



REPUBLIC OF KENYA



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**Waibara v Kibeh & another (Civil Application E390 of 2021)
[2022] KECA 406 (KLR) (4 March 2022) (Ruling)**

Neutral citation: [2022] KECA 406 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E390 OF 2021
HM OKWENGU, K M'INOTI & KI LAIBUTA, JJA
MARCH 4, 2022**

BETWEEN

CLEMENT KUNG'U WAIBARA APPLICANT

AND

ANNIE WANJIKU KIBEH 1ST RESPONDENT

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

(Being an application pursuant to Rule 42 and 47 of the Court of Appeal Rules, 2010 and all enabling provisions of the law for setting aside the Court's Ruling of 28th October 2020 in Civil Appeal No. E468 of 2020)

RULING

1. The applicant Hon. Clement Kung'u Waibara (Hon. Waibara) is the 1st respondent in Civil Appeal No. E468 of 2020 wherein Hon. Anne Wanjiku Kibeh (Hon. Kibeh) who is the respondent herein, is the appellant. In Civil Appeal No. E468 of 2020, Hon. Kibeh seeks to set aside the judgment of the High Court (Korir, J) dated 7th October 2020 in Constitutional Petition No. 210 of 2020. In that judgment, the learned Judge declared that the election of Hon. Kibeh as member representing Gatundu North Constituency in the National Assembly was in violation of Article 99(2) (a) & (d) of *the Constitution*, and that the seat of member of the National Assembly for Gatundu North Constituency held by Hon. Kibeh had become vacant by operation of Article 103(1) (g) of *the Constitution*.
2. Hon. Waibara has moved this Court by way of the notice of motion dated 10th November 2021 in which he seeks orders that the Honourable Court lacks jurisdiction to entertain Civil Appeal No. E468 of 2020 due to lapse of time and urges the Court to set aside the ruling dated 28th October 2020 in which the Court granted a stay of execution of the judgment of the High Court.



3. Hon. Waibara has filed written submissions in support of the motion. His application is anchored on Article 105(3) of the Constitution, which gives power to Parliament to give effect to Article 105 that provides for determination of questions of membership of Parliament, as read with section 76(1)(c) of the Elections Act. In his view, a question regarding determination of membership of Parliament should be heard and determined within 6 months, and that section 85(a) of the Elections Act that gives power to the Court of Appeal to hear appeals regarding election disputes requires an appeal to be determined within 6 months from the date of the impugned judgment. Accordingly, Civil Appeal No. E468 of 2020 ought to have been filed by 7th November 2020 and determined by 7th April 2021. The record of appeal was however filed on 24th November 2020, and the appeal is yet to be determined well over the 6 months' statutory deadline, hence his application to have the appeal struck out as the Court has no jurisdiction to entertain it after the statutory timeline.
4. Hon. Waibara relied on the Supreme Court decision in *Lemanken Aramat vs Harun Meitamei Lempaka & 2 others* [2014] eKLR in which the Supreme Court emphasized the centrality of timelines when dealing with election petitions. Hon. Waibara also relied on several decisions of this Court, including *John Munuve Mati vs Returning Officer Mwingi North Constituency, IEBC & Paul Musyimi Nzegu* [2018] eKLR; *Nicholas Kiptoo Arap Korir Salat vs IEBC & Others* [2013] eKLR; and *Maitha vs Said & Anor* Civil appeal No. 292 of 1998 [2008] 2KLR (EP 33). In these decisions, the Court had addressed and applied the strict timelines provided in the Elections Act.
5. Hon. Waibara argued that it is a time-hallowed principle that electoral disputes must be disposed of in a timely fashion and the laws giving timelines strictly enforced. He maintained that he was raising an issue of jurisdiction that goes to the root of this Court's jurisdiction to settle electoral disputes. He was not therefore simply raising an issue of procedural technicality capable of being cured by invocation of the Court's discretion under Rule 5 of the Court of Appeal Rules and Article 159 of the Constitution.
6. Hon. Kibeh filed a replying affidavit sworn on 23rd November 2021 and a notice of preliminary objection in which she urged the Court to strike out Hon. Waibara's motion with costs, as the same was *res judicata*. In her written submissions dated 23rd November 2021, Hon. Kibeh asserted that Hon. Waibara's motion was not only *res judicata*, but also an abuse of the Court process.
7. *John Florence Maritime Services Ltd. & Anor. vs Cabinet Secretary for Transport & Infrastructure & 3 Others* [2015] eKLR *Independent Electoral & Boundaries Commission vs Maina Kiai & others* [2017] eKLR were cited for the proposition that the following elements must all be satisfied for the threshold of *res judicata* to be met:
 - (i) the issue was directly and substantially in issue in a former suit,
 - (ii) the former suit was between the same parties or parties under whom they any of them claim,
 - (iii) those parties were litigating under the same title,
 - (iv) the issue was heard and finally determined in the former suit,
 - (v) the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
8. Hon. Kibeh argued that in this instance, the threshold for *res judicata* had been met. The parties in the appeal were the same parties as those in Civil Appeal No. 490 of 2019, Civil Application No. E314 of 2020, and Civil Appeal (Application) No. E468 of 2020. In Civil Appeal No. 490 of 2019 and Civil Application No. E314 of 2020, the Court noted that the issue before them was not based on the validity of election of Hon. Kibeh, nor was it an appeal against a decision in an election petition. That this Court in its judgment dated 19th June 2020 in Civil Appeal No. 431 of 2019, stated that



Hon. Waibara’s petition was not an election petition and, in accordance with the Court’s ruling, Hon. Waibara’s petition was remitted for a new trial as a constitutional petition in the Constitutional and Human Rights Division.

9. Hon. Kibeh maintained that the record of appeal, which was filed 47 days after the judgment of the High Court, was filed within time in accordance with Rule 82 of the Court of Appeal Rules, which provides a timeline of 60 days. Hon Kibeh further submitted that Hon. Waibara’s motion was an abuse of the Court process as it not only violates the doctrine of *res judicata*, but is also bad in law. The Court was therefore urged to strike out and/or dismiss Hon. Waibara’s motion.
10. The 2nd respondent, Independent Electoral & Boundaries Commission (IEBC) also filed written submissions opposing Hon. Waibara’s notice of motion dated 10th November 2021 on the grounds that all the issues raised in the application were fully addressed by a court of competent jurisdiction in Petition No. 210 of 2020, and that the application was a backhanded attempt at appealing the Ruling of the court delivered on 5th November 2021. The Court was urged that the application was not only *res judicata* but also brought in bad faith and should therefore be dismissed with costs.
11. We have carefully considered Hon. Waibara’s motion and the rival arguments in support and in opposition to the motion. Hon. Waibara’s argument is that the statutory deadline for determination of the appeal is 6 months from the date of the judgment, subject of the appeal. It is necessary to determine whether the appeal falls within Article 105 as read with section 76(2) of the *Elections Act* as contended by Hon. Waibara and, if so, what is the implication in so far as timelines are concerned?
12. In order to answer these questions, we revert to the petition that was the origin of the judgment subject of the appeal. It is not disputed that the said petition was lodged in the High Court Constitutional & Human Rights Division. This was following an order that was made by this Court in Civil Appeal No. 431 of 2019 wherein the Court stated *inter alia*:

“The petition before the learned Judge did not in any way question the validity of the election of the 1st respondent under Article 10(1) (a) of *the Constitution* as read with section 76(1) (a) of the *Elections Act*. The issue of validity of the election of the 1st respondent was the subject matter in Election Petition No. 1 of 2017, and parties are in agreement that this question was fully determined up to the Supreme Court of Kenya. It is indeed not the subject of this appeal.

Our understanding is that the appeal before us borders on determining whether the High Court should have invoked its original jurisdiction under Article 105(1) (b) of *the Constitution* as read with section 76(1) (c) of the *Elections Act*. To our mind, Article 105(1) (b) of *the Constitution* as read with Section 76(1) (c) of the *Elections Act* is not coincidental at all. It serves a legitimate purpose within a democratic society to determine whether a seat of the Member of Parliament has become vacant whether immediately upon resumption of office or during the term of five years. The jurisdiction can be invoked at any time during the term of five years. The jurisdiction can be invoked at any time during the life of Parliament and that such a petition must be heard and determined within six months in accordance with the provisions of Article 105(2) of *the Constitution*.”

13. Article 105 of *the Constitution* that is headed “Determination of questions of membership” states as follows:

“ 105.

- (1) The High Court shall hear and determine any question whether



- (a) a person has been validly elected as a member of Parliament; or
 - (b) the seat of a member has become vacant.
- (2) A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.
- (3) Parliament shall enact legislation to give full effect to this Article.”

14. Section 76(1) of the *Elections Act* that is headed “Presentation of a petition” states as follows:

(1) A petition—

- (a) to question the validity of an election shall be filed within twenty-eight days after the date of declaration of the results of the election and served within fifteen days of presentation;
 - (b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker;
- or
- (c) to seek a declaration that a seat in Parliament or a county assembly has become vacant may be presented at any time.”

15. A plain reading of Article 105(1) shows that the questions that may be determined by the High Court in regard to questions of membership of Parliament are twofold. First, whether a person has been validly elected as a member of Parliament; and, secondly, whether the seat of a member has become vacant. Section 76 of the *Elections Act* categorizes petitions that may be anchored on the grounds set under Article 105(1) of *the Constitution* in similar manner as in Article 105(1), but with specific timelines, and adds an additional ground of declaration that a seat in Parliament or County Assembly has not become vacant, upon which ground a petition may be brought after publication of notification of a vacancy by the relevant speaker. From the timeline prescribed in Section 76(1) of the *Elections Act*, a petition seeking a declaration that a seat in Parliament or County Assembly has become vacant under Section 76(1) (c) is not pegged to declaration of results or election, but may be brought at any time immediately upon assumption of office or during the 5 years. This clearly differentiates a petition brought on this ground from an election petition that is to be handled by an election court.

16. At paragraph 4.8, 4.9, 4.10 and 4.11 of Waibara’s petition, he avers as follows:

- 4.8 Consequently, the petitioner avers that as at 3rd March, 2017 and in any event as at 27th June 2017, Hon. Kibeh was still in office as a Member of County Assembly and was accordingly by dint of Article 99(2) (d) of *the Constitution* disqualified from election as a Member of the National Assembly.
- 4.9 Under Article 103(1)(g) and Article 105(1)(b) of *the Constitution* as read together with Article 76(1)(c) of the *Elections Act*, a person elected to the National Assembly and who was not qualified as aforesaid is liable to removal proceedings from the said position.
- 4.10 In the interests of full disclosure, the Petitioner avers the disqualification of the 1st respondent was pleaded as a ground for nullification of the 1st respondent’s election in Election Petition



Number 1 of 2017 between Clement Kung'u Waibara vs. Anne Kibeh & 2 Others. The said issue was however not determined on its merit and remains a justiciable one.

- 4.11 That notwithstanding, the petitioner avers that the High Court enjoys an unfettered parallel and/or coordinate jurisdiction under Article 105(1)(b) of *the Constitution* to hear and determine a petition seeking to declare vacant a set of a sitting Member of Parliament on similar grounds.”
17. Article 99(2) (d) of *the Constitution* provides that:
- (2) A person is disqualified from being elected a member of Parliament if the person: -
- (a)
-
- (d) is a member of a County Assembly.”
18. Article 103(1) (g) provides disqualification of a member for election to Parliament under Article 99(2) (d) as a ground upon which the office of a member of Parliament may become vacant. The averments in the petition adverted to above, considered in light of the above provisions reveal that the petition was not an election petition challenging the electoral process, but a constitutional petition seeking interpretation and application of the constitutional provision in regard to declaration of vacancy in the position of member of Parliament on the ground provided under Article 99(2) (d) of *the Constitution* as read with Article 103(1) (g) of *the Constitution*.
19. The core issue in Hon. Waibara’s petition was whether the Parliamentary seat held by Hon Kibeh fell vacant because Hon Kibeh was disqualified from being elected as a member of National Assembly representing Gatundu North Constituency as she was still a member of the County Assembly of Kiambu at the time of her nomination and gazettment of the nomination. The original jurisdiction of the High Court to hear a constitutional petition under Rule 105(1) (b) of *the Constitution* as read with section 76(1) (c) of the *Elections Act* must be distinguished from the High Court’s jurisdiction as an election court.
20. This means that while Hon Waibara’s petition was subject to the six-month timeline provided under Article 105(2) of *the Constitution*, it was not subject to section 85A of the *Elections Act* that provides a 30-day time limit within which an appeal from the High Court judgment is to be filed, or a six-month timeline within which appeals from the High Court in election petitions is to be heard and determined. Nor are the Court of Appeal Election (Petition Rules) 2017, Rule 8(5) which provide a 30-day timeline for filing appeals from the election Court from the date of the impugned judgment, applicable.
21. An appeal to this Court from Hon. Waibara’s constitutional petition was one governed by the timelines provided in the Court of Appeal Rules, 2010 which as per Rule 75(2) provides for 14 days for filing the notice of appeal, and as per Rule 82(1), which provides 60 days for filing the record of appeal. The applicant’s motion is therefore misconceived because it is anchored on Section 85A of the *Elections Act* and the Court of Appeal Election (Petition Rules), 2017 that are not applicable to Hon. Waibara’s constitutional petition.
22. We believe we have said enough to lead to the conclusion that Hon Waibara’s application is misconceived and without merit. It is accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 4TH OF MARCH, 2022.

HANNAH OKWENGU



.....
JUDGE OF APPEAL

K. M'INOTI

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

