IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OUKO & KIAGE, JJA.)

CIVIL APPEAL NO. 154 OF 2013

BETWEEN

KAKUTA MAIMAI HAMISI ……..…….....APPELLANT

AND

PERIS PESI TOBIKO……..1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARY COMMISSION

(IEBC).....……..……..... 2ND RESPONDENT

RETURNING OFFICER KAJIADO EAST

CONSTITUENCY.....3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (G.K. Kimondo, J.) delivered on the 25th June, 2013

in

HC. ELECTION PETITION NO. 5 OF 2013)

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JUDGMENT OF THE COURT

The appellant herein **KAKUTA MAIMAI HAMISI** contested the Kajiado North Parliamentary Seat in the March 4th 2013 General Election. When the results for that seat were announced on 5th March, 2013 he was announced as coming in second with 22,771 votes. The margin separating him and the declared winner **PERIS PESI TOBIKO**, the 1st respondent herein was the rather tantalizingly close figure of 874 votes.

Unhappy with the outcome of the election, and believing himself possessed of sufficient grounds in the form of stated irregularities and discrepancies, the respondent challenged the by way of a Petition filed at the High Court in Nairobi against the respondents herein in which he sought the following

prayers;

i. ***Declaration that the 4/3/2013 election of member of parliament of the 1st respondent is null and void for not being free fair and transparent and lacking credibility.***

ii. ***Certificate issued and granted to the 1st respondent be and is hereby quashed and nullified.***

iii. ***Fresh election be held.***

After the usual preliminaries, the petition was set down for hearing before the Election Court (G.K. Kimondo, J). In the course of the trial, the appellant moved that court by a Notice of Motion dated 16th May 2013 by which he sought scrutiny of votes and the production and supply of various election materials or documents in respect of some five polling stations.

The learned Judge directed that the application be held in abeyance in the first instance awaiting the conclusion of the trial by adduction of oral evidence which hearing of the petition proper ended on 19th June 2013 whereafter the learned Judge heard the rival arguments for and in opposition to the application for scrutiny.

By a ruling dated and delivered on 25th June 2013, the Election Court faulted the appellant for not having pleaded for scrutiny in the Petition proper and found that his application had meandered well beyond the confines of the Petition, the primary pleading by which he was bound. It did, however, find that there was a case made out for a partial scrutiny. The learned Judge delivered himself as follows on the issue;

"The Petitioner and his witnesses have in my view raised sufficient grounds for limited scrutiny. In addition, the court on its motion had identified a few centers where limited or partial scrutiny is justified. Most of the matters raised by the parties will be dealt with in the final judgment of the Court."

The learned Judge then ordered that the scrutiny of votes be undertaken from 27th June 2013 at 9.00am and to proceed from day to day until concluded. It was to be under the direct supervision of the Deputy Registrar of the High Court.

Aggrieved by the foregoing ruling, the appellant filed a Notice of Appeal the very next day followed by the lodging of the record of appeal on 17th July 2013. The Memorandum of Appeal therein raises some seven grounds of grievance against the decision of the Election Court as follows;

"1. That the learned judge erred in law and in fact in

selectively ordering for scrutiny of votes in polling

centres:-

a) Noonkopir Secondary School polling centre streams 018/6 only

b) GK Athi River Prisons Primary School polling centre streams 019/2 and 019/8 only

c) Korompoi Primary School polling centre 007/1 only

d) Emam Parisui Centre 001

2. That the learned judge erred in law and in fact in holding that a party who has not asked for vote scrutiny in the petition cannot ask for the same at the close of receiving evidence in petition in which serious evidence commending the same have arisen.

3. That the learned judge erred in law and in fact in failing to find scrutiny was essential as prayed for in the application based on the evidence arising from the reply by the respondent to the petition.

4. That the learned judge erred in law and in fact in that after hearing the witnesses and evidence of serious electoral malpractices being adduced he failed to:-

i) Order for scrutiny of votes suo motto
ii)Order for scrutiny in accordance with the applications by the petitioner for scrutiny.

5. That the learned judge erred in law and in fact after receiving original form 35 from the 2nd respondent on the face of which serious and glaring electoral errors were noted failed to include stations like stream 1-22 of polling stations 016, St. Monica and the rest mentioned in the application by the petitioner for scrutiny of votes.

6. That the learned judge erred in law and in fact in ignoring serious errors on the clear form 35 presented to Court by the 2nd respondent that would

automatically call for suo motto order for scrutiny of

votes.

7. That the learned judge erred in law and in fact in

partially disallowing the appellant application.

The appellant then beseeches this Court to order that;

"(a) The appeal be allowed.

(b) That the said ruling and order be set aside and the same be substituted by an order allowing scrutiny and vote recounts together with all the electoral materials including voter register, from 35, rejected and spoilt votes and register of voters who voted on the 4/3/2013 election.

(c) That cost (sic) of the appeal be awarded to the appellant.

In deference to the constitutional, statutory and public interest imperative that election related matters be expedited, this appeal was immediately fast tracked. It was listed for directions before us on 19th July 2013 and fixed for hearing less than a week later on 25th July 2013. The directions given included the filing of written submissions and lists of authorities prior to the hearing.

Now, when the appeal was called out for hearing, we inquired of counsel whether they had acquainted themselves with a ruling delivered by this Court the previous day in which the Court had pronounced itself devoid of jurisdiction to entertain appeals from interlocutory rulings and orders in election related cases. It was a curiosity and a surprise that in a much vaunted digital era, the very able counsel before us appeared blissfully oblivious of the epochal decision of **FERDINAND NDUNGU WAITITU Vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) & EIGHT OTHERS** CIVIL APPLICATION NO. 137 OF 2013 (UNREPORTED).

In order to allow counsel full opportunity to peruse, consider and reflect on the **WAITITU** decision aforesaid, we adjourned the hearing of this appeal for close to an hour during which we directed that copies of the ruling be availed to counsel, and so it was.

Upon reconvening, we sought to know from Mr. Omino, learned counsel for the appellant, where he stood with regard to his appeal being now cognizant of the decision aforesaid. Mr. Omino indicated that having mulled over the matter, and while appreciating that a jurisdictional elephant did stand in the path of the appeal, he would plow on lion-hearted with indomitable faith that he would persuade us otherwise.

Much as Mr. Omino did address us on the merits of this appeal by way of elucidation and elaboration of the grounds above cited complete with various authorities while his learned counterparts, Mr. Koin Lompu for the 1st respondent and Mr. T.T. Tiego, for the 2nd and 3rd respondents, also addressed us in opposition to the appeal, all their efforts were coloured and subject to our finding on jurisdiction. And both sides did address us on the question.

So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in

issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren ***cul de sac***. Courts, like nature, must not act and must not sit in vain.

The proper place of jurisdiction and the necessity to deal with it as the first order of business before an enquiry into merits of a cause was best captured in the timeless words of Nyarangi J.A in The **OWNERS OF THE MOTOR VESSEL LILLIAN 'S' Vs. CALTEX KENYA LTD [1989] KLR 1;**

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority;

'By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist, where a court takes it upon itself to exercise a jurisdiction which it does not possess, its acquired before judgment is given.'

See Words and Phrases Legally defined – Volume 3: 1 – N Page 113."

The jurisdictional quandary that confronts this appeal emanates from the fact that it is an inter-locutory appeal. It seeks to challenge before us and overturn a decision made by the Election Court, not of the end of a hearing in which a final pronouncement is made on the Petition itself, but rather, on only an aspect, doubtless an important aspect, of the adjudicative process before that court, but before the final judgment and decree. It is an appeal against a ruling and order.

The **Elections (Parliamentary and County Elections) Petition Rules 2013** provide the procedural architecture and framework that governs the conduct of court-based electoral dispute resolution. These Rules were made by the Rules Committee in exercise of the powers conferred on it by **Section 96** of the Elections Act 2011. They are brand new rules and were crafted with a clear aim to introduce a measure of rationality and efficacy in the management of election petitions.

They aim, *inter alia,* to eliminate some of the more egregious forms of delay, abuse and mischief that were at times so outrageous as to render illusory any notion of electoral justice thereby emboldening and encouraging malfeasance and impunity with the concomitant erosion of public confidence in the judicial process.

The ethos of the Rules is well captured as follows;

"4. (1) The overriding objective of these Rules is to facilitate the just, expeditious proportionate and affordable resolution of election petitions under the Constitution and the Act.
(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1).
(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

5. (1) For the purpose of furthering the overriding objective provided in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims –

(a)the just determination of the election petition; and
(b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.

(2) The court may, where a party has breached any requirement of these rules, issue orders, or impose penalties, as the court may consider just and fit including an order for payment of costs."

The timelines alluded to in the Constitution and the Act are to the effect that parliamentary election petitions shall be heard and determined by the High Court within six months. Appeals therefrom are also to be filed, heard and determined by this Court within six months.

These timelines, based on the Constitution and the Elections Act and being part of the overriding objective of the Rules, find further reflection in a logical progression at part V of the Rules which deals with case management. Under that part, there is a near palpable sense of urgency and time economy as can be seen from the following;

Rule 17 (2) - prohibits belated interlocutory application

Rule 18 – multiple petitions relating to the same elections must be consolidated

Rule 22 – trial proceedings shall be conducted on a day to day basis to conclusion and no adjournment shall be for more than five days.

In case of incapacity of the presiding officer the Chief Justice shall appoint a replacement who must continue with the proceedings from where they had reached without room for de novo trial.

The same urgency is imported into Part VII of the Rules which deals with appeals and in particular, for our purpose, **Rules 35** which provides simply;

"An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules."

(Emphasis supplied)

A plain reading of that Rule without launching into any analytical discourse shows that the rule-maker intended for appeals to lie from final and conclusive determinations of election petitions, hence the use of the words 'judgment' and 'decision'. The basic interpretation tenet of ***expressio unius est***

exclusio alterius applies with the common sense conclusion that had the rule maker intended for appeals to lie from the other determinations that take the form of rulings and orders within the petition proceedings, nothing would have been easier than for the rule maker to say so.

This Court's decision in **WAITITU** referred to above addressed this issue specifically as follows;

"In our view, Rule 35 does not lend itself to an interpretation that a party has a right of appeal against an interlocutory order or ruling made by the High Court in an election petition. We think that the limitation to the right of appeal was deliberate, realizing that in the course of hearing an election petition a number of interlocutory applications that occasion interlocutory rulings do arise and if any party aggrieved by such decisions were to be allowed to appeal or seek stay of proceedings pending appeal it would be difficult, nay, impossible, to conclude an election petition before the High Court within the stipulated period of six months."

We respectfully reiterate that analysis. The formulation of Rule 35 that limits the right of appeal to this Court is not an aberration. Nor is it accidental. It fits perfectly within the conceptual, doctrinal and philosophical framework that informs the current electoral adjudication laws. There is method and deliberation behind the Rule and we cannot see how an interpretation of it can be embraced and espoused that would allow interlocutory appeals without doing violence to, breaching and uprooting the strict constitutional and statutory timelines adverted to above.

The view this Court has taken here, as in **WAITITU** that appeals lie only from judgments and decrees in election matters, is neither unique to Kenya nor eccentric in reasoning. In next door Uganda, the law on the hearing and determination of electoral disputes is akin to ours. **Section 66(1)** of their **Parliamentary Election Act 17 of 2005**, states that;

"A person aggrieved by the determination of the High Court on hearing an election petition may appeal to the High Court against the decision."

Their Court of Appeal, faced with the same question that we are grappling with, found no difficulty in holding in **HON. GAGAWARA NELSON G. WAMBUZI Vs. KENNETH LEBOGO** Election Petition No. 00100 of 2011 (unreported) that it had no jurisdiction and so could not entertain an appeal from an interlocutory ruling in an election petition, since a 'determination' of an election petition meant a final decision reached by the High Court after hearing evidence and submissions. That Ugandan decision was affirmed and adopted as good law in the **WAITITU** case. We accept as good law the following reasoning of the Ugandan Court of Appeal;

"The appeal envisaged here is an appeal against a decision in a petition rather than a decision from an interlocutory matter. We cannot read in this Section any right of appeal against decisions of the High Court on interlocutory matters. The section has no exceptions or provisions relating to substantial questions of law going to the root of a petition. The legislature makes no mistakes when it legislates. It is presumed to know what it wants provided in the law it makes. The law must be interpreted as it is and not, as may be considered by some, it ought to be. The spirit behind that section and rules 28 and 29 of the parliamentary Elections (Elections Petitions) Rules S1 141-2 is that election petitions should be heard and concluded expeditiously, hence the absence of a provision for appeal against interlocutory orders of the High Court."

(Our Emphasis)

We are firmly persuaded that the same spirit of expedition in the fair and just conclusion of

petitions imbues our own constitutional and legislative framework and repudiates the possibility and desirability of interlocutory appeals.

Faced by the Rules and our decision aforesaid, the appellant took umbrage under **Article 159 (2) (d)** of the Constitution. To the appellant, a proscription or prohibition of the right to appeal in interlocutory decisions of the High Court to this Court amounts to violating the spirit of the Constitution any paying undue homage to procedural technicalities. It was contended that since the Court of Appeal Rules do contemplate and provide for appeals against rulings and orders of the High Court, we should give effect to them as they ought to override any contrary stipulations in the Elections Rules.

With respect to counsel, these twin arguments do not persuade us. The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at **Article 159 (2) (d)** of the Constitution. We do not consider **Article 159 (2) (d)** to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.

A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of **MUMO MATEMU Vs. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS** Civil Appeal No. 290 of 2012 as follows;

"In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases."

Having already found that jurisdiction stands on a higher, firmer and more peremptory position than procedural rules, we can only reiterate that it goes to the very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance-procedure dichotomy of **Article 159** of the Constitution.

As regards the second limb of the submission to the effect that Elections Rules should not be given effect because they purport to essentially constrict or oust a right of appeal that flows from the Appellate Jurisdiction Act and the Rules of Court made thereunder, we respectfully think it is founded on a demonstrable misconception that all matters of grievance are appealable from the High Court to this Court. This is not the case, of course. It is trite that no right of appeal exists absent an express donation by the Constitution, or by statute or by other law. That much is clear from a plain reading of the constitutive statute of this Court, the Appellate Jurisdiction Act, Cap 9, which provides as follows;

"S3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High court in cases in which an appeal lies to the Court of Appeal under any law."

(Our Emphasis)

The conclusion is inescapable by necessary and logical implication that unless an appeal lies to this Court it is bereft of jurisdiction to entertain any purported appeal. It behoves an intending appellant to be able to show under which law his right of appeal is donated. Unless such appeal-donating law can be found, no appeal can lie.

Another five-judge bench of this Court had occasion to pronounce itself on precisely this point

in the recent decision of **EQUITY BANK LTD Vs. WESTLINK MBO LTD** Civil Application No. 78 of 2011 (unreported). In his Ruling, Kiage J.A stated as follows, and we respectfully agree;

"The case of ANARITA KARIMI NJERU Vs. THE REPUBLIC (No. 2) (1976-80)I KLR 1283 cited by the respondent entails an excellent exposition of the evolution of this and its predecessor Court's appellate jurisdiction over time going back to the dawn of the 20th century. Through that march of time the one theme that has remained constant is that as an appellate tribunal, this Court has been able to entertain only such appeals as statute has declared appellable to it. This Court has never enjoyed a general supervisory role. It was for that reason that the main holding in that case was that, in the absence of express provisions, the court had no jurisdiction (at the time) to hear appeals from decisions of the High Court under Section 84 of the Constitution (enforcement of fundamental rights and freedoms). In arriving at that conclusion, correctly, given the context, in my view, the ANARITA KARIMI court criticized the earlier decision of MUNENE Vs. REPUBLIC (No 2) [1976-80] 1 KLR 838; [1978]KLR 105 …. The criticism was, I think well-deserved for;

'This Court then assumed jurisdiction which was not within that conferred by any statute and which had been expressly excluded by statute. With respect, to do so appears to us to do violence to the principles accepted by the court that there is no right to appeal outside of statute' p1286"

(Emphasis in original)

It is enough to say that the right of appeal must be statute or other law-based and so viewed, there is nothing doctrinally wrong or violative of the Constitution for such right to be circumscribed in ways that render certain decisions of courts below non-appellable. Developing this theme further, Kiage J.A. proceeded as follows in **EQUITY BANK** (supra);

"The respondent also appeared to fault the same sub-section [3(1) of Cap 9] for containing the qualification 'in cases in which an appeal lies to the Court of Appeal', the contention being that under the Constitution one can appeal to this Court on anything and everything. With respect, I cannot agree.

The actual jurisdiction in live cases and the manner and instances in which this Court exercises it, is actually to be found in the two procedural statutes. This was recognized by the ANARITA KARIMI court as a truism;

'As is well known, jurisdiction has been conferred on this Court in civil matters by the Civil Procedure Act and in criminal matters by the Criminal Procedure Code' (at p 1303)

Now, even a cursory look at the Civil Procedure Act (Cap 21) and the Rules made thereunder as well as the Criminal Procedure Code will immediately reveal that it is not every decision of the High Court … that is subject to appeal …. [A]ppeals may perfectly and legally be excluded by express provision of law. Indeed, even where not excluded, they may yet be circumscribed by conditionalities including furnishing of security. It could well be argued from an academic and sophistic stand point that such exclusions and conditionalities are themselves, unconstitutional but they derive their being from a sense of balance, proportionality and an appreciation of practical realities."

We are on our part perfectly satisfied that the exclusion of interlocutory appeals 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 exclusion of disruptive distractions such as interlocutory appeals that serve only to unnecessarily prolong the process with the attendant peril of piercing the statutory timelines. We are unable to see the utility of a truncation of the adjudicative process.

Having accepted the proposition of this Court in **THE M.V. LILLIAN 'S'** that "a question of jurisdiction once raised by a party or by the court on its own motion must be decided forthwith …", (at p15) we decide without hesitation that the Court of Appeal has no jurisdiction to entertain, hear or determine appeals from interlocutory rulings and orders of the High Court as an Election Court.

Being of that mind, we cannot venture into any consideration of this ill-fated appeal on its merits for to do so would be to embark on a meaningless misadventure the net result of which would be a nullity and a barren nothing for want of jurisdiction.

In the circumstances the only orders we can make are that the appeal before us is incompetent and we accordingly strike it out with costs to the respondents.

Dated and delivered at Nairobi this 8th day of August 2013.

W. KARANJA
……
JUDGE OF APPEAL

W. OUKO
……
JUDGE OF APPEAL

P.O. KIAGE
……
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR