



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), MUSINGA & MURGOR J.J.A)

ELECTION PETITION APPEAL NO. 27 OF 2018

BETWEEN

HAMDIA YAROI SHEIKH NURI.....APPELLANT

AND

FAITH TUMAINI KOMBE.....1ST RESPONDENT

AMANI NATIONAL CONGRESS.... 2ND RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION3RD RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Milimani (Kimaru, J.) delivered on 4th May 2018 in Election Petition Appeal No. 5 of 2018 As consolidated with Election Petition No. 1 of 2017)

JUDGMENT OF THE COURT

This appeal arises from an election petition filed by **the appellant, Hamdia Yaroi Sheikh Nuri, (Hamdia)** against **Faith Tumaini Kombe, the 1st respondent, (Tumaini)** and **Amani National Congress, the 2nd respondent, (ANC)** following Tumaini's nomination as member of the Tana River County Assembly by the ANC.

The petition was filed in the Chief Magistrate's Court at Milimani, Nairobi, wherein Hamdia contended that by Gazette Notice Number 8380 Tumaini was gazetted as member of County Assembly for Tana River County. Hamdia's complaint was that Tumaini was not a registered voter, and as such was not eligible for nomination or election as member of the County Assembly. As an active member of the ANC, Hamdia had applied for, and was nominated third, after Tumaini and one Catherine Muthoni Mwamba on the ANC's party list. Following the General Election, the ANC having garnered 2 seats in the County Assembly was entitled to nominate two person from its party list, and consequently, Tumaini was nominated to one of those seats, as member of the County Assembly in the Gender Top up category.

Hamdia therefore sought a declaration that Tumani's nomination was invalid, null and void.

The petition was supported by Hamdia's affidavit, sworn on 25th September 2017, wherein she deponed that after Tumaini was gazetted as the nominee, she searched the register of voters and ascertained that Tumaini was not a registered voter from her name, and Identity Card number published in the Daily Nation of 23rd July 2017 and the Kenya Gazette Number 8380; that she was not in the list of registered voters for Tana River County or anywhere else; that except for herself, neither Tumaini nor Catherine Muthoni Mwamba appeared on the register of voters and therefore were unqualified to be nominated as member of the County Assembly. In a supplementary affidavit sworn on 4th November 2017, Hamdia annexed a screenshot of a short text message which indicated that, no records existed in the register against Tumaini's Identity Card number 32994849.

The respondents failed to file their responses within the stipulated timeframe, and on 7th and 13th November 2017, Tumaini, the ANC and the IEBC respectively filed applications seeking to extend time within which to respond, and for their affidavits in reply filed on 6th and 13th November 2017 to be deemed as filed within the stipulated period.

In a ruling dated 22nd November 2017, Hon. Mburu, Principal Magistrate, accepted the IEBC's explanation that it was engaged in the conduct of the repeat presidential election which occasioned the delay in filing its response. The court however declined to accept Tumaini's and ANC's explanation for reasons that no documentary evidence was provided in support of the contention that the instructing counsel had sought for and was awaiting instructions from the ANC's Secretary General and the Chief Executive Officer, thereby failing to explain the inordinate delay.

Upon careful consideration of Hamdia's petition, and the IEBC's replying affidavit, as well as their submissions, the trial court concluded that Hamdia had done everything within her ability to demonstrate that Tumaini was not a registered voter, thereby shifting the evidentiary burden onto the respondents to prove otherwise. The court found that the respondents had failed to prove that she was a registered voter, and in so finding, nullified her nomination as member of the County Assembly for Tana River County.

Tumaini and the 2nd respondent were displeased with the trial court's rulings dismissing the applications for enlargement of time and filed an appeal in the High Court, in Election Petition No. 1 of 2017 against the trial magistrate's ruling and orders of 22nd November 2017. The grounds of appeal were that the trial court improperly exercised its discretion in dismissing their applications, despite the delay having been sufficiently explained.

They also appealed to the High Court in Election Petition Appeal No. 5 of 2018 against the judgment of the trial magistrate dated 19th January 2018, on grounds, inter alia that, the trial magistrate applied a standard and burden of proof that was below that required in elections; that Hamdia had failed to follow the laid down procedure for resolution of election disputes; that the trial magistrate had issued adverse orders against the second nominee, one Catherine Mwamba, who was not a party to the petition; that the trial magistrate failed to appreciate that the IEBC was empowered to select the most qualified candidate from amongst the list submitted to it by the ANC.

As the two appeals had arisen from the same petition, by consent of the parties they were consolidated and heard together.

In a judgment delivered by Kimaru, J, the High Court allowed the appeal and deemed the pleadings filed by Tumaini and the ANC as having been properly filed. The court also dismissed Hamdia's petition, having concluded that the allegation that Tumaini was not a registered voter was not proved to the required standard. The application to strike out the respondents' record of appeal for reasons that a copy of the judgment and decree were omitted, was also dismissed.

The appellant was aggrieved by the decision of the High Court and appealed to this Court on grounds that the learned judge fell into error in;

- i. allowing an unregistered voter (the 1st respondent) to be nominated, and elected to serve in the Tana River County Assembly contrary to the express provision of Article 193 (1) (a) of the Constitution and section 25 (1)(a) of the Elections Act;
- ii. interfering with the trial Magistrate's exercise of discretion to decline to allow the 1st and 2nd respondent to file responses to the election petition and replying affidavits which were filed inordinately late and without leave of the court;
- iii. failing to find that the 1st and 2nd respondents record of appeal filed on 14th February 2018 was incompetent and ought to have been struck out, for failure to include;
 - a. a copy of the decree
 - b. a copy of the judgment
 - c. all affidavits, evidence and documents produced as evidence before the trial court;
- iv. failing to find that the 1st and 2nd respondents memorandum of appeal defective as it was an appeal against the judgment and not against the decree and did not have a certified copy of the order;
- v. granting leave to file a supplementary Record of Appeal, a pleading unknown in the rules appertaining to Elections petitions;
- vi. failing to appreciate that the legal burden of proof remains at all times on the petitioner, but the evidentiary burden shifts from the petitioner to the respondents;
- vii. failing to appreciate that the appellant had sufficiently proved that the 1st respondent was not a registered voter, yet the trial magistrate had found that the appellant had done all that she could to demonstrate that she was a registered voter, and that the other two nominees had not;
- viii. failing to find that the appellant had proved her case;
- ix. And in finding that the 1st and 2nd respondents responses to the election Petition were properly filed.

As a preliminary issue, **Mr. Ngome** learned counsel for the 1st respondent, raised the question of whether or not we have jurisdiction to hear this appeal. Counsel submitted, that by dint of **Article 164 (3), section 85 A** of the **Elections Act**, and **rule 4** of the **Court of Appeal Election Rules**, that set out with specificity the nature of election appeals to be entertained by this Court, it did not have jurisdiction to determine this appeal. Counsel cited **Samuel Kamau Macharia vs Kenya Commercial Bank [2012] eKLR** and **Republic vs Danson Mugunya [2016] eKLR** in support of the proposition that, on account of the stipulated election provisions, this Court lacked jurisdiction to

entertain election petitions that were second appeals from the magistrates' court.

Responding to the question of jurisdiction, **Mr. Mokuu** learned counsel for the appellant, submitted that **Article 164 (3) (a)** of the **Constitution** grants this Court the mandate to hear appeals from the High Court, and that what was before this Court is an appeal from a judgment of the High Court; that since the High Court exercises original and appellate jurisdiction, **Article 164 (3) (b)** could not be interpreted in a manner that limited this Court's jurisdiction, so that in effect, **Article 164 (3) (a)** and **(b)** expanded the jurisdiction of this Court. The Elections Act merely proscribes jurisdiction and on a second appeal the Act is silent. The right to appeal is derived from the Constitution, he stated.

Counsel went on to argue that, according to the **Court of Appeal Election Petition Rules**, this Court can hear election appeals and related matters from the High Court, and therefore the appeal is properly before the Court.

Mr. Mokuu next turned to the other grounds of appeal. Regarding **rule 34 (6)** of the **Election Petition Rules**, counsel observed that the requirement to file a certified decree or a certified copy of the judgment was couched in mandatory terms, and that as the 1st and 2nd respondents had not included the decree or certified copy of the judgment in the record of appeal, and **rule 34** did not allow for the filing of a supplementary record of appeal, counsel asserted that the appeal was incompetent and ought to have been struck out.

On the High Court's decision to extend time for the 1st and 2nd respondents' to file their responses to the petition, counsel stated that the High Court wrongly interfered with the trial court's exercise of discretion to decline to extend time. In counsel's opinion, the decision ought not to have been faulted given the trial court's reasoning that the 1st and 2nd respondents had not satisfactorily explained the inordinate delay in the filing of their responses.

Finally, counsel submitted that the 1st respondent is not a registered voter, and therefore did not meet the requirements of **Article 193 (1) (a)** of the **Constitution** and **section 25 (1) (a)** of the **Elections Act**; that once Hamdia had demonstrated that Tumaini was not a registered voter, the evidentiary burden of proof shifted to the IEBC to show that she was registered voter. It was asserted that the High Court fell into error when it failed to appreciate that, with the production evidence demonstrating that Tumaini was not a registered voter, the evidentiary burden shifted to the respondents.

In response to the grounds of appeal, Mr. Ngome took issue with the appellant's Notice of Appeal in this Court, and submitted that the Court of Appeal Election Petition Rules provided a format for the Notice of Appeal, the prerequisites of which, the appellant had not complied with, which rendered the appeal incompetent.

With respect to the alleged incompetence of the High Court record of the appeal, counsel argued that the failure to include a copy of either the judgment and decree was not fatal as **rule 34** of the **Elections Rules** merely makes reference to a 'decision'. It was also argued that, **rules 4** and **5** of the same rules made provision for the overriding objective of expeditious and timely disposal of election disputes, and therefore this shortcoming was curable by **Article 159** of the **Constitution**.

Turning to the complaint that the High Court ought not to have interfered with the trial court's discretion to decline to extend the time for filing of their responses to the petition, counsel submitted that the High Court properly exercised its discretion to admit the responses that were struck out; that the High Court rightly found that the delay of 31 days and 38 days, respectively was not inordinate and was adequately explained, and that in any event, the trial had yet to commence so that no prejudice would be visited on the appellant.

On the question of whether the appellant had proved that the 1st respondent was not a registered voter, counsel complained that the appellant had filed a supporting affidavit attaching a screen shot of a short text message after the 1st and 2nd respondents' responses were struck out, and that they were not afforded an opportunity to respond to it. But this notwithstanding, it was the 1st respondent's case that the evidence produced did not at any time shift the evidentiary burden of proof to the respondents.

A final complaint was that, the trial court had issued adverse orders against a person who was not a party to the proceedings, and erred by directing the IEBC to gazette the name of the unlisted party. See - ***Linnet Kemunto Nyakeriga & Another vs Ben Njoroge & 2 Others [2014] eKLR*** and ***Moses Mwicigi & 14 others vs Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR***.

On his part, **Dr. Alutalala**, learned counsel for the ANC, submitted that the officials of the ANC had committed fundamental errors of law and fact in sending the name of Tumaini as the party's nominee since Tumaini was not and had never been a registered voter, and neither was she a registered member of ANC. Counsel apologized to the Court for the late disclosure. Consequently, the ANC associated itself with the appellant's submissions.

Mr. Magero, learned counsel for the IEBC, informed us that the IEBC had no position to take in respect of this appeal, and would leave the matter for the determination of the Court.

We have considered the pleadings, and the parties' submissions, and are of the view that the issues that fall for our determination are;

- i. whether we have jurisdiction to determine this appeal;
- ii. whether the High Court's record of appeal was incompetent and ought to have been struck out;
- iii. whether the High Court wrongly interfered with the trial court's exercise of discretion to strike out the 1st and 2nd respondents pleadings; and

iv. whether the appellant discharged the burden of proof to the required standard that the 1st respondent was not a registered voter.

Before delving into the merits of the appeal, it is imperative, at the outset, that we begin by addressing of the question of whether we have jurisdiction to determine this appeal. It is to be appreciated that being a jurisdictional question, it could well dispose of the entire appeal.

The respondents' case is that by dint of **Article 164 (3)** of the **Constitution, section 85 A** of the **Elections Act**, and **rule 4** of the **Court of Appeal Election Petition Rules**, this Court has no jurisdiction to determine election appeals from the Magistrates' court.

On their part, the appellant's argue that when **Article 164 (3) (a)** and **(b)** are read together, this Court has wide jurisdiction to determine all appeals from all courts, including those election disputes emanating from the Magistrates' courts.

Since the promulgation of the 2010 Constitution that established the County Assemblies, concern over the existence of the many levels of elections disputes has given rise to significant discourse. In the more recent case of **Wilson Ong'ele Ochola vs Orange Democratic Movement and 3 Others, Civil Appeal No 271 of 2017**, which involved a nomination dispute for the office of Member of a County Assembly, this Court described as "untenable" the multi-level of hearings and appeals established by **section 41 (2)** of the **Political Parties Act** which allowed for appeals from the Political Parties Disputes

Tribunal (PPDT) all the way to the Supreme Court. The Court took the view that amongst other challenges, the provisions did not take into account the timelines prescribed in the Constitution and the Elections Act for the expeditious resolution of election petitions.

The same disquiet also resonates with the concern over multi level election petition appeals filed by members of the county assembly in the Magistrates' courts, and which seek to have appeals determined by the High Court, the Court of Appeal, and the Supreme Court. But in these cases, it cannot be gainsaid that whether a matter is appealable or not turns on whether the court has the requisite mandate or jurisdiction donated to it by either the Constitution or the law to entertain the matter.

As observed by the Supreme Court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited, SC. App. No. 2 of 2011**;

"An appeal is granted in specific terms by the Constitution or a statute. The scope of appellate jurisdiction is clearly delimited by the legal source from which it derives its existence. A court of law cannot assume appellate jurisdiction where none has been specifically granted by the Constitution or statute."

The Court further stated that;

"A court's jurisdiction flows from either the Constitution or legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

Given these strictures, it becomes incumbent upon us to interrogate the provisions of the Constitution, the Elections Act and related rules and regulations to determine whether or not we have jurisdiction to entertain this appeal.

The appeal before us concerns an election dispute which arose after the 8th August 2017 General Election, where the ANC having garnered two seats in the Tana River County Assembly was entitled to elect by way of nomination 2 candidates from its party list. Tumaini was elected by nomination to one of the two seats. Hamdia, being displeased with Tumaini's nomination, filed an election petition in the Magistrates' court which nullified Tumaini's election. Tumaini was aggrieved by the Election court's decision and filed an appeal in the High Court, which reinstated her election to the County Assembly. Dissatisfied with that decision, Hamdia now seeks to have this Court to reverse that decision.

Beginning with the electoral provisions as set out in the Constitution, **Article 87 (1)** provides that Parliament shall enact legislation to establish mechanisms for the timely settling of electoral disputes.

Article 105 further states that;

"The High Court shall hear and determine any question whether:-

a. a person has been validly elected as a member of parliament; or

b. the seat of a member has become vacant.

2. A question under clause (1) shall be heard and determined within six months of the date of lodging the petition.

3. Parliament shall enact legislation to give full effect to this Article."

Pursuant to **Articles 87 and 105**, Parliament enacted the Elections Act specifying, various provisions relating to, inter alia resolution of election disputes. Of relevance are **sections 75 and 85 A** of the **Elections Act** which set out the mandates of the Magistrates' courts, the High Court and the Court of Appeal in the resolution of elections disputes.

Section 75 (1A) of the **Elections Act** provides that;

“A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.”

Under subsection (2), a question under subsection (1) would *“...be heard and determined within six months of the date of lodging the petition.”*

With respect to appeals from the decisions of the Magistrate's court, **Section 75 (4)** provides;

“An appeal under subsection 1 (A) shall lie to the High Court on matters of law only and shall be -

a. filed within thirty days of the decision of the Magistrates' Court, and

b. heard and determined within six months from the date of filing of the appeal.”

Rule 35 of the **Elections (Parliamentary and County Elections) Petition Rules 2017** sets out a procedure by which appeals from the Magistrates' courts were to be filed in the High Court. It provides that;

“(1) An appeal from the Magistrates Court under section 75 of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as the petition.

6. The appellant shall, within twenty one days, upon filing the memorandum of appeal file a record of appeal which shall contain the following documents—

a. memorandum of appeal;

b. pleadings;

c. typed and certified copies of the proceedings;

d. all affidavit, evidence, and documents put in evidence before the magistrate; and

e. signed and certified copy of the judgment appealed from and a certified copy of the decree.

10. The High Court may confirm, vary or reverse the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court, exercising original jurisdiction.”

As such, clear and comprehensive provisions were enacted for filing of appeals from the Magistrates' courts to the High Court, which provisions also outline the procedure for filing such appeals, by detailing the form and content of the memorandum and record of appeal, the period within which it was to be filed, the fees payable, and the type of orders that the court may render. Unlike the High Court, no mention is made in the Act of second or further appeals from the High Court to this Court.

In the case of **Isaac Oerri Abiri vs Samwel Nyang'au Nyanchama & 2 Others [2014] eKLR**, this Court succinctly observed;

“...there is no mention of a second or third appeal from the decision of the High Court under Section 75 (4) of the Act. In our view, the omission of a second or further appeal from the decision of the High Court under the said section is neither inadvertent nor an error but deliberate. The interpretation we ascribe to the omission is that the legislature intended that there should be no further appeals from the decision of the High Court on appeal from the determination of an election petition on a question of the validity of the election of a member of a county assembly. In our view, if at all it was the intention of Parliament to involve the Court of Appeal in determination of appeals from the High Court on appeals from the decision of the Resident Magistrate's Court, nothing would have been easier than to state that a party aggrieved by a determination of an appeal by the High Court from the Magistrates' Court, may prefer a second appeal to the Court of Appeal. In our view, the legislature clearly intended to confine jurisdiction to determine electoral disputes involving membership of a county assembly to the Resident Magistrates' Court with one chance of appeal to the High Court on matters of law only.”

So that, while **section 75 (4)** of the **Elections Act** and the ensuing provisions specify that appeals may lie to the High Court from the Magistrates' court, and set out a procedure for this purpose, nothing is said of election petition appeals to the Court of Appeal. Without such provisions, the omission would suggest, that it was always envisaged that appeals of members of the county assemblies would go from the Magistrates' court to the High Court and no further.

But that is not all. When the above provisions are analysed alongside the corresponding mandate of the Court of Appeal, it would also seem that election appeals by members of the county assembly to this Court were neither contemplated nor permitted. We say this because, the Constitution, the Elections Act and the Election Petition Rules specifically delineate the nature of election appeals that are eligible to be heard and determined by this Court, and disputes for members of the county assemblies are distinctly absent.

Article 164 (3) of the *Constitution*, is the Court of Appeal's overarching jurisdictional provision. It is from this provision that this Court derives its authority to determine appeals in general. It stipulates that;

“The Court of Appeal has jurisdiction to hear appeals from—

a. the High Court; and

b. any other court or tribunal as prescribed by an Act of Parliament”.

The provision empowers the Court of Appeal to determine two branches of appeals. On the one hand, those that emanate directly from the High Court and on the other, those that arise from any other court or tribunal, “*as prescribed by Parliament*”.

As read together with sub-article (a), **section 85 A** of the *Elections Act* is the provision that deals with election appeals to the Court of Appeal from the High Court and specifies that;

“An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governors shall lie to the Court of Appeal on matters of law only and shall be -

a. filed within thirty days of the decision of the High Court;

and

b. heard and determined within six months of the filing of the appeal.” (*emphasis ours*)

Pursuant to this, **rule 4** of the recently enacted **Court of Appeal (Election Petition) Rules 2017** stipulates that;

“(1) These Rules apply to the conduct of appeals from the High Court acting in its original jurisdiction in election petitions and the matters related thereto.

2. Where there is no applicable provision in these Rules, the provisions of the Court of Appeal Rules, 2010 relating to civil appeals in so far as they are not inconsistent with these Rules, shall apply to an election petition appeal. (*emphasis ours*).

In essence, **section 85 A**, and the recently enacted rules, which are expressed in mandatory terms, are specific on the nature of appeals that can be entertained by this Court. In summary, they provide that appeals shall lie to this Court only where (i) the dispute concerns membership of the National Assembly, Senate or the office of county governors; (ii) the High Court acting in its original jurisdiction; and (iii) the appeal is in respect of matters of law only. Such appeals must heard and determined within six months of the filing of the appeal. Because there was no intention to stretch electoral disputes from the magistrates' courts beyond the High there is no similar time limits for the hearing of such appeals.

In the **Owners of the Motor Vessel “Lilian S” vs Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA concisely addressed the limits or nature a court's jurisdiction thus;

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics.”(*emphasis ours*)

When the above parameters are enlisted to delimit the scope of **section 85 A**, what becomes clear is that the provision specifically identifies members of National Assembly, Senate and the office of county governors as the electoral positions for which appeals can be preferred to this Court. Conspicuously, missing are those of members of the county assemblies. Appeals to this Court are therefore effectively limited to the election petitions involving members of the National Assembly, Senate and county governors. And, if it was the intention of Parliament to include them amongst the elective positions specified, then nothing would have been easier than for Parliament to have expressly so provided. Consequently, the jurisdiction of appeals having been definitively limited to the elective positions specified by **section 85 A**, to go beyond these and entertain appeals of members of county assemblies would be to act in total disregard and in excess of the statutorily imposed jurisdiction.

Additionally, the Court of Appeal Election Rules, “...*apply to the conduct of appeals from the High Court acting in its original jurisdiction in election petitions and the matters related thereto*”. The suggestion being that if the election petition did not originate in the High Court, then these Rules would be inapplicable, and there would be no Rules governing election petitions from the Magistrates' courts.

Next, we consider the other branch of election appeals under sub-article (b) of **Article 164 (3)**. Pursuant to this provision, Parliament enacted **section 41 (2)** of the **Political Parties Disputes Tribunal Act** to address appeals arising out of other courts and tribunals which specifies that;

“An Appeal shall lie from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.”

The provision therefore allows for appeals from the PPDT, to be determined by the High Court, and thereafter by the Court of Appeal and then the Supreme Court. We have already alluded to the reservations expressed regarding this provision.

In the case of **Samuel Omondi Okumu vs Joshua Okumu Nyabolah [2017] eKLR** this Court explained;

“An examination of these provisions make it clear that in the context of election party dispute resolution, the appellate jurisdiction of this Court is not the general appellate power of the Court to hear appeals from the High Court as provided under Article 164(3)(a) of the Constitution, but the specific appellate power under Article 164(3)(b) as set out under section 41(2) of the Political Party Act. In this case, the origin of the dispute was the party primaries carried out by the ODM. Therefore this Court’s appellate jurisdiction must be in compliance with section 41 and 42 of the Political Parties Act, which means that the appeal must originate from the PPDT to the High Court and then to this Court as a second appeal on issues of law only.”

In other words, under **Article 164 (3) (b)** as read with **section 41 (2)** of the **Political Parties Act**, this Court is empowered to hear electoral party appeals that originate from the PPDT.

Bearing the foregoing electoral laws in mind, the question that we must answer is whether this Court has jurisdiction to entertain this appeal.

It is not in dispute that this appeal is concerned with the election by nomination of a member of the county assembly. It is also not in dispute that it arises from an appeal from the High Court against a decision of the magistrates’ court in an election petition, invoking the High Court’s appellate jurisdiction. And in view of it having originated in the magistrates court, it was not a matter that was before either the Political Parties Disputes Tribunal, or the IEBC’s disputes tribunal, and therefore the question of it being an appeal allowed by **section 41 (2)** of the **Elections Act** does not arise.

Deferring to the extant laid down criteria that specifies the nature of appeals to be heard by this Court, since the appeal was not in respect of a member of the National Assembly, Senate or the office of county governors, and it did not invoke the powers of the High Court acting in its original rather than its appellate jurisdiction, we find that the appeal has failed to meet the criteria necessary for election petition appeals to be determined by this Court.

In sum, we lack jurisdiction to hear and determine the appeal, and so must unreservedly down our tools, and decline to determine it. We hereby dismiss the appeal with costs to the 1st, 2nd and 3rd respondents.

It is so ordered.

Dated and delivered at Nairobi this 21st day of September, 2018.

W. OUKO (P)

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR