



**Kinyanjui & 5 others v Kalunga & 12 others (Election Petition Appeal E002 of 2023 & Election Petition Appeal (Application) E002 of 2023 (Consolidated)) [2024] KECA 317 (KLR) (22 March 2024) (Judgment)**

Neutral citation: [2024] KECA 317 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
ELECTION PETITION APPEAL E002 OF 2023 & ELECTION  
PETITION APPEAL (APPLICATION) E002 OF 2023 (CONSOLIDATED)**

**AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA**

**MARCH 22, 2024**

**BETWEEN**

**JOSEPHINE WAIRIMU KINYANJUI ..... 1<sup>ST</sup> APPELLANT  
FARTUN MOHAMED MUSA ..... 2<sup>ND</sup> APPELLANT  
AUGUSTINE NDEGWA ..... 3<sup>RD</sup> APPELLANT  
MULKI ABDULLAHI ADAN ..... 4<sup>TH</sup> APPELLANT  
KATUMBI MUTISYA ..... 5<sup>TH</sup> APPELLANT**

**AND**

**MARY CHARLES KALUNGA ..... 1<sup>ST</sup> RESPONDENT  
INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION  
(IEBC) ..... 2<sup>ND</sup> RESPONDENT  
KHADIJA NGALA ..... 3<sup>RD</sup> RESPONDENT  
MELDER J. NYAKITI ..... 4<sup>TH</sup> RESPONDENT  
KENGO JUDY CHIZI ..... 5<sup>TH</sup> RESPONDENT  
RUWA ELIZABETH MWANGOLA ..... 6<sup>TH</sup> RESPONDENT  
TERESIA B. MUOKI ..... 7<sup>TH</sup> RESPONDENT**

**AS CONSOLIDATED WITH  
ELECTION PETITION APPEAL (APPLICATION) E002 OF 2023**

**BETWEEN**



MARY CHARLES KALUNGA ..... APPLICANT

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION

(IEBC) ..... 1<sup>ST</sup> RESPONDENT

FARTUN MOHAMED MUSA ..... 2<sup>ND</sup> RESPONDENT

JOSEPHINE WAIRIMU KINYANJUI ..... 3<sup>RD</sup> RESPONDENT

AUGUSTINE NDEGWA ..... 4<sup>TH</sup> RESPONDENT

MULKI ABDULLAHI ADAN ..... 5<sup>TH</sup> RESPONDENT

KHADIIJA NGALA ..... 6<sup>TH</sup> RESPONDENT

MELDER J. NYAKITL ..... 7<sup>TH</sup> RESPONDENT

KENGO JUDY CHIZI ..... 8<sup>TH</sup> RESPONDENT

RUWA ELIZABETH MWANGOLA ..... 9<sup>TH</sup> RESPONDENT

TERESIA B. MUOKI ..... 10<sup>TH</sup> RESPONDENT

RACHAEL KATUMBI MUTISYA ..... 11<sup>TH</sup> RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Kizito Magare, J.) dated 14th September, 2023 in Election Petition Appeal No. E087 of 2023)*

## JUDGMENT

1. This Election Petition Appeal (the appeal) arises from a High Court judgment dated 14<sup>th</sup> September, 2023. The appellants seek to appeal against the High Court decision that allowed the 1<sup>st</sup> respondent, Mary Charles Kalunga's appeal from the trial Magistrates' court. In the course of the proceedings before this Court, the 1<sup>st</sup> respondent filed Election Petition Appeal (Application) No. E002 of 2023 by way of a Notice of Motion dated 16<sup>th</sup> October 2023 (the application) seeking to strike out the appellants' appeal for the reason that this Court lacked jurisdiction to hear and determine appeals from the High Court in respect of members of County Assembly. In effect, the question of jurisdiction having been raised at this juncture requires that we address the 1<sup>st</sup> respondent's application in so far as it relates to the appeal in the first instance. Hence, whether or not we will determine this appeal will be dependent on our pronouncement on the jurisdictional challenge.
2. The brief facts are that the 1<sup>st</sup> appellant filed an Election Petition dated 7<sup>th</sup> October 2022 before the Chief Magistrate's Court at Kwale being Kwale CMC Election Petition No. E 002 of 2022 seeking a declaration that: i) the special issue of the Kenya Gazette Notice Vol. CXXIV No. 186, Kenya Gazette Notice No. 10712 dated 9<sup>th</sup> September 2022 is null and void to the extent that it failed to nominate a representative of the persons living with disability to the County Assembly of Kwale; ii) a declaration that the nomination of the representatives of the County Assembly of Kwale contained in special issue of the Kenya Gazette Notice Vol. CXXIV No. 186, Kenya Gazette Notice No. 10712 is unconstitutional in light of Articles 8, 90 and 177 of *the Constitution*, and that the nomination of the representatives of the County Assembly of Kwale be re-gazetted in compliance with Article 177 of *the Constitution* and regulation 562(2) of the Election Regulations.



3. The 1<sup>st</sup> to 5<sup>th</sup> appellants opposed the Petition and filed their responses, save for the 2<sup>nd</sup> respondent's, the Independent Electoral and Boundaries Commission (IEBC)'s response, the other responses were struck out by the trial Magistrate for noncompliance with rule 11(1) as read with rule 19 of the Election (Parliamentary and County) Election Petition Rules, 2017. No appeal was lodged against that order.
4. The hearing of the Petition proceeded by way of submissions, where the 1<sup>st</sup> respondent contended that the nomination of the appellants, and the 3<sup>rd</sup> to 7<sup>th</sup> respondents did not comply with Article 81 of *the Constitution* as the elections were not transparent, free and fair and overlooked representation of persons with disabilities; that though the number of seats available for allocation to the political parties was 13, the 2<sup>nd</sup> respondent had disregarded Article 177(1) (b) and (c) of *the Constitution*, section 36 of the *Elections Act* and regulation 56(2) of the Elections (General) Regulations by allocating only 10 slots to members cumulatively instead of 13; that there was no compliance with Articles 38, 81(1) c. and 177(1) with respect to persons with disability as no person living with disability was nominated in breach of Article 90 of *the Constitution* on proportional representation; that, further, the nominations were shambolic and a nullity because the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> appellants, though nominated, were not registered voters or residents and, therefore, lacked the ethnic diversity of Kwale County as required by Articles 88 and 90 of *the Constitution*.
5. On their part, the 2<sup>nd</sup> respondent contended that the Political Parties resubmitted their party lists, which the Commission found to be compliant and published them in two nationwide circulated newspapers; that the lists as published were not final; that the Commission gave any aggrieved persons a chance to raise any disputes before the relevant bodies; and that the applicant ought to have filed her complaint at the Political Parties Dispute Tribunal. It was also contended that the available seats were 10, of which 4 were to be automatically allocated as special seats under section 38(6) of the *Elections Act* and Article 177(1) of *the Constitution*; that the total number of seats could only be 24, 20 elected and 4 special seats and marginalized category; that there was no legal requirement that a person nominated must be a resident of the particular county and that, therefore, the Commission acted in accordance with the law in publishing the impugned Gazette Notice.
6. Upon considering the parties' arguments, in a judgment dated 14<sup>th</sup> March 2023, the trial Magistrate dismissed the Petition with costs of Kshs. 400,000 to the 2<sup>nd</sup> respondent on the basis that the election by nomination of the appellants conformed with *the Constitution* and the electoral laws.
7. Aggrieved by the decision, the 1<sup>st</sup> respondent appealed to the High Court on the basis that the learned Magistrate misrepresented, misapprehended and distorted the facts and wrongly applied the law to the issues raised; in finding that the election of the appellants was in conformity with the electoral laws and *the Constitution*; in finding that the County Assembly of Kwale was properly constituted in the absence of a representative member being a person living with disability; and in failing to appreciate that the 1, 2<sup>nd</sup> and 5<sup>th</sup> appellants were neither residents nor registered voters of Kwale County, and that their nomination amounted to a flagrant breach of *the Constitution*.
8. The High Court, on considering the appeal, allowed it in the following terms:
  1. "The failure to nominate persons with disability is unconstitutional, null and void.
  2. Nomination of persons who are neither resident nor registered voters of Kwale county is invalid.
  3. I therefore declare that Fartun Mohamed Musa, Josephine Wairimu Kinyanjui, Augustine Ndegwa, Mulki Abdullahi Adan and Rachael Katumbi Mutisya were not validly elected by



nomination to the special seats they were elected to and as such declare that the said seats as vacant.

