



Maina & 12 others v The United Democratic Alliance Party & 5 others (Election Petition Appeal (Application) E001 of 2023) [2024] KECA 62 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KECA 62 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
ELECTION PETITION APPEAL (APPLICATION) E001 OF 2023
F SICHALE, FA OCHIENG & WK KORIR, JJA
FEBRUARY 2, 2024**

BETWEEN

**WACHIRA JAMES MAINA 1ST APPELLANT
TIROP EVERLYNE CHEPKOECH 2ND APPELLANT
WAIGANJO DAVID WAWERU 3RD APPELLANT
TIROP EVERLYNE CHEPKOECH 4TH APPELLANT
SEREM NAOMI CHEPKEMBOI 5TH APPELLANT
KEMBOI RODA JELAGAT 6TH APPELLANT
REBECCA JEROP 7TH APPELLANT
KIBOI CHEMTAI NANCY 8TH APPELLANT
HASSAN SAIDA CHEPKOECH 9TH APPELLANT
AIDID SAHRAABDI 10TH APPELLANT
KEBENEI MAGRINAH CHEBET 11TH APPELLANT
CHELIMO JULIET 12TH APPELLANT
CHERONO CAROLINE 13TH APPELLANT**

AND

**THE UNITED DEMOCRATIC ALLIANCE PARTY 1ST RESPONDENT
THE CLERK, UASIN GISHU COUNTY ASSEMBLY 2ND RESPONDENT
CELESTINE CHEPCHIRCHIR MUTAI 3RD RESPONDENT
REGINAH CHEPKEMBOI CHUMBA 4TH RESPONDENT
ROBERT KIPTANUI KERING 5TH RESPONDENT**



**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 6TH
RESPONDENT**

(Applications to strike out a Notice of Appeal and a mandatory injunction arising from the Judgment of the High Court of Kenya at Eldoret (S. Riechi, J.) dated 1st September 2023 in Election Petition Appeal No. E002 OF 2023)

RULING

1. Before us are two applications both dated 6th September, 2023. When this matter came up for hearing on 6th December 2023, Mr. Langat and Ms. Lumallas, learned counsel appeared for the 1st, 2nd, 3rd, 6th, 8th, 9th, 10th, 11th, & 12th appellants; Mr. Anjichi and Mr. Mosioma, learned counsel appeared for the 1st and 3rd respondents whereas Ms. Netia, learned counsel holding brief for Ms. Chiggai appeared for the 4th respondent. There was no appearance by the other parties. The parties agreed to have both applications heard together.
2. A brief background of facts is that the 1st and 3rd respondents moved the magistrates' court seeking to invalidate the election of the appellants as Members of the County Assembly of Uasin Gishu. The trial court ruled in favour of the 1st and 3rd respondents and invalidated the election of the appellants.
3. Being dissatisfied with the judgment, the appellants filed an appeal to the High Court. However, the High Court dismissed the appeal leading to the present appeal.
4. In their application, the 1st and 3rd respondents seek to strike out the notice of appeal dated 1st September 2023 and filed on 3rd September 2023. The application is premised on the following grounds:
 - a) This Court does not have jurisdiction to hear a second appeal involving the election of a Member of the County Assembly.
 - b) The appeal is a flagrant abuse of the court process to delay justice.”
5. The application is supported by the 1st respondent's affidavit, which states the following:
6. In his replying affidavit on behalf of the 1st, 2nd, 3rd, 6th, 8th, 9th, 10th, 11th, & 12th appellants, the 1st appellant stated that:
 - a) The *Constitution* guarantees the right to a fair hearing, thus entitling them to have their case decided by this court.
 - b) They have filed their notice of appeal under the Court of Appeal (Election Petition) Rules, 2017.
 - c) They have raised a point of law in their notice of appeal, being that the magistrates court has original jurisdiction over matters arising from pre-election disputes.
 - d) The issue of the jurisdiction of election courts was settled by the Supreme Court in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2019] eKLR.”
7. The 1st and 3rd respondents submitted that this Court has no jurisdiction to entertain the notice of appeal dated 1st September 2023 and the same should be struck out with costs. While referring to the



- case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others* [2011] eKLR, they submitted that a court cannot arrogate to itself a jurisdiction exceeding the limits conferred by law.
8. Also relying on *Moses Mwicigi & 14 Others v IEBC & 5 Others* [2016] eKLR, and the provisions of Article 87(1) of the *Constitution* and Section 75 of the *Elections Act*; the 1st and 3rd respondents stated that the Magistrates court jurisdiction to determine the election of a Member of the County Assembly included election by nomination through party lists.
 9. The 1st and 3rd respondents submitted that Section 85A of the *Elections Act* does not include the election of a Member of County Assembly among the elections from which an appeal lie to the Court of Appeal, as there is no right for a second appeal.
 10. The 1st and 3rd respondents relied on the cases of *Hamdia Yaro Sheikh Nuri v Faith Tumaini Kombe & 2 Others* (*supra*) and *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others* [2018] eKLR and submitted that this Court is bound by these decisions.
 11. In response, the 1st, 2nd, 3rd, 6th, 8th, 9th, 10th, 11th, & 12th appellants submitted that this Court has jurisdiction to hear and determine a second appeal of this nature, as the court is constitutionally clothed with appellate jurisdiction, and the same cannot be limited by statute. They relied on the case of *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* [2017] eKLR to buttress this submission.
 12. They reiterated that their appeal is premised on the jurisdiction of the election court on a pre-election dispute as espoused in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*, (*supra*).
 13. We have carefully considered the application, the affidavit in support thereof, the replying affidavit, the submissions by counsel, the authorities cited, and the law.
 14. It is common ground that the notice of appeal dated 1st September 2023 and filed on 3rd September 2023 was filed within the timelines and in accordance with the requirements of this Court. The main issue at hand is whether this Court has jurisdiction to hear a second appeal regarding the validity of a County Assembly Member's election.
 15. It is trite that jurisdiction is everything, and it is what gives a court or a tribunal the power, authority, and legitimacy to entertain any matter before it. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR the court held that:

“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 judgment is given.”
 16. Therefore, if a court proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.
 17. Appeals from the High Court are usually directed to the Court of Appeal according to Article 164(3) (a) of *Constitution* and Section 3 of the *Appellate Jurisdiction Act*. However, in election petitions, the



jurisdiction of the Court of Appeal under Section 85A of the [Elections Act](#) does not provide for appeals concerning membership of the County Assembly. This section specifies that:

“An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be—”

18. Section 75(1A) provides that:

“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’s Court designated by the Chief Justice.”

19. Section 75(4) provides that an appeal under subsection (1A) shall lie to the High Court on matters of law only.

20. The 1st, 2nd, 3rd, 6th, 8th, 9th, 10th, 11th, & 12th appellants argued that the silence of Section 85A concerning the election of members of the County Assembly was discriminatory. The Supreme Court in the case of [Hamdia Yaroi Shik Nuri v Faith Tumaini Kombe & 2 Others](#) (*supra*) held that:

“In declining to assume jurisdiction over the Petition at hand, the Court of Appeal took the view that, by remaining silent, as to whether election appeals concerning the validity of the election of a member of county assembly, lie to the Court of Appeal from the High Court, Parliament must have intended, that the High Court, would be the last port of call for such petitions. Such a pre-supposition, reasoned the Appellate Court, would be in accord with Article 87 of the *Constitution*, which mandates parliament to “enact legislation to establish mechanisms for timely settling of electoral disputes.”

21. In the case of [Jivraj v. Devraj](#) [1968] EA 263, the court stated that:

“There is a principle of law, however, that where a court has interpreted the law in a certain manner....and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustice.”

22. The right to appeal is not a part of common law tradition. It solely depends on the specific words stated in a statute. In general, an election court is a court established by a statute. Therefore, a right of appeal cannot be assumed unless there is a clear provision in the statute establishing the election court that confers the right of appeal. In [Staff Pension Fund & Kenya Commercial Bank Staff Retirement \(DC\) Scheme 2006 & Another v Ann Wangui Ngugi & 524 Others](#) [2018] eKLR, this Court expressly stated that:

“The Court of Appeal has on many occasions similarly held that a right of appeal must expressly be conferred by Statute and such right cannot be implied or inferred. (See for instance, [Harman Singh Bhogal t/a Harman Singh & Co. v Jadya](#) [1953] 20 EACA 17; [Anarita Karimi Njeru v Republic](#) (No. 2) [1976-1980] KLR 1283; [Kakuta Maimai Hamisi & 2 Others v Peris Pesi Tobiko & 2 Others](#) [2013] eKLR and [Nyutu Agrovet Limited v Airtel Networks Limited](#) [2015] eKLR).”



23. In the case of *Kakuta Maimai Hamisi & 2 Others v Peris Pesi Tobiko & 2 Others* [2013] eKLR the court stated thus:
- “It is enough to say that the right of appeal must be statute or other law based and so viewed, there is nothing doctrinally wrong or violative of *the Constitution* for such a right to be circumscribed in ways that render certain decisions of courts below non-appealable.”
24. In *R v Edwards* (No 2) [1931] SASR 376, the Australian Court of Criminal Appeal considered the right of a second appeal from the decisions of the High Court and held that:
- “The Court in its appellate jurisdiction is a statutory court. The right of the appellant to appeal has been exercised. There is no express power to entertain a second appeal and there is no precedent for it being done.”
25. It is clear that by reading Section 85A of the *Elections Act*, there is no mention of appeals related to membership to the County Assembly. This omission is the main reason for the various decisions made by the courts stating that no second appeal can be made regarding County Assembly membership. In *Hamdia Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 Others*, (*supra*), the Supreme Court stated that:
26. In *Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 Others* Election Petition No. 30 of 2018, this Court analysed Section 85A of the *Elections Act* regarding appeals to County Assembly membership and expressed the following:
- “It is clear to us, just as the applicant has stated, that the appeal envisaged in this Section can only be for membership of the three (3) offices specifically mentioned and no other. There exists no provision therefore for a second appeal with respect to a decision from the High Court reached in exercise of its appellate jurisdiction in a dispute of an election of a member of county assembly...Section 85A does not list disputes by a petition in a County Assembly election as part of the election petition that can lie in the Court of Appeal.”
27. The court further stated that:
- “The limitation in the number of appeals that may be filed in an electoral dispute are by design and we do not accept that any of the limitation in any way infringes on any party’s constitutional rights.”
28. In *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others; Emmanuel Changawa Kombe (Interested Party)* [2018] eKLR, D. K. Musinga, JA. expressed that:
- “In my view, in the absence of any express provision of a right of a second appeal to this Court by section 85A of the *Elections Act*, to find that this Court has jurisdiction to hear a second appeal from a judgment of the High Court in an election petition for MCA would be negation of our people’s aspiration for timely settlement of electoral disputes as reflected under Article 87(1) of the *Constitution*. If Kenyans so desire, they can lobby the legislature to amend section 85 of the *Elections Act* to provide for such an appeal. Short of that, I am not persuaded that this Court ought to depart from the position it has firmly held.”
29. It follows therefore that the Court of Appeal does not have jurisdiction to hear and determine issues regarding the validity of the election of a Member of the County Assembly. This is the preserve of the Magistrates Court and an appeal is to be taken to the High Court.



30. In the result, we find that the notice of appeal dated 1st September 2023 was filed before a court devoid of jurisdiction.
31. Rule 17(1) of the *Court of Appeal (Election Petition) Rules* provides that:
- “A person affected by an election petition appeal may, within seven days from the date of service of the notice of appeal or record of appeal as the case may be, apply to the Court to strike out the notice or the appeal on the ground that no appeal lies or that some essential step in the proceedings has not been taken within the prescribed time.”
32. From our perusal of the application, the applicants have brought this application on the limb “that no appeal lies” being that, this court has no jurisdiction to entertain a second appeal.
33. Having determined that this court lacks the requisite jurisdiction to hear a second appeal regarding the dispute at hand, we find that the 1st and 3rd respondents’ application dated 6th September 2023 is meritorious, and the same is allowed with costs.
34. As regards the application for a mandatory injunction, the 1st, 2nd, 3rd, 6th, 8th, 9th, 10th, 11th, & 12th appellants prayed for orders that:
- “a) Pending the hearing and determination of this application and the appeal, the court be pleased to issue a mandatory injunction compelling the 6th respondent to comply with Rule 18(1) of the *Court of Appeal (Election Petition) Rules*, and allow the applicants to access the County Assembly of Uasin Ngishu and perform their duties as members therein;
- b. Costs be provided for.”
35. The application is premised on the following grounds:
36. The application was further supported by the affidavit of James Maina Wachira in which he reiterated the grounds set out on the face of the application.
37. In a replying affidavit sworn by Celestine Chepchirchir Mutai, the 1st and 3rd respondents’ response to the application was that:
- a) This Court has no jurisdiction to entertain the application as the application is wrongly premised on the provisions of Rule 18(1) of the Court of Appeal (Election Petition) Rules.
- b. This Court has no jurisdiction to entertain a second appeal involving the election of a member of the County Assembly; as the High Court is the final appellate court in such matters.
- c. The application does not meet the threshold for grant of injunctive orders; as no prima facie case can be made, and no prejudice shall be visited upon the applicants.
- d. The application be dismissed with costs.”
38. The applicants submitted that there was inequality in the application of the law, as the High Court in Kericho had allowed a member of the County Assembly to remain in office. They reiterated their submissions in the application for striking out.
39. The 1st and 3rd respondents submitted that the application was anchored on the presumption that there was no election, but since there was a gazette, it means that there was an election. They argued that the decisions by the High Court are not binding upon this court.



40. We have carefully considered the application, affidavit in support, replying affidavit, submissions by counsel, authorities cited, and the law. However, having determined that this court lacks jurisdiction to entertain a second appeal, we will not belabor the same. This court in the case *Public Service Commission & 2 Others v Eric Cheruiyot & 16 Others*, Civil Appeal No. 119 of 2017 consolidated with *County Government of Embu & Another v Eric Cheruiyot & 15 Others*, Civil Appeal No. 139 of 2017, (unreported) stated that:

“36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority, and legitimacy to entertain a matter before it. John Beecroft Saunders in “*Words and Phrases Legally Defined*”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel

“Lillian S’ v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

39. The Supreme Court in *In the Matter of Interim Independent Electoral Commission [2011] eKLR*, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the *Constitution*, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

40. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR*, Application No. 2 of 2011, the Supreme Court reiterated its holding on a



court's jurisdiction. *In the matter of the Interim Independent Electoral Commission* (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law."

41. It follows therefore that this court does not have jurisdiction to consider the application for a mandatory injunction or the appeal herein.

42. In the result, the 1st, 2nd, 3rd, 6th, 8th, 9th, 10th, 11th, & 12th appellants' application dated 6th September 2023 is dismissed with costs to the 1st and 3rd respondents.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 2ND DAY OF FEBRUARY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

