



**Muli & another v Njomo & another (Civil Application
E021 of 2023) [2023] KECA 408 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KECA 408 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E021 OF 2023
HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA
APRIL 14, 2023**

BETWEEN

BEATRICE SAKI MULI 1ST APPLICANT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
APPLICANT**

AND

HON JUDE KANG'ETHE NJOMO 1ST RESPONDENT

HON JOHN MACHUA WAITHAKA 2ND RESPONDENT

*((Being an appeal against the Ruling and Orders of the High Court of Kenya at
Kiambu (A. Onger, J.) dated 9th January 2023 in Election Petition No. E003 of 2022))*

RULING

1. The 1st applicant (Beatrice Saki Muli) is an officer of the 2nd applicant (the IEBC) while the 1st respondent (Hon Jude Kang'ethe Njomo) and the 2nd respondent (John Machua Waithaka) were candidates in the election for the position of Member of National Assembly for Kiambu Constituency held on August 9, 2023, and whose results were announced on August 11, 2022.
2. Dissatisfied with the outcome of the election aforesaid, the 1st respondent filed a petition dated September 8, 2022, whose details are not disclosed in the record as put to us. Neither does the record contain the 1st respondent's interlocutory application dated November 7, 2022 at the Superior Court by which he sought, inter alia, orders directing the IEBC to produce certified copies of Forms 35A, 35B and 35C, polling station diaries, lists of voters, secure digital cards used in KIEMS Kits; and scrutiny of all exhibits produced by Information Technology experts appointed by the parties.
3. By its ruling delivered on January 9, 2023, the High Court (AN Onger, J) dismissed the 1st respondent's application dated November 7, 2022. According to the learned Judge, the 1st respondent



- had not adduced any evidence to warrant the court to call into question any of the requested documents for purposes of scrutiny, and that to allow his application would amount to assisting him on a fishing expedition to look for evidence in support of his case.
4. Aggrieved by the impugned ruling, the 1st Respondent lodged the Notice of appeal dated January 20, 2023 in the election court, and which the applicant's, by a Notice of Motion dated January 27, 2023, pray that it be struck out on the grounds that the notice was filed in the High Court on January 24, 2023 instead of being lodged in this Court's registry in accordance with rule 6(1) of the [Court of Appeal \(Election Petition\) Rules, 2017](#); that the notice is bad in law having been filed out of time, and that it was an abuse of the court process in that it ought to have been filed within seven (7) days of the date of the impugned decision; and that it is in the interest of justice that the 1st respondent's notice of appeal be struck out with costs.
 5. The applicants' Motion is supported by the annexed affidavit of Beatrice Saki Muli (the 1st applicant), the 2nd applicant's Returning Officer for Kiambu Constituency. In further support of the applicants' Motion, counsel for the applicants, Ms Lubulela & Associates, filed written submissions dated February 28, 2023, which Mr Lubulela highlighted orally, citing the cases of [John Munuve Mati v the Returning Officer Mwingi North, IEBC & Paull Musyimi Nzengu](#) [2018] eKLR where this Court emphasized the need for timely resolution of election disputes; [Moses Mwicigi & 14 Others v IEBC & 5 Others](#) [2016] eKLR where the Supreme Court held that the rules of procedure governing litigation cannot amount to vanity; [Apungu Arthur Kibira v IEBC & 2 Others](#) [2018] eKLR where this Court underscored the mandate to comply with rule 6 of this Court's Election Petition Rules; and [Mbaraka Issa Kombo v IEBC & 3 Others](#) [2017] eKLR where the Court drew a distinction between dismissal (of suits and applications) and striking out (of pleadings, applications or suits, as the case may be).
 6. The 2nd respondent filed "Grounds of Supporting the Application to Strike Out Notice of Appeal" dated March 1, 2023. Learned Counsel for the 2nd respondent, M/s. Ogado & Company, filed written submissions dated March 1, 2023, which Mr. Ogado highlighted orally, citing the case of [Abdikadir Farah Mohammed & Another v IEBC & 3 Others](#) [2018] eKLR.
 7. In response to the applicants' Motion, the 1st respondent raised a preliminary objection dated March 1, 2023 on the grounds that this Court lacks jurisdiction to hear and determine the application unless and until the 1st respondent has filed a notice of appeal against the judgment of the High Court of Kenya at Kiambu HCEP No. E003 of 2022; that the Motion was premature for having been filed before the jurisdiction of this Court under section 85A of the [Elections Act, 2011](#) is triggered in the petition; the Motion offends the rule as set out by this Court in [Jared Odoyo Okello & Another v IEBC & 6 Others](#)[2014] eKLR to the effect that (a) issues that arise in interlocutory determination must be canvassed on appeal after the final determination of the election court; and (b) issues that arise at the interlocutory stage shall be adjudicated during the hearing of an appeal against the judgment of the election court; and that rules 6 and 19 of this Court's [Election Petition Rules, 2017](#) do not relate to determinations of the election court at the interlocutory stage.
 8. In support of their preliminary objection, learned counsel for the 1st respondent, Mr. Kibe Mungai, filed a list of authorities, which he highlighted orally, citing the case of Jared Odoyo Okello (supra), the Constitution, [Elections Act, 2011](#) the Elections (General) Regulations, 2017 and the Court of Appeal (Election Petition) Rules, 2017.
 9. We hasten to observe that all learned counsel were on the same page, so to speak, on the mandatory provisions of section 80(3) of the [Elections Act, 2011](#) which requires that "interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections ... be heard and determined by the election court." In effect, interlocutory matters arising in an election



petition are to be heard and determined in the final decision of the election court so as to avoid interlocutory appeals, and to ensure that the court adheres to the strict timelines prescribed in section 85A of the Act. Only then could an appeal lie to this Court.

10. The pressing need to have interlocutory matters considered and determined with the main petition was underscored in the case of *Jared Oduyo Okello & Another v IEBC & 6 Others* [2014] eKLR where this Court observed:

“We must avoid a situation where a continuous and steady stream of election interlocutory appeals would clog the election petition process so completely that the ability of both the High Court and the Court of Appeal to dispense with petitions in their respective stipulated periods of six months would be impossible and thus defeat the constitutional requirement of timely resolution of election disputes.

... ..

We hold, as this Court held in *Peter Gichuki King'ara v IEBC & 2 Others*, CA No 23 of 2013, that the Court of Appeal has jurisdiction to hear and determine appeals from election disputes, whether final or interlocutory, but to protect and uphold the clear constitutional principles and values of among others timelines, issues that arise in interlocutory determinations must be canvassed on appeal after the final determination of the election court.”

11. This Court in *Mae Properties Limited v Joseph Kibe & Another* [2017]eKLR, reiterated its position as follows:

“We have said on numerous occasions that the rules of court exist for the purpose of orderly administration of justice before this court. The timelines for the doing of certain things and takings of certain steps are indispensable to the proper adjudication of the appeals that come before us. The rules are expressed in clear and unambiguous terms and they command obedience...”

12. Having carefully considered the applicants’ Motion, the 1st respondent’s preliminary objection, the rival submissions of learned counsel for the applicants and for the respondents, and the cited authorities, we can only conclude that the impugned notice of appeal was incompetent and as good as non-existent for the following reasons: that it had been filed in the election court; that the same was not in compliance with rule 6(1) of the Court of Appeal (Election Petition) Rules; that the notice related to an order of the election court made in determination of an interlocutory application; and that it was not a notice of appeal relating to the final decision of the election court as contemplated by statute and case law.
13. The record as put to us shows that the impugned notice of appeal was introduced to this Court by the applicants’ Motion urging us to strike it out. The question is, how do we strike out that which does not, in our view, exist in this Court’s register? Put differently, does this Court have jurisdiction to entertain the applicants’ Motion? It is this jurisdictional issue that the 1st respondent raises in his preliminary objection to which we now turn.
14. Counsel for the 1st respondent submitted, inter alia, that this Court lacks jurisdiction to hear and determine the application unless and until the 1st respondent has filed a notice of appeal against the judgment of the High Court of Kenya at Kiambu HCEP No. E003 of 2022, which was yet to be delivered. We agree with the 1st respondent that only then could this Court have jurisdiction to entertain any appeal arising from the election court’s final decision. In the circumstances, the applicants’ Motion was premature for having been filed before the Court assumed jurisdiction



pursuant to section 85A of the *Elections Act*. Accordingly, the 1st respondent's preliminary objection succeeds and, consequently, the applicants' Notice of Motion dated January 27, 2023 is incompetent and the same is hereby struck out with no orders as to costs.

Dated and delivered at Nairobi this 14th day of April, 2023.

H. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

