



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G. B. M. KARIUKI, KIAGE & J. MOHAMMED, JJ.A)

CIVIL APPEAL (APPL.) NO. 137 OF 2014

BETWEEN

JOEL NYABUTO OMWENGA1ST APPELLANT

DANIEL MUNYAO NZWILI2ND APPELLANT

ROSE WAMBUI MUNGAI3RD APPELLANT

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION1ST RESPONDENT

DANIEL MBUGUA MARI2ND RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nairobi (Hon. Lady Justice J. Kamau) dated 19th March, 2014

In

Election Petition Appeal No. 5 of 2013)

RULING OF THE COURT

Before the commencement of the scheduled hearing of this Civil Appeal No. 137 of 2014, **Mr. Mwangi**, learned counsel appearing with **Mr. Macharia** for **THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION**, the 1st Respondent in the appeal (‘the Commission’) drew the Court’s attention to the Notice of Motion filed in the appeal on 2nd July 2014.

That Motion brought under **Rule 84** of the **Court of Appeal Rules** seeks the single substantive order that;

“The appeal be struck out as no appeal lies to this Honourable Court”

Upon **Ms Kongweno**, the appellants’ learned counsel confirming that she had been served with the

Motion, and it being apparent that the Motion constituted a jurisdictional challenge, we directed that the same be argued first as it would, if successful, dispose of the appeal *in limine*.

The grounds upon which the application is predicated appear on the face of it as follows;

- a) ***“That the nature of this appeal is an Election Petition which is guided by the provisions of the Elections Act Cap. 7 Laws of Kenya.***
- b. ***The Appellants herein filed the original petition in the Chief Magistrate’s Court at Nairobi and the same was dismissed with costs.***
- c. ***The Appellants preferred an appeal against the decision of the Magistrate’s Court to the High Court pursuant to Section 75 (4) of the Elections Act, Cap. 7.***
- d. ***The Elections Act Cap. 7 does NOT provide for Appeals from the High Court to the Court of Appeal.***
- e. ***The Appellants purportedly lodged an Appeal in the Court of Appeal from the decision of the High Court which was filed on 28th May 2014.***
- f. ***The Appeal is only an abuse of the court process.***
- g. ***That litigation must come to an end.***
- h. ***That it is in the best interest of justice that this Appeal be struck out with costs as the same is NOT based on any law.”***

There was also filed in support of the Motion an affidavit sworn on 2nd July 2014 by **RUTH KAVUO MAKUTHU**, the Commission’s Legal Officer which contains the factual backing for the grounds in the Motion. The appellants, as we have indicated, were served with the Motion but they did not file a replying affidavit or other pleading in opposition or objection to the application.

Urging the application before us, **Mr. Mwangi’s** submission was that the appellants’ first appeal to the High Court from the decision of the subordinate court having been dismissed, there was no provision under the **Elections Act** nor under any other law, for them to prefer a second appeal to this Court. He termed the appeal before us an abuse of process and besought us to strike it out with costs. His learned co-counsel **Mr. Macharia**, with our leave, further elucidated that election petition proceedings and appeals are proceedings *sui genesis* and that the silence and absence of any provision for second appeals was by design of law and not inadvertent omission. He pointed to the strict timelines in the **Elections Act** and submitted that Parliament intended that finality would crystallize once a first appeal on points of law was determined. He perorated with the contention that there never is a guaranteed right of appeal beyond that of express statutory donation.

Mr. Walusala, learned counsel for **DANIEL MBUGUA MARI**, the second respondent in the appeal expressed no opinion on the application to strike it out, electing to leave it to the Court’s determination.

Ms. Kogweno opposed the application by first seeking to assure us that we are seized of jurisdiction to hear the appeal from the fact that **Section 75 (4)** of the **Elections Act** does not declare that the decision of the High Court on an appeal to it from the decision of a subordinate court in an electoral matter shall be final. Counsel chided her counterparts for misinterpreting **Section 75** of the **Act** and accused them of purporting to draft finality into the statute. She was emphatic that this Court’s jurisdiction emanates from the **Constitution** itself; which is the *grund norm* and it decrees at **Article 164 (3)** that this Court does have jurisdiction to hear appeals from the High Court.

Counsel asked us to dismiss the Motion which she characterized as an attempt by the Commission to frustrate the cause of justice. She submitted that if and when the High Court makes errors of law, this

Court can and should hear the party aggrieved. She then made this critical submission:

“There is no rule in the Elections Act allowing [second] appeals [to this Court] but the Constitution is enough.”

Ms Kogweno then proposed that in the absence of such rule, and in the consequential absence of time lines for the determination of the appeal such as her client filed herein, the Court should determine it within 6 months. She concluded by making this curious, if ominous, submission:

“The law does not give parties rights to go to the Supreme Court [from this Court’s decisions in electoral appeals] but they do.”

What we are called upon to decide is whether, in the agreed absence of an express provision of law allowing a second appeal to this Court from the High Court in its appellate jurisdiction in an electoral dispute, this Court can nevertheless, for whatever lofty reason, entertain and determine such an appeal. It is not a question of whether we can hear and determine such an appeal but rather whether we can rightfully, properly and lawfully embark on such an undertaking especially where, as here, our jurisdiction has been questioned.

It is trite law that jurisdiction is foundational to the efficacy, propriety and validity of determinations of courts of law. It behoves every court to be certain it is possessed of such jurisdiction lest it run the risk of being perceived as losing sight of an issue too basic and too plain for serious argumentation, seeing that jurisdiction is foundational to the binding force of a court’s decisions.

The late distinguished **Justice Nyarangi**, formerly of this Court, penned those eloquent and timeless words on jurisdiction that yet ring true a quarter a century later and should resound for much longer to come in. **OWNERS OF THE MOTOR VESSEL LILLIAN ‘S’ –VS- CALTEX OIL KENYA LTD [1989] KLR 1 at p 14;**

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Those famous words were penned by **Nyarangi JA** with a clear understanding that any judicial undertaking bereft and devoid of jurisdiction is pretentious emptiness. It is instructive that he immediately afterwards quoted from **WORDS AND PHRASES LEGALLY DEFINED VOL. 3: I – N at p 113**

“By jurisdiction is meant that authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means ... where a court takes it upon itself to exercise a jurisdiction it does not possess, its decision amounts to nothing...”

This must be so, for no institution and certainly no court, especially one exercising appellate jurisdiction, can pretend to be possessed of power that is unbridled, uncontained and openly at large. Creatures of the Constitution and statute that courts are, they derive and can exercise only such powers as are vested on them by the Constitution and statutes, and no other. This much has been authoritatively re-affirmed by the Supreme Court in the Advisory Opinion it rendered in **RE: THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR;**

“[30] The Lillian ‘S’ case [Supra] established that jurisdiction flows from the law, and the recipient–court is to apply the same, with any limitations embodied therein; such a court may not arrogate itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret intentions of parliament, where the wording of the legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their

respective jurisdictions are donated by the Constitution.”

(our emphasis)

These binding words are reminiscent of the persuasive decision of the **US. Supreme Court in STOLL – VS-GOTTLIEB [1938] 305 US. 165;**

“A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators.”

The right of appeal for any litigant, and concomitantly the jurisdiction of an appellate court, does not exist without express statutory conferment. In **MUNENE –VS- THE REPUBLIC (No. 2) [1978] KLR 105**, Madan and Law JJA (Wambuzi JA not signing) dealt with an argument akin to the one advanced before us by **Miss Kogweno** as follows, with which approach we respectfully agree;

“Mr. Wikinson who appeared on behalf of the appellant advanced what we consider an ingenious argument that there is a right of appeal ... because it is not expressly prohibited. We cannot accept this argument. It is well established that there is no right of appeal apart from statute, either it is expressly granted by statutory authority, or it is not. There is no right of appeal by mere implication or by inference,”

We consider this to be a sound enunciation on the foundation of this Court’s jurisdiction and, applying it to the **Elections Act**, which all parties agree does not donate or confer a right of appeal from the decision of the High Court in its appellate capacity, the conclusion is inescapable that no such appeal lies and none can be entertained.

The statute states quite clearly at **Section 75 (4)** that;

“An appeal [against the decision of a Resident Magistrate designated by the Chief Justice on a petition questioning the validity of the election of a member of a count assembly] 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 the of the appeal.”***

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.

Indeed, other than exemplifying unjustified innovation and hubris were this Court to capture and usurp such undonated jurisdiction, it would make nonsense of the need for finality and expedition that our new electoral laws sought to entrench by the strict timelines in the statute. It must be borne in mind that electoral contests and disputes are highly divisive and disruptive ventures and the people in the Constitution, and Parliament in the statute, sought to limit the period of anxiety and certainty. 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.

Rather, we must show fealty to the statute and to first principles regarding jurisdiction. This has been the law in this country for decades and has been part of the common law tradition for the longest time. We cannot arrogate ourselves a non-existent jurisdiction because, to quote an American court a century ago, in **EVANS –VS- OREGON SHORT R.R. CO.** [1915] 51 MONT. 107, 112;

“If a court has no jurisdiction of the subject of an action, a judgment rendered therein does not adjudicate anything. It does not bind the parties, nor can it thereafter be made the foundation of any right. It is a nullity without life or vigor. The infirmity appearing upon its face, its validity can be assailed on appeal or by motion to set it aside in the court which rendered it, or by objection to it when an effort is made to use it as evidence in any proceeding to establish a right,”

So seriously is jurisdiction taken that judgments and orders made in want of it are subject of a doctrine that allows the validity of a prior judgment to be impeached in a collateral proceeding. See, **Alvin F. Slight Jr; ‘Effect of Lack of Jurisdiction’** 16 Mont. L. Rev 1955 p 54.

That country's Supreme Court had, way back in 1828 held in **ELLIOT ET AL –VS- THE LESSEE OF PIERSOL ET AL** [1828], 1 PET. 328, T.L.ED. 164 (See, Slight Jr supra)that;

“... if it [any court] act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void....

This distinction runs through all the cases on the subject; and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.”

The learned University of Montana Law Scholar in his comment observed that whatever modification may have followed that decision in the intervening period;

“...the same basic doctrine, supported by the same verbage, can be found over and over again in nearly all the decisions involving a collateral attack on a prior judgment. Actually, it is no longer a rule, it is regarded more as a truism, something sacrosanct. Describing the fatal effect of judgments rendered in the absence of jurisdiction, the courts become lyrical, they are: ‘coram non iudice’, ‘without force or effect;’ ‘of no avail;’ ‘absolutely void’, ‘nullities’”.

In their own words American courts have been quite consistent in this regard. In **OLD WAYNE MUT.L.ASS. –vs- MCDONOUGH** 204 U.S. 8, 27'S.CT;

“A court cannot confer jurisdiction where none existed and cannot make a void proceeding valid. It is clear and well established law that a void order can be challenged in any court”-

In **DILLON –VS- DILLON** 187.P 27;

“Thus, where a judicial tribunal has no jurisdiction of the subject matter on which it assumes to act, its proceedings are absolutely void in the fullest sense of the term”.

Indeed, those courts have considered their approach to the question and effect of lack of jurisdiction to be, not a local or national idiosyncrasy, but as a principle that applies everywhere, stating, in NORWOOD – VS- RENFIELD 34 C 329 and in EX PARTE GIAMBONINI 49 p 732;

“A universal principle as old as the law is that a proceeding of a court without jurisdiction are a nullity and its judgment therein without effect either on person or property.”

Other jurisdictions takes a similar view. In DAPIALONG – VS- DARIYE [2007] 4. Sc (PT 111) 118, the Nigerian Supreme Court was categorical that absent jurisdiction, a court is incompetent to entertain a suit and it is irrelevant how well conducted the suit is or how learned the decision: everything of and about it remains a nullity. In his judgment, **Onnoghen** JSC cast it in memorable imagery;

“It is settled law that jurisdiction is a radical and crucial question of competence because if a court has no jurisdiction to hear and determine a case, the proceedings are and remain a nullity ab initio however well conducted and brilliantly decided they might be since a defect in competence is not intrinsic, but extrinsic, to the entire process of adjudication. Jurisdiction is therefore considered to be the nerve centre of adjudication, the blood that gives life to the survival of an action in a court of law in the very same way that blood gives life to the human being in particular and the animal in general” (Our emphasis)

This Court has only a fortnight ago in NGURUMAN LTD – VS- SHOMPOLE GROUP RANCH & ANOR [2014] eKLR entertained and granted a collateral attack on an earlier decision of a differently constituted bench of itself on the basis that the decision in question had been made without jurisdiction. In the lead Ruling, with which the rest of the five-judge bench concurred, Musinga, JA aptly expressed this Court’s view of orders made without jurisdiction;

“The ruling which this Court has been asked to review by the applicant was not decided per incuriam. I agree with Mr. Masika that the Court was making a conscious decision to grant the order of stay in the absence of a notice of appeal. However, no statutory provision or case law was cited as authority for so doing. I think the Court had no jurisdiction to grant the orders it did and to that extent such orders were void.”

In arriving at that conclusion, Musinga JA made reference to the words of the distinguished Lord Denning in MACFOY –VS-

UNITED AFRICA CO. LTD [1961] 3 ALL ER 1169 at 1172 which reflect the approach of English courts to this matter and which we consider to be good and persuasive authority;

“If an act is void, is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so.”

We consider these sentiments to be good law providing further reason, if any were needed, for our declining of the appellants’ invitation to assume a pretended but in verity a non-existent jurisdiction over the appeal they have filed in this Court. We down our tools.

The upshot is that the motion by the Commission dated 2nd July 2014 is granted and **Civil Appeal No. 137 of 2014** is accordingly struck out. The appellants shall pay the costs of the appeal to the respondents and of the motion to the Commission.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of October 2014.

G. B. M. KARIUKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