4. I Declare that the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> respondents, that is, Khadija Ngala, Melder J. Nyakiti, Kengo Judy Chizi, Ruwa Elizabeth Mwangola, Teresia B. Muoki were validly elected as nominated members of the county assembly of Kwale and continue to serve.
  5. I direct the First Respondent to choose from the qualifying lists provided by the parties in the proportions of the votes garnered by prioritizing under the marginalized as provided in section 36 of the *Elections Act* as doth: -i.one or two persons living with disability, then, ii. two youth, a man and woman resident or voter in the county of Kwale, iii. if one slot is available, a person in the list of marginalised qualifying as a foresaid as resident or voter in the county of Kwale county.
  6. I further direct that in filling the gender top up and in appointing people with disability, and the youth the determination already made as to party entitlements is to be maintained, save that shall a party entitled to have a person with disability, does not have in its list a person with disability, then such a party shall forgo that seat and it be given to the next qualifying party with one elected member as per the formula already adopted by IEBC.
  7. In filling the positions, priorities in the list must be respected save only where the commission has to comply with the order on residence and registration, and prioritizing persons to be nominated, persons living with disability are deemed to be on top of the lists with the youth as number 2.
  8. None of the candidates found to have been invalidly elected are eligible for re-election. i. As per *the Constitution*, the youth and people with disability must have that marginalization till the end of the term
  9. I dismiss the part of the Appeal on the number of seats allocated as 14 instead of 10 and find that as the formula applied by the 1<sup>st</sup> Respondent was the right one.
  10. The Appellant shall have costs of 200,000/= in the court below payable and 300,000/= in this court, both payable by the 1<sup>st</sup> Respondent.
  11. The other Respondents to bear their own costs.
  12. The clerk to the county assembly to ensure the newly nominated persons are sworn on the nearest Tuesday within or 7 days of appointment
  13. The 1<sup>st</sup> Respondent to conclude nominations to fill the vacant seats within 14 days.
  14. Certificates under section 86 of the *Elections Act* do issue accordingly.”
9. The appellants were aggrieved by the learned Judge’s decision and filed an appeal to this Court. In their Memorandum of appeal, the grounds were that: the learned Judge was wrong to invalidate the 1<sup>st</sup> to 5<sup>th</sup> appellants’ election as nominated Members of the County Assembly of Kwale for reasons that they were neither registered voters nor residents of Kwale County, thereby disregarding the provisions of Articles 38 (3) and 193 (1) of *the Constitution* as read with section 25(1) of the *Elections Act*; that, by so doing, the learned Judge acted in excess of his jurisdiction and rewrote *the Constitution* and the *Elections Act*; in wrongly placing reliance on section 13C of the *Elections Act* introduced by Legal Notice No. 73 of 2022 notwithstanding that the High Court at Nairobi in Petition No. E435 of 2022- Charles Makokha Sumba vs The Independent Electoral and Boundaries Commission & another had declared it unconstitutional; in determining the validity of the composition of political parties’ nomination lists



- to the County Assembly of Kwale, the learned Judge acted contrary to the requirements of Article 88 (4) (e) of *the Constitution* as read with section 74 (1) of the *Elections Act*; in usurping the 1<sup>st</sup> respondent's exclusive constitutional and statutory mandate by nullifying the 1<sup>st</sup> to 5<sup>th</sup> appellants' election; in the alternative, and without prejudice to the foregoing grounds, in nullifying the election by nomination of the 1<sup>st</sup> to 5<sup>th</sup> appellants to the special seats that the 2<sup>nd</sup> respondent had confirmed were in conformity with Article 177(1) (c) of *the Constitution* as read with section 36(8) of the *Elections Act*; and in applying the wrong standard of proof to nullify the nomination of the candidates.
10. In the course of the proceedings, the 1<sup>st</sup> respondent filed the Notice of motion dated 16<sup>th</sup> October 2023, being, Election Petition Appeal (Application) No. E002 of 2023 seeking to strike out the appeal on grounds that: no appeal lies to this Court from the High Court on matters touching on the question of the validity of the election of a member of the County Assembly; that, pursuant to section 75(4) of the *Elections Act* (No. 24 of 2011), the High Court is the court of last resort on questions of the validity of the election of a Member of the County Assembly; that, under Article 87(1) of *the Constitution*, elections disputes require to be settled in a timely manner, and without unreasonable delay; that the 1<sup>st</sup> to 5<sup>th</sup> appellants are still in office despite the annulment of their election by the High Court; that there is no stay of execution of the High Court judgment and that, therefore, the members whose positions were nullified should not be attending the County Assembly; that this appeal has no legal basis and is an abuse of the court process.
  11. During hearing on a virtual platform, learned counsel, Mr. Nyamodi and Ms. Cherono appeared for the appellants, learned counsel Ms. Kagori appeared for the 1<sup>st</sup> respondent, and learned counsel Mr. Amimo appeared for the 2<sup>nd</sup> respondent. The parties agreed that both the application and the appeal be canvassed together and determined simultaneously within the appeal.
  12. Counsel for the appellants relied on the written submissions filed on behalf of the appellants and begun by submitting that this Court has jurisdiction to hear and determine the appellants' appeal and that section 85A(1) of the *Elections Act* had been misinterpreted as a barrier to this Court's jurisdiction; that Article 164(3) (a) of *the Constitution* expressly provides a general right of appeal from decisions of the High Court, such as the one before this Court and, in support of this argument, counsels relied on the case of Judicial Service Commission & Secretary Judicial Service Commissions vs Kalpana H. Rawal [2015] eKLR and Equity Bank Limited vs West Link Mbo Limited [2013] eKLR.
  13. It was submitted that an interpretation of section 85A (1) of the *Elections Act* that either renders this Court unable to settle an election dispute appeal or leads to such a dispute being determined after six months of the date of its lodging is contrary to the intention of the Kenyan people; that the purpose of section 85A(1) of the *Elections Act* has been misconstrued by this Court to mean that *the Constitution*, as well as the *Elections Act*, do not contemplate second appeals to this Court in respect of elections for the position of Member of the County Assembly, and that such an interpretation falls short of the intended purpose of inclusion stipulated by Article 87(1) of *the Constitution* as parties would be left with unresolved election disputes; that the Court's jurisdiction subsequent to the promulgation of *the Constitution* was subsumed in Article 164(3), which stipulates that the jurisdiction of this Court is to hear appeals from the High Court. Counsel stated that, while they appreciated decisions of this Court as confirmed by the Supreme Court, that this Court does not have jurisdiction to deal with appeals specified by section 85 A of the *Elections Act*, the appellants nevertheless seek to persuade the Court that both this Court and the Supreme Court have wrongly interpreted section 85 A of the *Elections Act*. It was suggested that the jurisdictional bar arises, not from the express stipulations of the provision, but from its improper interpretation by this Court and the Supreme Court; that a proper interpretation of section 85 A would necessarily take into account this Court's jurisdiction as spelt out by Article 164(3) that vests it with jurisdiction to deal unreservedly with appeals from decisions of the High Court; that



the interpretation of section 85 A by the Supreme Court and this Court had resulted in an absurdity to the effect that this Court can only entertain, without leave, appeals from decisions in all matters from the High Court, except appeals from election petitions for members of County Assembly. Counsel asserted that a strict reading of section 85 A reveals that its true legislative purpose was to bring this Court within the same constitutional footing on timelines for determining election disputes as the High Court, but was never intended to bar access to this Court for certain appeals.

14. Also submitting on behalf of the appellants, Ms. Cheronu stated that the High Court wrongly assumed jurisdiction of the election dispute; that it was only the 2<sup>nd</sup> respondent and the Political Parties Dispute Tribunal that had the jurisdiction to determine member of County Assembly disputes of an electoral nature at first instance; and that, since the dispute had arisen prior to the elections, the High Court ought not to have assumed jurisdiction over it. Counsel also submitted that the High Court granted orders that were not sought in the Petition.
15. For his part, Mr. Amimo opposed the application and supported the appeal. Counsel also relied on the 2<sup>nd</sup> respondent's written submissions and submitted that the rationale behind the holding that this Court lacks jurisdiction to determine a second appeal regarding the election of members of the County Assembly in terms of section 75(4) of the Elections Act is contrary to Article 87 of the Constitution; that because of Article 164(3) (a), this Court is clothed with the necessary jurisdiction to hear all appeals including elections of the members of the County Assembly; that neither Article 87 of the Constitution nor section 75(4) of the Elections Act divests this Court of its jurisdiction to entertain second appeals for elections of members of a County Assembly and, therefore, the interpretation of the constitutional and electoral law provisions limiting such appeals was improper.
16. Counsel went on to submit that, the matter being one that concerned a pre-election dispute, the learned Judge delved into issues which ought to have been determined in another forum; that questions of validity and contents of party nomination lists are pre-election disputes which ought not to be addressed as an election petition by an Election Court under Article 88(4) (d) and (e) of the Constitution as read with section 74 of the Elections Act. Counsel asserted that the orders granted by the learned Judge were neither sought by the 1<sup>st</sup> respondent in the Petition before the Election Court nor in the appeal before the High Court.
17. In response, Ms. Kagori submitted that the law on election petition is clear that there is no provision for an appeal from the High Court to this Court in election petitions concerning member of County Assembly; that election petitions are unique cases of public interest, and that the Constitution clearly spelt out time limits for their determination. Article 87 gives 28 days to hear election disputes while section 85(A) of the Election Act specifies time limits applicable to election dispute arising from the Senate, Members of Parliament and Governors; that nothing is expressed on appeals arising from election of Member of County Assembly; that disputes from elections of Member of County Assembly are substantiated under section 74(4), which specifies that such disputes have one right of appeal to the High Court; that this ensures that election petitions are heard and determined within the specified timeframe; that the timelines specified were aimed at eliminating situations where election litigation was prolonged over the entire election period of five years; that further, in this case, this is the third time this matter is in court, yet the people of Kwale are still awaiting enjoyment of their election rights; and that the Krieglert report stated that election dispute should be completed within a short period of time. Counsel argued that, if this Court entertains an appeal on the basis of Article 154, it would have resorted to allowing the election petition period to be prolonged against constitutional dictates; that this Court does not have jurisdiction to hear the appeal, and that it should be dismissed in the public interest of the people of Kwale.



18. Counsel further submitted that the learned Judge made proper findings in the judgment, and that this Court should not disturb the decision of the High Court.
19. We have considered the grounds of appeal, the Notice of motion, and the rival submissions, and it is evident that a preliminary question of whether this Court has jurisdiction to hear the appeal has been raised in both the appeal and the application seeking to strike out the appeal. As such, it is well settled that once a jurisdictional question is raised, it must be disposed of at the earliest opportunity. And where it is held that a court or tribunal lacks jurisdiction, it should down its tools. See: *The Owners of the Motor Vessels “Lilian S” vs Caltex Oil (Kenya) Limited* [1989] KLR 1; *The Owners & Masters of the Motor Vessels “Joey” vs Owners & Masters of the Motor Tugs “Barbra” and “Steve B”* [2008] 1 EA. 367).
20. On the centrality of jurisdiction, this Court in *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* (2013) eKLR stated that:
- “So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cul-de-sac. Courts, like nature, must not sit in vain.”
21. According to Article 164(3)(a) of *the Constitution* and section 3 of the *Appellate Jurisdiction Act*, appeals from the High Court lie to this Court. But in pronouncing itself on the extent of this Court’s jurisdiction in the case of *Twaher Abdulkarim Mohammed vs Mwathethe Adamson Kadenge & 2 others* [2015] eKLR this Court succinctly observed that:
- “Whereas Article 164(3) is the constitutional foundation of this Court’s jurisdiction and in broad terms states, inter alia, that its jurisdiction is to hear appeals from the High Court, no inference can be drawn contrary to all other textual and contextual evidence that it was the intention of the framers of *the Constitution* that all appeals whatsoever from the High Court would lie to the Court of Appeal.”
21. That said, in the context of elections appeals, section 85A of the *Elections Act* is explicit. The 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...”
22. In construing the provision, it is clear that it does not expressly or by implication provide for appeals concerning member of the County Assembly to this Court. Instead, in so far as such disputes are concerned, section 75(1A) of the Elections Act 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.”
23. Furthermore, section 75(4) provides that an appeal under subsection (1A) shall lie to the High Court on matters of law only.



24. Despite the above express provisions, the appellants argue that the wide parameters of Article 163(4) (c) empowers this Court to hear all appeals, and in particular, election appeals that arise from the High Court.
25. However, a consideration of various decisions of this Court clearly show that it has consistently declined to assume jurisdiction on a second appeal from the High Court emanating from an election of a Member of County Assembly.
26. For instance, in the case of Hassan Jimal Abdi vs Ibrahim Nor Hussein & 2 Others [2018] eKLR, this Court held that it had no jurisdiction to hear a second appeal in respect of an election of member of a County Assembly. The Court considered the relevant articles of the Constitution as well as the relevant sections of the Elections Act before it rendered its decision and held, inter alia, that:

“It is therefore our view that sections 75 and 85A of the Elections Act cannot be used as an air valve that opens in different directions in order to clothe this court with jurisdiction. We also decline invitations by the respondents that, in any event, we should resort to Article 47, 40 and 164 of the Constitution in view of the clear, comprehensive and an unambiguous language of Article 87, which gave rise to the Elections Act. Sections 75 and 85A as well as the whole Elections Act was enacted in answer to Article 87, which donated power and authority to the legislature and that any other provision would result in losing the normative message of Parliament.”

27. In the same vein, in the case of Hamdia Yaro Sheikh Nuri vs Faith Tumaini Kombe & 2 others [2018] eKLR, this Court held that it lacked jurisdiction to entertain a second appeal from the High Court emanating from an election of a member of County Assembly. When arriving at its decision, this Court stated thus:

“In essence, section 85A, and the recently enacted rules, which are expressed in mandatory terms, are specific on the nature of appeals that can be entertained by this Court. In summary, they provide that appeals shall lie to this Court only where (i) the dispute concerns membership of the National Assembly, Senate or the office of county governors; (ii) the High Court acting in its original jurisdiction; and (iii) the appeal is in respect of matters of law only. Such appeals must be heard and determined within six months of the filing of the appeal. Because there was no intention to stretch electoral disputes from the magistrates’ courts beyond the High Court, there is no similar time limits for the hearing of such appeals.”

28. Likewise, in the case of United Democratic Movement & another vs Independent Electoral and Boundaries Commission & 2 others (Election Petition Appeal E017 of 2023) [2023] KECA 1338 (KLR) also cited by the appellants, this Court observed:

“57. Our reading of the provisions of section 75 and 85A of the Elections Act yields the interpretation that there is no provision of a second appeal to this Court concerning the election of a member of a county assembly. The Constitution as well as the Elections Act do not contemplate second appeals to this Court in respect of such elections.” (Emphasis Ours)

29. This position has been reiterated and remained steadfast in several other decisions. See also Mohamed Ali Sheikh vs Abdiwahab Sheikh & 4 others; Emmanuel Changawa Kombe (Interested Party) [2018] eKLR; Tomito Alex Tampushi vs Patrick Sosio Lekakeny & 3 others [2018] eKLR; Maina Kiai & 12



others vs Party & 5 others (Election Petition Appeal (Application) E001 of 2023) [2024] KECA 62 (KLR); Gedi vs Gedi & 2 others (Election Petition Appeal E018 of 2023) [2023] KECA 1336 (KLR).

30. In the case of Mohammed Ali Sheikh vs Abdiwahab Sheikh Osman Hathe & others; Emmanuel Changao Kombe (interested Party) [2018] eKLR, whilst dealing with an application for striking out an appeal in similar circumstances, Odek, JA categorically observed:

“Whereas in construing legislative intent, the effect of legislative silence or legislative inaction is debatable, it is trite that a right of appeal is a creature of law. The omission by the legislature to make provision for ‘a right of appeal’ means ‘the right’ does not exist. In the instant case a literal interpretation of section 85A of the [Elections Act](#) ends the debate whether the omission to provide for appeals concerning membership to County Assembly means the right to appeal does not exist. Conceptually, the right of appeal being a statutory right, failure to provide the right implies the right does not exist.”

31. The case of Hamdia Yaroi Sheikh Nuri vs Faith Tumaini Kombe & 2 others (supra) is also distinctive. In that appeal, this Court considered and adopted the dicta expressed in [Isaac Oerri Abiri vs Samuel Nyang’au Nyanchama & 2 others 2018 Election Petition Appeal No. 27 of 2018](#), and reemphasized that:

“Since the promulgation of the 2010 Constitution that established the County Assemblies, concern over the existence of the many levels of elections disputes has given rise to significant discourse. In the more recent case of Wilson Ong’ele Ochola vs. Orange Democratic Movement and 3 Others, Civil Appeal No 271 of 2017, which involved a nomination dispute for the office of Member of a County Assembly, this Court described as “untenable” the multi-level of hearings and appeals established by section 41 (2) of the [Political Parties Act](#) which allowed for appeals from the Political Parties Disputes Tribunal (PPDT) all the way to the Supreme Court. The Court took the view that amongst other challenges, the provisions did not take into account the timelines prescribed in [the Constitution](#) and the [Elections Act](#) for the expeditious resolution of election petitions.

The same disquiet also resonates with the concern over multi-level election petition appeals filed by members of the county assembly in the Magistrates’ courts, and which seek to have appeals determined by the High Court, the Court of Appeal, and the Supreme Court. But in these cases, it cannot be gainsaid that whether a matter is appealable or not turns on whether the court has the requisite mandate or jurisdiction donated to it by either [the Constitution](#) or the law to entertain the matter...”

32. This Court went on to state:

“But that is not all. When the above provisions are analyzed alongside the corresponding mandate of the Court of Appeal, it would also seem that election appeals by members of the county assembly to this Court were neither contemplated nor permitted. We say this because, [the Constitution](#), the [Elections Act](#) and the Election Petition Rules specifically delineate the nature of election appeals that are eligible to be heard and determined by this Court, and disputes for members of the county assemblies are distinctly absent....

33. It subsequently concluded that:

“Deferring to the extant laid down criteria that specifies the nature of appeals to be heard by this Court, since the appeal was not in respect of a member of the National Assembly,



Senate or the office of county governors, and it did not invoke the powers of the High Court acting in its original rather than its appellate jurisdiction, we find that the appeal has failed to meet the criteria necessary for election petition appeals to be determined by this Court. In sum, we lack jurisdiction to hear and determine the appeal...”

34. The decision of this Court in *Hamdia Yaroi Sheikh Nuri vs Faith Tumaini Kombe & 2 others* (supra) was challenged at the Supreme Court in *Hamdia Yaroi Shek Nuri vs Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission* [2019] eKLR, Petition No. 38 of 2018. The Supreme Court affirmed this Court’s decision regarding such appeals and expressed itself thus:

“(33) The foregoing analysis leads us to the conclusion, in agreement with the Court of Appeal, that in the absence of an express statutory provision, no second appeal lies to the Court of Appeal, from the High Court, emanating from an election petition concerning the validity of the election of a member of county assembly. As this determination conclusively disposes of the appeal before us, we shall not consider the second issue.” (emphasis ours)

35. But notwithstanding the above cited authorities and the pronouncements by both the Supreme Court and this Court on this Court’s jurisdiction to hear and determine appeals emanating from member of County Assembly elections, the appellants’ nevertheless seek to persuade us to depart from these erstwhile pronouncements and hold that we have jurisdiction to hear and determine this appeal; that this Court should interpret section 85 A(1) in a manner that gives full effect to the intent of the Kenyan people enshrined in Articles 87 (1) and 163 (4) (c) of *the Constitution*, so that we can assume jurisdiction in the appeal and proceed to determine the instant appeal.

36. In answer to this submission, we will reiterate the doctrine of stare decisis as expounded in the case of *Mohamed Abushiri Mukullu vs Minister for Lands and Settlement & 6 others* [2015] eKLR thus:

“The principle of stare decisis requires that, although not bound to do so, the court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong. In its vertical application, a court is bound by the decisions of a court superior to it. Horizontally, while it may be desired for the sake of certainty and consistency that the court does not deviate from decisions of the courts of the same rank, decisions by courts of concurrent jurisdiction are only of persuasive nature and cannot bind the court.”

37. Additionally, in the case of *Ferdinand Ndung’u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2014] eKLR this Court held:

“It is common place that we are bound by stare decisis, and cannot depart from sound precedents of law unless there is reason to distinguish it. The doctrine of precedent is of paramount importance to our jurisprudence. It is incumbent on lower courts to adopt and follow the principles set out by higher courts, unless there are good reasons to depart.”

38. In emphasizing the significance of the doctrine of stare decisis, the Supreme Court in the case of *Jasbir Singh Rai & 3 Others vs Tarlochan Singh & 4 Others*, [2013] eKLR explained that the rule of precedent promotes predictability, diminishes arbitrariness, and enhances fairness, by treating all cases alike. The doctrine of stare decisis holds that decisions of a higher court, unless distinguished or overruled, bear the quality of law, and bind all lower Courts in similar or like cases.



39. It is therefore trite that a lower court should follow the decisions of a higher court that is within the vertical hierarchy. At the horizontal level, where there are conflicting previous decisions of the court or there are inconsistent decisions of one court with another, or where the previous decision was pronounced per incuriam, a court is allowed to shift from a preexisting decision on a similar question. But in this case, we can find no such circumstances in the instant appeal to warrant such shift. See *Mohamed Ali Sheikh vs Abdiwahab Sheikh & 4 others; Emmanuel Changawa Kombe (Interested Party)* [2018] eKLR.
40. Of greater importance, and it remains at the foremost of our minds that, the Supreme Court has already pronounced itself on a similar issue. And pursuant to the provisions of Article 163 (7) of *the Constitution*, which provides that, “All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court”, this Court like other courts is bound by Supreme Court decisions. This edict was reinforced in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, thus:

Article 163 (7) of *the Constitution* is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this Court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this Court: *Jasbir Singh Rai v. Tarlochan Singh Rai & Others*, and quite recently, in *George Mike Wanjohi v. Steven Kariuki & Others* Petition No. 2A of 2014.

“In addition to the benchmark decisions to which this Court adverted in *Wanjohi v. Kariuki* (supra), regarding the importance of the doctrine of stare decisis, we would echo the dictum in *Housen v Nikoaisen* (2002) 2 SCR:

‘It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all Judges are liable, we must maintain the complete integrity of relationships between the courts’.”

41. In addition, in the case of *Kidero & 5 Others vs Waititu and Others*, Sup. Ct. Petition No. 18 of 2014 (Consolidated with Petition No. 20 of 2014), Ndungu, SCJ, in a concurring opinion, observed:

“The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Court’s vital essence and the decisions of this Court protect settled anticipations by ensuring that *the Constitution* is upheld and enforced, and that the aspirations of the Kenyan people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy, and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with



the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms.”

42. See also *Senate & 2 others vs Council of County Governors & 8 others* (Petition 25 of 2019) [2022] KESC 7 (KLR) (Constitutional and Human Rights) where the Supreme Court held that a party cannot expect the Court of Appeal to overturn Supreme Court decisions under which it is bound pursuant to Article 163(7) of *the Constitution*. So that, the Supreme Court having loudly and unequivocally pronounced itself on this question, now posed yet again to this Court in the instant appeal, this Court cannot with good conscious overturn similarly determined questions by the Supreme Court in the manner suggested by the appellants.
43. In view of the foregoing, we have said enough. No doubt, this Court is devoid of jurisdiction to entertain the instant appeal since it is concerned with the election of a member of a County Assembly, with the result that the Notice of Motion dated 16<sup>th</sup> October 2023 is merited and is hereby allowed.
44. And, having found as we have that this Court has no jurisdiction to hear and determine the appeal, we hereby down our tools and proceed no further to hear and determine the grounds raised in the appeal.
45. In sum, the appeal be and is hereby struck out for want of jurisdiction, and hereby make the following orders;
- i. The Notice of motion dated 16<sup>th</sup> October 2023 being Election Petition Appeal (Application) No. E002 of 2023 is merited and is hereby allowed;
  - ii. The appeal be and is hereby struck out; and
  - iii. Costs are awarded to the 1<sup>st</sup> respondent.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH, 2024.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

