# REPUBLIC OF KENYA

**IN THE COURT OF APPEAL OF KENYA**

**AT NAIROBI**

**Civil Appli 131 of 1994**

**DANIEL TOROITICH ARAP MOI ..... APPLICANT**

**AND**

**JOHN HARUN MWAU..... RESPONDENT**

**(Application for striking out Notice of Appeal in an intended appeal from a judgment of the High Court of Kenya**

**Nairobi (O'kubasu, Mbito & Mwera, JJ.) dated 30th May, 1994**

**in**

**ELECTION PETITION NO. 22 OF 1993)**

**RULING OF THE COURT**

The applicant in the present application is Daniel Toroitich Arap Moi, the President of the Republic of Kenya. The respondent is John Harun Mwau one of the unsuccessful candidates in the Presidential elections held on 29th December, 1992, and which was won by the applicant.

The present application has been brought to strike out the respondent's notice of appeal dated 30th May, 1994, and filed on the same date, on the ground that no appeal lies to this court against the decision of the High Court of 30th May, 1994, in the Election Petition brought by the respondent challenging the election of the applicant as President of the Republic of Kenya. It was submitted on behalf of the applicant, that since section 44 of the Constitution applied by virtue of section 10(1) of the Constitution, mutatis mutandis, to the determination of the question whether a person has been validly elected as a President, subsection (5) of that section which was introduced into the Constitution in 1984 to put to rest doubts on the issue, and which stated that:

"The determination by the High Court of any question under this section, whether the decision be interlocutory or final, shall not be subject to appeal", denied the respondent a right to appeal to this court, from the decision of the High Court sitting as the Election Court in the election petition brought by the respondent to determine in this case, as may be raised under section 10(2) of the Constitution, whether the applicant was validly elected as President.

An important point to be borne in mind, is that this court is a creature of statute and in this regard, we would content ourselves with setting out the following succinct and mpeccable dictum of Omolo, J.A. in his judgment in the case of Kenneth Stanley Njindo Matiba v Daniel Toroitich Arap Moi Civil Application No. NAI. 241 of 1993 (NAI.103/93UR) (unreported):

"... let me state from the very outset that our court is a creature of statute and it cannot be reminded too often that it (court) only has such powers and jurisdiction as are conferred on it by law. The court has no inherent jurisdiction on any matter and its jurisdiction cannot be implied from circumstances, however attractive such an implication may be. On the other hand, it must not be forgotten that we constitute the last court of resort in the Republic and we must not be too shy when it comes to the question of determining whether or not we have jurisdiction to hear and determine a particular issue. On this point, I would myself adopt a robust and liberal approach which was always advocated by that great jurist, The late Chief Justice C. B. Madan -see for example MUNENE V REPUBLIC (No.2) [1978] KLR 105 at Pg.112 where he is recorded as saying:-

"We will not usurp jurisdiction. We will interpret liberally the extent of our jurisdiction ..."

If we have no jurisdiction, then of course as was said in THE OWNERS OF THE MOTOR VESSEL "LILIAN S" V CALTEX OIL (KENYA LTD., CIVIL APPEAL NO.50 1989 (UNREPORTED), we must down tools.".

Mr. Kilonzo for the applicant has argued that the decision of the High Court was a final determination of the matter before it namely, the respondent's election petition and that being so, this court had, by virtue of Section 44(5) of the Constitution, no jurisdiction to hear an appeal from that decision of the High Court. If the appeal could be said to be in respect of matters unrelated to the determination whether the President had been validly elected as such, which is not the case that could well be another matter.

So what then was the respondent's election petition all about?

According to the judgment annexed to the affidavit in support of the applicant's application, and the respondent though he had had ample time to do so, has not filed any replying affidavit to challenge this, the respondent:

"Mr. John Harun Mwau, one of the unsuccessful candidates in the presidential election held on 29th December, 1992 challenges the validity of the election of the successful candidate His Excellency President Daniel Toroitich Arap Moi, the second respondent herein. He contends that the second respondent had not been duly nominated by the Electoral Commission, the first respondent, as the second respondent did not present forty standard sheets of foolscap papers to the first respondent on the nomination day as required by S.5(3)(b) of the Constitution as read with regulation 12 of the Presidential and Parliamentary Election Regulations (hereafter called the Regulations) for which reason the nomination of the second respondent and his subsequent election as President was in his view, invalid and should be nullified.".

This election petition speaks for itself, in that it challenges the validity of the election of the President on the ground that initial steps of the election process, namely the nomination of the President as a presidential candidate, had been faulty and thus, making the election void. In determining the issue before it, the High Court in brief, held that the dimensions of "standard sheets of foolscap papers" as submitted by the respondent was not in the Kenyan context, the "standard sheets of foolscap papers" referred to in Regulation 12 of the Presidential and Parliamentary Election Regulations and that in any case, there was no mandatory requirement under section 5(3)(b) of the Constitution with respect to the use of "standard sheets of foolscap papers". Furthermore, by virtue of section 72 of the Interpretation and General Provisions Act which provides that a

"form prescribed by a written law, shall not be void by reason of a deviation there from which does not affect the substance of the instrument or document and is not calculated to mislead", a deviation from the dimensions of standard foolscap papers if at all that were so, which, in this case, could not be said to have existed with the intention to mislead, did not render the sheets of paper used in submitting the applicants candidacy, void. In the result, the High Court concluded that:

"... the nomination herein including those of the 2nd Respondent and the Petitioner were valid and that all the candidates were entitled to participate in the poll. We therefore dismiss this petition."

Rightly or wrongly, this is the decision reached by the High Court which disposed finally of the election petition brought before it by none other than the respondent himself. It is obvious from this decision that even if the applicant had accepted that his nomination papers were not of the same dimensions as that alleged by the respondent to be those of the "forty standard sheets of foolscap papers" as required by section 5(3) (b) of the Constitution, he certainly did not, and neither did the High Court, accept that this made the nomination papers void for the purposes of the applicant's election as President.

The respondent who appeared for himself, argued his case strenuously. The High Court had in its judgment, noted that he was "a man of great industry and unrelenting crusader for justice and the rule of law". He is perhaps too much of a stickler in this regard. His submissions were that he had a right of appeal against the decision of the High Court for the following reasons that could be gleaned from the somewhat rambling and at times, irrelevant submissions of the respondent.

Firstly, the respondent argued that although he had raised several issues in his petition as the basis for his contention that the respondent's election was invalid and should be nullified, the High Court had, without considering any of the other issues, based its decision to reject his election petition only on the issue whether the applicant's nomination papers complied with section 5(3) (b) of the Constitution or not. But this does not make the decision of the High Court any the less, its decision which finally disposed of the respondent's election petition. A bad decision it might be, but, and we express no decided view one way or the other, on this point, it is the High Court's decision all the same, from which, as provided by section 44(5) of the Constitution, there can be no appeal.

Secondly, the respondent urged that since the Presidential and Parliamentary Elections Regulations did not deal with the issue of nominations, the High Court had no jurisdiction to pronounce on the validity of the nomination of the applicant which ironically, was an issue which as seen from the judgment of the High Court, had been vehemently propounded by the applicant before it. Apart from the fact that it was an issue which the respondent had himself raised as a basis for the nullification of the applicant's election, it is an issue of substance which according to section 5(3)(b) of the Constitution can affect the validity of a Presidential election, and which need not be included in the Regulations. It must also be mentioned that section 19 of the National Assembly and Presidential Elections Act which makes further provisions, inter alia, for the holding of Parliamentary and Presidential elections as prescribed in the Constitution, provides in line with sections 10 and 44 of the Constitution, that an application under the Constitution to determine whether a person has been validly elected as a President, which the respondent's election petition was all about, shall be made as the respondent did, "by way of petition" and which shall be tried by "an election court consisting of three judges", which was also precisely what happened to the respondent's election petition. Although the Parliamentary and Presidential Elections Regulations which were made under the National Assembly and Presidential Elections Act for the better carrying out of the purposes, general and particular, of the Act is silent on the question of nominations for elections, it does not mean that the question of nominations for elections ceases to be a substantive issue as regards the validity of an election carried out under the Constitution. We find no merit in the respondent's submission on this point.

Thirdly, the respondent criticised the High Court's finding that the nomination of the applicant was not contrary to the relevant provisions of the Constitution and the law and therefore not void. Whilst this may be a matter that could properly be raised in the hearing of an appeal from the decision of the High Court if such an appeal lay to this court, it is irrelevant to the present application before us namely, that the respondent's notice of appeal be struck out.

The respondent's other submission with respect to what occurred at the hearing of his election petition by the High Court namely, that the applicant had admitted that his nomination papers did not conform in dimensions, to that which the respondent claimed were mandatorily required to be used under section 5(3)(b) of the Constitution, also lacks merit in an application like the one now before us. In any case, we have already held that the applicant's admission in this regard, was clearly from the judgment of the High Court, an admission as to the dimensions of the applicants nomination papers only, and not as to their invalidity for the purpose of the nomination of the applicant and consequently, of his election as President. The respondent also argued that when read together, sections 10 and 44 of the Constitution did not give the High Court any jurisdiction to hear and determine the election petition which the respondent himself, had brought before it on the ground that the issue whether the applicant had been properly nominated or not, was quite a separate issue from his election itself, and so not one that affected the validity of his election. And if this were so, then the two sections of the Constitution did not confer on the High Court any jurisdiction to determine the election petition which the respondent himself, had brought challenging the validity of the election of the applicant on the ground that he had not been validly nominated in accordance with section 5(3)(b) of the Constitution. In such circumstances, therefore, it would follow that such a pseudo election petition not really being one contemplated or covered by sections 10 and 44 of the Constitution, would not be subject to section 44(5) of the Constitution which denies appeals to this court in respect of the decisions of the High Court in proper election petitions.

Ingenious though this argument may be, it holds no water for the simple reason that the nomination of the applicant to stand for the Presidential election is not only the initial stage, but also an integral part, of the election process which falls squarely within the provisions of sections 10 and 44 of the Constitution. The respondent lastly drew our attention to the following provisions of section 123(8) of the Constitution in support of his contention that this court has jurisdiction to hear the appeal from the decision of the High Court:

"No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law.".

We fear that the foregoing provisions of the Constitution do not grant us jurisdiction to hear the respondent's intended appeal. The definition of the word "court" in the Interpretation and General Provisions Act is that:

"'court' means any court of Kenya of competent jurisdiction".

This court's competent jurisdiction is that which is conferred upon it either under the Civil Procedure Act or by particular statutes and has no competent jurisdiction where this is specifically denied as it is by section 44(5) of the Constitution. And since we have already held that the matter before the High Court, was an election petition which fell squarely within the ambit of sections 10 and 44 of the Constitution, no appeal lies from the final decision in that election petition to this Court.

After considering all the grounds urged by the respondent in opposition to the applicant's notice of motion to strike out the respondent's notice of appeal filed over two and half years ago, we must come to the conclusion that the respondent has not succeeded in making us change the view we have earlier hinted at, that in the particular circumstances of the present application, no appeal lies to this court from the decision of the High Court by virtue of sections 10 and 44 of the Constitution. The applicant's application therefore succeeds and the notice of appeal filed by the respondent in the High Court on 30th May, 1994, is hereby struck out with costs for the applicant.

Dated and delivered at Nairobi this 16th day of January, 1997.

A. M. COCKAR

CHIEF JUSTICE

.....

R.S.C. OMOLO

JUDGE OF APPEAL

.....

A.M. AKIWUMI

JUDGE OF APPEAL

.....

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.