IN THE COURT OF APPEAL

AT KISUMU

(CORAM: KARANJA, WARSAME & GATEMBU, JJ.A)

CIVIL APPEAL NO. 52 OF 2013

BETWEEN

PAUL POSH ABORWA ……..…….……...APPELLANT

AND

INDEPENDENT ELECTION & BOUNDARIES COMMISSION.....1ST RESPONDENT

MICHAEL KOSGEI (RETURNING OFFICER) ……..... 2ND RESPONDENT

DAVID AOKO WERE ……..…….…….... 3RD RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (Eric Ogola, J) dated 7th October, 2013

in

HIGH COURT ELECTION PETITION NO. 9 OF 2013)

****

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the Election Court (E.K.O Ogola J) sitting at the High Court Kakamega in Petition No. 9 of 2013 delivered on 7th October 2013 by which the Court dismissed the appellant's petition challenging the election of the 3rd respondent as Member for National Assembly for Matungu constituency during the elections held on 4th March 2013.

Background

2. The appellant, Paul Posh Abwora, was one of nine contestants for the position of Member for National Assembly for Matungu constituency in the general election conducted by the 1st respondent, IEBC, on 4th March 2013. After counting of votes and tallying of the various Forms 35 Michael Kosgei, the 2nd respondent, who was the returning officer for that constituency announced David Aoko Were, the 3rd respondent, as the duly elected Member for National Assembly for Matungu constituency on 5th March 2013. Subsequently the 3rd respondent was gazetted as Member for National Assembly for Matungu constituency in the Kenya Gazette

published on 13th March 2013. According to the 2nd respondent the 3rd respondent garnered 13, 427 votes relative to the appellant's 12, 128 votes, a difference of 1299 votes.

3. The appellant was dissatisfied with the electoral process and the results. On 10th April 2013 he petitioned the High Court of Kenya at Kakamega and sought orders that there be a scrutiny and recount of the votes cast in Matungu constituency for the Member for National Assembly for Matungu constituency; a declaration that he, the appellant, was validly elected as the Member for National Assembly for Matungu constituency. Alternatively the appellant sought the annulment of the election; a declaration that the 3rd respondent was not validly elected and an order for the holding of a fresh election for the position of Member for National Assembly for Matungu constituency.

4. The complaints by the appellant before the Election Court were that on or before the election day the 3rd respondent personally or through proxies violated the provisions of Sections 62 and 64 of the Elections Act by engaging in acts of treating, inducement and bribery of voters for purposes of influencing them to vote for him; that in contravention of Sections 63 and 65 of the Elections Act the appellant's supporters were intimidated, threatened and physically assaulted for supporting him; that the respondents violated election regulations in that the appellant's agents were not permitted to accompany ballot boxes; presiding officers in various polling stations failed to disclose to the appellant's agents serial numbers of ballot papers and serial numbers of seals used to secure ballot boxes; that within the precincts of polling stations the 3rd respondent's agents maintained communication with voters with a view to influencing them on how to vote; the appellant's agents were not supplied with copies of declaration of results at various polling stations; that IEBC knowingly and recklessly employed the 3rd respondent's relatives as election officers thereby permitting manipulation of the electoral process to the disadvantage of the appellant; that counting of votes was not commenced in the presence of party agents who were also refused opportunity to scrutinize ballot papers; that unauthorized persons including supporters of the 3rd respondent were granted access into the constituency tallying center; that presiding officers at various polling stations procured the signatures of political parties' agents on blank Forms 35 prior to insertion of declared results.

5. It was also the appellant's case before the election court that the 1st and 2nd respondents permitted abuse of voter's register by, for instance, permitting a voter to use an identification card belonging to a deceased person; permitting unqualified persons to serve as clerks; denying the appellant's agent access to the register and willfully violating the law and regulations in the exercise of counting of votes with the result that the appellant lost votes.

6. In their response to the petition the respondent's contended that the election was credible, free and fair and conducted in accordance with the Constitution of Kenya, the Elections Act and the Regulations and that the declaration of the 3rd respondent as Member for National Assembly for Matungu constituency represented the free will of the people of that constituency; that the tallying of votes was carried out in an open and transparent manner save for a few arithmetic and clerical errors that affected all the candidates but which did not in any way affect the outcome of the election.

7. The respondents denied the allegations relating to bribery, treating, inducement, voter intimidation, violence and violation of regulations.

8. After hearing the parties, the election court dismissed the petition in the judgment that was delivered on 7th October 2013 that is the subject of this appeal.

The Appeal

9. The appellant challenged that judgment on 19 grounds that are set out in his memorandum of

appeal. At the hearing of the appeal on 13th March 2014 however, counsel for the appellant appreciated that under Section 85A of the Elections Act the appeal to this Court is on matters of law only. He accordingly confined his submissions to issues of law namely whether the election court correctly interpreted Section 65 of the Elections Act; whether the election court failed to analyze the evidence satisfactorily; whether the judge erred in failing to consider that the counting, tallying and declaration of results contravened the Constitution and whether the trial judge failed to give adequate weight to the evidence presented.

10. Through a notice of preliminary objection filed in Court on 13th February 2014 the 3rd respondent took objection to the competence of the appellant's appeal. The 3rd respondent contended the petition in the High Court was filed in reliance of Section 76(1) of the Elections Act; that Section 76(1) of the Elections Act was declared a nullity by the Supreme Court of Kenya in the case of **Ali Hassan Joho V Suleiman Shabal and 2 others Petition No. 10 of 2013** for inconsistency with the Constitution; that the petition in the High Court was filed outside the time frame permitted under Article 87(2) of the Constitution; that accordingly this Court has no jurisdiction to hear and determine this appeal as it emanates from proceedings that were a nullity *ab initio*.

11. At the hearing of the appeal learned counsel represented the parties. Mr. Ken Nyaundi appeared for the appellant. Mr. Morara Apemi appeared for the 1st and 2nd respondent while Mr. J.S Masinde appeared for the 3rd respondent. At the commencement of the hearing we directed counsel to address us on the preliminary objection in the course of their arguments on the substantive appeal. The understanding was that in the event that the preliminary objection succeeds we would down our tools and would not consider the grounds and submissions on the other grounds set out in the memorandum of appeal.

12. Mr. Morara Apemi, counsel for the 1st and 2nd respondents submitted that this court has no jurisdiction to entertain the appeal as the proceedings from which it emanates are a nullity having been commenced out of time in contravention of Article 87(2) of the Constitution.

13. Mr. Apemi urged that under Article 2(4) of the Constitution any law that is inconsistent with the Constitution is void to the extent of the inconsistency and any act or omission in contravention of the Constitution is invalid. On that basis he stated that the filing of the petition in the High Court outside of the time frame set out in the Constitution invalidates the entire process with the consequence that this Court cannot at the appellate stage validate the same. In that regard Mr. Apemi referred us to the High Court case of **Joshua Mutoto Werunga V Joyce Namunyak and 2 others Election Petition No. 10 of 2013** and urged us to dismiss the appeal.

14. Mr. J. S Masinde counsel for the 3rd respondent submitted that when the Petition giving rise to the present appeal was filed in the High Court in April 2013, the Constitution of Kenya 2010 was operational and so were the specific timelines set out in Article 87 of the Constitution within which the Petition should have been filed. Mr. Masinde further submitted that the Constitution takes precedence over any statutory law and any provision in any statute that does not accord with the Constitution cannot apply. To the extent that Section 76 of the Elections Act purported to depart from Article 87 it could not apply and in choosing to go by the time frame set under that section as opposed to complying with the time frame under Article 87 of the Constitution, the appellant did so at his own peril.

15. Opposing the preliminary objection, Mr. Nyaundi counsel for the appellant stated that the petition was filed within the time stipulated under Section 76 of the Elections Act. He did not contest that the petition was filed outside the time stipulated under Article 87 of the Constitution. Neither did Mr. Nyaundi contest that Section 76 of the Elections Act was declared a nullity by the Supreme Court in the case of **Ali Hassan Joho V Suleiman Shabal and 2 others** to the extent that it is inconsistent with the Constitution.

16. Mr. Nyaundi however went on to say that when nullifying Section 76 of the Elections Act the

Supreme Court did not state that its decision would have retroactive effect. According to Mr. Nyaundi, the Supreme Court decision in **Ali Hassan Joho V Suleiman Shabal and 2 others** nullifying Section 76 of the Elections Act can only operate prospectively. It cannot, according to him, operate to nullify the petition in this case or affect what the appellant did under Section 76 of the Elections Act; that the appellant, like many other persons in his position, was entitled to rely and did in fact rely on Section 76 of the Elections Act.

17. Mr. Nyaundi further submitted that in common law practice substantive law and pronouncement of the court should not operate retroactively unless the court making the pronouncement also pronounces the effect to be retroactive; that under Article 50 and 258 of the Constitution the appellant should not be left without a remedy; that the application of the Supreme Court decision retroactively will result in chaos as there are many election petitions that were filed in good faith outside of the time frame set under Article 87 of the Constitution but within the time frame under section 76 of the Elections Act.

18. In support of his submissions Mr. Nyaundi cited the decision of the South African Constitutional Court in the case of **State V Bhulwana (1995) CCT 12/95** and the decision of the Supreme Court of Canada in the case of **Attorney General of Canada v George Hislop and 4 others [2007] SCC 10** and argued that the Supreme Court of Kenya in **Ali Hassan Joho V Suleiman Shabal and 2 others** should have clarified whether its decision would apply retroactively. He urged us to take the view that in the absence of a specific pronouncement by the Supreme Court in that regard the decision must be construed to be prospective as a retroactive application cannot be fair and those persons like the appellant who relied on Section 76 of the Elections Act on the basis that it was the law should be protected.

19. Finally Mr. Nyaundi argued that the preliminary objection should not be entertained as the issue of the legality of Section 76 of the Elections Act was not canvassed before the election Court and no objection was raised and that leave has not been granted to the respondents to raise the matter at the appellate stage.

20. According to Mr. Masinde, the issues raised by the appellant regarding whether the decision of the Supreme Court in **Ali Hassan Joho V Suleiman Shabal and 2 others** has retroactive or prospective application does not arise as the Supreme Court was merely interpreting the law that has been in place since the promulgation of the Constitution 2010 and nothing new was introduced by the Supreme Court.

21. According to Mr. Apemi the objection is jurisdictional and it matters not whether the issue was taken up before the election Court. It is a matter that can be taken up for the first time on appeal, he said, and cited the case of **Tononoka Steels Ltd V The Eastern and Southern Africa Trade and Development Bank (2000) 2 EA 536**.

Determination

22. We have considered the preliminary objection taken by the 3rd respondent and supported by the 1st and 2nd respondents and the submissions by learned counsel and take the following view of the matter.

23. Article 87(2) of the Constitution provides:

> ***"(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission."***

On the other hand, section 76 of the Elections Act provided that:

> ***"76. (1) A petition—***

(b) to seek a declaration that a seat in Parliament or a county assembly has not become vacant shall be presented within twenty-eight days after the date of publication of the notification of the vacancy by the relevant Speaker; or…"

24. In its judgment delivered on 4th February 2014 in **Ali Hassan Joho V Suleiman Shabal and 2 others** the Supreme Court of Kenya stated, in relation to section 76(1) of the Elections Act as follows:

> ***"… as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under a Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution."***

With that, the Supreme Court went ahead to declare S. 76(1)(a) of the Elections Act 2011 a nullity to the extent of its inconsistency with Article 87(2) of the Constitution.

25. There can be no doubt therefore that the Supreme Court declared section 76 of the Elections Act to be invalid to the extent of its inconsistency with the Constitution. Decisions of the Supreme Court are binding on all courts under Article 163(7) of the Constitution. The question that arises is whether the pronouncement by the Supreme Court nullifying Section 76 of the Elections Act took effect from the date of the judgment of the Supreme Court, so that the appellant's petition is unaffected by that pronouncement, or whether the pronouncement operated from the date of promulgation of the Constitution.

26. It was Mr. Nyaundi's argument that as a general principle an order of invalidity should not affect cases that have been finalized prior to the date of the order of invalidity. He cited the South African constitutional court decision in **State V Bhulwana** as well as the Canadian Supreme court case of **Attorney General of Canada v George Hislop and 4 others** . In the later case, the Supreme Court of Canada expressed the view that when a court issues a declaration of invalidity it declares that henceforth the unconstitutional law cannot be enforced and that the nullification of a law is therefore prospective. On the strength of those decisions Mr. Nyaundi urged us to hold that the Supreme Court decision in **Ali Hassan Joho V Suleiman Shabal and 2 others** should not be applied in this case as it will be tantamount to a retroactive application of the law and that the Supreme Court should not have stopped at declaring Section 76 a nullity but should have expressed itself on whether that declaration should have retroactive effect.

27. Counsel for the respondents on the other hand submitted that the question of "retroactive application" of the law does not arise in this case as Article 87 of the Constitution has been in place since the promulgation of the Constitution and the Supreme Court decision did not at all change the law.

28. In the case of **State V Bhulwana** the Constitutional Court of South Africa was concerned with the question whether a provision in the Drugs and Drug Trafficking Act 140 of 1992 (S. 21(1)(a)(i)) which contained a "reverse onus" provision that imposed a burden of proof on the accused person was contrary to the provisions of S. 25(3) of the Constitution relating to the presumption of innocence of an accused person. The Constitutional Court of South Africa was of the view that that provision infringed the right entrenched in S. 25(3). An issue then arose as to whether the effect of the order by the Constitutional Court nullifying or invalidating S. 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992 would be suspended in order to require Parliament to remedy the defect in the legislation. The context in which that issue was addressed by that court is significant.

29. The Constitution of the Republic of South Africa in s. 98(5) and 98(6) provides that in the event of the Constitutional Court finding any law or provision to be inconsistent with the Constitution it shall declare such law or provision invalid. Unlike our Constitution, there is further provision in the South Africa Constitution that provides that the Constitutional Court may in the interests of justice and good government require Parliament or other competent authority to correct the defect

in the law within a specified period during which that provision shall remain in force pending the correction or the period specified. Section 98(6) of that Constitution provides that:

> *" that unless the Constitutional Court in the interests of justice and good government orders otherwise, and save to the extent that it so orders, the declaration of invalidity of law or provision thereof existing*

a. *at the commencement of this Constitution, shall not invalidate anything done or permitted in terms thereof before the coming into effect of such declaration of invalidity; or*
b. *passed after such commencement, shall invalidate everything done or permitted in terms thereof*."

30. The interpretation given by the Constitutional Court of South Africa to those provisions was that the effect of an order declaring invalid a legislative provision which existed when the Constitution came into force would not invalidate anything done or permitted in terms of that provision unless the court orders otherwise. In the circumstances of that case the court held that as the convictions took place before the court made its order of invalidity the effect of the declaration of invalidity would not apply.

31. The pronouncement by the Constitutional Court of South Africa in that case to the effect that an order of invalidity should have no effect on cases which have been finalized prior to the date of the order of invalidity must be seen in light and in the context of Sections 98(5) and 98(6) of that Constitution. The Constitution of Kenya 2010 does not have similar provisions.

32. The Canadian Supreme Court in the case of **Attorney General of Canada v George Hislop and 4 others** considered at length the question of retroactive effect of judgments to the extent that such judgments might involve a change in law. It was acknowledged in that case that it does not mean that every time a new Constitutional interpretation is adopted or a previous decision is overturned a change in law occurs. It was observed during the progression of that case that there is a difference between constitutional interpretation and actual constitutional change; that the normal retroactive effect of judgments may however need to be tempered in certain circumstances in order to protect other legitimate interests; that reasonable reliance, good faith, fairness to litigants and Parliament's role are important considerations to be taken into account in deciding whether a retroactive constitutional remedy should be denied. The court went on to say that different considerations apply when deciding whether a suspended declaration of invalidity should be granted; that a suspended declaration is a valid measure when a declaration of invalidity would pose a danger to the public, threaten the rule of law or deprive deserving persons of benefits without thereby benefitting the individual whose rights had been violated.

33. In that case the Canadian Supreme court was concerned with a situation where the law changes through judicial intervention. That cannot be said to be the situation obtaining in the present case where Article 87 stipulated in express terms the time limit within which an election petition must be filed. The Supreme Court decision in **Ali Hassan Joho V Suleiman Shabal and 2 others** did not, in our view, involve a change in the law. We are not therefore concerned with any legal consequences that would otherwise have been brought upon to bear if indeed the pronouncement or the declaration by the Supreme Court would have involved a change in the law so as to mitigate the retroactive effect if any of such declaration or pronouncement. The Supreme Court in **Ali Hassan Joho V Suleiman Shabal and 2 others** applied the law as set out in the Constitution. The nullification of Section 76 of the Elections Act brought statutory law in line with the Constitution. Section 76 of the Elections Act was invalid from the outset. A consideration as to whether the declaration has retroactive or prospective application would have been relevant if the Supreme Court of Kenya was "*fashioning new legal rules or principles and not when they are applying the existing law*".

34. The principle that emerges from the Supreme Court decision of **Attorney General of Canada v George Hislop and 4 others** is that when a court is developing new law within the broad confines of the Constitution it may be appropriate to limit the retroactive effect of its judgment. The Court

put it in the following terms:

> ***"People generally conduct their affairs based on their understanding of what the law requires. Governments in this country are no different. Every law they pass or administrative action they take must be performed with an eye to what the Constitution requires. Just as ignorance of the law is no excuse for an individual who breaks the law, ignorance of the Constitution is no excuse for governments. But where a judicial ruling changes the existing law or creates new law, it may, under certain conditions, be inappropriate to hold the government retroactively liable. An approach to constitutional interpretation that makes it possible to identify, in appropriate cases, a point in time when the law changed, makes it easier to ensure that persons and legislatures who relied on the former legal rule while it prevailed will be protected. In this way, a balance is struck between the legitimate reliance interest of actors who make decisions based on a reasonable assessment of the state of the law at the relevant time on one hand and the need to allow constitutional jurisprudence to evolve over time on the other."***

35. In our case section 76 of the Elections Act did not at any time prevail over the constitutional provision in Article 87. The hierarchy of norms has always been clear under section 3 of the Judicature Act, chapter 8 of the laws of Kenya. All other written laws are subject to the Constitution. The Constitutional provisions rank in priority over statutory provisions. Article 2 of the Constitution declares the supremacy of the Constitution. Any law inconsistent with the Constitution is void *ab initio*. It cannot therefore be said that any person could legitimately rely or conduct their affairs on the basis of Section 76 of the Elections Act in view of the supremacy of the constitutional provision in Article 87. We therefore reiterate that the decision of the Supreme Court did not entail a change in the law and the question of whether that decision has retroactive or prospective application does not arise.

36. The English House of Lord had occasion to deal with this question in the case of **In re Spectrum Plus Ltd (In Liquidation) [2005] UKHL 41**. The judgment of Lord Nicholls is illuminating. We quote at length from his judgment to the extent that we consider his views apply to the case before us. He stated:

> ***" …the interpretation the court gives an Act of Parliament is the meaning which, in legal concept, the statute has borne from the very day it went onto the statute book. So, it is said, when your Lordships' House rules that a previous decision on the interpretation of a statutory provision was wrong, there is no question of the House changing the law. The House is doing no more than correct an error of interpretation. Thus, there should be no question of the House overruling the previous decision with prospective effect only. If the House were to take that course it would be sanctioning the continuing misapplication of the statute so far as existing transactions or past events are concerned. The House, it is said, has no power to do this. Statutes express the intention of Parliament. The courts must give effect to that intention from the date the legislation came into force. The House, acting in its judicial capacity, must give effect to the statute and it must do so in accordance with what it considers is the proper interpretation of the statute. The House has no suspensive power in this regard ".*** [Emphasis added]

37. Regarding the question whether we have jurisdiction to dispose of this appeal on the basis of the preliminary objection when that objection was never canvassed before the Election Court, our answer is that we do. The Supreme Court and this Court have said in many decisions that jurisdiction is everything. In **Tononoka Steels Ltd V The Eastern and Southern Africa Trade and Development Bank** this court took the view that a point of law may be taken for the first time in appeal where an investigation of disputed facts is not involved, where no question of evidence arises and that the court may on its own motion raise a point of law where there is a question of jurisdiction. In our view the fact that the petition was filed outside of the time prescribed under Article 87 of the Constitution is not disputed. It is also not disputed that the

objection relates to the jurisdiction of this court to entertain the appeal. For those reasons we consider the objection as properly been taken before us.

38. The result of the foregoing is that we uphold the preliminary objection and determine that we have no jurisdiction to hear and determined the appeal emanating as it does from proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87 (2) of the Constitution 2010. We accordingly dismiss the appeal with costs to the respondents. The costs of the appeal are capped and shall not exceed Kshs. 500,000.00 for each respondent.

Dated and delivered at Nairobi this 2nd day of May, 2014.

W. KARANJA

……..

JUDGE OF APPEAL

M. A. WARSAME

…….

JUDGE OF APPEAL

S. GATEMBU KAIRU

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR