



THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE, WARSAME, J.J.A)

ELECTION PETITION APPEAL NO. 30 OF 2018

BETWEEN

HASSAN JIMAL ABDI.....APPLICANT

VERSUS

IBRAHIM NOOR HUSSEIN.....1ST RESPONDENT

RETURNING OFFICER,

WAJIR NORTH CONSTITUENCY.....2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

*(An application to strike out the notice of appeal dated 26th July, 2018 and the record of appeal dated 16th August, 2018*

in

**Election Petition Appeal No. 30 of 2018)**

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**RULING OF THE COURT**

The application before us raises the pertinent issue of jurisdiction. As has been often repeatedly said by the courts, jurisdiction is everything,

*“jurisdiction is the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by similar means.”* (See words & Phrases Legally Defined: Fourth Edition (2017) Supplement (October, 2017). See also Lilian S.

Warsame, JA in his dissent in Ferdinand Ndung'u Waititu vs. Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] eKLR (Civil Appeal No. 324 of 2013) described jurisdiction as:

*“The bridge or power that enables the court to undertake the process of analyzing, re-evaluating, and determining the weight, veracity, authenticity, accuracy and appropriateness of the decision rendered by the trial judge. It is the first and last step that the court must take before addressing its mind to the issues for determination.”*

We must therefore consider whether or not this Court has jurisdiction to determine Election Petition Appeal No. 30 which is the subject of this application, and whose background is as follows: Hassan Jimal Abdi, the applicant herein, (who is the 1st respondent in Election Petition Appeal No. 30 of 2018 was one of the contestants in the race for the County Assembly seat for Batalu Ward in Wajir North Constituency. He lost that election by the results announced by the 2nd defendant and successfully petitioned the Magistrate’s Court for an order nullifying the election. The 1st respondent, Ibrahim Noor Hussein, was aggrieved with this order, and filed a first appeal to the High Court challenging that order, but that appeal was dismissed. He has now filed Election Petition Appeal No. 30 of 2018 in this Court seeking to have the order of the High Court reversed.

After the appeal was filed, the applicant filed his own cross-appeal, but thereafter, through an application dated 23rd August, 2018, sought an order in the main, asking us to strike out the notice of appeal and memorandum of appeal filed on the 27th July, 2018 and 16th August, 2018 respectively because this Court does not have jurisdiction to hear and determine a second appeal with respect to an election of a member of county assembly.

The applicant set out various grounds upon which he relied in support of the application, but these can be condensed into two main ones: first, that the Court of Appeal has no jurisdiction to entertain a second appeal, on the election of a member of county assembly, or at all, unless leave has been sought and obtained to advance the appeal; and secondly, that **section 85A of the Elections Act and Rule 35 and 36 of the Elections (Parliamentary and County) Petition Rules, 2017** as read together with **Article 87 of the Constitution** give this Court limited jurisdiction to entertain an appeal from the judgment and decree of the High Court in an election petition concerning membership of the National Assembly, Senate or office of the County Governor only, and excludes any second appeal arising from election to the office of member of county assembly. As such, the applicant prays that we find that as jurisdiction flows from the Constitution or the law or both, and since the Court can only exercise it within the limits set out in the law, then we ought to strike out the appeal.

The application, is of course, opposed by the 1st respondent. He filed an affidavit wherein he states that the dispute in the subject appeal regards the interpretation of the application of the principles of the Constitution, the Elections Act and the Rules made thereunder and that it raises substantive issues of law. He further states that election appeals filed in this Court are governed by the Constitution of Kenya, 2010, the Elections Act, the Appellate Jurisdiction Act and the rules made thereunder. In his view, **Article 164 (3)** of the Constitution of Kenya gives this court jurisdiction to hear appeals emanating from the High Court, as well as any other court or tribunal that may be prescribed by Parliament.

He further contends that **Articles 48 and 50 (1)** as read with **Articles 24 and 25 of the Constitution** provide for a right of appeal which can only be ousted by an express provision in law, and in the absence of such a provision, this Court is clothed with jurisdiction to hear and determine the present appeal. In the premises, he believes that neither section 85A of the Elections Act, nor any other piece of legislation can bar an appellant from lodging an appeal before this Court if the subject matter of the appeal is the validity of the election of a member of County Assembly.

While the 1st respondent agrees that **Article 87 (1) of the Constitution** gives Parliament the power to enact legislation to establish mechanisms for the timely settling of electoral disputes, he contends that the said mechanisms include the Court of Appeal (Election Petition) Rules, 2017 under the appellate Jurisdiction Act which govern this Court's jurisdiction. The object of the rules, as outlined in rule 3 is to **"facilitate the just, expeditious and impartial determination of election petition appeals in exercise of the Court's appellate jurisdiction under Article 164 (3) of the Constitution**, while rule 4 states that they apply **"to the conduct of the appeals from decisions of the High Court in election petitions and matters relating thereto."** He avers that in this context, the word 'appeal', should take the meaning ascribed to it in rule 2 where it is provided that an appeal refers to an appeal from the decision of the High Court. He therefore contends that any party aggrieved by the decision of the High Court in election disputes, whether in its original jurisdiction or appellate jurisdiction, has an unlimited right to lodge an appeal to the Court of Appeal. He has urged this Court to interpret this provision of the Constitution in line with **Article 259 of the Constitution** and do so in a manner that promotes its purposes, values and principles and to advance the rule of law and human rights and fundamental freedoms in the Bill of Rights.

The parties filed written submissions which were highlighted orally before us on the 9th October, 2018. Mr. Noor, learned counsel for the applicant submitted in support of the application, that this Court's jurisdiction emanates from the Constitution; since election petitions are *sui generis*, they have specific laws that apply to them. He submitted further that Article 87 (1) of the Constitution mandates Parliament to enact legislation for the timely settling of election disputes and as such, Parliament enacted the Elections Act, which at section 85A provides for appeals to this Court. That section does not provide for election petition appeals with respect to the election of members of county assemblies urged counsel. Learned counsel further stated that section 75 of the Election act which provides for county election petitions only provides for appeals with respect to the election of a member of a county assembly, but does not make mention of second appeals in those petitions.

In conclusion, he submitted that this omission meant that it was never intended by Parliament that election petitions would undergo a two-tier appellate process. He urged us to consider the fact that Article 164 (3) of the Constitution gives this Court limited appellate jurisdiction as opposed to the unlimited original jurisdiction given to the High Court under Article 165 of the Constitution. For these reasons, Mr. Noor urged us to allow the application and grant the orders sought by the applicant.

Mr. Muganda, learned counsel for the 1st respondent, on his part submitted first that the Constitution is the supreme law of the land, and urged us to be guided by it. Article 164 therefore which provides for the jurisdiction of this Court has no limitations. In addition, learned counsel submitted that Article 47 and 50 of the Constitution which provide for fair administrative action and access to justice cannot be overridden by section 85A of the Elections Act since it is legislation that is subsidiary to the Constitution. In any event, Mr. Muganda urged us to consider the fact that section 85A of the Constitution deals only with limitations on time and limitations on the scope of issues that may be determined by the court, but does not completely oust jurisdiction of this Court. In conclusion, Mr. Muganda urged us to consider the rights of the appellants and the voters of the ward and find that there is a right OF a second appeal to this court, and that any limitation to this right must be express and unequivocal in law.

Mr. Katwa Kigen in support of the 1st respondent on his part argued that section 85A is not silent and that if it was intended that there be appeals on election petitions of members of county assembly, then the legislature would have expressly indicated it. He submitted that even Article 163 (4) limits appeals from this Court to the Supreme Court where either there is a matter of general public importance raised by the appeal, or secondly, where the appeal raises a constitutional question for determination by the Court. In counsel's view, Article 164 (3) of the Constitution gives the Court jurisdiction, 'as prescribed by parliament' and this is embodied in section 85A which excludes an appeal arising out of the election for a Member of County Assembly.

This Court is established under Article 164 of the Constitution of Kenya Article 164 (3) gives jurisdiction to this Court in the following terms:

**“(3) The Court of Appeal has jurisdiction to hear appeals from –**

**(a) the High Court; and**

**(b) any other court or tribunal as prescribed by an Act of Parliament.”**

With respect to disputes related to election petitions, the Constitution of Kenya at Article 87 (1) requires Parliament to enact legislation to establish mechanisms for the timely settling of election disputes. In fulfillment of this directive, Parliament enacted the Elections Act, No. 24 of 2011 which contains various elaborate provisions on the manner in which disputes arising from election petitions ought to be settled. In particular, section 75 of the Elections Act provides for county election petitions, and specifies that where there is a question **“as to the validity of the election of a member of county assembly such a dispute shall be heard and determined by the Resident Magistrate’s court designated by the Chief Justice.”** Appeals from these petitions are provided for under section 75 (4) of the Act as follows:

**“(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be -**

**(a) filed within thirty days of the decision of the Magistrate’s Court; and**

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

The other instance in the Elections Act where appeals are mentioned is at section 85A which provides that:

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

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

**(b) Heard and determined within six months of the filing of the appeal.”** (Our emphasis).

It is clear to us, just as the applicant has stated, that the appeal envisaged in this section can only be for the membership of the three (3) offices specifically mentioned and no other. There exists no provision therefore for a second appeal with respect to a decision from the High Court reached in exercise of its appellate jurisdiction in a dispute on an election of a member of county assembly. The Elections (Parliamentary and County Elections) Petition Rules, 2017 are similarly worded, with rule 34 providing for **“an appeal from the Magistrate’s Court under section 75 of the Act”**, while rule 35 makes provision for **“an appeal from the judgment and decree of the High Court in a petition concerning the membership of the National Assembly, Senate or office of the County Governor.”**

The availability of the right to a second appeal hearing has come to be expected by litigants in both civil and criminal matters. However with regard to a second appeal for County Assembly, there is a glaring silence as to whether this right is available. Section 85A does not list disputes by petitioner in a County Assembly election as part of the election petition that can lie in the Court of Appeal.

In the absence of specific provisions to provide for second tier appeals on election petitions to this Court, can recourse be had to Article 164 (3) of the Constitution? This Article is a general provision that provides for jurisdiction to hear appeals from **“any other court or tribunal as prescribed by an Act of Parliament.”** Again section 3 of the Judicature Act further enforces the court’s jurisdiction and states:

**“Section 3. Jurisdiction of Court of Appeal**

**(1) The court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law.”** (Emphasis ours).

The question that therefore arises is whether appellate jurisdiction of the Court of Appeal in the Constitution enabling a right of second appeal can be inferred in the Elections Act.

What is the rationale behind a second appeal? Tied to the above question is the purpose underpinning timely disposal of election disputes as restricted by the Constitution and Elections Act. Indeed, in **Isaac Oerri Abiri vs. Samwel Nyang’au Nyanchama & 2 others [2014] eKLR (Civil Appeal No. 25 of 2014 (Election Petition)**, this court, while considering a preliminary objection which was similar to the subject of this application noted that:

**“The [provisions of Article 164 of the Constitution] are general provisions which relate to appeals to this Court. They set out the Constitutional foundation for this Court’s jurisdiction which is to consider appeals from the High Court and from tribunals as by law prescribed. However, with respect to election disputes, Articles 87 and 105 of the Constitution are pertinent.”**

The question we must now consider is whether a party can find refuge in the general provisions in light of the clear provisions of the statute. To our minds, where there is a clear provision on the jurisdiction of the court, then it is not possible to resort to the general provisions. The Elections Act set the entry point for jurisdiction of the courts to hear and determine appeals at section 75 (1A), with respect to disputes on the validity of the election of a member of county assembly. With regard to disputes arising out of elections for the other elective positions, the entry point for jurisdiction is found under section 75 (1) for an election petition with respect to the office of county governor and Article 105 with respect to a question of whether a person has been validly elected as a member of Parliament. Similarly, section 75 (4) provides for a ceiling with respect to appeals from the magistrate’s courts to the High Court; these appeals which must be filed within thirty days, may only

raise issues of law, and must be determined within six months. In similar terms, section 85a provides for a ceiling for appeals from election petitions heard by the High Court to this Court.

The **Supreme Court of India**, in ***Narayanan Rajendran and Another vs. Lekshmy Sarojini and Others, Civil Appeal No. 742 of 2001*** the issue before the Court was whether the High Court had jurisdiction to entertain a second appeal on the ground of erroneous finding of fact under section 100 of the code of Civil Procedure and whether the High Court (as the third court) had the mandate to interfere with findings on fact by the subordinate courts.

According to the two-judge bench;

***“any rational system of administration of civil law should recognize that litigation in civil cases should have two hearings on facts – one by the trial court and one by the court of appeal. The search for truth has to be reconciled with the doctrine of finality. In Judicial hierarchy finality is absolutely important because that gives certainty to the law. An unqualified right of first appeal may be necessary for the satisfaction of the defeated litigant; but a wide right of second appeal is more in the nature of a luxury.***

***The rationale behind allowing a second appeal on a question of law is, that there ought to be some tribunal having jurisdiction that will enable it to maintain, and, where necessary, re-establish, uniformity throughout the State on important legal issues, so that within the area of the State, the law, in so far as it is not enacted law, should be laid down, or capable of being laid down, by one court whose rulings will be binding on all courts, tribunals and authorities within the area over which it has jurisdiction. This is implicit in any legal system where the higher courts have authority to make binding decisions on question of law.”***

In civil and criminal matters, the court in a first appeal can delve into matters of fact and law, whereas in a second appeal the Court cannot interfere with the findings of fact by the first appellate court, and it is confined only to questions of law.

In the realm of the special jurisdiction of determining election petitions, the Elections Act is specific under Section 75 (1A) that an appeal from the Resident Magistrates’ Court shall lie to the High Court on matters of law only.

The intention of the legislature is clear. The High Court is to carry out a function akin to that of the Court in a second appeal and make decisions on the law pertaining to election disputes by petitioners in county assembly elections that are binding on the subordinate courts.

The Court in Narayanan (supra) case in addressing the need for two appeals in matters of law stated:

***“The question which is often asked is why should a litigant have the right of two appeals even on questions of law? The answer to this query is that in every State there are a number of District Courts and courts in the District cannot be final arbiters on questions of law. If the law is to be uniformly interpreted and applied, questions of law must be decided by the highest Court in the State whose decisions are binding on all subordinate courts.”***

The High Court in Kenya under Section 75 (4) therefore serves the purpose of a Court sitting as a court of second appeal and assumes the normal role of the Court of Appeal in entering to appeals on matters of law only from the High Court.

Can the appellate jurisdiction of the court of Appeal under Article 164 (3a) of the Constitution be inferred in the Elections Act?

In ***Karwacki vs. Lorje, (1999) 189 Sask.R. 89 (CA)*** Karwacki, a candidate in provincial elections, requested a recount under section 155 (1) of the Saskatchewan Election Act, 1996. A Queen’s Bench judge was designated under section 158 (1) of the Act to perform the recount after which it was determined that Karwacki’s opponent, Lorje received 38 more votes than Karwacki. He then declared the constituency’s election to be null and void because of irregularities.

The issue before the Court was whether the learned Queen’s Bench Judge has the authority under the Act and under the doctrine of inherent jurisdiction of a superior court to extend its powers beyond the Statute.

The Saskatchewan Court of Appeal, per Tallis, J.A., allowed the appeal and stated that the Queen’s Bench judge exceeded his statutory authority and power on a recount under section 158 of the Act by declaring the election to be null and void.

In arriving at its decision, the Court referred to the language in the case of ***The Canadian Northern Ontario Railway Company vs. Smith, [1915]50 S.C.R. 476;***

***“a judge of the Superior Court of the Province, but for the purposes of that application his jurisdiction was “special and peculiar, distinct from, and independent of any power or authority with which he is clothed as a judge of that court.”***

***The Act conferring jurisdiction upon him provides all necessary materials for the full and complete exercise.”***

The Judges of the Court of Appeal cannot come clothed in their general appellate jurisdiction provided in the Constitution under section 164 (3). They must be clothed in special jurisdiction to determine appeals in election matters conferred by statute, namely the Elections Act.

The Court further emphasized the need to adhere to the strict letter of the law by referring to the case of ***Mather vs. Brown [I.C.P.D. 596]***, where Lord Chief Justice Coleridge stated that in construing Acts where special jurisdiction is conferred, the court has a duty with which the

court is entrusted to keep strictly to the Acts themselves.

With regard to inherent jurisdiction to deal with election issues, the court stated that “the legislatures of the provinces have exclusive inherent jurisdiction to deal with election issues. The jurisdiction of the courts is limited to that conferred upon them by legislative enactments.” In the Court’s opinion, “a judge presiding over a recount is not exercising the court’s ordinary civil or criminal jurisdiction. Parliament or the legislature, as the case may be, is the guardian of its own prerogatives and privileges and the courts have nothing to do with questions affecting membership except insofar as they have been specifically designated bylaw to act in such matters.” This principle was succinctly summed up by Turgeon J.A. in Lamb vs. Mcleod (1932), 1 W.W.R. 206 at 208:

***.....In acting in cases of election petitions, the Court is not exercising its ordinary civil or criminal jurisdiction. The Assembly is the guardian of its own prerogatives and privileges, and the Courts have nothing to do with questions affecting its membership except in so far as they have been specially designated by law to act in such matters. ... Therefore, the Courts will always approach questions concerning their jurisdiction over election contests with great caution, as being unwilling to interfere without undoubted authority...***

In the Supreme Court of Uganda, Baku Raphael Obudra & Another vs. The Attorney General, Constitutional Appeal No. 1 of 2005. The question before the court was whether the Constitution confers on the Supreme Court jurisdiction to hear and determine second appeals in election petitions despite the express provisions of section 67 of the Parliamentary elections Act 2001 (now repealed) which provided for appeals from the High Court to the Court of Appeal and expressly stated that the decision of the Court of Appeal was final.

Article 86 of the Constitution of Uganda confers on the High Court original jurisdiction to determine parliamentary election petitions. Article 140 (1) provides expeditious determination of matters under Article 86 (1) by court and clause (2) states that the Article shall apply in a similar manner to the Court of Appeal and the Supreme Court when hearing and determining appeals on questions referred to in clause (1) of the Article.

Each appellant sought declarations that subsection (3) of section 67 of the Parliamentary Elections Act, 2001 was inconsistent with Articles 86 and 140 of the Constitution and that the subsection infringes on their rights of Appeal under the Constitution.

The matter was dismissed by a majority of five to two. The court held that the Supreme Court did not have an appellate jurisdiction.

Justice Tsekooko in commenting on the silence of Article 86 on the jurisdiction of the Supreme Court stated:

***“If the Constitution intended to confer expressly the right of appeal to the Supreme Court, noting could have prevented the framers from providing that right of appeal under Article 86”.***

In his reasoning jurisdiction cannot be prescribed by mere inference.

In referring to the case of Attorney General vs. Shah, Civil Appeal 42 of 1970 EA 50 the court commented that it was trite law that there is no such thing as inherent appellate jurisdiction and appellate jurisdiction must be specifically created by law. It cannot be inferred or implied. On the general jurisdiction of the **Supreme Court by the Judicature Act** and more specifically by the Parliamentary Elections Act; (which is a special legislation about election) he stated that it would take precedence over the Judicature Act in matters of jurisdiction relating to election petitions.

According to Justice Mengo’s judgment, “it is unnecessary and unhelpful to attempt to read the intention of the framers of the Constitution from the absence of an express provision that the Supreme Court has or has no jurisdiction in election cases. The absence in Article 86 of a provision that the Court of Appeal decision shall be final is no more a basis for holding that a second appeal shall lie to the Supreme Court than for saying that no second appeal shall so lie. In his opinion the right of appeal and the jurisdiction conferred by Article 132 (2) can only be activated by an enactment of a law prescribing what decisions of the Court of Appeal are appealable to the Supreme Court. Furthermore, Parliament has an option to enact a law prescribing that the Court of Appeal decisions in election cases are appealable to the Supreme Court, thereby guaranteeing to an aggrieved party “the right of access to the highest appellate court in the land”. Equally, Parliament has the option to enact a law restricting appeals in election cases to the Court of Appeal.

In our opinion, the Legislature has gone beyond the general provisions of the Article 164 (3) of the Constitution and utilized the power under Article 87 to enact laws to determine election disputes and to provide special and specific jurisdiction to courts in determining election petitions. In the same manner that the legislature utilized its power to provide for appeals to the Court of Appeal from the High Court in the election petition concerning membership of the **National Assembly, Senate or the office of county Governor** it had the power to include MCAs but chose not to. One can therefore not automatically infer the Court of Appeal’s jurisdiction to entertain appeals from MCAs.

#### **What does the silence/omission of Section 85A imply?**

In India, the right to petition any Court in an election dispute must be anchored in statute. Black’s Law dictionary defines a statute as “an act of the legislature; a particular law enacted and established by the will of the legislative department of government, expressed with the requisite formalities, in foreign and civil law. The Constitution is therefore not a statute.

In Jyoti Basu & Others vs. Debi Ghosal & Others, Civil Appeal No. 1553 of 1980 the Court held:

***“A right to elect, fundamental though it is to democracy, is, anomalously neither a fundamental right nor a Common Law Right. It is a statutory right. So is the right to be elected, and the right to dispute an election. Outside of Statute, there is no right to elect, no right to be elected, and no right to dispute an election. Statutory creations they are, and therefore subject to statutory***

**limitation. An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to election law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down in the trial of election disputes, Court is put in a straight jacket.”**

See *sui generis* nature of election petitions in **N. P. Ponnuswami vs. Returning Officer, Namakkal Constituency, Namakkal, Salem District & Others** reported Case No. 351 of 1951 in AIR 1952 SC 64. The court referred to the case of **Wolverhampton New Water Works Co. vs Hawkesford [1859] 6 C.B. (NS) 336** where the need for the strict interpretation of statute was explained by

Willes, J., in the following passage:

**“There are three classes of cases in which a liability may be established founded upon statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law, there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy, there, the party can only proceed by action at common law. But there is a third class, viz, where a liability not existing at common law is created by a statute which at the same times gives a special and particular remedy for enforcing it... The remedy provided by the statute must be followed.”**

In **Karwacki vs. Lorje, (1999) 189 Sask. R. (CA)** (mentioned above) the Court stated that the County Court Judge had no discoverable power or authority, to try and determine the validity of the election apart from and beyond scrutinizing the ballot papers. Under section 70 of the Elections Act however applicable it may be to a tribunal to have such power. If the legislature intended to give this power to the County Court Judge, they have failed to do so in express terms or to make such an intention apparent by any reasonable inference.

We have deliberately set out the above jurisprudence to put the matter into the correct perspective, reminding ourselves the issue was dealt with, by this Court in the 2013 and 2017 election petitions involving Members of County Assembly who filed a second appeal.

This Court in **Isaac Oerri Abiri vs. Samwel Nyang’au Nyanchama & 2 others (supra)** was of a similar view. In determining that question, it rendered itself as follows:

**“21. It will be observed that there is no mention of a second or third appeal from the decision of the High Court under Section 75 (4) of the Act. In our view, the omission of a second or further appeal from the decision of the High Court under the said section is neither inadvertent nor an error but deliberate. The interpretation we ascribe to the omission is that the legislature intended that there should be no further appeals from the decision of the High Court on appeal from the determination of an election petition on a question of the validity of the election of a member of a country assembly. In our view, if at all it was the intention of Parliament to involve the Court of Appeal in determination of appeals from the High Court on appeals from the decision of the Resident Magistrate’s court, nothing would have been easier than to state that a party aggrieved by a determination of an appeal by the High Court from the Magistrate’s court, may prefer a second appeal to the Court of Appeal. In our view, the legislature clearly intended to confine jurisdiction to determine electoral disputes involving membership of a county assembly to the Resident Magistrate’s Court with one chance of appeal to the High Court on matters of law only.”**

We wholly agree with that reasoning, and find it to be the correct interpretation of the law. The jurisdiction of this Court is circumscribed and restricted. We reject the respondents’ invitation to expand it, as it would only be right for us to give the words of the statute their natural and plain meaning. It would be improper for this Court to use creative means to ascribe the clear words of a statute in order to assume a jurisdiction that it does not have. In the words of the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR (Application 2 of 2011):**

**“A court’s jurisdiction flows from either the Constitution or Legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of Law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings.”**

In the matter before us, it is clear that the appeal, as well as the cross appeal have been filed contrary to the law that restricts the filing of a second appeal in an election petition as the law does not envisage a second bite of the cherry. The basis and the purpose of this restriction was clearly intended by the people of Kenya in the Constitution that was approved by a referendum in 2010 and through the subsequent legislation in the frame of the elections Act. This was a reflection of the people of Kenya who were tired of the delay and dragging of the election petitions, even to the next election cycle. This Court in **Isaac Oerri Abiri vs. Samwel Nyang’au Nyanchama & 2 Others (Supra)** alluded to this when it stated that:

**“To assume jurisdiction in the circumstances, as learned counsel for the appellant has invited us to do, would, in our view, defeat the spirit and intention of the people of Kenya who prescribed strict timelines in the resolution of electoral disputes. If all determinations of the High Court in its appellate jurisdiction were to end up at the apex level of our judicial hierarchy, there would be no possibility that electoral disputes would be resolved within the strict timelines set out in the Law of the land.”**

This Court in **Joel Nyabuto Omwenga & 2 Others vs. Independent Electoral and Boundaries Commission & Another [2014] eKLR (Civil Appeal (Appl.) No. 137 of 2014)** was of a similar mind. It framed the question before it as follows:

**“What we are called upon to decide is whether, in the agreed absence of an express provision of law allowing a second appeal to this Court from the High Court in its appellate jurisdiction in an electoral dispute, this Court can nevertheless, for whatever lofty reason entertain and determine such an appeal. It is not a question of whether we can hear and determine such an appeal but rather whether we can rightfully, properly and lawfully embark on such an undertaking especially where, as here, our jurisdiction has been questioned.”**

The Court summarized the rationale as follows;

**“The [Elections Act] gives only one opportunity to appeal to the High Court and even then on matters of law only. It then imposes timelines on appellants as to the period within which to file the appeal, and on the High Court as to the deadline for its determination. In the absence of like provisions for yet another appeal to this Court with its own timelines, it is as ambitious as it is misconceived for the appellant to presume that a second appeal can lie to this Court.**

**Indeed, other than amplifying unjustified innovation and hubris were this Court to capture and usurp such undonated jurisdiction, it would make nonsense of the need for finality and expedition that our new electoral laws sought to entrench by the strict timelines in the statute. It must be borne in mind that electoral contests and disputes are highly divisive and disruptive ventures and the people in the Constitution, and Parliament in the statute, sought to limit the period of anxiety and certainty. To assume a non-statute based jurisdiction to entertain appeals would be to subvert the salutary aims of the people and Parliament. It is a task we have neither desire nor reason to undertake. ...A court should never invent for itself a jurisdiction and thereby prolong the anxiety and subvert the very finality the Constitution envisions and the statute institutes by making no further provision for appeals beyond the one on points of law.”**

It means therefore that the restriction on the time and the jurisdiction of the court was as a result of a long history riddled with delays caused by the parties and the Court. It is for that reason that the framers of the Constitution and the Election Act came to the conclusion that election petitions ought to be decided within 6 months, and any appeals therefrom be determined also within 6 months. It would now be against the clear provisions of the Constitution as well as the Elections Act to prolong the period during which a dispute arising out of the election can be heard to final determination.

The jurisdiction conferred on the election court is distinct and separate from the specific and special jurisdiction under section 75 of the same statute. The applicable principle in the present circumstance where the jurisdiction is clear is that the specific provision must prevail. It therefore follows, that this Court would not have jurisdiction to hear and determine such an appeal.

We wish to add that there is no conflict between sections 75 and section 85A of the Elections Act on the other hand and the provisions of Articles 47 and 50 of the Constitution on the other hand. Indeed the question of the constitutionality of section 85A of the Elections Act has been the subject of various courts before hierarchy of courts in Kenya, and in **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 3 Others [2014] eKLR (Petition No. 2B of 2014) the Supreme Court, rendered itself on the issue as follows:**

**“[62] Article 87 (1) grants Parliament the latitude to enact legislation to provide for “timely resolution of electoral disputes.” This provision must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about “timelines and timeliness”, was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in name of which elections are decreed and conducted, should not be held captive to endless litigation.**

**[63] Herein lies the nexus between Article 87 (1) of the Constitution and Section 85A of the Elections Act. Election petitions, not surprisingly, come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.**

**[64] Section 85A of Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. (Emphasis in original).**

While those sentiments were made with respect to the scope of the matters that can be heard on appeal, we find they apply with equal force to the limitation on the number of appeals as pointed out by the Court. The limitation on the number of appeals that may be filed in an electoral dispute are by design. And we do not accept that the limitation in any way infringes on any of the party’s constitutional rights. In addition, we do not understand the 1st respondent to be claiming that he was denied a fair opportunity to be heard, either at the magistrate’s court or at the High Court. What we do understand the respondents to be saying is that they are unhappy with the decisions of the lower courts, that they do not want to be bound within the jurisdictional limits of the law, and that they are therefore asking this court to enlarge the time within which their dispute can be ventilated. To agree to this request will be contrary to the purpose of timely disposal of electoral related disputes as required by Article 87 (1) of the Constitution.

It is therefore our view that sections 75 and 85A of the Elections Act cannot be used as an air valve that opens in different directions in order to clothe this court with jurisdiction. We also decline invitations by the respondents that, in any event, we should resort to Article 47, 40 and 164 of the Constitution in view of the clear, compressive and unambiguous language of Article 87, which gave rise to the Elections Act. Sections 75 and 85A as well as the whole Elections Act was enacted in answer to Article 87, which donated power and authority to the legislature and that any other proposition would result in loosing the normative message of Parliament. Again the invitation by the respondents urging us to undertake an archeological discovery to find something which does not exist is resisted. We resist because, we are not archeologists, but Judges who are required to give holistic and universal meaning to the intention of Parliament.

Jurisdiction is given by statute or the Constitution or both, and where the constitution is silent but the statute is clear, then the harmonious approach is to give life to the interpretation of the statute. As such, the Court of Appeal has no jurisdiction to hear or entertain a second appeal involving the election of a member of the county assembly. In the result, we find that this application must succeed. We hereby order the notice of appeal and the record of appeal filed by the 1st respondent struck out. Similarly, the cross appeal dated 23rd August, 2018 is struck out as well. There shall be no order as to costs in the appeal, but the applicant shall have the costs of this application.

**Dated and Delivered at Nairobi this 23rd day of November, 2018.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**M. WARSAME**

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**JUDGE OF APPEAL**

*I certify that this is the true copy*

*Of the original.*

**DEPUTY REGISTRAR**