



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

ELECTION PETITION APPEAL NO. 35 OF 2018

IN THE MATTER OF NOMINATION OF MEMBERS OF THE COUNTY ASSEMBLY IN MIGORI

BETWEEN

MOGESI AGNES BANGE 1ST APPELLANT

MILLICENT AKINYI ODALO 2ND APPELLANT

FLORENCE ADONGO OCHIENG 3RD APPELLANT

LILIAN ANYANGO OTIENO 4TH APPELLANT

ASENATH ADHIAMBO OLOO 5TH APPELLANT

HALIMA OMAR MARWA 6TH APPELLANT

HELLEN MORAA OMWOYO 7TH APPELLANT

HELLEN ATIENO ODUOR 8TH APPELLANT

GRACE ACHIENG OTIENO 9TH APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

ORANGE DEMOCRATIC MOVEMENT 2ND RESPONDENT

CAROLYNE AKINYI OKERE 3RD RESPONDENT

ELIZABETH TALLA 4TH RESPONDENT

ROSE AORO 5TH RESPONDENT

NARY DEDE ODIGA 6TH RESPONDENT

JUDITH GAD 7TH RESPONDENT

RUTH ATIENO ONYANGO 8TH RESPONDENT

CLARRIS DOLLY OYOO 9TH RESPONDENT
GRACE AKINYI ODHIAMBO 10TH RESPONDENT
FLORENCE ABICH OILE 11TH RESPONDENT
ROSELINE ADHIAMBO OYOO 12TH RESPONDENT
DORINE DANDE 13TH RESPONDENT

(Appeal from the entire judgment and decree of the High Court of Kenya sitting at Migori (**Mrima, J.**) dated 31st May, 2018

in

HC. Election Petition Appeal No. 2 of 2018

(As consolidated with election petition appeal No. 1 of 2018 and

No. 4 of 2018)

JUDGMENT OF THE COURT

[1] This appeal originates from an election petition that was filed by the appellants before the Chief Magistrate's Court at Migori. The appellants had sought declarations: that their rights to participate in the activities of the 2nd respondent herein-Orange Democratic Movement (ODM), had been violated; and that the declaration by Gazette Notice No. 8380 published by the 1st respondent herein the Independent Electoral and Boundaries Commission (IEBC), on 28th August, 2017, relating to the nomination of 3rd to 13th respondents as members of the County Assembly of Migori, under the gender top up list is illegal and void. Consequently, the appellants sought an order nullifying the nomination and gazettment of the 3rd to 13th respondents as members of the County Assembly of Migori; and an order directing ODM and IEBC to nominate and gazette the petitioners in accordance with a decision made by the Political Parties Dispute Tribunal (PPDT) on 2nd August, 2017 in complaint No. 497 of 2017.

[2] Upon hearing the petition and the response by IEBC and other respondents, the Senior Resident Magistrate, Rongo, gave judgment in favour of the appellants. The magistrate issued the declarations as sought, and directed ODM and IEBC to nominate and gazette the appellants as members of the County Assembly of Migori in accordance with the decision of the PPDT.

[3] The judgment of the magistrate elicited three (3) election petition appeals which were consolidated and heard before the High Court at Migori, (M'rima J). The appeals were initiated by the 3rd to 13th respondents. It is not necessary to fully set out the grounds of appeal and the arguments that were made for and in opposition to the appeals. Suffice to state that the learned judge delivered a judgment in which he ruled in favour of the respondents, set aside the judgment of the magistrate in its entirety and substituted an order dismissing the appellants' petition with costs.

[4] The main ground upon which the judgment of the High Court was anchored, was that the magistrate erred: in declining to consider whether the PPDT had jurisdiction to address the appellants' dispute; and in presuming that the PPDT's decision was a decision in finality. The learned judge held that neither the magistrate sitting as an Election Court, nor the High Court, could sit on an appeal over the PPDT's decision in regard to the issue of jurisdiction. The effect of this judgment was to reinstate the respondents as nominated members of the County Assembly of Migori.

