

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Wanjala & Njoki, SCJJ)

PETITION NO. 22 OF 2014

HON. BASIL CRITICOS PETITIONER

—VERSUS—

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION	}	RESPONDENTS
2. ISALAH SAHA MADUNGU		
3. NAOMI NANSI SHABAN		

*(Being an appeal from the Ruling of the Court of Appeal at Nairobi
(Warsame, Musinga and Kairu JJA) dated 19th May, 2014 in Nairobi Civil
Application No. 33 of 2013)*

RULING

A. INTRODUCTION

[1] The substantive matter before the Court is a petition of appeal dated 20th June, 2014 and filed on 23rd June, 2014 against the Ruling and Orders of the Court of Appeal at Nairobi dated 19th May 2014 (Civil Application No. 33 of 2013). It is contended that the petition at the High Court was filed outside the stipulated timeline, and was therefore null and void *ab initio*.

[2] The petitioner seeks the following Orders:

- (i) that the petition be allowed with costs, and the petitioner granted extension of time for filing the appeal from the Judgement of the High Court at Mombasa dated 27th September, 2013 in Election Petition No. 3 of 2013;
- (ii) that in the alternative, the Judgement, consequential orders and the proceedings before the Court of Appeal, in Nairobi civil Application No. 33 of 2013 and Mombasa High Court Petition No. 3 of 2013, be declared null and void *ab initio*, with each party bearing its own costs, and the sum of Kshs. 500,000/- deposited by the petitioner as security, refunded to the petitioner;
- (iii) that a declaration be made, that Section 85A of the Elections Act is unconstitutional, to the extent that it purports to limit the time within which an appeal is to be filed;
- (iv) that any further relief be granted, as the Court deems fit in the interest of justice.

[3] Subsequent to the filing of this petition, the petitioner filed a notice of motion dated 25th September, 2014 under certificate of urgency, seeking that:

- (i) execution of the Ruling and Orders of the Court of Appeal in Civil Application No. 33 of 2013, and the Judgement and Orders of the High Court dated 27th September, 2013 be stayed, pending the hearing and determination of the appeal.
- (ii) costs be in the cause.

[4] The application was heard *ex parte* in the first place, by *Tunoi, SCJ*, on 30th September, 2014, the matter being certified urgent, with Orders of stay

against execution of the Court of Appeal and High Court Judgments, pending hearing and determination of this appeal.

[5] The 1st and 2nd respondents were aggrieved by the *ex parte* Orders, and filed a Notice of Motion, a Preliminary Objection, of 18th December, 2014 seeking to discharge, vacate and/or set aside the said Orders. The 1st and 2nd respondents sought the following reliefs:

- (i) that the Ruling of *Tunoi SCJ* and the Order extracted therefrom, be vacated, discharged and/or set aside;
- (ii) that the costs be in the cause.

It is this 1st and 2nd respondents' application dated 18th December, 2014 that is the subject of this Ruling.

B. BACKGROUND

(a) Proceedings in the High Court

[6] The petitioner was a candidate for the seat of Member of the National Assembly for Taveta Constituency. He challenged the election of the 3rd respondent, Naomi Hamisi Shaban, as the duly elected candidate. In his petition before the High Court, the petitioner alleged that the electoral results had been declared in gross contravention of the Constitution, the Elections Act, and the Regulations made thereunder.

[7] The petitioner alleged that his electoral agents had been excluded from the forum of the tallying of votes, and that in several instances, the prescribed Form 35 had not been signed by agents. He also alleged that other electoral malpractices had been perpetrated by the respondents.

[8] However, *Ochieng, J* on 27th September, 2013, found no merit in the petition. He held that the petitioner had failed to prove any electoral offence on the part of the respondents; or that there was any significant breach of the electoral law; or that there had been widespread irregularities capable of vitiating the election. He dismissed the petition with costs, capped at Kshs. 1,500,000 and payable to the 1st and 2nd respondents jointly, and additional costs capped at Kshs. 1,500,000 payable to the 3rd respondent. In addition the Court ordered that the money deposited as security, be dispensed towards settlement of the respondents' costs.

[9] Thereafter, on 9th October, 2013, petitioner applied for certified proceedings from the High Court, and on the same date filed a notice of appeal, for lodging an appeal against the Judgment of *Ochieng J.* On 22nd November, the Deputy Registrar of the High Court informed the petitioner that the proceedings and Judgment were ready for collection.

(b) Proceedings before the Court of Appeal

[10] On 14th December, 2013 the appellant moved the Court of Appeal by way of Notice of Motion dated 25th November, 2013 seeking extension of time to file an appeal against the Judgment of the High Court, as the 30-day period provided under Section 85A (a) of the Elections Act, 2011 had lapsed, on account of delay in obtaining certified proceedings from the High Court. The application was premised upon Article 159 of the Constitution, Sections 3A and 3B of the Appellate Jurisdiction Act, and Rules 4, 47 and 82 of the Court of Appeal Rules. The application was canvassed *inter partes* before *Okwengu, JA.*, who dismissed it, on the ground that the Court lacked jurisdiction to extend time.

[11] Being dissatisfied, the petitioner filed a Reference, Civil Appeal No. Nai 33 of 2013, for a full-Bench review of the findings of the single Judge. He argued that the Constitution does not limit time for filing appeals to the Court

of Appeal, and that Section 85A of the Elections Act is *ultra vires* Articles 159 and 164 of the Constitution.

[12] On 19th May, 2014 the learned Appellate Court Judges affirmed the decision by *Okwengu JA* dismissing the application, on the ground that Section 85A of the Elections Act does not contravene the Constitution, but rather, complements the Constitution. The Court also affirmed the finding that it lacked jurisdiction to extend time for filing an appeal from a High Court decision in an election petition. The Court held that the time-frame specified in Section 85A (a) is mandatory, and could not be extended.

(c) Proceedings before the Supreme Court

[13] The Petition of Appeal to the Supreme Court was filed on 23rd June, 2014. The petitioner contends that the dismissal of his application for extension of time, by the Court of Appeal, denied him the right of access to justice, as guaranteed by Article 48 of the Constitution. He avers that he was denied the right to a fair trial, provided for in Articles 50(1) and 25(c) of the Constitution. He urged that two Supreme Court decisions supported his case, and he would have canvassed them before the Appellate Court.

[14] The Petitioner relies on this Court's decisions in ***Joho***, where it was held that Section 76(1) (a) of the Elections Act is unconstitutional; and in ***Mary Wambui***, for the contention that any proceedings predicated on Section 76(1) (a) is a nullity *ab initio*, having been filed out of time. It is the petitioner's case that given the ***Joho*** and ***Mary Wambui*** decisions, the entire Judgment and proceedings of the High Court in Mombasa Election Petition No. 3 of 2013: ***Hon. Basil Criticos v. Independent Electoral Boundaries Commission & 2 Others***, are a nullity *ab initio*, having been filed out time. He urges that each party should bear their own costs at the High Court, Court of Appeal, and this Court.

C. SUBMISSIONS

(i) *1st and 2nd Respondents*

[15] The 1st and 2nd respondents raised a preliminary objection to the application before us. The gist of the objection was that the application was not only incompetent, but had arisen from the *ex parte* Orders of a single Judge, before whom there was no disclosure of material facts by the applicant.

[16] Mr. Lubulellah, learned counsel for the 1st and 2nd respondents, submitted that the Ruling and Orders granted by *Tunoi, SCJ* on 30th September, 2014 constituted a final Order of stay of execution of the Ruling and Orders of the Court of Appeal, in Civil Application No. 33 of 2013, and the Judgment and Orders of High Court in Mombasa, in Petition No. 3 of 2013—pending the hearing and determination of the appeal.

[17] Counsel submitted that the said Orders were in breach of the constitutional principle of equality before the law, and of equal protection and equal benefit of the law under Article 27(1) as read together with Article 259(a) and (e) of the Constitution.

[18] Counsel contends that the appellant failed to disclose to the Court that one of the prayers in his application dated 25th September, could not be entertained *ex parte*, in an application for certification of urgency under Rule 26 of the Supreme Court Rules.

[19] Counsel argues that the petitioner does not have an arguable appeal, and does not satisfy the conditions for the grant of an order of stay of execution. He submits that the petitioner's appeal relates to the exercise of the power and discretion of the Court of Appeal, denying extension of time for the petitioner to file his appeal; and that this does not fall within the scope of Article 163(4)(a) or (b) of the Constitution. Counsel relied on the case of **Malcom Bell v. Daniel Torotich Arap Moi & Another** S.C Application No.1 of

2013, ***Lawrence Nduttu & 6000 v. Kenya Breweries Ltd. & Another*** Sup Ct. Petition No 3 of 2012, ***Peter Oduor Ngoge v. Francis Ole Kaparo*** SC Petition No.2 of (2012)[eKLR], ***Hassan Ali Joho v. Suleiman Said Shahbal & 2 Others*** Sup. Ct. Petition No. 10 of 2013, and ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*** S.C Petition No.2B of 2014(2014) eKLR.

[20] Mr. Lubulellah submitted that, pursuant to this Court’s decision in ***Munya*** and ***Hon. Lemanken Aramat v. Harun M. Lempaka & Others*** S.C Petition No.5 of 2014, Section 85A of the Elections Act is a normative derivative of Article 87(1) of the Constitution, in so far as it limits time for filing an appeal. It was urged that the timelines contemplated in Article 87(1) of the Constitution are reflected in Section 85A of the Act.

[21] It was counsel’s submission that the retrospective application of the doctrine of nullity, as signalled by this Court in ***Mary Wambui***, cannot be applied to non-existent matters. In this regard, counsel urged that the ***Mary Wambui*** decision was delivered when the petitioner’s case was not live, as it had already been dismissed by the High Court. The petitioner, counsel submitted, had not yet filed an appeal, as his appeal for extension of time had been dismissed by the Court of Appeal—and the fact that there was as yet no appeal had not been disclosed to the single-Judge Bench of this Court.

[22] Counsel submitted that the petitioner was seeking to benefit from his own non-compliance with the law, by avoiding payment of costs.

[23] Counsel urged that the Court of Appeal has its procedural laws in the Appellate Jurisdiction Act (Cap 9, Laws of Kenya) and the Court of Appeal Rules, 2010 which apply to election petition appeals, subject to any statutory limitations set under Section 85A of the Elections Act. He submitted that, where an Act of Parliament is explicit, as in the instant matter, as to the time-frame for filing an appeal, a Court is to take its terms into account. In this

regard, counsel submitted that the Court of Appeal decision in the instant matter was proper in every respect.

[24] Counsel submitted the petitioner's rights were not infringed, as there are clear provisions on hearing time-lines; in the circumstances, broader issues such as those relating to "access to justice and fair trial", were inapplicable. In any case, it was urged, the petitioner had had the opportunity to canvass his case at both the High Court and the Court of Appeal (and a relevant authority in this regard is ***Wavinya Ndeti v. IEBC*** Civil Appeal No.323 of 2013).

[25] With regard to costs, counsel urged the Court to depart from the reasoning in ***Lisamula, Mary Wambui*** and ***Joho***, and order that the petitioner bear the costs. Counsel urged the Court to allow the application as prayed.

(ii) 3rd Respondent

[26] Mr. Nyakundi, learned counsel for the 3rd respondent, submitted that the petition is an abuse of the Court process, in so far as there was no appeal to the Court of Appeal. Counsel sought reliance on this Court's earlier decisions in: ***Peter Oduor Ngoge; Erad Suppliers; and The Kenya Section of the International Commission of Jurists cases.***

[27] Counsel submitted that in line with the ***Wambui*** and ***Joho*** decisions, the retrospective applicability of the nullity principle is restricted to matters that were live at the time of delivery of the ***Joho*** decision; and thus, the principle in the ***Wambui*** and ***Joho*** cases could not apply to the instant case, as it was already heard and concluded.

[28] Counsel submitted that in accordance with Article 163(4)(a) and 163(4)(b) of the Constitution, appeals before this Court must relate to matters which have originated in the High Court and been conducted through to the Court of Appeal; and that, by contrast, the instant matter relates to a simple

application at the Court of Appeal. It was not based, learned counsel urged, on any issue of cogent constitutional controversy, as would be required on the terms of relevant authority: **Ngoge (Supra); Erad Suppliers & General Contractors Ltd. v. National Cereals and Produce Board [2012] eKLR**; and **The Kenya Section of International Commission of Jurists v. The Attorney General [2012] eKLR**.

[29] Mr. Nyakundi contended that this appeal was filed in bad faith; is incompetent; and bears the intent of denying the respondents their duly accrued costs, both in the High Court and Court of Appeal. He submits that the application should be dismissed with costs.

(iii) Petitioner's Case

[30] In response to the 1st and 2nd respondents' objection, Mr. Gichuhi, learned counsel for the petitioner, submitted that the petition properly falls under Article 163(4)(a) of the Constitution: in that this is an appeal as of right, relating to the interpretation and application of the Constitution. Counsel submitted that the petitioner was seeking the interpretation of Section 85A of the Elections Act, in relation to Articles 87,105,140 and 259 (8) of the Constitution. He urges that he intends to raise constitutional questions, relating to extension of time. In essence, he intends to contest the legality of the Ruling before the single appellate Judge and, later, a three-Judge bench.

[31] In support of his argument that the appeal is one raising issues of constitutional application and interpretation under Article 163(4) (a), counsel relied on the cases of **Samuel Macharia & Another v. Kenya Commercial Bank Limited & 2 Others** (2012) eKLR, **Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another** SC. Petition No.3 of 2014.

[32] Mr. Gichuhi submitted that an issue of jurisdiction can be raised at any time, and there was no need for the petitioner to file pleadings in respect of

such a matter. He relied on the Nigerian decision, ***All Progressive Grand Alliance v. Senate Christiana N.D Anyanwu & 2 Others*** LER (2014)SC.20/2013, which held that jurisdiction is so fundamental to adjudication, that it could be raised at any time, and in any manner, and even for the first time on appeal, or even just orally.

[33] Counsel submitted that by virtue of the Supreme Court's holding that Section 76(1)(a) of the Elections Act, 2011 is inconsistent with Article 87(2) of the Constitution, in ***Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*** [2014] eKLR, and its declaration of all proceedings as null and void in ***Mary Wambui Munene v. Peter Gichuki Kingara & 2 Others*** [2014] eKLR, and in ***Anami Silverse Lisamula v. the Independent Electoral and Boundaries Commission and 2 Others*** Sup Ct Petition No.9 of 2014, the proceedings (in both the High Court and the Court of Appeal) in the instant matter were a nullity *ab initio*.

[34] Learned counsel urged that, proceedings that are null and void *ab initio* could not be the basis for an award of costs. The rule is that nothing flows from proceedings that are null and void *ab initio*.

[35] Counsel submitted that, in High Court Petition No.3 of 2013, a limit had been placed on costs, yet the respondents overlooked those Orders, and chose to file an inflated Bill of Costs.

[36] Counsel argued that the petitioner had no intention of re-opening his appeal, and that the instant matter being an electoral matter, is inclusive in nature (involves registration, voting declaration and determination by Courts), and is active in its entirety so long as its pending in Court. To buttress his case, counsel relied on the case of ***A v. The Governor of Arbour Hill Prison*** 2006 (IESC 45), quoted in the ***Wambui*** case, for the submission that parties cannot re-open concluded causes of action.

[37] Counsel submitted that Article 163(4) of the Constitution required the Court of Appeal to adjudicate claims only within the established statutory or subsidiary laws duly instituted. Counsel submitted that the appellant had complied with the holding in ***Nick Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others*** (2014) eKLR, as regards the filing of mandatory notice of appeal within the prescribed time (he filed the notice of appeal 9 days after the High Court decision). He urged that the Court of Appeal had erred in disallowing his application for an extension of time. He urged the Court to dismiss the 1st and 2nd respondents' application.

D. ISSUES FOR DETERMINATION

[38] Only one issue falls for determination:

Whether this application can be sustained on the basis of Article 163 (4)(a) of the Constitution

E. ANALYSIS

[39] It is the 1st and 2nd respondents' submission that the appellant misled this Court to grant the *ex parte* Orders which stayed Orders of the Court of Appeal and the Judgement of the High Court, in a matter in respect of which no appeal had been lodged.

[40] Counsel rendered the following account: the High Court delivered its Judgement on 27th September 2013. On 9th October, 2013 the petitioner applied for certified proceedings from the High Court, and on the same date filed a notice of appeal, giving notice of an intended appeal against the Judgment. On 22nd November, 2013 the Deputy Registrar of the High Court

informed the petitioner that the proceedings and Judgment were ready for collection. On 14th December, 2013 the appellant moved the Court of Appeal by way of Notice of Motion, dated 25th November, 2013; he was seeking extension of time to file an appeal against the Judgment of the High Court, given that the 30-day period allowed under Section 85A (a) of the Elections Act, 2011 had lapsed, due to delay in obtaining certified proceedings from the High Court. This application was dismissed by *Okwengu, JA* on 21st February, 2014. Being dissatisfied with that decision, the appellant referred the application to a full Appellate Court Bench. This reference was also dismissed, on the 19th May, 2014.

[41] Counsel for the petitioner submitted that his appeal raises serious constitutional issues, in the context of this Court's declaration that Section 76(1)(a) of the Elections Act 2011 is inconsistent with Article 87(2), and is null and void. Counsel argues that this Court should apply the principle in its decision in *Mary Wambui*, and find that the petition filed by the appellant in the High Court is null and void *ab initio*, and that each party should bear its own costs.

[42] This argument is contested by all the respondents who urge that the principle set out in the *Mary Wambui* case is not applicable in the instant case, as the Court in *Mary Wambui* had pronounced itself long after the High Court decision had been given.

[43] In *Mary Wambui*, this Court pronounced itself on the standing of Section 76(1)(a) of the Elections Act, and stated the position as follows: [paragraph 91]:

“We are of the view that the above principles are sound in law and applicable in this case. As a result, the apprehension that a declaration of nullity and its retrospective effect may

trigger a frenzy to re-open concluded or determined election cases, should not arise or be contemplated.”

[44] It is not in dispute that the High Court petition was filed 32 days after the declaration of results. The decision was delivered on the 27th September 2013. The appellant had not kept due diligence, in filing his appeal. He waited until after the expiry of the prescribed time for filing an appeal; and then he filed an application seeking to extend time to file his appeal. This application was heard and dismissed by the Court of Appeal (*Okwengu, JA*).

[45] Following the said decision, the petitioner filed a reference to be heard by a three-Judge Bench. That Bench, however, upheld the decision of *Okwengu J.A.* Aggrieved by that decision, the appellant has now moved this Court by filing this appeal.

[46] Does the instant appeal come within the purview of Article 163(4)a of the Constitution, as contemplated in the principles in *Peter Munya*, and further restated in *Evans Odhiambo Kidero & 5 Others v. Ferdinand Ndungu Waititu and Others*, Sup. Ct. Petition No. 18 of 2014 (Consolidated with Petition No. 20 of 2014)? In *Peter Munya* the Court thus observed (at paragraph 244):

“In summary, the guiding principles that we have articulated under Article 163(4)(a) are:

- (i) a Court’s jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent;***
- (ii) the chain of Courts in the constitutional set-up have the professional competence to adjudicate***

upon disputes; and only cardinal issues of law or jurisprudential moment deserve the further input of the Supreme Court;

(iii) the lower Court's determination of an issue appealed against must have taken a trajectory of constitutional application or interpretation, for the cause to merit hearing before the Supreme Court;

(iv) an appeal within the ambit of Article 163(4)(a) is one founded on cogent issues of constitutional controversy..."

[47] This application amounts to an appeal against the Ruling of the Court of Appeal, dated 19th May, 2014 (in Civil Appeal No. 33 of 2013). In that Ruling the Appellate Court thus observed (paragraph 12):

"This Court lacks jurisdiction to extend time for filing an appeal from a High Court decision in an Election Petition. The period of 30 days for filing an appeal is provided by the Elections Act...."

The learned Appellate Judges further remarked as follows (paragraph 13):

"In our view the time frame stipulated under section 85A (a) of the Elections Act is peremptory and this Court has no power to extend it. We must reject the applicant's request to invoke the provisions of article 159(2)d of the Constitution, to extend time for filing the appeal."

[48] It is clear to us that the applicant is "appealing" against the denial of extension of time by the Court of Appeal. Clearly, the substantive appeal is yet

to be filed. Can this Court extend time for an intending appellant, so as to enable the appellant to lodge an appeal at the Court of Appeal, in an election petition?

[49] This Court in the case of **Nick Salat**, has held that extension of time is an equitable dispensation. In that case, the Court observed that:

*“Extension of time being a creature of equity, one can only enjoy it if [one] acts equitably: **he who seeks equity must do equity**. Hence, one has to lay a basis that [one] was not at fault so as to let time... lapse. Extension of time is not a right of a litigant against a Court, but a discretionary power of the Courts...”* [emphasis supplied].

[50] It is clear to us that an appeal against a Court of Appeal decision declining to extend time is not a matter falling under the purview of Article 163(4) (a) of the Constitution. In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this Court be sitting on appeal over? We have no doubt that, had this fact been openly ventilated in Court in the initial application by the applicant, the *ex parte* Order for stay would not have issued from the single-Judge Bench of this Court.

[51] An Order for stay will only issue from this Court to preserve either the subject matter of an appeal, or the appeal itself.

[52] This Court’s remark in **Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell**, SC Applications Nos. 12 and 13 of 2012 (paragraph 33), is pertinent:

“It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court’s capability to arrive at a just decision on the merits of an appeal,

would be substantially diminished. Both the Constitution and the Supreme Court Act have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case.”

[53] We would recall as well this Court’s remarks in ***Peter Munya Gitarau v. Dickson Mwenda Kithinji & 2 Others*** Sup. Ct. Petition No. 2 of 2014 (paragraph 87):

“The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.” [emphasis supplied].

[54] The application before us cannot be saved by the principles set out in the foregoing cases. The application is actually premised upon an intended appeal that exists in a vacuum. It is an application that, were it to be allowed, would have the effect of compelling the Court of Appeal to exercise a discretion of which it is itself the lawful repository. And such would perversely affect the vital principle of unconstrained decisional liberty for every Court and every Bench.

[55] It is clear that the grant of stay Orders did not benefit from an all-round set of submissions. There was no opportunity, in the circumstances, to consider vital questions relating to this Court's jurisdiction as regards the exercise of purely discretionary powers by other Courts. This, in our view, is a proper basis for vacating the said Orders.

F. ORDERS

[56] Such is the framework of issues and considerations that leads us to certain specific Orders, as follows:

- (i) *The Preliminary Objection is hereby allowed.***
- (ii) *The ex parte Orders issued by this Court on 30th September, 2014 are hereby vacated.***
- (iii) *The application herein dated 25th September, 2014 is hereby dismissed.***
- (iv) *Costs of this application are to be borne by the applicant.***

DATED and DELIVERED at NAIROBI this 24th Day of June, 2015.

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S. C. WANJALA
JUSTICE OF THE SUPREME COURT

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S. N. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT