein. Simultaneously with the filing of the appeal, the Appellant filed the application dated 9<sup>th</sup> January, 2018. Principally, the said application seeks orders that there be a stay of the proceedings in the Magistrates' Court pending the hearing and determination of the appeal.

3. The 1<sup>st</sup> Respondent has filed a Notice of Preliminary Objection on the following grounds:

**“The Honourable court herein lacks the jurisdiction to deal with an appeal arising from an interlocutory ruling in an election petition”**

4. The 2<sup>nd</sup> - 4<sup>th</sup> Respondents and the Interested party also filed a Notice of Preliminary Objection dated 17<sup>th</sup> January, 2018 on the grounds that:

**“1. This Honourable Court of High Court (sic) has no jurisdiction to entertain the application as it arises from an interlocutory decision of the Superior Court (sic) made in an election petition in respect of which no appeal lies to this court.**

**2. That the application is otherwise bad in law, misconceived, incompetent and an abuse of the process of this Honourable Court.”**

5. The Preliminary Objections were canvassed by way of written submissions.

6. The gist of the submissions by the 1<sup>st</sup> Respondent is that this court has no jurisdiction to hear an appeal arising from an interlocutory ruling in an election petition. The court was referred to Section 75 of the Elections Act.

Section 75(1A) 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.”**

Section 75(4) provides;

**“An appeal under subsection(1A) shall lie to the High Court on matters of law only and shall be –**

**(a) filed within thirty days of the decision of the Magistrate’s Court; and**

**(b) heard and determined within six months from the date of filing of the appeal.”**

The court was also referred to Rules 34 & 35 Elections (Parliamentary and County Elections) Petitions Rules (hereinafter Elections Petitions Rules) which deal with appeals and Section 80 (3) of the Elections Act which provides:

**“Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court.”**

7. The submissions by the counsel for the 2<sup>nd</sup>-4<sup>th</sup> Respondents and the Interested party are essentially in agreement with the submissions by counsel for the 1<sup>st</sup> Respondent. It is argued that there is no right of appeal in an interlocutory order made by the Magistrate’s Court and that the aggrieved party has to await the final judgment before lodging an appeal.

8, The counsel for the Petitioner submitted that this court has jurisdiction and referred to Article 165 (3)(e) of the Constitution which provides as follows:

**“Subject to clause (5), the High Court shall have**

**(e) any other jurisdiction, original or appellate, conferred on it by legislation.”**

9. The court was also referred to Section 75 (1A) of the Elections Act and Rule 34 of the Elections Petitions Rules and told that the law is silent on appeals from the Magistrates’ Courts to the High Court. Reference was made to Section 75(4)b of the Elections Act and Rules 34 and 35 of the Elections Petitions Rules which provide for appeals. Rule 34 specifically provides for appeals from the Magistrates Courts.

10. As stated in the case of **Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited [1989] KLR 1:**

**“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

11. It is abundantly clear from the papers filed herein that the Petition in the Magistrates’ Court is still pending. It is not in dispute the appeal herein is on an interlocutory ruling of the Magistrates’ Courts. The application herein dated 9<sup>th</sup> January, 2018 seeks orders that there be a stay of the proceedings in the Magistrates’ Court pending the hearing and determination of this appeal. The big question is whether this court has the jurisdiction to hear the appeal and the application filed herein before the Petition in the Magistrate’s Court has been concluded.

12. Section 75 (4) of the Elections Act provides for appeals from the Magistrates’ Courts. An appeal in respect of the election of a member of the County Assembly lies to the High Court and must be determined within six months. Rule 34 of the Elections Petitions Rules which provides for appeals from the Magistrates’ Courts makes no mention of appeal from orders made in interlocutory applications but talks of the judgment appealed from and the decree. Indeed none of the provisions of the law relied on by counsel for the Appellant come to his aid.

13. The jurisdiction of the High Court in election dispute resolution is a special jurisdiction conferred by the Constitution and the electoral law. This is unlike the High Court’s unlimited jurisdiction in civil and criminal cases. (See for example the Supreme Court decision in the case of **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR**; Court Appeal decision in **Ferdinand Ndung’u Waititu v IEBC & 8 others [2013] eKLR**; and **John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 others [2008] eKLR**)

14. The Bench Book on Electoral Disputes Resolution has amplified the aforesaid position in Chapter 2 paragraph 2.4.6.4 where it is stated:

**“Although there is no direct authority on the point, logical deduction from Supreme Court and Court of Appeal decisions indicates that a person seeking to appeal a Magistrate’s Court’s interlocutory decision to the High Court must await the final hearing and determination of the election petition by the Magistrate’s Court.”**

15. With the foregoing, I hold that the Appeal filed herein is premature. The practical effect of the appeal would be to clog the wheels of justice in this time-bound case. I find merit in the Preliminary Objections raised. Consequently, I hereby strike out the appeal together with the application with costs to the Respondents and the Interested party.

Dated, signed and delivered at Nairobi this 25<sup>th</sup> day of January, 2018

**B. THURANIRA JADEN**

**JUDGE**