REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: NAMBUYE, GBM KARIUKI, GATEMBU, M'INOTI & MURGOR, JJ.A.

CIVIL APPEAL NO. 16 OF 2013

BETWEEN

JARED ODOYO OKELLO……..APPELLANT

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION…….1ST RESPONDENT

THE RETURNING OFFICER, NYANDO CONSTITUENCY, DAVID MBUI……..2ND RESPONDENT

FREDERICK OUTA……3RD RESPONDENT

ODM PARTY……4TH RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Kisumu (Muchelule, J) dated 14th June, 2013)

in

ELECTION PETITION NO. 1 OF 2013

AS CONSOLIDATED FOR PURPOSES OF THE RULING ONLY WITH

CIVIL APPEAL (APPLICATION) NO. 19 OF 2013

BETWEEN

JOEL OMAGWA ONYANCHA……APPELLANT/RESPONDENT

AND

ENG. PETER KIMORI MARANGA …….. 1ST RESPONDENT/APPLICANT

ARCH.

ALBERT MBAKA NYAUNDI.....2ND RESPONDENT/APPLICANT

GILBERT SEREM ……. 3RD RESPONDENT

THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION …..... 4TH RESPONDENT

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CONSOLIDATED RULING OF THE COURT

This consolidated ruling arises from preliminary objections raised in **Civil Appeal No. 16 of 2013** and **Civil Appeal No. 19 of 2013** from which a common issue for determination arose.

The issue for determination common to both appeals and which is the subject of this ruling is whether this Court can entertain an appeal from an interlocutory decision of an election court.

Background to Civil Appeal No 16 of 2013

In Civil Appeal Number 16 of 2013, the appellant, *JARED ODOYO OKELO*, was a candidate in the 4th March 2013 elections for Member of National Assembly, Nyando Constituency, having been nominated by the political party known as Ford Kenya. The other contestants included Fredrick Otieno Outa, the 3rd respondent, under ODM Party, Martin Omulo under NARC Kenya Party and Nicholas Awando Otieno under TNA Party.

On 5th March, 2013 the Independent Electoral and Boundaries Commission (IEBC), the 2nd respondent, declared the 3rd respondent, **Fredrick Otieno Outa** as the winner of the Nyando Parliamentary seat having garnered

24,558 votes against the appellant's 23,815 votes. According to the appellant, the results of the elections would have been in his favour had the elections been conducted freely and fairly.

On 4th April 2013, the appellant petitioned the High Court of Kenya at Kisumu in Election Petition No. 1 of 2013 in which IEBC, the returning officer Nyando Constituency, David Mbui, Fredrick Otieno Outa and ODM Party were named as 1st to 4th respondents respectively. The appellant prayed for, among others, production and scrutiny of ballot boxes and register of voters for several polling stations, counting of votes from those stations and declaration of the appellant as the winner of the election held on 4th March 2013 for Nyando Constituency. Subsequently the appellant filed a notice of motion dated 10th May 2013 before the election court and sought an order for scrutiny and recount of votes for purposes of establishing the validity of the votes cast in 14 of the polling stations in Nyando Constituency.

After hearing the parties on that motion, the election court (Muchelule, J) delivered a ruling dated 14th June 2013 in which he concluded that "*no sufficient reasons have been demonstrated by the petitioner to cause the court to order scrutiny and /or recount in results of the polling station(s) in Nyando Constituency election*" and proceeded to dismiss the motion. Aggrieved by the decision on 28th June 2013, the appellant lodged this appeal in the Court of Appeal at Kisumu, in which he seeks orders that:

"*[T]he ruling dated 14th June 2013 by the trial judge be set aside with costs and the petitioners Notice of Motion dated 10th May 2013 in the original Kisumu High Court Election Petition Number 1 of 2013 be allowed to the extent of allowing scrutiny and recount of valid votes cast in the 14 polling station* (sic)…"

On 2nd August, 2013, the 3rd respondent filed and served a notice of preliminary objection in which he intimated that at the hearing of the appeal he would apply for the appeal to be struck out on grounds that:

"(i) *Section 80(3) as well as 85(a) Elections Act as read together with Rule 35 of Elections (Parliamentary and County Elections) Petition Rules 2013 do not envisage nor permit filing of appeals against interlocutory rulings and orders of the court.*

(ii) All interlocutory issues are the preserve of the Election Court and not the Court of Appeal

(iii) Substantial proceedings were taken by an advocate who did not have practicing certificate and thus an abuse to the court process."

On 13th August, 2013, when the appeal was scheduled for hearing before the Court at Kisumu, the Court allowed the appellant's application for an adjournment of the hearing to enable him apply to the President of this Court to constitute a bench, "*probably with more judges to consider the matter of jurisdiction*." Thereafter the President of the Court at the request of counsel constituted the present bench of 5 judges to hear and consider arguments on jurisdiction and determine whether this Court can entertain an appeal from an interlocutory decision of an Election Court.

Background to Civil Appeal No 19 of 2013

As regards Civil Appeal No. 19 of 2013, IEBC in a notice in the Kenya Gazette Notice Number 3155 dated 13th March 2013, declared ***JOEL OMAGWA ONYANCHA*****,** the appellant, as the duly elected member of National Assembly for Bomachoge Borabu Constituency. Eng. Peter Kimori Maranga and Arch Albert Mbaka Nyaundi the 1st and 2nd respondents respectively in this appeal, were among the candidates who contested for the office of Member of National Assembly for Bomachoge Borabu Constituency in the 4th March 2013 general elections. In their view, the election for that constituency was not conducted and carried out in accordance with the law.

By an Election Petition filed in the High Court of Kenya at Kisii, Election Petition No. 7 of 2013, Eng. Peter Kimori Maranga and Arch Albert Mbaka Nyaundi petitioned the High Court for several reliefs that included prayers for scrutiny of votes and voters registers and for declaration that Eng. Peter Kimori Maranga was the winner of the election, or in the alternatively an order for a fresh election for Member of National Assembly for Bomachoge Borabu Constituency. The petition was supported by affidavits sworn by Eng. Peter Kimori Maranga and Arch Albert Mbaka Nyaundi on 2nd April 2013 and 3rd April 2013 respectively.

By a Notice of Motion dated 29th April 2013, Eng. Peter Kimori Maranga and Arch Albert Mbaka Nyaundi applied to the Election Court for leave to file new and additional affidavits as well as for leave to file *"affidavits properly commissioned by a commissioner of oaths devoid of conflict of interest."* By a Notice of Motion dated 3rd May 2013, the appellant applied to the Election Court for orders to strike out and expunge from the record the affidavits of Eng. Peter Kimori Maranga and Arch Albert Mbaka Nyaundi in support of the Petition and for the Petition to be struck out.

After hearing both applications the Election Court (Edward M. Muriithi, J) in a ruling delivered on 19th June, 2013, ordered the affidavits by Eng. Peter Kimori Maranga and Arch Albert Mbaka Nyaundi in support of the Petition to be struck out and expunged from the record but declined to grant the prayer for the Petition to be struck out. The Election Court also granted the petitioners leave to file and serve new affidavits.

Aggrieved by the said ruling the appellant, on 11th July 2013 lodged Civil Appeal No. 19 of 2013 seeking to set aside the order of the election court declining to striking out the petition and substituting therefor orders striking out the petition and declaring ***rule 10(3) of the Elections (Parliamentary and County Elections) Petition Rules, 2013*** inconsistent with the ***Constitution and the Elections Act, 2011*****,** and therefore null and void.

By a notice of preliminary objection dated 26th July 2013, the 1st and 2nd respondents gave notice that they intended, at the hearing of the appeal, to apply for the same to be struck out for the reason that:

" *1. The Court of Appeal has no jurisdiction to hear and appeal against the decision of an Election Court in an interlocutory, Ruling, Order and /or Direction from an Election Court; and*

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

On 13th August, 2013, when the appeal was scheduled for hearing before this Court at Kisumu, the Court allowed the appellant's application for an adjournment to enable them apply to the President of the Court to constitute a bench. The Court observed that the "*appellant should make application for a five judge bench if he requires it to the President of the Court directly*." Thereafter the President of the Court at the request of counsel constituted the present bench of 5 judges to hear and consider arguments on jurisdiction and determine whether this Court can entertain an appeal from an interlocutory decision of an Election Court.

Procedural Direction

At a session of the Court with counsel for the parties in both appeals held on 30th August 2013 it was agreed, and the Court directed, that counsel would file and exchange written submissions and appear before the Court on 10th September 2013 for oral arguments.

Submissions by Counsel

We first heard arguments from learned counsel for the parties in Civil Appeal Number 16 of 2013.

Mr Otieno, learned counsel for the third respondent opted to argue the two issues raised in the preliminary objection together. He submitted that section 80(3) and 85(a) of the Elections Act, 2011 read together with Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereafter 'the Petition Elections Rules' do not allow appeals to this Court from interlocutory decisions of the High Court. In his view, all interlocutory issues are the preserve of the election court to the exclusion of this Court.

Learned counsel founded this argument on the Constitution of Kenya, 2010, which, he asserted, deliberately sought to break away from a past where election petitions dragged on in court without conclusion until elections for a new Parliament were called. To address that problem, ***Art 87(1) of the Constitution*** mandated Parliament to enact legislation to establish

mechanisms for *timely* settling of election disputes. ***Art 105(2)*** further vested in the High Court jurisdiction to hear and determine disputes touching on elections of members of Parliament while ***Art 105(2)*** imposed a time limit of six months within which such disputes must be heard and determined**.** ***Art 105(3)*** further mandated Parliament to enact legislation to give full effect to the requirement of ***Art 105*****.**

Pursuant to the constitutional mandate given in ***Art 87(1) and 105(3)*****,** Parliament enacted the Elections Act, 2011 by which ***section 80(3)*** provided that interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court. The term 'election court' is defined by ***section 2 of the Act*** to mean the Supreme Court, the High Court and the subordinate courts when hearing designated election disputes. The Court of Appeal is not included in the definition. Further, Mr Otieno submitted, ***section 85 A of the Act*** provided that appeals from the High Court in election petitions concerning membership of the National Assembly, the

Senate or office of Governor shall lie to this Court on matters of law only and shall be heard and determined within 6 months.

Mr Otieno urged that the ***Elections Act*** under ***section 96*** empowered the Rules Committee to make rules generally to regulate the practice and procedure of the High Court with respect to the filing and trial of election and referendum petitions. Pursuant to that power, the Rules Committee made the Election Rules of which ***Rule 35*** provides that an appeal from the ***judgment*** and ***decree*** of the High Court to this Court shall be governed by the Court of Appeal Rules.

Learned counsel concluded that ***Article 164(3) of the Constitution*** which provides that *"the Court of Appeal has jurisdiction to hear appeals from the High Court"*, when read together with ***Arts 87 and 105 of the Constitution*** and the ***Elections Act*** and the ***Elections Petition Rules*** did not allow appeals to this Court from interlocutory decisions of the High Court on election disputes. Under ***Section 80(3) of the Elections Act*****,** he submitted, interlocutory determinations are the preserve of the election court and by dint of ***rule 35 of the Elections Petition Rules***, an appeal to this Court on election disputes lies only from a final decree and judgment. The reason, he argued, was to avoid multiplicity of appeals on all and sundry determinations of the election court which would undermine the constitutional imperative that election disputes must be resolved without delay. He therefore invited us to invoke ***Art 259 (1)*** on the interpretation of the Constitution and interpret the jurisdiction of this Court in appeals from the High Court on election disputes as limited to appeals from final rather than interlocutory determinations.

Mr Otieno invoked, in support of his arguments the decisions of this Court **in *FERDINAND NDUNG'U WAITITU V IEBC & 8 OTHERS, (CA NO. 137 OF 2013 (UR 94 OF 2013) (NAIROBI) (MWERA, MUSINGA & KIAGE JJ.A.)*** **and *BENJAMIN OGUNYO ANDAMA V BENJAMIN ANDOLA ANDAYI & 2 OTHERS, (CA NO 24 OF 2013 9UR11/13 (KISUMU) (ONYANGO-OTIENO, AZANGALALA & S. OLE KANTAI JJ.A.)*****.** In the former case, the applicant had applied under ***rule 5(2) (b) of the rules of this Court*** for stay of execution and stay of further proceedings in an election petition pending the hearing and determination of an appeal by this Court. The order intended to be appealed against was an interlocutory order which had set the scope of the applicant's cross examination, and which he deemed unduly restrictive. In striking out the application, this Court held that no appeal lies from an interlocutory order, ruling or direction by an election court and that a party aggrieved by such an order must await delivery of the final judgment of the High Court and then file an appeal in this Court.

The latter case involved an application for stay of proceedings pending the hearing and determination of an appeal from interlocutory orders of the election court in Kakamega. On a preliminary objection on jurisdiction, it was held that this court has no jurisdiction to entertain appeals from interlocutory decisions because ***section 80(3) of the Elections Act*** as read with the definition of 'election court' did not empower this Court to hear interlocutory matters in election disputes and that ***Rule 35 of the Election Petition Rules*** allowed only appeals from final judgments and decrees. The Court explained, however, that where an interlocutory application resulted, for example, in an order striking out an election petition, there would be jurisdiction to hear and determine a resulting appeal because such an order is a final decision on the petition. Mr Otieno concluded by urging us to follow the above previous decisions of this Court, for the sake of precedent and consistency and because they are a recent and correct statements of the law.

Mr Ochieng Opiyo, learned counsel for the 4th respondent and Mr E. M. Mukele learned counsel for the 1st and 2nd Respondents supported the preliminary objection and adopted the submissions made by Mr Otieno. Mr Mukele emphasized the need for a holistic interpretation of the Constitution to ensure that ***Art 164(3) of the Constitution was read together with Arts***

87(1) and 105 and the relevant provisions of the Elections Act and the Election Petition Rules**.** In his view, there was no conflict between those provisions. He concluded by submitting that if this Court were to entertain appeals from interlocutory decisions, it would be usurping a jurisdiction expressly reserved for the High Court by ***section 80(3) of the Elections Act*****.**

Mr Odeny, learned counsel for the applicant vigorously opposed the preliminary objection. He faulted the respondents for failure to file a formal motion to strike out the Notice of Appeal and the Record of Appeal under ***Rules 84 and 42 of the rules of this Court*****.** In his view, the procedure adopted by the respondent of giving notice of preliminary objection was unknown in law and the preliminary objection ought to fail on that account.

Moving onto the jurisdictional issue, learned counsel submitted that ***Art 164(3) of the Constitution*** conferred jurisdiction in this Court to hear all appeals, whether from interlocutory or final decisions of the High Court. He contrasted ***Art 164(3) of the Constitution of Kenya, 2010*** **and *section 64(1) of the former Constitution*** and argued that the jurisdiction of this Court today springs directly from the Constitution while under the former Constitution, that jurisdiction was conferred by legislative enactments. He invoked the supremacy of the Constitution under ***Art 2(4)*** to call for invalidation of all legislative enactments, in particular ***Rule 35*** that were inconsistent with the ***Art 164(3) of the Constitution***. He argued that under ***section 31(b) of the Interpretations and General Provisions Act, cap 2***

Laws of Kenya**,** subsidiary legislation cannot be inconsistent with the provisions of an Act, let alone purport to oust or limit jurisdiction conferred by the Constitution.

As an alternative argument, learned counsel submitted that ***Section 2 of the Appellate Jurisdiction Act*** under which the Court of Appeal Rules are made defines the term *"judgment"* broadly to include decree, order, sentence and decision. Since ***Rule 35*** provides that appeals from a judgment and decree of the High Court shall be governed by the Court of Appeal Rules, the reference to judgement under ***Rule 35*** must be read under the Appellate Jurisdiction Act to include even an order. In addition, he urged, if it was intended that ***rule 35*** limits appeals to final judgments, that would have been made clearer through the use of the term *"final"* as was the case in ***s. 23(4) of the National Assembly and Presidential Elections Act, cap 7 Laws of***

Kenya (now repealed). Relying on ***In the Matter of an Application for Directions in the Nature of Habeas Corpus by Keshavlal Punja Parbat Shah, (1955) 22 EACA 381*****,** counsel submitted that where the legislature intends to abolish the right

of appeal, it normally expresses that intendment in express words. Turning to Civil Appeal No. 19 of 2013, Mr Omwanza Ombati and Mr Edward Begi, learned counsel for the 1st and 2nd appellants prosecuted their preliminary objection along the arguments presented by Mr Otieno, which we have set out above. Mr Ombati emphasized that by dint of ***section 85 of the Elections Act and Rule 35 of the Election Petition Rules*****,** as interpreted and applied in ***Ferdinand Ndung'u Waititu*** and ***Benjamin Ogunyo Adama*** (supra), this Court has no jurisdiction to entertain the appeal, arising as it does, from an interlocutory decision of the High Court. As far as counsel was concerned, no basis had been established for this court to depart from its rather recent precedent. The decision of the Supreme Court in ***JASBIR SINGRAI & 3 OTHERS VS TARLOCHAN SINGH RAI & 4 OTHERS, (SC PETITION NO 4 OF 2012*****)** was cited to urge fidelity to the principle of *stare decisis* on account of the special role of precedent in the certainty and predictability of the law and also as authority for the proposition that departure from precedent by higher courts ought to be in exceptional circumstances only. In that decision the Supreme Court observed:

"*Certainty in the law is a principle that has guided England's apex Court for a long time. Thus in Fitzleet Estates vs Cherry (1971) 1 WLR 1345, Lord Wilberforce remarked (at p. 1349):*

"*Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected… [D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.""*

For his part, Mr Kinyanjui Theuri, learned counsel for the 3rd and 4th Respondents opposed the preliminary objection by adopting most of the submissions by Mr Odeny in Civil Appeal No. 16 of 2013. He, however, added that in his reading, ***Arts 87 and 105 of the Constitution*** were consistent with ***Art 164(3)*** and that the latter Article was not limited or intended to be limited in any way by the former two Articles.

Learned counsel revisited the argument that where the Constitution intends to limit a court's jurisdiction, it has usually done so in express terms. He cited ***Art 163(4) (b)*** which expressly limits appeals from this Court to the Supreme Court and ***Art 165(5)*** which expressly excludes the jurisdiction of the High Court in matters reserved for the exclusive jurisdiction of the Supreme Court, the Industrial Court and the Land and Environment Court. In his view, such limitation can only emanate from the Constitution itself; not from statute and in the instant case the Constitution had not in any way limited the jurisdiction of the Court of Appeal to hear appeals from the High Court. On the strength of that reasoning, learned counsel attacked ***section 85A of the Elections Act*** as unconstitutional attempt to limit the jurisdiction of this Court under ***Art 164(3)*** by purporting to restrict appeals from the High Court on election matters to issues of law only.

Counsel concluded by submitting that there were practical difficulties that a party aggrieved by an interlocutory decision of the election court faces if he has to wait until the conclusion of the hearing and the issuing of a final order and decree. These include the requirements in the Court of Appeal Rules for the filling of the Notice of Appeal and the Record of Appeal within set time, the propriety of an omnibus Notice of Appeal for multiple interlocutory rulings,

a challenge adverted to by the Court in ***Benjamin Ogunyo Adama*** (supra), and the extent to which the interlocutory decision or decisions complained of can be said to affect the final determination.

Lastly, we heard Mr Kibe Mungai, learned counsel for appellant who joined Mr Theuri in opposing the preliminary objection. Mr Mungai started by putting the right of appeal in election matters in Kenya in historical context, to make the case that the Constitution of Kenya, 2010 intended to broaden rather than to constrict the right of appeal to this Court, including from election disputes. He saw the historical evolution of the appellate jurisdiction of this Court in electoral disputes as a great contestation between limitation and expansion, a reality easily apparent in decisions such as ***KARANJA V KABUGI AND ANOTHER, (1976-85) EA 165*****,** ***MATIBA V MOI, (1993-2009) 1 EAGR, 207*** and ***MOI V MATIBA & 2 OTHERS, (2008) 1 KLR 622 [EP].*** Mr Mungai referred us to ***S 44 of the former Constitution*** as it stood in the 1980s. That provision then conferred jurisdiction on the High Court to hear and determine whether a person had been validly elected a member of the National Assembly or whether a seat in the National Assembly had become vacant. Under ***section 44(5),*** the Constitution expressly provided that a determination by the High Court on any matter under ***section 44(1) "shall not be subject to appeal".*** Notwithstanding ***section 44(5), the Court of Appeal*****,**

in *KARANJA V KABUGI AND ANOTHER, (1976-85) EA 165***,** held that ***S 44(5)***

did not specifically preclude appeals from other determinations such as rulings on interlocutory applications. The response to ***Karanja v Kabugi*** (supra) was a constitutional amendment to ***section 44(5)*** which tightened the limitation of the right of appeal by providing that:

"*The determination of the High Court of any question under this section, whether the decision be interlocutory or final, shall not be subject to appeal".*

That restriction on the right of appeal to this Court on election disputes persisted until 1997. Following what are now known as the Inter Parties Parliamentary Group (IPPG) Reforms of that year that were intended to introduce political and institutional reforms in the country and expand enjoyment of constitutional rights and freedoms, ***section 44(5) of the former Constitution*** was repealed. This was followed by an amendment to the National Assembly and Presidential Elections Act, cap 7 by which ***section 23 (4)*** was introduced allowing appeals from the High Court to this Court on all decisions in election disputes. That provision provided:

"(4) Subject to subsection (5), an appeal shall lie to the Court of Appeal from any decision of an election court, whether the decision be interlocutory or final, within thirty days of the decision".

That remained the position until the promulgation of the Constitution of Kenya, 2010 and the repeal of the National Assembly and Presidential Elections Act by the Elections Act, 2011. Granted, that clear evolution from a state of limitation towards liberalization of the right of appeal, Mr Mungai submitted, it would be catastrophic to interpret ***Art 164(3) of the Constitution*****,** a great document heralded as our ultimate charter of rights and liberties, in a manner that takes us back to the pre-IPPG reform days. Learned counsel submitted that the proper approach is to see ***Art 164(3)*** as a consolidation of the gains of electoral reforms rather than a continuation of the limitations borne of a dark and bygone era.

Mr Mungai emphasized that the jurisdiction of this Court flowed directly from the Constitution and it could only be limited by the Constitution itself or by legislation expressly authorized by the Constitution to introduce limitation. As far as counsel was concerned, the Constitution neither expressly limited the jurisdiction of the Court of Appeal in election disputes, nor did it expressly authorise Parliament to enact a statute to introduce limitations. To that extent, any purported limitations introduced by the Elections Act and the rules made thereunder are unconstitutional, null and void. Learned counsel cited the

decision of the Supreme Court in ***SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK & 2 OTHERS, CIVIL APPLICATION NO. 2 OF 2011,*** to make the point that where jurisdiction is exhaustively provided by the Constitution, Parliament cannot extent or limit that jurisdiction. In the pertinent part, the Supreme Court expressed itself as follows:

"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."

Learned counsel criticized the decisions of this Court in ***Ferdinand Ndung'u Waititu*** and ***Benjamin Ogunyo Adama*** for holding that this Court has no jurisdiction to hear and determine interlocutory appeals from election disputes. In his view, the Elections Act and the rules made thereunder could legitimately *regulate* the right of appeal to this Court, but they cannot curtail it because it flows directly from the Constitution. On the same vein, he criticized,

HON GAGAWALA NELSON G. WAMBUZI V KENNETH LUBOGO, (UGANDA

COURT OF APPEAL EPA NO. 0010 OF 2011), which was cited with approval in ***Ferdinand Ndung'u Waititu*** and which interpreted ***S 66(1) of the Uganda Parliamentary Election Act*** providing *"**a person aggrieved by the determination of the High Court on hearing an election petition may appeal to the Court of Appeal against the decision"*** to mean that the appeal envisaged therein was an appeal against a decision determining an election petition rather than a decision from an interlocutory matter. In the view of learned counsel, the Uganda decision was based on a statutory provision and did not address jurisdiction as created by the Constitution. He submitted further that that decision is no avail in Kenya in light of the clear provisions of ***Art 164(3).***

Mr Mungai concluded by emphasizing the importance of a right of appeal in our constitutional and justice system. Conferred rights and freedoms are best protected when there is an opportunity to ventilate grievances in an appellate Court. In the present instance, he argued, it was more compelling to recognize the right of appeal to this Court in all instances because at issue is the exercise and enjoyment of political rights. He urged the Court to be guided by the need to ensure that aggrieved parties have an opportunity to fully ventilate their grievances rather than the mere observance of artificial time frames, because observance of the timelines was not an end in itself.

Analysis and Determination

Before we consider the issues raised in these appeals, it is prudent to note at this point that at around the time the parties presented their arguments, this Court ***(Visram, Koome and Odek, JJ.A.)*****,** sitting in Nyeri in

PETER GICHUKI KING'ARA V IEBC & 2 OTHERS, CA NO. 23 OF 2013) held that the Court of Appeal has jurisdiction to hear and determine appeals from interlocutory decisions of the High Court in election matters, save that that jurisdiction is deferred and exercisable after a final judgement and decree of the High Court.

The first issue that we shall begin by disposing of is Mr Odeny's argument that the preliminary objection was not properly before us because a formal application by way of notice of motion has not been filed. We do not agree with the objection that has been raised. In ***MUKISA BISCUIT MANUFACTURING CO LTD V WEST END DISTRIBUTORS LTD, (1969), EA***

696 Law JA observed as follows, regarding preliminary objections, at page 700:

"So far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear

application out of pleadings and which if argues as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court."

And Sir Charles Newbold added at page 701:

"*A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised of any fact has to be curtained or if what is sought is the exercise of judicial discretion."*

On his part, Nyarangi JA in ***THE OWNERS OF THE MOTOR VESSEL "LILLIAN S" V CALTEX OIL (KENYA) LTD, (1989) KLR 1*** stated that to a court,

jurisdiction is everything and without jurisdiction, a court has no power to make even one step. In such a case, a court downs its tools. In his exact words:

"*A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue right away on the material before it".*

Granted the foundational nature of a jurisdictional question, and having regard to ***Art 159(1) (d) of the Constitution***, the respondents who have raised preliminary objections were not obliged to file formal applications to strike out the appeals. They could legitimately raise the issue of jurisdiction, so long as they afforded their opponents an opportunity to know what kind of objection had to be met and reasonable opportunity to prepare themselves. As we have indicated above, unequivocal notices of preliminary objection were filed and served on the parties which left no doubt about the jurisdictional question being raised. In the circumstances, we find no merit in Mr Odeny's objection.

We now turn to consider the question that is central to this objection, namely whether this Court has jurisdiction to entertain interlocutory appeals from decisions of the High Court on election disputes. In our view, the starting point should be the jurisdictional base of the Court of Appeal, namely ***Art***

164(3) of the Constitution of Kenya, 2010, the extent to which that provision differs from its predecessor, section 64 of the former Constitution of Kenya and the legal effect of that difference. ***Article 164(3)*** of the Constitution of Kenya, 2010 reads as follows:

"*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.

On a plain reading of *Article* ***164(3) (a),*** no restrictions on the jurisdiction of the Court of Appeal to hear appeals from the High Court are readily apparent. It is only in respect of appeals from *"other courts or tribunals"* that the Court of Appeal has such jurisdiction as is conferred or limited by an Act of Parliament. It is important to compare and contrast how the jurisdiction of this Court is conferred under the Constitution of Kenya, 2010 with how it was conferred under the former constitution. The jurisdiction of the Court of Appeal under the former constitution was conferred quite differently from the 2010 Constitution. ***Section 64(1)*** merely created the Court of Appeal and conferred jurisdiction on it as follows:

"*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."*** *(Emphasis supplied).*

Under the former Constitution, one had to fall back on legislation to determine whether in a particular matter, the Court of Appeal had jurisdiction. It was exactly in that context that a line of decisions, prominent among them

ANARITA KARIMI NJERU V THE REPUBLIC, (No. 2) (1976-80) 1 KLR 1283,

held that the Court of Appeal has only such jurisdiction as is expressly conferred on it by statute and cannot claim a general supervisory role over the judicial process.

ANARITA KARIMI NJERU V THE REPUBLIC (No. 2) was very alive to the importance and relevance of the method used in conferring jurisdiction of the Court of Appeal. The Court identified two approaches in the conferment of jurisdiction that correspond to the two distinct formulations in our former and present constitutions. The Court stated:

"*The conferment of jurisdiction of a Court of Appeal takes one of two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived of jurisdiction that is done specifically in a particul*ar enactment. The secondi is where the legislature establishes a Court of Appeal expressly without

jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms: either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court; or by conferring jurisdiction on the Court of Appeal in particular enactments, as considered appropriate."

In our opinion, the different formulation of the jurisdiction of the Court of Appeal under the two Constitutions has significance and is not accidental. It is because of the way in which the jurisdiction of the Court of Appeal under the

2010 Constitution is formulated that it is not tenable, in our opinion to insist that there must be statutory basis in addition to ***Art 164(3)*** before the Court of Appeal can exercise jurisdiction. That approach was mandatory and legitimate under the former Constitution, but we are not convinced that it is still valid under the Constitution of Kenya 2010. As we indicate later, that is not to suggest that each and every decision of the High Court is necessarily appealable to this Court. There will be many instances where recognition and accommodation of competing constitutional principles and values will dictate reasonable regulation in appeals to this Court.

In our view, there is nothing in the Elections Act, 2011 or the Elections Petition Regulations, 2013 that limits or otherwise ousts the jurisdiction of the Court of Appeal under ***Art 164(3). Article 85A of the Elections Act*** provides as follows:

"85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be–

(a) filed within thirty days of the decision of the High Court; and

(b) heard and determined within six months of the filing of the appeal.

Leaving for the moment the provision that an appeal shall lie to this Court on matters of law only, all that the above section does is merely to regulate the exercise of the right of appeal by requiring that an appeal be filed within 30 days of the High Court's decision and be heard and determined within six months of the filling of the appeal.

For its part, ***section 80(3) of the same Act*** provides as follows:

"Interlocutory matters in connection with a petition challenging results of presidential, parliamentary or county elections shall be heard and determined by the election court."

It must be emphasized that ***section 80*** empowers the election court to deal with election petitions and it is distinct that the Court of Appeal is definitively excluded from the definition in ***section 2*****.** We do not, however, see how ***section 80(3)*** can be the basis for the argument that there is no right of appeal to the Court of Appeal on interlocutory matters. First and foremost, the reason for the exclusion of the Court of Appeal from the definition of an election court arises from the fact that it is not a court of original jurisdiction. Its jurisdiction is strictly appellate. On the other hand, the Supreme Court, has original jurisdiction to hear disputes touching on the election of the President ***(Art 140)*****,** whilst the High Court has original jurisdiction to hear disputes touching on election of members of the National Assembly, Senators and, Governors ***(Art 105 and section 75(1); Elections Act)*** and designated subordinate courts have original jurisdiction to hear disputes on elections of members of county assemblies ***(section 75(1A), Elections Act). To consider section 80(3)*** as the basis for curtailment of the right of appeal to this Court on interlocutory appeals is untenable and is no different from surmising that because ***section 84*** empowers an election court to award costs of a petition, that by itself means that there is no right of appeal to this Court from such award.

The most controversial argument advanced thus far, in our view, in support of the preliminary objection is that the jurisdiction of the Court of Appeal to hear and determine interlocutory appeals in election matters is limited by the ***Rule 35 of the Election Petition Rules***. That rule provides that:

"35. An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules."

We need not belabour the first principle that subsidiary legislation cannot, in our jurisdiction, be inconsistent with the principal legislation under which it is made, let alone the Constitution ***(See section 31(b) of the Interpretations and General provisions Act, cap 2 Laws of Kenya)*****.** It cannot possibly be that jurisdiction which is not expressly limited by the Constitution in ***Art***

164(3) is left to be limited by subsidiary legislation. We do not buy the argument at all. **In *Peter Gichuki King'ara v IEBC & 2 Others*** (Supra), that

argument was disposed off as follows:

"We hold that rule 35 of the Elections Petition Rules, being a subsidiary legislation within procedural rules, is not a jurisdictional rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We further hold that Rule 35 of the Elections Petition Rules cannot limit the jurisdiction of the Court of Appeal as granted under Art 164(3) of the Constitution and as operationalized by section 85A of the Elections Act. A subsidiary legislation cannot expand, add to r reduce the jurisdiction of any court as spelt out in the Constitution or by statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or statute. A rule cannot limit the jurisdiction of a court of law."

We have come to the conclusion that nothing in the Elections Act or the Election Petition Rules limits the jurisdiction of this Court under ***Art 164(3)*** to hear and determine interlocutory appeals. However, in our view, a purposive and holistic interpretation of ***Art 164(3)*****,** having regard to all other pertinent provisions of the Constitution to which we have made reference below, lead us to conclude that the right of appeal to this Court from the High Court in interlocutory election matters has legitimately been regulated so as to be invoked after the final determination in an election petition. We cannot consider ***Art 164(3)*** in segregation or in isolation from other provisions of the Constitution that cumulatively give a picture of the values that the provisions seek to achieve. As stated by the United States Supreme Court in ***SOUTH***

DAKOTA V NORTH CAROLINA, (192 US 268 (1940) L ED**:**

"Elementary rule of constitutional construction is that no one provision of the Constitution is to be segregated from all the others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be interpreted as to effectuate the general purpose of the instrument."

More important to us, ***Article 259(1) of the Constitution*** provides as follows regarding interpretation of the Constitution of Kenya, 2010:

"259. (1) This Constitution shall be interpreted in a manner that-

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE, S C ADVISORY OPINION NO 2 OF 2012) the majority in the Supreme Court stated as follows regarding interpretation of constitutions similar to ours:

"A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. ***Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions.*** *Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions****. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other."*** *(Emphasis added).*

There is little doubt in our minds that timeliness in the resolution of disputes in general, and electoral disputes in particular, is a core purpose, value and principle of the Constitution of Kenya, 2010**.** ***Art 159(2) (b) of the Constitution*** recognises, the principle that *"justice shall not be delayed"* as one of the key principles that must guide courts in the exercise of judicial authority. On electoral disputes, the following provisions underline the value of timeliness in dispute resolution as a constitutional imperative.

Article 105 (2) of the Constitution**,** for example, sets a period of six months within which parliamentary electoral disputes must be heard and determined. ***Article 140*** prescribes 14 days as the period within which disputes regarding election of the president must be heard and determined. ***Article 87(1) of the Constitution*** has mandated Parliament to enact legislation to provide mechanisms for ***timely*** resolution of election disputes. In exercise of the powers conferred by ***Art 87(1)*****,** Parliament has enacted the Elections Act, which in ***section 85A (b)*** requires appeals on election disputes from the High Court to this Court to be heard and determined within six months. ***Section 75 (1) of the same Act*** requires gubernatorial electoral dispute to be heard and determined by the High Court within six months. Lastly, ***section 75 (2)*** prescribes a time limit of six months within which a designated subordinate court should hear and determine electoral disputes regarding elections of members of county assemblies.

We are, therefore, called upon to interpret the Constitution, on the one hand bearing in mind the clear provision of ***Art 164(3) of the Constitution*** that vests in the Court of Appeal jurisdiction to hear and determine appeals from the High Court and the concomitant importance of access to justice, and on the other the uncontested constitutional value in timely resolution of disputes generally and electoral disputes in particular. We must avoid a situation where a continuous and steady stream of election interlocutory appeals would clog the election petition process so completely that the ability of both the High Court and the Court of Appeal to dispense with petitions in their respective stipulated periods of six months would be impossible and thus defeat the constitutional requirement of timely resolution of election disputes.

Taking into account all the above provisions of the Constitution as well as those of the Elections Act which has been enacted pursuant to an express power donated by the Constitution to Parliament to advance specified values,

we hold, as this Court held in ***PETER GICHUKI KING'ARA V IEBC & 2 OTHERS, CA NO. 23 OF 2013,*** that the Court of Appeal has jurisdiction to hear and determine appeals from election disputes, whether final or interlocutory, but to protect and uphold the clear constitutional principles and values of among others timeliness, issues that arise in interlocutory determinations must be canvassed on appeal after the final determination of the election court.

We are alive to the arguments advanced regarding the practical difficulties that a party aggrieved by an interlocutory decision of the election court faces if he has to wait until the conclusion of the hearing and issuing of a final judgment and decree before lodging an appeal and the argument that a right of appeal may be forfeited on account of non observance of the rules of this court on lodgment of appeals such as filing the notice of appeal and the record of appeal within prescribed time, the propriety of an omnibus notice of appeal for multiple interlocutory rulings, and the extent to which the interlocutory decision(s) complained of can be said to affect the final ruling.

The practice of appealing against interlocutory decisions in the final judgment is not unknown to our jurisdiction. It is the order of the day in criminal cases, where interlocutory determinations in the course of the trial are raised on appeal after conclusion of the trial. The concern may be addressed by formulation of procedural rules specific to election petitions. In addition, in view of what we have held above, particularly about the constitutional rights and values, we do not see how the Court of Appeal Rules can stand on the way of an appellant who wishes to address, in an appeal after the final disposal of a petition, a determination that was made in an interlocutory stage. All that is required is purposive interpretation of the rules to ensure that the appellant's constitutional right to raise an issue that was determined in the interlocutory stage is protected.

In the event, we uphold the preliminary objection and strike out the appeals in both Civil Appeal No. 16 of 2013 and Civil Appeal No. 19 of 2013 with costs to the respective respondents. Those are our orders.

Dated and delivered at Nairobi this 27th day of September, 2013.

R. N. NAMBUYE

JUDGE OF APPEAL

G. B. M. KARIUKI

JUDGE OF APPEAL

S. GATEMBU KAIRU

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR