



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL APPEAL NO. 153 OF 2013**  
**FORMERLY ELECTION PETITION MALINDI NO. 1 OF 2013**

**MWATHETHE ADAMSON KADENGE ..... APPELLANT**

**VERSUS**

**TWAHIR ABDULKARIM MOHAMED..... RESPONDENT**

**INDEPENDENT ELECTORAL**

**AND BUNDARY COMMISSI..... 1ST INTERESTED PARTY**

**HAMISI HALFANI TSUMA ..... 2ND INTERESTED PARTY**

**RULING**

**Introduction**

[1] From the Record of Appeal herein, the appellant was declared the winner of the County Assembly election for the Sheila Ward of Malindi constituency in Kilifi County following the general election of 4th March 2013 whereupon a petition dated the 10<sup>th</sup> April 2013 challenging the validity of his election was filed in the name of Bakari Hassan Juma (hereinafter the original petitioner) as Election Petition No. 2 of 2013 by a firm of advocates, M/s A.O. Hamza and Co. Advocates, Mombasa.

[2] Subsequently, the original petitioner filed a Notice of Intention to Act in Person and while so acting further filed a Notice of Withdrawal of Election Petition both notices being dated 2<sup>nd</sup> May 2013. Simultaneously with the said notices the original petitioner filed an '***Application to Withdraw an Election Petition***' supported by his affidavit sworn on the 2<sup>nd</sup> May 2013 and based on the three grounds, namely:

- a. ***That the petition was presented by one Twahir Abdulkarim Mohamed in conjunction with others, without my consent.***
- b. ***That I did not sign the petition nor the supporting affidavit.***
- c. ***That I am not interested in the petition, as personally I have no complaints regarding the elections conducted on the 4<sup>th</sup> of March 2013.'***

[3] On the 6<sup>th</sup> May 2013, one Twahir Abdulkarim Mohamed in response to the application for withdrawal of petition by the original petitioner filed a **Notice of Intention to be Substituted** and an **Application to be Substituted as Petitioner** both dated the 6<sup>th</sup> May 2013 supported by an affidavit of the same date. The principal answer to the original petitioner's claim was that he had indeed signed the petition after he volunteered to offer himself, at a meeting held for purposes of reviewing the conduct of the elections, as petitioner on behalf of the said Twahir Abdulkarim who was one of the candidates for the Sheila County Assembly ward at the election.

[4] By order dated 14<sup>th</sup> May 2013, the election court allowed the original petitioner to withdraw his petition and the said Twahir Abdulkarim Mohamed's application to be substituted as petitioner in place of the original petitioner was granted with the costs of the two applications to the respondents - the Independent Electoral and Boundaries Commission, the Returning Officer and the appellant herein.

### **The Appeal**

[5] Being dissatisfied with the election court's order of 14<sup>th</sup> May 2013, the appellant on the 28<sup>th</sup> May 2013 filed a Memorandum of Appeal dated the 24<sup>th</sup> May 2013, the primary ground of which is that the election court erred in allowing substitution of the petitioner after the notice of intention to withdraw the petition by the original petitioner and in failing to find that 'the original petition was a nullity in law and hence incapable of sustaining an application for substitution'. In response to the appeal, the respondent filed a Notice of Motion dated the 8<sup>th</sup> August 2013 seeking to strike out the appeal on the ground that there is no right of appeal to the High Court on an interlocutory order or ruling of the Election Court.

During the directions for the hearing of the appeal on the 9<sup>th</sup> December 2013, in the interests of an expedited determination of the appeal, the Court ordered that the issues raised by the Respondent in the Notice of Motion of 5<sup>th</sup> August 2013 be canvassed as a response to the appeal.

[6] It appears that the appellant did write to the court on two occasions requesting that the court takes step towards the hearing of the appeal. In response to the second letter dated the 26<sup>th</sup> July 2013 (in which reference is made to the earlier one of the 25<sup>th</sup> June 2013) the appeal was set for directions on 28<sup>th</sup> August 2013. On that day, the court minuted a direction that:

*“The Hon. Chief Justice will appoint a panel to hear appeals in petitions. Let the parties await due notifications.”*

The appeal was subsequently mentioned on the 11<sup>th</sup> and 14<sup>th</sup> November 2013 before the Deputy Registrar of the Court and on the 26<sup>th</sup> November 2013 before the judge when the court made the following order:

*“This appeal will be heard in Mombasa High Court. Matter now transferred there. It will be mentioned there on 3/12/13.”*

[7] The matter was in fact mentioned on the 9<sup>th</sup> December 2013 before the Resident Judge at Mombasa when the Hon Resident Judge made an order as follows:

*“This appeal to be heard by Hon. Muriithi, J. in High Court No. 3. Mention before the Judge at 2.30pm.”*

The appeal was then mentioned before me at 2.30pm on the 9<sup>th</sup> December 2013 when I gave directions for the hearing of the appeal referred to above, as follows:

*“By consent stood over to the 11<sup>th</sup> December 2013 at 12.00 noon for the hearing of the appeal and the Respondent's Notice of Motion of 5/8/13 to be deemed as a response to the appeal”*

### **Submissions by the Parties**

[8] Before the appeal could proceed to hearing on the 11<sup>th</sup> December 2013, the court noted that the appeal was filed on the 28<sup>th</sup> May 2013 and invited the parties to make submissions as to whether the court had jurisdiction to proceed with the matter in view of the 6-month timeline for the hearing and determination of appeals under section 75 of the Elections Act. The counsel for the parties - *Mr. Mouko for the appellant, Mr. Abubakar for the Respondent and Ms. Ngugi for the Interested parties* (the IEBC and the Returning Officer) - made their respective submissions and ruling was reserved for the 16<sup>th</sup> December 2013.

[9] For the appellant it was contended that the appeal was not governed by section 75 of the Elections Act and, in the alternative, that Article 159 of the Constitution cured any lapse in time because of the nature of the appeal which challenged the legality of the substitution of the original petitioner by the Respondent in the appeal. The Respondents concurred in the submission that the appeal was time-barred by virtue of the provisions of section 75 (4) (b) of the Elections Act. The verbatim submissions of counsel for the parties were as follows:

Mr. Mouko for the appellant

*'Article 105 of the Constitution. I take the view that the appeals from the subordinate court have no time limit. I now see that there is an amendment to the Elections Act.*

*The court has jurisdiction to deal with the appeal. This is an appeal brought before the proceedings in the Election Court were complete. The appeal is peculiar in that what is challenged is not a question as to the validity of election of a county assembly representative. It is an appeal which is challenging the locus of the substituted petitioner (Respondent in the appeal.) The Petition was filed and the petitioner applied to withdraw from the petition on the basis that he had nothing to do with the petition. He sought to be discharged. The Respondent came in to take over the petition. The Election Court allowed the Petitioner to come out of the petition and the respondent applied simultaneously to be the petitioner. The Election Court allowed the takeover of the petition which did not exist.*

*The appellant being dissatisfied with the election court's decision appealed. The appeal does not relate to validity of an election court. It relates to the locus of the Respondent; whether there was a petition that the respondent could be allowed to conduct. That puts this appeal outside the terms of section 75(1A) of the Elections Act.*

*There was a serious illegality which the court ought not to allow. Under section 75(1A) the court would be dealing with whether there was a valid election. What happens when there is an outright wrong? Should the person who benefits from an illegality keep the benefit?*

*Rule 34 [of the Elections (Parliamentary and County Assembly Elections) Petitions Rules, L.N. No. 54 of 2013] on appeals specifies that once a party has filed an appeal it is the responsibility of the Court to set in motion the process to ensure that the appeal is heard and determined. Registrar is required to take steps towards the hearing of the appeal. There are letters by the appellant asking the court to fix the appeal for directions as to hearing. The appellant did all he could but the information was that the Chief Justice would give directions. Our hands were tied.*

*Rule 34 [10] of the Rules gives the High Court power to confirm, reverse decisions of the Election Court. The court is seized of power to do what the election court could have done.*

*The procedural lapses cannot be blamed on the appellant and the court cannot lock out the appellant on matters of procedural technicality of which the appellant was not a party to. Article 159 of the Constitution requires that matters be considered without undue technicalities. Otherwise, the appellant will suffer great injustice. The lapse is a technical lapse on the part of the court administration. Where does the appellant get his relief. It is special circumstances. It is unique. If the 6 months are applicable, it should not be applied on him. It is an important appeal*

*which can be used in discouraging the people of forgery of court documents.'*

Mr. Abubakar for the Respondent

*'The jurisdiction of the court is primary before consideration on the merits.*

*Article 165 (3) (e) of the constitution. Jurisdiction of the High Court in relation to elections is conferred by legislation. The Jurisdiction to hear appeals is given by statute. Section 75 of the Elections Act. The petition was about the validity of the election. There is no other petition that the election court could hear other than election petition. An appeal arising from the petition is on the validity of the election. The appellant has by action conceded that the petition was about election petition and validly before the Election Court.*

*Section 75 (4) of the Elections Act as read with Article 165(3)(e). Jurisdiction must comply with (a) and (b) with regard to the filing of the appeal and the hearing within 6 months.*

*Appeal was filed on 28<sup>th</sup> May 2013. The 6 months period ended on 27<sup>th</sup> November 2013. The appeal is time-barred and there is no cure prescribed by the Elections Act or any other law. I refer to the Supreme Court decision quoted in the Court of Appeal Civil Application No. 24 of 2013, at p.10 where the Court cited the Supreme Court decision in Samwel Kamau Macharia and Anor. v KCB and 2 Ors. SC Civil Application No. 2 of 2011.*

*Substantive issues in the appeal. Section 80(3) of the Elections Act. Interlocutory matters in connection with elections shall be heard and determined by the Election Court. Even after filing the appeal, the High Court has jurisdiction to entertain any appeal including issues determined at interlocutory level the appeal must be filed in an appeal at the end of the petition.*

*The appellant did not file an appeal. The appellant also had opportunity to file a cross petition in the appeal by the other person in Appeal No. 2 of 2013.*

*Rules are procedural. They guide the proceedings of the court. The Court cannot extend time given by the Act or the Constitution. The time of 6 months is given by the Act and it goes to the jurisdiction of the Court, Article 159 of the Constitution and section 80 of the Act cannot cure the lapse. The court should down its tools.'*

Ms. Ngugi for the Interested Parties

*Election petitions are creatures of special legislation. The Elections Act Section 75 of the Act clearly stipulates the time for filing and determination of appeals.*

*The appeal by the appellant is under the Elections Act. It does not state by what other law the appeal is filed. The appeal is governed by the Elections Act and the Court must abide by the law.*

Mr. Mouko in reply

*Section 80 (1) (d) of the Elections Act, the High Court has power to exercise the power of the Election Court. The section gives the court power to decide all matters without regard to technicalities.*

*Although section 75 of the Act provides 6 months, section 80 which is a substantive provision of the statute gives the court the power to ensure that justice is done notwithstanding procedural lapses.*

*Where is the justice where the appeal is struck out and the person is allowed to benefit from his own wrong-doing.'*

## **Issues for determination**

[10] The issue before the court is therefore whether the appeal herein filed is an appeal within, and therefore governed by, section 75 of the Elections Act and whether it is time-barred by virtue of the provision of section 75 (4) (b) which requires that an appeal be heard and determined within 6 months of filing.

## **Determination**

[11] The jurisdiction of the High Court as the appellate court from the Election Court for the county assembly elections is circumscribed by section 75 of the Elections Act, which is in the following terms so far as material:

*“75. (1A) 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.*

*(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.*

*(3) In any proceeding brought under this section, a court may grant appropriate relief, including*

—

*(a) a declaration of whether or not the candidate whose election is questioned was validly elected;*

*(b) a declaration of which candidate was validly elected; or*

*(c) an order as to whether a fresh election will be held or not.*

*(4) 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.”*

[12] In giving effect to the right of appeal under section 75 of the Elections Act, Rule 34 of Elections (Parliamentary and County Assembly Elections) Petitions Rules, L.N. No. 54 of 2013 provides for Appeals from a Magistrate’s Court as an election court as follows:

***34. (1) An appeal from a Magistrate’s Court under section 75 of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition.***

*(2) The memorandum of appeal shall concisely set out under distinct head, the grounds of appeal, without any argument or narrative, from the judgment appealed from and the grounds shall be numbered consecutively.*

*(3) The memorandum of appeal shall be filed at the nearest High Court registry within fourteen days from the date of the judgment.*

*(4) The appellant shall, upon filing the memorandum of appeal, pay the fee specified in the Second Schedule.*

*(5) The appellant shall, within seven days of filing the memorandum of appeal, serve the memorandum of appeal on all parties directly affected by the appeal.*

(6) *The appellant shall, within twenty one days, upon filing of memorandum of appeal file a record of appeal which shall contain the following documents—*

*(a) memorandum of appeal;*

*(b) pleadings;*

*(c) typed and certified copies of the proceedings;*

*(d) all affidavits, evidence and documents put in evidence before the magistrate; and*

*(e) signed and certified copy of the judgment appealed from and a certified copy of the decree.*

(7) *Upon the filing of the memorandum of appeal, the registrar of the court to which the appeal is preferred shall, within seven days, send a notice of appeal to the court from whose decree the appeal is preferred.*

(8) *The court shall, on 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.*

(9) *The High Court shall, within thirty days of lodging the memorandum of appeal, fix a date for*  
—

*(a) directions including directions as to the manner in which evidence and exhibits may be presented; and*

*(b) hearing of the appeal.*

(10) *The High Court may confirm, vary or reverse the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.*

[13] In interpreting the provisions for the appellate jurisdiction of the High Court under section 75 of the Elections Act, it is clear that the court shall have power to entertain and determine an appeal from the Election Court in the following circumstances:

- a. *The appeal must arise from proceedings under section 75 (1A) of the Elections Act for the determination of a question as to the validity of the election of a member of a county assembly by the Resident Magistrate's Court;*
- b. *The appeal shall lie to the High Court on matters of law only;*
- c. *The appeal shall be filed within thirty days of the decision of the Magistrate's Court; and*
- d. *The appeal must be heard and determined within six months from the date of filing of the appeal.*

[There is noted discrepancy between the Rule 34 (3) and section 75(4) (a) as to time for filing of the appeal, wherefore the 30 days allowed by statute must prevail but nothing turns on that in this appeal].

[14] The Supreme Court decision on jurisdiction in the case of *Samuel Kamau Macharia and Anor. v Kenya Commercial Bank and 2 Ors.* SC Civil Application No. 2 of 2011, quoted in the Court of Appeal authority of *Benjamin Onguyo Andamav Benjamin Andola Andayi and 2 Ors* (2013) eKLR, and which is binding on this court is as follows:

*“A court’s jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate*

*with the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon parliament to set the jurisdiction of the court of law or tribunal the Legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law.”*

15] While making no determination as to whether this appeal could competently have been filed before the final determination of the election petition by the election court, (for which the court has not been served with full arguments), I find that this court is bound by the Elections Act to determine an appeal within 6 months of its filing. Therefore, this appeal - assuming that it was properly filed - must have been heard and determined by the 27<sup>th</sup> November 2013, that is six months after the appeal was filed by the Memorandum of Appeal dated 24<sup>th</sup> May 2013 and filed on the 28<sup>th</sup> May 2013. This holding is consistent with the objective of Article 87 (1) of the Constitution that election disputes be determined expeditiously embodied in the provision that “Parliament shall enact legislation to establish mechanisms for **timely** settling of electoral disputes”.

[16] With tremendous respect to counsel for the appellant, if the present appeal was not an appeal under section 75 of the Elections Act, the High Court could have no jurisdiction to entertain the appeal because an appellate jurisdiction under Article 165 of the Constitution must be granted by statute. In entertaining this appeal [and dealing with the issue of jurisdiction raised in the matter], this court must treat the appeal as having been filed pursuant to the provisions of the Elections Act. It would be absurd that an appeal arising from an election petition proceedings for which the Constitution and the Elections Act have provided for timely settlement within 6 months could have an open-ended timeline which could subvert the principle of expeditious disposal of electoral disputes.

[17] The appellant blames the court for not fixing the appeal hearing despite reminders by the appellant during the period prescribed. Although it is clear that the court was dilatory in processing the appeal to hearing, I think that for purposes of jurisdiction, save for an order for costs, it is irrelevant at whose default the appeal is not heard in time; whether the default is on the part of the court or the parties is immaterial. The court, of course, very much regrets the delay. The principal object of the provision for timely hearing of election disputes is to settle disputes relating to electoral outcomes within a short time considered reasonably necessary for the determination of electoral disputes to allow the establishment of governance structures which depend on identification of persons elected to the various elective positions. The section and the rules do not contain a provision for extension of time or the usual allowance in appeals that for purposes of reckoning time of filing of the appeal it shall be discounted such period as the court will certify as having been required for preparation of certified proceedings necessary in preparation of the record of appeal.

[18] The counsel for the appellant offered Article 159 of the Constitution to cure the lapse of time set for the hearing of the appeal in view of the issue of illegality allegedly involved in the question of the locus of the respondent to be substituted in the petition as the petitioner. In my view, a question of Jurisdiction is not one of technicalities of procedure which are amenable to the malleability of Article 159 principle of substantial justice without regard to technicalities of procedure. I have previously held in Mombasa High Court Civil Suit No. 235 of 2010, *D.J. Lowe & Company Limited v. Credit Agricole Indosuez and 3 Ors* of 20<sup>th</sup> February 2012 that Article 159 does not give jurisdiction to the court where none exists; the article only prescribes the manner of exercise of jurisdiction which exists. In that case I said:

*“I agree with the Counsel for the 1<sup>st</sup> Defendant that Section 1A and 1B of the Civil Procedure Act and Articles 50 and 159 of the Constitution cannot confer jurisdiction where none exists. They direct the manner of exercise of the jurisdiction which already exists and the object of such exercise. I also agree that the unlimited jurisdiction under Article 165 of the Constitution ought not to be invoked where there are clear statutory or other provisions that give jurisdiction elsewhere. In my view, the unlimited jurisdiction should only be invoked where the body to which jurisdiction is given by statute, or practice rules made there-under, refuses, neglects or is unable, for any reason, to exercise jurisdiction.”*

[19] In similar terms, I observed in High Court (Mombasa) Constitutional Petition No. 59 of 2011, *Abdullah Mangi Mohamed v. Lazarus Beja and 5 Ors* of 30<sup>th</sup> November 2012 that:

*“Properly understood, Article 159 of the Constitution does not cure defects on jurisdiction; it only excuses **“undue regard to technicalities of procedure”** in the interest of justice. Jurisdiction of the court must therefore be established before the invocation of Article 159 principle to excuse strict compliance with the technical procedure for the exercise of such jurisdiction. Accordingly, the issue of the constitutional court's jurisdiction over the matter set out in the Petition is of primary consideration.”*

I reiterate that finding in the circumstances of this appeal in holding that the court has no jurisdiction to deal with the appeal outside the 6 months limit of section 75 (4) (b) of the Elections Act.

[20] The appellant herein does not suffer substantial prejudice as his complaint may still be addressed by the High Court in the hearing, which is yet to commence, of the appeal filed against the final judgment of the Election Court, that is Appeal No. 2 of 2013 Malindi, in which the appellant herein is a respondent. Without prejudicing the hearing of the appeal by the appellate court, I observe that in its judgment on appeal the High Court has power to decide the appeal as between the parties including making a decree on favour of a respondent who has not filed an appeal or cross-appeal. This is the provision of Order 42 rule 32 of the Civil Procedure Rules which in my view is applicable in the interests of the overriding objective under rule 4 (1) of the Election (Parliamentary and County Assembly Elections) Petition Rules 2013 ‘to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act’ and in the absence of any rule in the said election petitions rules to the contrary.

[21] Order 42 rule 32 of the Civil Procedure Rules is in these terms:

*32. The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents although such respondents may not have filed any appeal or cross-appeal.*

### **Order**

[22] Accordingly, I hold that this court does not have jurisdiction to proceed to hear the appeal outside the time limit set for that purpose on the authority of Article 87 of the constitution by section 75 of the Elections Act. The court shall therefore mark the appeal as overtaken by lapse of time. However, as the lapse has taken place without the fault of any of the parties to the appeal, I do not propose to make any orders as to costs of the proceedings.

**DATED, SIGNED AND DELIVERED THIS 16<sup>TH</sup> DECEMBER 2013.**

**EDWARD M. MURIITHI**

**JUDGE**

In the presence of: -

Mr. Mouko for the Appellant

Mr. Abubakar for the Respondent

Ms Ngugi for the Interested Parties

Mr. Buoro – Court Assistant