



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJA.)

CIVIL APPEAL NO. 25 OF 2014 (ELECTION PETITION)

BETWEEN

ISAAC OERRI ABIRI APPELLANT

AND

SAMWEL NYANG'AU NYANCHAMA 1ST RESPONDENT

JUSTUS NALIAKHO, THE RETURNING OFFICE

NORTH MUGIRANGO CONSTITUTENCY 2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 3RD RESPONDENT

(An Appeal against the judgment and Decree delivered at High Court of Kenya at Kisii

(Lady Justice Sitati) dated 13th day of March, 2014

HCC.A. No. 128 of 2013

RULING

BACKGROUND

1. On the 4th day of March, 2013 Kenya successfully went through a general election for President and his deputy, Members of Parliament, County Governors, and County Representatives. The exercise was conducted by the 3rd respondent, the Independent Electoral and Boundaries Commission, which engaged *Justus Naliakho* (“2nd respondent”) as the Returning officer for North Mugirango constituency. *Isaac Oerri Abiri* (“the appellant”) and *Samwel Nyanga'au Nyanchama*, (“the 1st respondent”) participated in the election. They both contested the Itibo Ward seat in the Nyamira County Assembly (“the County Assembly”).
2. Following the election, the 2nd and 3rd respondents declared the 1st respondent as the duly elected

member of the County Assembly, Itibo Ward, having garnered 3130 votes. The appellant was the runner-up having garnered 3043 votes.

3. The appellant challenged those results in Election Petition Number 3 of 2013 at the Chief Magistrate's Court at Nyamira. After a full hearing, the learned magistrate (**J.N. Njagi, Principal Magistrate**) declared that the 1st respondent was validly elected member of the Nyamira County Assembly for Itibo Ward and dismissed the appellant's petition.

4. The appellant was aggrieved and lodged **Civil Appeal No. 128 of 2013** at Kisii High Court which appeal was heard by **R.N. Sitati, J.** The learned Judge, after hearing the appeal, concluded that the same had no merit and dismissed it with costs.

5. The appellant was still aggrieved by the dismissal of his appeal and lodged the appeal before us premised upon some eleven (11) grounds. Those grounds challenge the learned Judge's findings of law and fact.

PRELIMINARY OBJECTION

6. When the appeal first came up for hearing on 5th June, 2014, counsel for the 1st respondent, **Mr. G.J. M. Masese**, raised a preliminary objection as to the jurisdiction of this Court to entertain the appeal. We allowed counsel to file written submissions on the Preliminary objection which submissions were duly filed. The preliminary objection was then canvassed before us on 8th October, 2014. As the objection challenged our jurisdiction to entertain the appeal, we had to consider it first as without jurisdiction we must down tools and make no further step in the appeal. This principle was crystallized in the often cited case of **The Owners of Motor Vessel Lilian "S" -Vs- Caltex Oil Kenya Ltd [1989] KLR 1.** At page 14, the Court said:-

"When a court has no jurisdiction there would be no basis for a confirmation of proceedings pending the evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

SUBMISSIONS ON BEHALF OF RESPONDENTS

7. Mr. Masese briefly addressed us on the Preliminary Objection. He submitted that this Court has no inherent jurisdiction. Its jurisdiction must be donated by law. That, according to counsel, was the position under the retired constitution and remains so under the Constitution of Kenya, 2010. With particular reference to the matter before us, learned counsel stated that the jurisdiction of this Court is derived from the Constitution, the Elections Act (**"the Act"**) and the Rules made thereunder.

8. Substantiating his argument, learned counsel referred us to **Section 85 A** of the Act which deals with appeals to this court. In counsel's view, those provisions do not include appeals to this court from the High Court in its appellate jurisdiction. Learned counsel placed reliance upon two decisions of this court in **Samwel Kamau Macharia -Vs Kenya Commercial Bank & 2 others (S.CC Appl. No. 2 of 2011)** and **Benjamin Ongunyo Andama -Vs- Benjamin Andola Andayi & 2 Others (CAPPL.No.24 of 2011)**.

9. The second point raised by Mr. Masese but which was not urged was that this appeal was filed outside the period appointed by the Act and to that extent is incompetent. Counsel made that submission because, in his view, the appeal was filed outside thirty (30) days provided by the Act.

10 Mr. Odhiambo, learned counsel for the 2nd and 3rd respondents, associated himself with the submissions made by learned counsel for the 1st respondent. In his written submissions filed on behalf of his clients, learned counsel reiterated that no authority had been given to this Court by any statute or the Constitution to entertain appeals from decisions of the High Court in its appellate jurisdiction concerning membership of a County Assembly.

RESPONSE TO THE PRELIMINARY OBJECTION

11. **Mr. Orina**, learned counsel for the appellant, in responding to the Preliminary Objection, submitted that **Section 85 A** of the Act does not apply to this appeal. In his view, this appeal is competent by virtue of **Section 75 (4) of the Act** and **Article 164** of the Constitution which donate jurisdiction to this Court to hear appeals from the High Court. Counsel sought to distinguish the cases cited by the respondents on the ground that those cases related to appeals in interlocutory matters in election petitions which is not the case here.

12. It was also learned counsels' view that this court should follow the practice at the Supreme Court which has assumed jurisdiction to hear second appeals even though such jurisdiction is not expressly provided for in the Constitution or other legislation. In this regard, learned counsel referred to such cases as **Jasbir Singh Rai and 3 Others -Vs- Tarlochan Singh Rai and 4 Others [Sup. Ct Petition No. 7 of 2012] (UR)** and **Hon. Lemanken Aramat -Vs- Harun Meitamei Lempaka & 2 Others sup ct petition No. 5 of 2014] (UR)**.

13. Counsel concluded that at any rate the Preliminary Objection was incompetent as it was raised outside the period provided in **Rule 84** of this Court's Rules.

ANALYSIS

14. We commence our analysis of the preliminary objection on the issue as to whether the objection was raised too late in breach of the provisions of **Rule 84** of this Court's Rules. The Rule reads:-

“ 84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be”.

15. The short answer to the objection made by counsel for the appellant with regard to the time the objection has been raised, in our view, is that the above provisions do not take away the Court's discretion to allow arguments on the preliminary objection challenging the jurisdiction of this Court to hear the appeal. All the authorities relied upon by both counsel are unanimous that without jurisdiction we must down tools and take no further step in the matter. The precedent setting case of **The Owners of Motor Vessel “Lillian S” -Vs- Caltex Oil Kenya Limited (supra)** crystallized the principle at page 14: as cited above. The decision in **“Lillian S”** has received the Supreme Court's approval in several decisions of that court. For instance in the case of **Hon. Lemanken Aramat -Vs- Harun Meitamei Lempaka & 2 Others [petition No. 5 of 2014] eKLR, Mohammed Ibrahim, SCJ**, in his dissenting opinion stated in paragraph (182) as follows:-

“ I refer to the recent findings in the Lisamula case [in] which this Court held that [at paragraph 125 – 126]:

' Further, having found these proceedings were a nullity, we hold that we have no jurisdiction. This court cannot entertain a matter that is null and void ab- initio as a court of law cannot legitimately consider an issue in which it has already declared that it has no jurisdiction. We have severally cited the dictum of Nyarangi, JA in the Owners of Motor Vessel “Lillian S” -Vs- Caltex Oil (Kenya Ltd [1989] KLR 1 that jurisdiction is everything and where a court of law holds that it has no jurisdiction, it should down tools. In the Mary Wambui case that was the legitimate route that this Court took once it found that the proceedings were a nullity and it had no jurisdiction. Such a pragmatic approach cannot be departed from in this matter. Consequently this Court's pen rests'.

Before that the apex Court had rendered itself as follows in its Advisory Opinion in RE: The Matter Of The Interim Independent Electoral Commission [2011] eKLR:

“[30] The Lillian 'S' case [supra] established that jurisdiction flows from the law, and the recipient – court is to apply the same, with any limitation empodied therein; such a court may not arrogate itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret intentions of Parliament, where the wording of the legislation is clear and their respective jurisdictions are donated by the Constitution.”

16. We can not therefore proceed to hear the appeal once the 1st respondent raised the issue of jurisdiction. We need to go over the hurdle raised by the Preliminary Objection which specifically challenges our jurisdiction to entertain an appeal from the High Court in its appellate jurisdiction on a dispute concerning the election of the 1st respondent as member of the County Assembly for Itibo Ward in Nyamira County.

The Supreme Court in the case of **Macharia and Another -Vs- Kenya Commercial Bank Ltd & 2 Others** [sup ct Civil Appl. No. 2 of 2011] (UR), held:-

“ 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 first and second 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.”

SOURCES OF LAW

In the matter before us the relevant sources of law are the Constitution, The Appellate Jurisdiction Act, the Elections Act and the rules made thereunder.

As we stated in the case of **Benjamin Ogunyo Andama -Vs- Benjamin Andola Andayi & 2 Others** [Civil Appl. No. 24 of 2013] (UR),

“Election Petitions form their own category and are neither controlled by Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither criminal nor civil in nature

They are a class of their own. Although Rule 35 of the Election Petition Rules to which we shall refer herein later says:-

“An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules,” still there are some Court of Appeal Rules which cannot be applied in the Election Petition matters. One glaring example is the time allowed for filing the appeal which if the Court of Appeal Rules were to be applied would be 60 days from the date of filing the Notice of Appeal but which under the Elections Act is thirty days from the date of announcement of results.....

This is only one example. There are many other provisions of the Court of Appeal Rules which cannot be applied to Election Petition (Appeals).”

And in **Ferdinand Ndungu Waititu -Vs- Independent Electoral and Boundaries Commission**, (IEBC) and 9 others, in Civil Application No. 137 of 2013, this Court stated:-

“ The Elections Act and the Rules made thereunder constitute a complete code that govern the filing, prosecution and determination of election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Article 87(1) and 105 (2) and (3) of the Constitution is null and void. The Constitution is the

Supreme Law of the land and all statutes, Rules and Regulations must conform to the dictates of the Constitution.”

That is the position the Supreme Court took in the case of ***Gatiran Peter Munya -Vs- Dickson Mwenda Githinji & three others***, [sup. Ct Application No. 5 of 2014] (UR). In its own words:-

“ [63]

Election petitions, not surprisingly come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently.”

CONSTITUTIONAL PROVISIONS

17. We start with the Constitutional provisions on appeals to this Court. There is Article 164 (1) which is the provision establishing this Court. Then there is Sub - Article (3) of Article 164 which reads:-

“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 above are general provisions which relate to appeals to this Court. They set out the Constitutional foundation for this Court's jurisdiction which is to consider appeals from the High Court and from tribunals as by law prescribed. However, with respect to election disputes, Articles 87 and 105 of the Constitution are pertinent. The former reads as follows:-

“87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”

And Article 105 is in the following terms:-

“105 (1) 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.”

18. It is plain from a reading of the above provisions that, both Articles 87 (1) and 105 (3) of the Constitution empower Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes. It is also plain that whereas sub-Article 105 (3) empowers parliament to enact legislation to give full effect to the timely determination of electoral disputes on whether a member of parliament or the seat of a member has become vacant, Article 87 (1) empowers parliament to enact legislation to cover all electoral disputes

LEGISLATION PURSUANT TO ARTICLES 87 (1) AND 105 (3)

19. Pursuant to Articles 87 (1) and 105 (3) of the Constitution, Parliament enacted the Elections Act, 2011. The Rules Committee as constituted under the Civil Procedure Act was, by virtue of **Section 96** of the Elections Act, mandated to make rules generally to regulate the practice and procedure of the High

Court with respect to the filing and trial of election petitions. The same rules regulate the practice and procedure of the Resident Magistrate's Courts with respect to the filing and trial of election petitions thereat.

RELEVANT PROVISIONS OF THE ELECTIONS ACT

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

“74 (1A) 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.”

21. 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 the High Court on matters of law only.

JURISDICTION OF THE COURT OF APPEAL

22. Appeals to this Court in electoral disputes are governed by **Section 85A** of the Act which reads:-

“85A 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.

TIMELINESS AND TIMELINES FOR HEARING ELECTORAL DISPUTES

23. The underlying theme in the Constitution of Kenya, 2010 regarding resolution of electoral disputes at whatever level is timeliness. With regard to a dispute over the validity of the election of President, Article 140 (1) provides:-

“Within fourteen (14) days after the filing of a petition under clause (1) the Supreme Court shall hear and determine the petition.”

24. With regard to a petition challenging the election of a member of Parliament or where a question arises as to whether a seat of a member of Parliament has become vacant, the dispute, as mandated under Article 105 (2):

“shall be heard and determined within six months of the date of lodging the petition.”

25. With respect to electoral disputes concerning membership to a county assembly, **Section 75 (1A) and 4** prescribe the time such disputes should stay in our court system. The dispute should, be resolved within six months of the date of lodging the petition and if an appeal is preferred, the subject matter of the appeal is limited to matters of law only and the High Court should determine the appeal within six months from the date of filing the appeal.

26. Even the time within which a petition is to be lodged is limited to 28 days from the declaration of the election results by the Independent Electoral and Boundaries Commission (Art. 87 (2) of the Constitution).

27. To the argument that the Provisions of the Elections Act cannot limit the provisions of the Constitution and the Appellate jurisdiction Act, the Supreme Court provided the answer in the Munya case (supra).

At paragraph [63] and [64] the Court stated:-

“[63] Herein lies the nexus between Article 87 (1) of the Constitution and Section 85A of the Elections Act

[64] Section 85A of the Elections Act is therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants it says limit your appeals to the Court of Appeal to matters of law only.”

And at paragraph [77] the Court expressed itself as follows:-

“While we agree with learned counsel regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision we must hasten to add that the Elections Act and the Regulations thereunder are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court cannot disengage from the Constitution.”

It follows therefore that the provisions of **Section 75 (4)** of the Elections Act are sanctioned by the Constitution as they are provisions of the Act of Parliament which Act the Constitution commanded Parliament to enact to establish mechanisms for the timely settling of electoral disputes.

28. So, once a petition has been lodged the clock starts ticking and within six months of lodging the petition a resolution must be made. Where appeals in electoral disputes lawfully come before us the same must be heard and determined within six months of filing the same.

29. There are no provisions under the Elections Act for further appeals to this Court hence the dearth of provisions delineating the period within which an appeal should be filed and the period within which it should be heard and determined. The Supreme Court has pronounced itself clearly on the issue of timely resolution of electoral disputes. In the case of **Gatiran Peter Munya – Vs- Dickson Mwenda Githinji & 2 Others** [Sup. Ct Petition No. 2 (b) of 2014], it stated as follows at paragraphs 62 and 63.

“ [62]. The Constitutional sensitivity about 'timelines and timeliness,' was intended to redress this

aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.”

The legislation which prescribes the procedures and scope within which courts of law have to resolve electoral disputes is the Elections Act and the regulations made thereunder. That special legislation makes no provision for 2nd appeals from the determinations by Resident Magistrates on a question as to the validity of the election of a member of a county assembly.

30. To assume jurisdiction in the circumstances, as learned counsel for the appellant has invited us to do, would, in our view, defeat the spirit and intention of the people of Kenya who prescribed strict timelines in the resolution of electoral disputes. If all determinations of the High Court in its appellate jurisdiction were to end up at the apex level of our judicial hierarchy, there would be no possibility that electoral disputes would be resolved within the strict timelines set out in the Law of the land. See **Hon. Lemanken Aramat -Vs- Harun Meitamei Lempaka & 2 Others supra at paragraph 154** where the Court stated:-

“ Upon an extensive consideration of the factor of timeliness in the processing of electoral disputes under the Constitution and the statute law, this Court has come to the conclusion that the jurisdiction of the Election Court is linked to timeliness. Consequently the trial court lacked jurisdiction to entertain the electoral question remitted by the Court of Appeal, once its six month mandate had lapsed

31. It is our view that the decisions of the Supreme Court upon which learned counsel for the appellant placed reliance are clearly distinguishable from this appeal. The cases counsel cited, among others, are:

Odhiambo Kidero & 4 Others -Vs- Ferdinad Ndungu Waititu & 4 Others [2014] eKLR **Mary Wambui Munene -Vs- Peter Gichuki Kingara & 2 Others [2014] eKLR**, Gatirau **Peter Munya -Vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR**; **Zakaria Okoth Obado -Vs – Edward Akongo Oyugi & 2 other [2014] eKLR**.

32. We are of the view that those cases are distinguishable because the Supreme Court in all of them found a constitutional question which it sought to settle. In doing so, the apex Court was being loyal to the provisions of **Article 163 (4) (a)** of the Constitution which states:-

“ 163.

4. Appeals shall lie from the Court of Appeal to the Supreme Court – (a) as of right in any case involving the interpretation or application of this Constitution.”

The Supreme Court said in **Jasbir Singh Rai & two others -Vs- Torlochan Singh Rai & 4 others [Sup ct Pet. No. of 2012]**:

“ [81] It will be good practice for this Court to take every opportunity a matter affords it to pronounce itself on the interpretation of a constitutional issue that is argued either substantially or tangentially by parties before it.”

33. We have ourselves not pronounced, on our jurisdiction as liberally as the Supreme Court has and we, with respect, decline the invitation from counsel for the appellant to do so as our fidelity to the letter and spirit of the Law remains unshaken.

CONCLUSION

34. In the end, we must and do now uphold the Preliminary Objection raised by the 1st respondent. We find and hold that no appeal lies to this Court from the decision of the High Court in an appeal made under **section 75 (4)** of the Elections Act.

This appeal is incompetent and we order it struck out with costs to the respondents.

DATED AND DELIVERED AT KISUMU THIS 14TH DAY OF NOVEMBER ,2014

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL