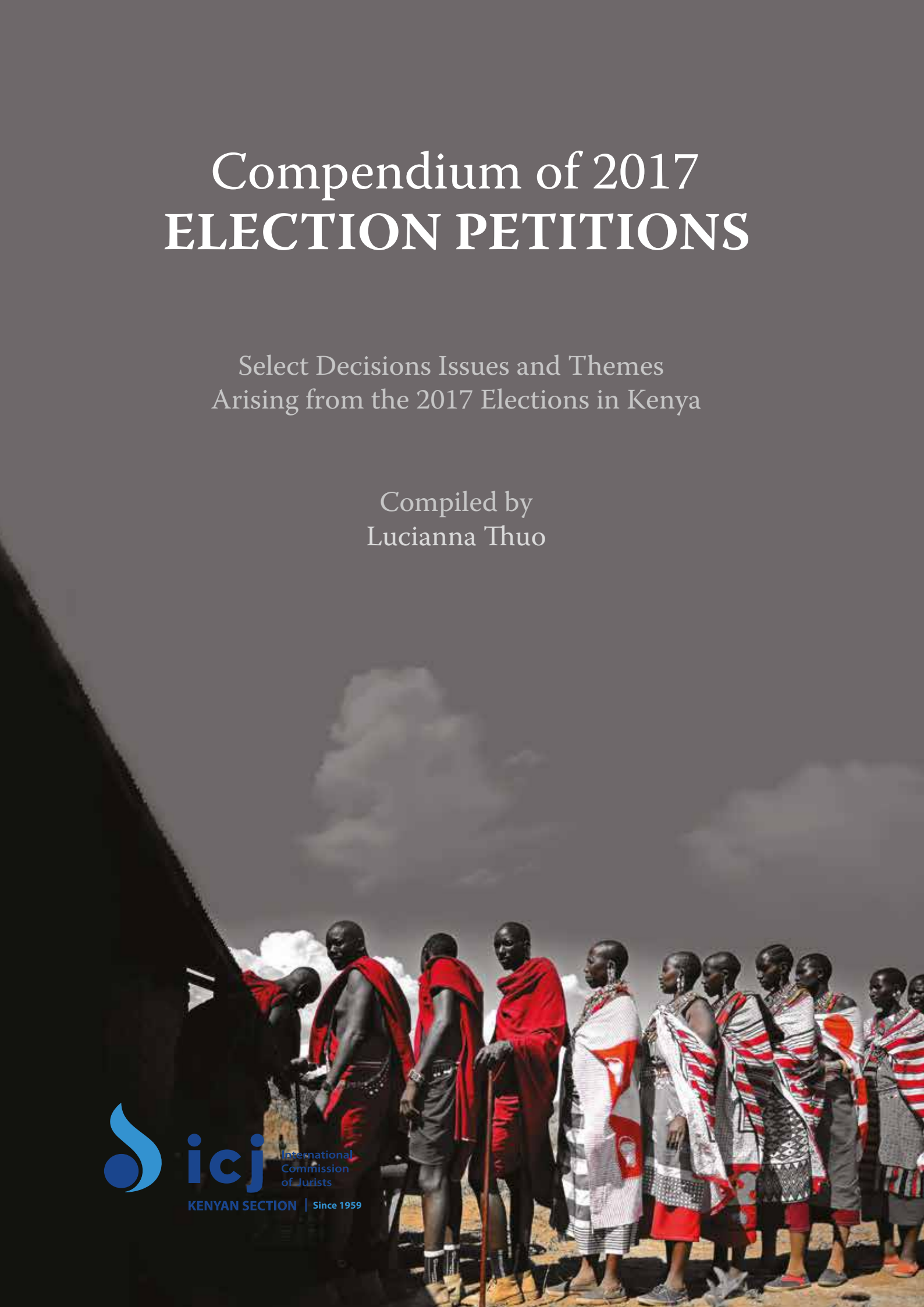
Compendium of 2017 **ELECTION PETITIONS**

Select Decisions Issues and Themes
Arising from the 2017 Elections in Kenya

Compiled by
Lucianna Thuo



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Compendium of 2017 **ELECTION PETITIONS**

2019

Select Decisions Issues and Themes Arising from the 2017 General Elections in Kenya

The Kenyan Section of the International Commission of Jurists (ICJ Kenya)

ICJ Kenya Compendium of 2017 Election Petitions – Volume 4
Select Decisions Issues and Themes Arising from the 2017 General Elections in Kenya

Year of publication: 2019
ISBN: 9966-958-55-x

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The Kenyan Section of the International Commission of Jurist (ICJ Kenya) is a membership, non-governmental, non-partisan and not-for-profit organization registered as a society in Kenya Since 1959. ICJ Kenya works on the promotion of human rights, the rule of law and democracy in Kenya and across Africa.

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To promote human rights, justice and democracy in Kenya and around Africa through the application of legal expertise and international best practices.

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Foreword

Through the promulgation of the 2010 Constitution, Kenya's legal system underwent a rebirth. In the new dispensation, the Constitution ushered a reorganised scheme for governance and democracy. It reaffirmed the central place of the people as the true source of sovereignty; introduced a higher criterion for integrity and accountability; dispersed powers from the central government; and established a number of independent offices as forms of checks and balances in the exercise of power.

In this reorganized scheme of governance, election management systems have been greatly impacted. From pre-election activities like registration of voters, nomination of candidates and procurement of election materials and resources to the manner in which elections are conducted, results declared and transmitted to resolution of disputes, the 2010 Constitution has sought to ensure strict adherence to the law, public participation and transparency.

The 2017 elections were the second general elections since the promulgation of the Constitution. The elections took place amidst clamours for constitutional amendments to reorganise power structures in the country—debates that continue to rage as we move towards the next election cycle in 2022. Questions abound as to whether the current political and electoral systems meet the democractic ideals that underlie the 2010 Constitution.

Considering the contentious nature of elections in Kenya, particularly the presidential and gubernatorial elections, the importance of an impartial arbiter to settle election disputes surrounding becomes paramount: there must be an effective, impartial and independent judiciary to facilitate fair, effective and impartial handling of disputes.

Moreover, the enhanced level of public participation in election management systems and accountability for stakeholders has given greater prominence to the role of the Election Dispute Resolution (EDR) mechanisms. At any given time, stakeholders look to the various EDR institutions as the interpreters, appliers and enforcers of the law. Here, the law is seen as the objective yardstick for fairness and credibility in the electoral process. Few issues have been the subject of popular political and scholarly opinions as elections and EDR mechanisms, both in the build-up before the elections and during the post-election period.

Despite the gargantuan task placed on the EDR systems, such systems are staffed and managed by people beset by their own human imperfections and individual biases. As part of the efforts to secure a unified jurisprudence on election laws, this compendium would play a big role in educating all stakeholders on where the law stands on a particular matter. I have noted with satisfaction that the edition covers decisions from the magistracy all the way to the Supreme Court.

Therefore, anyone who receives the benefit of reading this publication sets off on his role in the election management system with a huge advantage. The advantage of knowing what the written law says and the manner in which the various players the EDR system have interpreted and applied the law. This publication should thus be seen as an attempt towards eliminating uncertainty in the management of elections in Kenya and as a reference tool for best practices in election management for the region. In particular, the analysis seeks to review the approaches to resolving sticky issues that arose during the EDR processes, with a view to isolating what is the settled jurisprudence. This ensures that the

understanding of the law in an area is clear and consistent, and reduces instances of inconsistent jurisprudence in the future. The proposals for law reform will also go a long way in ensuring a coherent and cohesive body of legal norms that govern EDR going into the next EDR cycle.

I strongly commend ICJ Kenya for its sustained effort in keeping us apprised of developments in electoral dispute resolution and welcome this contribution to electoral law jurisprudence in Kenya.

Hon. Justice Kathurima M'Inoti
Judge of the Court of Appeal of Kenya
Director, Judiciary Training Institute

Preface

Electoral disputes are attendant to elections. Inherent in the right to vote is the right to sue relevant authorities to enforce all rights associated with voting.[1] This is because every violation of a human right, including the right to vote, entitles one to a remedy. Further, the right to challenge an electoral outcome, through an election petition, concretises the sovereignty is conferred to the people by Article 1 of the Constitution, and ensures that persons who exercise donated sovereignty in accordance with that provision are persons to whom trust has been properly bestowed through a process which, by consensus, meets established standards. In the Kenyan Constitution, these standards are enshrined in Articles 81 and 86. Article 38 of the Constitution also entitles every citizen to express their candidature for public office and if duly elected, to hold office.

Electoral Dispute Resolution (EDR) therefore provides an avenue for making this right tangible and ensuring that election results reflect the will of the people. The importance of EDR to safeguarding the will of the people was captured aptly by the Supreme Court in the case of ***George Mike Wanjohi v Stephen Kariuki & 2 Others [2014] eKLR*** in the following terms:

> *112. … Apart from the priority attaching to the political and constitutional scheme for the election of representatives of governance agencies, the weight of the people's franchise - interest is far too substantial to permit one official, or a couple of them, including the returning officer, unilaterally to undo the voters' verdict, without having the matter resolved according to law, by the judicial organ of State. It is manifest to this court that an error regarding the electors' final choice, if indeed there is one, raises vital issues of justice such as can only be resolved before the courts of law.*

Moreover, the effectiveness of EDR processes is also determined by whether they offer a right of appeal from the decisions of the arbiters. The remedies available must also include a mechanism for invalidation of the election result.[2] According to the African Charter on Democracy, Elections and Governance, states are required to establish mechanisms for redressing election related disputes in a timely manner as part of their commitment to holding transparent, free and fair elections as set out in the African Union's Declaration on the Principles Governing Democratic Elections in Africa.[3]

Following the 2017 general elections, 388 election petitions were filed in the High Court and Magistrates Courts, an over one hundred percent increase in the number of petitions filed after the first General elections under the Constitution in the year 2013 when 188 petitions were filed. Of the 388 petitions filed post 2017 general election, 174 related to county elections (challenging either the election of the county governor or member of county assembly), 125 related to Parliament (15 concerned senatorial elections, 12 concerned the election of woman representative and 98 challenged elections of Members of the National Assembly). A total of 89 petitions were filed (both in the High Court and in Magistrates' Court) in respect of party lists. The year 2017 was particularly significant with the determination of two presidential election petitions on merit. This was unprecedented in Kenya's electoral history, given

1 Denis Petit 'Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System' Office for Democratic Institutions and Human Rights (2000), 7. Available on https://www.osce.org/odihr/elections/17567?download=true (accessed 29 December 2018).

2 Petit, as above, 12.

3 See Article 17 (2)

that the petition challenging the August 8 election was only the third presidential election petition to be heard on merit.[4]

The upsurge in the number of petitions filed is not, according to Petit, to be taken as a reflection of the weakness in our electoral system; rather, it ought to be considered evidence of the 'strength, vitality and openness' of our political system, partly attributable to an increase in public understanding of the process of seeking redress.[5]

Nevertheless, where there are concerns about lack of independence of the Judiciary or due process of the law, the credibility of the EDR system is called into question. The state bears the responsibility of ensuring prompt and effective EDR, by ensuring that disputes are heard within set timelines and arbiters are independent and impartial.

The nullification of a presidential election for the first time in 2017, and the resultant backlash against the Judiciary and civil society raised concerns about the credibility of the EDR process, particularly in relation to the second presidential election petition. The Judiciary has experienced budget cuts which have hampered the EDR process, a reversal of the democratic gains ushered in by the post-2010 legal framework. A lot remains to be done to ensure that progress ushered in by the Constitution does not become illusory. As we prepare for the 2022 elections, vigilance is called for by all actors involved in the democratic process, particularly in ensuring that freedoms of association and assembly as well as expression, thought, conscience and religion are not rendered nugatory. This work cannot be left to civil society, but it remains the role of every person desirous of freedom. As articulated by John Stuart Mill:[6]

> *A people may prefer a free government, but if, from indolence, or carelessness, or cowardice, or want of public spirit, they are unequal to the exertions necessary for preserving it; if they will not fight for it when it is directly attacked; if they can be deluded by the artifices used to cheat them out of it; if by momentary discouragement, or temporary panic, or a fit of enthusiasm for an individual, they can be induced to lay their liberties at the feet even of a great man, or trust him with powers which enable him to subvert their institutions; in all these cases they are more or less unfit for liberty: and though it may be for their good to have had it even for a short time, they are unlikely long to enjoy it.*

On the upside, the Judiciary, under the framework of the Judiciary Committee on Elections, remains steadfast in its commitment to electoral justice, as evidenced by the timely resolution of electoral disputes. The jurisprudence emanating from the 2017 petitions builds on the already existing literature and continues to provide clarity on the emerging issues in EDR. With a continued evaluation of the outcomes of EDR processes and attendant legislative reform to address shortcomings in the legal framework, electoral law will achieve certainty and predictability, which in turn builds public trust in the system.

Just as previous Compendiums prepared under the aegis of ICJ Kenya , this volume contains both case summaries and an analysis of the jurisprudence emanating from the courts with emerging themes

4 The only other two being *Mwau vs Moi* Election Petition No. 22 of 1993 (2008)1 KLR(EP) and *Raila Odinga v IEBC & 5 Others* Election Petition 5 of 2013.

5 As above, 5.

6 John Stuart Mill, *Representative Government* (first publised1861) (Batoche Books: Kitchener, 2001) 9.

interrogated and analysed. It concludes with proposed recommendations for law reform for various actors with a role in EDR. While the Compendium does not cover all the petitions determined in the 2017 EDR cycle, this edition delves a bit deeper by assessing the pre-election and EDR political and legal contexts, evaluating the decisions from all election courts as well as filtering through some of the pre-election jurisprudence that may have impacted on the EDR process in the courts.

As far as possible, an attempt has been made to compare and contrast the jurisprudence emanating from the election courts following the 2013 EDR process with case law emanating from the 2017 EDR cycle. In addition, both the case summaries and the analysis sections have endeavoured to highlight the decisions that went on appeal to assess what the superior courts have settled on as the jurisprudence on a particular issue. It will be noted that the majority of the decisions that went on appeal related to the gubernatorial elections. This is hardly surprising given the growing recognition of the political significance and prestige attached to that elective office,[7] second only to the presidential election, which one author maintains is 'still the cherry on the cake', despite the creation of various leadership positions in the 2010 Constitution.[8] The text provides a one stop compendium on key areas regarding electoral dispute resolution making it a valuable mine for researchers.

It is hoped that this tome, particularly the analysis, will provide fodder for internal review by the Judiciary of the extent to which it is attaining its second pillar of judicial transformation, which under key result area 7 is to be seen in growth of jurisprudence and judicial practice.[9] This is especially in relation to the jurisprudence of the Supreme Court on election matters, where there are concerns about the timelines for the resolution of these matters as well as whether the Supreme Court is providing clarity or further obfuscating electoral law. It is our hope that this text finds its place in the growing literature on electoral law and the Kenyan jurisprudence and continues to contribute to the understanding and development of electoral law in Kenya.

Finally, we hope that the recommendations captured herein will catch the attention of law and policy makers and contribute ultimately to securing the constitutional place of the sovereignty of the people and the right to make political choices.

Lucianna Thuo

7 Since governors exercise executive authority and control significant resources in the counties under the 2010 Constitution, gubernatorial elections have elicited bitter rivalries since 2013 and formed the majority of the decisions that went all the way to the Supreme Court for determination.

8 FA Aywa 'A Critique of the Raila Odinga vs IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya' in C Odote & L Musumba (eds) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (2016), 46, 47.

9 The Judiciary Transformation Framework was anchored on four pillars aimed at "equitable access to and expeditious delivery of justice." The four pillars are; people-focused delivery of justice, transformational leadership, organizational culture and professional staff, adequate financial resources and physical infrastructure and harnessing technology as an enabler of justice. Under each of these pillars were specific key result areas, totalling ten in number. The framework was revitalized under the new commitment set out in the Sustaining Judicial Framework (SJT) 2017-2021 available on http://kenyalaw.org/kl/fileadmin/pdfdownloads/Strategic_BluePrint.pdf (accessed 28 February 2019).

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Lucianna holds an LL.M in ***Human Rights and Democratisation in Africa*** (University of Pretoria) and a Post-graduate Diploma in Realising Human Rights through Criminal Law (Åbo Akademi University), Finland. She obtained her LL.B from the University of Nairobi, followed by a post-graduate diploma in law from the Kenya School of Law. She is also an advocate of the High Court of Kenya and a Certified Professional Mediator (CPM) MTI.

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Acknowledgements

The Kenyan Section of the International Commission of Jurists (ICJ Kenya) is profoundly grateful to all the individuals who contributed to the successful production of this publication.

In particular, we wish to thank Lucianna Thuo for compiling the 2017 Election Petitions, as well as providing expert analysis and editorial input. Further, we wish to express our sincere gratitude to Ronald Allamano Ong'udi, Julie Kemunto Matoke, Shadrack Kuyoh and Cedric Kadima for their research and editorial support in the development of the publication. Special thanks go to Petronella Karimi Mukaindo, Elisha Zebedee Ongoya and Joseph Agutu Omolo for their invaluable insights, encouragement and technical support towards the conceptualisation and completion of the text. This edition is richer because of the team's dedication, sacrifice and input.

We are also grateful to the Judiciary Committee on Elections (JCE) for sharing decisions as they were released and sharing status updates on the progress of election petitions which made it easier to track the jurisprudence of the courts. ICJ Kenya also remains grateful to the stakeholders who took part in the validation workshop in January 2019 for their insighful feedback on the initial draft of the text.

We also thank the governing Council and members of ICJ Kenya for their support in the development of this publication. We would also like to acknowledge the hard work of the entire ICJ Kenya secretariat and particularly, the Access to Justice Program Team comprised of Teresa Mutua, Silas Kamanza, Vincent Muthaura and Sukhbir Thind who coordinated this project and its ensured completion.

Finally, this publication is made possible by the generous financial support of Uraia for which ICJ Kenya is most grateful.

Kelvin Mogeni
Chairman

Abbreviations

ACDEG	African Charter on Democracy, Elections and Governance
AU	African Union
BVR	Biometric Voter Register
CAK	Communications Authority of Kenya
COA	Court of Appeal
CRO	County Returning Officer
CTC	Constituency Tallying Centre
DCI	Director of Criminal Investigations
DPP	Director of Public Prosecutions
EACC	Ethics and Anti-Corruption Commission
EDMS	Electronic Data Management Systems
EDR	Electoral Dispute Resolution
EMB	Electoral Management Body
EOM	Election Observation Mission
EP	Election Petition
EPR	Election Petition Rules
HC	High Court
IDRM	Internal Dispute Resolution Mechanism
IEBC	Independent Electoral and Boundaries Commission
IFES	International Foundation for Electoral Systems
IREC	Independent Review Committee
JCE	Judiciary Committee on Elections
JPC	Joint Parliamentary Committee
KHRC	Kenya Human Rights Commission
KIEMS	Kenya Integrated Electoral Management System
KNCHR	Kenya National Commission on Human Rights
LSK	Law Society of Kenya
MCA	Member of County Assembly
NASA	National Super Alliance
NDI	National Democratic Institute
NTC	National Tallying Centre
PO	Presiding Officer
PPA	Political Parties Act
PPDT	Political Parties Disputes Tribunal
PSD	Polling Station Diary
PVR	Principal Voters Register
SC	Supreme Court

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Background

The year 2017 was an unprecedented year in the history of elections in Kenya. The year presented yet another constitutional moment for the country, to test the robust constitutional structures that the people had by a majority endorsed through a referendum, in August of 2010. The county governance structures had been tested in the first electoral cycle at (2013-2017), roles were now better understood and challenges identified. It was then a time for a sovereign people to make a more informed constitutional choice, that of electing their leaders in six posts under the devolved system of governance. Indeed, the 2017 elections attracted a large number of aspiring candidates in an electoral process at 16,259 from 12,776 in 2013 presenting a 27.2% increase.[10]

While 2013 marked a milestone in the electoral dispute resolution history of Kenya by having the first presidential election petition heard and determined on merit, it was in 2017 that a presidential election result was overturned for the first time in our electoral history. Consequently, it was the first time that a fresh presidential election was held in Kenya, setting the country firmly on unchartered jurisprudential waters. The run-up to the repeat poll was marked with hasty electoral reforms and concerns about the security of judicial officers, which compounded the challenge of navigating the murky waters we found ourselves in as a country.

The August 8 General Election was also preceded by highly contested political party primaries. A report by the Kenya National Commission on Human Rights (KNCHR) documenting the political party primaries of 2017[11] revealed that the political party nomination exercise was marred by incidents of electoral malpractices including voter bribery, violence, structural challenges including weak internal party dispute resolution mechanism as well as logistical shortcomings resulting in lack of party registers, missing names, inadequate voting materials[12] amongst others which compromised on the right to vote. Also significant was the fact that for the first time, Kenya witnessed an influx of independent candidates which rose to 3,752 candidates,[13] perhaps a testament on the burgeoning democratic space and/or discontent with the political party structures. As shall be discerned in the subsequent sections, technology formed an important component, in fact a defining aspect of not only the voting but also the transmission of results, and was pivotal in the overturning of the August 8 presidential election.

