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| Case Number:    | Civil Appeal. 23 Of 2013  |
| Date Delivered: | 10 Sep 2013   |
| Case Class:     | Civil   |
| Court:          | Court of Appeal at Nyeri  |
| Case Action:    | Judgment  |
| Judge:          | Alnashir Ramazanali Magan Visram, Martha Karambu Koome, James Otieno Odek   |
| Citation:       | Peter Gichuki King'ara v Independent Electoral And Boundaries Commission & 2 others   |
| Advocates:      | -   |
| Case Summary:   | <p><b><u>Jurisdiction of the Court of Appeal to hear an appeal on interlocutory matters raised during the hearing of an election petition.</u></b></p> <p><b>Peter Gichuki King'ara v Independent Electoral and Boundaries Commission &amp; 2 others</b></p> <p><b>Civil Appeal No 23 of 2013</b></p> <p><b>Court of Appeal at Nyeri</b></p> <p><b>Alnashir Visram, Martha Koome, J Otieno-Odek, JJA</b></p> <p><b>September 10, 2013</b></p> <p><b>Reported by Phoebe Ida Ayaya and Derrick Nzioka</b></p> <p><b>Issues:</b></p> <p>I. Whether the Court of Appeal had jurisdiction to hear interlocutory appeals in an election petition.</p> <p>II. Whether the jurisdiction of a court could be created, limited or governed by a</p> |

regulation or a rule of procedure made by the Rules Committee

***Electoral Law*** – election petition – interlocutory appeal – interlocutory appeal in respect of an interlocutory decision of the High Court – claim that the Court of Appeal did not have the jurisdiction to hear an appeal on an interlocutory decision made by the High Court in an election petition – claim that the jurisdiction of the Court of Appeal to hear an interlocutory appeal in an election petition was conferred by the laws governing election petitions – where it was averred that the provisions of the electoral laws did not specifically provide for the Court of Appeal to hear appeals on interlocutory decisions made by the High Court – whether the Court of Appeal had jurisdiction to hear an interlocutory appeal in respect of an interlocutory decision made by the High Court – Election (Parliamentary and County Assembly Elections) Petition Rules, rule 35; Elections Act, sections 2, 80(3) & 85A; Constitution of Kenya 2010, articles 105(2) & 164(3).

**Held:**

1. Subsidiary legislation, rules of procedure or a rule made by the Rules Committee could not confer or limit the jurisdiction of any court or tribunal established by the Constitution or statute, as jurisdiction was neither derived nor did it emanate from regulations or rules.
2. Rule 35 of the Election (Parliamentary and County Assembly Elections) Petitions Rules was not a provision conferring or limiting the jurisdiction of the Court of Appeal but was instead a procedural rule on case management, designed to ensure fair and consistent application of due process in the hearing of electoral petition appeals. Further, the entire Election Petition Rules were procedural rules that could not confer jurisdiction, as jurisdiction was a matter of substantive and not procedural law.
3. Parliament's intention concerning the jurisdiction of a court could only be deciphered from the Constitution and an

act which was tabled before it, unlike rules which were subsidiary legislation made by the Rules Committee and never tabled before it.

4. Section 85A of the Elections Act provided that in an election petition, an appeal from the High Court would lie to the Court of Appeal on matters of law only and so pursuant to the section, any and all points of law arising in an election petition were appellable to that court.
5. The Court disagreed with the contention that there was a period of delay or deferment of appeal to await the final judgment and decree of the High Court, and that passage or lapse of time could confer jurisdiction to the Court of Appeal to hear an interlocutory appeal where election petitions were concerned, stating that passage or lapse of time did not and could not confer jurisdiction since jurisdiction was a continuum and it could not lack one day and by passage or lapse of time exist the next day. It was either present *ab-initio* or absent forever.
6. Section 80(3) of the Elections Act had to be read with articles 105 and 164(3) of the Constitution of Kenya 2010, as in that context, the section did not oust jurisdiction, but simply delayed it to such a time as when the constitutional timelines for hearing and determining an election petition by the High Court had expired.
7. Section 80(3) of the Elections Act bestowed upon the High Court exclusive jurisdiction to hear interlocutory matters in an election petition, prior to a final judgment and decree. After the judgment and decree was issued, the Court of Appeal exercised its appellate jurisdiction on points of law as mandated by section 85A of the Elections Act.
8. There was no dispute that the Court of Appeal had appellate jurisdiction in respect of election petitions from the High Court despite the fact that it was not mentioned as an election court in section 2 of the Elections Act. The definition section of the Elections Act was however not a jurisdictional provision and therefore to

construe the definition of an election court under it as ousting the jurisdiction of the Court of Appeal was inconsistent with article 164(3) of the Constitution of Kenya 2010.

9. Section 80(3) of the Elections Act was a jurisdictional section and when read with section 85A and in the context of Constitutional timelines in article 105(2) for finalization of election petitions, there was a deferred, delayed and sequential exercise of the jurisdiction of the Court of Appeal in interlocutory matters arising in election petitions.
10. The Court of Appeal under article 164(3) of the Constitution of Kenya 2010, 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 (Parliamentary and County Assembly Elections) Petitions Rules was vested with an appellate jurisdiction to hear any and all points of law that arose out of an election petition during the substantive hearing of an appeal. The sequential jurisdiction gave practical effect, expediency and implementation to the constitutional timelines for determination of electoral petitions
11. The Court of Appeal therefore had deferred and sequential jurisdiction to hear interlocutory matters arising from an election petition, which jurisdiction was only exercisable after a final judgment and decree of the High Court had been made. As the points of law raised in the memorandum of appeal and the prayers sought therein were interlocutory in nature, the main election petition was still pending before the High Court and there was no judgment or decree from an election court, the issues raised in the appeal were premature and had to await the final judgment and decree of the High Court. The merits of the issues raised in the memorandum of appeal could not be considered and determined as they could well have been grounds of appeal in the

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|   | event a substantive appeal was lodged.<br><i>Appeal dismissed.</i> |
| Court Division:   | Civil  |
| History Magistrates:  | -  |
| County:   | Nyeri  |
| Docket Number:  | -  |
| History Docket Number:  | High Court Election Petition No. 3 of 2013                         |
| Case Outcome:   | Appeal Dismissed   |
| History County:   | Nyeri  |
| Representation By Advocates:  | -  |
| Advocates For:  | -  |
| Advocates Against:  | -  |
| Sum Awarded:  | -  |
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**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)**

**CIVIL APPEAL NO. 23 OF 2013**

**BETWEEN**

**PETER GICHUKI KING'ARA ..... APPELLANT**

**AND**

**INDEPENDENT ELECTORAL**

**AND BOUNDARIES COMMISSION ..... 1<sup>st</sup> RESPONDENT**

**JAMES MBAI ..... 2<sup>nd</sup> RESPONDENT**

**MARY WAMBUI MUNENE ..... 3<sup>rd</sup> RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Nyeri (Jairus Ngaah, J.) delivered on 6<sup>th</sup> August, 2013*

*in*

***High Court Election Petition No. 3 of 2013)***

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**JUDGMENT OF THE COURT**

1. Jurisdiction is everything and without it, the court must down its tools. The central issue in this appeal is whether this Court has jurisdiction to hear interlocutory appeals in an Election Petition. The present appeal arises from a ruling delivered on 6<sup>th</sup> August, 2013 in Election Petition No. 3 of 2013 which petition is yet to be determined by the High Court sitting at Nyeri.

2. The background is that by a Notice of Motion dated 3<sup>rd</sup> July, 2013 lodged at the High Court, the appellant sought *inter alia* orders for scrutiny and recount of the votes cast in all the polling stations in Othaya Constituency or in the alternative, a scrutiny or recount of the votes cast in 92 of the 112 polling stations in that Constituency during the general elections held on 4<sup>th</sup> March, 2013. Upon hearing the Motion, the Honorable Judge (Ngaah, J.) by a ruling dated 6<sup>th</sup> August, 2013 dismissed the Motion and expressed himself thus:-

***“This court is convinced that it is capable of determining this petition, one way or the other, without scrutiny and recount of the votes cast for the election of member of National Assembly***

**for Othaya. The reasons for this conclusion will be apparent in the court's judgment which, in my view, is the appropriate juncture at which the court can evaluate the evidence on record and make particular findings or conclusions, a feat that would determine the outcome of this petition and therefore prejudicial to the parties if it were to be done in a ruling on an application such as one before court."**

3. Aggrieved by the ruling dismissing the Motion, the appellant by way of an interlocutory appeal has moved this Court seeking orders that the ruling of the High Court dated 6<sup>th</sup> August, 2013 be set aside and in its place an order be issued for the scrutiny and recount of all ballots cast in Othaya Constituency during the general elections held on 4<sup>th</sup> March, 2013. He further seeks that upon finalization of the scrutiny and recount, the results thereof be certified by the Registrar of the Election Court and the matter be mentioned before the said court for further directions.

4. The appellant was ably represented by learned counsels **Mr. Kyalo Mbobu, Mr. Kithinji Marete and Ms Carol Kimere**; the 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by learned counsel **Mr. Munge P.M** while learned counsels **Mr. Peter Wena and Mrs. Pauline Makasila** acted for the 3<sup>rd</sup> respondent.

5. The appellant's Memorandum of Appeal dated 12<sup>th</sup> August, 2013 lists thirteen (13) grounds of appeal which counsel for the appellant categorized and submitted into five thematic headings *to wit:-*

- i. Right to be heard
- ii. Lack of consistency in proceedings
- iii. Bias against the appellant
- iv. Prejudging the petition and
- v. Suppression of Evidence.

6. The appellant elaborated on the grounds of appeal and urged this Court to find that by declining to order scrutiny and recount of the ballots cast, the trial court had denied the appellant the right to be heard as well as the right to adduce and avail evidence in support of the petition which was a gross violation of the rules of natural justice. Counsel cited the case of **Onyango Oloo –vs– Attorney General (1986-89) EA 456** and the decision in **Board of Education – vs- Rice (1911) AC 179** in support of the submission.

7. On lack of consistency in proceedings, the appellant submitted that the trial Judge demonstrated prevarication in his rulings in that by a ruling dated 24<sup>th</sup> May, 2013 he ruled that he would order scrutiny and recount of the ballots if evidential basis was laid out to warrant the same; and by a ruling dated 6<sup>th</sup> August 2013, the trial court showed inconsistency by declining to order scrutiny and recount after twenty three witnesses had testified laying down the foundation for the scrutiny and recount of the ballots.

8. Submitting that the trial court was biased, the appellant outlined instances where the alleged inference of bias in favour of the 3<sup>rd</sup> respondent should be drawn. The appellant takes issue with the following paragraph in the ruling dated 6<sup>th</sup> August, 2013 where the trial court stated that,

***“I am clear in my mind that the issues for determination as drawn will not require the court to consider and evaluate any other evidence beyond the evidence on record. Each of those issues will be resolved and this court is convinced that it is capable of determining this petition, one way or the other, without scrutiny and recount of the vote’s cast...”***

It is the appellant’s submission that the above statement by the trial court has prejudged the Petition and determined its outcome without allowing the petitioner the opportunity to prove his case to the required standard. Consequently, the appellant by way of this appeal seeks orders of this Court setting aside the interlocutory ruling made on 6<sup>th</sup> August, 2013.

9. The respondents opposed the appeal and urged that the appeal should be dismissed for lack of jurisdiction and merit. It was submitted that this Court lacked jurisdiction to hear interlocutory appeals in Election Petitions. On his part, the appellant submitted that this Court had jurisdiction to hear interlocutory appeals in Election Petitions. The submission by each party on the jurisdictional question is highlighted hereunder.

10. The respondents anchored their submission on lack of jurisdiction on the decisions of this Court in the cases of ***Ferdinand Ndungu Waititu – vs- Independent Electoral & Boundaries Commission & 2 Others (2013) eKLR*** and ***Benjamin Ogunya Andama –vs– Benjamin Andola Andayi & 2 Others -Kisumu Civil Application No. 24 of 2013 (UR.11/13)***. The respondents cited the dicta in the ***Benjamin Ogunya Andama*** case (*supra*) where this Court differently constituted (*Onyango-Otieno, Azangala & Kantai, JJ.A*) stated that:-

***“The Court of Appeal is not mentioned as an Election Court and that in itself means that in its mechanisms made to ensure timely settling of electoral disputes or in its legislation made to ensure that the electoral petitions are determined within limited six months period by the High Court, the Court of Appeal is not one of the courts empowered to hear interlocutory matters in connection with petitions challenging results of parliamentary or county elections.”***

The respondents further cited the holding in the ***Ferdinand Ndungu Waititu*** case (*supra*) where this Court differently constituted (*Mwera, Musinga & Kiage JJ.A*) held that:-

***“Under Rule 35 of the Election Petition Rules, no appeal lies to this Court from an interlocutory order, ruling or direction by an Election Court.”***

11. The respondents submitted that the wordings in ***Rule 35*** of the current ***Electoral Petition Rules*** is different from the provisions of ***Section 23 (2)*** of the repealed ***National Assembly and Presidential Elections Act***, Cap 7 of the Laws of Kenya which statute governed previous elections. ***Section 23 (2)*** of the repealed Act provided:-

***“Subject to sub-section (5), an appeal shall lie to the Court of Appeal from any decision of an***



***election court, whether the decision be interlocutory or final, within thirty days of the decision.”***

The current **Rule 35** of **Election Petition Rules** stipulates that:-

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

12. The respondents submitted that the differences between the repealed **Section 23 (2)** of the **National Assembly and Presidential Elections Act** and the current **Rule 35** of the **Election Petition Rules** in wording and phraseology was deliberate; that in **Rule 35**, Parliament intentionally omitted reference to interlocutory appeals to the Court of Appeal and thus the jurisdiction of the Court of Appeal to hear and determine interlocutory appeals was ousted. To fortify the submission, counsel cited the dicta in **Ferdinand Ndungu Waititu** case (*supra*) where this Court adopted the holding in **Hon. Gagwala Nelson G. Wambuzi –vs – Kenneth Lubogo - Election Petition Application No. 00100 of 2011 (unreported)** wherein the Ugandan Court of Appeal in dealing with a provision substantially in *pari materia* to **Rule 35** stated:-

***“An appeal envisaged here is an appeal against a decision determining an election petition rather than a decision from an interlocutory matter. We cannot read in this section any right of appeal against the decisions of the High Court on interlocutory matters.... The spirit 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.”***

13. In concluding their submissions, the respondents urged this Court to rely on the doctrines of *stare decisis*, *jurisprudence constant* and *quieta non movere* more so *stare decisis et non quieta movere* and uphold the cited judicial precedents.

14. The appellant fervidly submitted that this Court had jurisdiction to hear and determine interlocutory appeals in Election Petitions. Counsel emphasized that the jurisdiction of the Court of Appeal in relation to Election Petitions flows from **Article 164 (3)** of the **Constitution** and is operationalized by the **Section 85 A** of the **Elections Act**. Counsel submitted that if **Rule 35** of the **Election Petition Rules** is interpreted as a jurisdictional clause then such interpretation makes **Rule 35 ultra vires** and contrary to the **Constitution** and the enabling parent statute. The appellant cited the two decisions of this Court to support that the Court of Appeal has jurisdiction to hear and determine interlocutory appeals in Election Petitions. The appellant cited the decisions in **Nderitu Gachagu – vs- Dr. Thuo Mathenge & 2 Others- Nyeri Civil Appeal No. 14 of 2013**; and **Richard Ncharpi Leiyagu – vs- IEBC & 2 Others- Nyeri Civil Appeal No. 18 of 2013**. The appellant submitted that in these two cases, this Court heard and determined interlocutory appeals while the main Petition was still pending before the High Court.

15. The appellant submitted that **Article 164 (3)** of the **Constitution** establishes the jurisdiction of the Court of Appeal to hear appeals from the High Court. Counsel submitted that **Article 164 (3)** of the **Constitution** has not circumscribed or limited the jurisdiction of the Court Appeal to hear any appeals from the High Court. The question that is posited is, where is the limitation or restriction to the jurisdiction of the Court of Appeal to hear interlocutory appeals in Election Petitions emanating from" The appellant submitted that the respondents contend that the jurisdiction of the Court of Appeal to hear interlocutory appeals in Election Petitions has been restricted and ousted by **Rule 35** of the Election petition Rules as read and interpreted by this Court in the **Ferdinand Ndungu Waititu** and **Benjamin Andola** cases

(*supra*). To the appellant, this argument is untenable in constitutionalism and in the rule of law.

16. It was submitted on behalf of the appellant that the power of the Rules Committee to make **Rule 35** was donated by Parliament under **Section 96 (1)** of the **Elections Act**. The appellant submitted that since **Article 164 (3)** of the **Constitution** does not limit the jurisdiction of the Court of Appeal, it follows that **Rule 35** of the **Election Petition Rules** cannot limit the jurisdiction of the appellate court and oust interlocutory appeals. It was submitted that the legislature in **Section 85 A** of the **Elections Act** provided for appeals to the Court of Appeal and the section does not oust the jurisdiction of the appellate court in so far as interlocutory appeals are concerned. **Section 85A** stipulates:-

**“85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be-**

**(a) filed within thirty days of the decisions of the High Court;and**

**(b) heard and determined within six months of the filing of the appeal.”**

17. The appellant contends that both **Article 164 (3)** of the **Constitution** and **Section 85A** of the **Elections Act** do not contain any restriction or limitation to the jurisdiction of the Court of Appeal and it is erroneous to construe and interpret **Rule 35** as restricting or imposing a limitation to the jurisdiction of the Court of Appeal; and that the only qualification to the jurisdiction of the Court of Appeal in **Section 85A** is to hear and determine the appeal within six months. The appellant submitted that to the extent that the learned Judges of the Court of Appeal in the **Ferdinand Waititu** and **Benjamin Andalo** cases (*supra*) interpreted **Rule 35** as limiting the jurisdiction of the Court of Appeal as far as interlocutory appeals are concerned, amounted to a restrictive interpretation which is *ultra vires* and exceeds the ambit of the **Constitution** and the **Elections Act**.

18. We have considered the submissions by the parties hereto and the authorities cited and it is our considered view that the following issues arise for determination:-

**i. Is the jurisdiction of the Court of Appeal to hear Election Petitions conferred by Rule 35 of the Election Petition Rules" Can procedural rules embodied in the Election Petition Rules confer jurisdiction to any court of law.**

**ii. Is Rule 35 of Election Petition Rules an ouster clause that ousts or limits the jurisdiction of the Court of Appeal"**

**iii. What is the nature of Rule 35 of the Election Petition Rules as read with Article 105 of the Constitution and Section 80 (3) and 85 A of the Elections Act"**

**iv. Does Section 80 (3) of the Elections Act oust the jurisdiction of the Court of Appeal in relation to interlocutory matters"**

**v. What is the nature of the jurisdiction of the Court of Appeal in relation to Election Petitions"**

**vi. At what stage does the Court of Appeal have jurisdiction to hear interlocutory matters in Election Petitions"**

19. In addition to **Article 164 (3)** of the **Constitution**, the pertinent provisions of law in the determination of this appeal are identifiable. **Article 105** of the **Constitution** provides that the High Court has jurisdiction to hear and determine Election Petitions on the question as to whether a person has been validly elected as a member of Parliament or whether the seat of a member has become vacant. The Article further provides that the above mentioned issues shall be determined within six months of the date of lodging the Petition. **Section 85** of the **Elections Act** provides that an Election Petition shall be heard and determined within the period specified in the **Constitution**. **Rule 5 (1)** of the **Election Petition Rules** emphasizes that the election court shall conduct the Petition in an efficient and expeditious manner within the timelines provided in the **Constitution** and the Act. **Section 85A** of the **Elections Act** stipulates that appeals to the Court of Appeal shall only be on matters of law. **Rule 35** of the **Election Petition Rules** stipulates that appeals to the Court of Appeal shall be guided by the Court of Appeal Rules. **Section 80 (3)** of the **Elections Act** provides that interlocutory matters in connection with a Petition challenging results of a presidential, parliamentary or county elections shall be heard and determined by the Election Court.

20. Both the appellant and the respondents cited case law in support of their submissions. We are of the considered view that the case of **Richard Ncharpi Leiyagu – vs - IEBC & 2 Others (supra)** is distinguishable and inapplicable to this appeal. The **Richard Ncharpi** case was not an interlocutory appeal before this Court; it was an appeal arising from a final decree of the High Court in which the court had dismissed the Election Petition for non-attendance. In the present appeal, the relief sought is interlocutory in nature and the main Election Petition is pending before the High Court. In **Nderitu Gachagu – vs - Dr. Thuo Mathenge & 2 Others (supra)**, the question of the jurisdiction of this Court to hear interlocutory appeals arising from an Election Petition was neither raised nor canvassed by the parties and it was not considered in the judgment. It is trite law that a court cannot pronounce itself on an issue that is not in the pleadings of the parties. As was stated in the case of **Galaxy Paints Co. Ltd. – vs - Falcon Guards Ltd.- EALR (2000)2 EA 385**; the issues for determination in a suit generally flow from the pleadings and a court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination.

21. Counsel for the respondents cited and relied upon the Ugandan Court of Appeal decision in the case of **Hon. Gagawala Nelson G. Wambuzi – vs – Kenneth Lubogo (supra)** and submitted that **Rule 35** of Kenya's **Election Petition Rules** is akin to the Ugandan provision on jurisdiction of the Court of Appeal in Election Petitions; and that this Court should adopt the decision in the said case. On this submission, we refer to the caveat as stated in the English decision of **Nadarajan Chettiar – vs- Walauwa Mahatmee (1950) AC 481** where the Privy Council rejected the argument that the legislature of Ceylon by adopting in its statute the exact terms used in an English Act intended to adopt the meaning placed on those terms by earlier decisions of the English courts. The Privy Council held that it is quite another thing to presume that a legislature, when it incorporates in a local Act the terms of a foreign statute, intends to accept the interpretation placed on those terms by the courts of the foreign country. In **National & Grindlays Bank Limited – vs- Dharamshi Vallabhji and Others (1966) EA 186**, the court held that it was unsafe to assume that when an Act is modeled on another Act, the legislature must necessarily be supposed to have intended to import into that Act the case law of the country from which it is derived. In **Jaffer Gulamhussein Ismail – vs- R (1963) E.A 55**, the former Court of Appeal for Eastern Africa observed that when a statute is not truly a new enactment but is in substance a re-enactment of existing provisions, unless there is a clear intention to the contrary, the use of any words

which had previously received judicial interpretation would normally result in a presumed intention that the re-enacted words should receive a similar interpretation.

22. A primary issue for our consideration is whether **Rule 35** of the **Election Petition Rules** creates, establishes or limits the jurisdiction of the Court of Appeal to hear interlocutory appeals. The Rule stipulates that an appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules. This being an appeal in relation to Election Petition we are cognizant of the decision in ***Muiya – vs- Nyaga & Others (2003) 2 E.A. 616*** as restated in ***Murage –vs – Macharia (2008) 2 KLR (EP) 244*** wherein it was held that Election Petitions are governed by a self contained regime and that the Civil Procedure Rules are inapplicable except where expressly stated. We are also mindful of the case of ***Lillian 'S' [1989] KLR 1*** in which this Court succinctly set out the principles and context for determination of jurisdiction. Nyarangi, JA stated, *inter alia*:-

***“Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

23. In the present appeal, the starting point is the decision in ***Lillian 'S' Case*** as restated by the Supreme Court ***In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution- Constitutional Application No. 2 of 2011:-***

***“The Lillian ‘S’ case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”***

24. **Article 164** of the **Constitution** establishes the Court of Appeal whose jurisdiction is succinctly spelt out in **Article 164 (3)** and its jurisdiction is to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. **Section 3(1)** of the **Appellate Jurisdiction Act**, Cap 9, further espouses the jurisdiction of this Court and it provides that 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.

25. The jurisdiction of the Court of Appeal for election purposes is fortified by **Section 85A** of the **Elections Act** which stipulates that an appeal from the High Court in an Election Petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only. The jurisdiction of this Court to hear Election Petitions is restricted and narrowed to the extent that appeals lie only on points of law. **Section 85A** of the **Elections Act** is a statutory provision, while **Rule 35** of the **Election Petition Rules** is regulation made pursuant to the authority donated to the Rules Committee under **Section 96 (1)** of the **Elections Act**. The **Election Petition Rules** are rules of procedure and the question whether rules of procedure can confer jurisdiction must be answered. The issue for determination is whether the jurisdiction of the Court of Appeal or any other court for that matter can be created, established, limited or governed by a subsidiary

legislation more particularly a regulation and rules of procedure made by the Rules Committee.

26. Jurisdiction is specified either by the Constitution or Statute. In ***Samuel Kamau Macharia & another – vs- Kenya Commercial Bank & 2 Others- Supreme Court Civil Appeal (Application) No. 2 of 2011***, the Supreme Court delivered itself as follows on the issue of jurisdiction:-

***“A court’s jurisdiction flows from either the Constitution or legislation or both.”***

27. It is our considered view that a subsidiary legislation or rules of procedure or a rule made by the Rules Committee cannot confer, create, establish, limit or subtract the jurisdiction of any court of law or tribunal as established by the Constitution or Statute. **Rule 35** of the ***Election Petition Rules*** is a subsidiary legislation which is contained within the Rules of Procedure for the conduct and trial of Election Petitions. We hold that **Rule 35** of the ***Election Petition Rules***, being a subsidiary legislation within procedural rules, is not a jurisdictional rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We further hold that **Rule 35** of the ***Election Petition Rules*** cannot limit the jurisdiction of the Court of Appeal as granted under **Article 164 (3)** of the ***Constitution*** and as operationalized by **Section 85A** of the ***Elections Act***. A subsidiary legislation cannot expand, add to or reduce the jurisdiction of any court as spelt out in the ***Constitution*** or by Statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or Statute. A rule cannot limit the jurisdiction of a court of law.

28. As stated heretofore, **Rule 35** of the ***Election Petition Rules*** stipulates that an appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules. Conversely, what about interlocutory appeals which are not appeals from the judgment and decree of the High Court" Have such appeals been abolished, what rules are to govern such interlocutory matters" Is **Rule 35** an ouster clause that ousts the jurisdiction of the Court of Appeal to hear appeals which are not from the judgment and decree of the High Court i.e interlocutory appeals" It is not contestable that any appeal to the Court of Appeal whether interlocutory or arising from a judgment and decree of the High Court is and must be governed by the Court of Appeal Rules. **Rule 35** of the ***Election Petition Rules*** states the obvious and is redundant and tautological; what other rules save the Court of Appeal Rules could govern any appeal" The Respondent cited dicta in the ***Ferdinand Ndungu Waititu*** case (*supra*) where this Court differently constituted held that **Rule 35** does not permit interlocutory appeals but only allows appeals against judgments and decree of the High Court in election petitions. The court concluded:-

***“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. This interpretation is in line with the provisions of Section 80 (3) of the Elections Act which states that interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court.”***

29. It is our considered view that **Rule 35** of the ***Election Petition Rules*** is not a provision conferring or limiting the jurisdiction of the Court of Appeal but is a procedural rule on case management. It is a rule designed to ensure fair and consistent application of due process in the hearing of Electoral Petition appeals. Further, the entire ***Election Petition Rules*** are rule of procedure and it is our view that

procedural rules cannot confer jurisdiction. Jurisdiction is a matter of substantive not procedural law. Having stated that **Rule 35** is not a jurisdiction clause it follows the said rule cannot be an ouster clause.

30. We also do not agree with the argument that Parliament did not intend for this Court to hear appeals on interlocutory matters arising from the High Court by virtue of not providing the same under **Rule 35**. This is because the **Election Petitions Rules** is subsidiary legislation made by the Rules Committee and the same was never tabled before parliament. Therefore, parliament's intention concerning the jurisdiction of this Court in interlocutory matters can only be deciphered from the **Constitution** and the **Elections Act** which was tabled before parliament.

31. What about **Section 85A** of the **Elections Act**, is this a jurisdictional section" **Section 85A** provides that an appeal from the High Court in an Election Petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only. The four corners of the jurisdiction of the Court of Appeal are delineated by **Article 164 (3)** of the **Constitution**. Our reading of **Section 85A** shows that it delineates the jurisdiction of the Court of Appeal in relation to Election Petitions and espouses the manner in which the jurisdiction to hear appeals from the High Court under **Article 164 (3)** of the **Constitution** is exercisable. It further provides that such jurisdiction is exercisable on points of law as opposed to issues of fact. Therefore, pursuant to **Section 85A** any and all points of law arising in an Election Petition are appealable to this Court. The jurisdiction of the Court of Appeal exists *ex debito justitiae* vide **Article 164(3)** of the **Constitution** and **Section 85A** of the **Elections Act** delineate the justiciable and appealable electoral matters to this Court must be on points of law.

32. We have already stated that the **Constitution** requires **Election Petitions** be resolved within six months from the date of filing of the Petition. Whenever an appeal is proffered, the Court of Appeal is required to determine the appeal within six months from the date the appeal is lodged. We pose the question if no appeal lies to the Court of Appeal on interlocutory matters; can an appeal arising from an interlocutory order or ruling be made in the substantive appeal after the final judgment and decree of the High Court" Will the Court of Appeal now have jurisdiction to hear and determine an appeal on a point of law that was interlocutory during the substantive hearing of the appeal" This leads us to consider the nature of the jurisdiction of the Court of Appeal in the context of **Section 80 (3)** of the **Elections Act** as read with **Article 164 (3)** of the **Constitution** and **Rule 35** of the **Election Petition Rules**.

33. In the **Ferdinand Waititu** case, the Honourable Judges of Appeal opined and stated that:-

**“A party aggrieved by an interlocutory order must await the delivery of the final judgment by the High Court then file an appeal to this Court.”**

In our humble view we find that the implication of the above statement by the Honourable Judges is that there is a period of delay or deferment of appeal to await the final judgment and decree of the High Court; and that passage or lapse of time can confer jurisdiction to the Court of Appeal to hear an interlocutory appeal where Election Petitions are concerned.

34. It is our considered view that passage or lapse of time does not and cannot confer jurisdiction; jurisdiction is a continuum, jurisdiction cannot lack today and by passage or lapse of time exist tomorrow. Jurisdiction is either present *ab-initio* or absent forever. We find that **Rule 35** of the **Election Petition Rules** does not oust the jurisdiction of the Court of Appeal to hear interlocutory appeals. We also find

that it is not only upon final judgment or decree of the High Court being made, that the Court of Appeal acquires or assumes jurisdiction. A judgment and decree of the High Court cannot *ipso facto* confer or vest jurisdiction to the Court of Appeal. We are of the considered view that the Court of Appeal always has jurisdiction to hear appeals in interlocutory matters arising in an Election Petition; and that it is only that the jurisdiction to hear such a matter is delayed or deferred and not ousted. The issue is not absence of jurisdiction but deferred or delayed jurisdiction. It is our considered view that **Section 80 (3)** of the **Elections Act** does not oust the jurisdiction of the Court of Appeal to hear interlocutory matters of law arising in an Election Petition rather the section must be read with **Articles 105** and **164 (3)** of the **Constitution**. **Section 80(3)** in the context of **Articles 105** and **164 (3)** of the **Constitution** simply delays the exercise of the appellate jurisdiction to such a time when the constitutional time lines for hearing and determining an Election Petition by the High Court has expired. In this context, we hold that any and all interlocutory appeals that could be preferred in an Election Petition are deferred and delayed and should be raised as grounds of appeal in any substantive Election Petition Appeal.

35. The nature of jurisdiction of the Court of Appeal under **Section 85A** of the **Elections Act** is an *omnibus ex-ante jurisdiction exercisable a posteriori* after the High Court has issued judgment and decree in an Election Petition. The appellate omnibus jurisdiction is consequential and is to hear and determine all contested and amalgamated points of law in an Election Petition whether such points of law arose in an interlocutory matter or in the judgment or decree of the High Court. The jurisdiction of the Court of Appeal under **Sections 80 (3) and 85A** of the **Elections Act** is sequential whereby the appellate court is required to exercise its jurisdiction sequentially after judgment and decree of the High Court. It is an all encompassing comprehensive blanket jurisdiction rather than piecemeal jurisdiction.

36. Arising from the respondents' contention that the Court of Appeal has no jurisdiction to hear interlocutory matters; it is imperative that we consider whether **Section 80 (3)** of the **Elections Act** confers jurisdiction to the High Court to consider interlocutory applications in Election Petitions with no right of appeal to the Court of Appeal. **Section 80 (3)** provides that interlocutory matters in connection with a Petition challenging results of a presidential, parliamentary or county elections shall be heard and determined by the Election Court. The Section is geared towards the expeditious disposal of electoral disputes. The Section is implemented by **Part V** of the **Election petition Rules** more particularly **Rule 17 (d)** of the **Elections Petition Rules** which stipulates that the election court in a pre-trial conference shall deal with all interlocutory applications and decide on the expeditious disposal of the Petition. **Rule 17 (2)** reinforces the case management provisions and the expeditious disposal objective in that the election court shall not allow any interlocutory application made after the hearing of the Petition has commenced if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition.

37. In the **Ferdinand Ndungu Waititu** case, this Court (differently constituted) held:-

**“Parliament must have intended to confine jurisdiction to determine interlocutory matters in petitions such as defined in Section 80 (3) to the Election Court. There is no reference to the Court of Appeal in the definition of Election Court in Section 2 of the Elections Act in so far as determination of interlocutory matters is concerned. If at all it was the intention of Parliament to involve the Court of Appeal in determination of interlocutory matters, nothing would have been much easier than to state that a party aggrieved by a determination of an interlocutory matter may appeal to the High Court.”**

38. It is our considered view that **Section 80 (3)** of the **Elections Act** bestows upon the High Court exclusive jurisdiction to hear interlocutory matters in an Election Petition prior to a final judgment and decree of the court. After judgment and decree of the High Court is issued, the Court of Appeal exercises its appellate jurisdiction on points of law as mandated by **Section 85A** of the **Elections Act**. The seminal question is whether the appellate jurisdiction of the Court of Appeal to hear interlocutory appeals is ousted by **Section 80 (3)**. Does it mean there is no right of appeal in an interlocutory matter in so far as Elections Petitions are concerned bearing in mind that the High Court, as an election court, is a trial court of first instance"

39. In **Ferdinand Waititu** (supra), the Honourable Judges of Appeal stated that:-

***“A party aggrieved by an interlocutory order must await the delivery of the final judgment by the High Court then file an appeal to this Court.”***

Despite this statement, the Honourable Justices of Appeal cited with approval the holding and decision in the Uganda case of **Hon. Gagawala Nelson Wambuzi –vs – Kenneth Lubogo** (supra) that “there is no right of appeal against the decisions of the High Court on interlocutory matters”. It is our considered view that the statement by the Honourable judges that an aggrieved party must await the delivery of the final judgment by the High Court is the correct position in law taking into account that there is a delayed or deferred or sequential appellate jurisdiction of the Court of Appeal in Electoral Petitions.

40. In **Benjamin Ogunyo Andama – vs- Benjamin Andola Andayi & two others - Kisumu Civil Application No. 24 of 2013**, this Court differently constituted pronounced itself on the jurisdiction of this Court to hear interlocutory appeals as follows:-

***“The Court of Appeal is not mentioned as an Election Court and that in itself means that in its mechanisms made to ensure timely settling of electoral disputes, or in its legislation made to ensure that the electoral petitions are determined within limited six months period by the High Court, the Court of Appeal is not one of the courts empowered to hear interlocutory matters in connection with petitions challenging results of parliamentary or county elections. We add that, when Parliament wanted this Court to hear appeals from final decision of the High Court and on interlocutory matters, it stated so in the National Assembly and Presidential Elections Act Chapter 7 at Section 23 (4) of the retired Elections Act we have reproduced herein above. It is thus clear to us that this departure is deliberate and is meant to deny the Court of Appeal the jurisdiction to hear interlocutory matters such as before us and appeals from interlocutory decisions by the High Court. As if the above provisions were not enough, Rule 35 of the Elections petition Rules is explicit on the issue as it makes it clear that an appeal which is governed by the Rules of this Court is only an appeal from the judgment and decree of the High Court. It does not state an appeal would lie to this Court on interlocutory decision of the High Court.”***

Based on the foregoing decision the respondents' argued that because the Court of Appeal is not mentioned in the definition of “an election court” in **Section 2** of the **Elections Act**, then it has no jurisdiction on interlocutory matters. The cogency of this argument can be tested when the converse is



considered. If it is argued that since the Court of Appeal is not mentioned in the definition section of the **Elections Act** and thus it has no jurisdiction, where then does the jurisdiction of the Court of Appeal to here substantive Electoral Petition Appeals come from" There is no dispute that the Court of Appeal has an appellate jurisdiction in respect of Election Petitions from the High Court despite the fact that it is not mentioned as an Election Court in **Section 2** of the **Elections Act**. This in our view confirms that the definition section of the **Elections Act** is not a jurisdictional provision.

41. Spry V.P in **Somani's -vs- Shirinkhanu (1970) EA 580** stated that:-

***“A definition in section 2 only applies, of course, except when there is something in the subject or context inconsistent with such construction or interpretation.”***

Therefore, to construe the definition of an Election Court under **Section 2** of the **Elections Act** as ousting the jurisdiction of the Court of Appeal is inconsistent with **Article 164(3)** of the **Constitution**.

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 limes 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 12<sup>th</sup> 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 untrammelled 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.”**

44. For the foregoing reasons, we ground our tools and we dismiss the appeal. We decline to consider and determine the merits of the issues raised in the Memorandum of Appeal as these may well be grounds of appeal in the event a substantive appeal is lodged. We note that the main prayer in the Petition is for an order for recount of votes cast in Othaya constituency. As submitted by the appellant, this is the core and heart of the Petition. The appeal herein seeks this Court to pronounce itself through an interlocutory appeal on the core issue in the Petition before the High Court delivers final judgment and decree on the matter. This Court has no original jurisdiction to make a determination on a factual and core matter in an Election Petition. We note that the jurisdictional issues canvassed in this appeal are novel and the goals of Election Petitions are neither penal nor deterrent but aim to promote competitive democracy within the confines of the rule of law. The novelty of the jurisdictional issues canvassed in this matter makes it fair that each party should bear his/its own costs. It is so ordered.

***Dated and delivered at Nyeri this 10<sup>th</sup> day of September, 2013.***

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**MARTHA KOOME**

.....

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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