



IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, JA (IN CHAMBERS))

CIVIL APPLICATION NO. 104 OF 2018 (UR 66/2018)

BETWEEN

TOMITO ALEX TAMPUSHI.....APPLICANT

AND

PATRICK SOSIO LEKAKENY.....1ST RESPONDENT

MACHARIA OMBOGO ELIJAH.....2ND RESPONDENT

GEORGE OKUMU ADERA.....3RD RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....4TH RESPONDENT

(An appeal arising from the Judgment of the High Court of Kenya

at Narok (J. K. Bwonwongo, J) dated 31st May, 2018

in

Civil Appeal No. 1 of 2018)

RULING

The application filed herein on 14th August, 2018, invokes *Regulations 5 and 17 of the Court of Appeal (Election Petition) Rules* to seek the following substantive orders:

"2. THAT this honourable court be pleased to extend the time upon which the Applicant/Appellant can file the Notice of Appeal and Record of Appeal respectively.

3. THAT the Record of appeal and Notice of appeal filed herein be admitted out of time and be deemed as properly filed by this honourable court."

The applicant explains that he was late in filing the notice of appeal and the appeal itself due to bereavement of counsel on record, and because of lack of funds for security deposit.

The application is, however, opposed by the respondents on two planes; firstly, through a notice of preliminary objection (**PO**) filed by the 1st respondent asserting that this Court lacks the jurisdiction to entertain and/or determine the intended appeal and it would be futile to extend time for filing any. Indeed it is disclosed that the main appeal has already been filed but it is contended that it is incurably defective, bad in law and null and void *ab initio* for want of jurisdiction. There is no record of the appeal before me. Secondly, the application is opposed on the merits, in that the delay was inexcusable since a notice of appeal was a simple document which could have been filed in time, the

bereavement of counsel notwithstanding; and secondly, because lack of funds is not a good reason for delaying the filing of an election petition appeal.

Before I examine the merits of the application, I must deal with the issue of jurisdiction, for the simple reason that if none exists, then I will have to down my tools. See *The Owners of Motor Vessel Lilian "S" vs Caltex Oil Kenya Ltd [1989] KLR 1*. The Supreme Court in the case of *Macharia and Another vs Kenya Commercial Bank Ltd & 2 Others [Civil Appl. No. 2 of 2011] (UR)*, underscored the primacy of jurisdiction as follows:-

"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."

How did the matter end up before me?

The applicant was a candidate in the elections for Member of the County Assembly (MCA) in Shakoe Ward of Narok County, on 8th August, 2017. At the end of the day, however, the 1st respondent was announced as the winner of that election but the applicant challenged it before the Principal Magistrates Court, Kilgoris, in *Petition No. 3 of 2017*. The Senior Resident Magistrate (D. K. Matutu, Esq.) who heard the petition was satisfied that it was meritorious and therefore nullified the election of the 1st respondent on 18th January, 2018 and ordered a fresh election for the Ward. The 1st respondent was aggrieved by that decision and filed an appeal in the High Court (Bwonwonga, J.) sitting in Narok, in *Petition Appeal No. 1 of 2018*. On 31st May, 2018, the High Court delivered its judgment allowing the appeal and reversing the decision of the Senior Resident Magistrate. The 1st respondent was once again declared the winner.

That perhaps should have been the end of the matter and indeed it seemed so since no one challenged the decision. But on 12th June, 2018, a notice of appeal was filed on behalf of the applicant intending to challenge the decision of the High Court. If the Election Petition Rules applied (*Rule 6*), that notice would have been out of time by five days. The rules would also have required the filing of the appeal within 30 days of the High Court judgment, that is, on or before 30th June, 2018. However, the appeal that is intended to be validated was filed on 14th August, 2018, the same day the motion before me was filed.

Adverting now to the jurisdictional issue, learned counsel for the applicant, Mr. Leina Morintat, submitted that this Court has a wide jurisdiction under *Article 164 (3)* of the Constitution to hear all appeals from the High Court. He drew a parallel with the reasoning of the Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR* where it stated:-

"[37] In light of the foregoing, the test that remains, to evaluate the jurisdictional standing of this Court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the Superior Courts and has progressed through the normal appellate mechanism so as to reach this Court by way of an appeal, as contemplated under Article 163 (4) (a) of the Constitution. Indeed, ordinarily, in our view, a question regarding the interpretation or application of the Constitution may arise from a multiplicity of factors and interrelationships in the various facets of the law. Consequently, the Constitution should be interpreted broadly and liberally, so as to capture the principles and values embodied in it."

In counsel's view, that construction was forward looking and so, this Court ought to broadly and liberally construe *Article 164 (3)* in similar manner, and assume jurisdiction.

On the other hand, learned counsel for the 1st respondent, Mr. O. M. Otieno, emphasized that the right of appeal is a creation of the Constitution, the Elections Act and Regulations thereunder. The court cannot arrogate itself appellate jurisdiction where none is expressly spelt out. In his view, the application and the intended appeal are contrary to the mandatory provisions of *Article 164 (3)* of the Constitution, *sections 75 (1) (A), (4) and 85 A* of the Elections Act. He cited the decision of this Court which declared that it had no jurisdiction in a second appeal arising from elections of MCAs in *Isaac Oerri Abiri vs Samwel Nyang'au Nyanchama & 2 Others [2014] eKLR*.

In this submission, counsel found support from learned counsel for the 2nd and 4th respondents, Mr. Apiemi Morara. He filed what he termed "grounds of objection" to the application, asserting, *inter alia*, that the court had no jurisdiction to hear it. He also cited the cases of *Twaher Abdulkarim Mohamed vs Mwathethe Adamson Kadenge & 2 Others [2015] eKLR* and *Hamdia Yaroi Sheikh Nuri vs Faith Tumaini Kombe & 2 Others [2018] eKLR* both of which sustained objections raised on the jurisdiction of this Court in second appeals.

I have considered all the submissions and the authorities cited by counsel. In the end, I have come to the conclusion that the issue of jurisdiction of this Court in second appeals from MCA petitions is now virtually settled. The court has no jurisdiction.

The *Abiri case (supra)* arose from the MCA elections that took place in the year 2013. But the provisions of the law were still the same, and the court construed sections 74, 75 and 85 of the Elections Act as follows:-

"Concerning election disputes of members of a county assembly, Section 75 (1A) provides as follows:-

"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."

And such question "shall be heard and determined within six months of the date of lodging the petition."

With respect to appeals from such determination, section 75 (4) provides:-

"(4) 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."

It will be observed that 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 Magistrate's 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 Magistrate's Court with one chance of appeal to the High Court on matters of law only.

JURISDICTION OF THE COURT OF APPEAL

Appeals to this Court in electoral disputes are governed by section 85 A of the Act which reads:-

"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."

Second Appeals from the determinations of electoral disputes by the Resident Magistrate's Court are not mentioned at all."

More recently (21st September, 2018) in the *Hamdia Yaroi Sheikh Nuri case (supra)* this Court followed the *Abiri case* after interrogating the provisions of the Constitution, the Elections Act and related rules and regulations to determine whether or not the Court had jurisdiction to entertain a second appeal challenging the election by nomination of an MCA in Tana River County, in the 2017 elections. It reasoned as follows:-

"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.

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.**

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.....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 be 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 Court there is no similar time limits for the hearing of such appeals.”

With respect, I need not re-invent the wheel. I fully defer to the reasoning by the two different benches of this Court and find that this Court has no jurisdiction to entertain second appeals in MCA matters. It would make no sense therefore, and would be futile, to consider the merits of the application before me. The exercise of judicial discretion must accord with the law. Accordingly, I must down my tools and now do so.

The application is struck out with costs to the 1st, 2nd and 4th respondents.

Dated and delivered at Nairobi this 19th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR