



REPUBLIC OF KENYA



**Wasike v Lusenaka & another (Civil Application 85 of 2023)
[2023] KECA 1368 (KLR) (17 November 2023) (Ruling)**

Neutral citation: [2023] KECA 1368 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 85 OF 2023
HA OMONDI, JA
NOVEMBER 17, 2023**

BETWEEN

RICHARD JESOME WASIKE APPLICANT

AND

ANTHONY LUSENAKA 1ST RESPONDENT

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

(Being an application for extension of time for filing of a Notice of Appeal and Record of Appeal from the Judgment of the High Court of Kenya at Bungoma (R.E Ogola, J.) dated 25th April 2023 in Election Civil Appeal No. E002 of 2022)

RULING

1. By a Notice of Motion dated 19th July 2023, brought under rule 4 of the Court of Appeal Rules, supported by an affidavit of even date, sworn by Richard Jesome Wasike, the applicant prays that this Court extends time for filing of a Notice of Appeal and Record of Appeal against the judgment of the High Court of Kenya at Bungoma (R.E Ogola, J.) delivered on 25th April, 2023 in Bungoma High Court Election Civil Appeal No. E002 of 2022.
2. The applicant prays that this Court, be pleased to extend time for service of the Notice of Appeal, Record of Appeal and letter bespeaking typed proceedings; and the costs of and incidental to this application to abide the result of the intended appeal.
3. A brief background to this matter will help put issues in perspective. The applicant herein participated in the General Elections held on 9th August 2022, and was one of the candidates seeking to be elected as a member of the county Assembly of Bungoma for Bukembe West Ward. On 11th August 2022 the 1st respondent was declared the winner of the elections. The applicant was aggrieved by the declaration



and on 7th September 2022, filed an election petition CMCC Election Civil Appeal No. 2 of 2022 in the Magistrate's Court at Bungoma, contesting the election of a Member of the County Assembly; he subsequently filed an amended petition on 7th October 2022. On 21st October 2022, the 1st respondent filed a notice of motion application dated 19th October 2022 seeking to have the petition struck out in its entirety on the basis that the affidavits in support of the petition were filed out of statutory timelines and the petitioner's affidavit in support of the petition was commissioned by an advocate who did not have a practicing certificate hence incompetent.

4. The application was heard, and the trial court rendered its ruling and struck out the petition in its entirety vide a ruling delivered on 15th November 2022. Upon the matter being dismissed, he filed Bungoma High Court Election Civil Appeal No. E002 of 2022. The matter was heard, and judgment delivered on 25th April 2023, wherein the petition was dismissed for being incurably defective in failing to comply with the Elections (Parliamentary and County Elections) Petition Rules 2017.
5. The applicant being dissatisfied with the judgment explains that immediately after delivery of the judgment, counsel in conduct of the matter failed to update him on the recourse that was to be taken despite the applicant giving counsel instructions to proceed with lodging an appeal, file a notice of appeal and also file an application for stay of execution. According to the applicant, he kept on checking with his advocates to know the status of the matter, and he eventually concluded that the only reason why his advocates were taking him in circles, and not filing the appeal after delivery of the judgment, was that they had been compromised.
6. The applicant thus decided to engage another advocate, being Nabibia and Co Advocates, but time for filing a notice of appeal, record of appeal, service of letter bespeaking proceedings and service of notice of appeal and record of appeal had lapsed; yet he has a genuine interest to pursue the appeal; that he has also written to the deputy registrar of the High Court seeking typed and certified proceedings. He describes his appeal as merited and has high chances of success.
7. In opposing the application, the 1st respondent through the replying affidavit dated 16th October 2023, sworn by Anthony Lusenaka contends that rule 4 of the Court of Appeal Rules does not apply to Election Petitions which have timelines stipulated in the Constitution of Kenya as well as the Elections Act, thus stripping this Court of jurisdiction in the matter; that in any event the reasons given for delay are laced with unproven allegations intended to malign the former advocates on record; and do not meet the threshold to warrant extending the time within which to file the appeal.
8. In his written submissions, the applicant takes a more reconciliatory tone and says that his counsel inadvertently failed to file and lodge an appeal against the Judgment despite firm instructions to do so. He urges this Court to hold that the mistakes of counsel should not be visited on a litigant, unless both are out to mislead the Court, which is not the case in this instance. He maintains that rule 4 clothes this Court with jurisdiction to entertain his application; and refers to the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR, to reiterate the principles that guide the courts when dealing with applications for extension of time.
9. The 1st respondent submits that this Court lacks the jurisdiction to hear the matter ab intio, and refers to the provisions of section 75(1A) of the Elections Act No. 24 of 2011 as read together with section 75(4), which provides that appeals from the decision of the magistrate's court challenging the validity of election results in the position for member of the County Assembly lie in the High Court on issues of law only.
10. In addition, the 1st respondent refers to 85 of the Election Act which provides that appeals to the Court of Appeal from the High Court are in relation cases challenging results in the positions of National



- Assembly, Senate and County Governor. It is argued that the express omission of the position of County Assembly in section 85 shows that the legislature's intention was to bring an end to litigation, so that the decision of the High Court is final and there is no right of a second appeal to this Court.
11. This Court's attention is drawn to the constitutional underpinning that election petitions be heard expeditiously and are time bound, so that those elected can concentrate and serve the people instead of being embroiled in court cases for a long time; and there is no right to a further appeal. In support of this proposition the 1st respondent refers to the case of *Council of County Governors v The Attorney General and Another* (2017) eKLR.
 12. The second issue that is raised relates to whether this Court has jurisdiction to enlarge time for hearing of an election petition. The 1st respondent submits that Article 87 of the *Constitution* provides that Parliament shall enact legislation to establish mechanisms for timely settling of election disputes. and pursuant to this provision section 75(2) provides that election petitions shall be heard and determined within six months from the date of filing the petition. It is argued that the court has no jurisdiction to extend the statutory timelines for hearing of the petition.
 13. Drawing from the Supreme Court's decision in *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 Others* [2019] eKLR , the 1st respondent contends that a substantive hearing of an Election Petition cannot continue where the timelines for hearing a petition have already lapsed. The respondent argues that in this instance, the Petition was struck out in its entirety vide an application. The petition did not proceed to a full hearing, this, therefore, means that this appeal seeks to have the proceedings in the lower court reopened after the statutory timeline of hearing a petition of six months has elapsed.
 14. Ultimately, the 1st respondent submits that the applicant has not met the minimum principles that a party must prove to be granted orders under rule 4 of the *Court of Appeal Rules* as were laid down in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* (*Supra*) in this case, there has been an inordinate delay since Election Petitions are time-bound and there is a need for compliance. Reference is made to rule 6(2) of the *Court of Appeal (Election Petition) Rules* 2017 which provide that a notice of appeal is to be lodged within 7 days of the decision appealed against and be served on all parties within 5 days of filing under rule 7; that in this case, even the notice of appeal has not been filed; yet the decision was rendered on 25th April, 2023 which is 4 months down the line. That even if the court were to grant the orders sought there is no sufficient time to hear and determine the appeal since Rule 23 of the *Court of Appeal Election Petition Rules* 2017 provides that an appeal must be heard and determined within six months from the date of the judgment of the High Court. Four months have already elapsed from the date of the judgment.
 15. It is also pointed out that the applicant has confirmed in his supporting affidavit that the High Court proceedings have not been typed, he has not even annexed the letter requesting for the typing and payment of the same; and he has not given plausible reason for the delay as he has not produced any evidence to even show that he had given instructions to his advocate to appeal. The sum total of the applicant's submissions is that there is no petition properly before the court that can be re-opened and the court will be acting in futility.
 16. The first clarification that need to be is that the Judge who heard the appeal in the High court at Bungoma is R E. Ougo J. and not R. E Ogolla, J, actually there is no Judge who goes by that identification. The second thing I take note of, as pointed out by the 1st respondent, is that the applicant filed his Petition in the Magistrate's Court on 7th September 2022; and indeed, echo the question the observation made regarding profound juridical significance of this date in the determination of the question of whether there is any more to be done by this or any other Court after 7th March 2022.



There is no gainsaying that an election petition must be heard and determined within six months from the date of filing of the petition, after which proceedings in an election petition become a nullity if it has not been determined.

17. The applicant blames his previous counsel for failing to act, although there is no a single document presented to confirm that he had indeed given instructions. But with greatest respect, I think I am even being too indulgent to address that, because as was pointed out in the now oft cited case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, that jurisdiction is everything, and I must first address the question as to whether I even have jurisdiction to deal with an intended appeal arising from a disputed election of a Member of the County Assembly. In the event that statutory provisions and emerging jurisprudence frowns upon me inking my way in the matter, then I must do what the late Justice Nyarangi said in the *M.V. Lillian case* (*supra*) – that:

“... Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

It would thus mean that upon determining the status of this court in handling this matter, the ink in my pen must suddenly dry, and not take one step further. That is what would even cloth me with the temerity to even deign to consider the applicability of rule 4 of the *Court of Appeal Rules* in election petitions.

18. Starting with the statutory provisions on appeals from county elections petitions filed at the Magistrate’s court, sections 75(4) of the *Elections Act* provides as follows:

4. An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be:
 - a. filed within thirty days of the decision of the Magistrate’s Court; and
 - b. heard and determined within six months from the date of filing of the appeal.

19. The jurisdiction of this Court to hear election appeals is found in section 85A of the *Elections Act* which states:

- (1) An appeal from the High Court in an election petition concerning membership of National Assembly, Senate or the office of County Governor, shall lie to the court on matters of law only.

20. My understanding is that the two provisions I have adverted to, expressly provide that appeals regarding the election or nomination of members of the County Assembly at the High Court address matters of law only, clearly suggests that those appeals terminate at the High Court. This is fortified by the fact that significantly, the County Assembly is not included under section 85A of the *Election Act*, as it was the intention of Parliament that the High Court was the last port of call on matters pertaining to elections to the County Assembly, as provided for under section 75(4) of the *Election Act*.

21. The issue as to whether the Court of Appeal can entertain a second appeal regarding the election of a Member of County Assembly in the absence of an express Constitutional and/or statutory provision conferring jurisdiction on the Court of appeal has been the subject of judicial pronouncements in several case. Indeed, the Supreme Court has definitively ruled on the issue in *Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral & Boundaries Commission* [2019] eKLR, the apex Court agreed with this Court that in the absence of an express statutory provision, no second appeal lies in the Court of Appeal from the High Court, on matters regarding the question of validity of the election of a member of the County Assembly.



22. The key issue that the Supreme Court sought to answer was whether 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 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 87 of the *Constitution*.
23. Not to be left behind, and indeed a bolster to that jurisprudence, is this Court has made pronouncements in several decisions such as *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 Others*, *Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 Others*; *Twaher Abdukadirim Mohammed v Mwatethe 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 Samwel 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 cited, both the Supreme Court and the Court of Appeal also confirmed that the omission of a provision for a second or further appeal under section 75(4) of the *Elections Act* was deliberate.

24. I need not say more, this application would have nowhere to begin, not even one toe on which to pretend to stand, there would be no basis of granting leave to appeal on a matter which has no authority to close it as such. Consequently, I hold and find that the application for extension of time within which to file and serve the Notice of appeal and record of appeal, have no justification. The application lacks merit and is thus dismissed with costs to the 1st respondent.



DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF NOVEMBER, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

