



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

ELECTION PETITION APPEAL (APPLICATION) NO. 11 OF 2018

BETWEEN

MOHAMED ABDUL OMAR.....APPELLANT

AND

KIPONDA JOSEPH JOSEPPE NGUMBAO.....1ST RESPONDENT

KATANA REUBEN MWAMURE.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....3RD RESPONDENT

MASHA SUDI.....4TH RESPONDENT

(An application to strike out the appeal against the Judgment of the High Court of Kenya at Malindi (Thande, J.) dated 10th August, 2018

in

H.C. Election Petition Appeal No. 5 of 2018.)

RULING OF THE COURT

1. Whether or not this Court has jurisdiction under **Section 85A** of the **Elections Act** to entertain a second appeal in respect to an election of a Member of County Assembly was a live issue in several appeals before this Court. As a result, the President of this Court constituted a five Judge bench to consider that question in **Mohammed Ali Sheikh vs. Abdiwahab Sheikh Osman Hathe & others; Emmanuel Chagao Kombe (interested party) [2018] eKLR** . By that time, the appeal herein, also relating to an election of a Member of the County Assembly, had been filed in this Court by the appellant. Likewise, the 1st and 2nd respondents raised an objection challenging our jurisdiction to hear the appeal.
2. Be that as it may, the parties agreed for the appeal to be held in abeyance pending the determination of the jurisdictional issue by the five Judge bench. Ultimately, the full bench of this Court unanimously found that the Court lacked the jurisdiction to hear second appeals with respect to an election of a Member of County Assembly.
3. As such, when the parties appeared before us on 11th February, 2019, the appellant's counsel, Mr. Muniyithya sought an adjournment to seek further instructions from his client while Mr. Aboubakar, learned counsel for the 1st and 2nd respondent, urged us to strike out the appeal. We acceded to Mr. Muniyithya's request and granted him time to consult with the appellant.
4. The next time the matter came up before us on 4th March, 2019, the 1st and 2nd respondents had filed a notice of motion seeking the striking out of the appeal. Their application was based entirely on the decision of the five Judge bench. Mr. Aboubakar argued that the appeal was an abuse of the court process and was calculated to delay the by elections in Ganda Ward in Kilifi County.

5. Mr. Munyithya opposed the application on two fronts. Firstly, he was of the view that the decision by the five Judge bench was not binding and towards that end, the appellant had requested the President to set up another five Judge bench to consider the issue once again. Secondly, he argued that the appellant was entitled to an automatic right of appeal to the **Supreme Court** under **Article 163(4)** of the **Constitution** since there was a constitutional issue involved. It is integral for the Supreme Court to consider the import of the decision by the five Judge bench, *to wit*, whether or not a constitutional issue with respect to an election of a Member of County Assembly could be raised in this Court and go up to the Supreme Court. We understood him to be saying that the appellant could only get access to the Supreme Court through the appeal in question.

6. On his part, Mr. Anjarwala who appeared for the 3rd and 4th respondents, as he put it, left it to us to determine the best course of action. In his brief rejoinder, Mr. Aboubakar submitted that the decision by the five Judge bench was binding and what is more, the striking out of the appeal would not deprive the appellant of his right to appeal to the Supreme Court.

7. Having taken into consideration the arguments put forth on behalf of the parties, we are clear in our minds that the decision by the five Judge bench is binding upon us. Consequently, the only available option to us is to strike out the appeal for want of jurisdiction, which we hereby do. The appellant shall pay the costs of the appeal to the 1st and 2nd respondents. As the 3rd and 4th respondents did not take an active part in the appeal, we shall award no costs to them.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

M. KOOME

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR