



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MAKHANDIA, SICHALE & KANTAI, J.J.A.)

ELECTION PETITION APPEAL NO. 5 OF 2018

BETWEEN

NYUTU PETER KAMAU..... APPELLANT

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER, MBEERE SOUTH CONSTITUENCY.....2ND RESPONDENT

MUTURI GEOFFREY KING'ANGI.....3RD RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court of Kenya at Embu (Limo, J.) dated 14th *February, 2017* in *Petition No. 3 of 2017*)

JUDGMENT OF THE COURT

The appellant, **Nyutu Peter Kamau**, was one of the contestants for the position of Member of Parliament for Mbeere South Constituency in Embu County which seat was contested by 9 candidates in the election held on 8th August, 2018. The petition filed by the appellant in the High Court of Kenya, Embu, does not give the votes received by each candidate which is contrary to Rule 12(1) and (2) of the Elections (Parliamentary and County Elections)

Petition Rules, 2017. From the record the 3rd respondent, **Muturi Geoffrey King'angi**, was declared the winner by the 2nd respondent after garnering 18,028 votes. The appellant received 2,767 votes and was 7th in the race. Being dissatisfied with declaration of the results the appellant filed an election petition in the High Court of Kenya, Embu, where the Independent Electoral and Boundaries Commission was named as 1st respondent; Mbeere Electoral Constituency Returning Officer named as 2nd respondent and the person declared the winner, Muturi Geoffrey King'angi, named as 3rd respondent. The petition runs into 102 paragraphs – the first being descriptive of the parties and the purpose of the petition; paragraphs 8-22 restate articles of the Constitution of Kenya, 2010 that concern elections in Kenya; paragraphs 23-37 are an outline on the Elections Act No. 24 of 2011; paragraphs 38-66 summarize the Elections (General) Regulations, 2012; paragraphs 67 and 68 are on Elections (Technology) Regulations, 2017 while the remainder of the paragraphs 69 to 102 – are on “Facts and grounds upon which the petition is premised.” Amongst the issues stated in the said “facts and grounds” was that the appellant was a registered voter in Mbeere South Constituency; that he had been deprived of his right to be validly elected as Member of Parliament for the said constituency; that his agents had been denied copies of Forms 35A at polling stations by Presiding Officers contrary to the law; that there were irregularities, fraud and rigging in the said elections which violated the law; that officers of the 1st respondent committed election offences; that there was no proper tallying, count or totaling of votes in 13 polling stations; that the people of the said constituency had been denied their true representative; that there was massive voter bribery by 5 people on behalf of the 3rd respondent at Karuko Primary School Station, Makawani Polling Station, Wachoro Polling Station and Mungori Polling Station which was an offence under the Election Offences Act; that at the same polling stations, voting was allowed to continue beyond the election day – 8th August, 2017 contrary to law; that there were discrepancies in the results announced by the 2nd respondent and that all this was meant and designed to give an undue advantage to the 3rd respondent “....who subsequently ripped (sic) the benefit thereof”. It was therefore prayed that an order for scrutiny of all elections material including the KIEMS (Kenya Integrated Elections Materials System) be issued; that all votes cast in the constituency be recounted; that scrutiny be conducted in respect of 13 named polling centres; that various declarations be issued amongst them that the 3rd respondent was not validly elected as Member of Parliament for Mbeere South Constituency; that the election be declared null and void and costs be granted to the appellant. The petition was supported by an affidavit of the appellant and a list of witnesses was filed stating names of 12 witnesses who were to be called in support of the petition.

The 1st and 2nd respondents filed a response to the petition which denied the factual allegations in the petition stating that the election had

been conducted in accordance with the law. This was restated in an affidavit of the Returning Officer, Consolata Muthoni, the 2nd respondent, sworn at Embu on 22nd September, 2017 where various annextures were attached.

The 3rd respondent also filed a response to the petition in which he denied the factual allegations in the petition and the same was also contained in a replying affidavit of the 3rd respondent sworn at Embu on 23rd September, 2017. There were also affidavits of agents of the 3rd respondent and people who voted in the said elections which deposed that the election was properly conducted. Allegations of bribery, intimidation of voters or denial of agents to enter polling stations were denied in the said affidavits. The petition was heard by **R. K. Limo, J.** who in a judgment delivered on 14th February, 2018 found no merit in the petition which he dismissed with costs to the respondents. The appellant was dissatisfied with those findings and filed a Notice of Appeal at the High Court of Kenya, Embu. That Notice of Appeal is the subject of main discussion in this appeal and it is necessary to reproduce it here:

“REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELECTION PETITION NO. 3 OF 2017

NYUTU PETER KAMAU..... PETITIONER

AND

INDEPENDENT ELECTORAL

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

RETURNING OFFICER,

MBEERE SOUTH CONSTITUENCY 2ND RESPONDENT

MUTURI GEOFFREY KING'ANGI.....3RD RESPONDENT

NOTICE OF APPEAL

TAKE NOTICE that NYUTU PETER KAMAU, the Petitioner herein being dissatisfied with the entirety of the Judgment of the Honourable Justice Limo delivered at Embu on 14th February, 2018 in Embu High Court Election Petition No. 3 of 2017 intends to appeal to the Court of Appeal against the whole of the said decision.

The address for service of the Appellant is :-

Viola & Onyango Company

Advocates

Mpaka Plaza, 2nd floor

Mpaka Road, Westlands

P. O. Box 30588-00100 Nairobi

Cell: 0720467286

It is intended to serve copies of this Notice upon:

Nyamweya Mamboleo

Advocates

International Economic Law Centre

Finance House, 11th Floor

Loita Street

P. O. Box 20621-00100 Nairobi

Mutuma Gichuru & Associates

Gilfilan House

3rd Floor, Suite 137

Kenyatta Avenue

P. O. Box 4718 – 00100

Nairobi

DATED at NAIROBI this 21st day of Feb 2018

Signed

VIOLA & ONYANGO

ADVOCATES FOR THE APPELLANT

To: The Registrar of the High Court of Kenya at Embu Lodged in the High Court of Kenya at Embu this 22nd day of February 2018.

SIGNED

DEPUTY REGISTRAR

HIGH COURT OF KENYA AT EMBU

Drawn & Filed By:-

Ongoya & Wambola Advocates

Corner House, 13th Floor

Kimathi Street

P. O. Box 10586-00200 Nairobi

Cell: 0720467286”

The appellant thereafter filed a Memorandum of Appeal at the registry of this Court where 12 grounds of appeal are taken; which question both legal and factual findings by the learned Judge. We observe here that the Elections Act gives us jurisdiction to look only into legal issues in appeals arising from election petitions, factual issues not being within our jurisdiction. The learned Judge is faulted “...in law and fact...” for holding that the said election was conducted in accordance with the law; for failing to appreciate that the appellant's agents were denied entry into polling stations and the constituency tallying centre; that the Judge erred in denying the appellant an adjournment to introduce video evidence to prove bribery of voters; that the Judge should have allowed scrutiny of votes after parties had made submissions; that the Judge was wrong to hold that failure to plead declared results was fatal to the petition; that the Judge erred in not holding that Forms 35A which had no security features were valid; that bribery and acts of witchcraft had been proved and the elections should have been invalidated; that the Judge erred by admitting written submissions out of an agreed timeline and therefore the appeal should be allowed and the election of the 3rd respondent be nullified.

When the appeal came up for hearing before us on 9th July, 2018 we raised as an issue of law, the competence of the appeal because, as we have stated, notice of appeal was lodged at the High Court of Kenya, Embu, while The Court of Appeal (Election Petition) Rules, 2017, require that such notice be filed in this Court.

Mr. Dennis Onyango, learned counsel for the appellant in submissions before us on the issue of competence of the appeal admitted that the notice of appeal was lodged at the High Court registry, not the registry of this Court. It was his view that that was an anomaly that did not go to jurisdiction and was curable under Article 159 of the Constitution of Kenya 2010. In submissions in respect of the grounds raised in the Memorandum of appeal, Mr. Onyango submitted that the learned Judge was wrong to hold that alterations of results in Forms 35A did not compromise integrity of the elections in the said constituency. According to counsel there was evidence that Forms for 8 polling stations had been altered. Learned counsel further faulted the learned Judge for holding that alterations in other forms were insignificant and did not affect the final results. According to counsel, it was wrong for the Judge to observe that the other candidates in the said elections were not complaining submitting instead that the appellant was entitled to raise those issues. Counsel further faulted the learned Judge for denying the

appellant a recount of votes and holding that no basis for recount and scrutiny had been established.

The 1st and 2nd respondents were represented by 2 counsel - **Mr. Gilbert Nyamweya** and **Mr. James Mamboleo**. Mr. Mamboleo submitted that the election was properly conducted in accordance with the law and he supported the factual findings of the learned Judge. According to counsel, the appellant had been on a fishing expedition where the case set out in the petition was different from the case made in court and different from the submissions made before us. According to counsel, the appellant did not lead any evidence in relation to alteration of forms and that the only case made by the appellant before the learned Judge was that his polling agents had been denied entry into polling stations. According to counsel, the appellant had stated at various stages of the case that he would call witnesses to support those allegations but none were called. Mr. Mamboleo was of the further view that elections are serious matters and required to be taken as such. Counsel wondered why the appellant had claimed in the petition that he had garnered 14,000 votes but had not backed that with any evidence. In further submissions, counsel stated that the appellant had not established any grounds for an order for scrutiny or recount of votes to be made. Further, that the appellant had at the filing of the petition asked for an order for election materials to be preserved; that the trial court gave that order, the appellant did not appear on the appointed day. Counsel asked us to dismiss the appeal.

Mr. Elias Mutuma, learned counsel for the 3rd respondent challenged the competence of the appeal, submitting that without a proper notice of appeal, the appeal is incompetent *ab initio*. Learned counsel submitted that there is no provision in the Court of Appeal (Election Petition) Rules, 2017 for filing of Memorandum of Appeal. Further that the grounds stated in the Memorandum of Appeal all raised issues of facts which the law does not allow us to entertain. Counsel wondered what remedy could be granted on the issue of denial of an adjournment by the trial court which, in any event, according to him, a notice of appeal had not been filed against denial of the application for adjournment. On the issue of scrutiny and recount of votes, it was Mr. Mutuma's submission that no application, oral or written had been made to the trial court. Further that the appellant had been given an opportunity by the trial court to lay a basis for scrutiny or recount of votes but he had not done so. Finally, that the appellant had not even stated the votes cast or received by the candidates and had not attached a certificate to indicate that he was a candidate in the said election. For all this, he asked us to dismiss the appeal.

Mr. Onyango for the appellant had nothing to say and left the matter to us.

We start with the issue relating to competence of the appeal. That issue was the subject of a recent ruling of this Court in **Election Petition Appeal No. 9 of 2018 (Nakuru) Musa Cherutich Sirma vs. Independent Electoral Boundaries Commission & 2 Others** where we analyzed the Court of Appeal (Election Petition) Rules, 2017 in relation to how appeals to this Court arising from election petitions should be commenced and prosecuted. The said rules were enacted as Legal Notice No. 114 under the Appellate Jurisdiction Act Cap 9 Laws of Kenya. "Court" is defined in those Rules as the Court of Appeal and Notice of Appeal means notice lodged in accordance with Rule 6 of the Rules. "Registry" is registry of this Court and includes a sub-registry.

Rule 4(2) provides that where there is no applicable provision in the said rules, the Court of Appeal Rules, 2010 relating to civil appeals shall apply to an election petition appeal in so far as they are not inconsistent with the 2017 rules. By rule 4(3) where there is a conflict between the 2017 Rules and the Court of Appeal Rules 2010 on matters relating to election petition appeals, the provisions of the 2017 rules shall prevail over the 2010 rules. By rule 6 of the rules, it is provided:

- "6(1) A person who desires to appeal to the court shall file a notice of appeal, which shall be lodged in quadruplicate in the registry**
- 2. A notice of appeal shall be filed within seven days of the date of the decision appealed against.**
 - 3. A notice of appeal shall be in separate numbered paragraphs and shall –**
 - a. specify whether all or part of the judgment is being appealed and, if part, which part;**
 - b. provide the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice; and**
 - c. contain a request that the appeal be set down for hearing in the appropriate registry.**
 - 4. It shall not be necessary that the decree or order be extracted before lodging a notice of appeal**
 - 5. A notice of appeal shall be substantially in the Form EPA 1 set out in the Schedule and shall be signed by or on behalf of the appellant."**

The rules have a schedule of Forms and relevant to this appeal is Form EPA 1, it provides as follows:

"SCHEDULE

FORMS

FORM EPA 1

(r. 6 (s)

IN THE COURT OF APPEAL AT.....ELECTION PETITION APPEAL NO..... OF

20

IN THE MATTER OF.....

IN THE MATTER OFELECTION PETITION NO.....OF 20

BETWEEN

.....APPLICANT

AND

.....RESPONDENT

(APPEAL FROM THE OF THE HIGH COURT OF

AT

(HON. JUSTICE).....DATED.....,

20.....,

IN ELECTION PETITION NO. OF 20

.....)

NOTICE OF APPEAL

TAKE NOTICE thatbeing dissatisfied with the decision of

the Honourable Justice..... given aton theday of20.....intends to appeal to the Court of Appeal against the whole

of the said decision//such part of the said decision as decides that

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.....

.....

The address for service of the appellant is

.....

It is intended to serve copies of this notice on.....

The applicant requests that the appeal be set down for hearing in the appropriate registry.

Dated this day of. 20.....

Respondent..Signed..

Advocate for the respondent”

Notice of appeal in this appeal was lodged at the High Court of Kenya at Embu on 22nd February, 2018 to challenge the judgment of the High Court of Kenya Embu delivered on 14th February, 2018. It states amongst other things that it is intended to challenge the whole of the said decision. The said notice was not lodged at the registry of this Court as required by the Rules of this Court that govern matters election. The notice did not also state the grounds on which an appeal was being taken.

The competence of the appeal will be determined by whether the appeal was properly initiated. It has been held that the issue of jurisdiction of a court flows from the Constitution, Statute or Precedent. It is also trite that without jurisdiction a court downs its tools. The Supreme Court of Kenya in the case of **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others Supreme Court Civil Application No. 2 of 2011 (UR)** held as follows on the issue of jurisdiction:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the Court cannot entertain any proceedings.”

In the case of **Nicholas Kiptoo arap Korir Salat vs. Independent Electoral & Boundaries Commission & 7 others [2015] eKLR**, it was held that:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdiction prerequisite. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant’s notice of appeal as having been filed out of time in Silverbrand V County of Los Angeles [2009] 46 Cal. 4th 106, 113 stated inter alia:

As noted by the Court of Appeal the filing of a timely notice of appeal is a jurisdictional prerequisite unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal. The purpose of this requirement is to promote the finality of judgments by forcing the losing party to take an appeal expeditiously or not at all.” [Emphasis added].

The Supreme Court of Kenya pronounced itself on the purport and effect of Article 159 of the Constitution in **Raila Odinga & 5 others vs. Independent Electoral & Boundaries Commission & 5 others [2013] eKLR** by stating that:

“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls. All that the Courts are obliged to do, is to be guided by the principle that “justice shall be administered without undue regard to technicalities”. It is plain to us that Article 159 (2) (d) is applicable on a case by case basis.”

Mr. Mutuma, learned counsel for the 3rd respondent laid emphasis in his submissions that there was no competent appeal before us because the Notice of Appeal was incompetent.

The rules of this Court require an appellant who intends to challenge the decision of a trial Judge from an election petition to file a Notice of Appeal in the registry of this Court within 7 days of the date of judgment. As was stated by the Supreme Court in the **Samuel Kamau Macharia** (supra) case a court’s jurisdiction flows either from the Constitution or from legislation or both and a court can only exercise jurisdiction as conferred by the Constitution or other written law.

The Notice of Appeal filed at the High Court of Kenya, Embu to challenge the judgment of the High Court was incompetent as it was not filed in this Court as required by the Rules. As we held in the said **Musa Cherutich Sirma** (supra) case, without a valid Notice of Appeal the appeal does not lie.

Although that is our finding, we shall address the other issues raised by the appellant although again, the memorandum of appeal is irregular as the rules of this Court in relation to election petition appeals require grounds of appeal to be set out in the Notice of Appeal.

We have perused the whole record.

The appellant testified before the trial Judge stating that he had grievances on how the elections held on 8th of August 2017 were conducted. According to him, the elections were not properly conducted and the results announced by the 2nd respondent were not correct. He testified that when the elections were taking place, he received phone calls from 17 of his agents who told him that they had been denied entry into polling stations. In cross-examination he stated that there were 177 polling stations in the constituency and that there was rigging in all polling stations. When shown Forms 35A that bore the signatures of his agents, he could not recall that they were his agents.

Peter Magara was called as a witness by the appellant. He was the campaign manager of the appellant and had sworn an affidavit which had been filed in court. He testified that he did not witness any bribing of voters but that he had been told about it. He admitted that his name had not been forwarded to the 1st respondent as an agent of the appellant.

Kelvin Murimi was also called as a witness for the appellant. He had also sworn an affidavit which is on record. He testified that a meeting

had been called on 8th April 2017 by the 3rd respondent and that the agenda of the same was to plan how to cause violence if the appellant was declared the winner at the elections that were to be held in August of that year. According to him, sums of Kshs 500/- or 1,000/- were handed to those who attended and on his part he testified that the money given to him was to pay for his transport home. He believed the Kshs 1,000/- given to him was a bribe. In further testimony, it was his case that he attended another meeting on 21st July 2017 where a bull was slaughtered at night by old men and that there were also witchdoctors. Although he testified that those in attendance were given meat to eat, he did not himself partake of the same. Those who ate the meat were instructed to vote for the 3rd respondent otherwise a bad omen would befall them. He did not know any of the people who ate the meat and did not know any of the people at the meeting and he also did not know the people he believed to be witchdoctors. The trial Judge recorded that the witness was fidgeting and was uncomfortable. Pressed by the court he admitted that he had initially been a supporter of the 3rd respondent but had switched camp at an unstated time to be a supporter of the appellant.

James Kiminja Njeru was also called as a witness. He testified that he attended a meeting on 22nd July 2017 which was held in a bush but to which he had not been invited. That he arrived at 7.30 am but did not witness any witchcraft taking place. He did not know what happened at the meeting. The appellant's counsel then applied to the trial court to treat the witness as a hostile witness but the court found no basis for the application and the same was not granted. He did not partake of the meat and he was not given any money. The appellant's lawyer then applied to close the appellant's case before the trial court but also applied to be allowed to present a video but the court found that no basis had been laid for allowing further evidence and that application was disallowed.

Consolata Muthoni was the Returning Officer of the said constituency. She testified that she collated the results for the various positions that were contested in the elections held in August 2017 and that in respect of Member of Parliament, she found that the 3rd respondent had the highest number of votes. She thus announced him as the winner of the election. According to her all polling stations were opened at 6.00 a.m and there were Presiding Officers managing the elections. She visited most polling stations. The elections proceeded smoothly and she did not receive any complaints by an agent or a candidate. Counting of votes proceeded smoothly and she received results from all polling stations with relevant documents. Challenged on what the appellant's counsel thought were discrepancies in Forms 35A, it was her evidence that the Forms were the same, the difference being only in the photocopier used to take copies that were availed to candidates or their agents. She further testified that the other difference could arise depending on whether the copy was taken from the original or from a copy. On alterations made on some forms, she pointed that the same had been counter-signed by the Presiding Officers and agents present at polling stations. It was her testimony that such alterations did not affect the results and did not prejudice any of the candidates.

The 3rd respondent testified before the trial Judge. He had 26 years of military service and had risen to the position of Colonel after which he had served in various capacities before being elected to be Member of Parliament of the said constituency. He was an elder in the Anglican Church and denied that any violence had taken place before or during the election. He denied bribing voters and further denied all the factual allegations made by the appellant. The 3rd respondent called five witnesses. They all confirmed attending campaign meetings called by the 3rd respondent but denied that any violence or bribery of voters had taken place.

That was the evidence placed before the learned Judge by the appellant and the respondents. The learned Judge considered it in totality and found that the appellant had not made out any case and the petition was dismissed.

We have perused the memorandum of appeal and find that the same is fraught with matters of fact which as we have stated we have no jurisdiction to deal as the Elections Act limits us to deal with only issues of law. The appellant was not able to place before the trial court any evidence to show that there were any irregularities that took place in the elections. The learned Judge found the witnesses called by the appellant not to be credible and in any event none of them gave direct evidence on any matter that they witnessed in person. There was no evidence that any voters were bribed and there was no evidence to show that any violence took place. Although the appellant alleged that his agents had been denied access to polling stations, none were called to support those allegations. Forms were produced before the trial court to show that the appellant's agents in fact signed those forms in person. It could not therefore be true that the agents had been denied entry when they were in the polling stations and signed the documents.

None of the allegations set out in the petition were proved in any way at all. The learned Judge reached the correct decision. We have not found any merit in this appeal which we dismiss with costs to the respondents.

Dated and delivered at Nairobi this 31st day of July, 2018.

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. Ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR