



REPUBLIC OF KENYA



**Independent Electoral and Boundaries Commission & 2 others v Wabomba & 3 others
(Election Petition E001 of 2023) [2023] KEHC 22147 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 22147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
ELECTION PETITION E001 OF 2023**

DK KEMEL, J

FEBRUARY 3, 2023

BETWEEN

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
APPELLANT**

RETURNING OFFICER KANDUYI CONSTITUENCY 2ND APPELLANT

EVERTON SIFUNA NGANA 3RD APPELLANT

AND

MOSES JUMA WABOMBA 1ST RESPONDENT

SIMON WAFULA MAKHANU 2ND RESPONDENT

RAPHAEL LUFWALULA WANYAMA 3RD RESPONDENT

ARNOLD MAKHOHA NYONGESA 4TH RESPONDENT

*(Being an appeal against the entire decision of SPM Hon. Mutai in Election Petition No. 1
of 2022 at Bungoma Magistrate's Court in a Ruling delivered on 17th January 2023)*

JUDGMENT

1. The Appeal herein arises from the ruling delivered by Senior Principal Magistrate Hon. Mutai in Bungoma Chief Magistrate's Election Petition No. 1 of 2023 delivered on the 17TH January 2023 wherein he dismissed the Appellant' oral application to have new affidavits filed by the petitioners expunged from the record. The learned trial magistrate proceeded to allow the petitioners request to deem the witness affidavits filed as property on record.
2. Aggrieved by the decision of the learned trial magistrate, the 3rd Appellant has raised the following grounds of appeal:



1. The learned trial magistrate erred in fact and in law by exceeding his jurisdiction by allowing witness affidavits filed outside the statutory timelines yet the petition was not filed with any witness affidavit which is a fatal defect in the petition that five witness affidavits seek to cure yet the court lacked jurisdiction to grant amendments that change the form of the petition and introduces new evidence, issues and witnesses outside the statutory timelines for filing a petition.
2. The learned trial magistrate erred in fact and in law by failing to appreciate the submissions of the petitioners that the court has jurisdiction to allow amendments of a petition at any time yet the jurisdiction is limited only to inadvertent errors and omissions and arrived at a wrong decision and allowed the petitioner's witness affidavits that introduced new witnesses, new evidence and new issues outside statutory timelines and has prejudiced the 3rd respondent's case.
3. The trial magistrate erred in fact and in law in admitting the following witness affidavits as evidence yet they were filed outside the statutory timelines and have introduced new witnesses and new evidence that was not envisaged in the leave granted to the Petitioners to amend their petition:
 - a. Emmanuel Sikuku Mabale
 - b. Dennis Sifuna Wamamo
 - c. Moses W. Mukinisu
 - d. Emily Nafula Wabwile
 - e. Andrew Makokha
4. The trial magistrate erred in fact and in law and misdirected himself by failing to find that the said witness affidavits were filed outside the statutory timelines and were in violation of the constitutional and statutory timelines for filing a petition and witness affidavits.
5. The learned trial magistrate erred in fact and in law by failing to analyse the contents of the witness affidavits and misdirected himself and arrived at a wrong decision that the witness affidavits had not introduced new evidence yet the affidavits themselves were not amendments but totally new evidence and witnesses who had filed their affidavits together with the petition.
6. The trial magistrate erred in fact and in law by finding that the petitioners had not abused the court process yet they had used the leave the court granted them to amend the petition to introduce new evidence and affidavits which actions amounted to an abuse of the court process.
7. The trial magistrate erred in fact and in law by ignoring the entire submissions and authorities by the 3rd respondent in their entirety hence arrived at a wrong decision by allowing amendments that seek to cure a fatal defect in the petition outside statutory timelines.
8. The learned trial magistrate erred in law and in fact by ignoring the issues raised by the 3rd respondent in their entirety and dismissed the 3rd respondent's application and allowed the petitioners to prosecute their petition by use of their affidavits that were filed in support of the petition on 11th August 2022 yet the said affidavits are not admissible in evidence and that the petitioner's having amended their petition ought to prosecute their petition on the basis of affidavits sworn in support of the amended petition.



9. The learned trial magistrate erred in fact and in law and misdirected himself when he found that affidavits sworn in plural are valid.
10. The trial magistrate erred in fact and in law by delving on extraneous issues that were neither submitted on nor were before him when he made a decision to allow an application by the petitioners to admit the impugned witness affidavits as part of their evidence when in fact the petitioners did not make such an application and no such issue was canvassed before him, the issue that was before him was the application by the respondents to strike out the said affidavits from the record of the court.

The appellants therefore prayed that the ruling of the lower court delivered on 17th January 2023 be set aside and the appeal be allowed, and the following orders issued:

- (a). That the petition to proceed based on affidavits filed in support of the amended petition and the affidavits filed in support of the original petition to be disregarded by the court.
 - (b). The following witness affidavits to be expunged and or struck out from the record ,
 - i. Emmanuel Sikuku Mabale
 - ii. Dennis Sifuna Wamamo
 - iii. Moses W. Mukinisu
Emily Nafula Wabwile
 - v. Andrew Makokha
 - (c). The verifying affidavit in support of the petition sworn in plural dated 25th October 2022 to be expunged from the record.
 - (d). The 3rd respondent to be awarded costs of the appeal and the lower court.
 - (e). Interest on (d) above.
 - (f). Any other order the court may deem just to grant.
3. The appeal was canvassed by way of written submissions. Both the 3rd Appellant and Respondents duly complied. Learned counsel for the 3rd Appellant indicated that the rest of the appellants are in support of the appeal though none of them filed any pleadings in that regard.
 4. Vide submissions dated 31.1.23 and 2.2.23 learned counsel for the 3rd Appellant raised three issues for determination; firstly, whether this court has jurisdiction to hear interlocutory appeals; secondly, whether the petitioner's witness affidavits that were filed out of time should be admitted as part of the petitioner's evidence in support of the petition and thirdly, whether the Respondents have challenged the issues raised by the 3rd Appellant in the appeal.

On whether this court has jurisdiction, it was submitted that this court has the requisite jurisdiction to entertain this interlocutory appeal arising from an interlocutory application. Reliance was placed in the case of *Martha Wangari Karua v IEBC and 3 others* [2019] eKLR where the Supreme Court of Kenya held that the appellate courts have jurisdiction to hear appeals arising out of interlocutory applications in election petitions, in cases where the application seeks to strike out the petition on the basis of jurisdiction of the court to hear the petition. Learned counsel pointed out that the exceptional circumstances of the case merits this court hearing the appeal on merit and that this court should



stick to the doctrine of stare decisis so that a later decision of the court is the one to be followed since the authorities relied upon by the Respondents were made in 2017/20 18 before the Supreme Court restated the law on appeal arising out of interlocutory applications. Learned counsel urged this court to distinguish the cases cited by the Respondents which were not dealing with circumstances where the jurisdiction of the trial court to hear the petition was in issue but only on the efficacy of some affidavits sought to be introduced by parties. The court was urged to depart from relying on old decisions on the matter but to stick with the latest decision of the Supreme Court in *Martha Wangari Karua v IEBC & 3 Others* (Supra).

As regards the second issue, it was submitted that the Respondent failed to file witness affidavits within the stipulated time alongside the petition and hence they should not have been allowed to form part of the evidence since the election court has no jurisdiction to extend time for filing and or amending of pleadings in an election petition outside the statutory and constitutional timelines.

As regards the last issue, it was submitted that the Respondents have not challenged the appeal in any way as no counter issues were raised by them and hence this appeal should be allowed with costs to the 3rd Appellant.

5. Vide submissions dated 1.2.23, the Respondents raised two issues for determination namely, whether this court has jurisdiction to deal with an appeal arising from a ruling in an interlocutory application in an election petitioner and secondly, who is to bear the costs of the appeal?

On whether this court has the requisite jurisdiction, it was submitted that appeals against interlocutory decisions in election petitions must await the final judgment of that court. Reliance was placed in the cases of *Stephen Nzue Mwanthi v Philip Muia & 4 others* [2017] eKLR and *Almas Isaac Mohamed v IEBC and 4 others* [2018] eKLR and Bungoma High Court Election Petition No. E001 of 2022 *Tendet George Kwemoi v Kiptalam Hillary and 2 others*. Reliance was also placed on the *Bench Book on Electoral Disputes Resolution* vide Chapter 2 paragraph 2.4.6.4.

As regards the last issue, it was submitted that as the court lacks jurisdiction, it must down its tools and strike out the appeal with costs to the Respondents to be borne by the 3rd Appellant.

6. I have considered the 3rd Appellant's appeal as borne out of the grounds of appeal in the Memorandum of Appeal as well as the record of appeal and the submissions by learned counsels for the 3rd Appellant and the Respondents. I have also given due consideration to the authorities cited. I find the issues for determination are as follows:

- (i) whether this court has jurisdiction to hear an appeal emanating from an interlocutory application in an election petition.
- (ii) whether this court should interfere with the directions/orders of the trial court with regard to the additional witness affidavits in support of the amended petition.

7. Before i delve into the issues, the role of this court is well settled, namely to re-evaluate and analyze the evidence presented before the trial court and come to its own independent conclusion. (See *Sele v Associated Motor Boat Co. Ltd* [1968] E.A. 123). The record of appeal indicates that the Respondents filed a petition dated 11.8.22 and later amended it on 21.10.22 against the Appellants seeking for three reliefs: Scrutiny, recount, re-tallying of votes and thereafter an order directing the 2nd Appellant to declare winner and issue a certificate and finally costs of the petition. The three appellants filed responses to the petition wherein they vehemently opposed the Respondents claim and sought for the dismissal of the petition with costs. The parties conducted the pre-trial interference and later agreed to proceed with the hearing on the 10.1.2023. However, before the matter kicked off for hearing, learned counsel for the 3rd Appellant herein made an oral application wherein he objected to the filing



of witness affidavit outside the stipulated period and without leave of the court and sought for the same to be expunged from the record. After hearing the arguments of the learned counsels, the learned trial magistrate vide his ruling dated 17.1.23 rejected the objection and ordered that the witness affidavits filed by the Respondents herein be deemed as properly on record. This then prompted the present appeal.

7. As regards the first issue, jurisdiction is very vital to a court of law. In the case of *Owners of Motor Vessel "Lillian" s v Caltex Oil (K) Ltd* [1989] KLR 1 Nyarangi JA (as he then was) held as follows:

“Jurisdiction is everything. Without it, a court has no power to make on 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.”

A perusal of the record of appeal and the memorandum of appeal leaves no doubt that the petition in the lower court is still pending determination. It is also not in dispute that the appeal herein is on a ruling that emanated from directions made by the trial court regarding an interlocutory oral application. Looking at the prayer (a) in the Memorandum of Appeal dated 18.1.23, it is clear that the 3rd Appellant herein seeks that the petition does proceed, based on affidavits filed in support of the amended petition and that the affidavits filed in support of the original petition to be disregarded by the court. This then shows that the 3rd Appellant did not seek to strike out the petition in the lower court. His main borne of objection in the lower court is that the documents filed out of the statutory period should be expunged or rejected so that the parties can proceed with the earlier pleadings filed. He did not therefore seek to have the entire petition struck out by the trial court. Had that been the case, then this court would have had jurisdiction to deal with the appeal because appeals against interlocutory decisions must await the final judgement of that court. If such an appeal against a decision allowing an interlocutory application seeking to strike out a petition been lodged, then an appellate court shall have jurisdiction to hear such an appeal. This was the decision of the Court of Appeal in *Bashir Haji Abdullabi v Adan Mohamed Noor and 3 others* [2013] eKLR where it was held;

“However, in our view, if an appeal is against a decision of the High Court allowing an interlocutory application seeking striking out a petition then this court would have jurisdiction to hear it for an order striking out a petition is a final decision on the petition and an appeal from it is no longer an interlocutory appeal but an appeal on a final decision. This, in our view, is only where application for striking out the petition is allowed and the petitioner is struck out.”

Flowing from the above decision, the following provisions of the *Election Act* and Rules thereunder must be put into context. They are as follows;

Section 75 (1A) - A question as to the validity of the election of a member of a county assembly shall be heard and determined by a Resident Magistrate’s Court designated by the Chief Justice.

Section 75(4) – An appeal under sub- section (1A) shall lie to the High Court on matters of law only and shall be –

- a). Filed within thirty days of the Magistrate’s Court; and
- b) heard and determined within six months from the date of filing of the appeal.



Again, Rule 34 and 35 of the *Elections (Parliamentary and County Elections) Petition Rules* as well as section 80(3) of the *Election Act* provide as follows:

“Interlocutory matters in connection with a petition challenging results of presidential, Parliamentary or County Elections shall be heard and determined by the election court.”

8. It is not in dispute that the jurisdiction of the High Court in Election dispute resolution is a special one conferred by the *constitution* and election law unlike the usual unlimited jurisdiction in both civil and criminal matters under article 165 of the *Constitution*. Learned counsel for the 3rd Appellant has earnestly beseeched this court to depart from the decisions it reached in the cases of *Stephen Nzue Mwanthi v Philip Mua and 2 others* [2017] eKLR and *Tendet George Kwemoi v Kiptalam Hillary and 2 others* Bungoma High Court Election Petitioner No. 1 of 2022 on the grounds that the Supreme Court has already restated the position regarding appeals on interlocutory applications in the case of *Martha Wangari Karua v IEBC and 3 Others* [2019] eKLR. The said court held at paragraphs 55 and 56 as follows:

“We take the view that all the suggested propositions must be considered within the context of strict timelines provided from the settlement of electoral disputes. We understand that these proposals seek to remedy the likelihood of denial of substantive justice due to impending court processes or where a wrong cannot be corrected at the appellate stage due to lapse of time. Hence, a proper consideration of this issue requires a balancing of rights such as the right of appeal, access to court, the right to have a matter adjudicated within the specified time frames and the right to substantive justice. Consequently, learning from the experiences of the emerging jurisprudence in our courts, we propose the following.:

- a. All applications by a Respondent in an election petition, save in exceptional circumstances, should form part of the response to the petition. Similarly, a petitioner should as much as possible file any applications arising from his petition eg for scrutiny or recount at the same time as the petition.
- b. Unless for want of jurisdiction or in any other deserving circumstances, a trial court should exercise restraint in striking out a petition or a response, where such an action is likely to summarily dispose of the matter.
- c. All applications for striking out an election petition for want of jurisdiction or for any other reason must be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In this regard, it is for the trial court to make and enforce such case management orders so as to meet this objective.
- d. Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial court.
- e. In exceptional circumstances, an appellate court may dispose of an appeal arising from an interlocutory application filed and determined by the trial court while the substantive matter is still ongoing at the trial court. In doing so, the timeframe question as explained above must always be borne in mind.



(56) the above proposals as premised in (c) above do not in any way provide an exception to the requirement of settling disputes within the specified timeframe. As already stated, all election petitions must be resolved within the provided timeframes without qualification.....”

Learned counsel for the 3rd Appellant has submitted that the Appellant’s appeal herein falls within the exceptional circumstances in (e) as pointed out by the Supreme Court in the above case. I find the concerns of the 3rd Appellant have already been taken care of by this court in fast tracking this appeal within a span of one week without interfering with the lower court’s timelines. The special circumstances alluded to by the 3rd Appellant must be seen in the light of trying to ensure that the appeal on the issues raised are dealt with timeously. The guidelines of the Supreme Court in the aforesaid case appear to fall in all fours with the present circumstances and that this court will abide by the said decision and find that this court lacks the requisite jurisdiction to entertain the appeal. The record of the lower court clearly indicates that the 3rd Appellant had objected to some new witness affidavits sought to be relied upon by the petitioners but he had no problem with the earlier amended petition and affidavits. Further, the 3rd Appellant did not seek to have the petition struck out so as to enable this court have jurisdiction to entertain the appeal as per the guidelines of the Supreme Court in the above case. Again, the 3rd Appellant’s Memorandum of Appeal clearly sought in prayer (a) that the petition to proceed on the affidavits filed in support of the amended petition and that the affidavits filed in support of the original petition to be disregarded by the court. Clearly, that was an interlocutory application made before the trial court which it duly gave directions thereon. The 3rd Appellant now approaches this court on appeal against the said directions by the trial court and that it is fully aware that the petition is still in existence and awaiting to be heard in that court. Being guided by the above Supreme Court decision, i am satisfied that the appellant’s appeal is one on an interlocutory application other than for striking out and hence the same should await the final determination of the whole petition before the trial court. It is my view that the appeal has been lodged with a view to clog the wheels of justice in this time – bound election matter. The 3rd Appellant is fully aware of the strict timelines in the determination of the petition and ought to participate towards its finalization and not to forestall it. The 3rd Appellant seems not willing to seek to strike the petition while at the same time he wants to drag the matter via an appeal on an interlocutory application and to finally achieve one aim namely, to delay the determination of the petition by the trial court. This is unacceptable. I need to point out that the guidelines by the Supreme Court in the *Martha Wangari Karua V. IEBC and 3 Others* (supra) regarding the determination of appeals arising out of interlocutory applications have been cascaded in the *Bench Book on Electoral Disputes Resolution* for use and reference by judicial officers and that in Chapter 2 paragraph 2.4.6.4 it captures the following:

“ Although there is no direct authority on the point, logical deduction from Supreme Court and Court of Appeal decisions indicate 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.”

9. Having established that this court lacks jurisdiction to entertain the appeal, there is no need to delve into the remaining issues. The upshot is that the 3rd Appellant’s appeal lacks merit. The same is dismissed with costs to the Respondents.

DATED AND DELIVERED AT BUNGOMA THIS 3RD DAY OF FEBRUARY, 2023

D. KEMEI

JUDGE

In the presence of:



Ashioya/karani For The 3rd Appellant
Githonga For The 1st And 2nd Appellants
Wamalwa Simiyu For The Respondents
Kizito Court Assistant

