IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPLICATION NO. 26 OF 2013 (ur 13/13)

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

AND IN THE MATTER OF INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (REGISTRATION OF VOTERS REGULATIONS, 2012

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2013

AND

IN THE MATTER OF THE ELECTION FOR GOVERNOR OF SIAYA COUNTY

CORNEL RASANGA AMOTH ….....APPELLANT

VERSUS

WILLIAM ODHIAMBO ODUOL.....1st RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2nd RESPONDENT

BENSON MUGATSIA ….....3rd RESPONDENT

(Application from an Order of the High Court of Kenya at

Kisumu (Muchelule, J) dated 22nd July, 2013

in

KISUMU ELC PET No. 2 OF 2013)

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RULING OF THE COURT

When this application came up for hearing on 13th August, 2013 we delivered a short ruling and said we would give our reasons today. We now give our reasons.

On the 4th day of March, 2013 Kenya successfully went through a truly historic General Election for President and Deputy President, members of the Senate, members of the National Assembly, County Governors, Women County Representatives and County Representatives.

The General election was conducted by the Independent Electoral and Boundaries Commission ("2nd respondent") who engaged Benson Mugatsia ("3rd respondent") as the Returning Officer for Siaya County. Charles Rasanga Amoth ("the applicant") and William Odhiambo Oduol ("the 1st respondent") participated in the election. They both contested the gubernatorial seat for Siaya County. Following the election the 2nd and 3rd respondents declared the applicant as the duly elected governor for Siaya County having garnered 142,901 votes. The 1st respondent was the runner-up having garnered 133,900 votes.

The 1st respondent challenged those results in Election Petition Number 2 of 2013 at the High Court Kisumu. In the course of the hearing of the petition, the learned Judge of the High Court (Muchelule J) following an application by the 1st respondent ordered a recount of votes in certain specified polling stations.

Following the recount the 2nd and the 3rd respondents lodged applications in the High Court for among other things scrutiny and examination of election materials for specified polling stations in the county. Pending the scrutiny, they also sought stay of adoption, use and implementation of the results of the earlier recount. The following orders were also sought:-

> **(b) The court orders the opening and removal of the presidential ballot boxes in respect of these polling stations to get from therein the election materials subject of the scrutiny.**
>
> **(c) An order be given to the 1st and 2nd respondents to avail the parliamentary ballot boxes in respect of the polling stations to be opened to get the election materials and results therein for comparison with those in the polling stations at hand.**
>
> **(d) An order be given for an immediate and in depth investigations into possible post-election malpractices including the tampering with the election materials and results in respect of the polling stations.**
>
> **(e) The court summons for examination of any person responsible for the handling of the gubernatorial results in Siaya County and especially for the specified polling**

stations.

(f) The court makes a finding that the contents of the ballot boxes in the polling stations were tampered with.

(g) An order for costs.

The applicant, on his part, also sought the scrutiny of the votes cast in specified polling stations. In addition, he also sought, inter alia, the following orders:-

(a) The presiding officers of the polling stations, the returning officers for Rarieda and Gem constituencies and the regional coordinator responsible for Siaya County be summoned to give evidence in relation to the documents and materials that are required for scrutiny and also give evidence on the outcome of the elections of 4-3-2013.

(b) The County Elections Coordinator and security officers who were responsible for the security of the ballot boxes from the day they were handed to them by the presiding officers be summoned to give evidence.

The 1st respondent on his part applied for scrutiny of all votes cast in all polling stations in Bondo Constituency for the gubernatorial election and the recount of all the votes cast in all the polling stations in Alego Usonga, Ugunja and Ugenya constituencies for the gubernatorial elections held on 4th March, 2013. The 1st prayer was abandoned at the hearing.

All the three applications were canvassed before the High Court at length and in a reserved ruling dated 22nd July, 2013, the learned Judge found no merit in them and dismissed them with costs to abide the outcome of the petition.

The applicant who is the 3rd respondent in the Petition before the High Court was aggrieved by the dismissal of his application and therefore lodged a Notice of Appeal before that Court. He then filed the Notice of Motion now before us in which he seeks one substantive order namely:-

(a) That the court be pleased to order a stay of proceedings, in the Election Petition before the High Court and in particular the receipt of final submissions and subsequent judgment until the issue of scrutiny in the appeal is heard and determined.

The application was certified urgently and finally fixed for hearing on 13th August, 2013. When the application came up for hearing before us, counsel for the 1st respondent applied to canvass a preliminary objection of which notice had been filed and served. The notice expressed the objection as follows:-

"1. That this Honourable Court of Appeal has no jurisdiction to entertain, the application as it arises from an interlocutory decision of the Superior (sic) Court made in an election petition in respect of which no appeal lies to this court.

2. That the application is otherwise bad in law, misconceived, incompetent and an abuse of the process of this Honourable Court of Appeal".

We allowed arguments on the preliminary objection as the primary issue raised challenges the jurisdiction of this court to entertain an appeal from an order of the High Court made on an interlocutory application in the course of hearing an Election Petition. It is now settled that without jurisdiction, we down tools and cannot take any further step in the matter. This principle was crystallized in the case of T**he Owners of Motor Vessel Lilian "s" v Caltex Oil Kenya Ltd [1989] KLR 1**. At page 14 this Court, differently constituted, held:

"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 without jurisdiction."**

Learned counsel, for the 1st respondent, Mr. Wakla, who was led by learned counsel, Mr. Kwach, addressed us at length in support of the Preliminary Objection. In his opening remarks he rehashed the principle enunciated in the Lilian"s" case and further invoked the decision of the Supreme Court in **Macharia and Another v Kenya Commercial Bank Ltd and 2 others** [Civil Application No. 2 of 2011] (UR). At paragraph 68 of the Macharia case, the Supreme Court held:

> **"(68). 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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction the Court cannot entertain any proceedings."**

Counsel further invoked Articles 160 (1) and 164 (3) of the Constitution of Kenya 2010 to buttress his argument that a court's jurisdiction is a creature of either the Constitution or statute and that the relevant statute with regard to this Court is the Appellate Jurisdiction Act Chapter 9 Laws of Kenya.

Having laid that basis, counsel then took us through the electoral dispute resolution provisions of the Constitution and the Elections Act. In counsel's view , there is no right of appeal from an interlocutory order of the High Court in an election petition and where a party is aggrieved by such an order he must await the final decision on the dispute and then lodge his appeal. That, according to counsel, is the clear language of Section 80 (3) of the Elections Act and Rule 35 of the Election Petition Rules .

Reliance was placed upon two decisions of this Court to buttress that proposition. The first case counsel invoked is that of **Ferdinand Ndungu Waititu vs Independent Electoral and Boundaries Commission (IEBC) and 8 others** [Civil Application No. 137 of 2013 (UR 94 of 2013) (UR) in which this Court, differently constituted, concluded as follows:-

> **"In view of the foregoing, we hold and find that under Rule 35 of the Elections Petition Rules, no appeal lies to this Court from an interlocutory order, ruling or direction by an Election Court. A party aggrieved by such an order must await delivery of the final judgment of the High Court then file an appeal to this Court."**

The second decision invoked by counsel is the ruling of this Court in Civil Application No. 24 of 2013 (UR 11/13) (UR) between **Banjamin Ogunyo Andama and Benjamin Andola Andayi & 2 others** where we said:-

> **"Vide Articles 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 Rules 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."**

Mr. K'opot, learned counsel for the applicant, in responding to the Preliminary Objection, submitted that the two decisions of this court relied upon by counsel for the 1st respondent were made perincurium and are bad in law. According to counsel, this Court has jurisdiction to determine all appeals from the High Court under the Constitution including all decisions made during the hearing of an election petition. In counsel's view, Article 164 (3), of the Constitution does not limit this court's jurisdiction. For that proposition, counsel cited the case of **Matiba v Moi [1994] KLR 412,** where this court, differently constituted, assumed jurisdiction to hear an appeal from an interlocutory order of the High Court in an election petition. It was counsel's further argument that decisions made on interlocutory applications

normally confir certain rights and are appealable unless the right of appeal is expressly denied which is not the position in this case. Counsel drew parallels with other decisions of this court in appeals arising from interlocutory orders of the High Court on boundaries and party nominations and submitted that similarly this court has jurisdiction to entertain appeals from orders made in interlocutory proceedings in Election Petitions.

Mr. Nyamondi, learned Counsel for the 2nd and 3rd respondents, associated himself with Mr. K'opot's submissions and reiterated that this Court indeed has jurisdiction to entertain appeals from orders made on interlocutory applications in Election petitions. It was counsel's further argument that the two decisions of this court relied upon by counsel for the 1st respondent failed to consider the provisions of Section 85 A of the Elections Act which, unlike Rule 35 of the Election Petitions Rules, does not limit the jurisdiction of this court to only hear appeals from final decisions of the High Court in Election Petitions. In counsel's view, Rule 35 of the Election Petition Rules which limits this Court's jurisdiction, should give way to the unrestricted provisions of Section 85A aforesaid.

Counsel emphasized that the order appealed from declined an application for scrutiny and unless considered at this stage, there would be no other opportunity to consider the same as the Election Court will cease to have jurisdiction within a specified time. Counsel sought to distinguish the Uganda case of **Hon. Gagawala Nelson G. Wambuzi vs Kenneth Luhogo** [Election Petition Application No. 00100 of 2011] (UR) which was cited with approval by this court in the two decisions already referred to above on the basis that the Court of Appeal in Uganda is a creature statute and not the Constitution.

We have carefully considered the Preliminary Objection and the rival submissions of counsel as well as all the cases cited to us and the applicable law. Having done so, our focus will be on the weighty issue of whether this Court has jurisdiction to entertain an appeal from the High Court order denying the applicant an order of scrutiny in the on going election petition.

First, the Constitutional provisions: This Court is established under the provisions of Article 164 (1) of the Constitution of Kenya 2010 which reads:

> **"164 (1) There is established the Court of Appeal..."**
>
> And sub-article (3) reads as follows:-
>
> **"(3) 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."**

The above provisions set out the Constitutional foundation for this Court's jurisdiction which is to consider appeals from the High Court and from tribunals as by law prescribed. With respect to Electoral disputes, Articles 87 and 105 of the Constitution are pertinent. The former reads as follows:-

> "**87 (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes."**

And Article 105 reads 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."

So, whereas, under Article 87 (1) the Constitution empowers Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes, Article 105 (2) limits the hearing and determination of a petition challenging the validity of an elected member of parliament to six months from the date of lodging the petition.

It will be noted that gubernatorial seats are not mentioned in Article 105 (1) of the Constitution but the timeous disposal of an electoral dispute involving the election of a Governor of a county was clearly envisaged in the said Article. It cannot have been the intention of the people of Kenya that disputes over election of County Governors be disposed of beyond the six (6) months Constitutional limit. In our view, a dispute over the election of a Governor who is the Chief Executive of a County requires priority attention just like a dispute over the election of a Member of Parliament. We dare say a dispute over the election of a Governor should be given enhanced priority given the Governor's position in the county.

Pursuant to Article 87 (1) of the Constitution aforesaid, Parliament enacted the Elections Act 2011. The Rules Committee as constituted under the Civil Procedure Act was, by virtue of Section 96 of the Elections Act, mandated to make rules generally to regulate the practice and procedure of the High Court with respect to the filing and the trial of election petitioners. In accordance with that mandate the Rules Committee formulated the Election Petition Rules. Rule 35 thereof reads as follows:-

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

It is plain that the above rule envisages appeals to this Court from "the judgment and degree" of the High Court. Interlocutory directions, rulings and/or orders of the High Court are not mentioned in the rule at all. The interpretation we ascribe to this provision is that under the Elections Act, appeals to this court may only be from the decisions of the Election Court which finally and conclusively determines the rights of the parties with regard to the dispute before it.

Section 80 (3) of the Elections Act (supra) is also pertinent. It reads as follows:-

"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:-

"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."

It is plain that the Court of Appeal is not mentioned as an Election Court. This Court is therefore not one of the courts empowered to entertain interlocutory matters in connection with petitions challenging results of a presidential parliamentary or county elections. This is what we said in the case of **Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 others** (supra) a decision we rendered only last month.

As we stated in that case the exclusion of this Court from entertaining appeals from orders made on interlocutory applications was not by accident. The exclusion was deliberate given the History of

electoral dispute resolution mechanisms in this country. The predecessor of the Elections Act was the National Assembly and Presidential Elections Act, Chapter 7, Laws of Kenya. Section 23 (4) of that Act was in the following terms:-

> **"Subject to Sub-sections (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.**"

The framers of the Elections Act 2011 were fully alive to the provisions of the retired National Assembly and Presidential Elections Act aforesaid which expressly empowered this Court to entertain appeals from any decision of an election court whether the decision was interlocutory or final and deliberately omitted that requirement from the Elections Act 2011. To exclude any possibly of doubt Rule 35 of the Elections Rules was formulated and expressly limits the jurisdiction of this Court to only entertain appeals from judgments and decrees of the High Court in election disputes.

Counsel for the applicant and the 2nd and 3rd respondents submitted that section 85 A of the Elections Act empowers this Court to entertain all appeals from the High Court on election petitions without any restrictions. The section reads 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."**

This section does not define "decision" nor does it expressly state whether the decision appealed from is an order of the High Court on an interlocutory application or the judgment or decree of the High Court. It is however clear that the decision must be in an election petition concerning membership of the National Assembly, Senate or the office of county governor.

The section cannot be read in isolation. It must be read together with the provisions of Section 80 (3) of the Elections Act (supra). It must also be read together with Articles 87 (1) and 105 (2) and (3) of the Constitution of Kenya 2010 already referred to above. The Section must also be construed in the light of the set out objective in the Constitution with regard to expeditions disposal of electoral disputes within specified time lines.

In arriving at this interpretation, we have considered the position in other jurisdictions. In doing so the Ugandan case of **Hon. Gagawala Nelson G. Wambuzi v Kenneth Lubogo** (supra) comes to mind. That case was cited with approval in both the Waititu case and the Andama case (supra). There, the Court of Appeal of Uganda, interpreted Section 66 (1) of Uganda Parliamentary Election Act which provides that a person aggrieved by the determination of the High Court on hearing of an election petition may appeal to the Court of Appeal against that decision. In its own words:-

> **"The appeal envisaged here is an appeal against a decision determining an election petition rather than a decision from an interlocutory matter. We cannot read in this section any Right of appeal against decisions of the High Court on interlocutory matters. The section has no exceptions or provisos relating to substantial points of law going to the root of a petition. The legislature makes no mistakes when it legislates. It is presumed to know what it wants provided in the law it makes. The law must be interpreted as it is and not, as it may be considered by some, it ought to be. The spirit behind that section and rules 28 and 29 of the Parliament Elections (Election Petition) Rules S1 141 – 2 is that election petitions should be heard and concluded expeditiously, hence the absence of a provision for appeal against interlocutory, orders of the High Court."**

Rule 28 of the Ugandan Parliamentary Elections (Election Petition) Rules is in the following terms:-

28. **This part applies to appeals to the Court of Appeal from the decisions of the High Court on determination of Election Petitions".**
28. And Rule 29 of the Rules only refers to the judgment of the High Court.

The two rules are in pari passu with our Rule 35 of the Election Petition Rules (supra) and Section 66 (1) of the Uganda Parliamentary Election Act is similar to our Section 85 (A) of the Elections Act.

The interpretation of Section 66 (1) of the Uganda Parliamentary Election Act by the Uganda Court of Appeal is therefore of persuasive value to us. The Uganda Court of Appeal refused to interpret the provisions of Section 66 (1) in isolation and considered the spirit and objectives of the Act which is to hear and determine election petitions expeditiously.

In our case the Constitution of Kenya 2010 sets the pace with regard to the hearing and determination of electoral disputes. Article 105 (2) (supra) limits such hearing and determination to within six months of the date of lodging the petition. To achieve that result, Article 105 (3) empowered Parliament to enact legislation to give full effect to the purpose of the Article. There is also Article 87 (1) (supra) which placed on Parliament the obligation to enact legislation establishing mechanisms for timely settling of electoral disputes. Parliament in fidelity to the Constitution and particularly to Articles 105 (3) and 87 (1) enacted, the Elections Act 2011 which captured the aspirations of the people of Kenya.

When the people of Kenya promulgated the Constitution of Kenya 2010, they were unhappy with the period electoral disputes took to be resolved. In some cases the disputes were not resolved for the entire life of Parliament. In their wisdom, therefore the people of Kenya prescribed the period within which those disputes should be resolved, hence the parameters set out in Article 105 (2) and (3) aforesaid.

A member of a County Assembly is not mentioned in Article 105 aforesaid. In our view, the omission to mention membership of a County Assembly was not intended to leave open the period within which a petition challenging election to such an Assembly should be determined. That was not the expectation of the people of Kenya when they promulgated the Constitution of Kenya 2010. We say so, because in Article 87 (1) of the same Supreme Law the people of Kenya empowered Parliament to enact legislation to establish mechanisms for the timely settling of electoral disputes. Article 87 (1) does not exclude electoral disputes involving membership to the County Assembly. Parliament was there perfectly entitled to provide as it did in Section 75 (1) and (1A) of the Elections Act as follows:-

> **"75 (1) A question as to validity of election of a County governor shall be determined by the High Court within the county or nearest to the county.**
>
> **(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.**
>
> **(2) A question under sub-section (1) shall be heard and determined within six months of the date of lodging of the petition"**

It would be absurd to argue that Section 75 (1) and (2) of the Elections Act is unconstitutional merely because it makes provision for the timely hearing and determination of gubernatorial disputes when the timelines are not in the Constitution. For the same reason it cannot be argued that merely because the term "decision" rather than "judgment" or "decree" is used in Section 85A (a) of the Elections Act, appeals from interlocutory orders of the High Court are envisaged. That interpretation would indeed defeat the spirit and intention of the people of Kenya in prescribing strict timelines in the resolution of electoral disputes. If all orders, directions and rulings made in interlocutory applications were appealable, there would be no possibility that electoral disputes would be resolved within the strict timelines set out in the Supreme Law of the Land.

The underlying theme in the Constitution 2010 regarding resolution of electoral disputes at whatever level is timeliness. With regard to a dispute over the validity of the election of President, Article 140 (1) provides:-

> **"Within fourteen days after the filing of a petition under clause (1) the Supreme Court shall hear and determine the petition."**

With regard to a petition challenging the election of a member of Parliament or where a question arises as to whether a seat of a member of Parliament has become vacant, the dispute as mandated under Article 105 (2)

> **" shall be heard and determined within six months of the date of lodging the petition."**

Neither Article 140 (1) nor Article 105 (2) are subject to any pending interlocutory appeals. Once a petition has been lodged the clock starts ticking and within six months of lodging the petition a resolution must be made.

We must not also forget that appeals to this Court must be heard and determined within six months of filing the same. In the premises the term "decision" in Section 85 (A) of the Elections Act must be construed to mean the final decision on the electoral dispute at the High Court.

In our view appeals from interlocutory rulings, orders or directions during the hearing of electoral disputes would clog our justice system with the result that there would be no end to resolution of electoral disputes, the very mischief the Constitution 2010 sought to redress. We must guard, and protect the ideals and aspirations of Kenyans. That is the express demand made of us in Article 159 (1), 2 (b) and (e) of the Constitution 2010 which reads as follows:-

> **"159 (1) Judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunals established by or under this Constitution.**
>
> **(2) In exercising judicial authority the courts and tribunals shall be guided by the following principles**
>
> **(a) Justice shall be done to all, irrespective of status.**
>
> **(b) Justice shall not be delayed;**
>
> **…….....**
>
> **…….....**
>
> **(c) The purposes and principles of this Constitution shall be protected and promoted."**

In the case of **Njoroge & 6 others vs Attorney General & 3 others** [2KLR E.P], this Court differently constituted stated as follows:-

> **"The Constitution is not an Act of Parliament but the Supreme Law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purposes for which its makers framed it."**

As we have already said, the spirit and tenor of the Constitution 2010 with regard to electoral disputes is that the same must be resolved expeditiously within appointed strict timelines already stated above. We must give effect to these ideals and aspirations of the people of Kenya as enshrined in the Supreme Law of the Land.

In **S v Zuma CCT 5/94 1995,** the Constitutional Court of South Africa emphasized that in interpreting the Constitution regard must be paid to the legal history, traditions and usages of the country. On our part we take judicial notice of the fact that historically electoral disputes took inordinately too long to resolve and that is what the Constitution 2010 and the Elections Act redressed. It is therefore absurd to say that Rule 35 of the Elections Petition Rules, which expressly restricts appeals to this Court from final decisions of the High Court, is unconstitutional. It cannot be as the rules formulated pursuant to the provisions of the Elections Act are in consonance and in harmony with the objective of The Supreme law.

We were referred to this court's decision in **Matiba v Moi** (supra) for the proposition that this Court should assume jurisdiction to hear appeals from orders of the High Court made on interlocutory applications. In that case Matiba had lodged a petition in the High Court challenging the election of Moi as president. The petition was signed by Matiba's wife under a power of attorney as he himself was unable to sign the petition due to ill-health. An application was filed seeking the striking out of the petition on the basis that it had not been signed by the petitioner contrary to the then provisions of the Constitution. The High Court, as an election court, dismissed the application and Moi filed a Notice of Appeal intending to challenge the High Court decision. Matiba, by a Notice of Motion, applied to strike out the Notice of Appeal on the main ground that the Court of Appeal had no jurisdiction to entertain any appeal from a decision of the High Court in an election petition. The application was declined on the ground that this court had jurisdiction to entertain the appeal as the appeal was not from a decision of the High Court, on the validity of Moi's election but on the competence of the petition itself.

With all due respect to counsel, we think that decision is clearly distinguishable from this case. There, the court specifically found that the order appealed from was not on the validity of Moi's election but on the competence of the petition. At that time the retired Constitution specifically excluded this court from hearing appeals from the High Court on decisions affecting the validity of an election. This court, differently constituted, was of the view that any other decision of the High Court, not about the validity of an election was appealable.

We have no doubt in our minds that even under the law as it applied then, we would decline jurisdiction in the case before us because the order appealed from obviously concerns the validity of the election. An order allowing or refusing a recount or scrutiny is an order on an aspect of the validity of an election which could not then be heard by this court under the Constitution as it then applied.

The Constitution then did not also prescribe strict timelines within which electoral disputes would be resolved. The Constitution further provided no right of appeal to this court where the High Court decided on the validity of any election. The position has since changed. Whereas the Constitution 2010 makes no express provision for appeals to this court, there is no express denial of a right of appeal to this court. The Elections Act, now provides for appeals to this Court from the High Court in election petitions concerning membership of the National Assembly, Senate or office of county governor. We have already explained the purview of this court's jurisdiction elsewhere in this ruling and we need not repeat the same. What is of significance is the fact that a party who is aggrieved by a decision of the High Court in a interlocutory application has a clear remedy when a final decision on the election petition has been pronounced.

In the end and as we held in the Waititu and Andama cases, we find and hold

that we have no jurisdiction to entertain appeals from interlocutory orders of the High Court made in election petitions. We uphold the Preliminary Objection raised by the 1st respondent and strike out with costs the Notice of Motion dated 24th July, 2013.

It is so ordered.

Dated and Delivered at Kisumu this 23rd day of September, 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