



**Kamalik v Matheka & 2 others (Election Petition Appeal  
E001 of 2023) [2023] KEHC 20405 (KLR) (5 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20405 (KLR)

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

**FR OLEL, J**

**JULY 5, 2023**

**IN THE MATTER OF: ARTICLE 1, 2, 3, 10, 23, 38, 47, 48, 50, 74, 86(1),  
88(1), 97, 98, 193, 232 & 258 OF THE CONSTITUTION OF KENYA-2010**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 1, 2, 3, 10, 38, 47,  
48, 50, 74, 86, 88(1), 97, 98, 193 & 232 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: SECTION 22, 23, 31, 25, 83, 86, 109 & 110 OF THE ELECTIONS ACT**

**AND**

**IN THE MATTER OF: REGULATIONS 13, 34, 64, 68(3),  
79, 83 OF THE ELECTIONS GENERAL REGULATIONS**

**BETWEEN**

**JEMNYANGO MOSES KAMALIK ..... APPELLANT**

**AND**

**MASILA TITUS MATHEKA ..... 1<sup>ST</sup> RESPONDENT**

**BERNARD MUSEE ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION  
(IEBC) ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This appeal arises from the judgement and decree of Hon AN Makau (PM) dated and delivered on 28th day of October 2023 in Ngong law courts, Election Petition No E001 of 2022, where he did find that the petitioner had failed to serve the 1<sup>st</sup> respondent within 15 days of filing the petition, and



- also failed to serve IEBC and the returning officer at all with the petition within stipulated guidelines. Further the court did find that it did not have jurisdiction to hear and determine a petition that did not exist having been filed without supporting affidavits/witness statements. Consequently, the trial magistrate dismissed the petition on October 28, 2022.
2. Being dissatisfied and aggrieved by the said judgment the appellant did file this appeal on February 7, 2023, and raised 5 grounds of appeal, that;
    - a. The Honourable Magistrate erred in law and in fact by holding that the petition was not properly served through the known email of the Respondents and unnecessarily placed an unreasonable burden on the Appellant.
    - b. The Honourable Magistrate erred in law and in fact by unreasonably placing a burden of proving the known email address of the respondents to the detriment of justice.
    - c. The Honourable Magistrate erred in law and in fact by holding that there was no proper service to the respondent's and by doing so elevated procedural technicalities to the detriment of substantive justice.
    - d. The Honourable Magistrate erred in law and in fact and by doing so misinterpreted and Misapplied rule 8 of the Elections county and Parliamentary Rules 2017.
    - e. The Honourable Magistrate erred in law and in fact by holding that the filing of a petition and witness statements or affidavits should be simultaneously filed at the time of filing the election petition.
  3. The petitioner/appellant prayed that this appeal be allowed and this court be pleased to set aside the ruling/order dated and delivered on October 28, 2022. He also prayed that this court does direct that his petition be heard on priority basis by another Magistrate at Ngong law court and for the costs of this appeal be awarded to him.
  4. The Respondent's upon being served with the Memorandum of appeal did file a notice of motion dated March 8, 2022, brought pursuant to provisions of Article 87 of the Constitution, Section 75(4) of the Elections Act, 2011, Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and sought for orders that;
    - a) That the Honourable court be pleased to dismiss and/or strike out the Memorandum of Appeal dated February 7, 2023 for having been filed belatedly in breach of the mandatory constitutional timelines under Article 87 of the Constitution as read together with section 75(4) of the Elections Act, 2011, Rule 34 of the Elections (Parliamentary and county Elections) Petition Rules, 2017.
    - b) That this Honourable court be pleased to award punitive costs to the Respondents and Any other relief this court will be pleased to issue in the circumstances.
  5. The application was supported by the grounds on the face of the application and the Supporting affidavit of Masila Titus Matheka and Bernard Musee, the 1<sup>st</sup> and 2<sup>nd</sup> respondent's respectively. They did depone to the fact that the Ruling being challenged was delivered on October 28, 2022, and this appeal challenging the same was filed out of time on February 7, 2023, which was 102 days after delivery of the impugned ruling by Honourable AN Makau (PM). This appeal was thus filed contrary to the



statutory timelines requiring that any appeal challenging, the said decisions should be filed within 30 days from the delivery of the questioned judgement or ruling.

6. The respondents further deponed that this court was divested of jurisdiction to handle this instant appeal by provisions of Section 75(4) of the [Elections Act, 2011](#) as the appellant had raised issues of fact, which the court could not consider and also the appeal had been filed outside the constitutional provided framework provided for.
7. The respondents also noted that the prayers sought by the appellant, especially of fresh hearing of this case long after the six months constitutional and statutory period has expired offends the binding jurisprudence in [Martha Wangari Karua v Independent Elections and Boundaries Commission & 3 others](#) [2019] eKLR, which held that the time set in law does not stop running due to the existence of an appeal. The appeal as filed was thus frivolous, vexatious and were belated proceedings, which offended the timeous and expeditious determination of elections disputes and/or was undoubtedly a waste of precious judicial time.
8. This court did give direction on how this application was to be disposed of on May 15, 2023, though the appellants counsel was not in court. The court directed that they be served with the said directions and indeed on the same date they were served by the respondent's counsel through email and an affidavit of service by one Charles Rubia Waithaka was filed confirming the same. This court also noted that the appellant/ respondent did not file any grounds of opposition or Replying Affidavit in opposition to the said application nor did they attend any court proceedings relating to hearing and disposition of the appeal.

### Submissions

9. The respondent's/applicant's did file their submissions and stated that this court lacks jurisdiction to hear and determine this appeal. The appeal as filed, clearly offended provisions of section 75(4) of the [Elections Act, 2011](#), and raised issues of fact, which the court was divested of jurisdiction to hear and determine. Reliance was placed on [Owners of the Motor Vessel "Lillian S" v Caltex oil \[Kenya\] Ltd](#) [1989] eKLR, [Lorna Chemutai & 4 others v Independent Electoral and Boundaries Commission & 18 others](#) [2018] eKLR & [Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others](#) [2014] eKLR.
10. The respondents/applicants further submitted that this appeal had been filed out of time. The impugned ruling was delivered on October 28, 2022 and the Memorandum of Appeal was filed on February 7, 2023. This was 102 days after the said ruling was delivered. Article 81 of the [Constitution](#) stipulated that matters relating to Election disputes should be disposed of in a timely manner. Section 75(4) of the [Elections Act, 2011](#) also provided that any appeal from the magistrate court regarding election disputes would be based on issues of law only, be filed within 30 days of the Magistrates decision and heard and determined within six months from the date of filing the appeal. The appellant had flagrantly violated this strict guidelines and the court had no option but to strike out the said appeal.
11. The final issue raised by the respondent's/applicant's was that the law demanded that election disputes be heard and determined within six (6) months from the date of filing the petition. Timelines in election petitions did not stop to run and therefore an elections dispute could not be heard and determined after the expiration of the statutory mandated period. The respondents relied on the Supreme court citation of [Martha Wangari Karua v IEBC & 3 Others](#) [2019] eKLR. The respondent's prayed that this appeal be dismissed with costs



## Analysis and Determination

12. Section 75(1a) and (4) of the [Elections Act No 24 of 2011](#) provides that

(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 court designated by the Chief Justice.”

Further section 75(4) of the [Elections Act](#) provides that

“An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be;

- a. Filed within 30 days of the decision of the magistrate’s court; and
- b. Be heard and determined within six months form the date of filing the appeal.

13. There is no doubt that the ruling of the Honourable Magistrate, was delivered on October 28, 2022 and this appeal was filed on February 7, 2023. As correctly observed by the respondents, this appeal was filed way out of time, as an afterthought and is a nonstarter in law. The need to adhere to the constitutional framework was clearly emphasised in the case of [Hassan Ali Joho & Another v Sulciman Said Shabbal and others](#), SC Petition No 10 of 2013; [2013] e KLR and [Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others](#), S.C Pet No 20 of 2014; [2014] eKLR .

14. The second issue raised by the respondents was that, the appeal as filed raised issues of fact and not law, which was contrary to provisions of Section 75(4) of the Elections Act, 2011. The appeal was based on whether the respondents were properly served with the petition and whether or not the there was a fatal error in failing to file the witness statement’s simultaneously when the petition was being filed.

15. In [M’Iriungu vs R](#) (1983) KLR 455, the court of Appeal considered the phrase “question of law” and stated that;

“In conclusion, we would agree with the views expressed in the English case of Martin Vs Glyneed Distributors Ltd ( T/A MBS Fastenings)..... That where a right of appeal is confined to question of law only, an appellant court has loyally to accept the findings of fact of the lower court(s) and resist from the temptation to treat findings of fact as holdings of law or mixed findings of fact and law.”

16. The Supreme court, too did define, the concept of “matters of law” in the case of [Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others](#) at paragraph 80 and observed that;

“From the foregoing of the comparative judicial experience, we would characterize the three elements of the phrase “Matters of law” as follows

- a) The technical element: involving the interpretation of a constitutional or statutory provision
- b) The practical element: involving the application of the [Constitution](#) and the law to a set of facts or evidence on record.
- c) The evidentiary element; involving the evaluation of the conclusions of a trial court on the basis of the evidence on record”



17. At paragraph 81(a) the judges further stated that;

“It is for the court to determine whether the petition and the memorandum of appeal lodged before it by the appellant conforms to the foregoing principles before admitting the same for hearing and determination.”

18. The appeal as filed especially at grounds 1 to 5 of the grounds of appeal seeks that this court makes a determination with regards to issue of facts, which would be contrary to provisions of Section 75(4), which expressly bars this court from making any determination on issues of fact raised in the appeal. Finally, the petition should have been heard and disposed off within six months. As held in by the Supreme court in *Martha Wangari Karua v IEBC & 3 others* [2019] eKLR, which period in this instance has since expired.

### **Disposition**

19. I do find that the notice of motion dated March 8, 2023 is merited. The appellant/respondent did not file any grounds of opposition and/or replying affidavit to oppose the same. Secondly this appeal was filed way out of time without any leave of court and finally it is undisputed that, the appeal intends to challenge findings of fact made by the trial magistrate Honourable A.N Makau (P.M), Vide her judgment dated October 28, 2022. This court’s hands are tied by law and cannot relook at the same.
20. The said notice of motion application dated March 8, 2022 is thus allowed in terms of prayers two (2).
21. The appellant/Respondent will pay costs of this application and ½ costs of this appeal as it has been disposed of preliminarily without their participation.
22. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 5<sup>TH</sup> DAY OF JULY 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**Delivered on the virtual platform, Teams this 5th day of July, 2023.**

**In the presence of;**

.....for Appellant

.....for Respondent

.....Court Assistant