[5] The appellants are now before this Court in a second appeal challenging the judgment of the High Court. The appellants have filed a memorandum of appeal in which eleven (11) grounds have been raised. The appellants contended, *inter alia*, that the learned judge erred in: assuming appellate jurisdiction over the decision of the PPDT under **Article 165(3)(e)** of the **Constitution**, as read with **section 41(2)** of the **Political Parties Act**, and **Rule 34** of the **Political Parties Dispute Tribunal 2017**, when no appeal on the decision was before it; failing to rightly assume and restrict himself to the court's appellate jurisdiction over the decision of the Election Court in Rongo CMCC, Election Petition No. 8 of 2017 under **Article 87(1)** of the Constitution, **section 75(1A)&(4)** of the **Elections Act 2011** and **Rule 34(1)** of the Elections (Parliamentary and County), Petition Rules 2017; failing to find that an Election Court sitting under **Article 87(1)** of the Constitution **section 75(1A)&(4)** of the **Elections Act 2011** and **Rule 34(1)** of the Elections (Parliamentary and County), Petition Rules 2017, had no jurisdiction to set aside or vary the order of the PPDT; failing to appreciate that once the PPDT made a decision in complaint No. 497 of 2017, and directed the ODM and IEBC, that decision was binding on all parties unless set aside.

[6] On 18th July, 2010, a notice of motion was filed by the 3rd to 12th respondents under **Rules 42 & 84** of the Court of Appeal Rules, 2010; **Rule 4(1)&(2)** of the **Court of Appeal** (Election Petition) Rules 2017; and **Article 159(2)(d)** of the **Constitution**, seeking to have the consolidated appeals struck out, on grounds that no appeal lies to this Court from the judgment of the High Court, and that this Court therefore, has no jurisdiction to entertain the appeal. During the pre-trial conference, directions were given for this motion to be argued during the hearing of the appeal.

[7] It is now well settled that the issue of jurisdiction, is an issue that is pertinent and once raised, must be settled at the earliest opportunity,

and where it is found that there is no jurisdiction, the court or tribunal should not proceed any further with the matter. (**The owners of the Motor Vessels “Lilian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1; Owners & Masters of the Motor Vessels “Joey” vs Owners & Masters of the Motor Tugs “Barbra” and “Steve B” [2008] 1 EA. 367.**)

[8] It is for the above reasons that we find it necessary to focus on the issue of jurisdiction. Ideally, this issue should have been addressed before the hearing of the substantive appeal. However, due to the time lines and the urgency of the matter, it was deemed expedient that the issue be addressed within the appeal. The notice of motion for striking out the appeal which was supported by an affidavit sworn by the 7th respondent, Judith Gad, elicited a response by way of two replying affidavits. The replying affidavits sworn by Mogesi Agnes Bange, the 1st appellant, was in opposition to the motion whilst the replying affidavit sworn by Dorine Dande, the 13th respondent, was in support of the motion. Written submissions were also filed by the parties’ in regard to the motion.

[9] In support of the motion, the 3rd to 12th respondents filed written submissions in which they urged that the appeal is incompetent as no appeal lies to this Court from the judgment appealed; and that the Court has no jurisdiction to entertain the appeal. The Court was referred to **section 75(4)** and **section 85A** of the **Elections Act**, for the proposition that neither the Regulations nor the Act provide for a second appeal from a decision of the High Court in an appeal arising from an election dispute originating from a magistrate’s court, in regard to members of a County Assembly. It is also submitted that **Rule 2** of the **Court of Appeal** (Election Petition) Rules 2017, defines an appeal as an appeal from the decision of the High Court acting in its original jurisdiction in an election petition, thereby precluding a second appeal from the decision of the High Court exercising appellate jurisdiction.

[10] In support of their submissions, the 3rd to 12th respondents relied on this Court’s decision in **Isaack Oeri Abiri vs Samuel Nyang’au Nyanchama & 2 others [2014] eKLR**; and **the Supreme Court’s decision in Samuel Kamau Macharia vs Kenya Commercial Bank & 2 others, Civil Application No. 2 of 2011; Gachirao Peter Munya vs Dickson Mwenda Githinji & 3 others, Supreme Court Application No. 5 of 2014.**

[11] The 3rd to 12th respondents also relied on **Isaack Oeri Abiri vs Samuel Nyang’au Nyanchama & 2 others** (Supra); and **Benjamin Ogunyo Andama vs Benjamin Andola Andayi & 2 others**, Civil Appeal No. 24 of 2013, for the proposition that election petitions, form their own category, and are not controlled by Civil Procedure Rules, but are controlled by special legislations that prescribe the procedure and the scope within which courts of law have to resolve election disputes. This Court’s decision in **Hamdia Yaroi Sheikh Noori vs Faith Tumaini Kombe & 2 others [2018] eKLR**, was relied on for the proposition that the jurisdiction of the Court in election appeals have been limited to the elective positions specified under section 85A of the Elections Act, 2011, and therefore to go beyond the limitation provided in those sections, and entertain appeals of members of a County Assembly, that is not provided for, would be to act in total disregard and in excess of the jurisdiction imposed by statute.

[12] The 3rd to 12th respondents reiterated that section 85A of the Elections Act, clearly limits appeals by litigants who are dissatisfied with the judgment of an election court, to matters of law only and that there are no provisions under the Elections Act for a second appeal from the magistrate’s court. In addition, that the general appellate power of the Court of Appeal provided under Article 164(3)(a) of the Constitution, cannot be invoked to allow for a second appeal, as it was not the intention of Parliament to provide for a second appeal from the determinations of electoral disputes by the Resident Magistrate’s Court on the election of member of County Assembly amongst the elective positions specified in section 85A of the Elections Act.

[13] ODM also filed submissions in support of the motion for striking out the appeal. Reliance was placed on the **Owners of Motor Vessel Lilian S. vs Caltex Oil (Kenya) Limited [1989] KLR 14** and **Isaack Oeri Abiri vs Samwel Nyang’au Nyanchama & 2 others [2014] eKLR**, for the submission that the Court should down its tools and proceed no further with the appeal as it has no jurisdiction to hear and determine the appeal.

[14] The 13th respondent (Dorine Dande), also opposed the appeal, and supported the motion for striking out the appeal. She submitted that the dispute before the Court revolves around her nomination and inclusion on the ODM party list, which are governed by the Constitution, Elections Act, and Regulations, and party regulations in “The Elections (Party Primaries and Party Lists), Regulations 2017”. She urged the Court to resist the invitation by the appellants to expand its jurisdiction through judicial craft or innovation as there was no legal provision either through the Constitution or the written law, conferring jurisdiction on the Court to hear the appeal. The 13th respondent reiterated that on the basis of section 75(1) and 85A of the Elections Act, this Court lacked jurisdiction to entertain the appeal.

[15] For the appellant, it was submitted that the jurisdiction of this Court as provided under **Article 164(3)**, of the Constitution vests the Court with jurisdiction to hear and determine appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament; that although the jurisdiction of the Court in Election Appeals is operationalized by section 85A of the Elections Act, neither **Article 164(3)** of the Constitution, nor section 85A of the Elections Act, limits the jurisdiction of the Court to hear and determine the appeal before it.

[16] The Court’s attention was drawn to the Court of Appeal Election Petition Rules 2017, Legal Notice No. 114, pursuant to which the definition of appeal in Rules 2&4 was amended, and the earlier term used of “original” was deleted, showing that there was a purposeful intention to remove the restriction that came with the word “original”. Thus, it was argued that there is no provision of the law that either explicitly or implicitly circumscribes the jurisdiction of the Court of Appeal; that an ouster clause that ousts the jurisdiction of the court, must not only be express, but also unambiguous. The Court was urged to interpret the Constitution in a manner that promotes its purpose, values and principles, and advances the rule of law, human rights and fundamental principles under the bill of rights.

[17] We have considered this appeal, the submissions made by the parties’ advocate and the authorities cited. For reasons which shall become apparent in this ruling, we mainly focus on the grounds that touch on the issue of jurisdiction of this Court. The issue of jurisdiction that has been raised by the parties’ in regard to the application for striking out the appeal, is not a novel issue. This Court has had occasion to address this issue both as a three (3) judge Bench and as a five (5) judge Bench. The Court has had opportunity to address similar arguments as were raised by the parties’ herein, both for and against striking out the appeal. The Court has consistently, come to the conclusion that it

has no jurisdiction to hear a second appeal in regard to an election dispute of member of a County Assembly. In **Isaack Oeri Abiri vs Samwel Nyang'au Nyanchama & 2 others** (Supra), and **Hamdia Yaroi Sheikh Noori vs Faith Tumaini Kombe & 2 others** (Supra), both of which were referred to by the respondents in their submissions, this Court addressed similar arguments in regard to the issue of jurisdiction, and came to the conclusion that this Court had no jurisdiction to hear second appeals in regard to members of a County Assembly.

[18] As far as this Court is concerned, the issue of the Court's jurisdiction to hear second appeals in regard to members of a County Assembly, has now been laid to rest by the recent unanimous decision of the five (5) judge Bench in Election Petition Appeal (Application) No. 261 of 2018 **Mohammed Ali Sheikh vs Abdiwahab Sheikh Osman Hathe & others; Emmanuel Changao Kombe (interested Party) [2018] eKLR.**

[19] In that decision, the Court dealing with an application for striking out an appeal in similar circumstances, as the present appeal before us, had the opportunity to revisit its previous decisions and other arguments concerning the Court's jurisdiction to hear second appeals regarding elections of member of County Assembly. In rejecting the argument that the previous decisions were made *per in curium*, Musinga JA, in the leading judgment stated as follows:

“In all the past decisions of this Court regarding its jurisdiction to hear second appeals arising from decisions of the High Court in election petitions for member of a County Assembly, the Court has consistently considered all the relevant Articles of the Constitution and the Elections Act in light of various decisions by the Supreme Court. In the circumstances, this Court cannot be accused of having pronounced itself per in curium. ...

45. In my view, in the absence of any express provision of a right of a second appeal to this Court by section 85A of the Elections Act, to find that this Court has jurisdiction to hear a second appeal from a judgment of the High Court in an election petition for MCA would be negation of our people's aspiration for timely settlement of electoral disputes as reflected under Article 87(1) of the Constitution. If Kenyans so desire, they can lobby the legislature to amend section 85 of the Elections Act to provide for such an appeal. Short of that, I am not persuaded that this Court ought to depart from the position it has firmly held.”

[20] In the same judgment, Odek JA categorically stated as follows:

“Whereas in construing legislative intent, the effect of legislative silence or legislative inaction is debatable, it is trite that a right of appeal is a creature of law. The omission by the legislature to make provision for ‘a right of appeal’ means ‘the right’ does not exist. In the instant case a literal interpretation of section 85A of the Elections Act ends the debate whether the omission to provide for appeals concerning membership to County Assembly means the right to appeal does not exist. Conceptually, the right of appeal being a statutory right, failure to provide the right implies the right does not exist.”

[21] In our view, this Court having clearly rendered itself in the five (5) judge Bench, regarding its lack of jurisdiction to hear second appeals, in regard to the election of members of County Assembly, we do not need to reinvent the wheel. All the arguments raised before us have been addressed in the five-judge Bench decision and other previous decisions of the Court. We reiterate that section 85A does not provide a second right of appeal to this Court in regard to elections of members of County Assembly. It follows that this Court has no jurisdiction to hear the appellant's appeal. The Court must therefore down its tool and cannot address the substantive appeal. We therefore allow the application by the 3rd to 12th respondents and consequently strike out the appeal for want of jurisdiction. We award costs to the respondents against the appellants.

We make orders accordingly.

DATED and delivered at Kisumu this 24th day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.