REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 4 OF 2017

SAMWEL KAZUNGU KAMBI…… PETITIONER

VERSUS

NELLY ILONGO THE RETURNING OFFICER,

KILIFI COUNTY……1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION……..2ND RESPONDENT

KINGI AMASON JEFFAH…….3RD RESPONDENT

RULING NO. 7

[3RD RESPONDENT'S PRELIMINARY OBJECTION DATED 16TH NOVEMBER, 2017]

1. In order to avoid confusion in this decision, I shall refer to the parties as per their titles in the Petition. The Preliminary Objection dated 16th November, 2017 by the 3rd Respondent, Kingi Amason Jeffah is worded as follows:

"The 3rd Respondent intends to raise a preliminary objection on a point of law, being that:

1) The 3rd Respondent filed and served a Notice of Appeal dated 6th November, 2017 against the Ruling No. 1 and 4 dated 31st October, 2017 issued by the Hon. Court;

2) The pre-conditions contained within Rule 18 of the Court of Appeal Election Petition Rules 2017 have been complied with by the 3rd Respondent;

3) The mandatory stay envisaged by the said Rule 18 is now in force and the Hon. Court has been divested of any power to issue any judgement, decree, order or directions in this matter pending further orders from the Court of Appeal.

4) The Hon. Court cannot issue any judgement, decree, order or directions in this matter and any such attempt to do so would be unlawful and against the said Rule 18."

2. The 1st Respondent, Nelly Ilongo the Returning Officer, Kilifi County and the 2nd Respondent, the Independent Electoral and Boundaries Commission [IEBC] supported the Preliminary Objection.

3. The Petitioner, Samwel Kazungu Kambi opposed the Preliminary Objection.

4. Rule 18 of the Court of Appeal (Election Petition) Rules, 2017, Legal Notice No. 114 of 2017 states:

“18. (1) The filing and service of a notice of appeal stays the execution of any judgement, decree, order or direction from the High Court pending the determination of the appeal.

(2) Sub-rule (1) shall cease to apply if no record of appeal is filed within thirty days from the date of the judgement of the High Court.”

5. The 3rd Respondent, at the time of filing the Preliminary Objection, also filed written submissions. At the hearing, the advocates for the parties made oral submissions.

6. In support of the respondents’ case, their advocates provided and cited the following authorities:

a) Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]; Supreme Court Petition No. 10 of 2013;

b) Evans Odhiambo Kidero & 4 others v Ferdinand Ndung’u Waititu & 4 others [2014] eKLR; Supreme Court Petition No. 18 of 2014 as consolidated with Petition No. 20 of 2014;

c) Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others [2014] eKLR; Supreme Court Application No. 18 of 2014;

d) Suleiman Said Shahbal v Independent Electoral and Boundaries Commission & 3 others [2014] eKLR; Court of Appeal (Malindi) Civil Appeal No. 42 of 2013;

e) Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 others [2014] eKLR; Court of Appeal (Nairobi) Civil Appeal No. 300 of 2013; and

f) DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited [2017] eKLR.

7. On their part the advocates for the Petitioner cited the following Court of Appeal decisions in support of their position:

a) Cornel Rasanga Amoth v William Odhiambo Oduol & 2 others [2013] eKLR;

b)Peter Gichuki King’ara v Independent Electoral and Boundaries Commission & 2 others, Nyeri Civil Appeal No. 23 of 2013; and

c) Ferdinand Ndung’u Waititu v Independent Electoral & Boundaries Commission [IEBC] & 8 others [2013] eKLR.

8. Also cited by the Petitioner’s advocates are pages 83 and 105 of the **Judiciary Bench Book on**

Electoral Disputes Resolution, 2017 ('the Bench Book").

9. In brief, the 3rd Respondent's case is that Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 arrests all actions by this court once a notice of appeal has been filed and served against its ruling or judgement.

10. The 3rd Respondent states that he has filed and served notices of appeal against this court's Rulings Nos. 1 and 4 delivered on 31st October, 2017 and the said Rule18 is now in force and this court is divested of any power to issue any judgement, decree, order or directions in this matter pending further orders from the Court of Appeal. He asserts that any attempt by this court to issue any judgement, decree, order or directions in this matter would be unlawful and against Rule 18.

11. Referring to Rule 5(2)(b) of the Court of Appeal Rules, 2010, counsel for the 3rd Respondent asserts that whereas the said provision leaves the question of stay to the discretion of the Court of Appeal, Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 does not grant the Court discretion once a notice of appeal has been filed and served. According to counsel, the conditions set out in Rule 18 have been met as a notice of appeal was file on 6th November, 2017 and served on 8th November, 2017.

12. It is the submission of the 3rd Respondent's counsel that Rule 18 creates new jurisprudence and due to its novelty no case law is available on the provision. As such, they urge this court to use the "ordinary" interpretation rule, the language contained in the Rule itself and the context of the entire Legal Notice to interpret and properly utilize the said Rule.

13. It is the 3rd Respondent's case that apart from Rule 18, the Court of Appeal (Election Petition) Rules, 2017 has no other provision for granting stay meaning that Rule 5(2)(b) of the Court of Appeal Rules, 2010 is not applicable as Rule 4(3) of the Court of Appeal (Election Petition) Rules, 2017 clearly provides that where there is any conflict between the Court of Appeal Rules, 2010 and the Court of Appeal (Election Petition) Rules, 2017, the Court of Appeal (Election Petition) Rules, 2017 shall prevail.

14. It is the 3rd Respondent's position that Rule 18 stays the execution of four edicts of this court namely a judgement, a decree, an order or direction. His case is that each of these four edicts is within the scope of the automatic stay granted by Rule 18 because the word "any" immediately precedes the word judgement in the rule itself. He therefore asserts that the simple construction of the language found in the Rule is that any judgement, any decree, any order and any direction of this court is subject to the automatic stay.

15. According to the 3rd Respondent, the fact that the Rule does not refer to stay of proceedings does not in any way mean the court can proceed to hear the Petition for without the power to issue a judgement, decree, order or direction, the court is not equipped to proceed with the trial. His assertion is that once the four edicts are removed from the arsenal of the court, these proceedings are vitiated and crippled at best.

16. The 3rd Respondent contends that failure to comply with Rule 18 will prejudice him because his appeal has high chances of success. It is his submission that should his appeal succeed and it is determined that this court had no jurisdiction to enlarge time for the Petitioner to deposit security for costs, precious time will have been wasted on hearing the Petition.

17. The 3rd Respondent points out that the Petitioner has only four witnesses and they can be heard within a short time should the Court of Appeal decide against his appeal.

18. Counsel for the 1st and 2nd respondents submitted at length that the Court of Appeal erred in holding that it could not entertain appeals on decisions arising from interlocutory applications in election petitons. His view was that this position was contrary to that of the Supreme Court which has held that appeals on points of law and on jurisdiction should be considered. The Supreme Court decision in the case of **Hassan Ali Joho & another** (supra) is cited in support of this submission.

19. The advocate for the 1st and 2nd respondents joined counsel for the 3rd Respondent in stressing that the decisions of the Court of Appeal in the cases cited by the Petitioner's advocates amounted to abdication of the Court's mandate under Article 164(3) of the Constitution to hear appeals from this court. It is the submission of counsel for the 1st and 2nd respondents that the erroneous position taken by the Court of Appeal had recently been rectified by that Court in the case of **DHL Excel Supply Chain Kenya Limited** (supra).

20. The response by the Petitioner's counsel to the Preliminary Objection is that a reading of the Court of Appeal (Election Petition) Rules, 2017 as a whole will show that an appeal can only arise from the final decision of this court and any appeal against an interlocutory ruling is deferred. Further, that the right of appeal against decisions made in respect of interlocutory applications had not been taken away from the Court of Appeal as suggested by the respondents but was simply deferred and thus the right of appeal as guaranteed by the Constitution has not been violated.

21. Before proceeding to identify and deal with the main question for determination in this matter, I must address the Petitioner's assertion that this Preliminary Objection contravenes Rule 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. The advocates for the Petitioner submitted that this Preliminary Objection having been filed after the conclusion of the pre-trial conference on 29th September, 2017 contravenes the said Rule.

22. Rule 15(2) states that:

"An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition."

The rule is self-explanatory. It only allows interlocutory applications that by their nature could not be made before the pre-trial conference to be made after the pre-trial conference. The instant application is one of that kind. It is said the notice of appeal was filed on 6th November, 2017 and served on 8th November, 2017. If Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 is applicable to interlocutory decisions as asserted by the 3rd Respondent, then the Rule could only come into play from 8th November, 2017 which was after the pre-trial conference. Counsel for the 3rd Respondent alerted this court on 10th November, 2017 that he intended to raise the objection. The objection was therefore presented without undue delay. It is thus clear that the instant Preliminary Objection could not have been brought before the pre-trial conference. I therefore find and hold that the Preliminary Objection is not in breach of Rule 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

23. In my view, the key question in this matter is whether Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 applies to decisions made on interlocutory applications by an election court. Here, I am specifically referring to interlocutory decisions that do not lead to the conclusion of the petition.

24. I have perused the authorities placed before this court by the parties. At paragraphs 4.6.6.1 and 4.6.6.2 at pages 82–83 of the **Bench Book** it is stated that:

"4.6.6.1 Under statutory amendments enacted in 2016, the filing of an appeal against the final judgement and decree of an EDR court results in the automatic stay of the certificate of election results until the appeal is heard and determined (s. 85A(2) of the Elections Act, 2011). This means it is not unnecessary (sic) to file an application for conservatory orders or stay pending appeal from such final judgements and decrees.

4.6.6.2 Although there is no judicial authority on the point yet, the concept of *'deferred and sequential'* jurisdiction of appellate courts in EDR, discussed in Chapter 2 of the Bench Book, leads to the conclusion that the automatic stay of proceedings introduced by the 2016 amendments does not apply to interlocutory decisions of an election court. Previously, the prevailing jurisprudence was that a court which had appellate jurisdiction in EDR could entertain and grant an application for conservatory orders, stay of proceedings and similar reliefs pending the filing, hearing and determination of an appeal…."

25. In paragraph 4.10.1.1 at page 105, the authors state that:

"A person who seeks to appeal against the decision of the High Court in EDR must file a notice of appeal within 7 days of the decision (Rule 6(2) of the Court of Appeal (Election Petition) Rules, 2017). Although appeals against interlocutory decisions of the High Court in EDR must await the final judgement of that court, the notice of appeal in respect of an interlocutory decision must be filed *within 14 days* of the decision (*Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others,* Civil Appeal (Nyeri) No. 38 of 2013)."

26. The 2016 amendments to the Elections Act, 2011 cemented a long line of jurisprudence developed by the Court of Appeal in interlocutory appeals arising from election petitions from the 2013 general election. Through the decisions, the Court held that although the right of appeal against an interlocutory decision was available to a party in an election petition, that right was deferred to await the final decision of the election court.

27. In **Peter Gichuki King'ara** (supra) the Court of Appeal explained the decision it had taken thus:

"42. We are of the considered view that *Section 80 (3)* of the *Elections Act* is a jurisdictional section and when read with *Section 85 A* and in the context of Constitutional time lines in *Article 105 (2)* for finalization of Election Petitions, there is a deferred, delayed and sequential exercise of the jurisdiction of the Court of Appeal in interlocutory matters arising in Election Petitions. The jurisdiction of the Court of Appeal to hear a point of law that arises in an interlocutory matter in an Election Petition is not ousted by *Section 80 (3)* of the *Elections Act* or *Rule 35* of the *Election Petition Rules* but is delayed to be exercised *a posteriori ex-ante* after final judgment and decree of the High Court. This does not mean that the Court of Appeal has no jurisdiction to hear issues of law that could have arisen during interlocutory proceedings. Far from it, the Court of Appeal under *Article 164 (3)* of the *Constitution* as read with *Section 85A* of the *Elections Act* and the exercise of its jurisdiction as deferred in *Article 105 (2)* of the *Constitution* and as implemented by *Section 80 (3)* of the *Elections Act* and *Rule 35* of the *Election Petition Rules* is vested with an appellate jurisdiction to hear any and all points of law that arise out of an Election Petition during the substantive hearing of an appeal. The sequential jurisdiction gives practical effect, expediency and implementation to the Constitutional time lines for determination of Electoral Petitions.

43. From the foregoing we find that this Court as an appellate court has deferred and sequential jurisdiction to hear interlocutory matters arising from an Election Petition. However, the jurisdiction of this Court is only exercisable after a final judgment and decree of the High Court has been made. The points of law raised in the memorandum of appeal dated 12th August, 2013 and the prayers sought therein are interlocutory in nature. The main Election Petition is still pending before the High Court and there is no judgment or decree from an election court that is before this Court. We hold that the issues raised in this appeal are premature and must await the final judgment and decree of the High Court in the Election Petition. We concur and paraphrase in italics the dicta by this Court differently constituted in the case of *Kakuta Maimai Hamisi –vs- Peris Tobiko & 2 Others- Civil Appeal No. 154 of 2013* where it is stated:-

"We are on our part perfectly satisfied that *the delay or deferment of interlocutory matters* is an exemplar of that sense of balance, proportionality and appreciation of the practical realities of just, expeditious, time-bound and substantive determination of election petitions on merit untrammeled by the delays and confusion that can be sown by appeals to this Court on interlocutory rulings. The law on electoral dispute resolution as currently formulated was meant to facilitate a speedy and seamless process of adjudication of the petitions proper, hence the *deferment* of disruptive distractions such as interlocutory appeals that serve only to unnecessarily prolong the process with the attendant peril of piercing the statutory timelines.""

28. In **Bashir Haji Abdullahi** (supra) the Court of Appeal citing its decision in **Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 Others [2013] eKLR** further expounded on the principle of deferred appellate jurisdiction in regard to interlocutory decisions by election courts as follows:

"However in our view, if an appeal is against a decision of the High Court allowing an interlocutory application seeking striking out a petition then this Court would have jurisdiction to hear it for an order striking out a petition is a final decision on the petition and an appeal from it is no longer interlocutory appeal but an appeal on a final decision on the petition. This, in our view is only where application for striking out the petition is allowed and the petition is ordered struck out."

29. In support of the position of the 1st and 2nd respondents, their counsel, pointed out various statements by the Supreme Court, one such statement being at paragraph 49 in the **Hassan Ali Joho & another** case, where the Court stated that:

"In the present case, the issues arising out of the interlocutory application determined by the High Court, the Court of Appeal and now before this Court are issues of law that touch directly on the interpretation of the Constitution and the statute governing the electoral process. As the apex Court, we must always be ready to settle legal uncertainties whenever they are presented before us. But in so doing, we must protect the Constitution as a whole. Election Courts and the Court of Appeal, have discretion in ascertaining the justice of each case to balance justice, but that discretion must be concretised in enforcing the Constitution."

30. It was the submission of counsel for the 1st and 2nd respondents that the said passage confirm that appeals arising from interlocutory decisions can be entertained in electoral matters. He also pointed out that the appeal they have preferred against the decision of this court touches on the jurisdiction of the court to entertain the Petition. Further, that unlike the above cited decision of the Supreme Court, the interlocutory appeals in all the cases cited on behalf of the Petitioner had no jurisdictional element in

them.

31. In response to the assertion, counsel for the Petitioner stated that the Supreme Court decision in **Hassan Ali Joho** (supra) dealt with the question of stay at the Supreme Court level and not the question as to whether the Court of Appeal could stay proceedings before an election court.

32. It is important to note that the decision of the Supreme Court in **Hassan Ali Joho** (supra) was pointed out to the Court of Appeal in **Bashir Haji Abdullahi.** The Court of Appeal explained its understanding of the Supreme Court decision at paragraph 10 of its judgement as follows:

"It is true that in Joho's case the appeal was against the order of the High Court dismissing an interlocutory application to strike out the appeal despite its finding that the appeal was filed out of time stipulated by Article 87(2). There was a cross-appeal against the finding that the election petition was filed out of time. The Court dealt with the cross-appeal first, which decision disposed of the interlocutory appeal. The Court did not determine the appeal nor was the question of jurisdiction to entertain an interlocutory appeal raised or determined. It was submitted in Joho's case in the Supreme Court in reliance of the decision in Andama that the Supreme Court had no jurisdiction to entertain the appeal from the Court of Appeal because the decision appealed from arose from an interlocutory application. However, the Supreme Court did not determine whether or not the Court of Appeal had jurisdiction to entertain the interlocutory appeal."

33. In **Cornel Rasanga Amoth** (supra), the Court of Appeal gave a cogent reason as to why appeals from interlocutory decisions should not be entertained. The Court stated that:

"In our view appeals from interlocutory rulings, orders or directions during the electoral disputes would clog our justice system with the result that there would be no end to resolution of electoral disputes, the very mischief the Constitution 2010 sought to redress. We must guard, and protect the ideals and aspirations of Kenyans. That is the express demand made of us in Article 159(1), 2(b) and (e) of the Constitution 2010…."

34. The impression I get from a reading of the Court of Appeal decisions is that the Court has reached the conclusion that all appeals arising from interlocutory decisions of an election court are deferred to await the final judgement of the election court. The authors of the **Bench Book** have reached the same conclusion based on an analysis of the decided cases. Where I stand in the hierarchy of courts in this country, my opinion as to whether or not the Supreme Court has made a finding that an appeal can be entertained on an interlocutory decision will not be of any help to the 3rd Respondent. The prevailing jurisprudence in the Court of Appeal is as already stated and this court cannot change that jurisprudence. It is upon the 3rd Respondent to move the Court of Appeal to deal with that issue.

35. However, and with utmost respect to the Court of Appeal, I agree with the advocates for the respondents that in certain circumstances the dictates of justice would require that appeals on interlocutory decisions of election courts be heard promptly and not deferred to await the final decision. The Supreme Court's opinion in the **Hassan Ali Joho** case that the election courts and the Court of Appeal **"have the discretion in ascertaining the justice of each case to balance justice"** should be the guiding principle. The aim should be to do justice but with the courts always conscious of the ticking clock that overarches election petitions.

36. A classic example as to why appeals should be entertained on interlocutory decisions is the **Hassan Ali Joho** case itself. In the case, a constitutional question had arisen at the interlocutory stage as to whether the petition was filed out of time. The election court dismissed the application seeking to strike out the petition on the ground that it had been filed out of time. When the issue went to the Court of Appeal, the appeal was dismissed. Undeterred Hassan Ali Joho, whose election as the Governor of the County of Mombasa was being challenged, moved to the Supreme Court. The Supreme Court agreed with him that the petition had indeed been filed out of time. It is therefore apparent that had the issue reached the Supreme Court at supersonic speed, the election court need not have heard the petition.

37. Another example of an interlocutory decision that the tenets of justice would require that an appeal arising therefrom be heard promptly is where an application for scrutiny and recount has been rejected by the trial court. If an appeal is not entertained immediately, the injustice perceived to have been visited on the petitioner in the case of **Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR; Supreme Court Petition No. 5 of 2014** is likely to occur. In that case, the election court had rejected the petitioner's application for scrutiny and recount of votes. On appeal, the petitioner convinced the Court of Appeal to issue an order directing a recount of the votes. Lemanken Aramat who had been elected the Member of the National Assembly for Narok East Constituency moved to the Supreme Court which held, *inter alia*, that the time granted to the election court to hear the petition had lapsed. The appeal against the decision of the Court of Appeal was thus allowed. The issue of scrutiny and recount was thus buried in the process.

38. As I conclude on this point, it is my humble view therefore that the doctrine of deferred and sequential appellate jurisdiction in regard to interlocutory decisions in electoral disputes should be revisited and tinkered with so that the Court of Appeal acting upon its wisdom and discretion can promptly review some decisions. How this can be achieved without staying the proceedings of the election court is a matter that can be addressed by the Court of Appeal or by an amendment to the Court of Appeal (Election Petition) Rules, 2017. The right of appeal provided by Article 164(3) of the Constitution should not be rendered sterile simply because the appeal is arising from an interlocutory decision in an election dispute. It is alright to defer an appeal where such deferment will not prejudice the parties. However, if postponing an appeal will result in injustice, then such an appeal should be heard without undue delay.

39. Regardless of what I have stated, as matters stand now, the law is that the right of appeal on an interlocutory decision in an election petition is deferred awaiting the final decision of the election court. Reading Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 to mean that the proceedings of an election court are stopped once a notice of appeal on a decision in an interlocutory application is filed and served would result in an absurdity as the Court of Appeal at the moment does not hear appeals arising from interlocutory decisions by election courts. Such a stay would result in the abdication by an election court of its responsibility to hear and determine an election petition within six months from the date it is lodged.

40. The next point I need to consider is my understanding of Rule 18 of the Court of Appeal (Election Petition) Rules, 2017. I was urged by counsel for the 3rd Respondent to read the already cited Rule so that the term judgement includes decree, order, sentence and decision as defined in the Appellate Jurisdiction Act, Cap. 9. This, I was told will make me reach the inevitable conclusion that the Rule applies to all decisions arising in election petitions including those made at the interlocutory stage. I decline this invitation for it is now well-established that the law applicable to election petitions is the Constitution, the Elections Act, 2011 and the regulations and rules made thereunder.

41. In the **Evans Odhiambo Kidero** case the Supreme Court appreciated the tension that arises when

there is an attempt to marry other laws with the laws enacted to specifically deal with election disputes. At paragraphs 188 and 189, the Court observed that:

"[188] **This Court incorporated precisely such a perception in its recent Judgment in *Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others S.C. No. 10 of 2014,*when it thus held (paragraph 77):**

*"**On this account, it makes in our perception, eminent sense that the ordinary rules of procedure, in their full tenor and effect, tend to be ill-suited to the effectuation of substantive aspects of the Elections Act and the Rules made thereunder. It is clear to us, for instance, that Rule 35 of the Elections Petition Rules, in so far as it makes the Court of Appeal Rules applicable to appeals in election-dispute matters, is to be construed only as a supplement to and not a substitute to- the provisions of the Elections Act. We would state, for the avoidance of doubt, that the importation of the Court of Appeal Rules into the conduct of electoral appeals via Rule 35 of the Election Petition Rules, cannot oust the clear provisions of Section 85A of the Elections Act."***

[189] We would agree with the perception of *Warsame JA,* regarding the applicability or otherwise of Rule 82 of the Court of Appeal Rules, to election-petition appeals. The learned Judge in his opinion, thus stated (pp. 29-30 of the Judgment):

"Can Rule 82 of the Court of Appeal Rules, 2010 which provides for the certificate of delay, defeat the statutory provisions contained in section 85A of the Elections Act" The answer to this question must be in the negative…Section 85 is the legal foundation and all the rules must be interpreted in a manner that will not displace it….Therefore the Elections Act is the parent Act. It has all the and structures for the filing of the petition which is provided for in the Constitution….The time for lodging and determination of appeals in election disputes is found at section 85A of the Constitution, and a party who (sic) does not comply cannot find refuge in the rules of this Court. It is not tenable to elevate the rules of procedure of the Court above a statutory provision…""

42. In the circumstances I would be hesitant to seek the definition of the term "judgement" from the Appellate Jurisdiction Act. I would instead go for the answer provided by Rule 2 of the Court of Appeal (Election Petition) Rules, 2017 which states that an "appeal" means an appeal against the decision of the High Court. The meaning of the term "decision", which I will also read to mean "judgement", was provided in **Cornel Rasanga Amoth** (supra) when the Court of Appeal stated that:

"We must not also forget that appeals to this Court must be heard and determined within six months of filing the same. In the premises the term "decision" in Section 85(A) of the Elections Act must be construed to mean the final decision on the electoral dispute at the High Court."

43. A plain reading of the Elections Act, 2011 as amended in 2016 will clearly show that the decision that is to be stayed is the final decision of the election court. The words used in Section 85A(2) of the Elections Act, 2011 are clear that an **"appeal under subsection (1) shall act as stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined."**

44. The certificate referred to in Section 85A(2) is explained in Section 86(1) as follows:

“An election court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the petition, and shall certify its determination to the Commission and notify the relevant Speaker.”

45. It is therefore apparent that a certificate determining the questions raised in a petition can only be issued at the conclusion of the trial. Rule 18 of the Court of Appeal (Election Petition) Rules, 2017, which rules are made on the authority of the Elections Act, cannot purport to expand the applicability of Section 85A(2) to include stay of proceedings before an election court.

46. It goes without saying that the Court of Appeal (Election Petition) Rules, 2017 were drafted with the provisions of the Elections Act, 2011, and more so Section 85A, in mind. Subsidiary legislation cannot expand the territory of a statute. Subsidiary legislation is meant to effectuate the mother law but not to create rights not envisaged by the Act or take away rights given by the Act. Subsidiary legislation must strictly adhere to the provisions of the statute that creates it. The statute should, as a matter of course, be in consonance with the Constitution.

47. It is also noted that a perusal of the Court of Appeal (Election Petition) Rules, 2017 will show that the appeal contemplated is an appeal from the final determination of the High Court in an election matter. Rules 4(1), 6(3)(a), and 8(1)(g) and (h), among other rules, will bear testimony to this assertion. Rule 18 should therefore be read in line with the other rules so that the reference therein to a decree, order and direction can only mean a decree, order or direction arising from and after the judgement of an election court. This would be in tandem with the Court of Appeal’s already cited definition of the meaning of a decision in the **Cornel Rasanga Amoth** case.

48. My interpretation of Rule 18 also finds support from the **Bench Book.** One of the passages already cited in this decision clearing shows that the **Bench Book** was written after the Court of Appeal (Election Petition) Rules, 2017 had been promulgated. The authors state that the automatic stay introduced by Section 85A(2) of the Elections Act, 2011 is applicable to the final decision of an election court only. In my view, that is the correct exposition of the law.

49. An analysis of the law will therefore clearly show that appeals arising from decisions in interlocutory applications are to await the outcome of the petition unless such a decision has resulted in the striking out of the petition. The automatic stay granted by Rule 18 is only against the final decision of the election court. The Preliminary Objection is thus without merit and should stand dismissed at this stage. I will, however, take one more step.

50. Even assuming that the respondents are correct that Rule 18 stays proceedings upon the filing and service of a notice of appeal in respect of an interlocutory decision, I would not hesitate in finding the Rule unconstitutional and *ultra vires* the Elections Act, 2011. Such a provision would contravene the constitutional principles attendant to litigation of electoral disputes. One such principle is the need to meet the timelines provided by the Constitution and the electoral law.

51. In **Ferdinand Ndung’u Waititu** (supra), the Court of Appeal stressed the need to adhere to the timelines thus:

“These timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any court for whatever reason. It is indeed the tyranny of time, if we may call it so. That means a trial court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the

Elections Petitions Rules be amended to bring about mechanisms of expediting trials."

52. Any provision that would suspend or stay proceedings in an election petition would put the trial court at the risk of failing to comply with Article 105(2) of the Constitution. The fate of such a provision would be as provided by the Court of Appeal in **Ferdinand Ndung'u Waititu** thus:

"The Elections Act and the Rules made thereunder constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya. That being the case, any statutory provision or rule or procedure that contradicts or detracts from the expressed spirit of Articles 87(1), and 105(2) and (3) of the Constitution is null and void. The Constitution is the supreme law of the land and all statutes, Rules and Regulations must confirm to the dictates of the Constitution."

53. To read Rule 18 in the manner proposed by the respondents would by operation of sub-rule (2) thereof result in the automatic deduction of thirty days from the six months given to this court to hear an election petition. The thirty days given to an appellant by sub-rule (2) to file a record of appeal does not include the time for the actual hearing of the appeal. This court has no control over the Court of Appeal's diary and so the time that Court would take to hear and determine the appeal cannot be predicted.

54. As was stated by the Supreme Court in **Lemanken Aramat** (supra) the timelines provided by the Constitution and electoral law cannot be suspended. On the issue of timelines, the Court of Appeal in the **Cornel Rasanga Amoth** case stated that **"[o]nce a petition has been lodged the clock starts ticking and within six months of lodging the petition a resolution must be made."** An appeal to the Court of Appeal does not stop the constitutional clock from ticking. The constitutional clock plods an irrespective of the activities of the court and or the parties in an election dispute.

55. Rule 18 of the Court of Appeal (Election Petition) Rules, 2017 cannot therefore be read so that it can result in the stay of an election petition, as proposed by the respondents. Any provision that attempts to frustrate the constitutional timelines is void and should be ignored in preference to the word of the Constitution. In election disputes that word is that the disputes should be settled timeously. However, as already stated, Rule 18 only applies to the final decision of an election court. That is the decision that is stayed upon the filing and service of a notice of appeal by an appellant. In the circumstances there is no basis for declaring Rule 18 unconstitutional.

56. I have said enough to show why this Preliminary Objection must fail. The same has no merit and it is dismissed with costs to the Petitioner. The costs shall be met by the 3rd Respondent.

Dated, signed and delivered at Malindi this 21st day of November, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT