IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Miller & Potter JJA)

CIVIL APPEAL NO. 30 OF 1981

BETWEEN

KARANJA.....APPELLANT

AND

KABUGI.....RESPONDENT

JUDGMENT

Law JA This is an appeal by the petitioner in an election petition (No 20 of 1979), the hearing whereof has not yet begun before the High Court sitting as an Election Court under Section 44 of the Constitution of Kenya, against three rulings made by that Court in the course of interlocutory proceedings. The petition was filed on December 7, 1979, and two paragraphs in the petition are relevant to this appeal. The first is paragraph 10, which reads —

"10. Your Petitioner states that the said Preliminary Election for the said constituency was not conducted in accordance with the provisions of the Act and of the Regulations and other provisions of law nor in accordance with the principles laid down therein or in any law relating to such election nor in accordance with the principles of natural justice and that as such seriously affected the said election to the detriment of Your Petitioner"

The second is paragraph 12, which reads —

"12. The Second Respondent was by himself his agents and other persons on his behalf guilty of illegal practices at the said Preliminary Election by making and publishing before and during the said Preliminary Election certain false statements of fact in relation to the personal character and conduct of Your Petitioner who was then a candidate at the said Preliminary Election for the purpose of affecting the return of Your Petitioner contrary to the Election Offence Act, Cap 66 and the Act."

The first respondent to the petition, and in this appeal, was the Returning Officer. Through his advocate, the Attorney-General, he requested further and better particulars of paragraph 10, by a document stated to be issued under Order VI rule 8 of the Civil Procedure Rules. The second respondent to the petition, and in this appeal, was the successful candidate in the election. He requested, through his advocates, particulars of paragraphs 10 and 12, in a document stated to be issued under Order VI rule 8 of the Civil Procedure Rules. The particulars requested were duly supplied. The next step was that by the second respondent, by chamber Summons stated to be issued under Order VI rule 13, under Section 3A Civil Procedure Act (Cap 21), Rule 4(2), the National Assembly (Election Petitions) Rules, Section 20(2) National Assembly and Presidential Elections Act (Cap 7) and all enabling provisions of law, asking that

paragraph 10 be stuck out, and that the particulars under paragraph 12 be struck out.

The summons was duly heard in the High Court by the three judges who had been appointed to the Election Court which is to hear and determine the petition out of which this appeal arises. Three separate "Rulings" were delivered by the High Court on May 7, 8 and 12, 1981, respectively. In its first ruling, the learned judges ordered that the particulars supplied under paragraph 10 be struck out, but they refused to strike out paragraph 10 itself. In its second ruling they ordered that some of the particulars supplied under paragraph 12 be struck out, but they refused to strike out the others. In its third ruling, the learned judges gave leave to appeal against the first and second rulings.

We now have before us the appeal, in which the appellant challenges the striking out of particulars supplied under paragraphs 10 and 12, as ordered in the first and second rulings, and the order for costs contained in the third ruling, which was that the costs of the application for leave to appeal should be costs in the cause. We also have a cross-appeal filed on behalf of the second respondent, asking that paragraph 10 be struck out, and that the remaining particulars supplied under paragraph 12 be struck out. By ground 4 of the cross-appeal, the second respondent raises a point which is basic, and which if well-founded must involve the dismissal of this appeal. Ground 4 reads as follows —

"4. The High Court erred in giving leave to appeal against the rulings because the Court of Appeal has no jurisdiction to hear such appeals".

We have had the advantage of hearing Mr S Gautama and Mr Nowrojee expounding the case for the appellant, Mr Rana for the first respondent, and Mr Deverrell for the second respondent, and I for myself would like to thank these learned gentlemen for the skilful and clear presentation by them of their respective cases.

Clearly ground 4 of the cross-appeal must be taken first, because if we have no jurisdiction to entertain this appeal, that is the end of the matter.

Section 44(1) of the Constitution confers upon the High Court jurisdiction —

"to hear and determine any question whether —

a) any 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."

I think it is common ground that this Court only has such jurisdiction as is expressly conferred on it by statute, and that the jurisdiction conferred by Section 44 of the Constitution on the High Court to hear and determine Election Petition is a "special jurisdiction" within the meaning of Section 3 of the Civil Procedure Act (Cap 21), and an "other jurisdiction" within the meaning of Section 60(1) of the Constitution.

It is accordingly necessary to look for the statutory authority enabling this court to entertain this appeal. I agree with Mr Deverell that such authority cannot be inferred from the fact that Section 44(5) of the Constitution precludes an appeal from the determination of the questions whether a person has been validly elected, or whether a seat has become vacant, but does not specifically preclude appeals from other determinations such as rulings on interlocutory applications proceeding from the hearing of an Election Petition. As Mr Deverell rightly submitted, the precluding of a right of appeal in two respects cannot be construed as equivalent to the express conferment of a right of appeal in all other respects. Where then is the statutory authority for this Court to entertain these appeals? Mr Gautama relies on the decision of this Court's predecessor in *Mudavadi v Kibisu and Another* [1970] EA 585 in which case it was held that the Court of Appeal had jurisdiction to entertain an appeal from an interlocutory order of the High Court, sitting as an Election Court, which did not determine the validity of the election, the statutory authority for this assumption of jurisdiction being Section 66 of the Civil Procedure Act which provides that an appeal shall lie from the decree and any part of decree and from the orders of the High

Court to the Court of Appeal.

That proposition was concurred in by the distinguished advocate then appearing for the Republic. It seems to me that the instant appeal is clearly within this Court's jurisdiction, all the more so as the interlocutory proceedings, the subject of this appeal, were proceedings expressly taken under the Civil Procedure Act (Cap 21) and Rules, and there can be no doubt as to the jurisdiction of this Court to entertain appeals from such proceedings.

The decision in Mudavadi's case was followed in *Nyarangi v Mukuna* (Civil Application NAI 18 of 1975), and there extended by this Court to an intended appeal against an order as to costs made by the High Court sitting as an Election Court. No objection was taken to this Court's jurisdiction to entertain such an appeal. Mudavadi's case was also referred to, with apparent approval, in the majority judgment of this Court in *Munene v Republic* (Cr App No 59 of 1977), in which a different special jurisdiction was under consideration. It is not until the majority judgment of this Court in *Njeru v Republic* (Cr App No 4 of 1979) that the decision in Munene's Case was disapproved of, but although Mudavadi's case was referred to, no doubts were cast upon the authority of that decision.

For my part, I see no reason to doubt the validity and the authority of Mudavadi's case, which stood unchallenged for some nine years. I find support for this view in the persuasive authority of the case of *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31. In Malaysia the scheme relating to election petitions is very similar to that obtaining in Kenya. For instance, the decision of an election judge as to what person was duly elected or returned, or whether the election was void, is final and not subject to appeal. Nevertheless, it was held that a right of appeal lay to the Federal Court (the Malaysian Court of Appeal) upon an interlocutory matter, under Section 67 of the Malaysian Courts of Judicature Act, 1964, which, like Section 66 of the Civil Procedure Act (Cap 21), confers upon the Court of Appeal Jurisdiction to hear and determine appeals from any judgment or order of the High Court. With respect, I do not agree with the argument put forward by Mr Deverell and Mr Rana, that it would be anomalous for this court to have jurisdiction to entertain appeals in minor matters connected with Election Petitions, but be without jurisdiction to entertain an appeal against the substantive decision.

It is not beyond the bounds of possibility that Parliament, in order to obviate unnecessary delay in deciding the validity of an election, left that decision entirely to the High Court, but intended that the Court of Appeal should exercise a supervisory appellate control over interlocutory proceedings, so as to ensure that when the petition itself came up for hearing it was in proper form. That a court should not be able to entertain an appeal from a final determination, but should be able to upon an interlocutory matter, was described as "curious" in the *Devan Nair* case, but authority for such a state of affairs was to be found in the cases of *Harmon v Park* [1880] 6 QBD 323 and *Monkswell v Thompson* [1898] IQB 353.

I do not dispute the authority of the decision in *Njeru's* case insofar as it relates to Section 84 of the Constitution, with which that appeal was solely concerned. The special jurisdiction created by that section is of a criminal nature, and no question of interlocutory proceedings arises thereunder. I respectfully disagree with part of the decision in *Njeru's* case when it purports to deal with the general question of this Court's appellate jurisdiction, and that is why I found myself unable to sign the majority judgment in that case.

I am satisfied that this appeal is competent and within this Court's jurisdiction. Accordingly in my view the High Court did not err in giving leave to appeal and ground 4 of the cross-appeal fails and must be dismissed.

I now turn to the grounds of appeal. The first ten are directed against the striking out by the High Court of the particulars supplied by the appellant under paragraph 10, which is set out earlier in this judgment. No rules governing the practice and procedure of Election Courts have been made under Section 23 of the National Assembly and presidential Elections Act (Cap 7), and I have no doubt that it was right in these circumstances to make use of Order VI Civil Procedure Rules in this case, because the special jurisdiction created by Section 44 of the Constitution is of a Civil nature, and in the absence of rules under Cap 7 dealing with the striking out of particulars, or of a paragraph in a petition, the High Court properly called

in aid the Civil Procedure Rules and in particular rule 13 of Order VI to achieve this object, in accordance with the practice of the Election Courts, see for instance Sachdeva J's remarks in the *Osogo* case cited in the ruling of May 7, 1981.

Of the six particulars supplied, particulars (iv) and (v) charged the appellant with campaigning at polling stations, and with bribery, serious allegations which the High Court thought should have been the subject of separate paragraphs in the petition, and not properly the subject of particulars delivered long after the last date allowed for amending a petition. The other four particulars relate to complaints as to the conduct of the election itself; they are either basic and should have formed the subject of separate paragraphs in the petition, or are covered by existing paragraphs.

The learned judges expressed doubts as to whether they had power to strike out a substantive paragraph in a petition, and the first two grounds of the cross-appeal contend that the High Court had such a power, both under Order VI rule 13 and under its inherent powers. I agree. If it was proper to invoke the aid of Order VI to strike out particulars given under a paragraph, then it seems to me that in a proper case the paragraph itself could well be struck out. I would not however strike out paragraph 10 as Mr Deverell would have us do. The High Court thought that, shorn of its particulars, "it is otiose and of no effect", except perhaps as an introduction to the following paragraphs. That being so, there is no harm in letting it remain in the petition.

It must be remembered that the question whether particulars should be ordered, or whether particulars should be supplied, or whether particulars or a substantive paragraph should be struck out, is one of discretion the exercise whereof should not be interfered with on appeal unless clearly wrong. I have no reason to think that the High Court judges erred in the manner in which they dealt with paragraph 10 and its particulars. I would dismiss the appeal, and prayer (1) in the cross-appeal, in sofar as they relate to paragraph 10.

The second group of grounds of appeal, and ground 3 of the cross-appeal, relate to the particulars supplied by the appellant under paragraph 12, which is also set out earlier in this judgment. The High Court struck out particulars 1, 7, 8 and 10 and allowed the others to stand. The appellant appeals against the striking-out, and the respondent would have us strike out particulars 2, 3, 4, 5, 6 and 9 in addition to 1, 7, 8 and 10. As regards, 1, 7 and 10, in my view they were properly struck out as amounting to little more than expression of opinion, not amounting to false statement of fact in relation to the personal character or conduct of the appellant, for instance that his leadership at the University was not "good or proper", or that other persons considered the appellant unfit to hold high office. The only particular which I do not think should have been struck out is 8, which reads —

"statements that the petitioner is or would be a leader who would lead people on the road to darkness or into a wall of darkness, and is a leader `of darkness and death.' "

The High Court allowed 9 to stand, which reads —

"statements that the petitioner had and/or offered only qualities of hatred, jealously, vice and destruction and by being possessed of darkness could not offer leadership to the electors".

With respect, it seems to me illogical and wrong in principle to allow 9 to stand, and to exclude 8. Either both should stand, or both be struck out. The expression "a leader of darkness and death" has a notorious connotation, especially amongst Kikuyu people, and if its use can be proved, it might possibly be construed as having had some effect on the result of the election.

Mr Deverell, in submitting that all the particulars given under paragraph 12 should be struck out, said that you are entitled to blacken the name of a political opponent in the rough and tumble of an election so long as you only attack his political and public character, and not his personal character. That may be so, but the distinction is a fine one. When does an attack pass the bounds of fair comment and become a personal attack? In my view, both particulars 8 and 9, if proved, are capable of being construed as a personal attack. As was noted in the court below, Grove J in *Pankhurst v Hamilton* [1887] 3 TLR 500 rejected the

proposition that a man could say anything he pleased of another simply because it was during an election contest.

After careful consideration of the arguments and submissions made in relation to the particulars supplied under paragraph 12, I would not interfere with the discretion of the High Court in striking our particulars 1, 7 and 10 as "not sufficiently identifiable as containing statements of fact in relation to the personal character or conduct of the Petitioner", but with respect I think the striking out of particular 8 was wrong in principle, having regard to the refusal to strike out 9. I would restore particular 8, and hold that on this ground the appeal succeeds to this very limited extent. I would not strike out all the particulars we invited to do by the cross-appeal.

The last ground of appeal relates to the order for costs made on the appellant's successful application for leave to appeal, which was resisted by both respondents. Section 27(1) of the Civil Procedure Act (Cap 21) confers on courts what appears to be a very wide discretion as to, by whom and to what extent costs are to be paid, but it is a discretion which must be exercised judicially and on fixed principles, and with due regard to the proviso to Section 27(1), which reads —

"Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

The order made by the court below was that the costs of the informal application for leave to appeal should be costs in the cause; in other words, the appellant will not get the costs of his application unless his petition is successful. No "good reason" for not allowing the appellant those costs in any event is apparent from the record. The principles on which an appellate court should interfere with an order for costs were stated by Sir Clement de Lestang Ag P in *Kiska v de Angelis* [1969] EA 6. In short, the guiding principle is that a successful party should not be deprived of his costs unless his conduct has led to litigation which, but for his own conduct, might have been averted. Where no reasons are given for departing from the general rule that costs follow the event, an appellate court will interfere if satisfied that the order is wrong. With respect, I can see no "good reason" for depriving the appellant of the costs of his successful application for leave to appeal, and I would allow the appeal in this respect to the extent of ordering that those costs be the appellant's costs in the cause.

To summarize, my view is that the appellant has failed on his grounds directed to paragraph 10; that he has partially succeeded on his grounds directed to paragraph 12 by having one out of four particulars, which were struck out, restored; and I would vary the order as to the costs of the application for leave to appeal from "costs in the cause" to "petitioner's costs in the cause in any event." I would dismiss the cross-appeal, except to the extent that I agree with grounds 1 and 2 that Order VI rule 13 does apply to election petitions, and that the High Court had power to strike out paragraph 10. None of the prayers in the cross-appeal has however been successful, and in all the circumstances I would make no order for costs on the cross-appeal. As regards the costs of the appeal itself, it has succeeded to a very limited extent, and I would award the appellant one-third of his taxed costs, to be paid equally by the two respondents, and certify for two advocates.

The divergence of judicial opinion as to what, if any, right of appeal exists to this Court from decisions of the High Court under Section 44 of the Constitution, other than on the "questions" referred to in subsection (1) of that section, has given rise to a most unsatisfactory situation which could, and in my respectful opinion should, be remedied by an appropriate amendment of Section 44. It should at the same time be made clear whether or not or to what extent a right of appeal exists against any determination by the High court made under Section 84(2) of the Constitution.

As **Potter JA** agrees, it is so ordered.

Miller JA. This appeal is an off-shoot of an election petition from the last general elections of 1979. It is now mid-1981. Be it a retrograde step in view of previous decisions of this court, involving in one form or another the question of the right of appeal to it in kindred matters, I think that this particular appeal must be considered primarily as a matter of the interpretation of our relevant statutory provisions and

according to accepted principles and rules in that behalf, and this, by avoiding as much as possible, dicta in decided cases here, and in other countries, except where such dicta are directed and confined to the said principles and rules of interpretation and relate to the question of jurisdiction or no jurisdiction. The Constitution of Kenya itself, is designated by Parliament as the supreme law of the land; and it provides: "if any other law is inconsistent with this Constitution, the Constitution shall prevail and the other law shall to the extent of the inconsistency, be void."

The primary question, and one of law in this appeal, is whether or not this Court has jurisdiction to entertain an appeal emanating from orders of the High Court of Kenya exercising its powers under Section 44 of the Constitution which treats of the determining of questions as to membership of National Assembly. The provisions of section 44 are as follows:

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

(a) any 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) of this section 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 any question under subsection (1)(b) of this section may be made —

(a) where the Speaker has declared that the seat in the National Assembly of a member has by reason of any provision of this Constitution become vacant, by that member; or

(b) in any other case, by any 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 any such application

(5) The determination by the High Court of any question under this section shall not be subject to appeal

I think it is correct to say that the answer to the question posed, must largely be found upon examination of the words of this Section 44 and with respect to its enactment. In *Income Tax Commissioners v Pemsel* [1891] AC 531 Lord Halsbury LC observed that "a court of law is bound to proceed upon the assumption that the legislature is an ideal person that does not make mistakes", and I do not entertain the slightest doubt, that as the reasonable purpose of the Constitution dictates, that when Parliament enacted the Constitution amidst this country's existing laws either to be preserved, altered, replaced or added thereto by the legislature, the provisions of Section 44 of the Constitution were the result of careful consideration; and as I see it, the obvious predominant intention, even if suggested to be bordering onto policy, was to ensure the speedy determination of election petition so that (1) Parliament itself may not be made to suffer the inconvenient if not disabling suspense, of there being a notimprobable situation of a substantial amount of potential duly accredited members standing at the portals of the High Court, as the Election Petitions Court, awaiting determination of petitions; and (2) that the subsequent tenure of such potential then finally accredited members apart, *Wananchi* would at the earliest opportunity, be able to know and point to their settled representatives.

In furtherance of this predominant intention of the legislature which I have gathered from the apparent

purpose of the express provisions of Section 44, there was established the Election Petitions Court with prescribed jurisdiction.

I turn to an examination of the relevant statutory provisions, the seat of contended conflict of views on the matter. With the above given reasons in mind, and be they seen as remedial or beneficial or both, for purposes of this inquiry I adopt this dictum of Griffith, CJ in *Federal Saw Mills & Co v James Moore* [1908] CLR at page 486 - "The Constitution as this court has often pointed out, is to be construed by the application of the same rules that are applicable to the construction of other laws". Further, if as I have intimated, these reasons are seen as bordering onto considerations of public policy which is usually unsafe as an aid to construction, Lord Selborne made it clear in *Hardy v Fothergill* [1888] 13 App Case 351 that policy may be of assistance where it is apparent from, or at least consistent with, the language of the legislature in the statute or statutes upon which the question depends.

In the instant case, the High Court was sitting as the Election Petitions Court by virtue of the jurisdiction as conferred by Section 44 of the Constitution; and the question has arisen as to whether or not an appeal lies to this Court from interlocutory orders of the Election Petitions Court. These orders were made when the Election Petitions Court was seized of the petition (No 20 of 1979), hence the interlocutory orders; and it was pointed out during the course of argument of the appeal, that the petitioner's interlocutory application which initiated cause for appeal was captioned by a combination of provisions of the Civil Procedure Act (Cap 21) and Rules, and the National Assembly (Election Petition) Rules made under the National Assembly and Presidential Election Acts (Cap 7) and all enabling provisions of law. There can be no valid objection to this by reason of the interpretation of the provisions of Section 66, Civil Procedure Act (Cap 21) which confers on this Court an almost unlimited right to entertain appeals from the decrees, or part-decrees and orders of the High Court, in conjunction with Rule 31 of this Court's Rules; and at all events, it is the apparent uncertainty as to identity and limits of jurisdiction attaching to the present inquiry, which is the basis of the matter which is now properly before this Court as a matter of law should say in passing, that I have no doubt that the experienced advocates appearing for the parties may well have contemplated resort to Order XXXIV of the Civil Procedure Rules, ie by way of case stated at some stage, but for the same question of jurisdiction of the Court to supply the answer and the binding authority of such a Court under the said Order. It was also correctly pointed out that it was the Election Petitions Court as such which granted the leave to appeal; but for the reason just stated, and the uncertainty and search for jurisdiction, I consider this immaterial.

Returning to the exercise of interpretation, it is important to bear in mind that it is firmly settled that jurisdiction must be conferred by statute and in *Attorney-General v Sillem* [1864] 10 HLC 704 Lord Westbury said "The creation of a new right of appeal is plainly an act which requires legislative authority," and there is in Section 44 no express anticipated legislative direction as to appeals to any court from the Election Petitions Court *qua* the Election Petition court. As can be seen, section 44 of the Constitution confers the jurisdiction upon the High Court in the determining of the questions in subsection (1) (a) and (b) of the section. To my mind, the whole section 44 is an enabling statutory provision; and we must take the section as we find it. In *Crawford v Spooner* [1846] More PC 189 the Judicial Committee said: "We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up to deficiencies which are left there." Moreover, this is clearly not a case of altering the jurisdiction of a court of law which would have strictly forbidden implying a meaning to the provisions of the Section. I see the situation as one of the extension of the jurisdiction of the High Court for the specific purposes of Section 44; ie an extension of its jurisdiction conferred by Section 60(1) of the Constitution, prescribed as an unlimited original jurisdiction in civil and criminal matters and such "other jurisdiction and powers" (as in this case) as may be conferred on it by the Constitution or any other law." In simple terms these provisions direct that in respect of any other jurisdiction the High Court must look to the Constitution or any other law. Further to this, Section 3 Judicature Act (Cap 8), for purposes of this appeal, prescribes amongst its provisions, that the Court of Appeal and the High Court shall exercise their jurisdiction in conformity with the Constitution.

In the exercise of this extended or special jurisdiction conferred on the High Court by Section 44, I find the phrase "hear and determine any question," of great relevant significance to the present inquiry.

The interlocutory order is a "determination of a question" rightly or wrongly and as of necessity expressed by the interlocutory order, that has triggered off this appeal. Hence great care must be taken at this juncture with more than procedural "steps" in the proceedings as a whole having been taken by both parties before the Election Petitions Court to discern the true statutory or jurisdictional nature of the interlocutory order from which the further relief is sought by a dissatisfied party; for I think it is correct to say that the obligation on the court to decide in accordance with the law is necessarily implied in the conferment of what I have termed the extended or special jurisdiction.

Looking at the words and phrases employed in Section 44 which must be construed as a whole from its subject matter and entire text, it appears to me that the portion of the section from subsection (1) to (5) inclusive must clearly relate to the commencement up till the conclusion of an election petition. What meaning and application must therefore be attributed to subsection (5)? Does it expressly or impliedly give cognizance to the situation, that as a matter of fact and/or law resort was made to the Civil Procedure Act (Cap 21) and Rules (as mentioned above and in this case) in and for the interlocutory proceedings? Is it correct to assume that the legislature contemplated the exercise of a hybrid jurisdiction by the Election Petitions court with the existence of subsection (5) in the section, which section clearly gives the power to hear and determine a petition in its entirety? How many courts can the legislature be seen to have entrusted with complete jurisdiction to hear and determine election petitions? Is that conferred jurisdiction to be gathered and interpreted from an incident along the road towards the final determination of a petition?

I am particularly troubled over the phrase "any question," appearing as it does in both subsections (1) and the culminating subsection (5), if it is correct that the section should be construed as a whole with respect to its object, subject matter and machinery for purposes of jurisdictional authority and power. In search of assistance, I resort to the following enunciated principles, viz:

In *Attorney-General v Lockwood* [1842] 9 M & W 278 Alderson B said: "It must be borne in mind that a statute consists of two parts, the letter and the sense" and Plowden said: "It is not the words of the law, but the internal sense of it that make the law," and I should add, especially where the grammatical construction is clear and manifest. I find that the words and terms of subsection (5) are of themselves plain, clear and unambiguous and in such circumstances, in *Harcourt v Fox* [1693] I Show 506, Lord Holt said: "I think we should be very bold men, when we are entrusted with the interpretation of Acts of Parliament, to reject any words that are sensible in the Act.

In much simplified terms, it was argued for and against, that at all events this is indeed an appeal from the High Court and that since the essence the Election Petitions Court is in effect a division of the High court, there being no impediment to the right of appeal to this Court, then on the principle that the whole must include its part; and the right of appeal conferred upon this Court by Section 66 Civil Procedure Act (Cap 21), there is a right of appeal to this court in the matter.

As in this case, it is inevitably a vital question of construction, whether the Court is called upon to construe the terms of a section to decide whether powers are necessary to be implied in addition to those which are expressed. In the Constitution, Section 60(1) confers the general jurisdiction and powers on the High Court; and Section 44(1) must be seen as relating to certain special matters. When the general and special enactments are in any way repugnant to one another the rule to be applied has been laid down by Romily, MR in *Pretty v Solly* [1859] 26 Beav 606 as follows:

"The general rules which are applicable to particular and general enactments in statutes are very clear; the only difficulty is in their application. The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

Following this rule, I see Section 60(1) as the general enactment and Section 44 as the particular enactment and, in addition to what I have already stated, I cannot but adopt this rule in the present inquiry; and what is more, as can be seen, subsection (5) of Section 44 forbids an appeal from the

determination of any question within the section which clearly must include the questions prescribed by subsections (1)(a) and 9(b) of the section.

What then is to be done with subsection (5) of the section? Is it to be construed as meaningless or as mere surplusage? I would seriously resist the very thought of dubbing this subsection either meaningless or surplusage. As an alternative should it be notionally transplanted for effect amongst the constitutional provisions conferring jurisdiction upon the High Court?

In *Shannon Realties Ltd v Ville de St Michel* [1924] AC 185 the following principle of construction is demonstrated viz. "Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to regulate", and at page 194 the following appears:

"What has happened is that the aggrieved person has simply jumped over the regulative Act to the superintending power, and instead of both Acts being read together, the latter has been appealed to, so as to make it truly a supersession of the former. This has been done under the view presented that the challenge made is more than the presentation of a grievance but a demand for a declaration of nullity. To yield to such a demand might, as already stated, in their Lordships' opinion, lead to serious confusion and possibly irretrievable mischance."

The situation in that case is in essence not unlike that in this case; and I consider it appropriate that the two constitutional provisions conferring power to deal with election petition as clearly intended by the legislature, should be read together; and that consequently giving priority to the specific provisions within the rule as laid down in *Pretty v Solly* above, I hold that by operation of subsection (5) the order appealed from is not subject to appeal.

For the above, reasons, irksome as it may appear, for my part, I am constrained to conclude that there is no right of appeal to this court; and that the appeal is therefore incompetent and should accordingly be dismissed.

Had I been of the view that the appeal was competent, I would have agreed with the orders proposed by Law JA

Potter JA. It is not necessary to repeat the introductory matter so clearly stated by Law JA and so I turn at once to the question as to whether this court has jurisdiction to hear this appeal. I have not found this question an easy one although, I hasten to add, I have not been in the slightest influenced by what I may have argued as an advocate in this court some 11 years ago.

1. A number of propositions can be safely described as common ground. Section 44 of the Constitution confers jurisdiction on the High Court to determine two questions as to the membership of the National assembly, and provides that the determination of those questions shall not be subject to appeal. Section 10 of the Constitution applies Section 44 to Presidential elections, but that does not affect the issues before us.

2. Section 44 is however silent as to whether there is any appeal from the High Court sitting as an Election Court from any order which is not a determination "of any questions under this section", that is to say a final determination of an election petition.

This jurisdiction is a special jurisdiction. Section 60 of the Constitution provides that the High Court shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction as may be conferred on it by the Constitution or any other law. The National Assembly and Presidential Elections Act (Cap 7) defines "election court" as the High Court exercising the jurisdiction conferred on it by Section 44 of the Constitution. Section 19 of the Act provides that an election court shall consist of three judges, and Section 23(2) provides that, unless otherwise ordered by the Chief Justice, all interlocutory matters in connection with a petition may be dealt with and decided by a single judge.

3. Jurisdiction is conferred on the Court of Appeal by the written law; see *Njeru v Republic* (Cr App No 4 of 1979). No jurisdiction is conferred upon this Court by the Constitution or the National Assembly and Presidential Elections Act (Cap 7). The appellant submits that appellate jurisdiction is conferred, save where excluded by Section 44 of the Constitution and by Section 66.

Evidently, the question of an appellate jurisdiction remains moot. Judicial opinion is sharply divergent and is now a matter of concern. I, albeit hesitantly, hold the view that the Court of Appeal has jurisdiction to entertain this matter and agree with the orders proposed by Law JA.

Dated and Delivered at Nairobi this 10th day of June 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR