



REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 12 OF 2018

"BETWEEN"

SULEIMAN MWAMLOLE WARRAKAH.....1ST PETITIONER

MWARAPAYO A. MOHAMED WAMWACHAL.....2ND PETITIONER

MATSUDZO HAMISI MWAMREZI.....3RD PETITIONER

"AND"

MWAMLOLE TCHAPPU MBWANA.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

KWALE COUNTY RETURNING

OFFICER AMINA HUSSEIN SOUD.....3RD RESPONDENT

CONSTITUENCY RETURNING OFFICER FOR

KINANGO (CHARO KALUME CHARO)

MSAMBWENI (YUSUF ABUBAKAR MOHAMED)

MATUGA (KASSIM MWAGOMBA KAEMA)....4TH RESPONDENTS

THE PRESIDING OFFICER & THE DEPUTY PRESIDING

OFFICER, BARAZA PARK, MAKUPA.....5TH RESPONDENT

HON. SALIM MVURYA MGALA.....6TH RESPONDENT

(Being and appeal from the Judgment of the Court of Appeal at Mombasa (Visram, Karanja & Koome, JJ.A) dated 17th May, 2018 in Election Petition No. 4 of 2017)

JUDGMENT OF THE COURT

1. INTRODUCTION

[1] The petitioners moved this Court under Articles 22(1) & (2), 23(3)(a), 82(e), 159(2) and 259(1)(b) of the Constitution vide an appeal dated 22nd June, 2018 on 25th June, 2018, appealing against the Ruling and Order of the Court of Appeal (*Visram, Karanja & Koome, JJA*), sitting at Mombasa dated 17th May, 2018 in Election Petition No. 4 of 2017. The Court of Appeal decision dismissed the petitioner's application seeking to substitute the 1st respondent as appellant/petitioner in the case.

[2] On 18th July, 2018, the 2nd to 5th respondents filed a Preliminary Objection pursuant to Article 163(4) of the Constitution and Section 3 of the Supreme Court Act alleging that the Appeal does not raise matters of constitutional interpretation or application. Likewise, they alleged that the petition has not been certified as one involving a matter of general public importance.

[3] The Preliminary Objection was canvassed before this Court on 27th September, 2018.

2. BACKGROUND

(i) High Court

[4] On 6th September, 2017, the 1st Respondent filed Election Petition 5 of 2017, *Mwamlole Tchappu Mbwana v. Independent Electoral & Boundaries Commission & 4 Others*, challenging the election of the 6th respondent as the Governor of Kwale County. The 2nd to 5th respondents filed their joint response on 20th September, 2017. The 6th respondent's response was filed on 18th September, 2017.

[5] Before the Petition could be heard on merit, two Preliminary Objections were raised by the 2nd to 5th respondents. The first Preliminary Objection was filed on 3rd November, 2017 on the ground that, ***"The failure to enjoin the Deputy Governor within twenty-eight days of declaration/publication of results renders the whole petition incompetent and a violation of the Deputy Governor's rights to fair hearing under Article 50 of the Constitution."***

[6] The second Preliminary Objection was raised orally by the 2nd, 3rd, 4th and 5th respondents to the effect that ***the petition and supporting affidavit did not state the date of declaration of the results of the election thus rendering the petition incompetent.***

[7] Upon considering the parties' pleadings and submissions, the objections were upheld by the Election Court (*Thande, J.*) in a ruling dated 16th November, 2017. The learned Judge struck out the petition on the grounds of non-compliance with ***Rules 8(1)(c) & (d)*** and 12(2) (c) & (d) of the ***Election Petition Rules, 2017 (the Election Petition Rules)*** as well as non-joinder of the Deputy Governor who she deemed as a necessary party to the proceedings.

(ii) Court of Appeal

[8] Aggrieved by the Trial Court's Ruling, the 1st Respondent herein lodged Election Petition Appeal No. 4 of 2018 in Mombasa, *Mwamlole Tchappu Mbwana v. Independent Electoral & Boundaries Commission & 4 Others* on the 15th of December, 2017. The appeal was anchored on nineteen grounds the contents of which, for purposes of the petition before us, we do not consider necessary to reproduce.

[9] Before the appeal could be heard on merit, the 1st respondent wrote to the Court via a letter dated 5th February, 2018, indicating his intention to withdraw the appeal. Subsequently, he served the respondents with the requisite Notice in accordance with Rule 96 of the Court of Appeal Rules. Subsequently, a formal consent dated 8th February, 2018 was executed by all the respondents who then filed it before the Appellate Court on even date.

[10] It was the petitioners' case that the 1st respondent, on 10th February, 2018, advertised the Notice of Withdrawal in the Star

Newspaper and called upon any person desirous of being substituted in his place to make the necessary application before this Court. This claim was denied by the 1st respondent.

[11] Consequently, the petitioners, who are registered voters of Kwale County, filed an application dated 15th February, 2018 before the Appellate Court pursuant to *Articles 22, 23, 38, 81, 159, 259(1)* of the *Constitution, Sections 3, 3A & 3B* of the *Appellate Jurisdiction Act, Court of Appeal (Election Petition) Rules, 2017 (Election Appeal Rules)* and *Rules 21, 22, 23 & 24* of the *Election Petition Rules* seeking to be substituted as appellants and petitioners in the Court of Appeal and the election petition respectively.

[12] The petitioners swore affidavits in support of the application insisting that having coordinated various meetings within Kwale County, they were able to discern that majority of the electorate therein were not pleased with the declaration of the 6th respondent as the Governor. Likewise, they averred that the declaration did not represent the will of the electorate and as a result, majority of the electorate, including the petitioners nominated the 1st respondent to challenge the election. It was their evidence that, after the petition was struck out, they nominated the 1st respondent to lodge the appeal and were surprised to learn of the 1st respondent's intention to withdraw from the appeal in a newspaper advert, without their consent. They maintained they had an interest in the appeal despite the purported withdrawal.

[13] The 1st respondent opposed the application arguing that the same was incompetent, frivolous and an abuse of the Court process. He insisted that once the consent to withdraw the appeal was filed, the said appeal stood automatically withdrawn deeming the application, a non-starter, having been filed subsequent to the withdrawal. He averred that he never instituted the petition in a representative capacity but in his own capacity and that the petitioners had not established any *locus standi* in the appeal.

[14] On their part, the 2nd, 3rd, 4th and 5th respondents, filed grounds of opposition to the effect that the Court lacked jurisdiction to entertain the application; the petitioners had not established their interest in the appeal; the application was misconceived and did not lie in law. The 6th respondent also opposed the application in his view, the claims by the petitioners were just that, mere claims that could not be taken at face value as facts.

[15] In dismissing the application, the Learned Judges of Appeal held that electoral law being *sui generis* in nature, was subject to strict interpretation. Further, the Appellate Court held that the applicable procedural rules in an appeal from the Election Court are Election Appeal Rules and the Court of Appeal Rules. They cited Rule 4(1) of the Election Appeal Rules which stipulates:

“These Rules apply to the conduct of appeals from decisions of the High Court in Election Petitions and matters relating thereto.”

[16] Additionally, the Court observed that neither the Election Appeal Rules nor the Court of Appeal Rules provided for substitution of an appellant. They further held that, the closest applicable Rule, would have been Rule 99 of the Court of Appeal Rules. The Learned Judges found that they could also, not import Rule 24 of the Election Petition Rules. According to them, Rules 99 and 24 were applicable to election petitions filed in an Election Court relating to the election of members of parliament, county governors and members of county assemblies. Consequently, the Learned Judges found that there was no rule which could sustain or justify the application before them.

[17] The Court concluded that even if it had jurisdiction to allow the substitution sought, the Application would still fail since the Appeal, stood withdrawn as soon as the consent was filed. Accordingly, the Appeal had ceased to exist by the time the application for substitution was made.

(iii) Supreme Court

[18] Aggrieved by the Court of Appeal's decision, the petitioners filed Petition 12 of 2018, ***Suleiman Mwamlole Warrakah v. Mwamlole Tchappu Mbwana & 5 Others*** dated 22nd June 2018. It was based on grounds that the Court of Appeal erred:

(i) In failing to recognize that the petitioners herein had the locus to substitute the 1st respondent herein in the appeal.

(ii) In failing to appreciate the fact that the intended withdrawal of the appeal amounted to an impediment of justice as the issues raised in the appeal went unheard and determined.

(iii) *In failing to recognize that elections are a matter of general public interest litigation (**suit in rem**) and not a private or personal matter (**suit in personam**) hence occasioning grave injustice to members of the public who had not been consulted before withdrawal.*

(iv) *By elevating procedural technicalities above substantive justice.*

(v) *In adopting a literal approach in the interpretation of the law despite the resultant absurdity and injustice.*

(vi) *That in all the circumstance of the case, the findings of the Honourable Judges of Appeal are insupportable and authorities adduced and they failed to do justice.*

[19] The appellants seek the Orders that:

(i) *The Appeal be allowed.*

(ii) *The Ruling in favour of the respondents in the Superior Court be set aside.*

(iii) *The Orders made by Learned Judges in the Superior Court be set aside.*

(iv) *The petitioners be ordered to take the place of Appellant/1st respondent in the Superior Court.*

(v) *The Court of Appeal hears and determines the appeal on merit.*

(vi) *The costs of this appeal and the Court below be borne by the respondents.*

[20] The petitioners have identified a single issue for determination that is, *whether in the interest of the public, a petitioner in an election petition, including at appellate stage, can be substituted by a third party, at any stage of the proceedings, with leave of court.*

[21] As stated herein, in response to the Appeal, the 2nd, 3rd, 4th and 5th respondents on 18th July, 2018, filed a Preliminary Objection dated 7th August, 2018, challenging this Court's jurisdiction pursuant to Article 163(4) of the Constitution and Section 3 of the Supreme Court Act. It was contended that the Appeal does not raise matters of Constitutional interpretation or application. Likewise, the respondents argued that the petition had not been certified as one involving a matter of general public importance.

[22] It is this Preliminary Objection that is the subject of this Judgment.

3. SUBMISSIONS

(i) 2nd to 5th Respondents' Submissions

[23] Counsel for the respondents submitted that the only issue before the Appellate Court was "**whether an appellant who is intent on withdrawing an election petition appeal can be substituted by another person.**" He urged that this Court's jurisdiction is specific in Article 163(4) of the Constitution and access to this Court is either on matters of Constitutional interpretation and application, or upon certification, by either the Court of Appeal or this Court, on matters of general public importance. He maintained that the petition does not state under which provision of the Constitution it is brought, that is, either 163(4)(a) or 163(4)(b). Citing *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another* [2015] eKLR. Counsel contended, that a court of law has to be moved under the correct provisions of law and that the failure or omission to move the Court appropriately is not an oversight that is curable under Article 159 of the Constitution.

[24] Counsel urged further that the petition of appeal is in respect of a matter that does not arise from the conduct of the election of Governor of Kwale County conducted on 8th August, 2017. He thus submitted that the petition does not raise any matters of constitutional interpretation or application.

[25] Likewise, Counsel submitted that neither the Court of Appeal nor the Supreme Court have certified this petition as one involving a matter of general public importance as provided under Article 163 (4) (b) of the Constitution.

[26] They maintained that the Court of Appeal's determination was on the substitution of the 1st respondent with the petitioners which decision, turned on one major issue, that is, ***whether an appellant who is intent on withdrawing an election petition appeal can be substituted by another person***. They agree with the Appellate Court's holding that all the parties to the appeal having consented to its withdrawal pursuant to Rule 96(3) of the Court of Appeal Rules, the same was rightly struck out.

[27] Counsel also reiterated that the petitioners did not seek the interpretation or application of any provision of the Constitution, a jurisdictional prerequisite at this Court. They thus insist that the issues the petitioner seeks to appeal against have not been determined by the Court of Appeal. They support this assertion by citing this Court's decisions in, ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd. & Another*** Sup. Ct Petition No. 3 of 2012; [2012] eKLR; (*Nduttu Case*) and, ***Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others***, Sup.Ct. Petition No. 10 of 2013 (*Joho Case*).

[28] Finally, Counsel claimed that this Court could not direct the Court of Appeal to hear the appeal on merit since the Court of Appeal's jurisdiction is limited by the provisions of Section 85A 1B of the Elections Act, which provides that the Court of Appeal, should hear and determine an appeal within 6 months of the date of filing of the appeal. In his view, the Court of Appeal's time to hear and determine the appeal lapsed on 15th June, 2018; and as such there was nothing to be remitted to it.

(ii) 1st Respondent's Written Submissions in Support of the 2nd to 5th Respondents' Preliminary Objection

[29] Counsel for the 1st respondent associated himself with the 2nd, 3rd, 4th, and 5th respondents' Notice of Preliminary Objection reiterating that the Petition of Appeal herein neither raises matters of constitutional interpretation nor does it involve matters of general public importance and as such, cannot be entertained by this Court. In the 1st respondent's written submission dated 18th July, 2018, he supports the Preliminary Objection by relying on this Court's decisions in the ***Nduttu Case*** and ***Sum Model Industries Ltd v. Industrial & Commercial Development Corporation*** [2011] eKLR.

[30] Counsel further contended that there were no issues for determination touching on the interpretation or application of the Constitution in any way or form in the present petition, urging that this Honorable Court does not have jurisdiction to entertain the matter. Citing this courts' decision in ***Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others*** (2012) eKLR it is their submission that this Court cannot donate to itself jurisdiction that is otherwise not provided for in any law.

[31] He therefore supported the Preliminary Objection and urged the Court to dismiss the petition with costs to the 1st respondent.

(iii) 6th Respondent's Written Submission in Support of the 2nd – 5th Respondents' Preliminary Objection

[32] The 6th respondent sought to rely on both his oral and written submissions filed on 20th August, 2018. Counsel also adopted the submissions of the 1st to 5th respondents, and similarly contended that the petition before the Court does not raise matters of constitutional interpretation or application.

[33] Counsel in addition, submitted that in the absence of certification under Article 163 (4) (b) of the Constitution, this Court lacks jurisdiction to entertain the appeal. In his written submissions, the 6th respondent also urged that this Court had already pronounced itself as to when an appeal may be considered as one involving a matter of general public importance in the case of ***Hermanus Phillippus Steyn v. Giovanni Gnechi Ruscone***; Application No. 4 of 2012.

(iv) 1st to 3rd Petitioners' Written Submissions in response to the 2nd to 5th Respondents' Preliminary Objection

[34] Counsel submitted that in the absence of certification, the petition is to be regarded as anchored on Article 163(4)(a) of the Constitution, as of right, and therefore, does not require certification by either the Court of Appeal, or this Court under Article 163(4)(b) of the Constitution. Citing ***Gatirau Peter Munya v. Dickson Mwenda & 2 Others*** SC Application No. 5 of 2014; [2014] eKLR to support this assertion. Counsel maintained that under Rule 9 and form B of the Supreme Court Election Rules, which prescribe the template of a petition, there is no requirement that a petitioner to this Court must specify that their petition is brought either under Article 163(4)(a) or 163(4)(b) of the Constitution.

[35] Counsel further submitted that the constitutional question that allocates this Court jurisdiction arose from Article 22(3)(a) namely, the rights of standing provided to a person who seeks to approach this court or indeed any other Court. He maintained, the dispute before the Court of Appeal *was whether the Petitioners have standing to be substituted*. He urged that if this Court were to find that the Petitioners had some form of standing or some entitlement (enforcement of their rights under Article 38 and 81 of the Constitution as read with Article 251) to be substituted by the appellants, then this Court ought to assume jurisdiction.

[36] Furthermore Counsel maintained that the rules that guide the Court of Appeal are the Election Appeal Rules read together with the Court of Appeal Rules 2010. He urged the Court to determine whether those rules are appropriate rules for the purpose of guiding the Court on questions concerning the substitution of parties in electoral disputes.

[37] Counsel also urged the Court to look at the issue of enforcement of Article 38 rights and whether the absence of a rule could disentitle a desirous party from being substituted.

[38] It was the 6th respondent's further submission that the determination of the Appellate Court that no provision exists for substitution other than by the death of a party, goes against the petitioner's rights and freedoms in Article 38(2) as read with Article 81 Constitution including political rights and the right to equal protection of the law.

[39] He urged that the Court should seize the opportunity to create jurisprudence as to whether a party in an election petition appeal can be substituted where they wish to withdraw from the petition.

[40] To this end, he urged the Court to borrow a leaf from the Supreme Court of India's holding in *Bijayawanda Patwak v. Satrug-Hna Saha* AIR 1963 SC 1566 at 1569 that found that a Petitioner did not possess an absolute right to withdraw a matter in an election petition.

[41] Moreover, Counsel submitted that the Appellate Court's decision raises issues of the interplay between fundamental rights and collective political rights and interests of many, notably those falling under Articles 22, 38, 81, and 182 of the Constitution. Counsel in that regard, maintained that the petitioners have standing before this Court by virtue of Article 22, 38 and 81 of the Constitution.

[42] Consequently, he urged the Court to disallow the Preliminary Objection and let the appeal proceed to full hearing.

(v) Response by the 2-5th Respondents to the Petitioners' Submissions

[43] In response to the Petitioners' argument that Rule 9 and Form B of the Supreme Court Election Petition Rules, did not place any obligation upon an appellant to indicate under which provision of the Constitution, he was filing an appeal, Counsel for the respondents' referred to this Court's decision in *Daniel Kimani Njihia* to urge the contrary.

[44] In response to the petitioners' reliance on Article 22(3)(a), Counsel for the 2nd-5th respondents submitted that the Constitution vests original jurisdiction to interpret the Constitution upon the High Court. In his view therefore, as this argument was being made in the Supreme Court for the first time, it ought to have been dealt with at the High Court first before it procedurally escalated to this Court.

[45] Counsel also submitted that the absence of Rules in the Court of Appeal, in respect of the process that the petitioners sought to take advantage of, is an argument that was being made for the first time. He therefore insisted that the absence of applicable rules was never an issue that was taken up before the Court of Appeal.

[46] He thus urged the Court to uphold the Preliminary Objection and dismiss the Petition.

4. ISSUES FOR DETERMINATION

[47] Having considered the Petition of Appeal, the Preliminary Objection thereto, and the written and oral submissions of counsel, as supported by the authorities cited, it is clear to us that one issue stands out, the determination of which, will dispose of this appeal. This is:

Whether this Court has jurisdiction to entertain and determine the Appeal herein;

5. ANALYSIS

[48] The appeal before us substantively, seeks the setting aside of the Ruling of the Court of Appeal which dismissed the petitioners' application in which the latter had sought to be substituted and be placed in the shoes of the original petitioners in Petition of Appeal No. 4 of 2018: *Mwamlole Tchappu Mbwana v. IEBC & 4 Others*. The background to this appeal has been set out in detail in the foregoing paragraphs.

[49] At the outset, we note that before us, is the ever-recurring issue as to whether this Court has jurisdiction to determine the appeal before it. In this regard, we hasten to point out that, it is now settled law, that appeals from the Court of Appeal lie to this Court pursuant to Articles 163 (4) (a) or 163 (4) (b) of the Constitution. This Court in a steady line of cases, has repeatedly illuminated the frontiers of its appellate jurisdiction, under the said provisions of the Constitution.

[50] It follows that an appeal shall not lie to this Court, unless convincingly preferred within the confines of either of the two jurisdictional limbs. Towards this end, the respondents have raised a Preliminary Objection in which they contend that this Court lacks jurisdiction to hear the appeal because the same does not meet the admission criteria that has been established in the cases alluded to. Critically, the respondents submit that the jurisdiction of this Court has not been properly invoked, as the petitioners have not indicated under which limb they have filed the appeal. Instead the petitioners have moved this Court specifically, under Articles 22 (1) &(2), 23 (3) (a), 82 (e), 159 (2) and 259 (1) (b) of the Constitution.

[51] The petitioners on their part, while admitting that they have not indicated under which provision of Article 163 (4) of the Constitution they are moving the Court, nonetheless argue that, there is no requirement for them to do so. The petitioners submit that under Rule 9 and attendant Form B of the Supreme Court Election Petition Rules, there is no requirement that a party must specify under which limb of Article 163 (4) it is invoking the Court's jurisdiction. In his oral submissions, Counsel for the petitioners further contended that in the absence of certification, the appeal herein, must be considered to be anchored, on Article 163 (4) (a) of the Constitution. As such, the Appeal lies as of right.

[52] On our part, we find it inconceivable, contrary to the submissions of Counsel for the petitioners, that a party can seek to invoke this Court's appellate jurisdiction, without unequivocally indicating under which constitutional provision he/she seeks to move the Court. One cannot seek refuge in Rule 9 and the template in Form B of the Supreme Court Rules to justify such a fundamental omission. The appellate jurisdiction of this Court is donated by the Constitution. It is neither original nor unlimited. The limits of its jurisdiction are set out by the Constitution as clarified by this Court in a number of its decisions. In the circumstances, an intending appellant must either seek certification under Article 163 (b) of the Constitution or bring him/her (self) within the ambit of Article 163 (4) (a) thereof. This second option is by no means automatic as pronouncements of the Court in past decisions clearly demonstrate.

[53] In this appeal, what Counsel for the petitioners is asking us to do is to assume jurisdiction by way of elimination. This Court is being called upon to hold that, because certification, was not sought by the intending appellant, then it must follow that the said appellant, is invoking the Court's jurisdiction as of right, under Article 163 (4) (a) of the Constitution, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter. In *Daniel Kimani Njihia v. Francis Mwangi Kimani & Another* [2015] eKLR this Court was categorical that in preferring an appeal, "a litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution." This statement of principle, in our view, still holds sway, and we see no reason to engineer a shift from it.

[54] Consequently, and in view of the foregoing, we have no option but to dismiss this Petition at this stage, for want of jurisdiction.

[55] As for costs, the operative principle is that, costs follow the event. However, we also take note of the fact that, this is a unique petition, in which the petitioners herein, do seem in our view, to be promoting, not their personal interests, but the larger public interest of the political rights of a citizen to freely choose his representative in a free and fair election. We therefore think that they should not be punished in costs just because they have not properly invoked the jurisdiction of this Court. Consequently, the following Orders shall issue.

6. ORDERS

(i) The Petition of Appeal dated 22nd of June, 2018 is hereby struck out for want of jurisdiction.

(ii) Each party shall bear its own costs.

DATED and DELIVERED at NAIROBI this 21st Day of December, 2018.

.....

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT

OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

M.K IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

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



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)