



Okumali v Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E005 of 2023) [2023] KEHC 2899 (KLR) (24 March 2023) (Directions)

Neutral citation: [2023] KEHC 2899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
ELECTION PETITION APPEAL E005 OF 2023**

PJO OTIENO, J

MARCH 24, 2023

BETWEEN

DOUGLAS SHITOTE OKUMALI APPELLANT

AND

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

CONSTITUENCY RETURNING OFFICER 2ND RESPONDENT

STEPHEN MALOBA 3RD RESPONDENT

*(Being an appeal from the Judgment of Hon T A Obutu, SPM in Mumias
Election Petition No E001 of 2022 delivered on January 16, 2023)*

DIRECTIONS

DIRECTIONS

1. On a date fixed for the Court to give directions in the file, Mr Malala Counsel for the Appellant sought from the Court directions that the Court forwards the file to or writes to the Principal Judge for purposes of a Judge being appointed to handle the Appeal. He told the Court that his understanding of the position of election appeals is that the allocation of the appeals is done by the Principal Judge in Nairobi. He sought to know if this Court had been gazetted as an Election Court and if the file had been assigned to it by the Principal Judge.
2. Mr Chasia Advocate appearing for the 1st and 2nd Respondent shared the same views and relied on the provisions of Rule 34, of *The Elections (Parliamentary and County Elections) Petition Rules, 2017*, henceforth called the Rules, which he however concede was not explicit on the gazettelement and appointment of Judges to hear and determine appeals. He however said that there is an entrenched practice by which the Principal Judge appoints Judges to hear appeals.



3. For the 3rd Respondent, Mr Aoko told the Court that he did not share the views expressed by his two colleagues but left it to the Court for directions.
4. For purposes of the procedural law, this file landed before the Judge pursuant to Rule 9 of the Rules which mandates that the Court to which the appeal is lodged fixes the matter for directions within thirty one (31) days after filing.
5. The law says at Rule 34, in no equivocal words that the matter be dealt with by the Court to which the appeal is filed. There is no reference or advertence to an election court as defined by Section 2 of the *Elections Act*.
6. The designation of Judge for purposes of disposal of an Election Petition is provided for by Rule 6 of the Rules. That law provide:-

- “ 1 An election court shall be properly constituted to hear and determine-
- a a petition in respect of an election of a member of Parliament or to the office of governor, if it is composed of one High Court Judge; or
 - b a petition in respect of an election of a member of a county assembly, if it is composed of a Resident Magistrate designated by the Chief Justice under section 75 of the Act.
- 2 The Chief Justice may -
- a in consultation with the Principal Judge of the High Court, designate judges for the purposes of sub-rule (1) (a); and (b) designate magistrates for the purposes of sub-rule (1) (b), as may be required.
- 3 The Chief Justice shall publish the name of the Judges and Magistrates designated under sub-rule (2) in the Gazette and in at least one newspaper of national circulation.”

7. The Court reads the stipulation to apply to election petitions and never appeals. The Court further takes judicial notice that even election appeals to the Court of Appeal and those from the Court of Appeal to the Supreme Court never demand designation and gazettement of Judges for such appeals and determines that there is no law that mandate that for purposes of appeals from the magistracy, on elections, a judge of the High Court must be appointed and gazetted in accordance with Rule 6. The Court finds and reiterate that Rule 6 only applies to the election petitions and not appeals.
8. That finding disposes the need to answer the question whether an election appeal from the magistracy once filed needs to be referred to the Principal Judge for purposes of designation of a Judge to hear same. The Court finds that there is no such requirement as much as the Court is not aware of any entrenched practice in that regard.
9. In deed the position of the Principal Judge is constitutional with very important role to play in the organization and administration of the Court pursuant to section, 6 (1) of the High Court Organization and Administration Act, which stipulates the mandate of the office of the Principal Judge is ordained to include:-

- “ a The overall administration and management of the Court;



- b Ensuring the orderly and prompt conduct of the business of the Court;
 - c The Constitution of benches of two or more Judges in consultation with the Chief Justice; and
 - d Undertaking of such other duties as may be assigned by the Chief Justice.”
10. Those powers must be read to be in addition to Rule 6 of the Rules. A holistic reading of those powers do not include appointment of Judges to handle election appeals from the Magistrates Courts.
11. In conclusion, I do find the invitation to refer the matter to the Principal Judge to have no legal basis and I decline the invitation.
12. Having done so, and noting that the Record of Appeal has since been filed and lodged, and while further noting that the Court has upto April 30, 2023 to dispose of the appeal, the Court makes the following directions pursuant to Rule 9:-
- a. Let the Appellant file and serve written Submissions to the appeal within five (5) days from today.
 - b. Upon service let the Respondents equally file and serve Submissions within five (5) days from the date of service.
 - c. Time is of essence.
 - d. The matter shall be heard before Chirchir J for which purpose it shall be mentioned before the Judge online on March 28, 2023.

Dated, signed and delivered in open Court this 24th day of March 2023.

PATRICK J O OTIENO

JUDGE

In the presence of:

Mr Malalah for the Appellant

No appearance for the 1st and 2nd Respondent

Mr Aoko for the 3rd Respondent

Court Assistant: Polycap

