



REPUBLIC OF KENYA



**Mzai v Gathuku & 2 others (Civil (Election) Appeal E974 of 2022)  
[2024] KEHC 15617 (KLR) (Civ) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15617 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL (ELECTION) APPEAL E974 OF 2022**

**CW MEOLI, J**

**DECEMBER 5, 2024**

**BETWEEN**

**GEORGE MWANGI NDARA MZAI ..... APPELLANT**

**AND**

**ALLAN MAINA GATHUKU ..... 1<sup>ST</sup> RESPONDENT**

**ALICE NDUNGE KIMANI ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**RULING**

1. George Mwangi Ndara Mzai (hereafter the Applicant) lodged the present appeal vide the memorandum of appeal dated 28.11.2022 in respect of the ruling delivered by Hon. A.W. Mwangi (P.M.) on 31.10.2022 in Election Petition No. E003 of 2022 filed in the Elections Court sitting at Makadara Chief Magistrate's Court, Nairobi.
2. Subsequently, the appeal was withdrawn on 2.11.2023 by the Applicant's counsel then on record. A few weeks later, the Applicant filed the Notice of Motion dated 13.12.2023 (the Motion) seeking leave for the firm of Anyango Opiyo & Co. Advocates to come on record on behalf of the Applicant in place of the firm of M/S P.K. Njiiri & Co. Advocates, and further seeking the reinstatement of the appeal withdrawn on 2.11.2023.



3. In response, the Independent Electoral And Boundaries Commission (hereafter the 3<sup>rd</sup> Respondent) filed the notice of preliminary objection dated 26.03.2024 challenging the competency of both the Motion and the appeal as follows:

”Take Notice that the 3<sup>rd</sup> Respondent shall at the hearing of the Application dated 13<sup>th</sup> December 2023 raise a Preliminary Objection on the following Grounds That:

1. The Memorandum of Appeal herein is time barred contrary to Section 75(4) of the [Elections Act](#) and Rule 35(3) of the Revised Election (Parliamentary and County) Petition Rules, 2017.
2. This Honourable Court has no jurisdiction to entertain the Application and Appeal as provided under Section 75(4) of the [Elections Act](#) and Rules 4 and 21 Revised Election (Parliamentary and County) Petition Rules, 2017.
3. The Application is fatally defective, frivolous, vexatious and an abuse of the Court process.
4. The Application dated 13<sup>th</sup> December 2023 together with the Memorandum of Appeal dated 28<sup>th</sup> November 2022 be dismissed with costs to the 3<sup>rd</sup> Respondent.” (sic)
4. Directions were given for the preliminary objection to be heard first, by way of written submissions. Although the preliminary was raised by the 3<sup>rd</sup> Respondent, Alice Ndunge Kimani (hereafter the 2<sup>nd</sup> Respondent) through her counsel also indicated her own reliance on said the preliminary objection. However, Allan Maina Gathuku (hereafter the 1<sup>st</sup> Respondent) did not participate.
5. In urging the preliminary objection, counsel for the 3<sup>rd</sup> Respondent anchored his submissions on the decisions in Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] KECA 293 (KLR) and Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) where the Court of Appeal stressed that an objection regarding jurisdiction can be raised at any stage of proceedings, and even on appeal. Counsel submitted that the Applicant herein failed to comply with the provisions of Rule 35(3) of the Revised Election (Parliamentary and County) Petition Rules, 2017 (the Rules) which stipulate that an appeal against a decision rendered by an Election Magistrate’s Court shall be filed within 14 days of the impugned decision, and that pursuant to Section 75(4) of the [Elections Act](#) (the Act), such appeal ought to be heard and determined within a period of six (6) months from the date of filing. That, consequently, the present appeal was time barred and the court lacks jurisdiction to entertain it, or to grant the order for reinstatement as sought in the Motion.
6. Counsel equally urged the court to consider the decisions in Rozaa Akinyi Buyu v IEBC & 2 others [2014] eKLR and Lemanken Aramat v Harun Meitamei Lempanka, Isaac Ruto & Independent Electoral & Boundaries Commission (IEBC) [2014] KESC 45 (KLR). Where the respective courts acknowledged that proceedings in disputes arising from the electoral process are special, their procedure and disposal being governed by strict constitutional and statutory timelines. That if the court were to consider the merits of the Motion, then it would essentially be forced to investigate the substratum of the appeal, thereby undermining the principle of expeditious disposal of election disputes.
7. Counsel for the Applicant also filed written submissions, firstly arguing that contrary to the grounds in the preliminary objection, his appeal was filed within the timelines stipulated under Section 75(4) of the Act. Counsel however conceding that from a reading of Rule 35(3) of the Rules which states that a memorandum of appeal shall be filed within 14 days of the date of delivery of the impugned judgment, there is apparent delay in filing the present appeal, which he attributed to time taken to procure a certified copy of the subject ruling.



8. Counsel however drew this court’s attention to Rules 4(1) and 5 of the Rules, which grants discretion to the court in determining the consequences of non-compliance by a party with the strict timelines set out in the Rules. Counsel further relied on the decision in *John Munuve Mati v Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu* [2018] KECA 700 (KLR) where the Court of Appeal exercised such discretion. Counsel asserting that the Respondents herein have not demonstrated the manner in which they have either suffered or stand to suffer prejudice, if the appeal is determined on merit.
9. Further referring to the above provisions, counsel for the Applicant submitted that this court has jurisdiction to entertain both the appeal and the Motion. Counsel further urging the court to consider Rule 21 of the Rules in particular, which grants discretionary power to the court to extend or reduce the time required for performance of any act under the Rules, while ensuring that no party suffers an injustice in the process. Therefore, urging that the court be persuaded, in the interest of justice, to extend time as required, if it finds that the appeal was filed out of time. Counsel here relying on the decision rendered in *Njoroge v Kimani* [2022] KECA 1188 (KLR) to the effect that the court has discretionary power even in instances of non-compliance with the timelines for lodging appeal.
10. In closing, counsel attacked ground 3 of the preliminary objection as not constituting a pure point of law, thus unsuited in a preliminary objection, as defined in *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696. The court was therefore urged to dismiss the preliminary objection in its entirety.
11. The court has considered the notice of preliminary objection and the parties’ respective rival submissions. As to what constitutes a preliminary objection, the court in the renowned case of *Mukisa Biscuit Manufacturing Company v West End Distributors Limited* (1969) EA 696 stated that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
12. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR as follows:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
13. The preliminary objection herein is premised upon three (3) key grounds. Ground 3 was challenged by the Applicant on the basis that it does not constitute a pure point of law within the definition of a preliminary objection. Upon consideration of the said ground which was reproduced at the beginning of this ruling, the court readily concurs with the sentiments by the Applicant, that the same cannot be regarded as a pure point of law and therefore collapses.
14. This leaves grounds 1 and 2 of the preliminary objection both of which raise the twin questions whether the appeal is time barred and consequently, whether the court had jurisdiction to entertain the appeal and Motion. The established legal principle is that jurisdiction is everything and that without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of



“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989):

“Jurisdiction is everything. Without it a court has no power to make one 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....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

These words were echoed by this Court in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being Kagenyi v. Musirambo (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.” (Emphasis added).



15. The key argument raised by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is that the present appeal was filed outside the timelines stipulated in Section 75(4) of the Act as read with Rule 35(3) of the Rules. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further argue that the appeal had not been prosecuted within the six (6)-month timelines stipulated in both the Act and the Rules. Thus, the court is bereft of jurisdiction to entertain the appeal and motion.
16. Section 75 of the Act provides that:
1. A question as to validity of a election of a county governor shall be determined by High Court within the county or nearest to the county.  
(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.
  3. In any proceeding brought under this section, a court may grant appropriate relief, including—
    - a. a declaration of whether or not the candidate whose election is questioned was validly elected;
    - b. a declaration of which candidate was validly elected; or
    - c. an order as to whether a fresh election will be held or not.
  4. An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—
    - a. filed within thirty days of the decision of the Magistrate's Court; and
    - b. heard and determined within six months from the date of filing of the appeal.”
17. Under Subsection 4 above, it is clear that an appeal against the decision rendered by a Magistrate's Court ought to be filed within 30 days from the date of the impugned decision, and determined within six (6) months from the filing date. Rule 35 of the Rules makes provision for appeals against decisions rendered by the Magistrate's Court in the following manner:
1. An appeal from a Magistrate's Court under section 75 of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition.
  2. ...
  3. The memorandum of appeal shall be filed at the nearest High Court registry within fourteen days from the date of the judgment”.
18. From the above provisions, two different timelines have apparently been set out for filing an appeal. Here, the impugned decision was a ruling delivered on 31.10.2022 and the appeal was filed on or about 28.11.2022. Going by the timelines stipulated in the Act, the appeal was filed in good time. However, under the timelines stipulated in the Rules, the appeal was filed out of time. In the courts view, the parent Act should take pre-eminence over the subsidiary legislation.
19. Be that as it may, and as the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents rightly pointed out, election disputes constitute special proceedings which are governed by specific constitutional provisions and statutory electoral laws, which require strict adherence to the timelines set for compliance. This position was reiterated by



the Court of Appeal in *Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission, Hanson Njuki Mugo & John Olago Aluoch* [2014] KECA 809 (KLR) in the manner hereunder:

“The Supreme Court of India has pronounced itself on the same issue in *Tyota Basu & others v Debi Ghosal & others* 26<sup>th</sup> February, 1982 where it held:-

“...An Election petition is not an action at Common Law, nor, in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statutory (sic) creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied.

A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, Court is put in a straight jacket. Thus, the entire election process commencing from the issuance of the notification calling upon a constituency to elect a member or members right up to the final resolution of the dispute, if any, concerning the election is regulated by the Representation of the People Act, 1951, different stages of the process being dealt with by different provisions of the Act.

There can be no election to Parliament or the State Legislature except as provided by the Representation of the People Act 1951 and again, no such election may be questioned except in the manner provided by the Representation of the People Act. So, the representation of the People Act has been held to be a complete and self-contained code within which must be found any rights claimed in relation to an election or an election dispute.”

20. In regard to timely institution, prosecution and disposal of election disputes, Rule 4 of the Rules sets out the overriding objective of the Rules, which echoes the overriding objective under Section 1A of the [Civil Procedure Act](#) (CPA), as follows:
  1. The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of petitions under [the Constitution](#) and the Act.
  2. The court shall, in the exercise of its powers under [the Constitution](#) and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1).
  3. A party to a petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.
21. Furthermore, Rule 5 of the Rules provides that:

“The effect of any failure to comply with these Rules shall be a matter for determination at the Court’s discretion subject to the provisions of Article 159 (2) (d) of [the Constitution](#)”.
22. This means that while the overriding objective of the Rules is inter alia, to facilitate the just and expeditious disposal of the electoral disputes, the court is clothed with discretionary power to determine the effect of non-compliance with the Rules, subject to Article 159(2)(d) of [the Constitution](#).
23. Returning to the present matter, despite the Act and Rules stipulating different timelines for filing a memorandum of appeal against the decision of a Magistrate’s Court, the timeline for the resolution of an electoral appeal before the High Court is expressly set by statute. Pursuant to Section 75(4) (a) of the



Act, such appeal must be heard and determined within 6 months of filing. The provision is couched in mandatory terms, exemplifying the centrality of expedition in the resolution of electoral disputes. Despite filing his appeal on 28.11.2022, the Applicant had not taken any steps to perfect it as envisaged in the Rules to facilitate hearing and determination, at the time it was withdrawn on 2.11.2023. The withdrawal came almost a year since the filing of the appeal. Thus, the Applicant failed to comply with the strict statutory timeline for disposal of the appeal and the court would have had no jurisdiction to entertain the appeal, after the lapse of the six months provided for disposal in section 75 (4) of the Act. This statutory provision is not a matter subject to the discretion of the Court. Nor would Rule 5 of the Rules give succor to the Applicant.

24. The Supreme Court in *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR (Petition No.5 of 2014) held that: “(a) condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by *the Constitution* and the electoral law. The jurisdiction of the Court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the Court.”
25. It follows that at the time of withdrawal, the appeal had been rendered time barred and otiose, if not incompetent. The court would have no jurisdiction to entertain an application seeking its reinstatement, let alone jurisdiction to reinstate what is essentially a stillborn appeal.
26. Consequently, the notice of preliminary objection dated 26.03.2024 is upheld and the Motion dated 13.12.2023 is hereby struck out with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2024.**

**C. MEOLI**

**JUDGE**

In the presence of

For the Applicant: Mr. Okelo

For the 2nd Respondent: N/A

For the 3rd Respondent: N/A

C/A: Erick

