



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CIVIL (ELECTION) APPEAL NO.4 OF 2018**

**IBRAHIM NOOR HUSSEIN.....APPELLANT**

**VERSUS**

**HASSAN JIMAL ABDI.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER,**

**WAJIR CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**RULING**

This ruling relates to an oral application made by the counsel for the 1<sup>st</sup> respondent asking this court to strike out the petition of appeal for not being strictly on law, and an objection by the Counsel for 2<sup>nd</sup> and 3<sup>rd</sup> respondents to the Notice of Cross Appeal filed by counsel for the 1<sup>st</sup> respondent on 9<sup>th</sup> March 2018.

Counsel for all parties herein filed detailed submissions on the two issues for determination herein, citing several statutory and case authorities. Parties counsel also relied on applicable Articles of the Constitution of Kenya 2010.

I will start with the Notice of Cross Appeal filed by counsel for the 1<sup>st</sup> respondent on 9<sup>th</sup> March 2018. The written objection filed by counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents under section 75(4) of the Elections Act and Rule 35 of the Elections (Parliamentary and County) Petition Rules is in the following terms:-

1. The Notice of Cross Appeal has been filed out of time.
2. That the Notice of Cross Appeal has been wrongly filed in this court.

It is the consensus among counsel for the parties that the said Notice of Cross Appeal was filed 35 days after the judgment in the election petition was delivered on 2<sup>nd</sup> February 2018.

The relevant part of Section 75 of the Elections Act provides as follows-

**“75 (4). An appeal under subsection (1A) shall be to the High Court on matters of law only.**

**(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. “**

It has been agreed by counsel in their submissions that a cross appeal is an appeal, but counsel for the 1<sup>st</sup> respondent has made a parallel with the Court of Appeal Rules where a cross appeal can be filed within 15 days after service of the original appeal.

The law and rules regarding election petitions and appeals are specific and clear. There is no provision in the High Court for filing of cross appeals for appeals arising from election petitions from the magistrates' courts. The law and rules applicable are also mandatory and clear that appeals have to be filed within 30 days of the magistrate court's decision and a decision in the appeal made within six months of filing the appeal. Allowing another appeal to be filed after the lapse of 30 days from the date of judgment would mean extending the six months period set for delivery of judgment which is impossible. I thus uphold the objection and strike out the Notice of Cross-Appeal of the 1<sup>st</sup> respondent.

I now turn to the oral request of counsel for the 1<sup>st</sup> respondent to strike out the petition of appeal filed by counsel for the appellant on the ground that it contains considerations of points of fact in violation of statutory requirements that an appeal from a magistrate's election petition is restricted to points of law only. I have already highlighted section 75 of the Elections Act which clearly states that such appeals are on points of law only.

Again here several authorities have been relied upon by all counsel in written submissions filed. I will start by saying that though preliminary objections can be raised orally, it would be preferable in the present situation for counsel to have filed a written application.

The above observation aside, the request for striking out the petition of appeal will fail. First reason is that it is a premature attempt to persuade the appellate court to avoid administering substantive justice as required under Article 159 of the Constitution of Kenya 2010. Secondly, sometimes it is not easy to distinguish between pure points of law and pure points of facts. In such situations as the present, it is preferable to point out the alleged points of fact in the submissions at the substantive hearing of the appeal for the appeal court to make a decision on the same in its judgment. In this regard I go by the reasoning of the Court of Appeal when dealing with preliminary issues in the case of **Khatib Abdalla Mwashetani- vs- Gideon Mwangangi Wambua and 3 Others [2014] eKLR** where it stated as follow;-

**“31 In the premises, it would have been premature to determine at the preliminary stage the distinction between issues of law and issues of facts without going into substantive arguments and analyzing the basis of the conclusions of law arrived at by the trial court. Indeed as stated in *Attorney General v David Marakaru (1960) EA 484*, a decision is erroneous in law if it is one to which no court would reasonably come to. Such a conclusion cannot be made at the preliminary stage.”**

In my view the request herein to strike out the petition of appeal lacks merit. I dismiss the same.

The costs will follow the decision in the substantive appeal.

**Dated and delivered at Garissa this 7<sup>th</sup> May 2018**

**George Dulu**

**JUDGE**