



REPUBLIC OF KENYA



KENYA LAW
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**Abote v Kawaka & 4 others (Petition 16 (E019) of 2022)
[2022] KESC 36 (KLR) (25 July 2022) (Ruling)**

Neutral citation: [2022] KESC 36 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION 16 (E019) OF 2022
PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ
JULY 25, 2022**

BETWEEN

OSCAR OLUOCH OUMA ABOTE APPLICANT

AND

ROSELINE AKOTH AWINO 1ST RESPONDENT

LOICE AKOTH KAWAKA 2ND RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 3RD RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 4TH
RESPONDENT**

RETURNING OFFICER NDHIWA CONSTITUENCY 5TH RESPONDENT

RULING

1. UPON perusing the Notice of Motion dated 18th July, 2022 and filed on 20th July, 2022, pursuant to Article 163(4) of the *Constitution*, Sections 3, 21 and 24 of the *Supreme Court Act* and all enabling provisions of the law for orders that:
 - i. This Application be and is hereby certified urgent and heard ex parte in the first instance and appropriate directions issued;
 - ii. The Honourable Court do on a matter of urgency set down this Application and the main petition {for hearing} on a priority and emergency basis;
 - iii. Due to the urgency and strict timelines in the electoral process, this Honourable Court do direct immediate hearing of the petition lodged herein by the petitioner;
 - iv. The Honourable Court do issue necessary directions to preserve the substratum of the petition including where necessary to stop the printing of ballot papers for Member of County



Assembly for South Kabuoch/Pala Ward pending the hearing and determination of the Petition;

- v. Any other or further orders of the court geared towards protecting the dignity and authority of the court; and
2. Upon reading the applicant's grounds on the face of the application and the applicant's supporting affidavit sworn on 18th July, 2022 wherein he deposes that, the Court of Appeal in its impugned judgment in Civil Appeal No. E168 of 2022 erred by allowing the 1st and 2nd Respondent's appeal and setting aside in entirety the High Court's judgment in Constitutional Petition No. 1 of 2022 and therefore created a legal crisis by allowing subordinate courts to ignore binding decisions of superior courts in interpreting the law and have the liberty to come up with their own conjured interpretations of the law that differs from prior interpretation made by superior courts; that the Court of Appeal erred in finding that the High Court erred in considering the holistic nature of elections; that the matter relates to the nomination and registration of candidates for the election slated for the 9th August, 2022 hence the need for the matter to be heard expeditiously; that the expeditious hearing and determination of the main petition will enable the applicant's right to access to justice to be actualized in a meaningful way and; that the matter in dispute relates to and affects the exercise of the free franchise of millions of Kenyans who have a right to choose a leader of their choice in a democratic free and fair election; and
3. Upon considering the written submissions by the applicant wherein it is submitted that the application is merited and that with the elections being days away, there is need for the appeal to be heard expeditiously as printing of ballot papers is underway in light of the upcoming elections, with time being of the essence hence the need to preserve the substratum of the petition including where necessary, the need to stop the printing of ballot papers for Member of County Assembly for South Kabuoch/Pala Ward pending determination of the appeal; and
4. Further Considering the 1st and 2nd respondent's amended preliminary objection and written submissions both dated and filed on 20th July, 2022 claiming that the applicant failed to file a Notice of Appeal, a jurisdictional pre-requisite citing *Patricia Cherotich Sawe v. Independent Electoral & Boundaries Commission & 4 Others* [2015] eKLR and *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR; that the petition fails to specify under what limb of Article 163(4) that he invokes this Court's jurisdiction, contending that this Court has held that a party invoking this Court's appellate jurisdiction must indicate which constitutional provision they seek to move the Court citing *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* [2018] eKLR as well as *Mike Mbuvi Sonko v Clerk County Assembly of Nairobi Supreme Court* Petition 11 (E008) of 2022 and that the applicant failed to appeal Political Parties Dispute Tribunal judgment dated 1st May, 2022 before the High Court and the Court of Appeal, hence appealing the Political Parties Disputes Tribunal before the Supreme Court for the first time ever, claiming that the *Supreme Court Act* does not confer jurisdiction for direct appeals from the Political Parties Disputes Tribunal to the Supreme Court citing the case of *Yusuf Gitau Abdalla v. Building Centre (K) Ltd & 4 Others* [2014] eKLR ; and
5. Also Noting the written submissions by the 4th and 5th respondents dated 21st July, 2022 opposing the application where they submit that this Court lacks jurisdiction to entertain the appeal citing the applicant's failure to specify which limb of Article 163(4) that he has invoked this Court's jurisdiction hence failing the threshold for jurisdiction test and rely on our finding in *National Rainbow Coalition Kenya (NARC Kenya) v. Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party)* (Petition 1 of 2021) [2022] KESC 6 (KLR) (Civ) (17 February 2022) (Judgment), *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2*



others [2018] eKLR and *Daniel Kimani Njibia v Francis Mwangi Kimani & another* [2015] eKLR on the need to invoke this Court's proper jurisdiction and thus terming the applicant's petition as incompetent and fatally defective; that the decision by the Political Parties Dispute Tribunal was not in issue before the High Court and Court of Appeal and submit that this Court again lacks jurisdiction under Article 163(4) and; that the appeal is not founded on any grounds of appeal as the Court of Appeal had failed to include reasons for its decision rendering the petition defective and incurable under Article 159 of the *Constitution*; and

6. Further Noting the written submissions by the applicant in response to the 1st and 2nd respondents' preliminary objection contending that the 1st and 2nd respondents were indeed served with a Notice of Appeal but invites the Court to consider that since the appeal involves an election matter, the applicant was constrained by time hence inviting the Court to be guided by the principles under Article 159 of the *Constitution* as well as pointing out that the appeal raises matters of public importance; and
7. Taking into account the nature of the dispute and the urgency surrounding the determination of election related disputes and the impending elections to be held on 9th August, 2022, the applicant having sought to contest as a member of a County Assembly, and further taking into account that the judgment by the Court of Appeal sought to be appealed against is a brief judgment made without any reasons, the decision having been rendered pursuant to Rule 34(7) of the *Court of Appeal Rules, 2022* and that the petition filed herein is not the subject of our determination under the application before us at this juncture, WE NOW OPINE as follows:
 - i. Before addressing the substantive prayers in the nature of conservatory relief, a challenge has been made by all the respondents to the Court's jurisdiction to determine the application and the petition. The present application is founded on Article 163(4) of the *Constitution*. The jurisdiction under Article 163(4) is two-fold; the appeal must either be of right under Article 163(4)(a) or filed following certification as one raising matters of general public importance under Article 163(4)(b).
 - ii. As already settled by this Court in *Suleiman Mwamloe Warrakah & 2 other v Mwamloe Tchappu Mbwana & 4 Others*, Petition No. 12 of 2018 [2018] eKLR and *Daniel Kimani v Francis Mwangi Kimani & Another*, SC Application No. 3 of 2014 [2015] eKLR, in seeking to invoke a court's jurisdiction, a litigant must invoke the relevant constitutional or statutory provisions. We have in that regard often stated that, it is not for this Court to speculate on jurisdiction and assign to each appeal a jurisdiction not specifically invoked by a party. An appellant should therefore in an appeal, specify such jurisdiction with clarity to enable both the Court and the parties opposing the appeal to understand and know what type of appeal is before them. As we stated in *Cordisons International (K) Limited v Chairman National Land Commission & 43 others*, SC Petition No. 14 of 2019; [2020] eKLR without such specificity, such an appeal is one for striking out.
 - iii. Furthermore, and in addition to the above, what is on record is a brief judgment without reasons from the Court of Appeal and as we recently held in *Jimi Richard Wanjigi v Wafula Chebukati & 2 others*, SC Application No.6 of 2022, an appeal must of necessity, be against the outcome of a case based on the reasons for such outcome. In this instant case just as was in *Jimi Wanjigi*, the reasons for the Court of Appeal judgment are still to be availed to this court. As we stated therein, which finding we do uphold, there is no basis upon which a petition, such as the present one, can be jurisprudentially determined in the absence of reasons for an impugned judgment thus rendering any hearing of an applicant's appeal, in the absence of the reasons for the Court of Appeal judgment, untenable.



- iv. From the foregoing, we are unable to consider or grant the conservatory relief sought pending the determination of the appeal.
8. Having therefore considered the Notice of Motion, Preliminary Objections plus responses thereto, we must Dismiss the Notice of Motion dated 18th July, 2022 and filed on 20th July, 2022.
9. We shall make no order as to costs.
10. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY, 2022

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE COURT PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

