

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Maraga, CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 38 of 2018

– BETWEEN –

HAMDIA YAROI SHEK NURI..... PETITIONER

– AND –

FAITH TUMAINI KOMBE.....1ST RESPONDENT

AMANI NATIONAL CONGRESS.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BAOUNDARIES COMMISSION.....3RD RESPONDENT

*(Being an appeal against the Judgment and Decree of the Court of Appeal (**Ouko, Musinga & Murgor, JJ.A**) sitting at Nairobi in Election Appeal No. 27 of 2018 delivered on 21st September, 2018)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition of Appeal before the Court is dated 26th October, 2018 and lodged on even date. The petitioner seeks to challenge the decision of the Court of Appeal (*Ouko, Musinga & Murgor, JJ.A*) sitting in Nairobi, (***Election Petition Appeal No. 27 of 2018***). The Appellate Court in its Judgment of 21st September 2018, dismissed the petitioner’s appeal, and in so doing, while addressing a jurisdictional question, held that it lacked jurisdiction to hear and determine election petition appeals from the High Court, emanating from an election of a Member of a County Assembly (hereinafter, MCA).

B. BACKGROUND

(i) At the Chief Magistrate's Court

[2] Following the 8th August 2017 General Elections, the 1st respondent was gazetted as the Amani National Congress Party (2nd respondent herein) nominee to the Tana River County Assembly to fill the gender top up slot. The petitioner was however, aggrieved by the gazettelement, contending that, she was the one validly nominated by the party in the gender top up list. Consequently, the petitioner filed a petition in the Chief Magistrate's Court at Milimani, (Election Petition No 23 of 2017), on 25th September 2017, seeking *inter-alia*, a declaration that the 1st Respondent was not eligible for nomination as MCA, Tana River County Assembly as she was not a registered voter.

[3] In its Judgment delivered on 19th January 2018, allowing the petition, the Magistrate's Court found *that the 1st respondent was not eligible for nomination as a Member of County Assembly for Tana River County, as she was not a registered voter, and that her nomination as a Member of Tana River County Assembly was invalid, null and void.* The Court proceeded to set aside the nomination contained in Gazette Notice No. 8380; ordered the 3rd respondent, in not later than 7 days from the date of the Judgment, to gazette the petitioner HAMDIA YAROI SHEK NURI, as among the duly nominated gender top up list members of County Assembly of Tana River County.

(ii) At the High Court

[4] The 1st and 2nd respondents were aggrieved and filed an appeal in the High Court (*Election Appeal No. 5 of 2018*) on 14th February 2018. In its judgment delivered on 4th May, 2018, the High Court (*Kimaru, J.*) allowed the appeal, holding that in arriving at its decision, the lower Court had shifted the burden of proof to the respondent, thus ignoring the time-hallowed principle to the effect

that *he who asserts, proves*. The Court ruled that the Petitioner had not discharged the burden of proof.

(iii) At the Court of Appeal

[5] Aggrieved by the High Court's judgment, the petitioner filed an appeal to the Court of Appeal (*Election Appeal No. 27 of 2018*) on 31st May 2018, seeking the setting aside of the High Court judgment and reinstatement of the Magistrates Court's Orders.

[6] At the hearing of the appeal, the 1st Respondent raised a Preliminary Objection arguing that the Court of Appeal lacked 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, Section 85A of the Elections Act, and Rule 4 of the Court of Appeal Election Rules. The Appellant on the other hand, argued that the Court of Appeal had jurisdiction on grounds that Article 164(3)(a) and (b) of the Constitution had expanded the jurisdiction of the Court of Appeal.

[7] In its judgment delivered on 21st September 2018, the Court of Appeal, resolved at the outset to determine whether, it had jurisdiction to entertain the appeal.

[8] In its judgment dated – the Court of Appeal held that it lacked jurisdiction to entertain a second appeal from the High Court, emanating from an election of a member of a county assembly. In arriving at its decision, the Appellate Court stated thus:

“In essence, section 85A, and the recently enacted rules, which are expressed in mandatory terms, are specific on the nature of appeals that can be entertained by this Court. In summary, they provide that appeals shall lie to this Court only where (i) the dispute concerns membership of the National Assembly, Senate or the office of county governors; (ii) the High Court acting in its

original jurisdiction; and (iii) the appeal is in respect of matters of law only. Such appeals must be heard and determined within six months of the filing of the appeal. Because there was no intention to stretch electoral disputes from the magistrates' courts beyond the High Court, there is no similar time limits for the hearing of such appeals.”

(iv) At the Supreme Court

[9] Aggrieved by the judgment of the Court of Appeal, the Petitioner has filed this appeal seeking the following Orders:

- (a) The appeal be allowed;*
- (b) The petitioner's Notice of Motion dated 5/3/18 filed in the High Court seeking to strike out the 1st and 2nd Respondents' Memoranda of Appeal be allowed;*
- (c) High Court Election Petition Appeal No. 1 of 2017 and High Court Election Petition No. 5 of 2018 be dismissed;*
- (d) The High Court Judgment dated 4/5/18 in favour of the 1st and 2nd Respondents be set aside;*
- (e) The petitioner's Election Petition dated 25/9/17 be allowed;*
- (f) The costs of the instant Appeal, the Appeal at the Court of Appeal and the two Appeals at the High court (Appeal No. 1 of 2017 and Appeal no. 5 of 2018) and the Magistrate's Court Election Petition No. 23 of 2017 be awarded to the petitioner.*
- (g) In the alternative, and without prejudice to the orders sought above, this Honourable Court directs that this Appeal proceeds by way of fresh hearing.*
- (h) The Court be pleased to make any or further orders as may be just and expedient in the circumstances.*

[10] The petition is premised on 13 grounds summarized thus: that the Learned Court of Appeal Judges erred in law:

- (a) *In failing to find that **Article 164(3) of the Constitution confers direct jurisdiction to the Court of Appeal** for a party to appeal a High Court decision and jurisdiction is not left to an Act of Parliament;*
- (b) *In failing to find that **section 85A of the Elections Act is overridden by Article 164(3)(a) of the Constitution** to the extent of its restrictiveness and superfluity;*
- (c) *In failing to find that **Article 164(3)(a) confers both the right to appeal and jurisdiction to appeal a decision of the High Court**, irrespective of whether the High court was exercising its original jurisdiction or appellate jurisdiction;*
- (d) *In **allowing an unregistered voter to be nominated and elected** to serve in Tana River County Assembly contrary to Article 193(1)(a) and section 25(1)(a) of the Elections Act;*
- (e) *In **failing to strike out an incomplete Record of Appeal** of the 1st and 2nd Respondents that lacked certified decree and copy of judgment; and all affidavits, evidence and documents entered in evidence before the trial Magistrate as required by Rule 34(6)(d) & (e) of the Petition Rules 2017;*
- (f) *In failing to find that **the Memorandum of Appeal in the High Court was defective** for being an appeal against a judgment and not a decree; and also incomplete for lacking a certified copy of the order emanating from the ruling appealed against; and*
- (g) *Erred in granting leave to file a supplementary Record of Appeal, a pleading unknown in law as regards Elections Petition Rules 2017.*

C. THE PARTIES' CASES

(i) *Petitioner's Case*

(a) *On Jurisdiction*

[11] Regarding the central question in this appeal, as to whether the Court of Appeal has jurisdiction to hear appeals from the High Court, arising from an election of a member of a county assembly, it is the Petitioner's case, that indeed, the Appellate Court has such jurisdiction. The said jurisdiction, submits the Petitioner, is founded on the provisions of Article 164 (3) of the Constitution. This Article provides that 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.

[12] The Petitioner urges that the broad and permissive language in which Article 164 (3) is couched, means that there can be no limitation placed upon the jurisdiction of the Court of Appeal, to hear appeals from the High Court, whether as first appeals, or as in this case, second appeals. The Petitioner further contends that the restrictive regime of the Appellate Jurisdiction Act, which conferred jurisdiction upon the Court of Appeal in terms of specific prescriptions of a statute, has been replaced by the clear language of the Constitution which, does not envisage any limitations.

[13] It is the Petitioner's case that, by placing reliance upon the Elections Act, which is silent on the question as to whether there lies a second appeal to the Court of Appeal in matters election, and Section 85 A of the said Act, which only provides for appeals from the High Court to the Court of Appeal, emanating from the election of Governor, Senator, and Member of National Assembly, to decline jurisdiction, the Court of Appeal failed to appreciate that the provisions of Articles 2(4) and 164 (3) of the Constitution override the former.

[14] In support of her arguments, the Petitioner places reliance upon this Court's decision in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 Others*** Supreme Court App No. 2 of [2011] eKLR; wherein the court held, that jurisdiction flows from either the Constitution, or an Act of Parliament, but not through judicial craft. It is the Petitioner's case that the Court of Appeal's jurisdiction, to hear appeals from the High Court, including appeals emanating from the election of a member of a county assembly, flows from Article 164 (3) of the Constitution. The Petitioner also cites, as persuasive authority, the Court of Appeal's decision in ***Judicial Service Commission v. Kalpana Rawal*** [2015] eKLR wherein it was held that, the Appellate Court's jurisdiction is now anchored in the Constitution and hence, could not be limited.

[15] The Petitioner consequently submits that, should this Court determine that the Court Appeal, has jurisdiction to hear a second appeal from the High Court, arising from an election of member of county assembly, then her Petition should be remitted to that Court for hearing on merits. In the alternative, the Petitioner prays that, this Court should take over the appeal and determine it on the merits.

(b) The 1st Respondent's Case

[16] In response, the 1st Respondent is categorical that the Court of Appeal has no jurisdiction to hear appeals from the High Court, emanating from the election of a member of a county assembly. In agreement with the Appellate Court's decision, it is the 1st respondent's submission that Article 164 (3) of the Constitution does not grant the Appellate Court a blanket jurisdiction to entertain all election petition appeals from the High Court. It is the respondent's case that the only election petition appeals that lie from the High to the Court of Appeal are those provided for under Article 105 of the Constitution as read with Sections 75 (4) and 85A of the Elections Act and Rule 4 (1) of the Court of Appeal (Election Petition) Rules of 2017. Towards this end, argues the 1st Respondent, a second petition of appeal from

the High Court does not lie to the Court of Appeal, otherwise the same would have been provided for in unequivocal terms. To assume jurisdiction over election appeals emanating from the Magistrate's Court on the basis of the general provisions of Article 164 (3) of the Constitution, submits the 1st Respondent, would fly in the face of this Court's decision in ***Samuel Kamau Macharia*** (Supra) in which the Court cautioned against inventing jurisdiction through judicial craft. The 1st Respondent submits that Article 164 (3) must be read contextually together with Articles 87 and 105 of the Constitution.

(c) The 3rd Respondent's Case

[17] The 3rd Respondent supports the submissions of the 1st Respondent, arguing that by being silent on the question as to whether a further election appeal lies from the High Court to the Court of Appeal, Section 75 (4) of the Elections Act must be interpreted to mean that Parliament intended that the High Court would be the last port of call regarding petitions emanating from, the election of a member of a county assembly.

D. ISSUES FOR DETERMINATION

[18] Upon careful consideration of the grounds listed in the Petition of Appeal, the oral and written submissions by counsel for the parties, and the authorities cited in support thereof, we have formed the distinct view that only two issues clearly stand out for determination, in order to dispose of this Appeal. These are:

- (i) Whether or not the Court of Appeal 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; and***

(ii) If the answer to (i) above is in the affirmative, what remedies should the Court grant?

E. ANALYSIS

(a) On Jurisdiction

[19] The gravamen of the Petitioner’s case is that, the Court of Appeal erred, in declining jurisdiction to determine her Appeal, when Article 164 (3) (a) of the Constitution clearly vests it with jurisdiction to “*hear appeals from the High Court*”. It is her argument that the Appellate Court placed undue reliance on Sections 75 (4) and 85 A of the Elections Act, to deny her audience, even in the face of a constitutional provision, which cannot be overridden by a statute. Our understanding of the Petitioner’s stance is that, in view of the open-ended language, in Article 164 (3) (a) of the Constitution, which donates appellate jurisdiction to the Court of Appeal without restrictions, any legislation, the Elections Act included, which purports in any way to limit such jurisdiction, would at best, be of “doubtful constitutional validity” or at worst, “out-rightly unconstitutional”.

[20] Section 75 (1A) of the Elections Act provides that “*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.*” Section 75 (4) of the said Act, on the other hand, provides that “*an Appeal under subsection (1A) shall lie to the High Court on matters of law only...and shall be heard and determined within six months from the date of filing of the appeal.*” This section is however silent, as to whether a further appeal lies from the High Court to the Court of Appeal. On its part, Section 85A of the Elections Act provides that “*an appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the Office of county governor shall lie to the Court of Appeal on matters of law only and shall be ...heard and*

determined within six months of the filing of the appeal.” Again, no mention is made of any appeal lying to the Court of Appeal in an election petition concerning membership of a county assembly.

[21] It is the petitioner’s contention that the silence in Section 75 (4) and the non-inclusion in Section 85A 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, the provisions of Article 164 (3) (a) of the Constitution.

[22] The 1st and 3rd Respondents are however of a different view. It is their contention, in agreement with the Court of Appeal, that Article 164 (3) (a) of the Constitution does not confer a general right of appeal in election disputes. They further argue, that the said article must be read with Article 87 of the Constitution, which mandates parliament “*to enact legislation to establish mechanisms for the timely settling of electoral disputes.* One such legislation, they maintain, is the Elections Act and the Regulations made thereunder. There is therefore nothing unconstitutional about Sections 75 and 85A of the Elections Act.

(b) *The Constitutional validity of Sections 75 (4) and 85A of the Elections Act*

[23] Any doubts regarding the constitutional validity of Section 85A of the Elections Act, to the extent to which it is perceived, as limiting the appellate jurisdiction of the Court of Appeal, contrary to the provisions of Article 164 (3) (a) of the Constitution, were long dispelled by this Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, Supreme Court Petition No. 2B of 2014; wherein we affirmed its constitutionality at paragraphs 63-64 thus:

“By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.

“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.’”

[24] But even more categorical, was this Court’s declaration in ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others***, Supreme Court Petition No. 6 of 2014. In submissions reminiscent of those that have been made by the Petitioner herein, learned counsel, Mr Issa Mansur, had argued that Section 85A was inconsistent with Article 163 (4) (a) of the Constitution. Counsel took the view that the right to appeal from the High Court to the Court of Appeal, under Article 163 (4) (a) of the current Constitution cannot be restricted. Counsel urged that, as opposed to the repealed constitution, which conferred appellate jurisdiction pursuant to a specific statute, the current Constitution vests in the Court of Appeal *unrestricted powers to consider appeals from the High Court on matters of both law and fact.*

[25] In re-affirming the holding in ***Munya*** (*supra*), this Court re-stated the constitutionality of Section 85A at paragraph 73 thus:

“This Court’s perception of the configuration of the governing electoral law has been clearly signalled in the recent Munya case. From that foundation, we would observe that Section 85A manifests Parliament’s intention to regulate the scope of appeals to the Court of Appeal to ‘matters of law only’. We decline, with respect, the 1st respondent’s contention that the provision should be struck out, as an undue limitation on the Court of Appeal’s jurisdiction as conferred by Article 164 (3) (a) of the Constitution [emphasis added]. We re-affirm our earlier position, that the statutory provision regarding the jurisdiction

of the Court of Appeal, and in relation to ‘matters of law only’, is not a limitation to, or a restriction of the Court of Appeal’s jurisdiction under Article 164 (3) (a). It is our view that the appellate jurisdiction in electoral disputes, is donated not simply by virtue of Article 164 (3) (a), but also by legislation contemplated under Article 105 (3) of the Constitution [Emphasis added].”

[26] In view of these clear and unequivocal pronouncements by the Supreme Court, regarding the constitutionality of Section 85A of the Elections Act, the Petitioner’s arguments to the contrary cannot be sustained. However, it can still be assumed that, what the Petitioner is questioning in this case, is not the ‘*matters of law only*’ limb of appellate jurisdiction limitation, but the fact that both Sections 85A and 75 (4) of the Elections Act, are silent on the question as to whether, election appeals concerning the validity of the election of a member of a county assembly, lie to the Court of Appeal, from the High Court.

[27] In this regard, Section 85A only provides for appeals from the High Court to the Court of Appeal in election petitions concerning membership of the National Assembly, Senate, or, the office of County governor. Section 75 (4) on the other hand, only provides that appeals questioning the validity of the election of a member of county assembly, lie to the High Court from the Magistrate’s Court. The said section makes no provision for a second appeal to the Court of Appeal. Such ‘silence and non-provision’, in the view of the Petitioner, is offensive to the provisions of Article 164 (3) (a) of the Constitution.

[28] In declining to assume jurisdiction over the Petition at hand, the Court of Appeal took the view that, by remaining silent, as to whether election appeals concerning the validity of the election of a member of county assembly, lie to the Court of Appeal from the High Court, Parliament must have intended, that the High Court, would be the last port of call for such petitions. Such a pre-supposition, reasoned the Appellate Court, would be in accord with Article 87 of the

Constitution, which mandates parliament to “enact legislation to establish mechanisms for timely settling of electoral disputes.”

(c) The Sui-Generis nature of Electoral Law

[29] This Court, in keeping with comparative electoral jurisprudence, has in the past emphasized the fact that, election disputes, though not exempted from constitutional principles and the general law of the land, usually generate a ‘unique law’ of their own. This type of legal regime, while not necessarily “special”, does create normative and procedural divergences that are dictated by the “political nature” of these disputes. Towards this end, the 2010 Constitution has gone to great lengths, in creating a distinct normative and institutional architecture, for the resolution of electoral disputes. In a number of instances, the Constitution has given parliament the latitude, to enact legislation to give full effect to its declared principles, and general provisions regarding elections. In **Fred Outa** (*Supra*), this development was thus illuminated at paragraph 59:

“The Constitution of 2010 may, indeed, be seen as the foundation of ‘a regime of electoral law’, which, even though sharing common principles of justice and fairness with normal civil and criminal jurisdictions, bears a new ingredient that is underlined by objects of democracy, good governance, and efficiency of public institutions. This is the context in which Article 105 set a foot the process of enacting new electoral legislation, and the making of attendant rules and regulations. This is the context in which we would perceive the specific terms of the Elections Act- in a broad sense, a context of compatibility, rather than of discord.”

[30] Guided by the foregoing philosophical rationalization, 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-evident in the plain language of Article 87. The non-negotiability of timelines for the settlement of electoral disputes, is a principle that has repeatedly been decreed by this Court in a long line of cases (*Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others* Supreme Court Petition No. 2B OF 2014 [2014] eKLR; *Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others* Supreme Court Petition No. 5 of 2014 [2014] eKLR; *Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others* Supreme Court Petition No. 18 of 2014 as consolidated with Petition No. 20 of 2014 [2014] eKLR).

[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.

[32] As long as these “mechanisms” are not inconsistent with, or violative 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. In this context, one of the mechanisms for the timely settlement of electoral disputes is by limiting, ***not the***

right of appeal, but the scope, and level of appeal, in election petitions.

In this regard, Section 75 (4) of the Elections Act, does not limit the right of appeal emanating from an election petition, concerning the validity of the election of a member of a county assembly. The section in fact preserves the initial right of appeal to the High Court, but falls short of extending it to a second-tier level. 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 Article 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. The issue may very well be viewed differently, if what is in question, is a purely statutory limitation of appellate jurisdiction. It all depends on the nature and uniqueness of each case. This Court has held that, even at the level of the Supreme Court, not all election petition appeals, lie from the Court of Appeal to this Court. An intending appellant must satisfy the Court, that such an appeal meets the threshold delineated in Article 163 (4) (a) and (b) of the Constitution.

F. DETERMINATION

[33] The foregoing analysis leads us to the conclusion, in agreement with the Court of Appeal, 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. As this determination conclusively disposes of the appeal before us, we shall not consider the second issue.

G. ORDERS

- (i) The Petition of Appeal dated 26th October, 2018 is hereby dismissed.***

- (ii) The Judgment of the Court of Appeal dated 21st September, 2018 is hereby upheld.***

- (iii) Costs of this appeal shall be borne by the Petitioner.***

DATED and DELIVERED at NAIROBI this 17th Day of December, 2019.

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D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
J. B. OJWANG
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
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**