



**Adam v Jiir & 3 others (Election Petition Appeal E008 of 2023)
[2023] KECA 884 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KECA 884 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
ELECTION PETITION APPEAL E008 OF 2023
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA
JULY 24, 2023**

BETWEEN

HASSAN MOHAMED ADAM APPELLANT

AND

AHMED ABDULAHI JIIR 1ST RESPONDENT

AHMED MUHUMED ABDI 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

**COUNTY RETURNING OFFICER, WAJIR COUNTY MOHAMED ALI
ADAN 4TH RESPONDENT**

*(Being an Appeal from the Judgment and Orders of the High Court at Garissa
(Dulu, J.) dated 3rd March 2023 in Election Petition No. E008 of 2022)*

RULING

1. Hassan Mohamed Adam, the appellant herein, was a candidate in the Wajir County Gubernatorial elections in which Ahmed Abdullahi Jiir, the 1st respondent, and Ahmed Muhumed Abdi, the 2nd respondent, also contested for the seat of Governor and Deputy Governor of Wajir County respectively. The appellant was aggrieved by the outcome, and filed a petition on September 9, 2022, contesting the return by the Independent Electoral and Boundaries Commission (IEBC), the 3rd respondent, and as announced by the returning Officer, the 4th respondent, declaring the 1st and 2nd respondents' election as the Governor and Deputy Governor of Wajir County.
2. The appellant alleged several illegalities and irregularities in the conduct of the elections, which included intimidation and misinformation of voters, gross discrepancies in the statutory forms, improper tallying and tabulation of results, failure to deploy KIEMS kits and inflation of vote numbers



- through the use of supervisor method of voter identification. He sought an order for scrutiny and recount; that the results declared by the returning officer be set aside and fresh elections be conducted.
3. The 1st and 2nd respondents jointly denied all the allegations set out in the petition.
 4. Likewise, the 3rd and 4th respondents jointly denied all the allegations as set out in the petition, maintaining that the elections were backed by an elaborate electoral management system in compliance with various electoral laws, which system included several layers of safeguards to ensure an open, transparent, participatory and accountable system to guarantee free and fair elections pursuant to the Constitution.
 5. Upon hearing the petition, the trial court dismissed the petition with costs; and upheld the election of the 1st and 2nd respondents as Governor and Deputy Governor respectively.
 6. Aggrieved by that outcome, the appellant, through Sallah & Company Advocates, filed this appeal on grounds that the gubernatorial elections were not conducted in accordance with the Constitution, or the requisite election laws and regulations, as there were several breaches of the law, which fatally affected the integrity of the election, and the trial court was in error in its findings.
 7. Before the appeal could be heard, interlocutory applications were raised, but directions were given at the pre-hearing conference that the applications and the main appeal be heard together. When the appeal came up for hearing, Senior Counsel, Mr Kioko Kilukumi, Mr Nyamodi and Mr Issa Mansur led Mr Sallah, who is on record for the appellant. Senior Counsel Professor Tom Ojienda led Mr Omwanza, who is on record for the 1st and 2nd respondents, while Mr Mahat Somane and Mr Hassan Nura appeared for the 3rd and 4th respondents.
 8. Mr Kilukumi, SC, on behalf of the appellant, informed this Court that the effect of the aforesaid directions meant that the applications would be subsumed in the main appeal.
 9. Professor Ojienda, on behalf of the 1st and 2nd respondents, notified us that the application dated April 28, 2023 intended to flesh out and snuff out the life of the appeal at the conception stage. This was fortified by Mr Omwanza, who reiterated that they had a preliminary issue regarding this Court's jurisdiction on the basis that the notice of appeal, which is the document that triggers the jurisdiction of this Court, is in this instance fatally flawed and totally incompetent. Learned Counsel contended that the notice of appeal ought to have been filed in the Court of Appeal at Nairobi, yet in this instance it was filed on March 9, 2023 at the High Court registry in Garissa; and this means that the appeal is to be lodged at the High Court, and in effect no appeal lies before this Court; that in any event, the notice of appeal relied on is not included in the record of appeal, and does not contain sufficient information.
 10. He further pointed out that the notice of appeal filed does not comply with the provisions of rule 6(1) of the Court of Appeal (Election Petition) Rules, 2017, which requires that all appeals be initiated by way of a notice of appeal, and rule 6(2) which requires that an appeal be lodged within seven (7) days of the contested decision. Learned Counsel emphasized the critical status of a notice of appeal since under rule 6(3) it is the one that identifies the judgment on which the appeal is based, specifically pointing out which part of the judgment is contested; the basis for which the appeal is made; and is required to set out with precision the grounds of appeal; and concisely set out the reliefs sought. In this regard, we



were urged to consider the Supreme Court decision in *Anuar Loitiptip vs. IEBC and 2 Others [2019] eKLR* which stated that:

' And we emphasize that it is in the proper and timely filing of a Notice of Appeal, an absolute requirement, that invokes a court's jurisdiction. It is a vital document and without it, there can be no appeal.'

11. This position was supported by Mr Somane on behalf of the 3rd and 4th respondents, who submitted that a notice of appeal is a jurisdictional prerequisite which must contain sufficient information. In urging us to find that the notice of appeal sought to be relied on is wanting, counsel pointed out that there can be no redemption in trying to excuse the character of the notice of appeal herein. He drew our attention to a similar situation that played itself out in the case of *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 others [2018] eKLR*, where this Court was urged to strike out the appeal as the notice of appeal was filed at the High Court Registry instead of the Court of Appeal Registry, and although it was eventually transferred to this Court's registry, it was wanting in form and content, in setting out the grounds of appeal in the memorandum of appeal; in addition, the record of appeal which was filed did not contain a notice of appeal lodged at the Registry of the Court. Despite all these lapses which were almost on all fours as the present case, this Court excused all these missteps in the notice of appeal as mere inelegant mode of instituting an appeal, and breathed life into the appeal by invoking rule 5 of the Election Petition Rules, and Article 159 (2) of the *Constitution* to hold that no party would suffer prejudice if the appeal was heard on its own merits. The unspoken exhortation by learned counsel is that we should not be drawn into this approach as this decision was superseded by the Supreme Court decision in Anuar Loitiptip (supra) decision.
12. All the respondents thus held a shared position that the notice of appeal as filed offends the provisions of rule 6 of the Election Petitions Rules, and is thus null, void and incapable of initiating any appeal. They further contend that a notice of appeal is fundamental, and where it is defective, no appeal can be founded on it.
13. On the other hand, the appellant in opposing the preliminary objection, argued that it is not well founded as it was brought late in the day, and not formally as contemplated by rule 19 of the Court of Appeal (Election Petition) Rules, 2017; and in any event, that there is a valid notice of appeal on record.
14. Learned Counsel Mr. Issa Mansur, on behalf of the appellant, in opposing the objection pointed out that this is an oral application made by the respondents, and founded on wrong premises, particularly because under rule 19 (sic) of the Election Petition Rules, 2017, a party who intends to have the notice or record of appeal struck out must do so within 7 days from the date of service of the notice or record of appeal; and that since no such formal application was filed within the stipulated period, then under rule 19(2) (sic) a party is precluded from raising the issue. It was argued that the issue did not arise at the case management stage; and that the Court of Appeal Rules do not require specifically that a notice of appeal be lodged in this Court.
15. Secondly, it was argued that to the extent that rule 6(3) requires a notice of appeal to set out the grounds of appeal, then it is inconsistent with rule 6(1) and 6(2) which simply provides that an appeal is initiated by a notice of appeal. Although a concession was made that the only notice of appeal in the record of appeal is the one filed in the High Court, found at page 1533- 1534 of the record, there exists another notice of appeal filed in the Court of Appeal dated March 10, 2022, filed within the stipulated 7 (seven) days after the judgment of the High Court, albeit not part of the record of appeal.
16. In light of this, learned counsel invoked the provisions of rule 4(2) of the Court of Appeal (Election Petition) Rules, 2017, to argue the point that the Court ought to exercise its jurisdiction in a reasonable



manner, as well as Article 159(2)(d) of the Constitution which frowns on sacrificing substantive justice at the altar of procedural missteps, and grant them a lifeline, by allowing for filing of a supplementary record of appeal to formally include this later notice of appeal.

17. To augment this thread of contention, Senior Counsel, Mr Kilukumi, pointed out to us that the first notice of appeal appearing at page 1532-1533 of the record, may be inelegantly drawn, and may lack some details, but it is nonetheless a notice of appeal which notifies the parties that a dissatisfied litigant intends to challenge the decision of the High Court; and it is sufficient to clothe this Court with the requisite jurisdiction. The appellant's counsel seeks to distinguish the instant situation from that in the Anuar Loititip (*supra*) case, arguing that in the latter, no notice of appeal had been filed at all, whereas in the present case there is the second notice of appeal which was placed in the appellant's replying affidavit in the petition that was before the High Court, and it should be deemed as valid, as it is available to the Court even if it is not in the record of appeal; and the only omission is that it has not been formally presented before this Court.
18. It was also argued that the contents of the notice of appeal do not need to be more detailed than what is contained in the present one, as in this instance, the appeal is against the whole decision, and not part of it, thus there was no need to set out what aspects of the judgment is challenged. Further, that any election court when dealing with election petitions, need not read the rules in isolation, and can easily fall back to the Civil Procedure Rules when it is necessary to do so.
19. The respondents in reply, drew from the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696*, to reiterate that there is no need for filing a formal application, as a preliminary objection can be raised at any moment, and without notice; that in any case, rule 19 does not come to the appellant's aid as it is not applicable on issues of jurisdiction. We note that the rules have been revised and the provision cited now appears as rule 17 in the Court of Appeal (Election Petition) Rules, 2017 (Revised)]. It is submitted that whereas rule 17 contemplates expressly that the application for striking out must be formally made, there is a caveat in that it relates to a scenario where no appeal lies or where some essential step has not been taken, but cannot apply where the core issue is the jurisdiction of the Court.
20. We were also invited to consider the decision in *Apungu Arthur Kiberia vs IEBC & 2 Others [2018] eKLR* which addressed the argument that where the appeal is against the entire judgment, the notice of appeal need not specify what issues are contested, and find that there is no competent appeal before us; and resist the invitation to extend time to allow filing of a supplementary record of appeal, on grounds that a notice of appeal is a primary document which cannot be filed through a supplementary record; and that there are decisions of this Court which deal with the question as to whether Article 159(2)
(d) Is a panacea for every procedural lapse
21. The issue that we must first determine relates to our jurisdiction to determine the preliminary objection in light of the argument by the appellant's counsel that it has not been brought through a formal application, and is being raised too late in the day thereby offending the provisions of rule 17.
22. What then is a preliminary objection? This Court in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd (supra)* at page 700 D-F Law, JA as he then was, stated:

' A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and if which argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court'



At page 701 paragraph B-C Sir Charles Newbold, P added the following, ‘A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.’

23. The issue of jurisdiction as raised is a pure point of law, and goes to the very root of the matter, which must be dispensed with first, and at any stage of the proceedings. Indeed, it is a position widely acknowledged that preliminary objections on points of law can be raised at any stage of proceedings. This Court in answering the question as to whether it has jurisdiction to entertain the preliminary objection, therefore finds in the affirmative, and pronounces that we have jurisdiction to hear the preliminary objection.

24. Now, on the issue whether the notice of appeal as filed at page 1532 -1532 of the record of appeal is competent and whether this Court has the jurisdiction to extend time for filing a notice of appeal in this matter, this Court takes refuge in the Supreme Court’s holding in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others [2012] eKLR*, that:

‘ A court’s jurisdiction flows either from the *Constitution* or legislation or both and a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.’

Indeed, jurisdiction is a matter of law, which, in our view, cannot be capped by any regulation or rule, and must be settled before a court can delve into the main dispute.

25. Rule 6(1) of the Election Petition Rules provides that:

‘ 6.

(1) Unless otherwise provided by statute, all election petition appeals shall be initiated by notice of appeal.’

26. This was underscored by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2014] eKLR* to the effect that:

‘ A notice of appeal is a primary document and ought to be filed outright whether or not the subject matter under appeal requires leave or not. It is a jurisdictional prerequisite.’

27. The importance of a notice of appeal is stamped with authority by the Supreme Court’s holding in *Patricia Cherotich Sawe vs IEBC & 4 Others [2015] eKLR* at paragraph 28 that:

‘ What is the objective purpose of a notice of appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short or delayed. It signals the intention to pursue an appeal. It is only fair that parties, in light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process; ‘litigation must come to an end.’

28. The Supreme Court has also in the case of *IEBC vs Jane Cheperenger & 2 Others [2015] eKLR* emphasized that without filing a notice of appeal there can be no expressed intention to appeal.

29. The respondents’ counsel submitted that the notice of appeal before the Court is not compliant with rule 6 of the Election Petition Rules, 2017, as the same is filed in the High Court at Garissa and, as such, this Court has no jurisdiction to entertain the appeal as there is no appeal existing. To support this



proposition, the respondents rely on the case of Anuar Loitiptip vs IEBC & 2 Others (supra) which stated that:

' And we emphasize that it is in the proper and timely filing of a Notice of Appeal, an absolute requirement, that invokes a court's jurisdiction. It is a vital document and without it, there can be no appeal.'

30. Rule 8 sets out what constitutes a record of appeal, among them being the notice of appeal, see rule 8(1) (i); whilst sub-rule (5) provides that the record of appeal must be filed within 30 days, which means that since the impugned judgment was delivered on March 3, 2023, in this instance the record of appeal should have been filed by April 3, 2023.

31. The nature and character of a notice of appeal is set out in rule 6(3) as follows:

- ' (3) A notice of appeal shall identify the judgment from which the appeal is based and shall, in separate numbered paragraphs-
- a. Specify whether all or part of the judgment is being appealed and, if a part, which part;
 - b. Identify the source of the right of appeal and the basis for the jurisdiction of the Court to determine the appeal;
 - c. Precisely set out the grounds of the appeal;
 - d. Concisely state the relief sought;
 - e. Provide the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice; and
 - f. Contain a request that the appeal be set down for hearing in the appropriate registry.'

1. From this listing, it is apparent to us that the notice of appeal subsumes what would ordinarily be a Memorandum of Appeal, thus the specificity of its contents. Indeed, a valid notice of appeal must meet the requirements set out in rule 6(3), for it to kick off the jurisdiction of this Court. Therefore, the invitation to consider applying the general Court of Appeal Rules in this particular instance is not cushioned by rule 4(2) of the Election Petition Rules, as there exists a clear and specific provision to guide this Court. This Court in the case of Apungu Arthur Kiberia vs IEBC & 2 Others [2018] eKLR held that:

' Matters election, election petitions and election petitions appeals in particular, are sui generis. They cannot be placed on the same plane with ordinary civil appeals. Indeed, in tandem with the operational rules, they are christened 'Election Petition Appeals' and not 'Civil Appeals'. See also Rozaah Akinyi Buyu vs IEBC & 2 Others [2014] eKLR.'



33. This Court has also cited with approval the case of *Tyota Basu & Others vs Debi Ghosal & Others* February 26, 1982, which pronounced itself on the Indian Electoral Representation of the People Act, 1951 as follows:

' An electoral petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction and has to be exercised with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A court has no right to resort to them on consideration of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election petitions, court is put in a straight jacket.'

34. The respondents further argued that this Court has no jurisdiction to hear this appeal as per section 85A of the [Elections Act](#) as the notice of appeal intends to appeal against the whole of the judgment which means on both fact and law, contrary to aforesaid section.

35. The appellant's counsel admitted that the notice of appeal found at pages 1532-1533 of the record of appeal was filed in the High Court at Garissa. He further conceded that the second notice of appeal filed on March 10, 2023 in the Court of Appeal does not form part of the record of appeal before court. Counsel further stated that the notice of appeal before the Court is a proper one, and that the filing of the notice in the wrong court was an error and relied on Article 159(2) (d) to cure that defect, and asked this Court to allow him file a supplementary record so as to include the second notice of appeal dated March 10, 2023. In this regard, the appellant's counsel relied on rule 5 of the Election Petition Rules which provides that:

' 5. The effect of any failure to comply with these Rules shall be a matter for determination at the Court's discretion subject to the provisions of Article 159 (2) (d) of the [Constitution](#) and the need to observe the time set by the [Constitution](#) or any other law.

36. Counsel also referred to Article 159(2) (d) of the [Constitution](#) as a cure for failure to file a notice of appeal – the provision being:

' (d) Justice shall be administered without undue regard to procedural technicalities;'

37. The jurisdiction of this Court to hear election appeals is found in section 85A of the [Elections Act](#) which states:

' (1) An appeal from the High Court in an election petition concerning membership of National Assembly, Senate or the office of county governor shall lie to the court on matters of law only.'

38. In the case of [Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others \[2014\] eKLR](#) the Supreme Court pronounced itself on what constitutes questions of law only as used in section 85A of the [Elections Act](#) vis-a-vis the jurisdiction of the court, captured at paragraph 81 of the court's judgment.



39. In *John Munuve Mati vs Returning Officer Mwingi North Constituency & 2 Others [2018] eKLR*, addressing the meaning of the term 'matters of law,' this Court held that it means:

' The interpretation or construction of the Constitution, statute or regulation made thereunder or their application to the sets of facts established by the trial court whether the conclusions of the trial Judge are based on the evidence on record or whether they are so perverse that no reasonable tribunal would have arrived at them.'

Since jurisdiction is only created by the Constitution or by law, then we are persuaded that it is a matter of law as contemplated in the foregoing discussion.

40. The rule which deals with the filing, timeline and content of the notice of appeal is rule 6 of the Election Petition Rules. It is not disputed that the notice of appeal found in page 1532-1533 was filed within the stipulated timeline. In the Apungu case (supra) this Court referred to the definition section of the Court of Appeal (Election Petition) Rules, 2017 and defined 'registry' to mean registry of the Court and including a sub registry. In the same section, 'Court' is defined as the Court of Appeal.
41. It is admitted that the appellant herein did not file the first notice of appeal in the Court of Appeal registry but rather filed it in the High Court Registry at Garissa. It is also clear to this Court that the said notice is not in the format as provided for in rule 6(5). It is also clear to the Court that the purported notice is wanting as it seeks to challenge the whole of the judgment which is based on both facts and law contrary to section 85A of the Election Act.
42. However, there is the second notice of appeal dated March 10, 2023 which was filed in the Court of Appeal registry and paid for, it was referred to in the appellant's application in the High Court Election Petition E012 of 2022 and marked as Ex. HM1, but it does not form part of the record of appeal. Would it be unreasonable of us to then insist that there is no notice of appeal filed in the Court of Appeal, yet it is before our very own eyes? After all, isn't it human to err, and make some error of omission? Is Rule 5 available to salvage the situation? Unfortunately, matters are not as simple as waving a wand of human error, as this second notice is similar to the first notice found in the record of appeal, completely wanting in form and content. As such, there would still be no valid notice of appeal, and filing of a supplementary record of appeal would not offer any healing balm.
43. In interpreting the effect of non-compliance with rule 6 and the relief available under rule 5 of the Election Petition Rules, 2017, and Article 259 (2) (d) of the Constitution, the Supreme Court in *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others [2019] eKLR* emphasized the need for a court to carry out a balancing act in exercise of its discretion vis a vis the flexibility of the provisions of Article 159(2)(d) of the Constitution, and the need to observe timelines set by the Constitution or any other electoral law as well as the need to determine each case on its own merits, while taking into account the unique circumstances of a case.
44. We have attempted to apply the foregoing approach, and posed the question: 'But what if the appellant were to file a supplementary record introducing an amended notice of appeal incorporating the requirements under rule 6 (3)?' In our view, granting such a move, would not portray a balance of the interests of the parties as we would be allowing undue advantage to one party to fill in the gaps pointed out by the adversary.
45. That being the position, it is our finding that there is no valid appeal before the Court as only a proper notice of appeal can trigger an appeal.



46. This Court notes that the appellant has taken refuge in the provisions of Article 159(2) (d) to cure the defective notice. Kiage, JA, being the dissenting voice in the Salat case (supra) stated:

' I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destructions of rules of procedure and to create an anarchial free for all in the administration of justice. This court must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, when it seems to be aiding one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in this even handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their applications are concerned.'

47. We respect this very eloquently expressed approach by the learned Judge, yet can we re-invent the wheel and ignore the very specific directions in the Apungu case (supra), where the Supreme Court in acknowledging that parties and advocates may not have been aware of the Rules earlier on, noted that the Rules were no longer strange, and were within the public domain, stated as follows:

' 43] Article 159(2)(d) of the Constitution was also never meant to grant a Court jurisdiction denied by a Statute and we are therefore satisfied that in the specific circumstances of the matter before it, whatever our views regarding the place of filing a Notice of Appeal, a matter well regulated by Rule 6 of the Court of Appeal Rules in any event, we are unable to find that the Court of Appeal exercised its jurisdiction whimsically or unreasonably to warrant our interference with its decision.

(44) Having so said however, as the apex Court in the land, we are obligated to give directions where the Court of Appeal renders conflicting decisions as is now a matter of common knowledge regarding Notice of Appeal Rules aforesaid. While it is now clear to us that parties and their advocates may not have been aware of the publication of those Rules, and whereas we have refused to interfere with the exercise of discretion in the circumstances of the appeal before us, the Rules are no longer strange and are in the public domain. Parties in the next elections petitions cycle ought therefore to abide by the Rules and we foresee no conflicting decisions emanating from the Court of Appeal as happened in the 2017 – 2018 cycle.'

We hold the view that the apex Court gave a clear directive to all parties to comply with all the procedural requirements in the next election cycle, and there can be no rationale for indulgence.

48. Consequently, we find that the issue before us is not one of a procedural technicality that can be cured by Article 159 of the Constitution or rule 5 of the Election Petition Rules. We are in agreement with the respondents' argument that the notice of appeal filed was a nullity as it purports to be a notice of appeal filed under the Election Petition Rules. By parity of reasoning, it follows that no notice of appeal was filed in this matter and there is no jurisdiction for the Court to entertain the appeal and/or deign to extend time for filing the notice of appeal.



49. Ultimately, in step with the infamous refrain that jurisdiction is everything and without it a court has no power to make any further step, and must down its tools as was expressed in *The Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Limited [1989] KLR 1*, we hold that it was necessary to first consider and determine the preliminary objection raised as it centred on a jurisdictional issue- which is what we have done.

In the words of PN Waki, JA in *Apunga Arthur Kibira vs IEBC & 2 Others [2018] eKLR*:

' The Court has no business crafting a jurisdiction it does not have, whatever amount of sympathy it may have on the applicant. It has to down its tools.'

50. Accordingly, this Court upholds the respondents' preliminary objection, and with that holding it is clear that the record of appeal herein must be struck out on account of offending rules 6 and 8 of The Court of Appeal (Election Petition) Rules, 2017.

51. Accordingly, we hereby strike out this appeal and award costs thereof to the respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

