



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

ELECTION PETITION APPEAL NO. 40 OF 2018

BETWEEN

DAMARIS NYARANGI MOUNI.....APPELLANT

AND

WAFULA CHEBUKATI, CHAIRMAN IEBC.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

IRENE NYAKERARIO MAYAKA..... 3RD RESPONDENT

CLERK, NYAMIRA COUNTY ASSEMBLY.....4TH RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nyamira (Maina J.) dated 19th July, 2018

in

ELECTION PETITION APPEAL NO. 1 OF 2018)

JUDGMENT OF THE COURT

[1] The appellant, Damaris Nyarangi Mouni, was gazetted through Gazette Notice No. 124 of 28th of August, 2017 as having been nominated by the Orange Democratic Party as a member of the County Assembly of Nyamira, in the gender top up list. On the 7th of September, 2017, the appellant was sworn in as a member of the County Assembly of Nyamira. However, the 1st respondent who is the Chairman of the 2nd respondent (IEBC) published a gazette notice No. 8879 of 8th September, 2017, in which the name of the appellant was deleted and substituted with that of Irene Nyakerario (3rd respondent) as member of County Assembly for Nyamira. The appellant filed a petition in the Chief Magistrate's Court at Nyamira challenging her de-gazettement, and the decision of the 1st and 2nd respondents to substitute her name and also including the 3rd respondent and the Clerk, Nyamira County Assembly (4th respondent).

[2] The petition which was opposed by all the respondents, was heard by the Chief Magistrate, Nyamira, who dismissed the appellant's petition. In his judgment, the Chief Magistrate ruled, *inter alia*, that the IEBC had the mandate to degazette or revoke and replace the name of the appellant as a nominated member of the County Assembly of Nyamira, as their investigations had revealed that the inclusion of the appellant in the gazette notice was a result of a fraudulent court order, and that the appellant had failed to prove that she was validly nominated. The Chief Magistrate granted liberty to the 4th respondent to swear in the 3rd respondent as a nominated member of Nyamira County Assembly.

[3] The appellant being dissatisfied with the judgment of the Magistrate's Court, lodged an appeal in the High Court urging the court to declare that she was the duly nominated and gazetted member of Nyamira County Assembly. The learned judge of the High Court (Maina J), having heard the appeal, delivered a judgment in which she found, *inter alia*, that the appellant was not validly nominated as a member of the County Assembly for Nyamira, as her name was included in the party list through fraud, and therefore her swearing in as a member of the County Assembly was null and void *ab initio*. Consequently, the learned judge upheld the judgment of the Chief Magistrate and dismissed

the appellant's appeal.

[4] By a notice of appeal filed in this Court on 20th July, 2018, the appellant gave notice of her intention to file an appeal. Subsequently the appellant filed a record of appeal on 17th August, 2018. Her appeal was anchored on a memorandum of appeal in which she challenged the judgment of the High Court on six grounds. Having been served with a record of appeal, the 1st, 2nd and 3rd respondents filed written submissions as did the appellant. [5] On 30th January, 2019, this Court gave directions that the issue of the jurisdiction of this Court to entertain the appeal, be addressed first. This was in light of recent judgments and rulings that had been made by this Court on the issue of this Court's jurisdiction to hear a second appeal, originating from a magistrate's court on the election of a member of County Assembly. The judgments include **Mohammed Ali Sheikh vs Abdiwahab Sheikh Osman Hathe & others; Emmanuel Chagao Kombe (interested party) [2018] eKLR**, a five Bench decision from this Court (herein referred to as "the five judge Bench decision"). The parties' were therefore given time to consider their positions and if necessary file written submissions and be given a date for orally highlighting the submissions.

[5] **Mr. Nyambati**, learned counsel for the appellant reiterated his client's wish to proceed with the appeal. He submitted that this Court has jurisdiction to hear the appellant's appeal on the issue of this Court's jurisdiction to hear a second appeal originating from a magistrate's court on the election of a member of County Assembly; that **Article 164(3)** of the **Constitution of Kenya** confers this Court with jurisdiction to hear and determine any appeal filed against the decisions of the High Court; that the right of appeal is a constitutional right and that there is no provision of the law in the Elections Act and Rules that bars the appellant from filing an appeal against the judgment of the High Court; that the appeal is basically on the interpretation of the law as provided in the Constitution, the Elections Act and Rules, relating to the decision of the 1st and 2nd respondents.

[6] Mr. Nyambati referred to the Supreme Court decision in **Moses Mwigi & 14 others vs IEBC & 5 others [2016] eKLR**, in which the Supreme Court held that it had jurisdiction under **Article 163** to determine whether the nomination of the appellant as member of the Nyandarua County Assembly, was in accordance with the law. Further, Mr. Nyambati argued that the position of member of County Assembly is a constitutional office; he distinguished section 75 of the Elections Act that sets the route for appeals from the High Court, and section 85A of the same Act that deals with what he described as "the movement of election petitions" as opposed to appeals. He maintained that there was no law denying a right of second appeal in regard to election of members of County Assembly, and urged that there was an important issue intended to be raised in the appeal concerning the de-gazettement of a member of a County Assembly after being gazette, and assuming office. Counsel relied on the dicta of Odek JA in the five judge Bench decision.

[7] **Mr. Kirenga**, who appeared for the 1st and 2nd respondents argued that the jurisdiction of this Court to hear election matters is derived from the Constitution of Kenya 2010, the Elections Act and the Rules made thereunder. He distinguished Article 164 of the Constitution as setting out the jurisdiction of the Court of Appeal to hear appeals from the High Court from section 85A of the Elections Act that provides jurisdiction to the Court to hear appeals from election petitions originating from the High Court in regard to members of the National Assembly, Senate or the office of County Governor.

[8] Mr. Kirenga cited various authorities including **Lemanken Aramat vs Harun Meitamei Lempaka & 2 others [2014] eKLR; Owners of Motor Vessel Lillian S. vs Caltex Oil (Kenya) Limited [1989] KLR 1; Isaac Oerri Abiri vs Samuel Nyang'ahu Nyanchama & 2 others [2014] eKLR** and **Peter Gichuki King'ara vs IEBC & 2 others [2014] eKLR**. Counsel argued that election matters were *sui generis* as jurisdiction is donated to the court by statute and that since there was no statute that allows appeals originating from a magistrate's court to this Court, the Court lacked jurisdiction to hear the appellant's appeal.

[9] **Mr. Nyaberi**, who appeared for the 3rd respondent relied on his written submissions that were along similar lines as the submissions for the 1st and 2nd respondents. He pointed out that there was no law allowing for a second appeal from the Magistrate's Court to the Court of Appeal in election matters, and that nothing would have been easier, if the legislature intended such an appeal, to provide for it; that by virtue of section 75(4) of the Elections Act, appeals from the magistrate's court ended in the High Court and the appellant could not find refuge under **Article 159(2)** of the **Constitution**.

[10] **Ms Michoma**, counsel representing the Clerk to Nyamira County Assembly, informed the Court that her client was non-partisan and therefore left the matter to the Court.

[11] We have considered the submissions that have been made before us by all the parties on the issue of jurisdiction. The issue regarding the jurisdiction of this Court to hear a second appeal emanating from the magistrate's court, in regard to the election of member of County Assembly is not a novel issue. The matter has come up before this Court on several occasions. The Court has ruled on several occasions that it has no jurisdiction to hear such a second appeal.

[12] In **Oerri Abiri vs Samuel Nyang'au Nyanchama & 2 others (supra)**, this Court stated as follows:

"It will be observed that there is no mention of a second or third appeal from the decision of the High Court under section 75(4) of the Act. In our view, the omission of a second or further appeal from the decision of the High Court under the said section is neither inadvertent nor an error, but deliberate. The interpretation we ascribe to the omission is that the legislature intended that there should be no further appeals from the decision of the High Court on appeal from the determination of an election petition on a question of the validity of the election of a member of a county Assembly."

[13] In the five judge Bench decision, the learned judges of this Court had occasion to consider several previous decisions and rejected the arguments 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."

[14] In Mogesi Agnes Bange & 8 others vs IEBC & 12 others Election Petition Appeal No. 35 of 2018, (Kisumu), we stated as follows:

"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 tools and cannot address the substantive appeal."

[15] The upshot of the above, is that this Court has already addressed in previous decisions the arguments made before us in regard to the issue of jurisdiction. Needless to repeat that this Court has clearly made known its considered position in regard to jurisdiction to hear a second appeal on the election of member of a County Assembly. It matters not the number of times that parties will raise the issue before us. Our position remains firm, that this Court has no jurisdiction.

[16] We therefore strike out the appeal for want of jurisdiction. The appellant shall pay the costs of the appeal to the 3rd respondent and to the 1st and 2nd respondents jointly. As the 4th respondent did not take an active part in the appeal, we shall award no costs to it.

Those shall be the orders of the Court.

DATED and delivered at Kisumu this 14th day of February, 2019.

E. M. GITHINJI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEUTY REGISTRAR.