REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 300 OF 2013

(CORAM: MWERA, OUKO & KIAGE JJ.A)

BETWEEN

BASHIR HAJI ABDULLAHI …….....APPELLANT

AND

ADAN MOHAMMED NOORU ….....1st RESPONDENT

BILLOW ADAN KEROW ……...….....….....…….... 2ND RESPONDENT

EKONIT KOMOL JOHN (the Returning Officer Mandera

North Constituency) ….....3RD RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION …….....…… 4TH RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Nairobi (Onyancha, J.) delivered on 2nd October 2013

in

HC. Election Petition No. 7 of 2013)

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RULING OF THE COURT

By their notice of preliminary objection dated 4th December 2013, the 1st and 2nd respondents intimated that they would object in *limine* to the appeal herein. They raised five grounds for the said objection which are to the following effect;

- Several stated grounds of appeal relate to "errors of law and fact" or raise factual complaints over which this Court is devoid of jurisdiction.
- Some grounds in the memorandum of appeal are generic and lacking in specificity.

The said respondents assert that their preliminary objection furthers the overriding objective of the Appellate Jurisdiction Act and will aid in the expeditious and proportionate resolution of the appeal and conduce to the efficacious use of judicial resources. They urge that some **twenty-five** grounds in all be "struck off" the appellant's memorandum of appeal.

We directed that the parties file written submissions on the preliminary objection, which they did. They then appeared before us for argument of the same with learned counsel Mr. Kioko Kilukumi and Mr. Abbas Esmail appearing for the 1st and 2nd respondents. Mr. George Muchiri, learned counsel appeared for the appellant while learned counsel, Mrs. Nancy Kamau, appeared for the 3rd and 4th respondents.

That appeals to this Court from decisions of the High Court in electoral matters are limited to matters of law is trite. **Section 85A** of the **Elections Act** is plain, admitting to no argument; such an appeal lies to the Court of Appeal on matters of law only. This Court has on many occasions restated that position. See, **PETER GICHUKI KINGARA Vs. IEBC & 2 OTHERS;** Nyeri Civil Appeal No. 23 of 2013; **DR. THUO MATHENGE & ANOR Vs. NDERITU GACHAGUA & 2 OTHERS** Civil Appeal No. 29 of 2013**.**

It is not difficult to discern that the rationale for limiting this Court's jurisdiction in matters electoral is an attempt to bring a measure of finality in the decisions of the High Court as an Election Court. It lends credence and autonomy to that court so that its decisions on contested issues of fact are not to be enquired into afresh unless it be shown that the election court committed errors sufficient to invite a legal question for this Court's consideration.

A perusal of the memorandum of appeal filed herein immediately shows that there is merit in the objections by the 1st and 2nd respondents, in which they were joined by the 3rd and 4th respondents as well. In no less than **eleven** grounds of appeal, the appellant charges that "***the learned judge erred in law and fact***" in some respect or other. We must respectfully state that it is rather mind-boggling that counsel preparing a memorandum of appeal in a matter such as is before us, would add that trouble-inviting pair of words "and fact" in the face of a plain and straight-forward statutory exclusion of matters of fact from this Court's consideration. We recently deprecated this cavalier approach to the preparation of memoranda of appeal in election-related appeals in **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & ANOR Vs. STEPHEN MUTINDA MULE & 3 OTHERS** Civil Appeal No. 219 of 2013 as follows, which bears repeating;

> ***"Those points in an appeal of the kind before us, being from an election court's decision, are further circumscribed by Section 85A of the Elections Act which limits appeals to the Court of Appeal to matters of law only. It is therefore quite strange and improper that each of the seventeen grounds, without exception, commences with a standard expression "the judge erred in fact and law" or "the learned Judge erred in law and in fact." Clearly the drafters of the memorandum did not have the legal provision in active contemplation. Had they done so, they would have found that by invoking factual errors, they were inviting jurisdictional objections to their entire appeal."***

This caution is particularly apt to the case before us because we ourselves did point out to counsel for the appellant that some of the grounds of appeal were inarguably based on matters factual over which we had no jurisdiction, but counsel appeared quite firmly persuaded in the correctness of the appellant's approach and would hear none of it.

What then is a question of law over which we have jurisdiction, as opposed to a question of fact, over which we have none? **Black's Law Dictionary** defines the two terms as follows;

> ***"Matter of fact: A matter involving a judicial inquiry into the truth of alleged facts and Matter of law: A matter involving a judicial inquiry into the applicable law."***

One of the best expositions on the distinction between the two is to be found in the judgment of Denning

J in the English case of **BRACEGIRDLE Vs. OXLEY (2)** [1947] 1 ALL E.R. 126 at p 130;

> ***"The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deducted by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."***

That reasoning has been adopted in this jurisdiction. In **A.G. Vs. DAVID MURAKARU** [1960] EA 484, for instance, Chief Justice Ronald Sinclair sitting with Rudd J. adverted to the factual foundations of legal questions by stating that an appellate court restricted to determining questions of law may yet quite properly interfere with the conclusion of a lower court if the same is erroneous in point of law. This is the case where that lower court arrives at a conclusion on the primary facts that it could not reasonably come to. Such a conclusion or decision becomes an error in point of law. See also **PATEL Vs. UGANDA [1966] EA 311** and **SHAH Vs. AGUTO** [1970] EA 263.

There is no denying from the cases we have referred to, that in not a few cases the determination of whether a particular complaint on appeal is a question of law or of fact is not always a very straight-forward one, not least because the determination of whether a lower court drew the correct legal conclusions inevitably entails an examination of the factual basis of the decision. That reality has with it the inherent danger that legal ingenuity may attempt to dress-up and camouflage purely factual issues with the borrowed garb of "legalness." This is what the majority of this Court had in mind in **M'RIUNGU AND OTHERS Vs. R** [1982-88] 1 KAR 360 when it stated, (per Chesoni AJA) at p366;

> ***"We would agree with the views expressed in the English case of*** *Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)* ***[1983] 1 CR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decision of the trial of first appellate court unless it is apparent that; on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad law."***

As we have already indicated, the appeal before us wades into exactly that trap in that the grounds of appeal are couched in the stock phrase of "erred in law and in fact." This has necessitated our going through each of the grounds under attack to determine whether the issues raised are factual or legal and thereby determine whether they are properly before us. Having done so, we find that the following grounds of appeal, no matter how framed, raise only factual issues pure and simple;

> ***15. The learned Trial Judge erred in law and fact in holding that the disparity of votes between the presidential election results and the national assembly election results was 551.***
>
> ***16. The learned Trial Judge erred in law in failing to address the fact that the Returning Officer had sworn in an affidavit before the Superior Court that the disparity of votes cast in respect of the presidential election results vis-à-vis the national assembly election results was 3,176.***
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> ***17. The learned Judge erred in law and fact by pronouncing that 2 of the appellant's witnesses – Hassan Hussein and Yussuf Abdille were unreliable.***

23. The Trial Judge erred in law and fact in holding that there was evidence of high voter turnout in polling stations in Rhamu Ward.

24. The Trial Judge erred in law in holding that the issue of high voter turnout recorded in the Mandera North Assembly elections was not peculiar and that there was evidence on record and that this high voter turnout transcended the entire Mandera County.

29. The honourable Trial Judge erred in law and fact in holding that the swop of presiding officers who had been assigned to Quramathow and Mado Wells Polling Stations was conducted at the request of the 2 affected presiding officers and after due consultation and notification of the relevant parties.

The second prong of the 1st and 2nd respondents' preliminary objection is that some grounds in the memorandum of appeal lack the specificity required by **Rule 86(1)** with the effect that they stand ambushed by not having sufficient notice of the exact nature of the appellant's complaints. The Rule in question states as follows;

"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make."

That Rule does not summon the reader to any interpretational exertion. It is as plain as it gets. Unfortunately, it is a Rule that appears to be honoured more in breach by many an author of memoranda of appeal. We have decried that failure by counsel to comply with the basic and straight-forward requirement of the Rule in several recent decisions including in **LAW SOCIETY OF KENYA Vs. THE CENTRE FOR HUMAN RIGHS & DEMOCRACY & 13 OTHERS** [2013]eKLR which was cited to us by all sides to this preliminary objection. It bears repeating that the rule is couched in mandatory terms and this Court will not hesitate to deal decisively with violations of it. Order, certainty and precision are essential to the avoidance of confusion and ambush in the conduct of appeals.

Of the five grounds alleged to run afoul **Rule 86(1)**, we find that the following are lacking in specificity and are couched in terms so general and imprecise as to signify nothing the respondents can, without embarrassment and vexation respond to;

1. The learned Trial Judge erred in law in failing to appreciate and/or misconstruing the law governing the adjudication and determination of election petitions.

4. The learned Judge erred in pronouncing and making findings on issues which were neither pleaded nor which arose during the course of the trial to the benefit of the respondents.

32. The learned Judge erred in law by rejecting evidence properly on record and which evidence was favourable to the appellant's case.

36. The learned Trial Judge erred in law in failing to appreciate the law and evaluate the evidence before him and consequently arrived at wrong conclusions.

We are in full agreement with the sentiments expressed by the High Court in **RANGAL LEMEIGURAN & 3 OTHERS Vs. ATTORNEY GENERAL & 3 OTHERS,** High Court Misc, Appl. No. 305 of 2004;

"We must point out from the outset that the preliminary objections as formulated above are bare and bereft of any sufficient material and are couched in such a way that it is not possible for a party to whom they are addressed to sufficiently prepare and be ready to counter them. We are of the considered view that if a party wishes to raise a Preliminary Objection and files in Court a Notice to that effect and is subsequently served on other parties to the suit, the Preliminary

points should be sufficiently particularized and detailed to enable the other side and indeed the Court to know exactly the nature of the Preliminary points of law to be raised. To state that 'the Application is bad in law' without saying more does not assist the other parties to the suit nor the Court to sufficiently prepare to meet the challenge. If it is only at the hearing that the Preliminary Objection is amplified and elaborated, it gets the other side unprepared and is reminiscent of trial by ambush. Such practice of course ought to be discouraged."

Even though the matter under consideration there was a preliminary objection that was wanting in specificity, the same principle applies in our view, with equal if not greater force to an appeal to this Court where a reasoned decision of the High Court is being assailed or impeached. Generalized statements of discontent or grief will not do, especially where the Rules themselves decree the form and content that the memorandum of appeal should take.

The 1st and 2nd respondents have not sought to strike out the entire appeal. They have directed their attack on specific grounds of appeal that they consider incompetent and deserving of striking out, admitting thereby that the rest of the memorandum of appeal is rule-compliant. We are not called upon to declare the entire appeal incompetent as was sought preliminarily in **TIMAMY ISSA ABDALLA Vs. SWALEH SALIM SWALEH IMU & 3 OTHERS** Malindi Civil Appeal No. 36 of 2013. We therefore have no difficulty with the Court's pronouncement therein, to which Mr. Muchiri called our attention;

"51. That having been said it is evident that in determining whether the election court properly performed its duty, this court must be satisfied that the court acted judiciously and correctly applied the law. The conclusions of law drawn from the facts must also be reasonable and in accordance with the spirit and purpose of the Constitution of Kenya. This calls for examination of the findings of the election court and conclusions on primary facts in totality, taking into account the Constitution and the electoral laws, with a view to determining whether any conclusions of law arising therefrom have been properly arrived at. Thus the objection taken that the appeal is incompetent because the grounds of appeal raise issues of facts, was wrongly brought as a preliminary issue, as there is need to evaluate the conclusions arising from the primary facts. Moreover, it has been conceded that there are at least two grounds of appeal that raise issues of pure law, and to that extent the threshold of section 85A of the Elections Act has been met."

Counsel is of course wrong to assert that this Court is bound by its previous decisions. The correct position is that harmony and consistency in our decisions is much to be desired for certainty and finality's sake but we must always be free to depart. To that extent we agree with the sentiments of Charles Newbold, P, in **DODHIA Vs. NATIONAL & GRINDLAYS BANK LTD** [1970] EA 195 at p199, regarding the predecessor to this Court that made this precise point. We say so mindful that this Court remains the final court of appeal in all legal disputes save the few that get certified to the Supreme Court.

The upshot of our consideration of this preliminary objection is that it was properly taken before us. It succeeds and is upheld to the extent that the following **ten** grounds of appeal in the appellant's memorandum of appeal dated 30th October 2013 are struck out; **1, 4, 15, 16, 17, 23, 24, 29, 32 and 36.** They will accordingly not be canvassed before us as such.

The appellant shall pay the respondents' respective costs of the preliminary objection.

Dated and delivered at Nairobi this 14th day of March 2014.

J. W. MWERA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

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