



Oloo v Independent Electoral & Boundaries Commission (IEBC) & 3 others (Election Petition Appeal E001 of 2023) [2023] KEHC 18410 (KLR) (Election Petitions) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18410 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ELECTION PETITIONS
ELECTION PETITION APPEAL E001 OF 2023**

**JN NJAGI, J
MAY 19, 2023**

BETWEEN

KASERA CALVIN OLOO APPELLANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION
(IEBC) 1ST RESPONDENT**

**THE RETURNING OFFICER EMBAKASI WEST CONSTITUENCY 2ND
RESPONDENT**

SHADRACK MACHANJE NAMUNYU 3RD RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 4TH RESPONDENT

RULING

1. The 1st and 2nd Respondents have filed an application dated April 20, 2023 seeking for orders that:
 - (1) Spent
 - (2) Spent
 - (3) That alternatively this honourable be pleased to strike out the memorandum of appeal dated the January 31, 2023 and the record of appeal dated February 20, 2023 for being moot, academic and having been made in contravention of article 87 (1) 105(2) & 163 (7) of *the constitution* as read together with section 75(2) (4) of the *Elections Act*.
 - (4) That this Honourable Court be pleased to award punitive costs to the respondents.
 - (5) Any other relief that this Honourable Court will be pleased to issue in the circumstances.



2. The Application is premised on grounds on the face of the application and supported by the affidavit of one Tabitha Muhi. The same was however opposed by the Appellant vide grounds of opposition dated the April 28, 2023. The Appellant contends that:
 1. The application is vexatious, misconceived, has no basis in law and is otherwise meant to delay the hearing and determination of the appeal and to waste the court's precious judicial time.
 2. The applicants have misdirected themselves on basis legal issues and or are have been ill advised on very simple and clear issues of law and procedures and applications of law.
 3. The supreme court authorities being relied on to support the application are not at all applicable in the circumstances of this appeal and the applicants have been misadvised on the substance and contents of the aforesaid supreme court authorities.
 4. The appeal has merits, has raised serious triable issues and should therefore be heard and determined immediately.
3. The background facts to the present application are that the 3rd Respondent was elected the Member of County Assembly for Umoja 2 Ward in Embakasi West Constituency in the August 9th 2022 elections. His election was challenged by the Appellant herein who filed an election petition on the September 10, 2022. The same was dated September 6, 2022. The 1st and 2nd Respondents thereafter filed a Preliminary Objection dated September 26, 2022 seeking to have the petition struck out on the ground that the court lacked jurisdiction to hear the petition as the same was filed outside the 28 days of the declaration of the results of the election as stipulated by Article 87 (2) of *the Constitution* and section 76 (1) (a) of the *Elections Act, 2011*. The trial magistrate agreed with the argument by the 1st and 2nd Respondents and struck out the petition vide a ruling delivered on the January 19, 2023. The Appellant then moved to this court and filed an appeal that is pending hearing before this court in which he is seeking for orders of the trial magistrate striking out the petition be set aside and substituted with an order directing that the petition dated September 6, 2022 proceeds to full hearing before the election court at the court below.
4. The 1st and 2nd Respondents thereafter filed the application under consideration seeking to have the entire appeal struck out on the ground that the relief being sought by the Appellant that the court directs that the petition proceeds to full hearing before the election court is ignorant of the fact that this court lacks jurisdiction to expand the Constitutional timelines requiring the hearing of an election petition within six months from its filing as decreed under section 75(2) of the *Elections Act, 2011*. Further that the Constitutional timelines requiring a trial court to entertain an election petition within six months after filing has since expired and thus the remission of this case back to the trial court for hearing will be an affront to the strict constitutional timelines demanding for expeditious determination of election disputes.
5. More so that the request for a fresh hearing of this case long after the six months constitutional and statutory period has expired offends the binding Supreme Court jurisprudence in *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others* (2019) eKLR where it was held that "all election petitions must be resolved within the provided timeframes without qualification". That flowing from the decision in that case, it would be an academic exercise for the court to entertain the current proceedings, for in the event that the Appeal was to succeed, the lower court lacks the jurisdiction of entertaining the matter due to effluxion of the timelines of six months as set in law.
6. The application was canvassed by way of written submissions. Counsel for the 1st and 2nd Respondents, Mr Wambui Shadrack, submitted that the petition was filed at the subordinate court on the September 10, 2022. That the court was under a constitutional and statutory duty to complete the hearing and



- determination of the petition within 6 months. That the appeal ought by law to have been heard and determined by the first week of March 2023. That failure to hear the petition within the stipulated period is fatal to the petition as an appeal process does not have the effect of freezing constitutional timelines and neither does this court have powers capable of turning back the hands of time.
7. It was submitted that it would be an exercise in futility to return the petition to the subordinate court for hearing as the constitutional timelines for the hearing and determination of the petition has long expired. That this court consequently lacks the power in law to order for a full hearing of the Petition due to the effluxion of time.
 8. Counsel submitted that Article 87 of *the Constitution* demonstrates the drafters' seriousness in setting timelines that are aimed at ensuring that election matters are not only filed within certain timelines but are equally heard and determined within specific timelines. That the dictates of Article 87(1) of *the Constitution* is codified under Section 75(2) of the *Elections Act, 2011* which requires a petition against a Member of County Assembly to be determined within six months of the lodging of the petition.
 9. It was submitted that the current constitutional regime and legal framework yields to the conclusion that a petition challenging an election result must be heard and determined within six months from the date of its filing. The questions that yearn for an answer is whether the constitutional timelines for the hearing and determination of the petition can be frozen and whether that time runs concurrently or consecutive to the timelines set for the hearing and determination of an appeal. It was submitted that that time does not stop and no judicial intervention is capable of returning back the hands of time.
 10. The 1st and 2nd Respondents relied on the Supreme Court decision in *Martha Wangari Karua case* (supra) where the Petitioner's election petition had been struck out by the High Court for its failure to comply with the rules. Subsequently, the petitioner appealed to the Court of Appeal which ordered for the matter to be heard by the High Court long after the six months' timelines had expired. Consequent to the hearing of the Petition, a question arose at the Court of Appeal and later at the Supreme Court as to the legality of the High Court proceedings long after the expiration of the six months decreed in law. The Supreme Court Justices held that once a petition is filed at the High Court sitting as the Election Court, it must be determined within a period of 6 months and in that case where the High Court decided the matter long after the six months period had lapsed the High Court proceedings were a nullity.
 11. It was further submitted that this Court has no power to direct the subordinate court to hear the appeal after the expiry of the timelines set in law.
 12. Mr Wambui submitted that the appeal has become moot. That Courts do not act in vain. Counsel cited the case of *Shadrack Kinyanjui Wambui v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR where Mativo J (as he then was) held as follows:
 4. A matter is moot if further legal proceedings with regard to it can have no effect, or events have placed it beyond the reach of the law. Thereby the matter has been deprived of practical significance or rendered purely academic.
 5. Mootness arises when there is no longer an actual controversy between the parties to a court case, and any ruling by the court would have no actual, practical impact.
 13. Mr Ngala, advocate for the Petitioner, on the other hand submitted that the Supreme Court decision in *Martha Karua case* (supra) is irrelevant in the circumstances of this case. That the said case was an appeal from the High Court to the Court of Appeal while the present appeal is from the lower court to the High Court. That the Respondents are trying to argue the appeal from the back door. That the issues that they are raising could be articulated during the hearing of the appeal. In any case that the



Supreme Court in the referred to case stated that all the interlocutory applications and objections in an election petition must be argued together with the petition or response to the petition.

14. I have considered the grounds in support of the application, the grounds in opposition thereto and the rival submissions of the respective advocates for the parties. The issue for determination is whether this court should entertain the appeal herein after the statutory period within which the petition should have been heard by the magistrate's court of six months has expired. The 1st and 2nd Respondents argued that the hearing of the case long after the statutory period has expired is a futile exercise as the court has no power to extend the statutory timeline of hearing an election petition within six months.

15. Article 87 of *the Constitution of Kenya, 2010* provides as follows:

Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2)

16. It is therefore the requirement of *the Constitution* that election petitions must be heard and determined expeditiously and timely. Pursuant to the above Article, Parliament passed a law to govern the conduct of election petitions in the *Elections Act, 2011*. Section 75(2) of the Act provides as follows:

(1)

(1A) A question as to the validity of the election of a member of 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.

17. It is then incumbent that a petition against a member of the County Assembly must be determined within six months of the lodging of the election petition. The issue being raised in the instant application on whether an election petition can be heard after the statutory period of six months has expired was comprehensively dealt with by the Supreme Court in the case of *Martha Wangari Karua v IEBC & 3 others* (supra) where the court after considering other decisions emanating from the High Court and the Court of Appeal rendered itself thus:

(48) Section 75 undoubtedly derives its authority from Article 87 of *the Constitution* which requires timely resolution of electoral disputes. We have already explained why there was a need to provide for defined timelines for settling electoral disputes. As such, we hold and maintain our position that once an election petition is filed at the High Court sitting as the Election Court, it must be determined within a period of 6 months. In that regard, our position resonates with the Judgment in *Gerald Iha Thoya v Chiriba Daniel Chai & another Election Appeal No 1 of 2018; [2018] eKLR (Gerald Thoya)*, in which Korir J, pronounced himself as follows:

“The reference point is the date the petition is lodged. The calendar is not shifted by the conduct of the parties and neither can it be breached by the actions of the election court. The period is cast in stone and once the six months lapse the election court no longer has any powers to hear and determine the election petition. It must down its tools without prompting.”

18. On interlocutory applications in election petitions, the Court stated in paragraph 55 as follows:

(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 application arising from his Petition e.g. for scrutiny or recount at the same time as the Petition.



- (b) Unless for want of jurisdiction or in any other deserving circumstance, 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.
19. The Court finally stated as follows in paragraph 56:
- ...As already stated, all election petitions must be resolved within the provided timeframes without qualification. In this case, we have noted that the High Court determined the petition before it after the lapse of 6 months from the date of filing. That was an affront to *the Constitution* and the enabling electoral laws. As such, we agree with the Court of Appeal that the said High Court proceedings were a nullity.
20. The Supreme Court has therefore stated in very clear language that all election petitions must be resolved within the timeframe established by the law. This includes a petition against a Member of a County Assembly. The time frame provided for hearing of an election petition against a Member of County Assembly under Section 75(2) of the *Elections Act, 2011* is six months. The petition by the Appellant at the Magistrate's Court was filed on the 10th September 2022. The six months' period within which the petition should have been heard and determined lapsed on or about the March 9, 2023. That means that the magistrate's court does not as of now have jurisdiction as an election court to entertain the petition, its jurisdiction having ceased by operation of the law. I am therefore in agreement with the submission that the appeal process does not freeze the constitutional and statutory timelines for hearing of election petitions. The petition had to be heard within the six months period provided by the law. The submission by counsel for the appellant that the principles established by the Supreme Court in Martha Wangari Karua case do not apply in this matter is not correct. This court is bound by the precedents of the Supreme Court.
21. The issue that is before this court on appeal arises out of an application for striking out of an election petition for want of jurisdiction. The Supreme Court in the Martha Wangari Karua Case stated that such applications must be determined within the constitutional and statutory timelines for the resolution of electoral disputes. It therefore means that where such applications are escalated to an appellate court they should be dealt with expeditiously so as to give sufficient time to the election court to determine the petition before the statutory period of six months lapsed. Time does not stop to run by virtue of the fact that the matter has gone to an appellate court. In the instant case, the appeal should have been heard before the March 9, 2022 and if successful the matter remitted to the trial court for determination of the petition before the statutory deadline for the election court to hear the petition within the six months' period was over. This did not happen in this case. It means that even if this court proceeded to hear the appeal and the Petitioner's case turns out to be successful, it would be an exercise in futility to remit the case to the magistrate's court for hearing when that court no longer has jurisdiction to entertain the petition. Any proceedings in regard to the petition that may be conducted by the Magistrate's court would be a nullity. It therefore serves no purpose to proceed to hear the appeal as courts of law do not act in vain. The only option is to strike out the appeal.



22. In the premises this court finds the application dated April 20, 2023 to be merited and is therefore allowed in terms of prayer 3 of the notice of motion. The Appeal and the Record of Appeal herein are thus struck out with costs to the 1st, 2nd and 3rd Respondents.

Orders accordingly.

Delivered, dated and signed at NAIROBI this 19th May 2022

J. N. NJAGI

JUDGE

In the presence of:

Mr. Wambui Shadrack for the 1st and 2nd Respondents

Mr. Ngala & Beverly for Petitioner

Mr. Okach & Miss Aniala for 3rd Respondent

Court Assistant – Amina.

