Kering v Torome & 5 others (Election Petition Appeal (Application) E078 of 2023) [2024] KECA 295 (KLR) (8 March 2024) (Ruling)

Neutral citation: [2024] KECA 295 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

ELECTION PETITION APPEAL (APPLICATION) E078 OF 2023

FA OCHIENG, LA ACHODE & WK KORIR, JJA

MARCH 8, 2024

BETWEEN

ALICE CHEPKIRUI KERING ..... APPLICANT

AND

JOSEPHINE SENEIYO TOROME ..... 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT

JUBILEE PARTY ..... 3RD RESPONDENT

ORANGE DEMOCRATIC MOVEMENT ..... 4TH RESPONDENT

SPEAKER, COUNTY ASSEMBLY OF NAROK ..... 5TH RESPONDENT

COUNTY ASSEMBLY OF NAROK ..... 6TH RESPONDENT

(Being an application for an injunction arising from the Judgment of the High Court of Kenya at Narok (F. Gikonyo, J.) dated 6th September 2023 in Election Petition Appeal No. E002 of 2023)

RULING

1. Before us is an application dated 20th September 2023 seeking orders inter alia that:

> "a) This court be pleased to issue an order of injunction, retraining the 2nd and 4th respondents from declaring vacant, and subsequently filling up the position currently held by the applicant pending the hearing and determination of this application and also, the intended appeal.
>
> b. The costs of this application be provided for."

2. The application is premised on the grounds that:

"a) The applicant was dissatisfied with the impugned judgment and lodged a notice of appeal dated 11th September 2023.

b) Unless this court intervenes, the applicant is at the risk of losing her seat if the 2nd respondent declares the said seat vacant.

c) Unless the applicant is heard and determined urgently, the intended appeal will be rendered nugatory."

3. The application is supported by the applicant's affidavit, which states the following:

"a) The order of injunction sought will stop the 2nd respondent from interfering with the applicant's roles as a nominated member of the 4th respondent.

b. The courts below have set a new threshold on evidence and the burden of proof.

c. The courts below ventured into new frontiers when they legislated on matters that were well within obtaining law.

d. The courts below discriminated against the applicant.

e. The applicant has demonstrated that the appeal is arguable, and it will be rendered nugatory if the orders sought are not granted."

4. The 1st respondent raised a preliminary objection on the grounds that:

"a) It is trite that a second appeal does not lie from the High Court in its appellate jurisdiction concerning the validity of an election of a member of a County Assembly, this court lacks jurisdiction to hear and determine the instant appeal.

b) The instant application and the notice of appeal dated 11th September 2023 should be struck off with costs to the 1st respondent."

5. When the application came up for hearing on 6th February 2024, Mr. Kipkoech, learned counsel appeared for the applicant. There was no appearance by the respondents. Counsel relied on his written submissions.

6. In opposition to the preliminary objection, counsel pointed out that Article 163 of *the Constitution* gives this court jurisdiction. Counsel invited this court to have a fresh look at its previous decisions. Counsel pointed out that the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR held that, where a statute limits jurisdiction, this Court may yet have a constitutional mandate.

7. The applicant submitted that the question of jurisdiction is not a mere procedural technicality, it goes to the very heart of the matter, and without jurisdiction, the court cannot entertain any proceedings. The applicant relied on the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank & 2 Others [2011] eKLR in support of this submission.

8. The applicant stated that the right to appeal is a constitutional right that cannot be limited by Section 85A of the *Elections Act*. The applicant further relied on the cases of DHL Excel Supply Chain

Kenya Limited v Tilton Investments Limited [2017] eKLR, Judicial Service Commission & Another v Kalpana H. Rawal [2015] eKLR, Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others [2018] eKLR, and Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others [2014] eKLR in submitting that it would be a total disregard of the express provisions of *the Constitution* regarding the right of appeal, for this Court to hold that it cannot hear the instant appeal for want of jurisdiction. The applicant pointed out that the silence of the drafters in Section 85A on the right to a second appeal does not indicate that there is no right of appeal since this Court's jurisdiction to hear all appeals from the High Court cannot be limited except where it is expressly so stated by *the Constitution* or statute.

9. The applicant submitted that the holding that this Court cannot entertain this application is a negation of the applicant's right to a fair hearing under Articles 20(3)(b), 48 and 50 of the Constitution. The applicant was of the view that subsidiary legislation or rules of procedure cannot confer or limit the jurisdiction of any court hence Section 85A cannot override the constitutionally guaranteed right of appeal.

10. Turning to her application for an order of injunction, the applicant relied on the case of Teachers Service Commission v Kenya National Union of Teachers & 3 Others [2015] eKLR in submitting that this Court has inherent jurisdiction to preserve the substratum of the appeal. The applicant also relied on the case of Alfred Mincha Ndubi v Standard Limited [2020] eKLR in pointing out that the twin principles that she has to establish before an injunction can be granted are that: the appeal is arguable, and the appeal is likely to be rendered nugatory if the injunction is not granted.

11. On whether or not the appeal is arguable, the applicant invited this court to find that there is at least a single bona fide arguable ground raised in the draft memorandum of appeal annexed to the application. The applicant was of the view that the court shifted the burden of proof to her. The applicant relied on the case of Kitho Civil & Engineering Co. Ltd v National Bank of Kenya Limited & Another [2023] KECA 387 to buttress this submission.

12. On the nugatory aspect, the applicant relied on the case of Reliance Bank Limited v Norlake Investment Limited [2002] 1 EA 227 in submitting that the factors that render an appeal nugatory should be considered within the circumstances of each case. The applicant stated that she was apprehensive that, should the 2nd and 4th respondents declare the position she holds vacant, the substratum of the appeal would be defeated.

13. In answer to those submissions, the 1st respondent submitted that all the arguments by the applicant concerning the right of appeal were considered and determined by this court in the case of Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others, (supra). The 1st respondent pointed out that the correct interpretation of the applicability of Articles 87 and 164(3) & (4) of *the Constitution* vis-à-vis Sections 75(4) and 85A of the *Elections Act* was rendered in the case of Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral and Boundaries Commission [2019] eKLR.

14. We have carefully considered the application, the affidavit in support thereof, the preliminary objection by the 1st respondent, the submissions by counsel, the authorities cited, and the law. The preliminary issue for determination is whether or not this Court has jurisdiction to hear a second appeal arising from the election of a Member of a County Assembly.

15. It is trite that jurisdiction is everything, and it 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. It follows therefore that 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 thereafter will be amenable to being set aside ex debito justitiae.

17. It is trite, as correctly submitted by the applicant, that appeals from the High Court lie to the Court of Appeal according to Article 164(3)(a) of *the 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 applicant submitted that the absence of any mention of the right of appeal for the election of Members of the County Assembly in Section 85A does not imply that no such right exists. The applicant submitted that this Court has jurisdiction to hear all appeals from the High Court and relied on the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, (supra) where the Supreme Court held that:

> "By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length, and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.
>
> Section 85A of the *Elections Act* is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says: 'Limit your appeals to the Court of Appeal to matters of law only."

21. It is our understanding that the Supreme Court while dealing with the constitutional validity of Sections 75(4) and 85A of the *Elections Act* to the extent it is perceived as limiting the appellate jurisdiction of the Court of Appeal contrary to the provisions of Article 164(3)(a) of *the Constitution*; the court was dealing with a matter relating to a gubernatorial election as opposed to the election of a member of the County Assembly.

22. The Supreme Court while commenting on its reasoning in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, (supra) stated as follows, in the case of Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe & 2 Others (supra) where the court was dealing with the jurisdiction of the Court of Appeal in matters relating to the election of a member of the County Assembly;

> "In re-affirming the holding in Munya (supra), this Court re-stated the constitutionality of Section 85A at paragraph 73 thus:
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> > "This Court's perception of the configuration of the governing electoral law has been clearly signaled in the recent Munya case. From that foundation, we would observe that Section 85A manifests Parliament's intention to regulate the scope of appeals to the Court of Appeal to 'matters of law only'. We decline, with respect, the 1st respondent's contention that the provision should be struck out, as an undue limitation on the Court of Appeal's jurisdiction as conferred by Article 164 (3) (a) of *the Constitution*. [emphasis added]."

23. The court went to state that:

> " We re-affirm our earlier position, that the statutory provision regarding the jurisdiction of the Court of Appeal, and in relation to 'matters of law only', is not a limitation to, or a restriction of the Court of Appeal's jurisdiction under Article 164 (3) (a). It is our view that the appellate jurisdiction in electoral disputes is donated not simply by virtue of Article 164 (3) (a), but also by legislation contemplated under Article 105 (3) of *the Constitution*."

24. The applicant pointed out that the right to appeal is a constitutional right that cannot be limited by Section 85A of the *Elections Act*. The Supreme Court in dismissing the Petitioner's arguments in the case of Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe & 2 Others (supra), addressed itself as follows:

> "(26) In view of these clear and unequivocal pronouncements by the Supreme Court, regarding the constitutionality of Section 85A of the *Elections Act*, the Petitioner's arguments to the contrary cannot be sustained. However, it can still be assumed that, what the Petitioner is questioning in this case, is not the 'matters of law only' limb of appellate jurisdiction limitation, but the fact that both Sections 85A and 75 (4) of the *Elections Act*, are silent on the question as to whether, election appeals concerning the validity of the election of a member of a county assembly, lie to the Court of Appeal, from the High Court.
>
> (27) In this regard, Section 85A only provides for appeals from the High Court to the Court of Appeal in election petitions concerning membership of the National Assembly, Senate, or, the office of County governor. Section 75 (4) on the other hand, only provides that appeals questioning the validity of the election of a member of county assembly, lie to the High Court from the Magistrate's Court. The said section makes no provision for a second appeal to the Court of Appeal. Such 'silence and non- provision', in the view of the Petitioner, is offensive to the provisions of Article 164 (3) (a) of *the Constitution*.

(28) 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."

25. The Supreme Court went on to address the Sui-Generis nature of Electoral Law as follows:

"(29) This Court, in keeping with comparative electoral jurisprudence, has in the past emphasized the fact that election disputes, though not exempted from constitutional principles and the general law of the land, usually generate a 'unique law' of their own. This type of legal regime, while not necessarily "special", does create normative and procedural divergences that are dictated by the "political nature" of these disputes. Towards this end, the 2010 Constitution has gone to great lengths, in creating a distinct normative and institutional architecture, for the resolution of electoral disputes. In a number of instances, *the Constitution* has given Parliament the latitude, to enact legislation to give full effect to its declared principles, and general provisions regarding elections. In Fred Outa (Supra), this development was thus illuminated at paragraph 59:

> "*The Constitution* of 2010 may, indeed, be seen as the foundation of 'a regime of electoral law', which, even though sharing common principles of justice and fairness with normal civil and criminal jurisdictions, bears a new ingredient that is underlined by objects of democracy, good governance, and efficiency of public institutions. This is the context in which Article 105 sets a foot the process of enacting new electoral legislation, and the making of attendant rules and regulations. This is the context in which we would perceive the specific terms of the *Elections Act*- in a broad sense, a context of compatibility, rather than of discord."

(30) Guided by the foregoing philosophical rationalization, it is not difficult to critically advert to such argumentation, as would question the constitutional validity of Sections 85A and 75 (4) of the *Elections Act*. In this context, the starting point, in our view, must be Article 87 of *the Constitution*, pursuant to which parliament is majestically charged with the duty of enacting legislation to "establish mechanisms for the timely settling of electoral disputes." The fact that *the Constitution* lays a fundamental premium on the need for the expeditious disposal of electoral disputes, is self-evident in the plain language of Article 87. The non- negotiability of timelines for the settlement of electoral disputes, is a principle that has repeatedly been decreed by this Court in a long line of cases (Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others Supreme Court Petition No. 2B OF 2014 [2014] eKLR; Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others Supreme Court Petition No. 5 of 2014 [2014] eKLR; Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu

Waititu & 4 Others Supreme Court Petition No. 18 of 2014 as consolidated with Petition No. 20 of 2014 [2014] eKLR).

(31) It has to be noted that, what Article 87 requires parliament to do, is not limited to the enactment of legislation setting "timelines" for the disposition of electoral disputes. The article talks of "mechanisms for the timely" settlement of electoral disputes. As such, the setting of timelines in legislation is just but one of the mechanisms, for the timely settlement of electoral disputes. Other mechanisms, are discernible in the other provisions of the *Elections Act*, touching upon such other matters, as the form of petitions, manner of service of petitions, the scope of appeals, and in our view, the level of appeals among others."

26. The Supreme Court further stated that:

> "As long as these "mechanisms" are not inconsistent with, or violative of the provisions of *the Constitution*, and as long as they are in accord with Article 87 of *the Constitution*, their validity cannot be questioned. In this context, one of the mechanisms for the timely settlement of electoral disputes is by limiting, not the right of appeal, but the scope, and level of appeal, in election petitions. In this regard, Section 75 (4) of the *Elections Act*, does not limit the right of appeal emanating from an election petition, concerning the validity of the election of a member of a county assembly. The section in fact preserves the initial right of appeal to the High Court but falls short of extending it to a second- tier level. To argue that, notwithstanding the non-provision for a second appeal in Section 75 (4) of the *Elections Act*, such right of appeal nonetheless subsists under Article 164 (4) (3) (a) of *the Constitution*, would be subversive of Article 87 of *the Constitution*. It is worth repeating that *the Constitution* cannot subvert itself. Indeed, what may appear as a limitation of the jurisdictional reach of Article 164 (3) (a), of *the Constitution*, is borne out of Article 87 of the same Constitution. The issue may very well be viewed differently if what is in question, is a purely statutory limitation of appellate jurisdiction. It all depends on the nature and uniqueness of each case. This Court has held that, even at the level of the Supreme Court, not all election petition appeals, lie from the Court of Appeal to this Court. An intending appellant must satisfy the Court, that such an appeal meets the threshold delineated in Article 163 (4) (a)and (b) of *the Constitution*."

27. It is trite that this court is bound by the decisions of the Supreme Court and therefore, we cannot depart from the Supreme Court's interpretation of Section 85A of the *Elections Act* in the above case. 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."

28. It is commonly understood that the right to appeal is not inherent to the common law tradition. It is solely dependent on the precise language stated in a statute. In general, an election court is established by a statute. Therefore, a right of appeal cannot be assumed unless the statute that establishes the election court provides for 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 vs. Airtel Networks Limited [2015] eKLR)."

29. 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."

30. In R v Edwards (No 2) [1931] SASR 376, the Australian Court 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."

31. It is evident that Section 85A of the *Elections Act* does not include any provision for appeals relating to membership to the County Assembly. The perceived lack of clarity in the said provision has resulted in several court decisions, stating that no second appeal can be made concerning County Assembly membership. In Hamdia Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 Others, (supra), the Supreme Court stated that:

> "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 the county assembly. As this determination conclusively disposes of the appeal before us, we shall not consider the second issue."

32. In Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 Others, Election Petition No. 30 of 2018, this court analyzed Section 85A of the *Elections Act* regarding appeals with respect to County Assembly membership and expressed itself in the following manner:

> " 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."

33. 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."

34. In Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 others; Emmanuel Changawa Kombe (Interested Party), (supra), the learned Judge 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."

35. 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 on matters of law only.

36. In the result, we find that the notice of appeal dated 11th September 2023 and the applicant's application for injunction were filed before a court devoid of jurisdiction. Subsequently, we uphold the 1st respondent's preliminary objection and hold that the application dated 20th September 2023 lacks merit and it is struck out with costs to the 1st respondent.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF MARCH, 2024.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR