



IN THE COURT OF APPEAL

AT KISUMU

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

J. MOHAMMED, JJA.)

ELECTION PETITION APPEAL (APPLICATION) NO. 43 OF 2018

BETWEEN

HARRIET KERUBO ONGERA.....APPLICANT

AND

ROSE MOTURI MWENE.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

THE JUBILEE PARTY.....3RD RESPONDENT

KISII COUNTY ASSEMBLY.....4TH RESPONDENT

(Being an Application to Strike out the Record of Appeal vide Election Petition Appeal No. 43, lodged in the Court Registry on the 10th September, 2019 and filed against the Judgment of the High Court of Kenya at Kisii,

(R.E. Ougo, J.) delivered on 10th July, 2018

in

HCC ELECTION PETITION APPEAL NO. 3 OF 2018

RULING OF THE COURT

[1] This Ruling relates to an application dated 15th September, 2018, made by **Harriet Kerubo Ongera (applicant)**, the 3rd respondent in the Court of Appeal Kisumu **Election Petition Appeal No. 43 of 2018**.

The applicant seeks an order that the Election Petition Appeal No. 43 of 2018 be struck out on various grounds including the ground that no appeal lies to this Court from the judgment of the High Court dated 10th, August, 2018.

[2] The application is brought under various provisions of the Court of Appeal (*Election Petition*) Rules, 2017, including **Rule 19; sections 75 A and 85 A** of the Elections Act and other provisions of the law.

The application is supported by the affidavit of **Joseph Oguttu Mboya**, learned counsel for the applicant.

The applicant has filed written submissions and list of authorities in support of the application. In addition, the applicant's counsel made oral submissions in support of the application.

[3] The application is supported by the **Independent Electoral and Boundaries Commission, (IEBC), the 2nd respondent** in the application. IEBC also filed a replying affidavit sworn by **Salome Oyugi**. Further, **Ms. Khisa Patricia**, learned counsel for the IEBC filed written submissions and made oral submissions in support of the application.

[4] The application is opposed by the 1st respondent, **Rose Moturi Mwene**, who is the appellant in the appeal. **Mr. Nyamweya** for the 1st respondent has filed written submissions which were augmented by oral submissions.

[5] Prior to Presidential, Parliamentary and County General Elections held on 8th August, 2017, the Jubilee Party, a political party nominated the applicant and the 1st respondent in the party list to be Kisii Members of County Assembly to fill special seats stipulated under **Article 177 1 (b)** of the Constitution.

Article 90 (1) of the Constitution provides, *inter alia*, that, elections for Members of County Assemblies under **Article 177 1(b) and (c)** shall be on the basis of proportional representation by use of party lists. By **Article 90 (2)**, IEBC is responsible for the conduct and supervision of elections provided under **clause 1 of Article 90**.

The name of the applicant was second in Jubilee Party so called **Gender Top-up List** but her gender was designated as male. The name of the 1st respondent was No. 11 in the party list.

After the elections, IEBC bypassed the 1st respondent as the Gender Top-up List indicated that the gender of the 1st respondent was male, approved the nomination of the applicant and proceeded to gazette her name as member of Kisii County Assembly. Upon receiving notification from the Jubilee party that the applicant was a female, IEBC published a corrigenda on 8th September, 2017 deleting the name of the 1st respondent and substituting it with the name of the applicant as the nominated Member of County Assembly.

[6] Thereafter the 1st respondent filed an **Election Petition No. 8 of 2017** in the Chief Magistrate Court at Kisii seeking various reliefs including a declaration that she was properly and lawfully elected as a Member of the Kisii County Assembly and a declaration that deleting of her name and replacing it with the name of the applicant was unlawful, unconstitutional, null and void. The petition was heard by **Hon. V. Karanja**, a Senior Resident Magistrate who by a judgment dated 12th February, 2018, revoked the nomination of both the applicant and the 1st respondent and ordered IEBC and the Jubilee party to conduct fresh nomination for Gender Top-up List.

[7] The 1st respondent was aggrieved by the decision and filed **Election Petition Appeal No. 3 of 2018** in the High Court at Kisumu.

By a judgment delivered on 10th August, 2018, the High Court, in essence ordered the gazette notice to be amended to reflect the proper gender of the applicant as a female and as number 2 on the Jubilee party Gender Top-up List and that the gazette notice to that effect be published within 14 days of the judgment.

The effect of the judgment of the High Court was to restore the name of the applicant in the party list and to be gazetted as the duly elected Member of the Kisii County Assembly.

The 1st respondent was again aggrieved by the decision and on 10th September, 2018, filed **Election Petition Appeal No. 43 of 2018** in the Court of Appeal at Kisumu.

[8] While this appeal was pending for hearing, a Five-Judge Bench delivered a Ruling on 19th December, 2018 in **Nairobi Election Petition Appeal (Application) No. 261 of 2018 - Mohammed Ali Sheikh V. Abdi Wahab Sheikh & 4 others [2018] eKLR (Mohammed Ali Sheikh's case)** holding in essence that a second appeal does not lie from a decision of the High Court in its appellate jurisdiction concerning the validity of an election of a Member of County Assembly and that the Court of Appeal has no jurisdiction to entertain such an appeal.

When the decision was brought to the attention of the respective counsel, the 1st respondent's counsel applied for adjournment for one week to study the judgment. The Court adjourned the application for hearing but on the hearing date, the 1st respondent's counsel elected to oppose the application.

[9] We have considered the respective submissions. This Court has in several decisions *inter alia*, **Isaac Oerri Abiri V. Samuel Nyangau Nyanchama & 2 others [2014] eKLR**; **Hamdia Yaroi Sheikh Nuri V. Faith Tumaini Kombe & 2 other [2018] eKLR**; **Joel Nyabuto Omwenga & 2 others V. Independent Electoral and Boundaries Commission & Another [2014] eKLR**.

All those decisions were considered in the **Mohammed Ali Sheikh's case** by a Five-Judge Bench of this Court and found to have been correctly decided.

In addition, this Court sitting at Kisumu has recently followed the decision in **Mohammed Ali Sheikh's case** in **Marthlida Auma Oloo V. Independent Electoral and Boundaries Commission (IEBC) & 3 others - Kisumu Election Petition Appeal No. 36 of 2018** and in **Mogesi Agnes Bange & 8 others V. Independent Electoral and Boundaries Commission & 12 others - Kisumu Election Petition Appeal No. 35 of 2018**.

[10] The question of a right of a second appeal regarding the election of a Member of County Assembly, like in the present case, and the question of jurisdiction of this Court to entertain a second appeal have been exhaustively and incisively considered by the Court in the decisions cited above.

The issue raised by Mr. Nyamweya relating to the application and interpretation of **Article 164 (3)** of the Constitution has been raised before and considered by this Court in several decisions. A full re-examination of the constitutional and statutory provisions relating to the jurisdiction of the hierarchy of courts in electoral dispute resolution is thus unwarranted. Consistently with the reasoning in the previous decisions of the Court, we find that a second appeal does not lie to this Court and the Court has no jurisdiction to entertain the appeal before the Court.

[11] In the result, the application is allowed with costs to the applicant against the 1st respondent (**Rose Moturi Mwena**) only. Consequently, **Election Petition Appeal No. 43 of 2018** is struck out as incompetent with costs to the **IEBC** and **Harriet Kerubo Ongera** (*1st and 3rd respondents in the appeal*). The 2nd and 4th respondents in the appeal who did not participate in the appeal shall bear their own costs.

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

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR