



REPUBLIC OF KENYA



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Obino v Independent Electoral & Boundaries Commission & 2 others (Election Petition Appeal E015 of 2023) [2023] KECA 1263 (KLR) (24 October 2023) (Ruling)

Neutral citation: [2023] KECA 1263 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
ELECTION PETITION APPEAL E015 OF 2023
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
OCTOBER 24, 2023**

BETWEEN

CLAIRE MORAA OBINO APPELLANT

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

JUBILEE PARTY OF KENYA 2ND RESPONDENT

REDEMPTA VERA ONKUNDI MOTOA 3RD RESPONDENT

(Being an appeal from the judgment and decree of the High Court at Nyamira (J. Kamau, J.) dated 30th June, 2023 in ELECTION PETITION APPEAL NO. E002 OF 2023)

RULING

1. The Notice of Appeal before the Court is dated 30th June, 2023. It is expressed to have been filed under Rule 6 of the *Court of Appeal (Election Petitions) Rules, 2017*. It seeks to challenge the judgment of the High Court sitting in Kisii (J. Kamau, J.) dated 30th June, 2023 in Election Petition No E002 of 2023 on the following grounds: -
 - a. That the learned judge erred in law by concluding that the appellant is not a member of the 2nd respondent as required under section 3(2A) of the *Political Parties Act* No 12 of 2011 whereas she is and contrary to the provisions of Articles 4(9) and 4(10)(e) of *the Constitution*.
 - b. That the learned judge erred in law by making a finding that the election by nomination of the appellant did not comply with Article 90 of *the Constitution* of Kenya, 2010 and Sections 34 and 35 of the *Elections Act* No 24 of 2011 when it indeed complied.
2. Thus, the appellant sought the following orders: -



- a. That the judgment and decree delivered on 30th June, 2023, by Justice J. Kamau be set aside.
 - b. That the appeal be allowed.
 - c. That the Honourable Court do uphold the election by nomination and gazettelement of the appellant as a member of the County Assembly of Kisii in Kenya Gazette Notice dated 9th September, 2022 in volume CXXIV – No 186 as compliant with all applicable laws.
 - d. Costs of the appeal be borne by the respondents.
3. In its judgment, the High Court dismissed in its entirety an appeal filed against the decision of Honourable C.A. Ocharo, Senior Principal Magistrate dated 16th December, 2022 at the Kisii Chief Magistrate’s Court in Election Petition No E005 of 2022.
 4. At the Magistrate’s Court, the 3rd respondent herein, Redempta Vera Onkundi, was the petitioner while the appellant herein, Clare Moraa Obino, was the 3rd respondent. The Independent Electoral and Boundaries Commission (IEBC), the 1st respondent herein, was also the 1st respondent at the Magistrate’s Court while the Jubilee Party of Kenya was the 2nd respondent in both the Magistrate’s Court and here.
 5. In brief, the controversy ensued as follows. The 3rd respondent filed an election petition challenging the gazettelement of the appellant by the 1st respondent as the duly nominated candidate under the gender top up list for the 2nd respondent. The 3rd respondent’s case at the Magistrate’s Court was that she was a life member of the 2nd respondent and had gone through a public participation exercise designed by the 2nd respondent to determine its party list for nomination purposes for gender top up at the County Assembly. The 3rd respondent claimed that she had been listed at position 3 in the list. However, after the general elections, she was shocked to learn that the 2nd respondent had irregularly removed her from position 3 and, instead, replaced her name with that of the appellant. With the switch in positions, the 3rd respondent was placed at position 27 and, hence, missed nomination by a wide margin as the nomination slots available to the 2nd respondent were not enough.
 6. At the Magistrate’s Court, the 3rd respondent assailed the switching of her name with that of the appellant as irregular both because it went against the process designed by the 2nd respondent and, therefore, un-procedural, as well as because the appellant was not a member of the 2nd respondent – which is a legal requirement for nomination. Instead, the 3rd respondent claimed, the appellant was a life member of the Orange Democratic Movement (ODM) Party.
 7. At the conclusion of the trial, the election court found that the appellant had resigned as a member of the ODM Party but had not satisfied the requirements for joining the 2nd respondent as a member. The election court, therefore, concluded that it was irregular for the 2nd respondent to have submitted the appellant’s name for the Gender-Top Up nomination to the Kisii County Assembly. Consequently, the election court made a declaration that the gazettelement of the appellant in Kenya Gazette Number 10712, Volume CXXIV, No 186 dated 9th September, 2022 (“gender top up Gazette Notice”), as a nominated member of the Kisii County Assembly was invalid. It also ordered that a fresh list be prepared as per an earlier order of the Political Parties’ Dispute Tribunal. The PPDT order had been made before the formal nomination and gazettelement of the appellant as a member of the County Assembly.
 8. The appellant, being dissatisfied with the decision of the election court, preferred an appeal to the High Court. The High Court dismissed the entirety of that appeal as presenting no merit and ordered



the appellant to pay costs. It is the decision of that appeal at the High Court that is the subject of the present appeal.

9. When the matter first came up before us, counsel for the 1st and 3rd respondents indicated to us that they wished to raise jurisdictional issues. We directed the parties to file their submissions on the jurisdictional question and scheduled the oral highlighting of the submissions on 11th October, 2023. This was because we appreciated the need to make a determination on the jurisdictional issue right away as informed by the timeless words of Nyarangi, JA in In the *Owners of MV Lillian “S” V. Caltex Oil Kenya Ltd* [1989] KLR 1 at pg 14:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obligated to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. The 1st and 3rd respondents filed their submissions as did the appellant. The 1st and 3rd respondents took the view that this Court has no jurisdiction to entertain an appeal from the High Court emanating from an election of a Member of a County Assembly. The appellant took the opposite view. During the plenary hearing, Mr. Kiarie, learned counsel, appeared for the appellant while Mr. Juma and Mr. Ondieki, learned counsel, appeared for the 1st and 3rd respondents respectively. The 2nd respondent neither filed submissions nor appeared for the hearing. The singular issue canvased is whether this Court is clothed with jurisdiction to hear and determine the appeal filed.
11. For the position that this Court does not have jurisdiction, the 3rd respondent submitted that sections 75(4) and 85A of the *Elections Act* expressly provide that appeals regarding the election or nomination of members of the County Assembly terminate at the High Court. She argued that it was instructive that the County Assembly is not included under section 85A of the *Election Act*, as it was the intention of Parliament that the High Court was the last port of call on matters pertaining to elections to the County Assembly, as provided for under section 75(4) of the *Election Act*. The 3rd respondent submitted that, indeed, the Supreme Court has definitively ruled on the issue in *Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral & Boundaries Commission* [2019] eKLR, wherein the Supreme Court agreed with this Court that in the absence of an express statutory provision, no second appeal lies in the Court of Appeal from the High Court, on matters regarding the question of validity of the election of a member of the County Assembly.
12. The 3rd respondent contended that the adjudication of this matter ended at the High Court and litigation must come to an end, as this Court has no jurisdiction to adjudicate this matter. She submitted that the appeal is incompetent and should be struck out with costs.
13. The 1st respondent, only filed a list and bundle of authorities of cases decided. It did not file any submissions. The cases they filed for our perusal included: *Hamdia Yaroi Shek Nuri v Faith Tumaini Kombe, Amani National Congress & Independent Electoral & Boundaries Commission* [2019] eKLR; *Mohamed Ali Sheikh v Abdiwahab Sheikh Osman Hathe & 3 others* [2019] eKLR; and *Mohamed Ali Sheikh v Abdiwahab Sheikh & 4 others; Emmanuel Changawa Kombe (Interested Party)* [2018] eKLR. During the plenary hearing, Mr. Juma submitted in support of the position taken by the 3rd respondent on the question of jurisdiction.
14. On her part, while acknowledging the long line of cases by the Supreme Court and this Court taking the position that this Court does not have jurisdiction to entertain an appeal from the High Court



arising from an election of a member of a County Assembly by dint of Article 164(3) of *the Constitution* and sections 75(4) and 85A of the *Elections Court*, the appellant sought to show us, in her counsel's words, that the Supreme Court decision in *Hamdia Yaroi Shek Nuri Case* (*supra*) and the plethora of decisions by this Court both before and after the *Hamdia Yaroi Shek Nuri Case* (*supra*) did not firmly shut the door against all intending appeals, emanating from appeals from the High Court arising from an election or nomination of a member of a County Assembly. The door, her counsel argued, was left "slightly ajar."

15. How is the jurisdictional door "slightly ajar"? The appellant pursued two lines of argument in a bid to persuade us that the weight of cases which have unanimously interpreted Article 164(3) of *the Constitution* and sections 75(4) and 85A of the *Elections Court* to reach the conclusion that this Court has no jurisdiction to hear and determine second appeals on elections of members of County Assemblies still left room for an appellant such as her to approach this Court.
16. First, the appellant argued that this Court's jurisdiction is provided for in section 41(2) of the *Political Parties Act* No 11 of 2011, which allows aggrieved parties to appeal the decisions of the Political Parties Disputes Tribunal (PPDT) to the High Court on points of law and facts; and to appeal to both the Court of Appeal and the Supreme Court on points of law. Therefore, according to the appellant, this Court has jurisdiction to hear and determine the instant matter on points of law only.
17. To buttress her argument, the appellant relied on this Court's decision in *Kennedy Moki v Rachel Kaki Nyamai & 2 others* [2018] eKLR, and contended that the Court expounded on the questions in elections disputes that this Court could legitimately deal with. The appellant submitted that the Court was guided by the Supreme Court's decision in *Fredrick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, and drawing from it opined that, whether or not a candidate has been nominated is a question of fact, whereas the question whether the nomination itself and the process leading to the nomination is valid is a question of law. In this regard, the appellant argued that the record shows that the issue for determination in this instant matter is based on the validity of her nomination, and more so, whether or not due process was adhered to. It is her case that the dispute was first handled by the PPDT and then appealed to the High Court in accordance with Article 41 of the *Political Parties Act*, and now to this Court.
18. Additionally, the appellant argued that in *Kennedy Moki Case*, this Court further expounded that an election court is a court with special jurisdiction, that in instances in which there may be alternative procedures and mechanisms of solving a dispute; such as where *the Constitution* provides for two or three methods of resolving disputes, none can exclude the other. To this end, the appellant argued that this Court held that in such cases, the decision of the forum that has constitutional finality in resolving the dispute and cause of action prevails. Thus, in electoral disputes, it is the electoral law that applies and any electoral disputes must be resolved by way of an election petition and not through judicial review process. The appellant cited the dicta in *Kipkalya Kiprono Kones v The Republic & another Ex-parte Kimani Wanyoike & 4 others* [2006] eKLR, as well as the dicta in *Mwihia & another v Ayah & another* [2008] 1 KLR (EP) 450, wherein it was held that nominations to stand for elections are part of the election process and as such, they could only be challenged after elections by way of an election petition. Also cited was the decision in *Wamboko v Kibunguchi & another* [2008] 2 KLR 477, wherein it was held that an election court has jurisdiction to hear and determine a petition where one of the issues is nomination of a candidate – as nomination is a process of election. The appellant argues that these cases show that this Court has been variously persuaded that election is a process which includes nomination of candidates, and if a dispute arose as to the validity of a nomination certificate and eligibility to vie, an election court has jurisdiction to determine the validity



of the nomination certificate and the eligibility of the person bearing the certificate to vie. Therefore, the appellant submitted that this Court has the jurisdiction to hear and determine this matter.

19. In our view this argument by the appellant is misguided on two points which can be easily stated. First of all, the dispute herein is not a dispute that began at the PPDT and was then appealed to the High Court and ultimately reached here on second appeal. As the very cases the appellant has cited have shown, once a person has been nominated and gazetted, one can only challenge their nomination through a duly gazetted election court. Such an appeal, therefore, cannot be said to have started at the PPDT to which the right to appeal is granted by section 41 of the *Political Parties Act*. The transcendental controversy that was adjudicated upon at the election court and appealed to the High Court was whether the appellant herein was validly elected as a Member of the Kisii County Assembly by way of nomination. The learned senior principal magistrate concluded that she was not. On appeal to the High Court, the learned judge's ultimate decision was, also, that the appellant was not so validly nominated; and, therefore, dismissed the appeals letting the decision of the trial (election court) stand. Differently put, it is, simply, a profound inexactitude to claim that the dispute herein is an appeal from PPDT.
20. Second, the cases cited by the appellant were electoral disputes in which this Court had express jurisdiction to hear as first appeals under the *Elections Act*. The issue raised in those cases, now settled, was whether one can challenge a completed nomination which has resulted in a duly gazetted election results or party lists of a member of Parliament through a mechanism other than a gazetted election court. The question whether a second appeal resulting from an election or nomination of a member of a County Assembly were not issues in those cases.
21. The appellant also directly attacks the interpretation given by the courts to Article 164(3) of *the Constitution* and sections 75(4) and 85A of the *Elections Court* to reach the conclusion that this Court has no jurisdiction to hear and determine second appeals on elections of members of County Assemblies. The argument is the familiar one raised in the cases cited above that this interpretation denies a party a constitutionally-granted right of appeal.
22. In a ruling in a companion case to this one which this bench has issued today (*Dolphine Nyangara Onkoba v Michelle Kemuma Omwoyo & 2 others*, Kisumu Court of Appeal Elec. Pet. No E014 of 2023), we have cited the Supreme Court's decision in the *Hamdia Yaroi Shek Nuri Case* (*supra*) to explain the fallacy of that position. That case was on all fours with the present one. The 1st respondent before the Supreme Court (Faith Kombe) had, following the 8th August, 2017 General Elections, been gazetted as the Amani National Congress Party's nominee to fill the Tana River County Assembly gender top up slot. The petitioner (Hamdia) challenged the gazettelement before the Chief Magistrate's Court at Milimani. The Chief Magistrate's Court held in favour of the petitioner. The 1st respondent appealed to the High Court. The High Court allowed the appeal and held in favour of the 1st respondent. Dissatisfied with the decision of the High Court, the petitioner filed a further appeal to this Court. This Court (Ouko JA (as he then was), Musinga, JA (now PCA); and Murgor, JA) held that the Court of Appeal lacked jurisdiction to hear and determine election petition appeals from the High Court, emanating from an election of a Member of a County Assembly.
23. The petitioner, again, filed a further appeal to the Supreme Court specifically raising the issue of jurisdiction. At the Supreme Court, the petitioner raised very similar arguments to the ones the appellant has propounded before us. The specific question that the Supreme Court sought to answer was whether or not this Court has jurisdiction to hear and determine an appeal from the High Court (being a second appeal) emanating from an election of a member of a County Assembly. In reaching its verdict, the Supreme Court directly took up the question the appellant and the respondents have put



to us, to wit, whether the silence in section 75(4) and non-inclusion in section 85(A) of the Elections Act notwithstanding, a right of appeal still lies to the Court of Appeal from the High Court, in an election petition concerning membership of a County Assembly, in view of Article 164(3) of the Constitution. After citing its earlier decisions on the constitutional validity of the restrictions placed in the number, length and costs of electoral disputes by statute by section 85A of the Elections Act (see, for example, Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Supreme Court Petition No 2B of 2014), the Supreme Court stridently put the matter to rest in the following words:

30.It is not difficult to critically advert to such argumentation, as would question the constitutional validity of sections 85A and 75(4) of the Elections Act. In this context, the starting point, in our view, must be Article 87 of the Constitution, pursuant to which parliament is majestically charged with the duty of enacting legislation to ‘establish mechanisms for the timely settling of electoral disputes.’ The fact that the Constitution lays a fundamental premium on the need for the expeditious disposal of electoral disputes, is self-evidence in the plain language of Article 87.....

31. It has to be noted that, what Article 87 requires parliament to do, is not limited to the enactment of legislation setting ‘timelines’ for the disposition of electoral disputes. The Article talks of ‘mechanisms for the timely’ settlement of electoral disputes. As such, the setting of timelines in legislation is just but one of the mechanisms for the timely settlement of electoral disputes. Other mechanisms, are discernible in the other provisions of the Elections Act touching upon such other matters, as the form of petitions, manner of service of petitions, the scope of appeals, and, in our view, the level of appeals among others.

As long as these ‘mechanisms’ are not inconsistent with, or violation of the provisions of the Constitution, and as long as they are in accord with Article 87 of the Constitution, their validity cannot be questioned.... To argue that, notwithstanding the non-provision for a second appeal in section 75(4) of the Elections Act, such right of appeal nonetheless subsists under Article 164(4)(3)(a) of the Constitution, would be subversive of 87 of the Constitution. It is worth repeating that the Constitution cannot subvert itself. Indeed, what may appear as a limitation of the jurisdictional reach of Article 164(3)(a) of the Constitution is borne out of Article 87 of the same Constitution.

24. We are of the view, as we were in the companion case to this one (Dolphine Nyangara Omwoyo Case (supra)), that the Supreme Court’s reasoning adequately responds to all policy and constitutional arguments raised about the well-settled position that this Court does not, in the absence of an express statutory provision, have jurisdiction to hear and determine second appeals emanating from an election petition concerning the validity of the election of a member of a County Assembly. We do not need to belabour the analysis here.

25. We, therefore, strike out the appeal for want of jurisdiction. The appellant shall pay the costs of the appeal to the 1st and 3rd respondents. As the 2nd respondent did not take an active part in the appeal, we shall award no costs to it.

26. Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL



H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

