



**Onkoba v Omwoyo & 2 others (Election Petition Appeal  
E014 of 2023) [2023] KECA 1262 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KECA 1262 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
ELECTION PETITION APPEAL E014 OF 2023  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
OCTOBER 24, 2023**

**BETWEEN**

**DOLPHINE NYANGARA ONKOBA ..... APPELLANT**

**AND**

**MICHELLE KEMUMA OMWOYO ..... 1<sup>ST</sup> RESPONDENT**

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**JUBILEE PARTY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and decree of the High Court at Nyamira  
(Njuguna, J.) dated 29th May, 2023 in ELECTION PETITION APPEAL NO.  
E001 OF 2022 AS CONSOLIDATED WITH E001 OF 2023 AND E003 OF 2023)*

**RULING**

1. At the conclusion of the General Elections held on 6<sup>th</sup> August, 2022, political parties that participated in the elections for Member of County Assembly in Nyamira County submitted to the Independent Elections and Boundaries Commission (IEBC), the 2<sup>nd</sup> respondent herein, party lists for Gender-Top Up in accordance with Article 177 as read with Article 90 of the [Constitution](#). The 3<sup>rd</sup> respondent herein, the Jubilee Party, was one such party. Both the appellant herein, Dolphine Nyangara Onkoba, and the 1<sup>st</sup> respondent, Michelle Kemuma Omwoyo, are members of the 3<sup>rd</sup> respondent. They both sought to be considered for nomination in that category of gender top up. Unfortunately for them, the 3<sup>rd</sup> respondent was only entitled to nominate one member to the Nyamira County Assembly in the category of gender top up.
2. As a result, a dispute soon ensued. It would appear that the 3<sup>rd</sup> respondent submitted an original list to the 2<sup>nd</sup> respondent listing the 1<sup>st</sup> respondent as number three; whilst listing the appellant as number



- one in the gender top up list. Consequently, on the 27<sup>th</sup> August, 2022, the 2<sup>nd</sup> respondent published the party list adhering to this ranking. The 1<sup>st</sup> respondent was dissatisfied with that list. She moved to the Political Parties Disputes Tribunal (PPDT) to challenge it.
3. The PPDT gave a determination on 8<sup>th</sup> September, 2022 remitting the matter to the 3<sup>rd</sup> respondent to make a determination “with priority listing of [the 1<sup>st</sup> respondent] vis-à-vis [the appellant] in accordance with the party’s laws and whilst considering their respective interests and to communicate the party position to the IEBC by 2:00pm on 9<sup>th</sup> September, 2022 for implementation.”
  4. Unfortunately, further confusion followed. The 3<sup>rd</sup> respondent ended up writing two letters to the 2<sup>nd</sup> respondent – one, written by the Chairman of the party, naming the appellant as the party’s nominee; the other, by the party’s Secretary General, nominating the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent acted on the first letter and proceeded to publish, vide Kenya Gazette Number 10712, Volume CXXIV, No. 186 dated 9<sup>th</sup> September, 2022 (“gender top up Gazette Notice”), the list of nominees with the appellant as the nominee for the Nyamira County Assembly gender top up.
  5. The 1<sup>st</sup> respondent reacted by filing an election petition at the Nyamira Chief Magistrates court challenging the nomination of the appellant. In a judgment dated 11<sup>th</sup> January, 2023, the honourable Chief Magistrate (Hon. W.K. Chepseba) rendered his considered judgment. In the judgment, the Honourable Chief Magistrate found for the 1<sup>st</sup> respondent on the merits of the case and proceeded to order the nullification of the impugned gender top up Gazette Notice. The learned trial magistrate also ordered the 2<sup>nd</sup> respondent to “forthwith gazette the Gender Top Up List [of the 3<sup>rd</sup> respondent] for Nyamira County Assembly using the fresh/new list dated 9<sup>th</sup> September, 2020 submitted by the Secretary General [of the 3<sup>rd</sup> respondent].”
  6. This, in turn, set the stage for appeals at the High Court. The appellant herein filed two of the appeals while the 2<sup>nd</sup> respondent filed one. The appeals filed by the appellant at the High Court were: Nyamira High Court Election Petition Appeal No. E001 of 2022, *Dolphine Nyangara Onkoba v Independent Electoral & Boundaries Commission and 2 others*; and Nyamira High Court Election Petition Appeal No. E001 of 2023, *Dolphine Nyangara Onkoba v Independent Electoral & Boundaries Commission and 2 others*. The appeal filed by the 2<sup>nd</sup> respondent was: Nyamira High Court Petition Appeal No. E003 of 2023, *Independent Electoral & Boundaries Commission v Michelle Kemuma Omwoyo & 2 others*.
  7. On 28<sup>th</sup> February, 2023, the High Court (L. Njuguna, J.) consolidated the three appeals. Upon hearing of the appeals, the learned judge delivered a judgment dated 29<sup>th</sup> May, 2023. In the judgment, the learned judge found all three appeals lacking merit and dismissed all of them. Although there were issues of the procedural competence of the first appeal, the learned judge considered the single, substantive predominant question presented in all the appeals: whether the appellant herein was validly elected as a Member of the Nyamira County Assembly by way of nomination. The learned judge’s ultimate decision was that the appellant was not validly nominated; and, therefore, dismissed the appeals letting the decision of the trial (election court) stand.
  8. The appellant is further aggrieved by the (consolidated) judgment of the high court and has filed an appeal before this Court challenging the whole of the learned judge’s judgment and decree. As will become clear shortly, the parties concede that the Notice of Appeal dated 5<sup>th</sup> June, 2023 was timeously filed but the 1<sup>st</sup> respondent contests that there was proper service of that Notice of Appeal. The 1<sup>st</sup> respondent, also, contests that the appellant paid the mandatory security deposit as required by Rule 27(1) of the *Court of Appeal (Election Petition) Rules*, 2017. Finally, and more substantively, the 1<sup>st</sup> respondent challenges the jurisdiction of this Court to hear and determine this appeal.



9. Consequently, the 1<sup>st</sup> respondent filed a Notice of Motion Application dated 9<sup>th</sup> June, 2023, challenging the Notice of Appeal filed by the appellant herein, Dolphine Nyangara Onkoba. The 1<sup>st</sup> respondent sought the following orders: -
- a. The Notice of Appeal dated 5<sup>th</sup> June, 2023, be struck out.
  - b. The Record of Appeal in this matter be struck out.
  - c. The costs of this application and interest thereon be awarded to the 1<sup>st</sup> respondent.
  - d. Any other further relief that this Honourable Court may deem fit and just to grant in the circumstances.
10. The summary of the grounds on the face of the Notice of Motion are that:
- a. This court lacks jurisdiction to hear and determine the instant appeal by virtue of there being no express statutory provision for a second appeal in this Court from the High Court, emanating from an election petition concerning the validity of the election of a member of a County Assembly.
  - b. Failure of the appellant to effect service of the Notice of Appeal either by way of direct service or publication in a newspaper of national circulation as provided for under Rule 7(3) of the *Court of Appeal (Election Petition) Rules, 2017*. Instead, the appellant effected the Notice of Appeal via email to the 1<sup>st</sup> respondent advocates, yet service by way of email is unknown to the Court of Appeal (Election Petition) Rules.
  - c. Failure of the appellant to deposit a sum of five hundred thousand shillings as security for costs, upon filing the appeal as provided for under Rule 27(1) of the *Court of Appeal (Election Petition) Rules, 2017*.
11. The Notice of Motion application is supported by the supporting affidavit of the 1<sup>st</sup> respondent, sworn on even date. The 1<sup>st</sup> respondent also filed written submissions which were, during the plenary hearing of the Notice of Motion, supported by the 2<sup>nd</sup> respondent. The appellant filed submissions on matters of law with regard to the Notice of Motion application. The 3<sup>rd</sup> respondent did not participate in the proceedings.
12. Since the Notice of Motion is potentially dispositive of the entire appeal, we gave directions that it be heard first. For the same reason, we will deal with the question of jurisdiction first. This is because if we have no jurisdiction to hear the appeal, then we must promptly down our tools. As countless cases have extolled, jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See *Owners of the Motor Vessel "Lillian SS" v Caltex Oil Kenya Limited* (1989) KLR 1. While asserting that a court's jurisdiction flows from either the *Constitution* or legislation or both, the Supreme Court has restated this rule in *The Matter of the Interim Independent Electoral Commission*, discussed the issue of jurisdiction in the following manner:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the *Constitution*; by statute law, and by principles laid out in judicial precedent the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the Court, is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity.



In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by the *Constitution*".

13. In the present case, the 1<sup>st</sup> respondent's argument is simple. This Court, she argues, does not have jurisdiction to hear and determine this instant appeal as there exists no express statutory provision for a second appeal that lies in this Court from the High Court, emanating from an election petition concerning the validity of the election of a Member of a County Assembly. This is the only logical and faithful interpretation of the *Constitution* and sections 75(4) and 85A of the *Elections Act*, the 1<sup>st</sup> respondent argues. She further argues that this has been the consistent approach that the Supreme Court and this Court has given to the *Constitution* and the two sections in a plethora of cases including *Hamdia Yaroj Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral & Boundaries Commission* [2019] eKLR – a unanimous decision of the Supreme Court; and this Court's decisions in *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 others*, *Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 others*; *Twaber Abdukadirim Mohammed v Mwathethe Adamson Kadenge & 2 others* [2015 eKLR; *Emmanuel Changawa Kombe (Interested Party)* [2018] eKLR; and *Mogesi Agnes Bange & 8 Others v IEBC & 12 others* [2018 eKLR; *Isaac Oerri Abiri v Samuel Nyang'au Nyanchama & 2 Others* [2014] eKLR. All these cases have held that the Court of Appeal has no jurisdiction to entertain a second appeal from the High Court regarding the question of validity of the election of a Member of the County Assembly. In the decisions, both the Supreme Court and the Court of Appeal also held that the omission of a provision for a second or further appeal under section 75(4) of the *Elections Act* was deliberate.
14. Despite the immense fecundity of these decided cases, the appellant sought to persuade us to depart from them. As we understand it, the appellant sought to persuade us to chart a different jurisprudential path on four related grounds. First, the appellant believes that the *Constitution* gives us clear and uncontested jurisdiction to entertain the appeal in Article 164(3) thereof. Second, the appellant argues that this Court (and the Supreme Court) has, outside sections 75(4) and 85A of the *Elections Act*, interpreted Article 164(3) of the *Constitution* to give this Court an automatic right of appeal from all decisions emanating from the High Court. In this regard, the appellant has cited the decision of this Court in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* [2017] eKLR and the separate and concurring decision of Kiage, JA in *Kalpana Rawal v Judicial Service Commission & another* [2015] eKLR.
15. Third, the appellant argues that the constitutional right to appeal can only be denied, limited or restricted by express statutory provisions. This is so, the appellant argues, because of the potential of the restrictive reading of the denial of a right of appeal to infringe on a party's right to access justice under Articles 47(1); 48 and 50 of the *Constitution*. Further, the appellant argues that denying a party the right to appeal a decision from the High Court to this Court amounts to a limitation of the intended appellant's rights – and should only be done after an Article 24 analysis: to confirm that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; and after taking into consideration the relevant factors listed in Article 24 of the *Constitution*.
16. Finally, the appellant explicitly urges us to depart from the jurisprudential precedents on the question under consideration. The appellant argues that we should so depart from the precedents because the question implicates constitutional principles; involves previous decisions which were "inconsistent with justice or social welfare"; the existing precedents have not produced such substantial reliance or been expounded with such unanimity as to militate against overruling them. These factors, appellant told us, are culled from Banks CP, *Reversals of Precedent and Judicial Policy-Making: How Judicial Conceptions of Stare Decisis in the U.S. Supreme Court Influence Social Change*, Akron Law Review. 1999;32(2):233–58.



17. We have anxiously considered the submissions and arguments by the parties on this dispositive question of jurisdiction. As afore- stated, the appellant explicitly urges us to depart from established precedents on this question. We decline to do so for at least four reasons.
18. First, the appellant carefully avoids stating that the Supreme Court has, in a clear and binding precedent, spoken on this question. This was in the Hamdia Yaro Shek Nuri Case (supra). That case was on all fours with the present one. The 1<sup>st</sup> respondent before the Supreme Court (Faith Kombe) had, following the 8<sup>th</sup> August, 2017 General Elections, been gazetted as the Amani National Congress Party’s nominee to fill the Tana River County Assembly gender top up slot. The petitioner (Hamdia) challenged the gazettement before the Chief Magistrate’s Court at Milimani. The Chief Magistrate’s Court held in favour of the petitioner. The 1<sup>st</sup> respondent appealed to the High Court. The High Court allowed the appeal and held in favour of the 1<sup>st</sup> respondent. Dissatisfied with the decision of the High Court, the petitioner filed a further appeal to this Court. This Court (Ouko JA (as he then was), Musinga, JA (now PCA); and Murgor, JA) held that the Court of Appeal lacked jurisdiction to hear and determine election petition appeals from the High Court, emanating from an election of a Member of a County Assembly.
19. The petitioner, again, filed a further appeal to the Supreme Court specifically raising the issue of jurisdiction. At the Supreme Court, the petitioner raised very similar arguments to the ones the appellant has propounded before us. The specific question that the Supreme Court sought to answer was whether or not this Court has jurisdiction to hear and determine an appeal from the High Court (being a second appeal) emanating from an election of a member of a County Assembly. In reaching its verdict, the Supreme Court directly took up the question the appellant and the respondents have put to us, to wit, whether the silence in section 75(4) and non-inclusion in section 85(A) of the *Elections Act* notwithstanding, a right of appeal still lies to the Court of Appeal from the High Court, in an election petition concerning membership of a County Assembly, in view of Article 164(3) of the *Constitution*. After citing its earlier decisions on the constitutional validity of the restrictions placed in the number, length and costs of electoral disputes by statute by section 85A of the *Elections Act* (see, for example, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Supreme Court Petition NO. 2B of 2014), the Supreme Court stridently put the matter to rest in the following words:
  30. ....[I]t 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-evidence in the plain language of Article 87.....
  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.

As long as these ‘mechanisms’ are not inconsistent with, or violation 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....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 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*.

20. We have taken the time and trouble to reproduce in extenso the reasoning of the Supreme Court in this case because it not only clearly sets the decisional rule of law in the matter which is binding on us under the doctrine of stare decisis but also because it responds with laconic comprehension all the policy arguments raised by the appellant about the need to revisit the jurisprudential trajectory by the two layers of our judicial system on this question. To restate, the second reason to reject the appellant’s invitation to revisit the controversy is that the Supreme Court has, like this Court in its various decisions on the topic, responded to the argument that sections 75(4) and 85A of the *Elections Act* somehow infringe on an intending appellant’s right to appeal conferred by the *Constitution*. The short response to that argument is that Article 164(3)(a) of the *Constitution* creates jurisdiction for the Court of Appeal to hear appeals from the High Court. It does not automatically create a right of appeal by the parties in all circumstances. A right of appeal precedes jurisdiction; and the general jurisdiction of the Court of Appeal to hear and determine appeals from the High Court does not, ipso facto, give a party a right to file such an appeal absent such a right. See *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & Another* Supreme Court Petition No. 12 of 2016. Differently put, contrary to the appellant’s arguments, this Court does not automatically have jurisdiction to hear all appeals from the High Court: whether a statute has unreasonably limited the right to appeal; and whether a party has appropriately exercised that right is an analysis which is both context and fact intensive dependent, in part, on legitimate constitutional goals and objectives. In the present case, as the Supreme Court explained, Article 87 of the *Constitution* provides ample constitutional justification and constitutional salubrity to the restriction against second-tier electoral appeals: sections 75(4) and 85A of the *Elections Act* are not statutorily taking away the right to appeal; they are, instead, breathing life to Article 87 of the *Constitution*. This line of argument also sufficiently responds to the appellant’s argument that the Court of Appeal has assumed jurisdiction in certain other situations where there is similar statutory silence about the right to appeal. The two cases cited in support of this contention are *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* [2017] eKLR and *Kalpana Rawal v Judicial Service Commission & Another* [2015] eKLR. The answer is that those cases dealt with dissimilar statutory and constitutional schemes. The first one dealt with the *Arbitration Act* – which the Supreme Court addressed at length in the *Nyutu Agrovet Case* (*Supra*) while the second one dealt with a question of enforcement of the Bill of Rights and whether a party can be said not to have a first right of appeal in such a case. In both cases the courts did not find similar constitutional justifications for restricting the right of first appeal as those found in Article 87 respecting the restriction of the right to a second appeal.
21. The third reason to decline the appellant’s invitation can be briefly stated: the appellant simply misunderstands the scope and meaning of the right to access justice under our *Constitution*. The right



to access justice under Articles 47, 48 and 50 of our Constitution is not inimical to the concept of finality and timeliness in settling electoral disputes. Differently put, the right to access justice does not imply a right for a party to file endless appeals in all situations: instead, our Constitution explicitly anticipates situations where the right or scope of appeals can be restricted in order to promote timely and proportionate settlement of cases.

22. Fourth, even if this Court had the jurisdictional wherewithal to overturn the precedents established in this area (which we do not have in view of the Supreme Court's binding precedent), none of the conditions for such overturning of precedents as given by the appellant exists: as explained in this judgment, there is no constitutional right involved; the social justice of the case is in favour of letting the precedent to continue stably; and the interpretations by all the Supreme Court and Court of Appeal benches on the question have been unanimous hence making the interpretation stable, predictable and authoritative over time. Differently put, even if the doctrine of stare decisis did not strictly bind us to the outcome we have reached, we would have declined to revisit the question based on the doctrine of comity: there are no strong policy objective reasons to depart from the well-established judicial authority.
23. The upshot is that this Court has no jurisdiction, in the absence of an express statutory provision, to entertain a second appeal, from the High Court, emanating from an election petition concerning the validity of the election of a Member of a County Assembly. Since this result is determinative of the whole appeal, and since we have concluded that we have no jurisdiction, we find it unnecessary to consider the other two issues raised in the Notice of Motion dated 9<sup>th</sup> June, 2023. In the result, we hereby strike out the Notice of Appeal dated 5<sup>th</sup> June, 2023 for want of jurisdiction. The appellant shall pay the costs of the appeal to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Since the 3<sup>rd</sup> respondent did not actively participate in the appeal, we shall not award costs to it.
24. Those shall be the orders of the Court.

**DATED AND DELIVERED AT KISUMU THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

