



REPUBLIC OF KENYA



KENYA LAW
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**Waibara v Kibeh & another (Civil Appeal E 468 of 2020)
[2021] KECA 231 (KLR) (5 November 2021) (Ruling)**

Neutral citation: [2021] KECA 231 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E 468 OF 2020
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA
NOVEMBER 5, 2021**

BETWEEN

CLEMENT KUNG’U WAIBARA APPLICANT

AND

ANNIE WANJIKU KIBEH 1ST RESPONDENT

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

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Hon. Weldon Korir, J.) dated 7th October, 2020 in Constitutional Petition No. 210 of 2020)

RULING

1. By a Notice of Motion dated 6th April, 2021, the applicant, Hon. Clement Kung’u Waibara has sought for the Record of appeal dated 19th November, 2020 and filed on 24th November, 2020 by the 1st respondent, Hon. Annie Wanjiku Kibeh be struck out.
2. The application is brought on the grounds that the applicant had filed a petition dated 14th February, 2019 seeking for the removal of the 1st respondent as a Member of the National Assembly. The petition was dismissed on 14th August, 2019 and was followed by an appeal to this Court. By a judgment dated 19th June, 2020, this Court allowed the appeal and remitted the petition back to the High Court for hearing de novo as a Constitutional Petition.
3. In a judgment rendered on 7th October, 2020, the High Court (Korir, J.) upheld the applicant’s petition, and declared the seat of Member of the National Assembly for Gatundu North Constituency as vacant. The applicant contended that the result of such declaration was that the people of Gatundu North Constituency were entitled to an election to elect their representative of choice within 90 days



of the date of declaration. By a ruling of this Court of 28th October, 2020, the High Court's decision was stayed pending hearing and determination of the 1st respondent's appeal.

4. It was the applicant's further contention that the Record of appeal that was filed on 24th November, 2020 was contrary to Article 105 (2) of the *Constitution* as read with section 76(1) (c) of the *Elections Act* that classifies such cases as Election Petitions; that consequently, under section 85A of the *Elections Act* as read with rule 9(2) of the *Court of Appeal election petition Rules 2017*, any appeal arising from an election petition must be filed within 30 days of the judgment and determined within 6 months of the judgment; that as a consequence, the appeal ought to have been filed before 7th November, 2020, but instead, it was filed well past the timeline stipulated by the rules of this Court; which has rendered, the appeal incompetent and irredeemably defective and it should therefore be struck out.
5. The motion was supported by the applicant's affidavit and, submissions, wherein the applicant relied on the cases of *Lemanken Aramat vs Harun Meitamei Lempaka & 2 Others [2014] eKLR*, *John Munuve Mati vs Returning Officer Mwingi North Constituency, Independent Electoral & Boundaries Commission & Paul Misyimi Nzengu [2018] eKLR*, and *Lorna Chepkemoi Laboso vs Anthony Kipkoskei Kimeto & Two Others – Civil Appeal (Application) No. 172 of 2005 (Unreported)* to support the proposition that Electoral Dispute resolution, requires strict adherence to the timelines prescribed by the Constitution and the Electoral Law and that the jurisdiction of a Court to hear and determine Electoral disputes is hinged on adherence to the prescribed timeframes.
6. The 1st respondent did not file a replying affidavit but in written submissions, it was contended that the motion turned on whether the appeal should be struck out for failing to adhere to the stipulated timelines.
7. It was further contended that the motion was res judicata by reason of the decision of this Court in Civil Appeal No. 431 of 2019 *Clement Kung'u Waibara vs Annie Wanjiku Kibeh and Another* and Civil Application E 314 of 2020 *Annie Wanjiku Kibeh vs Clement Kung'u Waibara*; that in Civil Appeal 431 of 2019, this Court overruled the High Court's decision in Petition No. 8B of 2019 and held, inter alia, that;

“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...”
8. Thereafter, vide Civil Application No. E314 of 2020, this Court held that in ordinary election petition appeals, the lodging of a Notice of appeal operated as an automatic stay of the judgment of the High Court.
9. In effect, it was submitted, this Court held that the petition that was before the High Court was not an election petition within the meaning of applicant's motion because, firstly, an election petition is heard and determined by an Election Court, and when this Court remitted the petition arising out of Civil Appeal 431 of 2019 to the High Court, it was remitted back for determination by the Constitutional and Human Rights Division of the High Court in a re-trial. And secondly, the prescribed timelines stipulated in section 85A of the *Elections Act* apply only to election petitions that challenge electoral outcomes, and this being an appeal arising out of a constitutional petition, the provision was not applicable to the instant appeal.



10. We have considered the application, the parties' submissions and the law, and essentially, what is before us is an application to strike out the 1st respondent's appeal for the reason that it relates to an election petition that was filed out of the period prescribed by law. On the one hand, the applicant contends that the appeal having arisen from an election petition, section 85A as read with rule 9(2) of the Court of Appeal election petition rules were applicable meaning that the appeal ought to have been filed within 30 days of the decision of the High Court, while on the other the 1st respondent maintains that in view of the appeal having arisen from a constitutional petition, the prescribed period for filing is specified in rule 82 of this Court's rules as 60 days and therefore it was properly filed within the specified period.
11. It becomes apparent that before determining whether or not the appeal ought to be struck out, it will be essential to begin by determining whether it arises from an election or a constitutional petition in view of the different timeframes specified by the rules of this Court. This means that of necessity, we will have to consider the genesis of the appeal. The applicant and the 1st respondent were both contestants in the Gatundu North Constituency 2017 general elections. After winning the election the 1st respondent was declared the duly elected Member of the National Assembly for that seat. The applicant was aggrieved and filed an election petition in the High Court seeking to have the 1st respondent's election nullified. In a judgment dated 1st March, 2018, the court found in favour of the applicant and nullified the election. Dissatisfied with the decision the 1st respondent appealed to this Court which overturned the High Court's decision on 31st July, 2018, which decision was upheld by the Supreme Court.
12. Undeterred, the applicant filed a Constitutional petition in the High Court this time seeking to have the 1st respondent's election nullified for the reason that she had failed to resign from the position of Member of County Assembly immediately prior to the general elections within the prescribed time, and as a consequence, under Article 105 of the Constitution, she was not eligible to hold the seat of member of the National Assembly. Upon finding that the issue was res judicata, in a judgment dated 14th August, 2019, the High Court dismissed the petition, prompting the applicant to appeal to this Court. By a judgment dated 19th June, 2020, this Court allowed the appeal and ordered that the petition be remitted to the Constitutional and Human Rights division of the High Court for hearing and determination, this time as a Constitutional petition. No appeal to the Supreme Court was filed against that decision.
13. Upon consideration of the constitutional petition, the High Court found in the applicant's favour, and nullified the 1st respondent's election which decision was stayed by this Court pending the hearing and determination of the 1st respondent's appeal. The 1st respondent filed a record of appeal on 24th November, 2020, the subject of the motion that is before us.
14. It is not in dispute that this Court in its judgment dated 19th June, 2020 determined that the petition was not an election petition. The Court concluded that;-

“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.



15. It is also not disputed that, in compliance with this Court's order, the petition was remitted to the High Court to be heard by the Constitutional and Human Rights division of the High Court as opposed to an Election Court. It is upon this basis that the High Court considered the petition and rendered its decision. Having been fully aware that the petition was remitted to the High Court as a constitutional petition, and heard and determined as such, the applicant's assertion that the 1st respondent's appeal arose out of an election petition is most incomprehensible and untenable.
16. Furthermore, it is trite that for a decision to be ascertained as having arisen from an election petition, it ought to, firstly have been filed within 28 days after the declaration of the results of the election in accordance with Article 87(2) of the Constitution in order to question the validity of the election, and served within fifteen days of presentation of the petition. Secondly, it is also trite that the decision in an election petition ought to have been rendered by an Election Court established under Rule 6 (2) (3) of the Elections (Parliamentary and County) Petition Rules, 2017.
17. A consideration of the motion does not disclose that the decision appealed against arose out of an election, and further, the applicant has not provided any material to support the assertion that the court that rendered the decision from which the appeal arose was an Election Court as by law established.
18. As such, the applicant having failed to show that the decision sought to be appealed arose from an Election Court, we are not satisfied that the appeal arose out of an election petition.
19. That said, we turn to the question of whether the appeal should be struck out for the reason that it was filed out of time? Having found as we have that the appeal did not arise from an election petition, it is evident that rule 82 of the *Court of Appeal Rules*, and not this Court's Election rules would be applicable to the circumstances of this case.
20. Section 82 stipulates the period for filing of the record of appeal as 60 days from the date of filing of the Notice of appeal. Though we have no indication of when the Notice of appeal was filed, it is no doubt clear that the record was filed on 24th November, 2020, which was 47 days after the judgment of the High Court was delivered. It was therefore filed well within the 60 days period stipulated by the rules and therefore was properly filed.
21. Consequently, the Notice of Motion dated 6th April 2021 fails and is dismissed with costs to the respondents.

And it is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL



I certify that this is a true copy of the original

DEPUTY REGISTRAR

