IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, M'INOTI & MURGOR, JJ.A.)

CIVIL APPLICATION NO. NAI 14 OF 2014 (UR 5/2014)

BETWEEN

JOSEPH AMISI OMUKANDA.....APPLICANT

AND

THE INDEPENDENT ELECTIONS & BOUNDARIES COMMISSION....1ST RESPONDENT

WILSON KIMUTAI KIPCHUMBA.....2ND RESPONDENT

EMMANUEL WANGWE.....3RD RESPONDENT

(An application for certificate to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Kisumu, (Musinga, Azangalala & S. ole Kantai, JJ.A) dated 14th March, 2014

in

Kisumu Civil Appeal No. 45 of 2013)

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RULING OF THE COURT

The applicant, ***Joseph Amisi Omukanda***, was one of the candidates who contested the seat of member of the National Assembly, ***Navakholo Constituency,*** during the 4th March, 2013 general elections. On 5th March, 2013, the third respondent, ***Emmanuel Wangwe***, was declared the duly elected member of the National Assembly by the 1st respondent, the ***Independent Electoral & Boundaries Commission (IEBC),*** having garnered 10,246 votes to the appellants 10, 214 votes. Disgruntled that he had lost the election literally by a whisker, (a paltry 32 votes), the appellant lodged ***Election Petition No. 4 of 2013*** in the High Court at Kakamega. In the petition, he indicated that except for various malpractices and irregularities which he alleged in the collating, tabulation, tallying and counting of the votes, he was otherwise satisfied with the conduct and management of the entire election in the constituency.

The appellant accordingly sought only two substantive prayers: firstly, an order for scrutiny of all the ballot papers cast at the election, a recount of the votes and an examination of the tallying; and secondly, an order that the candidate found to have the highest number of votes after the scrutiny and recount, be declared the duly elected member of the National Assembly for Navakholo Constituency.

The petition was heard by ***Chitembwe, J***. who, in the course of the hearing, ordered recount of votes in two polling stations (in one, the entire station and in the other, one stream only), and re-tallying of the votes in all the 82 polling stations in the constituency. After that exercise, the 3rd respondent still led by 10,596 votes to the applicant's 10, 223 votes. The margin of the 3rd respondent's win therefore increased from 32 votes to 373 votes. Finding the petition not proven, the learned judge, on 20th September, 2013, dismissed the same, but ordered each party to bear their own costs.

Aggrieved by the decision, the applicant lodged ***Civil Appeal No. 45 of 2013*** in this Court in Kisumu. The primary complaint was that the learned judge had erred by declining to order recount of votes in all the 82 polling stations in the constituency and that the re-tallying of the votes had proceeded on the basis of inadmissible evidence, namely photocopies of Forms 35 rather than the originals, which forms had cancellations, alterations and erasures.

The 3rd respondent, on his part, filed a cross appeal against the order of the learned judge directing each party to bear their own costs.

On 14th March, 2014, this Court ***(Musinga, Azangalala and S. ole Kantai, JJA.)*** dismissed the appeal after finding that the appellant had not established any basis to justify recount of the votes in the entire constituency and that the alleged irregularities on Forms 35 had not been pleaded, and in any event, the same were inconsequential and did not affect the result of the election.

As regards the cross appeal on costs in the High Court, the Court allowed the same and awarded the 3rd respondent, as against the appellant, costs capped at Kshs 1,500,000/=. On costs of the appeal, the respondents were awarded costs capped at Kshs 1,000,000/= for each respondent.

Dissatisfied with the judgment of this Court, the applicant, on 28th March, 2014, filed the application now before us, seeking certification to enable him lodge a further appeal to the Supreme Court. The application, expressed to be brought under ***Article 163(4) of the Constitution***, ***sections 15 and 16 of the Supreme Court Act*** and ***Rule 24 of the Supreme Court Rules, 2013***, is surprisingly founded on three different classes of grounds, namely:

i. issues of interpretation of the Constitution are involved;
ii. a miscarriage of justice is apprehended; and
iii. matters of general public importance are involved.

Before us, ***Ms Ashioya*** and ***Mr Amasakha***, learned counsel, appeared for the applicant; ***Ms Ngeresa***, learned counsel, for the 1st and 2nd respondents; and ***Mr Namada*** and ***Mr Mulanya***, learned counsel, appeared for the 3rd respondent. On matters of general public importance, Ms Ashioya and Mr Amasakha submitted in turns that the High Court and the Court of Appeal had deviated from a long standing principle of law that an election court may consider issues that arise in the course of the trial of the petition, even though such issues had not been pleaded; that this Court thus made conflicting decisions on the issue; and that the Supreme Court will have an opportunity to state the correct position, thus clarifying the law and developing jurisprudence.

On the interpretation of the Constitution, learned counsel for the applicant argued that the High Court and this Court erred by upholding re-tallying of votes on the basis of copies of Forms 35 and 36; that the Supreme Court will therefore be requested to interpret the meaning of the term "election material" in ***Article 86 (d) of the Constitution*** and determine whether the term includes photocopies or is limited to original materials; that the High Court and this Court failed to follow ***RAILA AMOLLO ODINGA VS IEBC & OTHERS, SC Petition No 5 of 2013*** where each party was ordered to bear its own costs; and that the Supreme Court will therefore be requested to interpret ***Article 163(7) of the Constitution*** and the extent to which its decisions are binding on this Court.

On miscarriage of justice, submissions of learned counsel tended to be rather general and overlapping with the other grounds upon which the application was founded, namely matters of general public

importance and issues of interpretation of the Constitution. Thus, for example, it was submitted that a miscarriage of justice arose because this Court did not address the issues raised in the appeal or had misdirected itself on issues of law; by the use of copies of forms 35 and 36 rather than the originals; by the order of this Court that the costs of the petition and the appeal be borne by the applicant; and by the dismissal of the applicant's prayer for scrutiny and recount.

Ms Ngeresa for the 1st and 2nd respondent opposed the application on the basis of grounds of opposition dated 8th April, 2014. Learned counsel submitted that under ***Article 163(4) of the Constitution***, there is no right of appeal from the decisions of this Court to the Supreme Court on grounds of apprehended miscarriage of justice; that the High Court had affirmed that view in ***COMMISSION ON ADMINISTRATIVE JUSTICE VS ATTORNEY GENERAL HC Petition No 284 of 2012;*** that the application did not raise any issue of general public importance; that this Court properly found that the issues that the applicant was raising in the appeal had not been pleaded in the petition; and that on costs, the same follow the event, so that this Court was justified in interfering with the order of the High Court.

Mr. Namada, learned counsel, for the 3rd respondent joined Ms Ngeresa in opposing the application, relying on grounds of opposition filed on 2nd May, 2014. Learned counsel submitted that there was no jurisdiction to appeal to the Supreme Court on grounds of miscarriage of justice; that the issues before this ***Court in Civil Appeal No. 45 of 2013*** did not involve interpretation or application of the Constitution; that there was no matter of general public importance involved in the intended appeal to the Supreme Court; that the issues that the applicant intended to place before the Supreme Court were settled issues of law that did not involve matters of great jurisprudential moment; that any conflicts in the decisions of this Court are resolved before this Court and do not warrant an appeal to the Supreme Court; that in any event, the applicant had not identified any conflicting decisions of this Court; that this Court arrived at the correct decisions on award of costs; and that the application was a desperate move to turn the Supreme Court into a court for routine appeals.

We have carefully considered the application, the grounds of opposition, the judgment of the High Court, the judgment of this Court, the submissions of counsel and the authorities that they cited. We do not intend to spend time on the grounds of the application founded on alleged miscarriage of justice because the applicant belatedly abandoned the same when his attention was drawn to the fact that ***section 16(2) of the Supreme Court Act, 2011*** which purported to confer jurisdiction upon the Supreme Court to hear appeals from this Court where substantial miscarriage of justice was apprehended, was declared unconstitutional by the High Court on 19th September, 2013. In declaring that provision unconstitutional in ***COMMISSION ON ADMINISTRATIVE JUSTICE VS ATTORNEY GENERAL (supra)***, Lenaola, J. delivered himself as follows:

> ***"That Section 16 (2) of the Supreme Court Act, 2011 is declared to be ultra vires the Constitution [of Kenya], 2010 to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the Court is satisfied that a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard."***

To the best of our information, that judgment has not been appealed or otherwise reversed or set aside. Subsequently in ***MALCOLM BELL VS DANIEL TOROITICH ARAP MOI & ANOTHER***, **SC App No. 1 of 2013,** the Supreme Court affirmed the same view and upheld an objection to its jurisdiction purportedly under ***section 16(2) of the Supreme Court Act***, terming it an invocation of a jurisdiction that did not coincide with the Constitution's donation. We shall not say more on those grounds.

Regarding the grounds in support of the application based on interpretation and application of the Constitution, we shall make only two observations. Firstly, if issues of interpretation and application of the Constitution are directly and squarely involved in the intended appeal to the Supreme Court, the applicant does not need any certification from this Court. Under Article 163(4) (a) of the Constitution, appeals lie from this Court to the Supreme Court as of right in any case involving the interpretation or

application of the Constitution.

Secondly, as the Supreme Court stated in ***THE KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS VS THE ATTORNEY GENERAL & 2 OTHERS***, ***SC Crim. App. No. 1 of 2012,*** the issues of interpretation and application of the Constitution that qualify to be certified to the Supreme Court ***on appeal*** from decisions of this Court, must not be *collateral questions*, only minimally related to the substantive issue determined by this Court. If the issue is merely *collateral*, a certificate from this case is required, meaning that the Court must be satisfied that the matter is one of general public importance. In that case, the Supreme Court evaluated its appellate jurisdiction and after considering several decided cases, stated the following principles:

> ***"[22] The effect of the foregoing decisions is that: (i) appeals to the Supreme Court, in general, require grant of leave by the Court of Appeal – except where the Court of Appeal's refusal of leave has been reversed by the Supreme Court; (ii) in matters of interpretation or application of the Constitution, an appeal will be entertained by the Supreme Court as of right; (iii) the issue for interpretation or application of the Constitution coming on appeal to the Supreme Court, is not to be a collateral question, only minimally related to the substantive cause pending in the Court of Appeal, and if it is such, then leave of the Court of Appeal is required – unless the Supreme Court has reversed the refusal to grant leave by the Court of Appeal; (iv) subject to the foregoing principles, an appeal to the Supreme Court is not limited by the mere fact of the issue being preliminary or interlocutory***.(Emphasis added).

The Supreme Court's final conclusion was as follows, regarding interpretation and application of the Constitution as a collateral case:

> ***[34] There was, therefore, no legitimate issue of interpretation or application of the Constitution, regarding the role of the Attorney-General in the proceedings before the Court of Appeal, which merited an appeal to the Supreme Court. The issue raised before the Court of Appeal and which is now sought to be brought to the Supreme Court, squarely fell within the category of a collateral case – a matter not appealable save with the leave and certificate of the Court of Appeal. There being no such certificate, and there not having been a reference, leading to a differing position taken in this Court, this is the typical case in which no appellate jurisdiction lies in the Supreme Court."*** (Emphasis added.)

We are satisfied that the issues raised by the applicant on the interpretation and application of the Constitution are collateral questions minimally related to the substantive issues determined by this Court. To that extent we shall consider them under matters of general public importance.

It has been consistently held by the Supreme Court and this Court that in applications for certification under ***Article 163(4) (b) of the Constitution***, only exceptional cases which raise ***"cardinal issues of law or of jurisprudential moment"*** will deserve the attention of the Supreme Court. (See ***PETER ODUOR NGOGE V HON FRANCIS OLE KAPARO & 5 OTHERS, SC Petition No. 2 of 2012*** and ***KOINANGE INVESTMENTS & DEVELOPMENT LTD VS ROBERT NELSON NGETHE, C.A No 15 of 2012).*** The reason behind that approach is that the Supreme Court was never intended to serve as an additional tier for all and sundry appeals from this Court. On the contrary, the requirement for certification was intended to serve as a filtering process to ensure that only appeals with elements of general public importance engaged the Supreme Court, whose role may not be relegated to that of correcting errors in the application of settled law, even where they are shown to exist.

The applicant is therefore obliged to satisfy us that the issue intended to be canvassed before the Supreme Court is one, the determination of which transcends the circumstances of the case and has a significant bearing on the public interest and that where the issue involved is a point of law, the point of law involved is a substantial one, the determination of which will have a significant bearing on the public interest. (See ***HERMANUS PHILLIPUS STEYN V GIOVANNI GNECCHI-RUSCONE, (SC App. NO 4 OF 2012).***

It should also be pointed out that in ***MALCOLM BELL VS DANIEL TOROITICH ARAP MOI &***

ANOTHER, (supra), the Supreme Court asserted that its jurisdiction under Article 163(4) (b) is not a jurisdiction to be invoked merely for the purpose of rectifying errors with regard to matters of settled law, and equally, that it is not a jurisdiction to be invoked merely for the determination of contested facts between the parties. We may add too, that the mere apprehension of a miscarriage of justice without satisfying the requirements of ***Article 163(4) (b) of the Constitution*** will not justify certification.

The issues of general public importance relied upon by the applicant are the alleged error by this court in upholding the decision of the election court that its judgment must be based on pleaded issues; the alleged conflicting decisions on whether, in an election petition, the courts will base their decisions on unpleaded issues; and the opportunity that the Supreme Court now has to clarify the law. The applicant did not cite the alleged conflicting decisions of this Court, nor are we aware of any.

It is a well settled principle of law that parties are not allowed to raise matters that are not in their pleadings. The basis of this eminently sensible rule is that each party must know the cases they have to meet, and that cases must be decided only on the issues that the parties have placed before the court. Any desire to introduce new issues is catered for through the device of amendment of pleadings. (See ***GANDY VS CASPAIR (1956) 23 EACA 139).***

There is however a well known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an unpleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. (See ***ODD JOBS VS MUBIA (1970) EA 476).***

In this case, this Court reiterated the principle that the learned judge could not base his decision on unpleaded issues; but all the same he had gone ahead and considered the appellant's complaints and found them lacking in merit. In our opinion, the law on pleadings is too clear to require, at this point in time, further input from the Supreme Court. Even if we assumed there were conflicting decisions of this Court on the issue, which we have reiterated we are not aware of, and the applicant did not produce any, that in itself would not justify certification to the Supreme Court. This Court has well known and time-tested mechanisms for resolution of such conflict, which are at the appellant's disposal. The Supreme Court made the point in ***MALCOLM BELL VS DANIEL TOROITICH ARAP MOI & ANOTHER***, (supra), thus:

> ***"In principle, this Court believes, these Court of Appeal decisions should be aligned, to create consistency…The Court of Appeal itself has the competence to deal with this question in its subsequent decisions. As stated in Peter Ngoge v ole Kaparo, this Court ought to safeguard the respective jurisdictions of other courts in the hierarchy of Courts in Kenya, and should resist the temptation to encroach on their proper spheres of work."***

On the question of the application and interpretation of the Constitution, we have stated that this was not an issue squarely before this Court; it is being raised as a collateral question. The applicant's complaint is that the re-tallying of the votes was on the basis of photocopies of Forms 35 and 36. Those forms were obtained by the applicant from the 1st respondent, and it was on the basis of those Forms that he had sought re-tallying of the votes. This Court addressed the applicant's complaint as follows:

> ***"As the learned Judge in our view, correctly pointed out, the complaints with respect to errors in forms 35 were not captured in the petition. Strictly speaking, no evidence should therefore have been led in purported proof of what had not been pleaded. Indeed, in our view, the learned Judge could not base his decision on unpleaded issues. If he had done so, the respondents would be the ones complaining. Our perusal of the record however, leaves no doubt in our minds that notwithstanding that the complaints with respect to forms 35 had no foundation in the petition, the learned Judge nonetheless considered in great detail each and every complaint so raised and found that the same related to minor errors which did not vitiate the final results. That was generous and gratuitous of the learned Judge. Like him, even if the complaints about errors in forms 35 had had foundation in the petition, the errors would not, in***

our view, have vitiated the final result which the election produced."

Again, we do not perceive any issue of jurisprudential moment in the determination of what constitutes election materials, so as to justify a certificate to the apex Court. We do not also see any substantial point of law involved, the determination of which will have a significant bearing on the public interest.

The last issue on the application and interpretation of the Constitution was the effect of ***RAILA AMOLLO ODINGA VS IEBC & OTHERS*** (supra) and Article 163(7) of the Constitution which provides that all courts, save the Supreme Court, are bound by decisions of the Supreme Court. We are afraid that the applicant, in putting forward this ground, is labouring under some illusion. On the facts of ***RAILA AMOLLO ODINGA VS IEBC & OTHERS*** (supra), the Supreme Court determined that the best order to make on costs was that each party should bear their own costs. The Supreme Court never handed down a rule that in all election petitions, the order on costs must always be that each party should bear their own costs. In the present appeal, the High Court, after finding that the appellant's appeal had no merit, ordered each party to bear their own costs. On cross appeal, this Court found that on the facts of this case, the High Court had erred in making that order, and directed the appellant to pay the costs of the appeal in the High Court to the 3rd respondent and those in the Court of Appeal to the respondents.

To the extent that in ***RAILA AMOLLO ODINGA VS IEBC & OTHERS*** (supra) did not lay down any hard and fast rule on costs, there is no basis for the suggestion that this Court was in error in making a different order on costs on the facts of this case and the law applicable, or that the Court erred in failing to follow a binding precedent of the Supreme Court, contrary to Article 165(7) of the Constitution. We find this particular ground to be totally misconceived and lacking in merit.

We have come to the conclusion that the application before us does not meet the threshold set by Article 163(4) (b) of the Constitution so as to justify certification that the intended appeal involves a matter of general public importance deserving the attention of the Supreme Court. The application is accordingly dismissed with costs to the respondents.

Dated and delivered at Nairobi this 27th day of June, 2014.

P. N. WAKI

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

jkc