



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, ODEK & KANTAL, J.J.A.)

CIVIL APPEAL NO. 31 OF 2018

BETWEEN

ORANGE DEMOCRATIC MOVEMENT.....1ST APPELLANT

EVE MALENYA.....2ND APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

PERPETUA MPONJIWA.....2ND RESPONDENT

AND

THE SPEAKER-NAIROBI COUNTY ASSEMBLY.....INTERESTED PARTY

(Being an appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Nzioka, J.) delivered on 17th July, 2018

in

Election Petition No. 4 of 2018)

RULING OF THE COURT

The 2nd respondent, **Perpetua Mponjiwa** was a member of the political party Orange Democratic Movement, the 1st appellant herein. She applied for nomination by the 1st appellant to contest for the seat of Member of County Assembly (MCA) for Nairobi County pursuant to **Article 177(1) (b)** of the **Constitution** under the gender top up Rule. She was not nominated and she filed suit at the Chief Magistrate's court at Nairobi being **Petition No. 3 of 2017**. The same was heard by the magistrate court, was found to have no merit and was dismissed. That provoked **Election Petition Appeal No. 4 of 2017** filed at the High Court of Kenya at Nairobi. The appeal was heard and in a judgment delivered on 17th July, 2018 the appeal was allowed.

The 1st appellant and **Eve Malenya**, the 2nd appellant, were dissatisfied with those orders and filed this appeal. There are various grounds of appeal in the memorandum of appeal filed by the appellants.

When the appeal came up for hearing the 2nd respondent indicated that she had filed a notice of preliminary objection on 23rd August, 2018. We allowed the parties to urge the preliminary objection.

In urging the preliminary objection **Mr. Gordon Ogado** learned counsel submitted that there is no valid notice of appeal pointing out that the matter was governed by the Constitution and the Elections Act. He pointed out that the Notice of Appeal at page 374 of the record is addressed to the High Court of Kenya at Nairobi but was not filed or received by this Court. This according to counsel violated Court of Appeal (Election Petition) Rules. He also pointed that the notice had no grounds set out, again contrary to the said rules. According to

counsel we have no jurisdiction to entertain a second appeal like this one arising from elections of MCA.

Ms. Magdaline Ng’etich learned counsel for the 1st respondent agreed with those submissions.

Mr. Oduor Ibrahim learned counsel for the appellants opposed the preliminary objection but conceded that this Court had made a finding in respect of election petition appeals.

In a judgment of this Court comprising five judges delivered on 19th December, 2018 in **Election Petition Appeal (Application) No. 261 of 2018 Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe and Others [2018] eKLR** this Court reviewed in detail the jurisdiction of the Court in respect of elections. It was found that there is no right of appeal from elections arising from an election for MCA to this Court. Appeals in that respect end at the High Court level.

In the event and following those findings we have no jurisdiction to entertain this appeal which is incompetent and it is hereby struck out. We award costs to the 2nd respondent.

Dated and delivered at Nairobi this 5th day of July, 2019.

W. KARANJA

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR