IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 45 OF 2015

BETWEEN

TWAHER ABDULKARIM MOHAMMED.....APPELLANT

AND

MWATHETHE ADAMSON KADENGE.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....2ND RESPONDENT

HAMISI HALFANI TSUMO.....3RD RESPONDENT

(Being an appeal from the Judgment and Order of the High Court of Kenya

at Malindi (Chitembwe, J.) dated 17th June, 2015

in

Electoral Petition No. 1 of 2014)

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RULING OF THE COURT

The 1st respondent, **Mwathethe Adamson Kadenge** has raised a preliminary objection to the jurisdiction of this Court to hear the instant appeal. At the same time the 2nd and 3rd respondents, that is, the **Independent Electoral & Boundaries Commission** and **Hamisi Halfani Tsumo** (the Returning Officer) have, for their part also taken out a motion on notice praying that the appeal be struck out with costs for want of jurisdiction.

The notice of preliminary objection and the notice of motion were, by consent consolidated and thereafter argued together. This ruling therefore relates to both.

The appeal herein is against the decision of the High Court (**Chitembwe, J**) dismissing an appeal from the judgment and decree of the Malindi Chief Magistrate Court in **Election Petition No. 1 of 2014**. That petition arose out of a by-election outcome for the seat of Member of the County Assembly (MCA),

Shella Ward in which the 1st respondent was declared by the 2nd and 3rd respondents duly elected by a margin of 2236 against his closest rival, the appellant's 1,965 votes. The learned trial magistrate (**L.W. Gicheha, SPM/DR**) in dismissing the petition found that the grounds upon which it was brought were not proved on a balance of probabilities; that the by-election was substantially carried out in accordance with the law; and that the few irregularities and the alleged election offences did not affect the outcome of the election. She ordered that the costs be paid to the 1st respondent by the appellant and the 2nd and 3rd respondents.

The dismissal of the petition aggrieved the appellant who challenged it in Malindi High **Court Election Petition Appeal No. 1 of 2014**. The 2nd respondent on the other hand was dissatisfied by the order of costs which it challenged by filing a notice of cross- appeal. In a judgment, the subject matter of this appeal, rendered on 17th June 2015 the High Court likewise dismissed the appeal with costs holding that the learned trial magistrate committed no error; and that indeed the by-election was conducted freely and fairly. The court, however allowed the cross-appeal and set aside the order of costs against the 2nd and 3rd respondents.

Once more the appellant was not happy with this outcome, lodged a notice of appeal and subsequently the present appeal. We reiterate that the sole question raised in the notice of preliminary objection and in the motion is whether the appellant has a right to bring a second appeal to this Court. **Mr. Mouko**, learned counsel for the 1st respondent and **Mr. Munyithya** learned counsel for the 2nd and 3rd respondents have relied on the provisions of **Article 87(1)** of the Constitution, **section 75(1A)** and **(4)** of the **Elections Act** and the rules made thereunder as well as two decisions of this Court in **Isaac Oerri Abiri v Samwel Nyang'au Nyanchama & 2 others**, **Civil Appeal No. 25 of 2014** and **Joel Nyabuto Omwenga & 2 others v Independent Electoral & Boundaries Commission and Another Civil Appeal No. 137 of 2014** to persuade us that the appeal is for striking out. According to counsel, **Article 164(3) (a)** of the Constitution grants this Court jurisdiction to hear appeals from the High Court. However, that jurisdiction has to be exercised in accordance with **Article 87(I),** which, in relation to electoral disputes, directs Parliament to enact legislation to establish mechanisms for timely settling of such disputes. Therefore, in their view **section 75A of** the Elections Act, being such legislation limits appeals from the subordinate courts to the High Court; and that that limitation is sanctioned by the Constitution itself.

Mr. Aboubakar, learned counsel for the appellant does not think that the Court lacks jurisdiction to entertain the appeal, or that the appellant has no right of appeal to this Court. His argument, simply stated is that **Article 164(3) (a)** of the Constitution imposes no limitation as to the nature of decisions from the High Court that are appealable to the Court of Appeal. In his opinion there is a distinction between the jurisdiction of the Court of Appeal under **Articles 164(3) (a)** and **164(3) (b)**; that while by the former the Court's jurisdiction to hear appeals from the High Court is not subject to legislation, under the latter appeals from any other court or tribunal to the Court has to be in accordance with and as may be prescribed by an Act of Parliament. It follows, according to counsel, that no legislation can limit the jurisdiction of this Court in relation to appeals from the High Court under **Article 164(3) (a)** which stipulates that;

> ***"164(3). The Court of Appeal has jurisdiction to hear appeals from –***
>
> *(a)* ***The High Court;***
>
> ***…"***

He further draw a parallel between section 64 of former Constitution which, after creating the Court of Appeal provided that its jurisdiction to hear appeals from the High Court would be conferred by any law; that where the Constitution intends to limit jurisdiction it has always done so in express terms. For example by **section 44 (5)** of the former Constitution, the determination by the High Court of electoral disputes was final, and not subject to appeal.

Since the impugned judgment was a decision of the High Court, counsel submitted, there cannot be a bar

to challenging it to this Court; that it is settled by the Supreme Court's decision in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others Application No. 2 of 2011,** that a court's jurisdiction can only flow from the Constitution itself or statute or from both; and that it follows that the jurisdiction of the Court of Appeal under the Constitution is to hear and determine appeals arising from decisions of the High Court. For this reason learned counsel invited us to depart from the decisions of **Isaac Oerri** and **Joel Nyabuto** (supra) as they espoused bad law.

In the first decision which incidentally was also based on a notice of preliminary objection on similar ground as this one, the Court (**Maraga**, **Azangalala** & **Kantai, JJ.A**) observed that it is accepted that election disputes are neither civil nor criminal; that they are a class of their own; and that election petitions are governed by special legislation that prescribe the scope and the procedure for resolving those disputes. They, after making these general observations, held that **Article 164(3) (a)** and **(b)** aforesaid are;

> ***"… general provisions setting out constitutional foundation of the court's jurisdiction…. However, with respect to election disputes, Articles 87 and 105…. empower Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes".***

The Court went on to state that, pursuant to the foregoing, Parliament enacted the Elections Act which provides, among other things, for the jurisdiction of the courts with regard to disputes emanating from county elections. Specifically, the Court held that **Section 75(4)** of the **Elections Act**, which limits appeals from the decision of a magistrate's court on the question of validity of election of an MCA to the High Court on matters of law only, is sanctioned by the Constitution under **Article 87**.

In the second case of **Joel Nyabuto** (supra) decided one month before **Isaac Oerri** the Court (**GBM Kariuki, Kiage** & **Mohammed, JJ.A**.) expressed the same view as those in the first case stating, in pertinent part, that;

> ***"The statute gives only one opportunity to appeal to the High Court and even then on matters of law only".***

In terms of the decision in **Mukisa Biscuit Manufacturing Co.Ltd** v **West End Distributors Ltd** (1969) EA 696, the point being raised in the instant notices, being a question of jurisdiction, was properly taken and argued *in limine* as envisaged in Rule 27(3) and (4) of the Court of Appeal Rules.

It is a basic principle of constitutional interpretation that in construing its provisions, the entire Constitution has to be read as an integrated whole each provision in harmony with each other. See **Olum** v **Attorney General of Uganda (2002) 2 EA 508.** It follows that the language of the Constitution falls to be construed not in a narrow manner but broadly and liberally to give effect to its spirit and to promote its purpose, values and principles. Whereas **Article 164(3)** is the constitutional foundation of this Court's jurisdiction and in broad terms states, *inter alia,* that its jurisdiction is to hear appeals from the High Court, no inference can be drawn contrary to all other textual and contextual evidence that it was the intention of the framers of the Constitution that all appeals whatsoever from the High Court would lie to the Court of Appeal. **Article 164 (3) (a)** must be read with **Articles 87(1), 48** (on the right to access to justice) and **261**. (Consequently legislation) **Article 87(1),** with reference to electoral disputes provides that;

> ***"(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes".*** *(Emphasis supplied)*

According to **Concise Oxford English Dictionary**, 12th Edition, 2011, pg.887 a "mechanism is defined as;

> **"a natural or established process by which something takes place is brought about."**

The law envisaged in Article 87 (1) for the purpose of establishing mechanisms for ensuring the timely

settlement of electoral dispute, namely the Elections Act, provides, first and foremost that the appeal from the Magistrate's Court will be made to the High Court. Secondly, that such appeal shall only be on matters of law; that such appeal must be filed within thirty days of the decision of the Magistrate's Court; and finally that the appeal must be heard and determined within six months from the date of filing. These constitute mechanisms as defined above, intended to achieve a timely resolution of electoral disputes.

While **Article 87(1)** was specifically enacted to deal with mechanisms for resolving electoral disputes, **Article 261,** on the other hand, gives Parliament general legislative authority to enact any law required under the Constitution to govern a particular matter within the period specified by the Constitution. It is generally accepted that the Constitution only lays down, in broad terms, a set of guiding fundamental principles according to which the State is governed. It provides for the framework or skeletal structure without the details. It is from these broad guiding framework that laws are made to give life and meaning to the Constitution. It is in those laws and not the Constitution that the details reside.

On a plain reading of **Article 164(3) (a)** no restrictions on the Jurisdiction of the Court of Appeal to hear appeals from the High Court are readily apparent as is the case with appeals from "*other courts or tribunals*" where the jurisdiction is subject to provisions of an Act of Parliament. But a purposive and holistic reading of the Constitution as we have demonstrated, the language of **Article 164 (3) (a)** does not create a thoroughfare between the High Court and this Court. In **Jared Odogo Okelo** v **The IEBC & 3 others** Civil Appeal No.16 of 2013, this Court emphasized this point thus;

> ***"As we indicate later, that is not to suggest that each and every decision of the High Court is necessarily appealable to this Court. There will be many instances where recognition and accommodation of competing constitutional principles and values will dictate reasonable regulation in appeals to this Court"***

The question in that appeal was whether an appeal lay to this Court from an interlocutory decision of the High Court arising from an election petition. While the Court appreciated that nothing in the Elections Act or the rules limited the Court's jurisdiction under **Article 164 (3),** it held that the aggrieved party's right of appeal could only be invoked after the final determination of the petition. Later in **Nyutu Agrovet Limited** v **Airtel Networks Ltd**, Civil Appeal (Application) No.61 of 2012 the court reiterated the passage in **Kakuta Maimai Hamisi** v **Peris Tobiko & others** Civil Appeal No.154 of 2013 that;

> ***"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 from such right to be circumscribed in ways that render certain decisions of the courts below non appealable"***

Although the court in **Nyutu** (supra) specifically acknowledged that the question whether **Article 164 (3) (a)** creates a right of appeal from the decisions of the High Court "*in all and sundry*" cases was not before it, it went ahead to (*obiter*) draw a distinction between jurisdiction and the right of appeal.

It explained;

> ***"Article 164 (3) confers jurisdiction on this Court to hear appeals where there is a right of appeal. The conferment of jurisdiction on the Court by Article 164 (3) to hear and determine appeals from the High Court cannot be understood to create the right of appeal to this Court from all decisions of the High Court. The right of appeal as distinct from jurisdiction must be expressly conferred by the Constitution or by statute."*** (Per M'Inoti, JA) (Our emphasis)

So that, while **Article 164(3) (a)** provides the jurisdiction of the court, section 85 of the Elections Act, made pursuant to **Article 87,** determines the right of appeal to this Court from the decision of the High Court in an election petition concerning membership of the National Assembly, Senate and the office of County Governor. That right is confined to matters of law.

The Supreme Court has also restated the law as follows in **Gatirau Peter Munya** v **Dickson Kithinji & 2 others**, SC Petition No. 2B of 2014 page (14/55)

"[65] An examination of various legal systems indicates that the right, process and form of appeals from lower to appellate judicial forums are matters regulated, almost invariably, by legislation, except in cases where the Constitution provides otherwise. Parliaments have often prescribed either narrow or broad scopes, within which judgments and orders may be contested in higher courts of appeal. In one case, a statute may grant an unfettered right of appeal (appeal as a matter of right), or may require that such appeal by way of leave of the court (appeal subject to leave). In some cases, a statute or rule of procedure may limit the range of questions on which a party may found an appeal: one may be restricted to appearing on a question of fact; while in other cases it may be prescribed that an appeal will only be on a question of law, or a mixed question of law and fact."

Finally in **Equity Bank Ltd** v **Westlink MBO Ltd**, Civil Application No.78 of 2011 the Court found that, although under **Article 164 (3) (a)** the Court's jurisdiction is confined to hearing and determination of appeals from the High Court, the court can entertain applications under **Rule 5(2) (b)** of the Court of Appeal Rules even though such jurisdiction is not specifically provided for under the Constitution; and that that jurisdiction is a procedural innovation designed to empower the Court to entertain an interlocutory application for the preservation of the subject matter of the appeal. We have cited these decisions, to demonstrate that this Court has settled the question of its jurisdiction under **Article 164 (3) (a)** and that the interpretation sought by the appellant is too narrow besides ignoring the very clear provisions of **Article 87.**

Article 87 and all the provisions of the Constitution dealing with electoral disputes emphasise two fundamental principles, the timely settlement of electoral disputes and, save for petition concerning Presidential election, the other electoral disputes, have one appellate chance restricted to matters of law only.

We find no merit in the argument that an electoral dispute of an MCA should be entertained from the Magistrates' Courts upto this Court, while that involving Presidential election is restricted to the Supreme Court within a specified time limit, and that of Governors, Senators and Members of the National Assembly is heard in the High Court with appeal to this Court on matters of law.

Applying the purposive construction of the Constitution under **Article 259** and bearing in mind the principle in **Article 259(3),** that the law is always speaking, the people of Kenya made a conscientious decision to limit electoral disputes, other than that of the Presidential election, to one chance of appeal. It is a matter of historical fact that before **1997** the determination by the High Court of any question, relating to electoral dispute, whether the decision was interlocutory or final was not subject to appeal. In **Kenneth Stanley Njindo Matiba v Daniel Toroitich Arap Moi Civil Application No. NAI 241 of 1993** it was categorically stated that the Court of Appeal under section 44 of the former Constitution had no jurisdiction to entertain appeals from the decisions of the Election Court (High Court). That history is consistent with the improved trend introduced by the 1997 amendment to the former Constitution which allowed the election decisions of the High Court to be challenged on appeal to this Court. It is also consistent with the intent and spirit of the 2010 Constitution.

We are therefore of the firm view that the two decisions, namely **Joel Nyabuto & Isaa Oerri** (supra) and all the other relevant decisions cited in this judgment, state the correct position of the law.

Article 163 (7) of the Constitution enjoins all courts, other than the Supreme Court itself, to follow the decisions of the Supreme Court. In practice the courts below are bound by the decisions of the courts superior to them. The doctrine of judicial precedent, based on *stare decisis et non quieta movere* serves to promote continuity, predictability, certainty, uniformity and stability of the law. The Supreme Court in **Jasbir Rai and others v Rai Plywoods** Supreme Court Petition No.4 of 2012 has laid down the circumstances under which it would depart from its previous decision. As an apex court, it held, that it can do so only "*for good cause and after taking into account legal considerations of significant weight*" or where the decision was an *obiter dictum* or rendered *per incuriam,* or where there are conflicting decisions of the court.

In what circumstances can this Court depart from its previous decision? Prior to the creation of the Supreme Court as the court of last resort, the Court of Appeal adopted similar guidelines as those expressed in **Rai** (supra), which had evolved from the Court of Appeal for East Africa, summarized in **Dodhia v National Grindlays Bank Ltd (1970) EA 195** as follows;

> ***"I entirely agree with my Lord Presider that this court must, as the ultimate Court of Appeal, have a similar power to that formerly exercised by the Privy Council when it was the final Court of Appeal for Kenya. The duty of this Court in Kenya is to decide any case coming before it according to the laws of Kenya and this Court may be unable to do so if it is bound to follow a previous decision which is clearly contrary to law and which this Court feels that it would be wrong to follow, and the Court must therefore, as the ultimate Court of Appeal, be able to depart from a previous decision when it appears right to do so"*** (Per Sir William Duffus, V-P)

See also **Kiriri Cotton Co. v Ranchhodass Devani (1958) EA 239.**

The Court of Appeal remains the last court in many situations and these guidelines remain true. However the Court will not disregard its previous decision, as we have been invited to do here, without good cause. We find no basis of departing from the cited decisions of this Court regarding the application of **Article 164 (3) (a)** of the Constitution.

For these reasons we sustain the objection and strike out the appeal with costs.

Dated and delivered at Malindi this 11th day of December, 2015

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR