



**Matiba v Moi (Civil Application 241 of 1993)  
[1993] KECA 1 (KLR) (19 November 1993) (Ruling)**

*Kenneth Stanley Njindo Matiba v Daniel Toroitich arap Moi [1994] eKLR*

Neutral citation: [1993] KECA 1 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 241 OF 1993  
AM COCKAR, MG MULI & RSC OMOLO, JJA  
NOVEMBER 19, 1993**

**BETWEEN**

**KENNETH STANLEY NJINDO MATIBA ..... APPLICANT**

**AND**

**DANIEL TOROITICH ARAP MOI ..... RESPONDENT**

*(Application to strike out a notice of appeal in an intended appeal from a decision of the High Court of Kenya at Nairobi (Mr Justice Torgbor, Mr Justice Amin & Mr Justice Couldrey) dated 1st July, 1993 in High Court Election Petition No 27 of 1993)*

**A ruling on the competency of an election petition does not fall within the bar under section 44(5) of the Constitution and is therefore appealable**

*The applicant sought to strike out a notice of appeal against an election court's ruling that a presidential election petition signed by the petitioner's wife under a power of attorney was valid. The Court of Appeal held that the determination of the competency of an election petition does not fall under the bar of section 44(5) of the Constitution, which limits appeals on questions of the validity of elections, and thus an appeal was competent. The application to strike out the notice of appeal was dismissed with costs.*

Reported by Kakai Toili

**Jurisdiction** – jurisdiction of the High Court - jurisdiction of the High Court sitting as an election court – jurisdiction to determine the competency of a petition - whether the High Court sitting as an election court had the jurisdiction to determine the competency of a petition - Constitution of Kenya sections 44(5) and 64(1).

**Jurisdiction** – jurisdiction of the Court of Appeal - jurisdiction to hear appeals from interlocutory decisions of the High Court sitting as an election court -whether the Court of Appeal had jurisdiction to hear appeals from interlocutory decisions, of the High Court sitting as an election court, that did not affect the validity of an election - Constitution of Kenya, sections 10 and 44(5).



## **Brief facts**

The applicant sought to strike out the notice of appeal filed by the respondent on the ground that no appeal lay against the decision of the election court by virtue of section 44(5) of the Constitution. The respondent had appealed the decision of the High Court sitting as an election court in which that court dismissed an application to strike out an election petition on the grounds that the same had not been signed by the petitioner personally but by his wife holding a general power of attorney.

## **Issues**

- i. Whether the High Court sitting as an election court had the jurisdiction to determine the competency of a petition.
- ii. Whether the Court of Appeal had jurisdiction to hear appeals from interlocutory decisions of the High Court, sitting as an election court, that did not affect the validity of an election.

## **Held**

1. The words which had defined the jurisdiction given to the High Court by section 44(1) of the Constitution were “to hear or determine any question whether any person has been validly elected”. Therefore, what was not subject to any appeal was the determination of the validity of the election.
2. Any question which would affect the validity of an election would only arise from acts or omissions of the candidates or the administration or their personnel prior to or during election up to the time the result was finally declared. It was the determination by the High Court (the election court) of any such question only which was not subject to appeal. In fact the amendment to subsection (5) of section 44 of the Constitution had confined its scope in respect of interlocutory decisions also to those matters only. That did not mean a denial of a right to appeal on the determination of any question which the High Court could be called upon to adjudicate but which did not in any way affect the validity of the election. Its decisions on such matters were appealable.
3. The matters over which the Court of Appeal had jurisdiction, had been defined in section 64(1) of the Constitution, section 3 of the Appellate Jurisdiction Act (Cap. 9) and section 66 of the Civil Procedure Act (Cap. 21), the cumulative effect was that an appeal lay from every decision of the High Court to the Court of Appeal unless otherwise expressly provided by the Civil Procedure Act.
4. There was no mention of an election court in section 44 of the Constitution or in any other section of the Constitution. It was a court created by statute. Section 2 of the National Assembly Elections and Presidential Elections Act defined an election court to mean the High Court in the exercise of the jurisdiction conferred upon it by section 44(1). As an election court, the High Court was merely exercising an additional jurisdiction conferred on it by section 44(1). The High Court was not thereby deprived of unlimited original jurisdiction conferred on it by section 64(1) of the Constitution.
5. The preliminary point raised before the High Court questioned the competency of the petition filed by the applicant and it had nothing to do with any part of the election exercise itself.
6. The question raised by the preliminary point had nothing at all to do with any part of the election exercise itself such as misconduct on the part of any personnel engaged thereon. In fact, the point raised was with regard to an act, or perhaps an omission, committed by the petitioner after the declaration of the result of the election. The High Court when performing the functions of an election court was strictly confined to matters which could have affected the validity of the election. The determination of the validity of an election and the determination of the competency of a petition were basically two entirely different matters.
7. Section 44(1) of the Constitution and the National Assembly Elections and Presidential Elections Act had comprehensively provided an adjudication on any matter affecting the validity of an election. But the determination of the competency of a petition had not been envisaged nor provided for in either the section 44(1) or the Act. The reason for that was simple in that the High Court when functioning strictly as an election court was restricted to determining questions relating specifically to the validity of an election only.



8. When confronted with an issue falling outside the ambit of section 44(1) of the Constitution, such as the instant one questioning the competency of the petition, the High Court would shed that role and assume its normal role and jurisdiction conferred on it by section 64(1) of the Constitution. As there was no written law forbidding an appeal from the High Court to the Court of Appeal on that issue, there was no hesitation in finding that an appeal in the instant case lay to the Court of Appeal.

*Application dismissed; costs of the application to the respondent and the day's attendance costs to the Electoral Commission against the applicant.*

### **Citations**

1. *Karanja v Kabugi* [1981] KLR 270; (2008) 1 KLR (EP) 235
2. *Mudavadi v Kibisu & another* [1970] EA 585
3. *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31
4. *Commissioner of Income Tax v Menon Tax* [1985] KLR 104; [1982-88] 1 KAR 695
5. *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64
6. *Canadian Eagle Oil Co Ltd v The King* [1946] AC 119
7. *Anarita Karimi Njeru v Republic (No 2)* [1979] KLR 162
8. *Munene v Republic (No 2)* [1976 – 80] 1 KLR 838
9. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1

### **Statutes**

1. Court of Appeal Rules (cap 9 Sub Leg) rules 42(1); 76, 80
2. Constitution of Kenya sections 10(2); 44(1)(a)(b);(4)(5); 60(1); 64(1)
3. National Assembly Elections and Presidential Elections Act (cap 7) sections 2, 7, 8, 9, 10, 11, 23(3)
4. Appellate Jurisdiction Act (cap 9) section 3
5. Civil Procedure Act (cap 21) section 66
6. National Assembly Elections (Elections Petition Rules) (cap 7 Sub Leg) rules 3, 3(3)

### **Advocates**

*Mr Kariuki* for the Applicant

*Mr Shah & Mr Ombogo* for the Respondent

*Mr Gautama* for the Commission

## **RULING**

### **Cockar JA.**

1. This is a notice of motion filed under rules 42(1) and 80 of the Court of Appeal Rules to strike out the notice of appeal dated and filed on 2nd July, 1993, on behalf of the respondent against the decision of the High Court of Kenya given on 1st July, 1993. The facts leading to the notice of motion briefly are that following the election of His Excellency President Daniel Toroitich arap Moi, the respondent, as the President of the Republic of Kenya, in the election of 29th December, 1992, a petition has been filed in the High Court by the applicant challenging the validity of the said election. Section 44(1) of the Constitution allows any person entitled to vote in the election concerned to make such an application. A preliminary point was taken before the High Court challenging the competency of the petition which was rejected. That gave rise to the filing of the notice of appeal by the respondent and of this application to strike it out.



2. The application to strike out is supported by an affidavit dated 1st October, 1993, sworn by Mr GBM Kariuki, advocate for the applicant, in paragraphs 7 and 8 whereof he has deponed as follows:

“7. That I have studied the law relating to appellate jurisdiction of this honourable court in relation to decisions of the election court and in particular the Constitution of Kenya and case law and I am convinced that this honourable court has been deprived of appellate jurisdiction in relation to decisions of the election court.

8. That no appeal lies against the ruling/decision of the election court in Election Petition No 27 of 1993, dated 1st July, 1993.”

3. It is prayed that the notice of appeal be struck out on the ground that no appeal lies against the decision of the election Court.

4. Mr Kariuki’s submissions mainly centred around sub-sections (5) and (4) of s 44 of the Constitution. To be able to appreciate properly the significance of these sub-sections, I quote them below together with the relevant portions of the section itself:

S 44(1) The High Court shall have jurisdiction to hear and determine any question whether:

(a) a person has been validly elected as a member of the National Assembly; or

.....

.....

(4) Parliament may make provision with respect to:

(a) circumstances and manner in which, the time within which and the condition upon which an application may be made to the High Court for the determination of a question under this section; and

(b) the powers, practice and procedure of the High Court in relation to the application.

(5) The determination by the High Court of any question under this section, whether the decision be interlocutory or final, shall not be subject to appeal.”

5. It is to be noted that the provisions of s 10 of the Constitution have extended the application of s 44 to the presidential elections also.

6. Mr Kariuki’s contention was that in the past despite the provision in ss (5) of s 44, as it then stood, the Courts had found that appeals lay to the Court of Appeal on decisions arising from interlocutory applications. He cited CA No 30 of 1981. *Karanja vs Kabugi & another* (unreported) and *Mudavadi vs Kibisu & another* [1970] EA 585 as being the appeals in which the Court of Appeal had exercised jurisdiction over decisions of the election Courts arising from interlocutory applications. Prior to its amendment ss (5) read as follows:

“The determination by the High Court of any question under this section shall not be subject to appeal”.



7. Mr Kariuki contended that in order to close the loopholes exposed by the Court of Appeal in these decisions the Parliament had added the following words in the sub-section:

**Whether the decision be interlocutory or final.”**

8. The decision herein by the election Court having been given in respect of an interlocutory application to strike out the petition was, therefore, in consequence of the addition of the aforesaid words, non-appealable. The addition of the words “interlocutory” had, in Mr Kariuki’s views, once and for all closed all the channels by way of an appeal from an election Court leading to the Court of Appeal. All issues relating to the validity of an election were prescribed to be determined under section 44 of the Constitution. Ss (5) thereof had rendered non-appealable every decision in respect of any question or issue relating to the validity of the election which was covered by this section.
9. Mr Kariuki further strongly argued that Parliament gave effect to the requirements of s 44(4) by enacting the National Assembly Elections and Presidential Elections Act (cap 7) (hereafter referred to as the Act). The National Assembly Elections (Elections Petition) Rules (hereafter referred to as Rule or Rules) have been promulgated thereunder. Therefore any decision made by the election Court involving compliance or non-compliance with any of the Rules was in fact to be construed as a decision under s 44(4) and would, therefore be subject to ss (5) and so would be non-compliance. It followed that the decision of the election Court rejecting the preliminary point which had sought that the petition be struck off for non-compliance with rule 4 sub rule (3) must be deemed a determination of a question which had arisen under s 44(4), and so must be treated as non-appealable. Mr Kariuki urged that the notice of appeal filed by the respondent be ordered to be struck out.
10. Mr Shah assisted by Mr Ombogo, was quite succinct in his submissions made on behalf of the respondent. He said that s 44 was designed to deal with the validity of the election only. The petition had been filed under the Rules promulgated in consequence of the provisions of the Act. The preliminary point that was raised had questioned the competency of the petition itself. It had no connection with any question related to the conduct of the election which alone was the subject matter of s 44. It therefore, was not a matter which fell under the provisions of s 44. He also referred to the CA No 30 of 1981, Karanja vs Kabugi & another (unreported) and Mudavadi vs Kibisu and another [1970] EA 585 both of which had been cited by Mr Kariuki. What he stressed was that in both the decisions the Court of Appeal had strongly come in favour of the view that any order which did not determine the validity of the election was appealable; that would also mean determinations such as ruling on interlocutory applications preceding the hearing of an election petition. Mr Shah’s contention was that ss 5 applied strictly to matters which affected the validity of the election itself and no more. He urged that the application to strike out the notice of appeal be dismissed with costs for 2 counsel.
11. Perusing s 44(1) of the Constitution carefully I would observe that the words which have defined the jurisdiction given to the High Court by this section are:
- to hear or determine any question whether:
- (a) any person has been validly elected ....”
12. What, therefore, is not subject to any appeal is the determination of the validity of the election. Any question which will affect the validity of an election will only arise from acts or omissions of the candidates or the administration or their personnel prior to or during election up to the time the result is finally declared. So it is clear that it is the determination by the High Court (the election Court) of any such question only which is not subject to appeal. In fact the amendment to ss (5) of s 44 of the Constitution on which Mr Kariuki was relying heavily has to my mind now clearly confined its scope



in respect of interlocutory decision also to the aforesaid matters only. That does not mean a denial of a right to appeal on determination of any question which the High Court may be called upon to adjudicate but which does not in any way affect the validity of the election in a manner already stated. Its decisions on such matters, in my view, and as has already been held earlier by the Court of Appeal, are appealable. The matters over which the Court of Appeal has jurisdiction, have been defined in s 64(1) of the Constitution, s 3 of the Appellate Jurisdiction Act (cap 9) and s 66 of the Civil Procedure Act (cap 7), the cumulative effect whereof, put in simple words, is that an appeal lies from every decision of the High Court to the Court of Appeal unless otherwise expressly provided by the Civil Procedure Act.

13. Before proceeding further I shall now deal with the term “Election Court”. There is no mention of an “Election Court” in s 44 of the Constitution or in any other section of the Constitution. It is a Court created by statute. In s 2 of the Act it is defined as follows:

“Election Court” means the High Court in the exercise of the jurisdiction conferred upon it by section 44(1) of the Constitution.”

14. As an “Election Court” the High Court is merely exercising an additional jurisdiction conferred on it by s 44(1) of the Constitution. The High Court is not thereby deprived of the unlimited original jurisdiction conferred on it by s 64(1) of the Constitution. It follows that when it is called upon to function as an “Election Court” under part VI of the Act the High Court has not forsaken its functions or jurisdiction conferred on it by s 64(1) of the Constitution. Having said that with regard to the dual functions and jurisdiction of the High Court under s 44 of the Constitution I now find that it is not difficult to decide the question of whether or not an appeal lies from the ruling of the High Court in this case.
15. The preliminary point raised before the High Court questioned the competency of the petition filed by the applicant. It cannot be disputed that the question raised by the preliminary point has nothing at all to do with any part of the election exercise itself such as misconduct on the part of any personnel engaged therein. Infact the point raised was with regard to an act, or perhaps an omission, committed by the petitioner after the declaration of the result of the election. The High Court when performing the functions of an election court is strictly confined to matters which may have affected the validity of the election. There is no denial of what is obvious, and that is that the determination of the validity of an election and the determination of the competency of a petition are basically two entirely different matters. S 44(1) of the Constitution and the Act have comprehensively provided an adjudication on any matter affecting the validity of an election. But the determination of the competency of a petition has not been envisaged nor provided for in either the aforesaid section or the Act. The reason for that is simple in that the High Court when functioning strictly as an election Court is restricted to determining questions relating specifically to the validity of an election only. But when confronted with an issue falling outside the ambit of s 44(1) of the Constitution, such as the present one questioning the competency of the petition, it will shed that role and assume its normal role and jurisdiction conferred on it by s 64(1) of the Constitution. As there is no written law forbidding an appeal from the High Court to the Court of Appeal on this issue, I have no hesitation in finding that an appeal in this case lies to this Court.
16. Mr Kariuki also submitted that any question relating to rule 4 sub rule (3) be accepted as a part or an extension of ss (4) of s 44 of the Constitution and so be deemed to be an interlocutory matter as envisaged under ss (5) of the section. On this point I am quite clear in my mind that rule 4(3) is a part of a procedural scheme devised and set out by the Rules Committee under s 23(3) of the Act to regulate the practice and procedure concerning petitions. By no stretch of imagination can any rule be deemed to be capable of adding to or subtracting from s 44 (4) of the Constitution.



17. As both my lords Muli, JA and Omolo, JA agree with my aforesaid decision the order of this Court is that an appeal in this case lies to the Court of Appeal and, therefore, the notice of motion filed by the applicant on 5th October, 1993, to strike out the notice of appeal is now dismissed. As regards the costs Mr Shah had applied for costs for two counsel. The reason he advanced was the legal complexity of the issues involved. Mr Kariuki made no response to that. The Electoral Commission was not served with the application by Mr Kariuki because the Commission had not filed a notice of appeal. The Commission, however, was served as an interested party under rule 76 of the Court of Appeal Rules by Mr Shah. Mr Gautama appeared for the Commission and was in attendance throughout the hearing of the application. He did not address the Court but offered to do so if called upon by the Court. We did not feel any need for that. However, in our view, it was proper for the Commission to be served because it is an interested party. As to their costs they will be entitled to the day's attendance costs only. With regard to Mr Shah's request for costs for 2 counsel I am not persuaded that this matter is fit for an order for 2 counsel's costs. In the event, I award costs of the application to the respondent and the day's attendance costs to the Electoral Commission against the applicant. Orders accordingly.

### **Muli JA.**

1. The applicant, Kenneth Stanley Njindo Matiba brought this application by way of a notice of motion dated 30th September, 1993 under rules 42(1) and 80 of the Rules of this Court seeking to strike out the notice of appeal filed on behalf of the respondent, Daniel Toroitich arap Moi on the 2nd of July, 1993 on the ground that no appeal lies against the decision of the election court dated 1st July, 1993 in Election Petition No 27 of 1993. The respondent is the President and Commander-in-Chief of the Armed Forces. The election petition itself is not on record but the decision from which the intended appeal is sought states that the applicant/petitioner filed the petition to challenge the election of the President held on the 29th December, 1992. There was a preliminary objection to the petition by motion filed by the respondent and the Electoral Commission on the ground that the said petition having been signed by Mrs Edith Matiba under the powers of attorney instead of by the applicant/petitioner himself as required under rule 4(3) of the National Assembly Election petition) Rules (the Rules) was incompetent or invalid and should be rejected by the Court. In a long and detailed "decision", as was called by the election Court (Torgbor, Couldrey and Sheikh-Amin JJ), the respondent's motion was dismissed with costs. The respondent filed the notice of appeal which the applicant/petitioner now seeks to have it struck out on the ground that this court has no jurisdiction to entertain the intended appeal or any appeal from the decision of the election court.
2. The jurisdiction of this court to entertain appeals from the election Courts has come up on many occasions in the recent past. Arguments on this point have not become dormant despite the many applications which have come to this court on the very basic issue of the jurisdiction of this court. Mr Kariuki for the applicant and Mr Shah for the respondent cited recent decisions of this Court and made valuable submissions which assisted us in appreciating the real issue. I am sure my brothers on this bench also join me in thanking both counsel.
3. In order to determine as to whether or not this Court has jurisdiction to hear appeals from the election Court of the High Court, it is necessary to examine closely the law as provided under the Constitution of the Republic of Kenya and the laws made thereunder. the Constitution is the substantive law of the land and if any other law made thereunder is inconsistent with the Constitution, the Constitution prevails and the other law made thereunder is void to the extent of the inconsistency (see s 3 of the Constitution).
4. This Court is the creature of the Constitution and it is the superior court of record. It's jurisdiction and powers in relation to appeals from the High Court is conferred on it by law (see s 64).



5. Chapter 1 part of the *Constitution* provides inter alia for election of the President of the Republic of Kenya and in particular section 10 thereof provides:

“S10(1) Subject to this section, section 44 shall apply to the hearing and determination of a question whether a person has been validly elected as President, as it applies to the hearing and determination of a question whether a person has been validly elected as a member of the National Assembly.

(2) Where a person applies to the High Court for the determination of more than one of the following questions, namely, whether the President was qualified to be nominated for election as president, or was validly elected as President, or was validly elected as a member of the National Assembly, he shall make one application only to the High Court.”

6. Section 44 of the *Constitution* provides:

S 44(1) The Court shall have jurisdiction to hear and determine any question whether:

- (a) A person has been validly elected as a member of the National Assembly; or
- (b) The seat in the National Assembly of a member thereof has become vacant.

(2) An application to the High Court for the determination of a question under subsection (1)(a) may be made by any person who was entitled to vote in the election to which the application relates, or by the Attorney General.

(3) An application to the High Court for the determination of a question under subsection (1)(b) may be made:

- (a) where the Speaker has declared that the seat in the National Assembly of a member has by reason of a provision of this Constitution become vacant, by that member; or
- (b) in any other case, by a person who is registered as a voter in elections of elected members of the Assembly, or by the Attorney-General.

(4) Parliament may make provision with respect to:

- (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
- (b) the powers, practice and procedure of the High Court in relation to the application.

(4) The determination by the High Court of any question under this section, whether the decision be interlocutory or final, shall not be subject to appeal”.

7. The result of the application of both the above sections is that the High Court has jurisdiction to hear and determine, in the case of the President, whether the President was qualified to be nominated for presidential elections, or was validly elected President, or was validly elected as a member of the National Assembly. In the case of any other parliamentary member whether the member has been validly elected as a member of the National Assembly or whether a seat in the National Assembly of a member thereof has become vacant. In short the High Court has jurisdiction to hear and determine limited matters arising out of an election. That is to say the validity of nomination of and the election of President or whether the President was validly elected as a member of the National Assembly (s



10 supra) as well as whether a seat of a member of the National Assembly has become vacant. This is made abundantly clear and unquestionable by the provision of sub-section (5) of section 44 of the Constitution (supra). The use of the phrase “under this section” puts this beyond doubt.

8. The High Court has limited jurisdiction on matters for determination arising from an election as are provided for under section 44 of the Constitution and to the extent of those matters only the determinations thereof are final. The finality of those determinations in respect of matters of nomination, and election of the President as well as election of a parliamentary member or the determination as to whether the President or the parliamentary member have been validly elected as members of the National Assembly and finally whether a seat in the said Assembly has become vacant makes it very clear that no appeal lies to the Court of Appeal. The result is that this Court has no jurisdiction to hear or to entertain appeals from the decisions of the election Court in respect of those limited matters conferred to the High Court under sections 10 and 44 of the Constitution. Those decisions of the High Court, whether the decisions be interlocutory or final are not subject to appeals to the Court of Appeal. I am attempting to make it as clear as I can make it that the validity of qualifications to be nominated as President and the election of the President as a parliamentary member as well as whether a seat in the National Assembly has become vacant, are within the jurisdiction of the High Court only and no appeals, whether be interlocutory or final, lie to this Court. This Court, whose jurisdiction to hear or to entertain appeals from the election Courts of the High Court has been expressly denied by the Constitution (s 10 & 44) and expressly conferred on the election Court of the High Court alone cannot be curtailed or extended except by Parliament itself. I would be bold to summarise the jurisdiction of the High Court in matters of elections within the scope of sections 10 and 44 of the Constitution and which the Court of Appeal is constitutionally deprived of jurisdiction. In my view these are:
  - 1) Validity or otherwise as to whether the President was qualified to be nominated for election as President.
  - 2) Validity or otherwise as to whether the President was elected as President.
  - 3) Whether the President or a parliamentary member was elected as a member of the National Assembly.
  - 4) Whether a seat in the National Assembly has become vacant.
10. The decisions of the election Court, whether interlocutory or final are not appealable to the Court of Appeal. Mr Kariuki, for the applicant was at great pain attempting to convince us that all questions arising from an election are constitutionally barred from the jurisdiction of the Court of Appeal. He was basing his arguments on the use of the phrase “any question” appearing in section 44(5) of the Constitution (supra). This cannot be so. I would be brave to state that the High Court has limited jurisdiction of election matters within the scope of sections 10 and 44 of the Constitution only and matters outside this scope may ultimately be appealable to the Court of Appeal. I have used the word “may” cautiously. To accede to Mr Kariuki’s submissions on this point would be to cause violent misinterpretation of the Constitution. It would be tantamount to violent misconceptions of the law. The more Mr Kariuki attempted to convince us the more I was convinced that he was clearly wrong.
11. This brings me right on the real question and that is that was the petition filed by the applicant/petitioner valid or not on the ground that it was not signed by the applicant/petitioner himself but by his wife under the powers of attorney? I for one would have liked to see a copy of the petition and the powers of attorney. We are told that the petition was signed by Mrs Edith Matiba but we are not told whether the powers of attorney conferred on Mrs Edith Matiba were general or specific. However, I will accept that there was a petition and the powers of attorney as the parties do not appear to have



any difficulties about them. The petition is still pending in the election Court of the High Court. I do not know the contents of that petition and the prayers therein. Since the petition has not yet been heard and determined, the qualification to be nominated as President, the validity of election of the President or as a member of the National Assembly have not taken place. The provisions of sections 10 and 44 of the *Constitution* have not been exhausted yet. What was that issue before the election Court was the validity of the petition as to whether or not it was properly conceived having been signed by Mrs Edith Matiba but not by the applicant/petitioner himself.

12. Sub-section (4) of section 44 of the *Constitution* empowered Parliament to make provisions with respect to:

- (a) The circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and
- (b) The powers, practice and procedure of the High Court in relation to the application.

13. The National Assembly and Presidential Election Act – cap 7 Laws of Kenya (the Act) was enacted by Parliament. Sub-section (3) of section 23 of the Act empowered the Rules Committee to make Rules of the Court regulating the practice and procedure concerning petitions. The relevant rules are National Assembly Elections (Election Petition) Rules. Regulation 4(3) thereof provides as follows:

- “(3) The petition shall conclude with a prayer as, for instance, that some specified person should be declared duly elected or nominated, for that the election should be declared void and shall be signed by all the petitioners”.

14. The word “shall” is used which makes it mandatory that the petition must be signed by all the petitioners. I am mindful that I am dealing with an interlocutory application to determine whether or not this court has jurisdiction to hear the intended appeal against the ruling of the election court that the petition was validly signed notwithstanding that the petitioner/applicant himself did not sign the petition but by his wife under powers of attorney.

15. As I have already shown, the High Court has a limited jurisdiction to hear and determine election matters within the scope of sections 10 and 44 of the *Constitution*. It follows therefore that there are certain election matters outside the scope of the High Court jurisdiction. For instance, there is procedure for a person aggrieved by the registration as a voter or elector as provided for under sections 8, 9, 10 and 11 of cap 7 Laws of Kenya. The Court referred to in part III thereof is not the election Court. Section 7 thereof lays down the procedure to be followed by any person adjudged or declared disqualified from being registered as a voter or elector by reasons mentioned therein. He has a right of appeal against the decision to disqualify him. Then there are matters concerning the form of the petition. The regulations provide the form to be adopted by a petitioner. Rules 3 and 4 thereof are couched in mandatory terms by the use of the word “shall”. I reproduce the Rules.

3(1) The presentations of an election petition shall be made by delivering it at the office of the Registrar, and the Registrar or the officer of his department to whom the petition is delivered shall give a receipt in the following form Received on the ..... day of ....., 19...

At the Registry of the High Court, a petition touching the election/nomination of ..... for ..... purporting to be signed by ..... (insert the names of petitioners)

Registrar

(or other officer to whom the petition is delivered)



- (2) Two copies of the petition shall be delivered with the petition.
  - (4)(1) An election petition shall contain the following statements:
    - (a) it shall state whether the petitioner is entitled to petition under section 44 of the Constitution.
    - (b) It shall state the holding and results of the election, and shall briefly state the facts and grounds relied on to sustain the petition.
  - (2) The petition shall be divided into paragraphs, each of which shall be confined, as nearly as is practicable, to a distinct portion of the subject, and every paragraph shall be numbered consecutively, and no costs shall be allowed for drawing or copying any petition not substantially in compliance with this rule, unless otherwise ordered by the election Court.
  - (3) The petition shall conclude with a prayer as, for instance, that some specified person should be declared duly elected or nominated, or that the election should be declared void, and shall be signed by all the petitioners”. (underlining is mine).
16. Non-compliance of the form of a petition is not one of the matters falling within the ambit of sections 10 and 44 of the Constitution. It is a matter which is properly decided by the High Court (by election Court) exercising its unlimited jurisdiction. In particular, the manner of presentation of a petition, contents and the form thereof, evidence not to be stated in a petition without leave of the election Court etc.... There are other procedural matters within the Rules which may be dealt with by the ordinary Courts, the Registrar, appeals against nominations, multiplicity of petition etc. These matters do happen before the actual election of President or parliamentary member takes place. More so in cases of non-registration and disqualifications.
17. I am of the firm view that these procedural matters and substance of petitions are not within the scope of section 10 and 44 of the Constitution. Occurring as must of necessity do, they take place before elections themselves take place and as such are outside the scope of sections 10 and 44 of the Constitution. Decisions of the High Court (election Court), whether, interlocutory or final, are not caught by sub-section (5) of section 44 of the Constitution. Any appeal from the decisions of the High Court (election Court) on matters outside the scope of sections 10 and 44 of the Constitution are appealable as of right to the Court of Appeal. I hold therefore that the Court of Appeal has jurisdiction to hear appeals from the election Court on these procedural substantial matters which are outside the scope of sections 10 and 44 of the Constitution.
18. The decision of the High Court (election court) from which the present application comes is on the validity of the petition in Election Petition No 27 of 1993. The High Court has not yet heard the election petition with the result that sections 10 and 44 of the Constitution do not apply. This Court has therefore jurisdiction to hear and determine this application as well as the intended appeal from the decision of the High Court (election Court). The notice of appeal lodged by the respondent is properly before this Court and the intended appeal should be processed in the normal way.
19. Before I conclude this ruling I would like to say a few words about the authorities cited to us by counsel. I have read them with much stimulation.
20. For over a decade this Court has been seized of the issue of jurisdiction in appeals from election Courts of the High Court. Following the persuasive authority in a Malaysian decision in *Devan Nair v Young Kuan Tek* [1967] 2 AC 31 this Court broke through by holding that it has jurisdiction to hear appeals on interlocutory matters from the election Court dealing with election petitions. In *Mudavadi v Kibisu* [1970] EA 585 it so held that this Court has jurisdiction to hear an appeal from an order of the High



Court which did not determine the validity of the election. In *Karanja v Magugu & another* Civil Appeal No 30 of 1981 it was held by the majority decision (Miller JA dissenting) that this Court had jurisdiction. *Mudavadi* and *Karanja* decisions were before the amendment of sub-section (5) of section 44 of the *Constitution* was enacted. What jurisdiction had hitherto appeared to be vested in this Court before the introduction of a phrase “whether interlocutory or final” in sub-section (5) was restricted even further by the amendment (*Act No 7 of 1984*). The earlier authorities in *Mudavadi* and *Magugu’s* authorities are no longer good law and are clearly distinguishable on facts and law. The Malaysian persuasive authority too is distinguishable and will no longer be a persuasive authority in this country.

21. We were also referred to the authority in *Commissioner of Income Tax v Menon* Tax [1982-88] 1 KAR 695. This authority is distinguishable on facts and law. It should not have been cited to us as canons of interpretation of taxing statutes are quite different from interpretations of other laws (see *Cape Brandy Syndicate v CIR* [1921] 2 KB 403 Rowlatt J and approved by Viscount Simon LC in *Canadian Eagle Oil Co Ltd v The King* [1946] AC 119 at 140 and applied to this country in case No 93 *Sir George Arnautoglu v CIT* of 1962:-
22. A number of these quotations have been set out in the judgment under appeal and it will be sufficient for my purpose to say that in taxation legislation, it is the letter of the law that is paramount and to quote what was said Rowlatt J.....
23. In a taxing act one had to look merely at what is clearly said. There is no room for imendment as to tax. Nothing is to be real in, nothing is to be implied. One can only look fairly at the language used.”
24. In the result I would dismiss the motion with costs to the respondent and the Electoral Commission as proposed by my brother Cockar JA. It will remain an unsatisfactory state unless Parliament amends the *Constitution* to curtail altogether the jurisdiction of this court over the whole of election matters or to confer by law some jurisdiction to it in clear terms. Until then the High Court (election Court) will continue to exercise limited jurisdiction of election matters within the scope of sections 10 and 44 of the *Constitution* and the Court of Appeal will continue to exercise limited jurisdiction on those election matters which are outside the scope of the same sections and which do not determine the validity of the election.

#### **Omolo JA.**

1. Under section 44(1), of the *Constitution* of Kenya, the High Court has jurisdiction to hear and determine two questions namely:
  - (a) Whether any person has been validly elected as a member of the National Assembly; or
  - (b) Whether the seat in the National Assembly of a member thereof has become vacant.
2. By section 44(5) of the same Constitution,

“The determination of the High Court of any question under this section, whether the decision be interlocutory or final, shall not be subject to appeal.”
3. Kenneth Stanley Matiba, the applicant is challenging the election of Daniel Toroitich Arap Moi, the respondent, as the President of the Republic of Kenya and for that purpose, the applicant filed a petition in the High Court of Kenya. That petition was signed for the applicant by his wife, Edith Matiba. It appears from the record that due to ill-health the applicant is no longer able to perform simple tasks like signing documents. The applicant, it would appear from the “decision” of the High Court which is the subject of the dispute before us, blames the respondent for the ill-health which has



deprived him (applicant) of power to sign documents. The wife of the applicant signed the petition on behalf of the applicant pursuant to a power of attorney which the applicant donated to her.

4. Rule 4(3) of the National Assembly Elections (Election Petitions) Rules, 1993,(the Rules) made pursuant to section 23(3) of the National Assembly and Presidential *Elections Act*, is in the following terms:-

“The petition shall conclude with a prayer as for instance, that some specified person should be declared duly elected or that the election should be declared void, and shall be, signed by all the petitioners.”

5. Seeing that the applicant had not signed his petition himself, the respondent moved the High Court, by way of notice of motion, that the applicant’s petition ought to be struck out as being contrary to the Rule which I have already set out herein. The applicant strenuously resisted the respondent’s application in the High Court and in a considered “decision” dated the 1st July, 1993, the High Court sitting as an election court ruled that the applicant’s petition was valid because in the circumstances of the applicant, such as his inability to write and sign, the signature of the applicant’s wife was a valid and sufficient signature for the purposes of rule 4(3). The election court then dismissed with costs the respondent’s notice of motion. Faced with that reversal, the respondent filed his notice of appeal on the 2nd of July, 1993, stating in that notice that he intended to appeal to this court against the whole of the decision of the election court.
6. On the 5th October, 1993, the applicant filed his present application by notice of motion and under certificate of urgency and the application prays to us for orders:-
  1. That the Notice of Appeal dated and filed in Court on the 2nd day of July, 1993 by Daniel Toroitich arap Moi through his advocates, Messrs Kilonzo and Company, be struck out on the grounds that no appeal lies against the decision of the election court dated the 1st July, 1993 in Election Petition No 27 of 1993 involving the applicant and the respondent.
  2. That the respondent be condemned to pay the costs of these proceedings”.
7. I have already set out the relevant provisions of section 44 of the *Constitution*. Section 44(5), as it now stands, in particular, categorically states that the determination of the High Court which for the purpose is the election court of any question under the section whether interlocutory or final, shall not be subject to appeal. It is interesting that Parliament has always sought to keep out the Court of Appeal from matters dealing with the *Constitution* particularly those arising from election petitions. The history behind section 44(5) is well known. Before its amendment this court had always insisted that it had jurisdiction to hear appeals from the determination of the election court on interlocutory matters. If it were necessary to cite any decisions on the matter, I would refer to the cases of:-
  1. Mudavadi v Kibisu & another [1970] EA 583
  2. J N Karanja v M N Kabugi & another Civil Appeal No 30 of 1981 (unreported)
8. Faced with the resolute attitude of the court not to be totally kept out of the matters arising from election disputes, Parliament brought in the amendment to section 44(5) of the *Constitution*, and knowing the history underlying the matter, one would conclude that Parliament must have thought it had succeeded in keeping out the Court of Appeal from these matters. The applicant is clearly of the same view and hence his application that we strike out the notice of appeal for if we do not have jurisdiction to hear an appeal from the determination of an election court; then the notice of appeal



filed herein can only be a waste of time and ought to be struck out under rule 80 of the Court's Rules. The question, however, still remains:-

Has Parliament eventually succeeded in totally depriving this court of any jurisdiction in matters relating to election petitions?

9. Before I can attempt to answer that question, let me state from the very outset that our Court is a creature of statute and it cannot be reminded too often that it (Court) only has such powers and jurisdiction as are conferred on it by law. The Court has no inherent jurisdiction on any matter and its jurisdiction cannot be implied from circumstances, however attractive such an application may be. On the other hand, it must not be forgotten that we constitute the last Court of resort in the Republic and we must not be too shy when it comes to the question of determining whether or not we have jurisdiction to hear and determine a particular issue. On this point, I would myself adopt a robust and liberal approach which was always advocated by that great jurist, the late Chief Justice C B Mandan – see for example *Munene v Republic (No 2)* [1978] KLR 105 at Pg 112 where he is recorded as saying:-

“We will not usurp jurisdiction. We will interpret liberally the extent of our jurisdiction.....”

10. If we have no jurisdiction, then of course as was said in *The Owners of The Motor Vessel “Lilian S” v Caltex Oil (Kenya Ltd)* Civil Appeal No 50 1989 (unreported) we must down tools.

11. Now, what questions were the election court called upon to determine? By his notice of motion, the respondent was saying that the applicant had not presented before the election court a valid election petition upon which that court could proceed to determine the question:-

- “ 1. Whether Daniel Toroitich arap Moi was qualified to be nominated for election as President; and
2. Whether Daniel Toroitich arap Moi has been validly elected as President” – section 10 of the *Constitution*.

12. These questions still remain undetermined by the election Court. The question it was called upon to determine was

Whether Kenneth Stanley Njindo Matiba” had presented before the election court a valid election petition upon which the election court could proceed to determine the primary questions.

13. Section 44(1) of the *Constitution* sets out the issues upon which the election Court can be called to determine. Those issues are two and in my view it is only upon those two issues that:-

“the determination by the High Court of any question under this section, whether the decision be interlocutory or final, shall not be subject to appeal”.

14. Whether or not a party has presented a valid election petition to the High Court is not among the issues set out in section 44(1) and it is to be remembered that while the High Court itself would, under section 60(1) of the *Constitution* have unlimited original jurisdiction to hear election petitions, it (High Court) would not have an inherent jurisdiction to hear and determine invalid election petitions. The power to do so is conferred upon it by the *Constitution*, the National Assembly and Presidential *Elections Act* and the Rules made there under. In the absence of a valid election petition, ie a petition which does not comply with the Act and Rules, the High Court would have no jurisdiction to hear and determine



the two question set out in section 44(1) of the Constitution. In my view if Parliament had intended that the question of whether a valid petition has been presented to the High Court, which gives the High Court its jurisdiction, was also to be left to the determination of that Court, such a question would have been included in section 44(1) and if it had been so included, the determination of the High Court thereon would have been final and subject to no appeal.

15. Mr Kariuki for the applicant drew our attention to section 44(4) of the Constitution which provides that-

“Parliament may make provisions with respect to –

- (a) the circumstances and manner in which, the time within which and the conditions upon which an application may be made to the High Court for the determination of question under this section;

and

- (b) the powers, practice and procedure of the High Court in relation to the application”.

16. Mr Kariuki submitted that pursuant to this sub-section Parliament enacted the National Assembly and Presidential Elections Act cap 7, and that under section 23(3) of the Act, the Rules Committee has made the National Assembly Elections (Election Petitions) Rules, 1993 which provide for, among other things how election petitions are to be signed. Mr Kariuki then contended that the determination of the issue of whether or not an election petition has been properly signed, ie whether or not there is a valid election petition before an election court, is necessarily a determination under or pursuant to section 44(1) and is not appealable.

17. I at first found this argument almost irresistible but on further examination, it is really not sustainable. As I have said repeatedly, section 44(1) provides for the determination of only two issues and read in conjunction with section 10(2) of the Constitution, three other issues are added, namely whether the President was qualified to be nominated for election as President, or was validly elected as President or was validly elected as a member of the National Assembly. Those are the questions which an election court is required under the Constitution, to determine, and as we pointed out to Mr Kariuki during the hearing of the application, neither the National Assembly and Presidential Elections Act, nor the Rules made thereunder can add another question to those set out in the Constitution. If they purported to do so, they (ie the Act and Rules) would be in conflict with the Constitution and to the extent of that conflict they and their purported addition, would be void – section 3 of the Constitution. So that the issues to be determined by the election court must remain those which are set out in section 10(2) and section 44(1) (a) and (b) of the Constitution.

18. I have already pointed out that if there was no valid election petition before an election court, then that court from the very beginning, would have no jurisdiction to proceed to determine the questions set out in the two sections of the Constitution and the court would be bound to decline jurisdiction and strike out the purported petition. In my view, the question of jurisdiction, though it is in a way an interlocutory matter, is such a serious one that if Parliament had intended that a ruling on it by the election court is the matters not appealable, it (Parliament) would have included it in section 44(1) of the Constitution. So that in the present application, if the election court had ruled that there was no



valid election petition before it and struck out the petition, I would see nothing in the Constitution to prevent the applicant from coming to this court and telling it:

“The election court has wrongly ruled that my petition before it is invalid. It has consequently held that it has no jurisdiction to decide the question or questions I have raised before it under sections 10(2) and section 44(1) of the Constitution. I ask the Court of Appeal to rule that my petition is valid and hence the Election has jurisdiction to hear and determine the questions I have raised.”

19. Once it is held, as I do, that the validity of an election petition is not one of the matters covered under section 44(1) of the Constitution, then section 44(5) does not apply and the ordinary appeal provisions, particularly section 66 of the Civil Procedure Act, apply and there is a right of appeal to this court. That was the position adopted by this court in cases such as *Mudavadi v Kibisu & another* [1978] and *Karanja v Kibugi* [1981] to which I have referred. It was not until the majority decision of the Court in the case of *Anarita Karimi Njeru v The Republic (No 2)* [1979] KLR 162 that the position was doubted. It is fair to add that Njeru’s case was subjected to heavy criticism in the judgement, particularly that of Madan, JA, (as he then was) in the case of *Commissioner of Income Tax v Ramesh K Menon* (1982-88) KAR 695 and that the same case is now under a sustained attack in a specially constituted division of this Court. Accordingly, I would not wish to base my ruling, one way or the other, on the Njeru case. I have already held that section 44(5) of the Constitution has really not succeeded in totally depriving this Court of all jurisdiction in election petitions and that the matter raised by the respondent before the election court, namely, the validity of the election petition itself is still appealable to this Court. I would also dismiss the application with costs to the respondent but I see no reason to certify for two counsel. I would also award the Electoral Commission the costs for its counsel’s attendance for the day.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER 1993.**

**A.M.COCKAR**

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**JUDGE OF APPEAL**

**M.G.MULI**

.....

**JUDGE OF APPEAL**

**R.S.C. OMOLO**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

