IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPLICATION NO. 24 OF 2013 (UR. 11/13)

BETWEEN

BENJAMIN OGUNYO ANDAMA …..... APPLICANT

AND

BENJAMIN ANDOLA ANDAYI …..1ST RESPONDENT

SALLY CHESANG (RETURNING OFFICER) …..2ND RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSIONS …..3RD RESPONDENT

(An application for stay of further proceedings from the Rulings and Orders of the High Court of Kenya at Kakamega (Dulu, J) dated 19th June, 2013, 20th June, 2013 and 02 July, 2013

in

HIGH COURT ELECTION PETITION NO. 8 OF 2013)

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RULING OF THE COURT

On 4th March, 2013, Presidential, Senatorial, Parliamentary and County Assembly Elections were held in Kenya together for the first time under the present Constitution which was promulgated on 27th August, 2010. The applicant in this Notice of Motion before us, ***Banjamin Ogunyo Andama*** and the first respondent ***Benjamin Andola Andayi*** together with others were candidates for National Assembly seat for ***Khwisero Constituency in Kakamega County***. The second respondent Sally Chesang was the Returning Officer for that Constituency working under the general supervision of the third respondent, The Independent Electoral and Boundaries Commission. After the close of voting and vote tallying the

first respondent was pronounced the winner and was thereafter declared the elected member of the National Assembly for Khwisero Constituency. The applicant felt dissatisfied with that declaration. He moved to the High Court at Kakamega and filed Election Petition No. 8 of 2013. It is not easy to tell when it was filed as a copy of the Petition is unfortunately not annexed to the record before us. That Petition was placed before *Dulu J.* for hearing. It would appear that during the hearing of it and towards the end of the proceedings two applications were made by the applicant, and one objection was taken by the respondent, all of which were decided against the applicant. Purely going by the orders annexed to the record in respect of the three rulings and the rulings which were annexed, the first matter was in respect of a Supplementary Petition which was filed in the record of the Petition together with an application by way of Notice of Motion seeking leave to file affidavits in support of the Supplementary Petition. The second application was seeking witness summonses be issued for three witnesses by the Court and that the Court should not allow the

respondents to call their witnesses as the applicants' three witnesses had not been traced and the last application was for scrutiny and recounting of the votes in respect of various election polling stations in the Constituency. All these applications and objections to them were each considered at various times as they were raised on different dates and heard at different times. The learned Judge, in lengthy rulings declined to grant the orders prayed for in each application. The first was rejected vide a ruling dated 19th June, 2013, where the learned Judge ordered the Supplementary Petition struck out and the Notice of Motion seeking leave to file affidavit in support of the same supplementary Petition was also struck out. The second application seeking issue of witness summonses for three witnesses for the appellant, was rejected in a ruling dated 20th June, 2013 and the third application for scrutiny of votes and recount of votes in respect of some polling stations was declined in a ruling dated 2nd July, 2013.

The applicant, felt dissatisfied with each of the learned Judge's decisions, and has moved to this Court for redress. However, in a Notice of Appeal filed in the High Court on 2nd July, 2013 but received in this Court on 5th July, 2013, the applicant states in part:-

> *"TAKE NOTICE that the Petitioner herein Benjamin Ogunyo Andama being dissatisfied with the rulings of the Honourable Justice George Dulu given at Kakamega On 19th June, 2013, 20th June, 2013 and 02 July, 2013, intends to appeal to the Court of Appeal against the whole of the said ruling."*

We observe that that Notice of Appeal, which sets out to support appeals against three different decisions made at different times in respect of different complaints may not be legally tenable, but as we are dealing with an interlocutory matter, we say no more on that. We however point out that the Notice of Appeal was filed after the High Court had finalised the hearing and the date of Judgment was fixed for 29th August, 2013.

Following that Notice of Appeal, the applicant filed Notice of Motion dated 18th July, 2013, on 19th, July, 2013. The Notice of Motion seeks four orders as follows:-

> *"1. That this application be certified as urgent and service be dispensed with in the first instance.*
>
> *2. That the Honourable Court be pleased to grant a stay of any further proceedings in the said High Court Election Petition No. 8 of 2013, Kakamega, Pending the hearing and determination of this application.*
>
> *3. That the Honourable Court be pleased to grant a stay of any further proceedings in the said High Court Election Petition No. 8 of 2013, Kakamega, pending the hearing and determination of the Applicant's appeal.*
>
> *4. That the costs of this application be provided for."*

The grounds for the application are on the main, that the intended appeal has high chances of

success and that success of the intended appeal will be rendered nugatory unless this application is granted as the applicant will suffer irreparable loss and damage if the proceedings in the High Court Election Petition No. 8 of 2013, Kakamega are not stayed.

On being served with the record of the Notice of Motion, the first respondent, through his firm of Advocates, Nchogu Omwanza & Nyasimi, filed four grounds of opposition which were that:

" 1. The Court of Appeal lacks jurisdiction to entertain an appeal or an application as present in this case at an interlocutory stage from an Election Petition.

2. The applicant has not demonstrated that the appeal will be rendered nugatory should the Court refuse to stay proceedings at the Supreme Court. (sic)

3. The application seeks to defeat the principle of expeditious disposal of Election Petitions as provided under Article 105 (2) of the Constitution.

4. The application is incompetent and fatally defective because neither a judgment has been pronounced nor decree has been extracted as envisaged under Rule 35 of the Election (County and Parliamentary) Petition Rules."

The second and third respondents filed Notice of Preliminary Objection dated 23rd July, 2013. That Notice was duly served upon the applicant's advocates. It raises four grounds and these are that:-

1. The Court of Appeal has no jurisdiction to hear an appeal against the decision of an Election Court on an interlocutory application without leave.

2. *Appeal under Section 85A of the Election Act read together with rule 35 of Election (Parliamentary and County Elections) Petition Rules, 2013 is limited to appeals against judgment and decrees.*

3. *The Notice of Motion is incompetent and fatally defective as it has been drawn in an omnibus manner that prejudices the 2nd and 3rd respondents' rights to adequately and appropriately defend the application.*

4. *Election Petitions are neither civil proceedings or (sic) criminal proceedings capable of being determined under Rule 5 of the Court of Appeal Rules, 2010."*

When the application came up for hearing on 25th July, 2013, we directed the learned counsel for all parties to address us on the issues raised in the Preliminary objection we have cited above. This was in appreciation of the time honoured acceptable legal principle that for a court of law to act on any matters without jurisdiction is to act in vain and that without jurisdiction we would have no power to take the next step on the matter for as was stated by this Court in the case of **The Owners of Motor Vessel Lillian "S" vs Caltex Oil Kenya, Ltd (1989) KLR 1 at page 14,**

> **"when a court has no jurisdiction, there would be no basis for a confirmation of proceedings pending the evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is withou jurisdiction."**

We thus needed to go over the hurdle raised by the Preliminary Objection which specifically stated that we have no jurisdiction to hear an interlocutory appeal in respect of interlocutory decisions made by the trial court in the course of the hearing of Election Petitions.This is important because, this application seeks to stay proceedings in the High Court pending the hearing of intended appeal from the High Court which intended appeal, we have been told and it is in the record, will be an interlocutory appeal and if we are persuaded that we have no jurisdiction to hear the intended appeal then we cannot entertain an application that seeks orders pending the hearing and determination of that appeal. We need to add here

that even though the first respondent did not raise Preliminary Objection as such, his first, and fourth grounds of opposition are also on the issue of whether or not we have jurisdiction to hear an appeal from the decisions of the High Court on interlocutory matters.

Addressing us on the Preliminary Objection, Mr. Odhiambo, the learned counsel for the 2nd and 3rd respondents refereed us to several authorities and maintained that, unlike the repealed Constitution, the present Constitution – promulgated on 27th August, 2010, does not intend to donate and has not donated the jurisdiction to this Court to hear interlocutory appeals from the High Court on Election Petitions.He also submitted that the provisions of ***Section 85*** of the present ***Elections Act Number 24 of 2011*** which is close to the provisions of ***Section 82*** of the retired Act clearly indicates that the Court of Appeal is not intended to hear interlocutory matters and added that the import of ***Article 105*** of the present Constitution is that there are time limits for finalising the hearing of the Election Petitions and hence the need to do away with provisions that would defeat that intention.He also referred us to cases on similar matters decided in *Sri Lanka* and in *England* and submitted that the trend is the same.On the defect of the Notice of Appeal, he submitted that one Notice of Appeal cannot buttress more than one decision. When reminded by the Court that that matter would not be visited at this stage, he abandoned it and ended by informing us that the hearing had been concluded and only judgment was being awaited, which judgment is to be delivered on 29th August, 2013. He said that in the circumstances, the applicant should wait for judgment to be pronounced and thereafter lodge an appeal if still aggrieved, against the decision on the entire Petition rather than seek to delay the judgment of which a date has already been fixed.

Mr. Omwanza , the learned counsel for the first respondent in his submissions, stated that A***rticle 105 (a)*** and ***(b)*** of the Constitution provides only two scenarios under which an appeal can lie to the Court of Appeal. ***Section 85*** of the ***Elections Act*** says appeals to the Court of Appeal shall only be on matters of law and ***Rule 35*** of the ***Election Rules*** says appeals shall be guided by the Court of Appeal Rules. He submitted that the appeals to the Court of Appeal on Election Petitions shall only be on judgments and Decrees.He then urged us to compare that to the provisions of ***Section 23 (4)*** of the *retired* ***Elections Act*** which allowed and clearly stated that appeals could be on judgments and interlocutory decisions meaning that the present Elections Act based on the present Constitution has deliberately left out the provision for appeals on interlocutory decisions which was in the old Act. He thus submitted that appeals on interlocutory decisions do not lie to this Court. He also urged us to strike out the application.

Mr. Simiyu, the learned counsel for the applicant opposed the Preliminary Objection and contended that this Court has jurisdiction to entertain appeals from interlocutory decisions of the High Court. He referred us to ***Section 85A*** of the ***Elections Act*** and said that Section says this Court has powers to entertain appeals from the High Court on Election Petitions without qualifying the right of the appellants.He maintained that if the intention was to confine such appeals to only appeals from the final decisions of the High Court, it would have stated so. In his view ***Rule 35*** is unconstitutional in so far as it limits the power of the Court. He conceded that that Rule does limit the jurisdiction of the court but adds that it goes against the Constitution and so must be ignored.

Mr. Simiyu submitted further that ***Article 164 3 (b)*** of the ***Constitution*** is the foundation of Court of Appeal's jurisdiction. In his view, ***Section 85A*** is clear on the issue. He then referred us to the Notice of Motion and cited several complaints made therein which he asserted required the Court to consider. When Court reminded him of the decision of this Court differently constituted in the case of **Waititu vs Kidero** ***and 9 Others - Civil Application No. NAI. 137 of 2013*** made on 24th July, 2013, Mr. Simiyu said the application before us is distinguishable and referred us to the case of *Hassan Joho vs Suleiman Said Shabal, Civil Appeal No.12 of 2013* and contended that in that case the Court accepted that it has jurisdiction to entertain interlocutory appeals. He ended by asking us to avoid technicalities and go for substantive justice.

In his reply, Mr. Odhiambo referred to ***Rule 4*** of the ***Election Rules*** made pursuant to ***Article 87 (a)*** of the ***Constitution*** and urged us to accept that there is need for expeditious disposal of the Election matters and entertaining interlocutory appeals would defeat that requirement.

We have considered the Preliminary Objection, the submissions raised by all learned counsel, the

cases to which we were referred and the law.

We think the proper place to start at is the retired *National Assembly and Presidential Elections Act, Chapter 7 Law of Kenya.* We say so, because in the past since the inception of this Court, it has been hearing all appeals from the decisions of the High Court on both interlocutory decisions and final decisions and one is bound to ask under what provisions was the Court doing so. In that ***Act*** as revised in 1998, ***Section 23 (4)*** stated as follows:-

> **"Subject to Sub-section (5), an appeal shall lie to the Court of Appeal from any decision of an election court, <u>whether the decision be interlocutory</u> or final, within thirty days of the decision." (underlining supplied)**

and ***Section 23 (6)*** stated:-

"An appeal from a petition under this Act shall be heard and determined on priority basis."

That provision under ***Section 23 (4)*** of the then ***National Assembly*** and ***Presidential Elections Act chapter 7*** was clear and left no doubt whatsoever that all decisions of the High Court on Election Petitions whether interlocutory or final would be heard by this Court and there was no doubt as to the jurisdiction of this Court at that time. The retired Constitution was also clear on the jurisdiction of this Court and one could see clearly that the provisions in ***Section 23 (4)*** we have referred to above emanated from ***Section 64 (1)*** of the then retired Constitution which created Court of Appeal and stated its jurisdiction was donated to it by law. ***Section 64 (1)*** stated:-

"There shall be a Court of Appeal which shall be a Superior Court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law."

Thus strictly the Court of Appeal had no inherent powers and all the jurisdiction it had was that donated by law and as to decisions on appeal from Election decisions made by the High Court, ***Section 23 (4)*** gave it jurisdiction over both interlocutory appeals and final appeals. We must add here that the retired Constitution never set out any time limits for hearing the Election Petitions nor for hearing the appeals from such decisions.

What about the Kenya Constitution 2010 and the Elections Act, 2011 together with Elections (Parliamentary and County) Elections Rules, 2013? What do they state and what intention does one read from their departure if any, from the provisions in the repealed Constitution and Elections Act we have referred to above? These are the issues we now wish to discuss.

We have set out the relevant provisions in the retired Constitution and in retired National Assembly and Presidential Elections Act, Chapter 7 as a basis for assessing the intention of the new Constitution of Kenya 2010 and of the Elections Act 2011 as well as the Elections (Parliamentary and County Elections) Petition Rules, 2013 and Legal Notice No. 54 *(Hereinafter referred to as the **"Election Petition Rules."**)*

In our view, as has been said time and again, Election Petitions form their own category and are neither controlled by Civil Procedure Act and Rules made thereunder, nor are they controlled by the Criminal Procedure Rules. They are neither Criminal nor Civil in nature. We may say there is an element of Public law in them but even that is not all correct. They are a class of their own. Although ***Rule 35*** of the ***Election Petition Rules*** to which we shall refer herein later says:-

> **"An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules,"**

still there are some Court of Appeal Rules which cannot be applied in the Election Petition matters.One glaring example is the time allowed for filing the appeal which, if the Court of Appeal Rules were to be

applied, would be 60 days from the date of filing the Notice of Appeal but which under the Elections Act is thirty days from the date of announcement of the results which we take to be thirty days from the date of gazettement of the results by the Independent Electoral and Boundaries Commission. This is only one example. There are many other provisions of the Court of Appeal Rules which cannot be applied to Election Petition Rules.

This Court differently constituted in the case of **Ferdinand Ndungu Waititu vs Independent Electoral and Boundaries Commission, IEBC and 9 others in Civil Application NO. 137 of 2013,** where it stated:-

> "**The Elections Act and the Rules made thereunder constitute a complete code that govern the filing, prosecution and determination of election petitions in Kenya.That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Articles 87 (1), and 105 (2) and (3) of the Constitution is null and void. The Constitution is the Supreme Law of the land and all Statutes, Rules and Regulations must conform to the dictates of the Constitution."**

It will be clear from the above pronouncement that when ***Rule 35*** of the ***Election Rules*** says the appeals to this Court would be governed by the Rules of this Court, one must read the words ***"so far as applicable,"*** to that provision.

What then does the Constitution say on appeals to this Court?

This Court is established pursuant to ***Article 164 (1)*** of the ***Kenya Constitution 2010***. **S*ection 164 (3)*** States:-

> **"The Court of Appeal has jurisdiction to hear appeals from:-**
>
> **(a) The High Court, and**
>
> **(b) any other court or tribunal as prescribed by an Act of Parliament."**

Concerning Election Petitions, Article 105 of the Constitution of Kenya 2010 states as follows:-

> "**105 (1) The High Court shall hear and determine any question**
>
> **whether:-**
>
> **(a) a person has been validly elected as a member of parliament; or**
>
> **(b) the seat of a member has become vacant.**
>
> **(2) A question under clause (1) shall be heard and determined within six months of the date of lodging the Petition.**
>
> **(3) Parliament shall enact Legislation to give full effect to this Article."**

Article 105 (3) above is to an extent similar to ***Article 87 (1)*** which states:-

> "**Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes."**

It is clear, that the Constitution, which is the supreme law is clear that the High Court has to settle election disputes concerning membership of National Assembly or in short Election Petitions in respect of National Assembly Elections within six months of the date of lodging the Petition and proceeds to direct parliament to enact legislation that would give full effect to that provision. It also says in ***Article***

105 (3) that parliament shall enact legislation to establish mechanisms for timely settling of Electoral disputes. Thus the makers of the Constitution and the people of Kenya were clearly anxious to have Election disputes settled within a specific time frame and unlike the old Constitution where no time limitation was enshrined, the new constitution directs Parliament to ensure time limits are set out from the commencement to the finalisation of the Election disputes both in the High Court and in the Court of Appeal and also in the subordinate courts in respect of county Assembly Elections.

In response, Parliament put in place Elections Act (supra) together with Election Rules, ***Section 80 (3)*** of the Elections Act states:

> **"Interlocutory matters in connection with a petition challenging results of a presidential, parliamentary or county elections shall be heard and determined by the Election Court."**
>
> And Election Court is defined in the Elections Act as follows:-
>
> **" Election Court" means the Supreme Court in exercise of the jurisdiction conferred upon it by Article 163 (3) (a) or the High Court in the exercise of the jurisdiction conferred upon it by Article 165 (3) (a) of the constitution and the Resident Magistrate's Court designated by the Chief Justice in accordance with Section 75 of this Act."**

The Court of Appeal is not mentioned as an Election Court and that in itself means that in its mechanisms made to ensure timely settling of the electoral disputes or in its legislation made to ensure that the electoral petitions are determined within limited six months period by the High Court, the Court of Appeal is not one of the courts empowered to hear interlocutory matters in connection with petitions challenging results of Parliamentary or county elections. In the Waititu case (supra) we said:-

> **"If at all it was the intention of Parliament to invoke the Court of Appeal in determination of interlocutory matters, nothing would have been easier than to state that a party aggrieved by a determination of an interlocutory matter by the High Court may appeal to the Court of Appeal.Parliament must have intended to confine jurisdiction to determine interlocutory matters in petition such as defined in Section 80 (3) above to the Election Court."**

We add that, when Parliament wanted this Court to hear appeals from final decision of the High Court and on interlocutory matters, it stated so in the National Assembly and Presidential Elections Act chapter 7 at **Section 23 (4)** of the *retired* ***Elections Act*** we have reproduced herein above. It is thus clear to us that this departure is deliberate and is meant to deny the Court of Appeal the jurisdiction to hear interlocutory matters such as before us and appeals from interlocutory decisions by the High Court.

As if the above provisions were not enough, ***Rule 35*** of the ***Election Rules*** we have reproduced above is explicit on the issue as it makes it clear that an appeal which is governed by the Rules of this Court is only an appeal from judgment and decree of the High Court. It does not state an appeal would lie to this Court on interlocutory decision of the High Court. If such an appeal was envisaged, this rule, like **Section 23 (4)** of the old National Assembly and Presidential Elections Act, would have stated so. It would have been the easiest thing to do. It did not say so, in our view, deliberately because of time limits as by dint of ***Section 85 A*** of the ***Election Acts***, even this Court is required to hear and determine Appeals from the High Court decisions on Election Petitions within six months of the date they are filed.

We have perused the Uganda Court decision in the case of **Hon. Gagawala Nelson G. Wambuzi Vs Kenneth Luhogo (Election Petition Application No 00100 of 2011) (unreported)** which was quoted with approval in the Waititu case (supra) where the Uganda Court relying on ***Section 66 (1)*** of ***Uganda Parliamentary Election Act 17 of 2005*** *and* ***Rules 28 and 29*** of Uganda Parliamentary Elections (Election Petitions) Rules, decided that it had no jurisdiction to hear appeals on interlocutory decisions of the High Court. We agree. It should be noted that **Rule 28** of the Ugandan Parliamentary Elections (Election Petition) Rules states:-

> **"28. This part applies to appeals to the Court of Appeal from the decisions of the High Court on determination of Election Petitions,"**

and Rule 29 of the same Rules referred only to the judgment of the High Court and not to Rulings or Orders. In our mind ***Rule 35*** of the ***Election Petition Rules*** is specific and it cannot be interpreted to include decisions on interlocutory matters by the High Court. Equally we cannot see how the word decree can include orders. One would understand the intent of that Rule and appreciate it when one reads the overriding objectives of the Election Petition Rules. These are set out as follows:-

> **"4 (1) The overriding objective of these Rules is to facilitate just, expeditious, proportionate and affordable resolution of the election petitions under the constitution and the Act."**

When the hearing of the Preliminary objection commenced, the Court referred Mr. Simiyu to the Waititu case which had just been delivered the previous day prior to the date of hearing, but Mr. Simiyu informed us that he would distinguish it. In his well researched submission, he ended up referring us to the decision of this Court in the case of **Hassan Joho and another Vs Suleiman Said Shahbal and two others - (Civil Appeal No.12 of 2013)** in which this Court differently constituted heard what was an interlocutory application and made a short ruling on 10th June, 2013. We have perused that ruling of 10th June, 2013. In our view, it does not distinguish the matter before us because in that matter the issue of jurisdiction was never raised, never canvassed and no decision was made on it. Secondly in that matter, the Court did not make any far reaching decision on the matter that was before it. All it did was to allow the respondent time to file cross appeal and to order interim stay till the hearing of the cross appeal.

We think we have said enough to indicate that we do think we have no jurisdiction to entertain interlocutory appeals from the decisions on interlocutory applications in the High Court. If we cannot hear interlocutory appeals, it goes without saying that an application such as the one before us which seeks orders of stay of proceedings in the ***High Court Election Petition No. 8 of 2013*** at Kakamega pending hearing and determination of the intended Appeal, cannot succeed as to grant such a stay would be an act in futility as the Court has no jurisdiction to hear the intended appeal.

In any case ***Section 80 (3)*** of the Elections Act we have alluded to above clearly does not mention this Court as one of the Courts to hear interlocutory matters in connection with a petition challenging results of any election. The application before us is in itself, let alone the intended appeal, in connection to a petition challenging results of a parliamentary election. We thus have no jurisdiction to entertain it even if ***Rule 35*** had donated any jurisdiction to us. In short looked from any angle, we have no jurisdiction to hear and determine both the intended appeal, being an interlocutory appeal and the application before us, being an interlocutory matter connected to a petition challenging election results.

However, in our view, if an appeal is against a decision of the High Court allowing an interlocutory application seeking striking out of a Petition, then this Court would have jurisdiction to hear it for an order striking out a petition is a final decision on the petition and an appeal from it is no longer an interlocutory appeal but is an appeal on final decision on the Election Petition. This, in our view is only where application for striking out the petition is allowed and the petition is ordered struck out.

In the case of **Samwel Kamau Macharia and another Vs. Kenya Commercial Bank and 2 others – (Supreme Court of Kenya Civil Application No. 2 of 2011) (unreported)** the Supreme Court had this to say on jurisdiction:-

> **"A Court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.**
>
> **Where the constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional**

limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power upon Parliament to set the jurisdiction of the court of law or tribunal the Legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law."

The latter part of the above pronouncement is what happened here. Vide ***Article 87 (1)*** and ***105 (3),*** the constitution conferred power upon Parliament to facilitate mechanism or legislation to ensure timely disposal of the Election Petitions and the legislation vide ***Section 80 (3)*** of the Elections Act and **Rule 35** of the Election Rules excluded the Court of Appeal from hearing interlocutory matters and Appeals from interlocutory decisions of the High Court and that is the law as it stands.

As we have stated elsewhere above, in law jurisdiction is everything and once a court concludes that it has no jurisdiction to entertain a matter, it must down tools. We do exactly that. The matter complained of in intended appeal can very well form the complaints in the main appeal at the end of the full determination of the Petition if such an appeal will still be necessary. Because of this finding, we will not consider other matters raised in the Notice of Preliminary objection.

The sum total of it all is that as we have no jurisdiction to entertain the intended appeal and we also have no jurisdiction to hear the Notice of Motion before us it being an interlocutory matter, the Preliminary Objection is sustained. The Notice of Motion is hereby struck out with costs to be paid by the applicant to the respondents. Orders accordingly.

Dated and Delivered at Kisumu this 7th day of August, 2013.

J.W. ONYANGO OTIENO

….....

JUDGE OF APPEAL

F. AZANGALALA

….....

JUDGE OF APPEAL

S. ole KANTAI

….....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR