



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, NAMBUYE, MUSINGA, GATEMBU & ODEK, J.J.A.)

ELECTION PETITION APPEAL (APPLICATION) NO. 261 OF 2018

IN THE MATTER OF THE ELECTIONS ACT NO. 4 OF 2011

IN THE MATTER OF THE COURT OF APPEAL (ELECTION PETITION RULES, 2017)

IN THE MATTER OF ELECTION FOR MEMBER OF COUNTY ASSEMBLY

ABAKAILE WARD

IN THE MATTER OF GARISSA HIGH COURT ELECTION PETITION APPEAL NO. 6 OF 2018

BETWEEN

MOHAMED ALI SHEIKH.....APPELLANT/1ST RESPONDENT

VERSUS

ABDIWAHAB SHEIKH

OSMAN HATHE..... 1ST RESPONDENT/APPLICANT

ABDULLAHI MOHAMED OLOW.....2ND RESPONDENT

ISAACK MUHUMED MOHAMED.....3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....4TH RESPONDENT

EMMANUEL CHANGAWA KOMBE.....INTERESTED PARTY

(Being an application to strike out the Notice of Appeal filed by the

Appellant/1st Respondent from the judgment and decree of the

High Court of Kenya at Garissa (Dulu, J.)

dated 29th August, 2018

in

Election Petition Appeal No. 6 of 2018)

RULING OF D.K. MUSINGA, J.A.

Introduction

1. The issue for determination in this application is whether this Court has jurisdiction to hear a second appeal from a judgment of the High Court in an election petition (appeal) for election of member of a county assembly (MCA).
2. The background to this application is that in the general election held on 8th August, 2017, **Mohamed Ali Sheikh**, the appellant, was declared member of the county assembly for **Abakaile Ward, Dadaab Constituency, Garissa County**.
3. **Abdiwahab Sheikh Osman Hathe**, the applicant/1st respondent herein was aggrieved by the conduct of the said election and declaration of the results. Consequently, he filed **Election Petition No. 1 of 2017** in the Chief Magistrate's Court at Garissa, challenging the declaration of the appellant as the duly elected MCA for Abakaile Ward.
4. In his considered judgment, the learned Magistrate, **Cosmas Maundu, CM**, found that the election was free and fair and the results declared reflected the will of the people of Abakaile Ward. Having so found, he dismissed the petition with costs.
5. Aggrieved by the decision of the trial court, the applicant/1st respondent preferred an appeal to the High Court of Kenya at Garissa, to wit, **Election Petition Appeal No. 6 Of 2018**. Following a full hearing, the High Court (**Dulu, J.**) allowed the appeal and set aside the judgment of the trial court and ordered the **Independent Electoral and Boundaries Commission (IEBC)** to conduct a fresh election in accordance with the law.
6. Mohamed Ali Sheikh, the appellant, being dissatisfied with the High Court decision, moved to this Court and filed a second appeal, seeking to overturn the High Court's decision.
7. Before the appeal could be set down for hearing, Abdiwahab Sheikh Osman Hathe, the applicant herein, filed an application by way of a Notice of Motion dated 10th September, 2018 under **sections 75(4) and 85A (1) and (2) of the Elections Act, 2011 (Elections Act), rule 35 of the Election (County and Parliamentary) Election Rules, 2017 and rule 19(1) of the Court of Appeal (Election Petition) Rules**. The application seeks the following orders:

“1. That the notice of appeal dated 30th August, 2018 and filed on 31st August, 2018 by the appellant/1st respondent be struck out.

2. That the costs of this application be awarded to the 1st respondent/applicant.”

The applicant also filed a preliminary objection dated 19th September, 2018 seeking to challenge the jurisdiction of this Court to hear and determine the appeal.

Applicant's submissions

8. The applicant was represented by learned counsel, **Mr. Issa Mansur** and **Mr. Paul Mugwe**. Counsel filed written submissions and Mr. Mansur orally highlighted the same during the hearing of the application.
9. Mr. Mansur submitted that this Court does not have jurisdiction to hear or entertain a second appeal involving the election of a member of a county assembly. Citing the decision of the Supreme Court in **Samuel Kamau Macharia And Another v Kenya Commercial Bank And 2 Others, [2011] eKLR**, counsel submitted that a court cannot arrogate itself jurisdiction exceeding the limits conferred upon it by law. In the aforesaid matter, the Supreme Court delivered itself as follows:

“A Courts jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise its jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd 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.”

10. Counsel further submitted that election petitions are sui generis; they are neither civil nor criminal. In support of that submission he cited the Supreme Court decision in **Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2015] eKLR** where the court held:

“It is now an indelible principle of law that the proceedings before an election court are sui generis. They are neither criminal, nor civil. The parameters of this jurisdiction are set out in statute (the Elections Act) as such, while determining an election matter, a court acts only within the terms of the statute, as guided by the Constitution.”

11. Counsel referred the Court to **section 75 of the Elections Act** which provides for county election petitions. Although the applicant's emphasis was on subsection (4), I shall reproduce the provisions of the entire section for clarity and contextual appreciation of the cited subsection. The section provides as follows:

“75. County election petitions

(1) A question as to validity of an election of a county governor shall be determined by High Court within the

county or nearest to the county.

(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

(3) In any proceeding brought under this section, a court may grant appropriate relief, including-

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected;

or

(c) an order as to whether a fresh election will be held or not.

(4) An appeal under subsection 1(A) 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.”

Counsel contended that **section 75(4)** is clear that appeals from decisions of the Magistrate's Courts lie to the High Court on matters of law only; the subsection does not provide for the right of a second appeal to this Court.

12. Turning to the provisions of **Article 164(3)** of the **Constitution** which stipulates that this Court has jurisdiction to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament, Mr. Mansur submitted that the Article ought to be read together with **Article 87(1)** of the **Constitution** which delegates to Parliament the power to enact legislation for settling of electoral disputes. Pursuant to that Article, Parliament enacted the **Elections Act, 2011. Section 85A** thereof states as follows:

“85A Appeals to the Court of Appeal

(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be –

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

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

It is evident that the aforesaid section does not include election appeals for membership of a county assembly and the legislative intent was to bar a right of a second appeal to this Court, counsel submitted.

13. The applicant's counsel further submitted that since the Constitution is silent as to the election of MCAs, the Court must be guided by the relevant provisions of the Elections Act as regards the mode of settlement of electoral disputes arising therefrom. Counsel cited the Supreme Court decision in **Moses Masika Wetangula v Musikari Nazi Kombo & 2 others** (supra), where the court held, inter alia:

“... while determining an election matter, a court acts only within the terms of the statute, as guided by the Constitution. This approach is in keeping with the stand taken by the Supreme Court of India in Jyoti Basu & Others v Debi Ghosal & Others (1982) AIR 983:

“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 statutes makes and applied. 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 stringent to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election dispute, the court is put in a straight jacket.”

14. To emphasize that this Court ought to be guided by the provisions of the Elections Act as relates to its jurisdiction to hear second appeals from judgments of the High Court in election petitions for member of county assemblies, Mr. Mansur pointed out that the Constitution does not also provide for election of county governors. It is **section 75** of the **Elections Act** that provides for such elections and the petitions arising therefrom.

15. Lastly, the applicant's counsel submitted that this Court has in several decisions consistently held that it has no jurisdiction to hear second appeals in respect of election of member of a county assembly. He cited, inter alia, **Isaac Oerri Abiri v Samuel Nyang'au Nyanchama & 2 Others [2014] eKLR**, **Hamdia Yaroi Sheikh Nuri v Faith Tumaini Kombe & 2 Others [2018] eKLR** and **Joel Nyabuto Omwenga & 2 Others v IEBC & Another [2018] eKLR**. Counsel stated that the aforesaid decisions were not made per incuriam and urged this Court not to depart from its earlier position.

The Appellant's Submissions

16. The appellant, the 2nd and 4th respondents opposed the application. One **Emmanuel Changawa Kombe**, represented by **Mr. Omagwa Angima**, advocate, who was joined as an interested party/respondent, also opposed the application. The appellant represented by **Mr. Ahmednassir Abdullahi**, Senior Counsel, **Mr. Peter Wanyama** and **Mr. Humphrey Manyonge**, filed written submissions that were highlighted by the Senior Counsel.

17. The appellant argued that a court's jurisdiction is derived from either the Constitution or legislation or both. Conversely, a court's jurisdiction is similarly limited by either the Constitution or statute. Under **Article 164(3)** of the **Constitution** the jurisdiction of this Court is to hear appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. That being so, this Court's jurisdiction to hear all appeals from the High Court cannot be limited except where it is expressly so stated by either the Constitution or statute.

18. Mr. Abdullahi, SC, submitted that the jurisdiction of this Court is no longer premised on a right of appeal donated by another statute. He cited this Court's decision in **DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited [2017] eKLR** where the Court stated:

"....the right of appeal to this Court from a decision of the High Court can only be restricted by express statutory terms. In our view, the fact that section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The section grants the High Court jurisdiction to intervene in arbitral proceedings where it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution."

19. Senior Counsel made reference to an earlier decision of this Court, **Judicial Service Commission and Another v Kalpana H. Rawal [2015] eKLR** where Kiage, JA. delivered himself as hereunder:

"I state and hold, unhesitatingly, that both jurisdiction and the right to appeal from the High Court to this Court are now founded, in the first instance, on the Constitution of Kenya, 2010. The jurisdiction invested on this Court is not qualified by words such as "where a right of appeal arises". It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself."

20. Senior Counsel further made reference to **Article 48** of the **Constitution** that enshrines the right of access to justice. **Article 50(1)** further grants a right to every person to access the courts for resolution of disputes, including this Court, he added. He further submitted that **Articles 22, 23** and **258** grant every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. Further, **Article 25(c)** protects the right to a fair trial as an absolute right that cannot be limited by legislation.

21. Regarding the provisions of **section 85A** of the **Elections Act** that is silent as to this Court's jurisdiction to hear a second appeal in respect of election of a MCA, Senior Counsel submitted that the section is outrightly discriminatory as it allows appeals to this Court concerning membership of the National Assembly, Senate, and office of county governor but purports to deny that right to persons contesting the position of MCA. The section contradicts the provisions of **Article 27(1)** of the **Constitution** which expressly provides that every person is equal before the law and has the right to equal protection and equal benefits of the law, Mr. Abdullahi contended. He added that the right of access to justice before a court of law is inherent in the right to a fair trial; that it is an inalienable and non-derogable right provided under **Article 25** of the **Constitution**.

22. The appellant cited the Supreme Court decision in **Mohamed Abdi Mahamud v Ahmed Abdulahi Mohamad, Petition No. 7 Of 2018** where the Court stated as follows:

"86. We are also minded that the interests of justice dictate that this Court ensures that all parties to a dispute are accorded a fair hearing so as to resolve the dispute judiciously. This is particularly so because what is at stake is the appellant's right to a fair election as well as the right of voters to non-interference with their already cast votes, the will of the people to speak....."

87. It is important to restate that a literal reading of the Constitution of Kenya shows that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or administrative context."

23. Going back to the provisions of **section 85A** of the **Elections Act**, the appellant's counsel submitted that a section of an Act of Parliament cannot be equated to a constitutional provision; adding that it will be absurd for this Court to interpret a provision of the Elections Act in total disregard to the express provisions of the Constitution regarding the right of appeal to this Court. In that regard, reference was made to the Supreme Court decision in **Fredrick Otieno Outa v Jared Odoyo Okello and 4 others [2014] eKLR**, where the Court, in respect of interpretation of **section 87** of the **Elections Act** cited its decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 others [2014] eKLR** where it stated as follows:

“54.section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the regulations made thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a court of law cannot disengage from the Constitution.

56.The legitimate expectation of the Kenyan people, as founded in the Constitution, is that they will not be deprived of the right to have electoral disputes resolved through the hierarchy of judicial mechanisms, and the system of justice known to the Constitution. The right to question the validity of an election entails an examination by the High Court whether the electoral provisions, the principles of the Constitution, and the requirements of the law have been satisfied.....

57. The Constitution’s intent, in our view, is that a comprehensive appellate system be in place, to crystallize a uniform and settled authority of the law, to be applied fairly, in the administration of justice. For the resolution of electoral disputes, an appeal serves an even a more invaluable objective: it ensures that through the judicial process, it is ascertained that a particular candidate is seen to be validly and popularly conferred with the electoral mandate, to lead and represent the people. The appeal process also serves to impart credence, by affirming the place of certainty and predictability in the law, as the appellate court lays down precedent-setting norms, to be applied by lower courts.”

24. Lastly, Mr. Abdullahi, SC addressed the court on „legislative silence doctrine? with regard to section 85A of the Elections Act. He submitted that silence in a statute does not indicate a positive determination by the legislature, one way or the other. It would therefore be improper for a court to abnegate its authority to construe a statute in accordance with its own best judgment as to the intent of the Legislature, Senior Counsel added. In that regard, he cited **Bennion, Francis Alan Roscoe, Kay Eileen Goodall, Geoffrey Morris Bennion on statutory interpretation, pages 552 to 559**, where the learned authors refer to what they term „drafter’s silence?. They state as follows:

“When a particular matter is not expressly dealt with in the enactment this may simply be because the drafter thought that as a matter of common sense it went without saying....

All one need add today is really a glimpse of the obvious, so obvious that no doubt the draftsman did not think it necessary to put it in the Act, namely, that in matters of law the lay justices must take a ruling from the presiding judge in precisely the same way as the jury is required to taking his ruling when it considers its verdict.

Drafters are often silent on points of detail, simply because it is not possible to express every aspect of a matter. Common sense may be needed in working out the detail.”

25. With those submissions, Mr. Abdullahi, SC urged this Court to depart from its previous decisions where it had taken the position that it has no jurisdiction to hear second appeals with respect to county assembly elections. He strongly submitted that the previous decisions of the Court were made per incuriam.

26. Both **Ms. Cynthia Njagi**, learned counsel for the 2nd and 4th respondents as well as **Mr. Angima**, learned counsel for **Emmanuel Changawa Kombe**, an interested party, supported the submissions made by appellant’s advocates. Mr. Angima added that **Article 87(1)** of the **Constitution** gives Parliament power to make procedural legislation setting out mechanisms for timely settling of electoral disputes. The Article did not permit Parliament to curtail the constitutional right of appeal to this Court. He urged us to find that if Parliament, in enacting **section 85A** of the **Elections Act**, intended to deny an aggrieved person a right of a second appeal to this Court in a dispute arising from election of MCA, it would have expressly stated so.

Analysis of the Submissions & Determination

27. I have carefully considered the powerful and eloquent submissions by counsel in this application. It is not in dispute that this Court has consistently held that it has no jurisdiction to hear a second appeal in electoral disputes in respect of election of MCA. That notwithstanding, the appellant’s learned counsel as well as Ms. Cynthia Njagi and Mr. Angima urged us to boldly find that all those past decisions were made per incuriam.

28. A decision made per incuriam refers to a judgment of a court which has been decided without reference to a statutory provision or earlier judgment which would have been relevant. **Halsbury’s Laws of England** (4th edition) volume 26 states that:

“A decision is given per incuriam when the court has acted in ignorance of a previous decision of its own or of a court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow.....; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force.”

29. According to **Black’s Law Dictionary** (tenth edition), a decision is per incuriam if it was wrongly decided, usually because the judge or judges were ill-informed about the applicable law.

30. I shall shortly consider some of the decisions made by this Court on the issue under consideration in this application with a view to examining whether the decisions were actually made per incuriam. Where it is properly demonstrated that this Court or any other court, in making a decision acted per incuriam, the court is duty bound to reverse itself. On the other hand, the doctrine of judicial precedent, based on the principle of stare decisis, is very important in our judicial system. It promotes continuity, predictability, certainty, uniformity and stability of the law. See the Supreme Court decision in **Jasbir Rai & Others v Rai Plywoods [2013] eKLR**.

31. In the above cited decision, the Supreme Court delivered itself thus:

“For the special role of precedent in the certainty and of the law as it plays out in daily transactions, any departure is to be guided by rules well recognized. It is a general rule that the Court is not bound to follow its previous decision where such decision was an obiter dictum (side –remark), or was given per incuriam (through inattention to vital, applicable instruments or authority). A statement obiter dictum is one made on an issue that did not strictly and ordinarily, call for a decision: and so it was not vital to the outcome set out in the final decision of the case. And a decision per incuriam is mistaken, as it is not founded on the law and governing pillars of law.”

32. What is the standard of proof where a party argues that a court has acted per incuriam and urges it to reverse itself? In the **Rai case** (supra) the Supreme Court held:

“Comparative judicial experience shows that the decision of a superior court is not to be perceived as having been arrived at per incuriam, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority.” (Emphasis supplied)

33. It follows, therefore, in the context of the matter before us, for this Court to depart from a legal position it has consistently held, the parties who contend that the Court’s earlier decisions on the issue under consideration were made per incuriam must strictly demonstrate that the Court acted in ignorance of a decision of its own which had authoritatively settled the issue; or more importantly, in ignorance of a Supreme Court decision; or in ignorance of relevant Articles of the Constitution or statute.

34. **Article 163(7)** of the **Constitution** states that all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. In my consideration of the rival arguments advanced by the parties in this application, I must therefore follow the path chartered by the Supreme Court in its interpretation of various constitutional and statutory provisions, primarily **Article 87(1)** that grants Parliament the mandate to establish mechanisms for timely settling of electoral disputes; **Article 164(3)** that grants this Court jurisdiction to hear appeals; and **section 85A** of the **Elections Act** that provides for appeals to this Court from electoral disputes.

35. In interpreting the Constitution, the entire Constitution has to be read as an integrated whole, each provision in harmony with each other; in other words, the Court must adopt a purposive and holistic reading. See **Olum v Attorney General of Uganda [2002] 2 E.A. 508**.

36. The history of the **Constitution of Kenya, 2010** is well documented. It is a product of a people’s determined aspiration to, inter alia, re-engineer the social order and bring to an end events or happenings that occasioned great injustice and suffering as a result of the length of time election disputes took before determination. The Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank [2012] eKLR** aptly stated that the Constitution looks forward and backwards, vertically and horizontally.

37. In the context of the issue at hand, one of the historical injustices that the Constitution specifically sought to redress under Article 87 was the perennial delay in determination of electoral disputes. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others** (supra), 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).

38. In **Hassan Jimal Abdi v Ibrahim Nor Hussein & 2 Others [2018] eKLR**, where this Court held that it had no jurisdiction to hear a second appeal in respect of an election of member of a county assembly, the Court observed that although the above quoted sentiments were made by the Supreme Court with regard to the scope of matters that can be heard on appeal, the sentiments apply with equal force to the limitation on the number of appeals. The Court considered all the relevant Articles of the Constitution as well as the relevant sections of the Elections Act before it rendered its decision. The Court held, inter alia:

“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, comprehensive 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 provision would result in loosing the normative message of Parliament.”

It cannot therefore be said that the decision was per incuriam. The limitation by **Section 85A** cannot be said to be discriminatory or unconstitutional. It is actualization of constitutional values and principles as earlier stated.

39. With reference to this Court’s holding in **DHL Excel Supply Chain Kenya Limited v Tilton Investments Ltd** (supra), that was not an appeal arising from an election petition. The Court was considering whether there is a right of appeal to this Court, in spite of the silence of **section 35** of the **Arbitration Act**. To the best of my recollection, there is a pending appeal on the issue before the Supreme Court.

The decision is therefore distinguishable. This is an election petition appeal and election petitions are sui generis, the conduct of electoral disputes is guided by the **Constitution** and the **Elections Act**.

Similarly, the position taken by Kiage, J.A. in **Judicial Service Commission & Another v Kalpana H. Rawal** (supra) was, in my view, quite correct in the circumstances and facts of that civil matter. But I do not think that holding can be applied in an electoral dispute such as the one under consideration.

40. I do not agree with the appellant’s counsel’s submission that as long as **Article 164(3)** of the **Constitution** grants this Court jurisdiction to hear appeals from the High Court, the Court should not be unduly concerned by the fact that **section 85A** of the **Elections Act** says nothing about second appeals arising from election petitions for member of a county assembly. I do not think the “**drafter’s silence**” in that section, if I may call it so, was inadvertent, nor do I agree that it was simply because Parliament thought that the jurisdiction of this Court to hear that kind of second appeal was obvious.

41. In **Isaac Derri Abiri v Samuel Nyangau Nyanchama & 2 others** (supra), this Court held that the provisions of **Article 164** of the **Constitution** are general provisions which set out the jurisdiction of this Court to hear appeals, but as regards election disputes, **Articles 87 and 105** of the **Constitution** are pertinent. I may add that the said Articles must be read together with **sections 75 and 85A** of the **Elections Act**.

42. In **Moses Masika Wetangula v Musikari Nazi Kombo** (supra), the Supreme Court held that the parameters of a court’s jurisdiction in an electoral court are set out in statute (the Elections Act), and as such, in determining an election matter a court acts only within the terms of the statute as guided by the Constitution.

43. In all the past decisions of this Court regarding its jurisdiction to hear second appeals arising from decisions of the High Court in election petitions for member of a county assembly, the Court has consistently considered all the relevant Articles of the Constitution and the Elections Act in light of various decisions by the Supreme Court. In the circumstances, the Court cannot be accused of having pronounced itself per incuriam. I have already stated that the test of per incuriam is a strict one. The required threshold has not been attained by the parties who were urging this Court to find that its earlier decisions on the issue were per incuriam.

44. I do not think that the kind of constitutional interpretation that the appellant, the 2nd & 4th respondents urged this Court to make fully accords with the requirements of **Article 259(1)** of the **Constitution** that lays the principles of interpretation as follows:

“259(1) This Constitution shall be interpreted in a manner that- (a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

44. The Supreme Court in **In The Matter of Interim Independent Electoral Commission [2011] eKLR** cited with approval the captivating words of **Mahomed, A.J.** in the Namibian case, **S v ACHESON 1991 (2) S.A. 805** regarding constitutional interpretation, where the learned judge stated:

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a „mirror reflecting the national soul?; the identification of ideals andaspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”

45. In my view, in the absence of any express provision of a right of a second appeal to this Court by **section 85A** of the **Elections Act**, to find that this Court has jurisdiction to hear a second appeal from a judgment of the High Court in an election petition for MCA would be negation of our people’s aspiration for timely settlement of electoral disputes as reflected under **Article 87(1)** of the **Constitution**. If Kenyans so desire, they can lobby the legislature to amend **section 85** of the **Elections Act** to provide for such an appeal. Short of that, I am not persuaded that this Court ought to depart from the position it has firmly held.

46. In conclusion, therefore, I would allow the notice of motion dated 10th September, 2018; uphold the preliminary objection dated 19th

September, 2018, and order that the notice of appeal dated 30th August 2018 be and is hereby struck out for want of jurisdiction. Consequently, I would order that the substantive **Election Petition Appeal No. 32 of 2018** be and is hereby struck out. Each party shall bear its own costs of this application.

Dated and delivered at Nairobi this 19th day of December, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

RULING OF OTIENO-ODEK, JA

LEGAL PENUMBRA

1. The scope of appellate jurisdiction of the superior courts and organs in election petition appeals is debatably in a state of uncertainty and overlap. This has created a penumbra of grey area where logic and legal principles on electoral appellate jurisdiction is uncertain. There is a discomfiting overlap in appellate jurisdictional competence of the High Court, the **Political Parties Dispute Tribunal** (PPDT), the **Independent Electoral and Boundaries Commission Election Committee** and the **Judicial Review** process in resolving appellate electoral disputes. Further, there is conflicting jurisprudence on interpretation and application of seminal electoral laws and regulations. Such conflicting jurisprudence necessitates either the Supreme Court or the legislative intervention. It is in this context that I appreciate dicta in **Kenfreight (EA) Limited vs. Benson K. Nguti [2018] eKLR**, where the Supreme Court expressed that the prospect of inconsistent determinations in the process of application of the law would invite the jurisdiction of the Court in terms of **Article 163(5)** of the **Constitution**.

2. Of central bearing to this application is whether this Court has appellate jurisdiction in election petition appeals concerning Membership to County Assembly (MCA). The jurisprudence on this issue is not settled. If this Court has jurisdiction, this will be a second appeal concerning membership to the County Assembly. In the same vein, if an appeal were to lie to the Supreme Court in election petitions concerning membership to the County Assembly, it will be a third appeal. *Ipsa facto* then, the jurisdiction of the Supreme Court to hear and determine a third election petition appeal concerning membership to County Assembly would become contestable.

3. The imprecision in appellate jurisdiction on election petition appeals concerning membership to the County Assembly does not augur well for electoral justice. The jurisdiction of a court must be certain and not fuzzy; must be apparent not latent and discretionary; must be determined by law and not on a case by case basis. Certainty in jurisdictional competence of the appellate forum in election petition appeals stimulate public confidence in electoral justice.

4. There is a pressing need to resolve uncertainty in electoral jurisdictional competence of appellate courts in Kenya. It is high time for the Supreme Court as the apex Court or Parliament to intervene and make certain that which is uncertain. In principle, it is the legislature, not the courts that must intervene and resolve the scope of the appellate jurisdictional ambiguity. Courts are unsuitable as the existing overlap jurisprudence has sprung from court decisions. They are unsuitable as they adjudicate case specific issues yet the jurisdictional question is a governance, systemic and structural issue that must be addressed both politically and holistically, taking into account the hierarchical court structure and the quest for speedy, efficacious, timeous and finality in resolution of electoral disputes.

5. Case specific determination of the jurisdictional question is fact based and does not lead to wholesome resolution of the appellate jurisdictional uncertainty. Courts are unsuitable to delineate jurisdictional controversies as this is tantamount to a court delineating the scope and limit of its jurisdiction. The risk of a court arrogating to itself or abdicating jurisdiction through craft of interpretation is a pointer for continuing uncertainty in appellate electoral dispute resolution. This is anathema to electoral justice

6. In **Hassan Jimal Abdi vs. Ibrahim Noor Hussein & 2 others, Election Petition No. 30 of 2018**, this Court, quoting from Lord Coleridge in **Mather vs. Brown (IC.PD. 596)** expressed itself thus:

“Parliament or the legislature, as the case may be, is the guardian of its prerogative and privileges and the courts have nothing to do with questions affecting membership except in so far as they have been specifically designated by law to act in such matters.”

7. To institute certainty in appellate jurisdiction concerning MCA election petitions, the Supreme Court or Parliament should intervene and expressly state there is or there is no right of second appeal to this Court and or no right of a third appeal to the Supreme Court. In making any decision, it must be borne in mind the Supreme Court under **Article 163 (4) (a)** of the Constitution has jurisdiction as of right to hear and determine all appeals concerning interpretation and application of the Constitution. Denying a right of appeal to the Supreme Court in matters concerning membership to County Assembly may run afoul **Article 163 (4) (a)** of the Constitution.

CONTEXTUAL FACTS

8. In the instant matter, before this Court is an application and appeal arising from the 2017 Election Petition for Member of County Assembly for Abakaile Ward in Garissa County.

9. By a Preliminary Objection dated 19th September 2018 and a Notice of Motion dated 10th September 2018, the applicant, **Mr. Abdiwahab Sheikh Osman Hathe** has moved this Court seeking an order to strike out the Notice of Appeal dated 30th August 2018 filed before this Court on 31st August 2018 in Election Petition Appeal No. 32 of 2018.

10. The grounds in support of the application are *inter alia* that this Court lacks jurisdiction to entertain a second appeal from judgments and rulings of the High Court in election petition appeals for member of County Assembly; that the Elections Act 2011 neither provide nor contemplate a second appeal with respect to petitions for election of member of County Assembly and the decision of the High Court is final.

11. The background facts to this application are well captured in the supporting affidavit deposited by **Mr. Abdiwahab Sheikh Osman Hathe** dated 10th September 2018. He deposes he vied for the seat of Member of County Assembly for Abakaile Ward in Garissa County in the General Elections held on 8th August 2018; the 1st respondent, **Mr. Mohammed Ali Sheikh**, was declared winner; the applicant filed an election petition before the Chief Magistrate's court which dismissed the petition; the applicant appealed to the High Court which allowed the appeal in its judgment dated 29th August 2018.

12. Aggrieved, the respondent to this application, **Mr. Mohammed Ali Sheikh**, filed Election Petition Appeal No. 32 of 2018 before this Court. On his part, the applicant, **Mr. Abdiwahab Sheikh Osman Hathe**, lodged a preliminary objection and an application contending this Court has no jurisdiction to hear and entertain a second appeal in election petitions concerning Membership to County Assembly (MCA).

13. At the hearing of the application, learned counsel **Mr. Issa Mansur** and **Mr. Paul Mugwe** appeared for the applicant. Senior Counsel **Ahmednassir Abdullahi** and learned counselS, **Mr. Peter Wanyama** and **Mr. Humphrey Manyonge** appeared for the 1st respondent while learned counsel **Ms Cynthia Njagi** instructed by Mahat Somane & Co. Advocates appeared for the 2nd, 3rd and 4th respondents. Learned counsel Mr. Angina appeared for the Interested Party.

THE LEGAL ISSUE and SUBMISSION BY APPLICANT

14. The legal issue in this application is whether this Court has jurisdiction to entertain a second appeal concerning membership to the County Assembly. The applicant contends this Court has no jurisdiction and hence the application to strike out the Notice of Appeal. The application is grounded on **Sections 75 (4) & (5)** and **Section 85 (A) (1) & (2)** of the **Elections Act No. 4 of 2011**. The application is further grounded on **Rule 35** of the **Election (County & Parliamentary) Election Rules 2017 & Rule 19 (1) of the Court of Appeal (Election Petition) Rules**.

15. The overarching theme in the applicant's submission is that **Section 75 (4)** of the **Elections Act** stipulates appeals from decisions of the Magistrate's Court lie to the High Court on matters of law only. The Section does not provide for a right of second appeal to the Court of Appeal. Alongside, the applicant submitted that **Section 85A** of the **Elections Act** which enacts the appellate jurisdiction of this Court in election petitions provides that:

"An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only...". (Emphasis supplied).

16. It is the applicant's argument that **Section 85A** of the **Elections Act** restricts the right of appeal to this Court only to membership of the National Assembly, Senate and office of County Governor. The section does not contain any reference to membership of County Assembly and as such, no appeal lies to this Court concerning membership to County Assembly.

17. In support of the central theme, counsel cited Supreme Court dicta in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others** [2011] eKLR where it is stated :

"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 to itself jurisdiction exceeding that which is conferred upon it by law."

18. In **Ferdinand Ndungu Waititu vs. Independent Electoral and Boundaries Commission (IEBC) and 9 others**, in Civil Application No. 137 of 2013, it was stated that the Elections Act, and the Rules made thereunder, constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya.

19. The applicant while emphasizing election petitions are *sui generis* proceedings cited the decision of this Court in **Isaac Oerri Abiri vs. Samuel Nyang'au Nyanchama & 2 others** [2014] eKLR where it was expressed:

"...there is no mention of a second or third appeal from the decision of the High Court under Section 75 (4) of the [Election] 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 county 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 of 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 Magistrates' 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 Magistrates' Court with one chance of appeal to the High Court on matters of law only.”

20. The applicant also cited the decision of this Court in Hamdia Yaroi Sheikh Nuri vs. Faith Tumaini Kombe & 2 others [2018] eKLR where this Court considered and adopted the dicta expressed in Isaac Oerri Abiri vs. Samuel Nyang'au Nyanchama & 2 others (supra) **Election Petition Appeal No. 27 of 2018**. In adopting and endorsing the dicta, this Court in Hamdia Yaroi Sheikh Nuri (supra) expressed:

“Since the promulgation of the 2010 Constitution that established the County Assemblies, concern over the existence of the many levels of elections disputes has given rise to significant discourse. In the more recent case of Wilson Ong'ele Ocho la v. Orange Democratic Movement and 3 Others, Civil Appeal No 271 of 2017, which involved a nomination dispute for the office of Member of a County Assembly, this Court described as “untenable” the multi-level of hearings and appeals established by section 41 (2) of the Political Parties Act which allowed for appeals from the Political Parties Disputes Tribunal (PPDT) all the way to the Supreme Court. The Court took the view that amongst other challenges, the provisions did not take into account the timelines prescribed in the Constitution and the Elections Act for the expeditious resolution of election petitions.

The same disquiet also resonates with the concern over multi-level election petition appeals filed by members of the county assembly in the Magistrates' courts, and which seek to have appeals determined by the High Court, the Court of Appeal, and the Supreme Court. But in these cases, it cannot be gainsaid that whether a matter is appealable or not turns on whether the court has the requisite mandate or jurisdiction donated to it by either the Constitution or the law to entertain the matter.....

But that is not all. When the above provisions are analyzed alongside the corresponding mandate of the Court of Appeal, it would also seem that election appeals by members of the county assembly to this Court were neither contemplated nor permitted. We say this because, the Constitution, the Elections Act and the Election Petition Rules specifically delineate the nature of election appeals that are eligible to be heard and determined by this Court, and disputes for members of the county assemblies are distinctly absent....

Deferring to the extant laid down criteria that specifies the nature of appeals to be heard by this Court, since the appeal was not in respect of a member of the National Assembly, Senate or the office of county governors, and it did not invoke the powers of the High Court acting in its original rather than its appellate jurisdiction, we find that the appeal has failed to meet the criteria necessary for election petition appeals to be determined by this Court. In sum, we lack jurisdiction to hear and determine the appeal...”

21. Counsel for the applicant in concluding his submissions urged this Court has consistently held there is no second appeal concerning election petitions for membership of the County Assembly. The decisions in Joel Nyabuto Omwenga & 2 others vs. IEBC & another Civil Appeal No. 137 of 2014 and Tomito Alex Tampushi were cited.

22. In Joel Nyabuto Omwenga & 2 others vs. IEBC & another Civil Appeal No. 137 of 2014, this Court stated:

“The statute 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.

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. We are cognizant that the true theatre of electoral competition is the ballot box and there is urgent need for closure. 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.

Counsel for the appellant submitted but neither substantiated nor demonstrated that the Supreme Court has, notwithstanding the provisions of Section 85A, which are to the exact effect as Section 75 (4) of the Elections Act, assumed jurisdiction and entertained appeals from this Court's decisions in electoral matters without express statutory conferment. Counsel thereby sought to persuade us to also assume jurisdiction.

We are unable to.”

23. The applicant urged us to find that the various decisions of this Court declining jurisdiction to hear second election petition appeals concerning membership to County Assembly are good law and should be affirmed and upheld.

1st RESPONDENT'S SUBMISSIONS

24. The 1st respondent in opposing both the preliminary objection and the application to strike out the Notice of Appeal urged us to find the various decisions of this Court declining jurisdiction in second appeal on membership to County Assembly are erroneous and unconstitutional; the decisions endorse and promote discriminatory treatment of members of County Assembly. The core and leitmotif of the 1st respondent's submission is that denial of a second appeal to this Court is denial and abjuration of the constitutional right of access to

justice; it is a negation of the right of every person to access courts for resolution of disputes and a violation of the right to fair hearing under **Articles 48 and 50** of the Constitution as read with **Article 20 (3) (b)** of the Constitution.

25. Senior Counsel, **Mr. Ahmednassir Abdullahi**, submitted that the 1st respondent is seeking to persuade this Court to depart from the various three (3) judge bench decisions of this Court that hold this Court has no jurisdiction to hear second appeals concerning membership to County Assembly.

26. Senior counsel submitted that under **Article 164 (3)** of the Constitution, the jurisdiction of this Court is no longer premised on a right of appeal donated by another law – read statute; there exists an automatic right of appeal conferred upon the 1st respondent by virtue of **Article 164 (3) (a)** of the Constitution; where the subject matter of appeal is a decision of the High Court that raises issues of law and miscarriage of justice, the remedy lies before the Court of Appeal. Counsel accentuated that the right of access to justice enshrined in **Articles 47 (1), 48 and 50** of the Constitution enjoins this Court to permit second appeals concerning membership to County Assembly. It was paraphrased that **Article 47 (1)** of the Constitution guarantees *inter alia*, a right to expeditious, reasonable and fair procedure; **Article 48** enjoins the State to ensure access to justice for all persons and **Article 50 (1)** grants a right to fair hearing and a right to every person to access courts for resolution of disputes. Counsel submitted **Articles 22 (1) and 23** as read with **Article 258** of the Constitution grants every person the right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. Counsel urged **Article 25 (c)** protects the right to a fair trial as an absolute right that cannot be limited by legislation.

27. To buttress submission on access to justice, Senior Counsel urged **Article 20 (3) (b)** of the Constitution enjoins this Court to adopt an interpretation that most favours enforcement of a right or fundamental freedom.

28. Focusing his submissions on the appellate jurisdiction of this Court under the **Elections Act**, Senior Counsel urged **Section 85A** of the **Elections Act** is discriminatory and unconstitutional. The Section is unconstitutional as it is a provision that allows only a certain category of persons to appeal to this Court and denies others (read MCAs) the right to appeal. By expressly allowing only appeals concerning membership of the National Assembly, the Senate and the Office of County Governor to lie to the Court of Appeal and excluding membership of County Assembly, **Section 85A** of the Elections Act is discriminatory. Counsel cited the decision in **Mohamed Fugicha vs. Methodist Church in Kenya [2016]eKLR** and urged us to find the decisions of this Court holding that appeals concerning membership to County Assembly (MCA) are not appealable are bad in law for endorsing a discriminatory practice; he opined the vote for an MCA is not lesser than a vote for a Governor or the President; the office of MCA is not lesser than other electoral offices.

29. Citing **Article 24** of the Constitution, Senior Counsel submitted that the position that there is no second appeal to this Court concerning MCA election petitions is an affront to justice; the right of appeal in election petitions is not limited under Article 24 of the Constitution; there is no specific section of law or Article in the Constitution that directly limits second appeals for elections concerning membership to County Assembly; there is no express provision in **Section 75 (4)** of the Elections Act that the decision of the High Court is final and there is no constitutional justification for limitation of the 1st respondent's appeal to this Court. Counsel cited the Supreme Court dicta in **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohammad Petition No. 7 of 2018** where it was stated interest of justice dictates a court should ensure all parties to a dispute are accorded a fair hearing so as to resolve disputes judiciously because what is at stake is the right to a fair election as well as the right of voters to non- interference with their already cast votes.

30. In further support, Senior Counsel cited the case of **DHL Excel Supply Chain Kenya Limited vs. Tilton Investments Limited [2017] eKLR** to buttress submission that a right of appeal to this Court can only be restricted by express statutory terms. In further support, dicta from the decision of Kiage, JA in **Judicial Service Commission vs. Kalpana H. Rawal [2015] eKLR** was cited where the learned judge expressed that:

“.....both the jurisdiction and the right of appeal from the High Court to this Court are now founded, in the first instance, on the Constitution of Kenya 2010. The jurisdiction vested on this Court is not qualified by words such as “where a right of appeal arises” The constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself.”

31. Senior Counsel further cited dicta from the decision of Otieno-Odek, JA in **Judicial Service Commission vs. Kalpana H. Rawal [2015] eKLR** where it was expressed:

“The spirit and values embodied in the 2010 Constitution in Articles, 10, 20 (4) (b), 21, (1) and 22 (1) enjoins that courts must protect and advance the rights and fundamental freedoms of individuals. In my view, the spirit of the 2010 Constitution does not support the notion that courts in Kenya must restrict and limit rights and fundamental freedoms by curtailing the appellate process....”

32. Re-emphasizing submission on the right to access justice, the 1st respondent cited dicta from arbitration cases of this Court where the right of appeal has been held to exist.

33. Senior counsel further cited the Tanzanian decision in **Ndyanabo vs. Attorney General [2001] 2 EA (CAT)** in which the Court of Appeal held, *inter alia*, that the right of access to justice can only be limited by legislation that was not only clear but which is not violative of the Constitution. Grounded on this dicta, counsel urged that Section 85A of the Elections Act does not in any way limit the right of appeal to this Court; to oust this Court's jurisdiction there must be a clear, express and unambiguous statutory provision. (See also dicta in Uganda Supreme Court **Baku Raphael Obudra & others vs. Attorney General, Constitutional Appeal No. 1 of 2005 [2006] UGSC 5**).

34. In concluding, Senior Counsel urged us to depart from previous decisions of this Court and find that there is a right of a second appeal in election petitions concerning membership to the County Assembly. Counsel urged the erroneous decisions of this Court amount to legislating from the bench; that such legislation from the bench erodes the rule of law and democratic ideals. It was urged the various decisions of this Court curtailing the right of second appeal failed to take into account **Articles 20, 22, 23, 24, 25 (c), 48, 50 (1) and 164 (3) of the Constitution**. In particular, Counsel urged us to depart from the decisions in **Hamdia Yaroi Sheikh Nuri vs. Faith Tumaini Kombe & 2 others [2018] eKLR** and **Isaac Oerri Abiri vs. Samuel Nyangau Nyamanch & 2 others [2014], Election Petition Appeal No. 27 of 2018**.

2nd, 3rd and 4th RESPONDENTS' SUBMISSIONS

35. The 2nd, 3rd and 4th respondents and the Interested Party adopted submission by the 1st respondent and joined in opposing both the preliminary objection and the application to strike out the Notice of Appeal dated 30th August 2018.

36. Learned Counsel **Mr. Angina** for Mr. Emmanuel Chagawa Kombe, the Interested Party, endorsed submission by the 1st respondent asserting **Section 75 (4)** of the **Elections Act** does not expressly say one cannot appeal beyond the High Court; the section does not oust the jurisdiction of this Court to hear a second appeal; the section does not state that the decisions of the High Court is final. Counsel submitted elections are meant to be free and fair and at the end of day, electoral justice and the right of an aggrieved person to access this Court should be paramount. It was urged **Article 87 (1)** of the Constitution which is the parent provision underpinning the Elections Act does not expressly deny a party a second appeal to this Court.

37. Learned counsel Mr. Mansur in reply urged that neither **Section 75 (4)** nor **Section 85A** of the **Elections Act** negate, impede nor deny the right to be heard. In MCA election petitions, the right to be heard is recognized and preserved as MCA election petition can be filed before the Magistrate's Court where full hearing is conducted with the right of appeal to the High Court pursuant to **Section 75 (4)** of the **Elections Act**. Counsel submitted the failure to have a second right of appeal to this Court does not impede the right of hearing because hearing has already taken place at the magistracy. Counsel recapped that election petitions are *sui generis* and ought not to be compared to arbitration proceedings; to this extent, it was submitted reference by the 1st respondent to decisions of this Court under the Arbitration Act is misplaced.

ANALYSIS

38. I have considered the written and oral submissions by all parties on the issue of second appeals concerning membership to County Assembly. It is uncontested that jurisdiction of a court flows from the Constitution or statute; and a court cannot through craft of judicial innovation arrogate to itself jurisdiction.

39. In this application, the singular question is whether this Court has jurisdiction to entertain a second appeal concerning membership to County Assembly. The right to appeal is not of common law origin; it depends upon express words of a statute. Generally, an election court is a statutory court and such a court will not imply a right of appeal unless there is express provision conferring the right of appeal in the statute establishing the election court. In **Staff Pension Fund & Kenya Commercial Bank Staff Retirement (DC) Scheme 2006 & another vs. Ann Wangui Ngugi & 524 others [2018] eKLR**, this Court expressed as follows:

“The Court of Appeal has on many occasions similarly held that a right of appeal must expressly be conferred by Statute and such right cannot be implied or inferred. (See for instance, Harman Singh Bhogal t/a Harman Singh & Co. v Jadya [1953] 20 EACA 17; Anarita Karimi Njeru v Republic (No. 2) [1976-1980] KLR 1283; Kakuta Maimai Hamisi & 2 Others v Peris Pesi Tobiko & 2 Others [2013] eKLR and Nyutu Agrovot Limited vs. Airtel Networks Limited [2015] eKLR).

40. In **Kakuta Maimai Hamisi & 2 Others vs. Peris Pesi Tobiko & 2 Others [2013] eKLR** this Court said at page 9 of the judgment:

“It is enough to say that the right of appeal must be statute or other law based and so viewed, there is nothing doctrinally wrong or violative of the Constitution for such a right to be circumscribed in ways that render certain decisions of courts below non-appealable”

41. Comparatively, in **R vs. Edwards (No 2) [1931] SASR 376** the Australian Court considered whether there was a right of second appeal from the decisions of the High Court. It was held:

“The Court in its appellate jurisdiction is a statutory court. The right of the appellant to appeal has been exercised. There is no express power to entertain a second appeal and there is no precedent for it being done.”

42. In **Hassan Jimal Abdi vs. Ibrahlim Noor Hussein & 2 others, Election Petition No. 30 of 2018**, this Court in considering issues *in pari materia* to the instant application posited the question whether appellate jurisdiction of this Court can be inferred under Article 164 of the Constitution to enable a right of second appeal under the Elections Act. In answering the question in the negative, this Court expressed:

“To our mind, where there is a clear provision on the jurisdiction of the Court, then it is not possible to resort to... general provisions....Section 85A provides for a ceiling for appeals from election petitions heard by the High Court.”

43. In the instant matter, **Section 75 (4)** of the **Elections Act** provides that an appeal from a magistrate's court in election petitions concerning membership to County Assembly shall lie to the High Court on matters of law only. *Pari pasu*, **Section 85 A** of the **Elections Act** provides that:

“An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law....”(Emphasis supplied)

44. It is evident from a literal reading of **Section 85A** of the **Elections Act** that there is no reference to appeals concerning membership to County Assembly. The failure to include appeals concerning membership to County Assembly is the *ratio decidendi* of the various decisions of this Court to the effect that no second appeal lies concerning membership to County Assembly. (See **Hamdia Yaro Sheikh Nuri vs. Faith Tumaini Kombe & 2 others** [2018] eKLR and **Isaac Oerri Abiri vs. Samuel Nyangau Nyamanch & 2 others** [2014], **Election Petition Appeal No. 27 of 2018**).

45. The interpretation given to **Section 85 A** of the **Elections Act** in the foregoing decisions of this Court apply the latin maxim *expressio unius est exclusio alterius*; meaning the explicit mention of one (thing) is the exclusion of another; or when one or more things of a class are expressly mentioned others of the same class are excluded; and that when certain persons or things are specified in a law..., an intention to exclude all others from its operation may be inferred. (See **Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others** [2013] eKLR; **Mary Wanjuhi Muigai vs. Attorney General & another** [2015] eKLR).

46. In **Hassan Jimal Abdi vs. Ibriahim Noor Hussein & 2 others**, **Election Petition No. 30 of 2018**, this Court in analyzing **Section 85 A** of the **Elections Act** concerning appeals to membership of County Assembly expressed itself thus:

“is clear to us, just as the applicant has stated, that the appeal envisaged in this Section can only be for 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 of an election of a member of county assembly...Section 85A does not list disputes by a petition in a County Assembly election as part of the election petition that can lie in the Court of Appeal.”

47. In my considered view, to the extent that the decisions of this Court as pronounced in **Hamdia Yaro Sheikh Nuri vs. Faith Tumaini Kombe & 2 others** [2018] eKLR and **Isaac Oerri Abiri vs. Samuel Nyangau Nyamanch & 2 others** [2014], **Election Petition Appeal No. 27 of 2018** and lately in **Hassan Jimal Abdi vs. Ibriahim Noor Hussein & 2 others**, **Election Petition No. 30 of 2018** apply the maxim of *expressio unius est exclusio alterius*, they are good law and I affirm the same.

48. Notwithstanding the foregoing, as correctly urged by the 1st respondent, election as member of County Assembly has a constitutional underpinning. **Article 176** of the Constitution establishes County Government consisting of County Assembly and County Executive. **Article 177** provides for elections to membership of County Assembly. The Office of County Assembly and membership thereto and the exercise of political rights under **Article 38** of the Constitution entail constitutional application and interpretation.

49. Recalling that the office of member of County Assembly is a constitutional office, disputes relating to the office may raise issues of constitutional application and interpretation. Such issues may invoke the jurisdiction of this Court and the Supreme Court to hear and determine election petition appeals concerning membership to County Assembly. There is a jurisdictional uncertainty if a second or third appeal can be entertained if the contestation or grievance involves interpretation and application of the Constitution. Due to the unsettled jurisprudence, it is time for the Supreme Court, as the apex Court or the Legislature, to pronounce and settle this jurisdictional ambiguity. Any Supreme Court or legislative intervention ought to take into account the jurisdiction of the Supreme Court as espoused in **Article 163 (4)** of the Constitution as follows:

“Appeals shall lie from the Court of Appeal to the Supreme Court:

(a) as of right in any case involving the interpretation or application of the Constitution and

(b) in any other case in which the Supreme Court, or the Court of Appeal certifies that a matter of general public importance is involved....”

50. Supreme Court or Parliamentary intervention must also consider that if a second or third appeal were to be allowed, this will go against the constitutional and statutory requisite of timely resolution of electoral disputes and more particularly, the dictate that a trial court should finalize elections petitions within six months and the appellate process should be concluded within six months. A second or third right of appeal would negate the ethos of timeous resolution of electoral dispute.

51. The general appellate jurisdiction of this Court together with a reading of the Supreme Court's jurisdiction under **Article 163 (4) (a)** of the Constitution *ipso jure* portray that the Court of Appeal has jurisdiction to hear and determine cases involving interpretation or application of the Constitution and when it does so, for an aggrieved party, an automatic right of appeal arises and inures to the Supreme Court.

52. There is no rule of law that in election petitions appeals concerning membership to County Assembly, both the Court of Appeal and Supreme Court have no jurisdiction to interpret and apply the Constitution.

53. If it is held that this Court has no jurisdiction to hear a second appeal in MCA election petitions, how can a party aggrieved by the

decision of the High Court in its application and interpretation of the Constitution in an MCA election petition appeal access this Court and if aggrieved, access the Supreme Court?

54. On the strength of submission that **Sections 75 (4) and 85 A** of the **Elections Act** are silent on second or third appeals, can an aggrieved party by-pass the Court of Appeal and directly approach the Supreme Court since the Supreme Court has jurisdiction as of right on matters of interpretation and application of the Constitution under **Article 163 (4) (a)** of the Constitution?

55. It can be argued that these questions are rhetorical and academic. However, in **Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others [2015] eKLR**, the Supreme Court expressed that even where a matter be held be essentially academic, a hypothetical matter is nonetheless capable of raising issues of general public importance (**R vs. Secretary of State for the Home Department, ex parte Salem [1999] 1 All ER 42**).

56. In **Evans Odhiambo Kidero & 4 others vs. Ferdinand Ndungu Waititu & 4 others [2014] eKLR**, commenting on its jurisdiction, the Supreme Court expressed at paragraph 144 of its judgment that:

“...where disputes arise with regard to the interpretation and application of such principles and norms in election petitions, this Court, Kenya’s apex Court, cannot gaze helplessly when moved by a litigant.”

57. Conceptually, if there is no right of second appeal to this Court in election petitions concerning membership to County Assembly, it would follow there is no right of a third appeal to the Supreme Court. However, **Section 17** of the **Supreme Court Act** regulates direct appeals to the Court in exceptional cases. The Section provides:

“The Supreme Court shall not grant leave to appeal directly to it against a decision made, a conviction entered, or a sentence imposed in proceedings in any court or tribunal, other than the Court of Appeal, unless in addition to being satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal, it is also satisfied that there are exceptional circumstances that justify taking the proposed appeal directly to the Supreme Court.”

58. Counsel for the applicant submitted that an aggrieved party in an MCA election petition appeal determined by the High Court pursuant to **Section 75 (4)** of the **Elections Act** can seek leave under **Section 17 of the Supreme Court Act** to directly access the Court. Counsel urged the absence of a second appeal to this Court does not mean an aggrieved party has no redress or access to an appellate process. If it is in the interest of justice and there are exceptional circumstances, leave can be obtained pursuant to **Section 17** of the **Supreme Court Act** and an MCA election petition appeal can lie directly from the High Court to the Supreme Court. In **Geoffrey M. Asanyo & 3 others vs. The Attorney General, SC Petition No.21 of 2015**, the Supreme Court expressed:

“[63] We further reiterate that this Court should only depart from the principle that issues of constitutional interpretation must rise through the Superior Courts to this Court in the clearest of cases and the exception to that principle should be carefully considered by the Court.....”

59. An interesting observation is dicta from the Supreme Court in **Frederic Otieno Outa vs. Jared Odoyo Okello & 4 others [2014] eKLR** where the Court stated:

“[55]..... Thus, it is for certain, that electoral contestations will involve constitutional interpretation or application. When such disputes are adjudicated upon by the High Court, new contests may emerge, that require resolution within the judicial system. Such further disputes are, in our view, directly appealable to the Court of Appeal.....”

[56]The legitimate expectation of the Kenyan people, as founded upon the Constitution, is that they will not be deprived of the right to have electoral disputes resolved through the hierarchy of judicial mechanisms, and the system of justice known to the Constitution. The right to question the validity of an election, entails an examination by the High Court whether the electoral provisions, the principles of the Constitution, and the requirements of law have been satisfied. First-instance determinations of such questions, are amenable to appeal before the Court of Appeal, in accordance with the provisions of Section 85A of the Elections Act; and this is by no means, subversive of the hierarchical setting of the Court system in Kenya.

[57] The Constitution’s intent, in our view, is that a comprehensive appellate system be in place, to crystallize a uniform and settled authority of the law, to be applied fairly, in the administration of justice. For the resolution of electoral disputes, an appeal serves an even a more invaluable objective: it ensures that through the judicial process, it is ascertained that a particular candidate is seen to be validly and popularly conferred with the electoral mandate, to lead and represent the people. The appeal process also serves to impart credence, by affirming the place of certainty and predictability in the law, as the appellate Court lays down precedent-setting norms, to be applied by lower Courts.

60. In my considered view, except for advisory opinions by the Supreme Court under **Article 163 (6)** of the Constitution or as ordained by **Article 163 (3) (b) (ii)**, and subject to direct access to the Court pursuant to **Section 17** of the **Supreme Court Act**, the appellate constitutional landscape for electoral dispute resolution does not envisage parachuting and by-passing any tier of court and leap frogging to the next tier. The tier of superior courts in Kenya is an appellate ladder, one must climb the ladder, one at time, to the next level without leap frogging. This reasoning is informed by the Supreme Court dicta in **Peter Ngoge vs. Francis Ole Kaparo and Five Others, Sup. Ct. Petition No. 2 of 2012, [2012] eKLR**, where it was observed:

“In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court.”

61. In my view, the Supreme Court cannot exercise its appellate jurisdiction under **Article 163 (4) (a) or (b)** of the Constitution unless and until the Court of Appeal has heard and determined a matter. There is no legal room for an MCA election petition appeal to reach the Supreme Court without a hearing and determination by the Court of Appeal. In **Charles Michael Angus Walker- Munro vs. Pamela Ann Walker-Munro**, Supreme Court **Petition No. 7 of 2015** it is stated thus:

“[24] This Court has long settled the question of when and whether an appeal lies from the Court of Appeal under Article 163 (4) (a) of the Constitution. A perusal of any of the decisions wherein the Court has pronounced itself on the applicability of the said Article, would immediately reveal that for an appeal to lie to this Court, the impugned decision must have turned on the appellate court’s interpretation or application of the Constitution.”

62. My view is fortified by the Supreme Court dicta in **Boniface Katana Kilaveri vs. Ethics & Anti-Corruption Commission & Commissioner of Land** [2018] eKLR where it was stated that until a matter has been heard and determined at the High Court, and the proper appellate processes has been followed, the Supreme Court does not have jurisdiction to entertain an appeal. In my considered view, if the Supreme Court hears an MCA appeal under the provision of direct access pursuant to **Section 17** of the **Supreme Court Act**, such a direct appeal is akin to an advisory opinion or case stated and it is debatable whether the results of an MCA election can be nullified or affirmed through such a direct access appeal.

63. I am alive to dicta in **Erad Suppliers & General Contractors Ltd vs. National Cereals and Produce Board**, S. C. **Petition No. 5 of 2012** where the Supreme Court expressed that a question integrally linked to a main cause before a superior court is first to be resolved at that forum before appeal to the Supreme Court. It follows that an aggrieved party in a dispute relating to application and interpretation of the Constitution in relation to membership of County Assembly can only do so if there is *ipso jure* an automatic right of appeal to the Supreme Court from a decision of the Court of Appeal. If there is no right of appeal to this Court then, no right of appeal exists to the Supreme Court.

64. In furtherance of their submission, the respondents urged the position that this Court has no jurisdiction to entertain second appeals concerning MCA election petitions impede, negate and contradict the automatic right of appeal to the Supreme Court under **Article 163 (4) (a)** of the Constitution on questions involving application and interpretation of the Constitution. It is settled law with regard to election matters that not every election petition-decision by the Court of Appeal is appealable to the Supreme Court - only those appeals arising from the decision of the Court of Appeal in which questions of constitutional interpretation or application were at play lie to the Supreme Court. This was stated by the Supreme Court in **Lawrence Nduttu & 6000 others vs. Kenya Breweries Ltd & Another**, S.C. **Petition No. 3 of 2012; [2012] eKLR** as follows:

“...the appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a).”

65. At a *de facto* and *de jure* level, both the Court of Appeal and the Supreme Court have in the recent past heard and determined election petition appeals concerning membership to County Assembly. Notable cases where the Supreme Court has considered membership to County Assembly appeals include the judgment in **Independent Electoral & Boundaries Commission vs. Jane Cheperenger & 2 others** [2018] eKLR; **Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others** [2016] eKLR and **Jennifer Koinante Kitarpei vs. Alice Wahito Ndegwa & another** [2015] eKLR. It is noteworthy that in all these cases the superior court in the first instance was moved by way of judicial review and not an election petition. Except in the pending case of **Hamdia Yaroi Sheikh Nuri vs. Faith Tumaini Kombe & 2 others** [2018] eKLR there is presently no other MCA election petition appeal heard by the Supreme Court.

66. It begs the question if the Court of Appeal has no jurisdiction to entertain MCA second appeals, it would be creating legal confusion to hold the above cited cases were heard and determined by both the Court of Appeal and Supreme Court without jurisdiction and are *per incuriam*. This cannot be so. It can be argued that the foregoing cases that were heard and determined by this Court and the Supreme Court were initiated through a judicial review process and as such, both courts had jurisdiction. This may be so. However, doctrinal consistency and electoral jurisdictional certainty should not encompass and entertain a two way approach to appellate dispute resolution namely: that if you follow the judicial review route, this Court and the Supreme Court have jurisdiction to hear and determine a second or third appeal respectively; that if you follow the election petition appeal route, there is no second or third appeal. This is the duality and dichotomy of legal penumbra that is not doctrinally consistent. Such duality in jurisdictional approach should not be tenable in law. It is for this reason that the Supreme Court or legislative intervention is required to settle the jurisdictional question on the right to second or third appeals concerning MCA election petitions.

67. A reading of paragraphs 117 and 118 of the Supreme Court judgment in **Moses Mwicigi & 14 others vs. Independent Electoral and Boundaries Commission & 5 others** [2016] eKLR relating to nomination concerning membership to County Assembly

seems to suggest the Court of Appeal has no jurisdiction to entertain MCA election petition appeals. The paragraphs state:

***“[117] It is clear to us that the Constitution provides for two modes of ‘election’. The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.*”**

[118] On such a foundation of principle, we hold it to be the case that whereas the Court of Appeal exercised jurisdiction as an appellate electoral Court, it had not been moved as such, in accordance with Section 85 A of the Elections Act, and relevant provisions of the Constitution. The respondents had moved the Appellate Court on the basis that they were aggrieved by the High Court’s decision in judicial review proceedings, in which that Court had declined jurisdiction. This in our view, would have been a proper case for the Appellate Court to refer the matter back to the High Court, with appropriate directions. (Emphasis supplied)

68. I am also alive to the principle that in the first instance, each court interprets the law delineating its jurisdiction. Nevertheless, this Court cannot by shutting out MCA second appeals delimit the jurisdictional competence of the Supreme Court to hear appeals relating to interpretation and application of the Constitution on matters concerning membership to the County Assembly. Noting that the Supreme Court has jurisdiction under **Article 163 (4) (a)** on interpretation and application of the Constitution, there must be a corresponding right of access to the Supreme Court through the Court of Appeal. Consequently, the intervention of the Supreme Court or the legislature to expressly pronounce if there is a second or third appeal concerning MCA election petitions is imminent and urgent. The reasoning herein is informed by the Supreme Court dicta in **Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others [2014] eKLR** where it was stated that:

“...It is the responsibility vested in the Supreme Court to interpret the Constitution with finality and this remit entails that this Court determines appropriately those situations in which it ought to resolve questions coming up before it, in particular, where these have a direct bearing on the interpretation and application of the Constitution.”

69. The quest for legislative or Supreme Court intervention to settle the question whether there is a right to a second or third appeal in MCA election petitions is fortified by a pragmatic approach to interpretation of the 2010 Constitution.

70. The Supreme Court, contestably has held it has jurisdiction to hear and determine election petition appeals; the Supreme Court has heard and determined MCA election petitions appeals. This is a *de facto* situation. The Court of Appeal is bound by Supreme Court decisions whether they are good or bad law. This is the pragmatic approach to reality on the ground. As was stated by the Supreme Court in **Anami Silverse Lisamula vs. The Independent Electoral & Boundaries Commission & 2 Others, Sup Ct. Pet. No. 9 of 2014**, at paragraph 120 of its judgment:

“This Court is not about to depart from this pragmatic perception, which endeavours to sustain a right recognised under the operative state of the law. We are of the opinion that such a pragmatic perception, once reflected in judicial interpretation, is to be regarded as a building-block of our jurisprudence under the new constitutional dispensation.”

71. On the issue of legislative intervention to determine if a second appeal lies to this Court concerning MCA election petitions, the Chief Justice Hon. D. K. Maraga is reported by Citizen Digital on 31st August 2016 to have stated as follows:

“As chair of the election committee, we proposed an amendment to amend Article 163(4) to have election petitions end at the Appeals Court with only presidential petitions being handled by the Supreme Court.”

“We can amend Article 75 (4) of Elections Act to make High Court decisions on MCA elections final, with other election matters ending at the Court of Appeal.”

72. In my considered view and with deference to the competent organs, save for Presidential elections as provided for in the Constitution, I propose legislative enactment to give one right of appeal to all electoral seats. Election petitions originating from the magistracy should end at the High Court. Election petitions originating from the High Court to end at the Court of Appeal. No appeal should lie to the Supreme Court in electoral matters. In effect, there should be no right of second or third appeal in all election petitions. The enactment should explicitly provide that upon gazette of the election date, no election dispute shall be resolved by way of judicial review. A court hearing any election related judicial review application shall cease to have jurisdiction after a specified period upon gazette of the election date. The enactment should provide that no interlocutory appeals shall be entertained in election petitions unless the order is a final decree. The Supreme Court should retain its jurisdiction on interpretation and application of the Constitution and in such cases, a time line for determination of such disputes should be stipulated.

73. On the issue of access to justice, in the instant matter, the 1st respondent submitted that denial of second appeal to this Court is denial of fundamental right of access to justice and albeit a right to appeal. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed. In **R vs. Home Secretary, Ex parte Simms [2002] 2 AC 115** it was stated every citizen has a right of unimpeded access to the court. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

74. In the UK case of **Totel Ltd vs. The First-Tier Tribunal (Tax Chamber) and The Commissioners for Her Majesty’s Revenue and Customs [2012] EWCA Civ 1401; [2013] 2 WLR 1136, CA; Mosses, J.** stated:

“It is high faulting to describe a right of appeal from the decision of the First-tier Tribunal to the Upper tribunal in relation to a hardship application as a fundamental right, analogous to freedom of expression, or access to justice. The right is a right to appeal, only with permission on a point of law...”

75. Guided by the UK dictum, the 1st respondent’s submission that denial of a second appeal to this Court is denial of the right of access to justice is high faulting and unmeritorious. This position is fortified by the dicta in **Hassan Jimal Abdi vs. Ibriahim Noor Hussein & 2 others, Election Petition No. 30 of 2018** where this Court stated”

“The limitation in the number of appeals that may be filed in an electoral dispute are by design and we do not accept that any of the limitation in any way infringes on any party’s constitutional rights.”

76. Of significance are observations by the Supreme Court in **Frederick Otieno Outa vs. Jared Odoyo Okello & 4 others [2014] eKLR**, where the Court posited the following question and appraised its answer as follows:

“[62] Since it is not in doubt that the Court of Appeal has jurisdiction to entertain appeals from the High Court, in electoral disputes determined under Article 105 of the Constitution, can such a jurisdiction be limited, fettered or restricted in scope, manner, procedure, or confined to only a particular category of questions? Does the Constitution envisage a limitation of the right of appeal? (Emphasis supplied)

In answering the question, the Court stated:

[63] By Article 105(3) the Constitution, Parliament was mandated to design and enact a special legislative mechanism, to enable the realization of two objects: the judicial duty of the High Court to hear and determine causes of action in electoral contests, in the first instance, and, where required, provide an avenue of appeal to the Court of Appeal; and secondly, the specification of jurisdiction and timelines. (Emphasis supplied)

[64]The framers of the Constitution considered it appropriate to leave it to Parliament to define in an elaborate statutory text, all the mechanisms and procedures attendant upon the right to bring an action, and to pursue an appeal to its conclusion, in the context of efficacious, expedient, fair and free elections.

[76] In short, we recognize that a right to judicial redress cannot be attained in a legal vacuum. As a constitutional guarantee, its pursuit and attainment can only be realized through detailed procedure, the prescription of which falls to normal legislation. In the making of such legislation, Parliament is not to limit or inhibit the right of access to judicial recourse. If it does, this would offend the Constitution.

[77] We hold that the law can regulate or confine the time within which, or the scope or nature of questions that, an appeal Court may accord a hearing – as long as that restriction does not negate or defeat the essence of the right of appeal, or diminish the spirit of the fundamental right to adjudication of electoral disputes. Any such restrictions embodied in statute law, we would hold, are not to be regarded as a breach of the Constitution.

77. In the instant matter, a pertinent submission by the 1st respondent relate to omission in **Section 85A** of the **Elections Act** to provide for a right of appeal in election petitions concerning membership to County Assembly. It was urged the omission does not imply there is no right of appeal to this Court; the omission does not denote absence of a right of appeal. Citing drafter’s silence, it was urged when a particular matter is not expressly dealt with in an enactment, this may simply be because the drafter thought as a matter of common sense it went without saying. (See **Bennion, Francis Alan Roscoe, Kay Eileen Goodall, and Geoffrey Morris in Bennion on Statutory Interpretation pages 553- 559**).

78. In support, Senior Counsel **Ahmednassir** submitted you cannot ascribe something to an omission – an omission is a loud silence and in silence, if you hear something it is your own. Grounded on this reasoning, Senior Counsel submitted this Court erred in **Isaac Oerri Abiri vs. Samuel Nyangau Nyamanch & 2 others [2014]** when it heard something of its own, ascribed what it heard and thereafter erroneously expressed as follows:

“...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 county assembly....”

(Emphasis supplied)

79. Whereas in construing legislative intent, the effect of legislative silence or legislative inaction is debatable, it is trite that a right of appeal is a creature of law. The omission by the legislature to make provision for “a right of appeal” means “the right” does not exist. In the instant case, a literal interpretation of **Section 85A** of the **Elections Act** ends the debate whether the omission to provide for appeals concerning membership to County Assembly means the right to appeal does not exist. Conceptually, the right of appeal being a statutory right, failure to provide the right implies the right does not exist. Comparatively and in contrast, Justice Gowora, JA of the Zimbabwe Supreme Court in **Tendayi Tamanikwa & 3 others vs. Zimbabwe Manpower Development Fund, Civil Appeal SC 197/11** expressed:

“The Regulations do not deny an appeal process beyond that available to the Trustee. They are silent and in my view, the omission to provide for such an appeal process to the Labour Court is not in itself constitutive of the denial of a right of appeal....”

80. In buttressing opposition to the instant application, the 1st respondent urged Section 85A of the Elections Act is unconstitutional to the extent that it discriminates against MCAs from appealing to this Court. Though not in the context of MCA second appeals, the constitutionality of Section 85A of the Elections Act has been considered and determined by the Supreme Court in **Frederick Otieno Outa vs. Jared Odoyo Okello & 4 others** [2014] eKLR. The Supreme Court held **Section 85A** of the **Elections Act** was not unconstitutional. In so holding, the Court expressed:

“[50] It is to be recognized that Section 85A found its way into the Elections Act by way of a Miscellaneous Amendment Act, No. 47 of 2012. The Act, in its original design, was silent on the issue of appeals to the Court of Appeal. Section 85 had only provided that an election petition was to be heard and determined within a period specified in the Constitution. That period is specified in Article 105(2) of the Constitution: a question relating to the validity of the election of a Member of Parliament is to be heard and determined within a period of six months by the High Court. The Act, as initially enacted, gave no room for appeals to the Court of Appeal, with respect to election petitions. (Emphasis supplied)

[69] Counsel urged that Section 85A of the Elections Act is unconstitutional, as it limits the jurisdiction of the Court of

Appeal to determine questions of law only in appeals on electoral disputes from the High Court. With respect, we do not agree. What meaning is to be attached to the word “unconstitutional?” According to Black’s Law Dictionary 9th ed. (2009), the term “unconstitutional” means:

“contrary to or in conflict with a constitution....”

A statutory provision can be said to be unconstitutional only if it contravenes an express provision of the Constitution. A reading of Section 85A of the Elections Act shows that there is nothing in it that runs into conflict with the constitutional provision conferring appellate jurisdiction upon the Court of Appeal, or with any other constitutional provision. To allow Section 85A to be impugned, without a cogent forensic ground, would open up improper avenues for contests to yet other statutory provisions: such as Section 75 of the Elections Act, which limits the appellate jurisdiction of the High Court (on appeals from a Resident Magistrate Court, on the validity of the election of a County Assembly Member) to matters of law only; and Section 71A of the Civil Procedure Act, which also limits the appellate jurisdiction of the High Court to matters of law only.” (Emphasis supplied)

81. Guided by the foregoing dicta from the Supreme Court, it is my considered view **Section 85A** of the **Elections Act** is constitutional. Whereas it can be argued that the Supreme Court in pronouncing the constitutionality of Section 85A did not consider its discriminatory aspect in election petition appeals concerning membership to the County Assembly, I am of the view **Section 85A** cannot be constitutional in one context and be unconstitutional in another. The Supreme Court having held **Section 85A** to be constitutional, the Section remains constitutional for all intents and purposes in all circumstances and scenario.

82. It is worth considering the doctrinal consistency of the respondents’ contestation that this Court should allow a second appeal in MCA election petitions. Conceptually, if such an appeal were to be allowed, what would be the distinction in appellate jurisdiction of the High Court, Court of Appeal and the Supreme Court in MCA election petition appeals?

83. **Section 75 (4)** of the **Elections Act** stipulates that the MCA election petition appeals to the High Court lie only on matters of law. If the High Court’s jurisdiction is on matters of law, what then will be the jurisdiction of the Court of Appeal if a second appeal is allowed? And by extension what would be the jurisdiction of the Supreme Court if a third appeal is allowed?

84. The Supreme Court has aptly answered the question about its jurisdiction in election petition appeals. If an election petition appeal proceeds to the Supreme Court, its jurisdiction is on matters of law. This is the overlap in appellate jurisdiction that overlooks hierarchy in court structure and generates doctrinal uncertainty in law. How can two courts of different hierarchical set up have the same jurisdictional scope? The Supreme Court has expressed its inherent jurisdiction in the following terms:

(a) In Rutongot Farm Ltd vs. Kenya Forest Service & 3 others [2018] eKLR, the Supreme Court reiterated it does not have jurisdiction to entertain an appeal that does not raise a question of constitutional interpretation or application; the mere clothing of an appeal or intended appeal as a question of constitutional interpretation or application does not automatically grant jurisdiction to the Supreme Court.

(b) In a ruling delivered in Chris Munga N. Bichage vs. Richard Nyagaka Tongi & 2 others, SC Petition No. 17 of 2014, the Court expressed:

“[46]In the exercise of its exclusive original jurisdiction in Presidential-election petitions, this Court sits as a Court of first instance, and therefore, it may deal with matters of fact and of law. Now as, in appellate election-petition matters, Section 85A of the Elections Act limits the Court of Appeal to matters of law only, the question arises: should the Supreme Court, sitting on second appeal, also restrict itself to matters of law only?”

[48] The emerging principle logically entails the position that the Supreme Court, sitting on second appeal, is essentially restricted to matters of law only..... (See also Mohamed Abdi Mahamud vs. Ahmed Abdulalahi & 3

others, Petition No. 7 of 2018).

(c) In *Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others* [2014] eKLR, it was stated:

“[102] The Supreme Court’s jurisdiction in relation to *electoral disputes* is, in our opinion, broader than that of the other superior Courts. We note in this regard that while the Court of Appeal’s jurisdiction is based on Section 85A of the Elections Act, with its prescribed timelines, that of the Supreme Court is broader and is founded on the generic empowerment of Article 163 of the Constitution, which confers an unlimited competence for the interpretation and application of the Constitution; and this, read alongside the Supreme Court Act, 2011 (Act No. 7 of 2011) illuminates the greater charge that is reposed in the Supreme Court, for determining questions of constitutional character.”

(d) In *Deynes Muriithin & 4 others vs. Law Society of Kenya* (2016) eKLR, the Supreme Court expressed:

“[61] This Court has the inherent jurisdiction to forestall an instance of injustice....

[63] ...where there is such a palpable injustice...this Court has jurisdiction not as to the merits, but for the purpose of correcting the injustice occasioned by a contravention of the Constitution”.

(e) In *Geoffrey M. Asanyo & 3 others vs. The Attorney General, SC Petition No. 21 of 2015* the Supreme Court expressed at paragraph 61 of its judgment that where there is a *prima-facie* case of derogation from constitutional principles, the Court will intervene so as to safeguard the Constitution within its jurisdiction under Article 163(4)(a) of the Constitution.

85. Section 85A of the Elections Act is more or less a replica of Section 75(4) of the Elections Act that stipulate election petition appeals to the Court of Appeal lie on matters of law. If a second appeal in election petitions concerning membership to the County Assembly is to be allowed, both the High Court and Court of Appeal will have jurisdiction on matters of law. This is the overlap that has potential to create jurisdictional uncertainty. The scope and limit of the jurisdictional competence of hierarchical courts must be distinct, exclusive and determinable. Overlapping jurisdictional competence is source of uncertainty in jurisprudential interpretation and reduces public confidence in the judiciary because in such cases, courts of similar jurisdictional competence but of different hierarchy may arrive at divergent conclusions of law. This becomes a mockery of justice and lends credence to the old adage that law is as good the judge who pronounces it and long as the chancellor’s feet.

86. If this Court were to hear second appeals in MCA elections, and a subsequent a third appeal to the Supreme Court ensues, what will be the scope of the jurisdiction of all the three superior courts? Will each of them be exercising jurisdiction on matters of law? A potential exists that each court will come up with divergent interpretation of the legal issue in disputation and this portends absurdity and confusion in electoral jurisprudence. To avoid such a possibility, I opine the Supreme Court or Parliament should pronounce with finality if there should be a second or third appeal from appellate decision of the High Court concerning MCA election petitions.

87. Counsel for the applicant urged that if at all a second appeal concerning MCA election petitions is to be allowed, it should be in exceptional circumstances as direct appeal to the Supreme Court pursuant to Section 17 of the Supreme Court Act. Senior Counsel *Ahmednassir* urged that a second appeal should be allowed on fine points of law. In my considered view, legislative intervention should consider enactment of a right of second or third appeal concerning MCA election petitions on substantial questions of law involving application and interpretation of the constitution. Any ensuing appeal to the Supreme Court should be confined to its jurisdiction as per Article 163 (4) (a) and (b) of the Constitution. In the absence of such legislative intervention, the literal interpretation of Section 85A of the Elections Act declining a second right of appeal concerning MCA election petition stands.

88. In recognition of legislative authority, Parliament can intervene and expressly state either there is or is no right of second or third appeal concerning membership to County Assembly.

89. Comparatively, in India, a second appeal is allowed on a “substantial question of law.” In *Rimmlapudi Subba Rao vs. Noony Veeraju* ILR 1952 Mad 264 it was expressed:

“The proper tests for determining whether a question of law raised is substantial would be whether it is of general public importance or whether it directly and substantially affect the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled or is not free from difficulty or calls for discussion of alternative views. If the question has been settled by the highest court or the general principles to be applied in determining the question are well settled and there is mere question of applying those principles, the question would not be a substantial question of law.... Where a question of law is fairly arguable, where there is room for difference of opinion on it or where there are alternative views, the question of law is substantial.

To be “substantial”, the question of law must be debatable, not previously settled by law or binding precedent and must have a material bearing on the decision of the case if it is answered either way.”

90. In parity of reasoning from the Indian comparative jurisprudence, there is no provision in law for the Court of Appeal to entertain a second election petition appeal concerning membership to County Assembly either on matters of law or substantial questions of law.

DISPOSITION

91. In penultimate, this Court has in several decisions cited above made a determination there is no second appeal in election petitions concerning membership to County Assembly. In **Jivraj vs. Devraj [1968] EA 263** it was expressed:

“there is a principle of law, however, that where a court has interpreted the law in a certain manner....and that interpretation has been acted upon for a considerable time, then that interpretation should not be departed from unless it is clearly wrong and gives rise to injustice.”

(See also **Southern Shield Holdings Limited vs. Estate Building Society [2013] eKLR**).

92. In totality, the respondents in this matter have not demonstrated the wrongfulness of **Section 85A** of the **Elections Act**; they have not demonstrated the injustice caused by application of the section and the Supreme Court has held **Section 85A** is not unconstitutional. In light of all these, I am impelled not to depart from the various decisions of this Court that have interpreted that **Section 85A** of the **Elections Act** does not confer a right of second appeal in MCA election petitions.

93. Convinced of the soundness of literal interpretation of **Section 85A** of the **Elections Act** and the application of *expressio unius est exclusio alterius* principle, I make this concurring opinion allowing the Preliminary Objection dated 19th September 2018 and Notice of Motion dated 10th September 2018.

94. Accordingly, the Notice of Appeal dated 30th August 2018 filed before this Court on 31st August 2018 in Election Petition Appeal No. 32 of 2018 be and is hereby struck out for want of jurisdiction on the part of this Court. The Preliminary Objection dated 19th September 2018 be and is hereby also upheld. It follows that the Record of Appeal filed in Election Petition Appeal No. 32 of 2018 be and is hereby also struck out.

95. Each party to bear his/its own costs in this application.

Dated and delivered at Nairobi this 19th day of December, 2018

J.OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

RULING OF VISRAM, J.A

I have had the advantage of reading in draft the rulings of Musinga & Odek, JJ.A. I am in full agreement with the reasoning and conclusion reached by both Judges.

As the court unanimously concurs that the applicant’s application by Notice of Motion dated 10th September, 2018 has merit, the said application be and is hereby allowed.

For avoidance of doubt, the final orders of this Court are:

- 1. The Notice of Appeal dated 30th August 2018 filed before this Court on 31st August 2018 in Election Petition Appeal No. 32 of 2018 be and is hereby struck out for want of jurisdiction on the part of this Court.**
- 2. The Preliminary Objection dated 19th September 2018 be and is hereby also upheld. It follows that the Record of Appeal filed in Election Petition Appeal No. 32 of 2018 be and is hereby also struck out.**
- 3. Each party to bear his/its own costs in the application.**

Dated and delivered at Nairobi this 19th day of December, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

RULING OF NAMBUYE, J.A.

I have had the advantage of reading in draft the rulings of Musinga & Odek, JJ.A. I am in full agreement with the reasoning and conclusion reached by both Judges.

Dated and delivered at Nairobi this 19th Day of December, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

RULING OF GATEMBU KAIRU, JA

I have read the separate opinions rendered by the Hon. Mr. Justice Musinga, JA and by the Hon. Mr. Justice Otieno-Odek, JA with respect to the application by the 1st respondent dated 10th September, 2018 seeking an order to strike out the notice of appeal. I agree with the conclusion reached by my brother Judges. Considering that a court's jurisdiction flows from either the Constitution or legislation or both (*Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & 2 others [2012] eKLR*); and being of the view that the omission of a provision for a second or further appeal under Section 75(4) of the Elections Act is deliberate, I am not persuaded that there is a basis for the Court to depart from its previous decisions (the latest being *Hassan Jimal Abdi vs Ibrahim Noor Hussein and 2 others, Nairobi EPA No. 30 of 2018*) that have consistently held that this Court has no jurisdiction to entertain second appeals from the High Court regarding question of validity of the election of a member of county assembly.

Dated and delivered at Nairobi this 19th day of December, 2018.

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR