



**Okal v Ojuok & 2 others (Election Petition Appeal 39 of 2018)
[2019] KECA 977 (KLR) (14 February 2019) (Ruling)**

Peter Bodo Okal v Philemon Juma Ojuok & 2 others [2019] eKLR

Neutral citation: [2019] KECA 977 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
ELECTION PETITION APPEAL 39 OF 2018
EM GITHINJI, HM OKWENGU & J MOHAMMED, JJA
FEBRUARY 14, 2019**

BETWEEN

PETER BODO OKAL APPELLANT

AND

PHILEMON JUMA OJUOK 1ST RESPONDENT

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

RETURNING OFFICER, NYAKACH CONSTITUENCY 3RD RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisumu, (T.W. Cherere, J.) dated 12th day of July, 2018 in High Court Election Petition Appeal No. 3 Of 2018 2.(Arising from the Original Judgment of the Chief Magistrates Court, (Hon. C. Yalwala, (PM) in Election Petition No. 2 of 2017 delivered on 5th day of February, 2018))

RULING

1. This is a Ruling on two applications filed in the appeal. The appeal is from the judgment of the High Court in its appellate jurisdiction dated 12th July, 2018, whereby the High Court allowed an appeal from the judgment of the Principal Magistrate (Hon. Yalwala).
2. The appellant, Peter Bodo Okal and the respondent Philemon Juma Ojuok were among the several candidates who vied for the election for Kisumu County Member of County Assembly for Central Nyakach Ward in the Presidential, Parliamentary and County elections held on 8th August, 2017. The election results were announced by the Returning officer (3rd respondent) herein on the following day, 9th August, 2017 and the respondent was declared as duly elected Member of County Assembly having garnered 3, 321 votes against the appellant's 3,235 votes.



3. The appellant being aggrieved by the election results filed Election Petition No. 2 of 2017 before the Resident Magistrate’s Court at Kisumu seeking various reliefs including scrutiny, recount, a declaration that the 1st respondent was not validly elected and an order for fresh election to be held.

The petition was heard on the merits. The result of scrutiny and recount showed that the respondent herein had garnered 3,300 votes against 3,236 for the appellant – a difference of 64 votes. Ultimately, the election court allowed the petition and granted several orders including an order that fresh elections be held.

4. The 1st respondent being dissatisfied with the decision of the election court filed Election Petition Appeal No. 3 of 2018 in the High Court at Kisumu. The appeal was heard by Cherere, J. who allowed the appeal on 12th July, 2018, granting an order that the respondent was validly elected as a Member of County Assembly for Central Nyakach Ward.

The present appeal was filed on 10th August, 2018, against the judgment of the High Court.

5. On 16th August, 2018, the 2nd and 3rd respondents in the instant appeal filed a Notice of Motion under sections 75 (4) and 85 A of the *Elections Act*, Rules 42 and 84 of the *Court of Appeal Rules* and Rule 17 (1) of the *Court of Appeal (Election Petition) Rules*, 2017 for an order that the appeal be struck out on the ground that no second appeal lies to this Court concerning election of a Member of County Assembly. On 17th August, 2018, the 1st respondent also filed a Notice of Motion for orders that the appeal be struck out on grounds, inter alia, that, there is no right of appeal to this Court taking into account the provisions of Rule 35 of the *Court of Appeal (Election Appeal Petition) Rules*, 2017. The two applications are filed in the appeal.

6. The respective counsel for the parties filed written submissions both on the application and on the merits of the appeal.

The appeal was listed for hearing on 24th October, 2018 when the Court brought to the attention of the respective counsel that a Five-Judge Bench of the Court of Appeal had been constituted in Nairobi to determine the very issue of the jurisdiction of this Court to entertain the appeal and with the consent of the respective counsel, the appeal was adjourned to await the decision of the Court.

On 19th December, 2018, a Five- Judge Bench of this Court sitting at Nairobi delivered a unanimous ruling in Nairobi Election Petition Appeal (Application) No. Nai. 261 of 2018 - *Mohammed Ali Sheikh v Abdi Wabab and 5 others* (Mohammed Ali Sheikh’s case) restating previous decisions of the Court that there is no right of second appeal from an election concerning Membership of County Assembly and that the Court has no jurisdiction to hear a second appeal.

7. That decision was brought to the attention of the respective counsel on 21st January, 2019, and the appellant’s counsel given time to seek further instructions from the appellant in respect of the appeal. On 29th January, 2019, the appellant’s counsel intimated that the appellant still wanted to prosecute the appeal. Thereupon the Court ordered thus:-

“Hearing of the appeal on 12th February, 2019 at 9 a.m. The question of the Court’s jurisdiction to be determined first. The issue to be determined on the basis of written submissions and oral highlighting by respective counsel for 10 minutes each.”

Pursuant to that order, the respective counsel for the 1st respondent on one part and for 2nd and 3rd respondents on the other prosecuted the applications. The appellant’s counsel responded to the application.



8. We have considered the written submissions filed by the 1st respondent together with the oral submissions by learned counsel for the 1st respondent made at the hearing. Similarly, we have considered the written submissions filed by the 2nd and 3rd respondents. We have also considered the oral submissions of Mr. Lugano, learned counsel for the 2nd and 3rd respondents.

On his part, Mr. Kirenga, learned counsel for the appellant referred to various Articles of the Constitution including Articles 1, 2 (4), 10, 25, 50, 27, 38, 159, 164 (3) and sections 74, 75 and 85 A of the Elections Act. He submitted in essence that the Court has the requisite jurisdiction. He asked the Court to declare sections 74, 75 and 85 A of the Elections Act to be inconsistent with the Constitution and therefore invalid. We have similarly considered his submissions.

9. Since the decision of the Five-Judge Bench in Mohammed Ali Sheikh's case (supra), this Court sitting at Kisumu has followed the decision of the Five-Judge Bench in Kisumu Election Petition Appeal No. 36 of 2018 - Marthlida Auma Oloo v Independent Electoral and Boundaries Commission (IEBC) & 3 others and also in Election Petition Appeal No. 35 of 2018 - Mogesi Agnes Bange & 8 others v Independent Electoral and Boundaries Commission & 12 others.

10. In Marthlida's case (supra), the Court said at para. [11]:-

“In arriving at its decision, the expanded court in Mohammed Ali Sheikh's case extensively and incisively considered the relevant constitutional and statutory provisions relating to the jurisdictional question including the matters raised by the 1st appellant's counsel in opposition to the instant application.

Thus, this Court has consistently determined that a second appeal does not lie from the High Court in its appellate jurisdiction concerning the validity of an election of a Member of County Assembly and that the Court lacks jurisdiction to hear such an appeal. The appellant's counsel has not raised any new matter that has not already been considered in the previous decisions of this Court.”

We adopt that passage in relation to the respective submissions made in support of the applications and in opposition of the application. In view of that finding, it is unnecessary to consider the appeal on the merits.

11. For the foregoing reasons, we allow the two applications and find that the appeal is incompetent and strike it out under Rule 19 (1) of the Court of Appeal (Election Petition) Rules, 2017. The appellant shall pay the costs of the appeal to the 1st respondent on the one part and to the 2nd and 3rd respondents jointly on the other part.

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

DEPUTY REGISTRAR

