



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Civil Appeal 38 of 2010**

BETWEEN

MWAKWERE CHIRAU ALI APPELLANT

AND

**AYUB JUMA MWAKESI 1ST RESPONDENT
(Original Petitioner)**

**INTERIM INDEPENDENT
ELECTORAL COMMISSION 2ND RESPONDENT**

(Appeal from the judgment and certificate of the High Court of Kenya at Mombasa (Ibrahim Mohamed, J.) dated 5th February, 2010

in

ELECTION PETITION NO. 1 OF 2008)

RULING OF THE COURT

This is an appeal from the judgment of the High Court of Kenya at Mombasa (Ibrahim, J.) dated 5th February, 2010 in the *Election Petition No. 1 of 2008*. When the appeal came up for hearing before us on 3rd May, 2010 the appellant **MWAKWERE CHIRAU ALI** was represented by Mr. Mwenesi, Mr. Buti and Mr. Mabeya while Mr. Balala appeared for the 1st respondent **AYUB JUMA MWAKESI** and Mr. Omwanza and Ms. Kadzo appeared for the 2nd respondent, **INTERIM INDEPENDENT ELECTORAL COMMISSION**. Counsel appearing for the parties agreed that the outcome to this appeal shall determine Civil Appeal No. 42 of 2010 which concerned the same issues. Hence the Court made the following order:-

“By consent the Court to hear Civil Appeal No. 38 of 2010, and the outcome thereof to determine Civil Appeal No. 42 of 2010, which concerns the same issues and parties.”

Before we could commence the hearing of the appeal, Mr. Balala raised a preliminary objection to the effect that this Court had no jurisdiction to hear appeals arising from the High Court on the question of validity of an election of a Member of Parliament. We decided to hear the preliminary objection before we could proceed with the appeal since it would serve no purpose to hear the appeal if, indeed, this Court has no jurisdiction to hear the appeal from the *Election*

Petition Court. This ruling, therefore, is in respect of the preliminary objection raised by Mr. Balala.

In his submission, Mr. Balala maintained that the decision of the High Court was final as there is no decree from the High Court but a certificate. He went on to argue that election petitions are proceedings of a special nature and that the right of appeal can only emanate from **section 44** of the Constitution. To buttress his submission, Mr. Balala relied on the decision of this Court in ***MATIBA V. MOI*** (2008) 1 KLR (EP).

On his part, Mr. Omwanza submitted that the decision in ***MATIBA V. MOI*** was overtaken by events by virtue of **Act No. 10 of 1997** which gave this Court jurisdiction to hear matters from Election Petition Courts.

In his submission Mr. Mabeya stated that the right of appeal to this Court was statutory and hence this appeal lies to this Court by virtue of the provisions of the National Assembly and Presidential Elections Act (*Cap. 7 of Laws of Kenya*). Mr. Mabeya further submitted that as *Act 7* of the Laws of Kenya has never been declared to be ultra vires the Constitution then, it follows that this Court has jurisdiction to hear appeals from the Election Petition Courts.

On this issue of jurisdiction, we must start with the establishment of this Court by the Constitution. **Section 64(1)** of the Constitution provides:-

“There shall be a Court of Appeal which shall be a superior court of record and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.”

In view of the foregoing, we agree with Mr. Balala’s submission that the right of appeal to this Court emanates from the Constitution. He however, sought to rely on **sections 44** and **45** of the Constitution but these sections have been either repealed or amended and in our view they are not relevant to the preliminary objection.

From the Constitution we must go to the relevant legislation governing the hearing and determination of election petitions. The relevant legislation is, of course, the ***National Assembly and Presidential Elections Act*** (*Cap. 7 Laws of Kenya*). **Section 2** of that Act defines election Court as follows:-

““election court” means the High Court in the exercise of the jurisdiction conferred upon it by section 44(1) of the Constitution.”

Hence when Ibrahim, J. embarked on hearing and determination of Election Petition No. 1 of 2008 he was doing so pursuant to **section 44(1)** of the Constitution.

Section 23 of the National Assembly and Presidential Elections Act sets out the procedure to be adopted by the election court. **Section 23(4), (5)** and **(6)** of that Act provides:-

“(4) Subject to subsection (5), an appeal shall lie to the Court of Appeal from any decision of an election court, whether the decision be interlocutory or final, within thirty days of the decision.

(5) An appeal from a petition under section 19(2) shall be heard by a bench of five judges of appeal.

(6) An appeal from a petition under this Act, shall be heard and determined on a priority basis.”

From the foregoing it is clear that an appeal lies to this Court from any decision of an election court, whether the decision be interlocutory or final. It is immaterial whether the decision gives rise to an order, decree, or certificate. The law has donated the power to hear appeals from an election Court. That answers Mr. Balala’s preliminary objection which was to the effect that this Court has no jurisdiction to hear appeals from an election court. As that was the main issue which was raised by Mr. Balala, we do not want to say more.

In view of the foregoing there can be no doubt that the preliminary objection raised by Mr. Balala lacks merit and we order that the same be dismissed with costs.

Dated and delivered at NAIROBI this 4th day of June, 2010.

S.E.O. BOSIRE

.....
JUDGE OF APPEAL

E.O. O’KUBASU

.....
JUDGE OF APPEAL

ALNASHIR VISRAM

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR