REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION APPEAL NO. 2 OF 2018

HAFID MAALIM IBRAHIM.....APPELLANT

VERSUS

ECONOMIC FREEDOM PARTY.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

ISSACK DAHIR ABDI.....3RD RESPONDENT

HALIMA BILLOW OMAR.....4TH RESPONDENT

(Being an appeal from the judgement of the Magistrate's Court at Mandera delivered by Hon. P. N. Areri, SRM on 9th January, 2018 in Election Petition No. 2 of 2017 and 5 of 2017 (consolidated)).

JUDGEMENT

BACKGROUND

1. This appeal arises out of the judgement of the Mandera Magistrate's Court delivered on 9th January, 2018 in which the court struck out and/or dismissed Election Petitions No. 2 of 2017 and 5 of 2017 dated 4th September, 2017 and 15th September, 2017 respectively (consolidated) with costs to the respondents to be borne by the petitioners severally.

2. It is worth noting that the two consolidated petitions before the Magistrate's Court had different petitioners, that is, Hafid Mohamed Ibrahim and Mohamed Ali Bashir respectively, with Hafid Maalim Ibrahim being 1st petitioner, and Mohamed Ali Bashir being 2nd petitioner whereas respondents were the Economic Freedom Party as 1st respondent, Independent Electoral and Boundaries Commission (IEBC) 2nd respondent, Issack Dahir Abdi 3rd respondent and Halima Billow Omar 4th respondent.

THE APPEAL

3. Consequent, upon the decision of the magistrate's court above, Hafid Maalim Ibrahim alone filed this appeal through a Memorandum of Appeal dated and filed on 6th February 2018 on the following grounds;-

(1) The learned trial magistrate erred both in law and fact by announcing a flat judgement devoid of the necessary ingredients contrary to Order 21 rule 3 and 4 (of the Civil Procedure Rules).

(2) The learned trial magistrate erred in law by affirming before hearing of evidence that he had jurisdiction to hear and determine the petition only to renege in the judgement for lack thereof.

(3) The learned magistrate erred in law and fact by considering and basing his decision on the respondent's case or pleadings when the matter proceeded as an undefended cause.

(4) The learned trial magistrate erred in law and fact by holding and finding that the petitioner ought to have presented the petition/complaint at the Independent Electoral and Boundaries Commission Tribunal after the declaration of the election results of 8th August, 2017 when the matter properly laid for determination in an election court.

(5) The learned trial magistrate erred in finding that the 4th respondent was validly nominated without clearing discrepancies of the law which were uncontroverted.

(6) The learned trial magistrate erred in law and fact as he made no reference and/or reliance on the entirety of the evidence and submissions by the appellant and reasons for disallowing the same in the judgement.

4. Relying on the above grounds of the appeal, the appellant asked this court to find that the nomination of the 3rd and 4th Respondents by the 1st and 2nd respondents for the position of Member of Mandera County Assembly was not validly done under Article 177 of the Constitution of Kenya and electoral Laws; that the party list submitted by the 1st respondent be amended by deleting the name of the 4th respondent and inserting Hafid Maalim Ibrahim the appellant to represent people with disability; that the 1st respondent be ordered to fill a suitable candidate for the slot/post of the 3rd respondent to represent the youth; and that costs be awarded to the appellant against the respondents jointly.

5. In response to the appeal, the 1st, 3rd and 4th respondents through counsel filed a Notice of Preliminary Objection, which in relation to the appeal, was that this court lacked jurisdiction to entertain the appeal; and that the appeal was incompetent and fatally and incurably defective for offending the salient and mandatory provisions of rule 34 (6) of the Elections (Parliamentary and County Elections) Petition Rules 2017.

6. The 2nd respondent on the other hand, through counsel also filed a Notice of Preliminary Objection pursuant to section 75 (4) of the Elections Act, and Rule 34 (3) and (6) (e) of the Elections (Parliamentary and County Elections) Petition Rules 2017 hereafter referred as to the Election Petitions Rules on the ground that the record of appeal was incompetent and did not conform to the mandatory provisions of the rules, and that this court did not thus have jurisdiction to hear the appeal filed.

SUBMISSIONS BY PARTIES COUNSEL

7. By consent of all counsel for the parties, the appeal proceeded by way of filing written submissions and highlighting the same.

8. Mr. Nyamberi appeared at the hearing of the appeal for the appellant while Mr. Makhokha appeared for the 1st, 3rd and 4th respondents and Mr. Odhiambo appeared for the 2nd respondent.

9. Mr. Nyamberi for the appellant submitted that the judgement of the trial court was bare and was not signed by the trial court, and also that the trial court failed to address all the issues that it had framed. According to counsel, the 4th respondent had been disqualified from nomination and should not have been nominated for the position of member in the Mandera County Assembly since she had applied for nomination in two election constituencies, which issue the trial court failed to address.

10. With regard to jurisdiction of the trial court, counsel submitted that the trial court erred in finding in the final judgment that it did not have jurisdiction to entertain the petition, while it had earlier found that it had such jurisdiction. In addition, the trial court should have found that the petition was undefended as though the agreement reached by the parties counsel was to proceed to hearing through *viva voce* evidence the respondents failed to offer any evidence in their defence, thus making the petition undefended.

11. Counsel emphasized that the requirements under Article 90 of the Constitution for the validity of nomination of the 4th respondent as member of the Mandera County Assembly were not followed, and faulted the court for not addressing issues of law in arriving at its decision, and urged this court to quash the nomination of the 3rd and 4th respondents as Members of the Mandera County Assembly.

12. In response to the written submissions of the respondents, counsel submitted that though the record of appeal did not contain a decree, since the appeal filed was against the whole judgement of the trial court, the record of appeal was competent and thus the appeal was proper and alive, and concluded by stating that all the parties' counsel herein were not entitled to raise such an issue at this stage as they did not raise the issue at the appeals directions stage. Counsel relied on a number of court cases such as **Rose Wairimu Kamau –Vs- IEBC & 3 Others [2013] eKLR, National Gender Commission –Vs- IEBC & Another – Petition No. 147 of 2013;** and **Kones –Vs- Republic & another – Exparte Kimani Wanyoike & Others [2008] eKLR.**

13. Mr. Makhokha for the 1st, 3rd and 4th respondents, on his part, submitted that the appeal was incompetent and fatally defective for two reasons. First it offended the mandatory provisions of rule 34 (6) (e) of the Election Petition Rules which required a certified judgement and certified decree to be part of the record of appeal. According to counsel, since no certified copy of either document was in the record of appeal, this court had no jurisdiction to entertain the appeal. Counsel made reference to Rule 87 of the Appellate Jurisdiction Rules (for the Court of Appeal) which provided for the remedies available in such a situation, and stated that since the mistake herein was not remedied, then this court lacked jurisdiction to entertain the appeal.

14. The second error, according to counsel, related to a violation of section 75 (4) of the Elections Act which required Election Petitions appeals to the High Court to be restricted only to matters of law. Counsel made a comparison with section 85 (A) of the Elections Act relating to appeals to the Court of Appeal which was similar, and submitted that since the memorandum of appeal and record of appeal herein show that the appeal herein was on both points of law and fact, which was also echoed in the submissions of counsel for the appellant in court, the appeal was incompetent and was thus only fit for dismissal; and relied on a number of cases such as the case of **Hon. Mohamed Abdi Mohamud –Vs- Ahmed Abdullahi Mohamad & 3 Others (Nairobi Court of Appeal Election Petition No. 2 of 2018) 2018 eKLR.**

15. With regard to the merits of the appeal, counsel submitted that the reliance by the appellants counsel on Order 21 of the Civil Procedure Rules was misplaced as election petitions and appeals were governed by special provisions under the Elections Act of 2011 and rules made thereunder, and relied on a case of **Japhet Murokot & Another –Vs- IEBC & 3 Others [2017] eKLR.**

16. With regard to the contents of the judgement of the trial court, counsel felt that the trial court complied with all the requirements of the law both in form and content and disagreed with the appellant counsel's allegation that the trial court made an unsigned judgement, and contended that the appellant's counsel did not apply for the signed judgement from the court.

17. Counsel also stated that the trial court considered all the necessary issues in determining the matter and was correct in not considering the extra issue raised by the appellant counsel in submissions, as same did not arise from pleadings and evidence on record.

18. Counsel further submitted that it was not true that the trial court declared from the word go that it had jurisdiction to hear the election petition, and took the position that the said legal issue was retained as one of the issues to be considered by the court in the judgement.

19. With regard to the reasons why the petition was dismissed, counsel submitted that it was dismissed primarily because the appellant did not present a strong case, even though jurisdiction was one of the issues considered by the trial court.

20. On whether the petition was an undefended cause, counsel submitted that the burden of proof was on the petitioners, to prove their case to the required standard, which the petitioners did not discharge. According to counsel therefore, even if the affidavits of the respondents in the trial court were expunged, the appellant would still have lost the case, and relied on a case of **Hon. Mohamed Abdi and Another** (Supra) and the case of **Raila Ondiga & 5 Others vs IEBC Election Petition No. 5 of 2013.**

21. Counsel submitted also that the present case was distinguishable from the case of **Ledama Ole Kina vs Samuel Kantai Tunai & 10 Others [2013] eKLR** which was a case involving an election by voting, and urged this court to dismiss the appeal.

22. Mr. Odhiambo on behalf of the 2nd respondent relied on their written submissions filed on 6th April 2018 and their Notice of Preliminary Objection filed on the same date, as well as their response to the petition in the trial court.

23. Counsel fully concurred with the submissions of counsel for the 1st,3rd and 4th respondents and asked this court to dismiss the appeal on the basis of their preliminary objection, as the appeal did not comply with Rule 34 (6) (c) and (e) of the Election Petition Rules, as well as section 75 (4) of the Elections Act, as the said legal provisions were mandatory in nature and thus failure to comply with them, rendered the appeal fatally defective.

24. With particular reference to section 75 (4) of the Elections Act, counsel pointed out that election appeals to the High Court were by statute restricted to matters of law only, and as from the contents of the Memorandum of Appeal herein, it was clear that the appeal was based on both matters of law and facts, this court was not entitled to adjudicate on it, and relied on the cases of **Peter Munya –Vs- Dickson Mwenda [2014] eKLR and Zacharia Obado-Vs- Edward Akongo [2014] eKLR** in which the Supreme Court clearly stated that an election appellate court could only interfere with a finding of facts where an appellant had demonstrated from the agreed facts that the conclusions arrived at by the trial court were so perverse that no reasonable tribunal could have reached such conclusion. As the appellant had not demonstrated any pervasive conclusions, this appeal should be dismissed.

25. With regard to the burden of proof, counsel submitted that the burden lay squarely on the petitioners to prove their case to the required standard and relied on the case of **Raila –Vs- IEBC (supra).** According, to counsel, as the petitioner failed to produce any cogent evidence before the trial court to support their case and show that they had lodged a complaint with the IEBC Tribunal, even if the respondents did not file any response to the petition, the petition would still be dismissed.

26. With regard to the jurisdiction of the trial court, counsel submitted that any court had powers to determine whether it had jurisdiction to hear a matter, and in the present case, the trial court was correct in deciding that it had no jurisdiction to entertain the petition as the appellant did not comply with the existing mandatory legal provisions.

27. Counsel added that, as the 2nd respondent, the IEBC had supervisory powers to settle nomination disputes under section 39 (1) and 40 of the Political Parties Act through its tribunal, such mechanism should have been exhausted before the appellant could go to court, which was not done in the present case, and the petition was thus a non-starter.

28. With regard to the appellant counsel's submissions that the parties counsel had, during pre-appeal trial directions accepted that the appeal was properly filed together with the record, counsel submitted that our legal system being an adversarial system of litigation, it was not the respondents' duty to point out the mistakes of the appellant, and that it was sufficient that the respondents raised preliminary objections.

29. Secondly, in response to the argument by counsel for the appellant that he had requested the trial court for the judgement, counsel argued that there was no indication of such a request on record, and stated that there was also no record of any letter written by counsel for the appellant requesting for the trial court judgement. Therefore, according to counsel, it could not be said that counsel for the appellant was denied the certified signed copy of the trial court judgment.

30. Counsel lastly, argued that the issue of 4th respondent applying to be nominated also in Marsabit County, was not in the pleadings, and that since there was no indication in any documents filed that the 4th respondent applied for nomination as MCA in two Counties the issue should not arise. Counsel maintained that the nominations by the political party herein (the 1st respondent) were proper and that the IEBC received the communication from the party and acted on the nominations in accordance with the law, and urged this court to dismiss the appeal with costs with the amount being similar to that awarded in the trial court.

31. In response to the submissions of the respondents' counsel, Mr. Makhokha for the appellant emphasized that under Rule 34 and 35 of

the Election Rules, the respondents were required to comply with the law and the laid down legal mechanism including the publication of the nomination of MCAs. Counsel emphasized that section 34 of the Elections Act provided for the process and resolution of nomination

disputes in line with Article 88 (4) (e) of the Constitution, and was of the view that in terms of the existing legal provisions, it was not possible after 8th of August, 2017 (the date of the general elections) for the appellant to go to the IEBC Tribunal which was the reason why the appellant had to use the only avenue available by going to court, and relied on section 39 (1) and section 40 of the Political Parties Act. Counsel emphasized and that Rule 12 and 13 of the Election Rules did not make a distinction between a direct nomination and an election of MCAs, as both were defined as elections.

32. Counsel also submitted that since the unsigned copy of the judgement in the record of appeal was certified, the same should be taken to be a signed judgement.

33. With regard to the alleged violation of section 75 (4) of the Elections Act, which required that the appeals from the election court be on points of law only, counsel said that all the appellant's submissions in court were based only on law.

CONSIDERATIONS

34. I have considered the appeal and all issues raised in the submissions of counsel for the parties, and in my view, the issues for the determination of this court are as follows;-

(1) Whether the appeal should be dismissed for violation of section 75 of the Elections Act.

(2) Whether the appeal should be dismissed because the record of appeal is incomplete contrary to Rule 34 (6) of the Elections Petition Rules.

(3) Whether the petition before the trial court was undefended.

(4) Whether the trial court erred in framing its own issues and in determining that it had no jurisdiction to entertain the case while that was not one of the issues it framed.

(5) Whether the trial court erred in holding that the appellant should have presented their complaint to the IEBC Tribunal.

(6) Whether the trial court erred in not referring to evidence and submissions of parties tendered in the judgment and for violating Order 21 Rule 3 and 4 of the Civil Procedure Rules.

(7) **Whether this court can grant any of the prayers sought.**

(8) **Who will bear the costs of the appeal?**

(1) Whether the appeal should be dismissed for violating section 75 of the Elections Act 2011.

35. Section 75 of the Elections Act provides that an appeal from an election court to the High Court should be on matters of law only. The relevant provisions of the section state as follows:

"75(1A) A question as to the validity of the election of a member of the County Assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

……

(4) – An appeal under subsection 1 (A) 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) heard and determined within 6 months from the date of filing the appeal."

36. I have perused the Memorandum of Appeal filed herein, which I have already reproduced above in this judgment. Paragraph 1, 3, 4 and 6, state that the magistrate "erred in law and fact". The other contents of these paragraphs however do not challenge the trial court findings on evidence nor call upon this court to re-evaluate the evidence on record. In submissions also the appellant's counsel has not called upon this court to delve into matters of evaluating the evidence.

37. It is unfortunate that the first sentences of the above grounds of appeal refer to law and facts. However, in my view, the appeal as it stands is not an appeal on matters of law and facts but an appeal on matters of law alone. The combination of the words "law and facts" are unfortunate and lawyers are better advised to avoid such drafting which causes unnecessary concern and anxiety, and objections.

38. The Court of Appeal recently had occasion to deal with such a situation in the case of **Hon. Sumra Irshadahi Mohamed –Vs- IEBC & Another – Nairobi Court of Appeal, Election Petition Appeal No. 22 of 2018** and after referring to its earlier reasoning in the case of **Mohamed Abdi Mahamud –Vs- Ahmed Abdullahi Mohamad** in which it had stated that such drafting of grounds of appeal can call for their striking out added a caveat in the following terms;

"We would agree, but with a caveat. This court is a court of justice, and where the grounds raised in the Memorandum of Apeal disclose that the court is asked to consider a matter of law, then the court ought to consider the ground raised despite the fact that the first words as set out in the memorandum include the phrase "erred in law and fact".

I thus find that the memorandum of appeal is not fatally defective on that account.

(2) Whether the appeal should be dismissed because the record of appeal was incomplete contrary to Rule 34 (6) of the Election Petition Rules.

39. What is complained about is that there is neither the decree nor a signed judgment in the record of appeal, which position appears to be confirmed by counsel for the appellant. Indeed the rules require that these two documents be part of the record of appeal, as a requirement. The relevant part of rule 34 (6) which is not disputed, provides that the record of appeal should include a signed judgement and copy of decree in the following terms;

"34 (6) (e) a signed and certified copy of the judgment appealed from and a certified copy of the decree".

40. Counsel for the appellant has tried to explain the reason for failing to comply with the above mandatory rule and seems to pass blame to the court for the default, by stating that the court did not prepare a signed judgement. However, there is nothing on record to show that he applied for the documents and was denied the same.

41. The above default notwithstanding, none of the advocates for the respondents has suggested that they or their clients were prejudiced by the failure of the appellant's counsel to include the decree and signed judgment in the record of appeal. From the record also, all parties were represented in the trial court by able counsel who knew the results and the decision of the trial court after it was pronounced.

42. In my view, on the reasoning of the decision of the Court of Appeal in **Hon. Sumra Irshadahi Mohamed –Vs- IEBC (supra)** since no party has been prejudiced by the omission of the appellant's counsel to include the decree and signed judgment in the record of appeal, and since there is a signed judgment in the original court file which is before this court, I hold that the appeal is not fatally defective merely because of this default. The defect in my view in the circumstances of this appeal is curable under Article 159 of the Constitution which enjoins courts to strive to administer substantive justice in all cases. I decline to dismiss the appeal on this technicality.

(3) Whether the petition before the trial court was undefended.

43. I now go to the issue whether the case in the trial court was an undefended cause. Counsel for the appellant has argued this issue very strenuously, and contended that since there was a consent by parties counsel to proceed to trial by tendering viva voce evidence, and no witnesses for the respondents testified in court, the affidavits of the respondents should have been ignored and not considered by the trial court.

44. I have perused the record of the trial court. At trial directions stage, all the parties counsel acknowledged the affidavits filed by all parties, and nobody challenged any of the said affidavits. The magistrate did not make any specific orders on the affidavits or even on the issue of tendering *viva voce* evidence. It is clear from the record also that at that stage only counsel for the petitioners said that they would bring witnesses. In my view therefore, all affidavits filed were admitted and only the advocate for the appellant opted to offer oral evidence through witnesses. It is thus misleading for counsel for the appellant to say that all counsel for the parties agreed that they would bring witnesses in court.

45. In my view, the fact that none of the respondents' witnesses testified in court did not mean that the suit was undefended, as a defendant has a right under Article 50 (1) (i) of the Constitution to keep quiet where appropriate, if the defendant thinks that the person who has brought the case has not established a prima facie case.

46. In my view therefore, the magistrate was correct in considering the affidavits and submissions of the respondents. In any case, at no point did the counsel for the appellant seek orders from the trial court to disallow the said affidavits nor did they seek to cross examine any of those who filed the affidavits. In the circumstances, I find no mistake committed by the trial magistrate in this regard, as this was defended cause.

(4) Whether the trial court erred in framing its own issues and in finding that the court did not have jurisdiction to entertain the case while that was not one of the issues framed.

47. With regard to the issue as to whether the trial court was wrong in framing its own issues after the hearing of the case and also holding that the court had not jurisdiction to entertain the proceedings which was not a framed issue, I start by saying that the record does not show that the parties filed agreed issues. The petitioners counsel filed their proposed, but not agreed issues.

48. In my view, even if the parties counsel had filed agreed issues, the trial court was not necessarily bound to go by the framed issues, as in my understanding, issues arise from the pleadings, evidence and the law. Thus depending on the nature of the pleadings, the evidence tendered, and the law applicable, the court may either go by the issues agreed or add or reduce them, provided it addresses the issues in contest or which arise from the pleadings and evidence.

49. In the present case I agree that the judgement is brief. However, I have not been told of any specific issue raised in pleadings and evidence, that the trial court failed to address, or any issue that was not an issue that the trial court considered. In my view therefore, the learned magistrate was entitled to frame issues in the judgment. That dispenses of the first limb.

50. On the second limb whether the court was entitled to dismiss the petition on the ground that it had no jurisdiction to entertain the proceedings, counsel for the appellant submitted that as the court had decided that it had jurisdiction to deal with the case, it should not have changed goal posts during judgment stage. Counsel has not stated however the date in the proceedings on the record, when the trial court determined that it had jurisdiction. I have perused the record myself and nowhere was it put on record that the court made a determination either after a contest or on its own volition that it had jurisdiction to entertain the proceedings as a final determination, It is worth noting that the issue of jurisdiction arose from the determination of the next issue on whether the appellant should have approached the IEBC Tribunal before filing a petition in court. I will deal with it under the next issue.

(5) Whether the trial court erred in holding that the Appellant should have Presented their Complaint to the IEBC Tribunal.

51. I turn to the issue whether the court erred in holding that the appellant should have presented their complaints to the IEBC. This is the issue that determined the case and led the trial court to state that it did not have jurisdiction.

52. The trial court relied on Section 74 (1) of the Elections Act which provides as follows;

> **"74 (1) Pursuant to Article 88 (4)(c) of the Constitution, the commission shall be responsible for settlement of election disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of the election results.**

53. The dispute herein pre-existed the date of the general election. The Political Parties Tribunal had ordered fresh nominations from the political party – Economic Freedom Party to be submitted to IEBC. This order was made before the date of the general election of 8th August, 2017.

54. The dispute brought to the Magistrate's Court was thus primarily a complaint about the process in the Political Party before the date of the general election. As such, any dispute therefrom even if the facts became known to the affected party after the date of the general election should have gone to the IEBC Disputes Tribunal first. If the appellant had approached the IEBC Tribunal and was shut out then, at that point he would have all rights to approach the court. I agree with the magistrate that the appellant should have first approached the IEBC before the trial court could be clothed with jurisdiction to determine the dispute.

(6) Whether the trial court erred in not referring to evidence and submissions of parties before it and violating Order 21 Rule 3 and 4 of the Civil Procedure Rules

55. On whether the magistrate did not refer to the submissions of parties, I have perused the judgement. It was a brief judgement. However, the magistrate considered the issues that he thought were important to consider, and did not have to refer to everything in the submissions and proceedings. In any case, the evidence on record was not long or complicated. Order 21 Rule 3 and 4 of the Civil Procedure Rules, are not applicable as election petitions are special proceedings governed by the Elections Act and Rules made thereunder. However, a court is required in any judgement or ruling to consider the pleadings, evidence and the law and come to its own conclusions. The issue of disqualification of the 4th respondent for applying for nomination in two counties was not pleaded, and the court could not consider it. In my view, from the evidence on record, the magistrate cannot be faulted for the short judgement that he wrote.

(7) Whether this court can grant any of the orders sought by the appellant

56. From the foregoing, it is clear that the appeal will not succeed. This court cannot therefore grant any of the orders sought by the appellant.

(8) Who will bear the costs of the appeal

57. The appeal having been lost, it is only fair that the costs be awarded to the respondents against the appellant.

DETERMINATION

58. From the foregoing considerations, it is my view that this appeal lacks merits. I thus dismiss the appeal with costs to the respondents which I will cap at Kshs.300,000/= for the 1st, and 3rd and 4th respondents and Kshs.100,000/= for the 2nd respondent all payable by the appellant.

Dated, Signed and Delivered in the open court at Garissa this 19th July, 2018.

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George Dulu

JUDGE