



**Okal v Ojuok & 2 others (Election Petition (Application) 9 of 2019 & Application 33 of 2019 (Consolidated)) [2020] KESC 51 (KLR) (30 April 2020) (Ruling)**

*Peter Bodo Okal v Philemon Juma Ojuok & 2 others [2020] eKLR*

Neutral citation: [2020] KESC 51 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**ELECTION PETITION (APPLICATION) 9 OF 2019  
& APPLICATION 33 OF 2019 (CONSOLIDATED)**

**PM MWILU, DCJ & VP, DK MARAGA, CJ, MK  
IBRAHIM, SC WANJALA & N NDUNGU, SCJJ**

**APRIL 30, 2020**

**BETWEEN**

**PETER BODO OKAL ..... APPLICANT**

**AND**

**PHILEMON JUMA OJUOK ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**RETURNING OFFICER, NYAKACH CONSTITUENCY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for extension of time within which to file an appeal from the Ruling and Order of the Court of Appeal at Kisumu (E. M. Githinji, Hannah Okwengu & J. Mohammed, JJA) dated 14th February 2019 and Stay of execution of the Decree and Orders in Election Petition Appeal No. 39 of 2018)*

**RULING**

**A. Background**

1. The applicant and the 1<sup>st</sup> respondent, with other candidates, contested for the position of Member of County Assembly for Central Nyakach Ward of the Kisumu County Assembly. The 1<sup>st</sup> respondent garnered 3,300 while the applicant garnered 3,236 votes. The magistrate's court allowed the applicant's petition challenging that result but on appeal, the High Court reversed that decision and declared the 1<sup>st</sup> respondent the winner. On a further appeal, the respondents filed applications challenging the competence of that further appeal on the ground that no second appeal lies to the Court of Appeal



from a High Court decision concerning election of a Member of County Assembly. In its ruling dated February 14, 2019, the Court of Appeal allowed those applications and struck out the appeal. The applicant wishes to appeal to this Court against that decision.

### **B. The Applicant's Case**

2. By his application (No. 9 of 2019) dated and filed in this Court on March 28, 2019, the applicant seeks, *inter alia*, extension of time and leave to file a Petition of Appeal out of time. He seeks further leave to file a supplementary record of appeal. The application is premised on the grounds that the applicant filed his notice of appeal in time, that is on February 20, 2019 (within 14 days of the Court of Appeal decision), but he was not supplied with the entire typed proceedings in time.
3. By another application (No. 33 of 2019) dated November 10, 2019, the applicant seeks stay of execution of the decree and order of taxation in Kisumu Election Petition Appeal No. 19 of 2018. We will first consider application No. 9 of 2019.
4. The application (No. 9 of 2019) is supported by the applicant's affidavit sworn on March 28, 2019 in which he avers that after filing the notice of appeal on February 20, 2019, he changed advocates and appointed the firm of Ochieng Oginga & Co, Advocates on 11<sup>th</sup> March 2019 who wrote to the Court of Appeal on the same day requesting for a certified copy of the proceedings. On March 21, 2019, the Court of Appeal supplied them with only part of the proceedings. It failed to supply the orders, decree and some other documents hence the reason for failure to file the appeal in time.

### **C. The 1<sup>st</sup> Respondent's Response**

5. In response to the application, the 1<sup>st</sup> respondent filed a preliminary objection that the application does not meet the basic threshold set under article 163 (4)(b) of the Constitution and rule 24 of the Supreme Court Rules, 2012 and a replying affidavit as well as written submissions in both of which she contends that the applicant has not given a satisfactory explanation for the delay. On the delay, she relies on this Court's decision in Nicholas Kiptoo Arap Korir Sala v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR.

### **D. 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' Response**

6. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents relied on the replying affidavit sworn by George Jabando on 8<sup>th</sup> of April 2019 and written submissions filed on May 29, 2019. Besides failure to give a reasonable explanation for the delay, they contended that as section 75(4) of the Elections Act does not confer a right of appeal from the High Court to the Court of Appeal on an election petition challenging the validity of the election of a member of county assembly, no such right exists.

### **E. Determination**

7. Upon careful consideration of the application, the responses and submissions by counsel for the parties, it is clear that two issues arise for our determination:
  - (i) whether this Court has jurisdiction to entertain an appeal in this matter, and, (ii) whether the applicant has given a satisfactory explanation for the delay.
8. In our recent judgement in Hamdia Yaroi Shek Nuri v. Tumaini Kombe & 2 others. Pet No. 38 of 2018; [2019] eKLR, we held that "in the absence of an express statutory provision, no second appeal lies to the Court of Appeal, from the High Court, emanating from an election petition concerning the validity of the election of a member of county assembly." This being the legal position, it follows



that this Court has no jurisdiction to entertain an appeal in this matter. As such, we do not need to go into the merits of the application.

9. This determination renders consideration of application No. 33 of 2016 otiose. Consequently, we dismiss both applications and make the following final Orders:

- (a) The application (No. 9 of 2019) dated March 28, 2019 is hereby dismissed.
- (b) The application (No. 33 of 2019) dated November 10, 2019 is hereby dismissed.
- (c) The applicant to bear the costs of both applications.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL, 2020.**

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**D. K. MARAGA**

**CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT**

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**P. M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE- 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**

.....

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**

