



Okumali v Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E005 of 2023) [2023] KEHC 3337 (KLR) (18 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3337 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
ELECTION PETITION APPEAL E005 OF 2023
SC CHIRCHIR, J
APRIL 18, 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 16th January 2023)*

RULING

1. This matter came up on 17/4/2023 to confirm filing of submissions in respect to the hearing of the Appeal, pursuant to the directions given by this Court on 28/3/2023. Counsel for the 3rd Respondent however informed the Court that the 3rd Respondent died on 1st April and sought directions on the way forward. His position, which was supported by counsel for the 1st and 2nd Respondent, was that the suit has abated. Parties were called upon to make submissions on this issue.

Appellant's Submissions

2. Counsel for the Appellant has submitted that an Election Petition do not abate upon death of a party; that Election Petitions/Appeals are not actions in personam but are in rem; that they are brought in public interests; that the issues raised in the Appeal are constitutional and electoral in nature and cited a number of those issues as lifted from the Memorandum of Appeal; that the court should proceed and make a determination on the aforesaid issues, the demise of the 3rd Respondent notwithstanding. It is submitted further that the Deceased respondent was not the only Respondent and that the Appeal



should proceed against the other Respondents. The Appellant has relied on the decision of the High Court in Machakos High Court in Party of independent Candidate of Kenya & Aon vs Mutula Kilonzo and 2 others Petition No. 6 of 2013.

Respondents' submissions

3. The 1st and 2nd Respondent's submissions is that the real dispute is between the Appellant and the Deceased's 3rd Respondent and in the circumstances, in the absence of the 3rd Respondent the dispute should abate.
4. The 3rd Petitioner's Counsel, has argued that an Election Petition is against an individual and upon death of the individual the suit should abate. The Counsel has also pointed out the unenforceability of any order that may be directed against the Deceased's Respondent if one is to be issued.
5. As for constitutional and electoral issues, it is his submissions that there is nothing new about the said issues as the issues have been litigated before and determinations made.

Determination

6. I have considered the respective parties submissions. The key issue is whether an Election Petition or an Appeal as the case herein, abates upon the Death of one party, in the Instant case, against a person whose election is being challenged.
7. Although the Respondent did not submit a Death Certificate, from the parties' submissions, there is an implied consensus that the 3rd Respondent herein has since died .
7. The Rules applicable to the Petition giving rise to this Appeal is the [Elections \(Parliamentary and County\) Petition Rules, 2017](#).
8. Rule 29 (1) of the Rules provides as follows:-
 - (1) If before the hearing of a Petition, the person whose election is being contested –
 - (a) dies or vacates office; or
 - (b) gives notice in writing to the Registrar that the person does not intend to oppose the Petition,
The Petition shall abate.”
9. Much as this is an Appeal, the provisions of 29 (1) do apply as it is the same Petition albeit being litigated at an Appellate stage.
10. I have considered the Court's finding in [Party of Independent Candidate & Another -vs- Mutula Kilonzo & 2 Others](#) [2013] eKLR cited by the Appellant, in which the court held that an Election petition does not abate upon the death of the person whose election is being contested. However, that finding was based on the [Election \(Parliamentary and County\) Petition rules](#) of 2013, which expressly provided that the suit shall not abate upon the death of the person whose election is being contested. Those rules were replaced by the 2017 Election petition Rules. Therefore based on the 2017 Election Rules, the decision in Party of Independent Candidate (supra) is no longer good law.
11. Rule 29 (1) applies to not only in the event of Death, but also if the person in whose election is being contested, opts not to contest the Petition or decides to vacate office. Therefore, if for instance, the



Respondent chose not to contest the Petition, would the hearing of the Petition have proceeded for the sake of it? I think not. Such litigation would be purely academic.

12. I have considered, and largely agree, with the Appellant's submissions that an Election Petition is a cause of action in rem not personam and that there are constitutional issues and issues touching on electoral laws, which will eventually lend themselves for determination. However in this case, there is a statute governing Elections, namely the [Elections Act](#) which spelt out what is supposed to happen when a person whose election is being contested dies. Rule 29 (1) of the [Election \(Parliamentary and County\) Petition Rules](#) is not only unambiguous but it is also gauged in mandatory terms. The Appeal must abate.
14. In conclusion, I make the following :-
 - (a) A declaration that the Appeal herein has abated.
 - (b) The Registrar of this Court to publish a Notice in terms of rule 29 (2) (a) of the Election (Parliamentary and County) Petition Rules.
 - (c) Each party to meet their own costs in this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 18TH DAY OF APRIL 2023.

S. CHIRCHIR

JUDGE

In the presence of:

Court Assistant: Erick

Ms Mburu for the Appellant

Mr. Chasia for the 1st Respondent the 2nd Respondent

Mr. Aoko for the 3rd Respondent