The Supreme Court of Kenya, in the ***In the Matter of the Principle of Gender Representation in the National Assembly and the Senate and in the Matter of the Attorney General (on behalf of the Government),***[14] acknowledged that elections are not a single event; rather, they are a process. Further, the Supreme Court acknowledged that disputes could arise at different stages of the electoral process. Where dispute resolution mechanisms are not properly activated or capacitated, disputes spill over to the next dispute resolution mechanism. The context in which the elections were conducted, as captured in the various pre-election processes, is therefore important for understanding the setting in which the electoral dispute resolution process in the courts, which is the focus of this Compendium, took place in 2017.

10 KNCHR, 'Mirage at Dusk: A Human Rights Account of the 2017 General Elections' xiii (2018).
11 KNCHR, 'The Fallacious Vote: A Human Rights Account of the 2017 Party Primaries' (2018).
12 The Fallacious Vote, pp 25-34.
13 KNCHR 'Mirage at Dusk' 1. See also https://www.voanews.com/a/kenya-surge-independents-august-elections/3932740.html (accessed 16 February 2019).
14 Advisory Opinion 2 of 2012.

A. Conduct of the Elections

The run-up to the elections was not without its own fair share of challenges. An audit of the 2013 elections had demonstrated that the IEBC was highly rated and enjoyed a high level of confidence of public trust due to the open and competitive manner in which the commissioners had been appointed.[15] This was reversed in 2016, when the IEBC suffered a dented public image resulting from the refusal of the Commissioners to leave office, amidst Opposition-led protests calling for their removal on allegations of bias. The tug of war with the Opposition was exacerbated by in fighting, with some Commissioners expressing a desire to leave, while others determined to remain in office pending a formal Presidential directive.[16] Calls for the resignation of the Commissioners sparked violent demonstrations, and police brutality in quelling the demonstrations was reminiscent of the pre-multiparty era.[17] Both the decision to remove the Commissioners in the year preceding the election and the prolonged battle over tenure served to poke a hole in an already leaking ship.[18]

Picture 1: ODM Secretary-General Ababu Namwamba leads a section of Kisii residents in the anti-IEBC demonstrations on May 23, 2016. PHOTO | BENSON MOMANYI | NATION MEDIA GROUP

15 C Schulz-Herzenberg et al 'The 2013 General Elections in Kenya: The Integrity of the Electoral Process' Institute for Security Studies, Policy Brief 74 (2015), 2.

16 http://www.nation.co.ke/news/four-iebc-bosses-said-to-be-ready-to-resign/1056-3264068-mmlx9kz/index.html (accessed 4 July 2018).

17 See G Lynch http://www.nation.co.ke/oped/Opinion/Beating--protesters-by-police-in-IEBC-saga/440808-3222228-a7ngmd/index.html (accessed 4 July 2018).

18 The Independent Review Commission (IREC) had recommended that there be no changes in the membership of the Commission within 2 years of a general election. See Kriegler and Waki Reports Summarised Version Revised Edition 2009, 10; available on http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf (accessed 11 October 2018).

Compounding this predicament were numerous court battles, which dealt a further blow to the already diminishing public confidence and served to further fortify the existent concerns about the capacity of the freshly constituted IEBC to conduct the August 8 elections. From challenges regarding the place of technology in the elections, to the procurement of electoral material, to the mandate of the IEBC Chair amidst other cases that were filed and escalated in rapid succession, the electoral body was under siege even as time rapidly ticked towards the much awaited date of August 8. This further heightened electoral temperatures and fever in the country.

Prior to the procurement of technology for the elections, the decision of the IEBC to award the tender for the supply and delivery of ballot papers, election result declaration forms and poll registers to Al Ghurair Print and Publishing Company was challenged in ***Republic v IEBC & 3 Others ex parte Coalition for Reform and Democracy***.[19] The High Court ruled that the IEBC was under an obligation to operate in an open and transparent manner when procuring technology to be deployed in elections. This meant procuring the technology in consultation with the relevant stakeholders to maintain the perception of fairness and win the confidence of the electorate. In the words of the Court:[20]

> *...the provisions of section 38 of the Political Parties Act ought to be put into motion and implemented and the Political Parties Liaison Committee activated and booted up as it were in order to avoid unnecessary tensions and suspicions between the Independent Electoral Commission (sic) and Boundaries Commission, the Registrar of Political Parties and the political parties themselves...It must be appreciated that the process of general election is as much a political process as it is legal. Perception therefore plays a not too minor role in the said process. It is therefore as much important for the process to be fair as it is to be seen as fair. It is therefore crucial that a continuous dialogue between the Commission, the Registrar of political parties and the political parties themselves be nurtured in order to avoid any suspicions that the process is not being undertaken in a free, fair and transparent [manner] and that the system being administered is not impartial, neutral, efficient, accurate and accountable. An electoral process must not only meet the constitutional and legal threshold but ought to carry with it the confidence of the electorates. This in my view can only be achieved in a process where all the players are afforded a forum at which to air their grievances collectively and individually and in my view this is where the Political Parties Liaison Committee comes in.*

In June 2017, a three-judge bench of the High Court was in the case of ***Kenneth Otieno v A-G & IEBC,***[21] was called upon to rule on the constitutionality of the technical committee established under section 44 (8) of the Elections Act to oversee the adoption of technology. The Petitioner expressed concern, *inter alia*, that amendments which had been introduced via the Elections Laws (Amendment) Act No. 34 of 2017 had brought changes which were radical and impractical to the electoral process. In relation to the technical committee, the Petitioner expressed concern that section 44(8) of the Elections Act had left it unclear which agencies, institutions or stakeholders would constitute the technical committee.[22]

The Court agreed with the Petitioner's argument that the use of the words 'relevant agencies, institutions or stakeholders' in the composition of the committee left room for political or other

19 Nairobi High Court Miscellaneous Civil Application No. 637 of 2016.
20 At paras 238-239.
21 Nairobi High Court Petition 127 of 2017.
22 The section provided that the Committee would comprise such members and officers of the IEBC and such other relevant agencies, institutions or stakeholders as the IEBC considered necessary. This, in the view of the Petitioner, would undermine the independence of the IEBC.

partisan influences through the inclusion in the technical committee of persons expressly excluded by Article 88 (2) of the Constitution. This would effectively threaten the structural independence of the IEBC.

In ***National Super Alliance (NASA) Kenya v The Independent Electoral & Boundaries Commission & 2 Others,***[23] the place of technology in the upcoming elections was the subject of contention. The High Court was urged to declare that the General Election on 8th August 2017 was to be exclusively electronic in respect to identification of voters and transmission of results. The Petitioners were concerned that the IEBC had not complied with the timelines established by the Elections Act, not having procured and tested the technology 40 days prior to the general election.

The High Court, in a decision which was upheld on appeal,[24] acknowledged that the legal regime obtaining in the country required an integrated electronic system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The Court however observed that the complementary mechanism envisaged in section 44A only sets in when the integrated electronic system failed. In rejecting the prayer that identification of voters and transmission of results be exclusively electronic, the Court held:

> *To our mind, what was required of the Respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.*

The other contentious issue related to the extent of the powers of the chairman of the IEBC, as the returning officer for presidential elections, in confirming, verifying and varying results at the national tallying centre. This was the next knotty issue that the courts had to untangle. In a landmark decision, delivered by the Court of Appeal about one and a half months to the General elections in August 2017, in the case of ***IEBC v Maina Kiai & 5 Others,***[25] the Court agreed with the Respondents that the results declared by a returning officer were not provisional but final hence upholding the High Court's verdict that sections 39 (2) and 39 (3) of the Elections Act and Regulations 83 (2) and 87 (2) of the Elections (General) Regulations) were unconstitutional since they relegated to the IEBC chairperson the sole mandate of confirming, varying or verifying the results of the presidential elections. The Electoral body's apex had once again been dealt another salvo in as far as the extent of its mandate was concerned.

The Court of Appeal, in the case of ***Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others,***[26] upheld the finding of the High Court that as a general principle, public participation was mandatory in all procurements by a public entity. However, it overturned the High Court finding that public procurement was necessary in all cases, including direct procurement, since neither Article 227 of the Constitution nor section 103 of the Public Procurement and Asset Disposals Act 33 of 2015 mandated it in respect of direct procurement. Direct procurement is therefore an exception to public participation in procurement.

23 Nairobi High Court Petition No. 328 of 2017.
24 National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others Civil Appeal 258 of 2017.
25 Nairobi Civil Appeal 105 of 2017.
26 Civil Appeal (Nairobi) No. 224 of 2017.

The importance of transparency in the appointment of election officials formed the subject of the decision in ***Republic v IEBC Ex parte Khelef Khalifa & Another [2017] eKLR*** where the High Court held that the failure by IEBC to provide a list of persons proposed for appointment to political parties and independent candidates at least 14 days prior to the proposed date of appointment to enable them make representations violated both the Constitution and the law, specifically, the comparable regulation 3(2) of the Elections (General) Regulations, 2012 as read with Articles 38 and 81 of the Constitution.

In the week preceding the election, concerns as to the integrity of the election came to a head with the assassination of the ICT manager at the IEBC, the late Chris Msando.[27] Given that he was one of the few people who knew the location of the IEBC servers, many read this as an orchestrated plan to stealthily interfere with data security by gaining unauthorised access to the system. Thus, it could not be said with certainty that the results transmission process was free from external interference. Indeed one of the Petitioners' grievances in the 2017 ***Raila Odinga*** petition was that unauthorised persons had access to the servers, a fact which the IEBC did not successfully refute, as they failed to comply with the Court's directive to allow the Petitioners access to the server logs. This contributed to the nullification of the August 8 presidential poll as will be discussed later in this text.

B. Pre-election Processes

The credibility of the nomination process was cast into doubt following incidents of bribery, violence, intimidation and harassment, destruction of voting material, disorganisation at tallying centres and attacks against marginalised groups, particularly women aspirants and the youth.[28] The Kenya National Commission on Human Rights (KNCHR) noted with concern that many of the shortcomings of the process in 2017 had been highlighted in 2013.[29] There continues to be a broader concern that political parties do not promote internal democracy, evidenced by attacks against and exclusion of marginalised groups and by the number of people who left their parties following disaffection with the party primary processes. This disaffection was also evident in the number of disputes that were handled by the political parties' internal dispute resolution mechanisms, the Political Parties Disputes Tribunal, the IEBC as well as the courts through trigger of the appeal process.

Concerns were also raised as to the increased involvement of children in election campaigns, sometimes with detrimental effects when public rallies became violent and had to be disrupted using teargas by law enforcement agencies.[30] Another concern was use of state resources and machinery by the Executive and politicians in campaigning.[31]

C. Amendments to the Elections Infrastructure

The legal framework for elections was also amended following proposals for constitutional review and proposed amendment to various statutes that touched on the electoral process. A Joint Parliamentary

27 P Okumu & M Michira 'Missing IEBC Manager Chris Msando Found Dead' https://www.standardmedia.co.ke/article/2001249856/missing-iebc-manager-chris-msando-found-dead (accessed 3 October 2018).

28 See KNCHR, 'The Fallacious Vote' (2018) 2.

29 KNCHR 'The Fallacious Vote', 53.

30 See KNCHR 'Mirage at Dusk: A Human Rights Account of the 2017 General Election', 92.

31 See European Union Election Observation Mission, 'Final Report Republic of Kenya General Elections 2017' https://eeas.europa.eu/sites/eeas/files/eu_eom_kenya_2017_final_report_0.pdf (accessed 2 March 2019)

Committee on electoral reforms was therefore constituted which held public hearings, culminating in two bills which were assented to in 2016.[32] The Election Laws (Amendment) Act 2016 amended the Elections Act, the IEBC Act, the Supreme Court Act and the Political Parties Act of 2011 and the Registration of Persons Act. The Election Offences Act[33] was also passed, removing election offences from the ambit of the Elections Act, under the mandate of the IEBC, and placing the responsibility for the prosecution of election offences with the Directorate of Public Prosecutions.[34] However, it was the 2017 amendments to electoral laws that were the most acrimonious. In January 2017, the Election Laws (Amendment) Act No. 1 of 2017 was passed amid protests by the opposition.

However, by far the most damning electoral amendments were made in the run-up to the fresh election, following the nullification of the August 8 presidential election result. The Election Laws (Amendment) Act 2017[35] introduced electoral amendments in three broad categories: amendments to administrative structure of the IEBC, amendments on the electoral process and amendments introducing new election offences. Late amendments to electoral laws were among the factors cited to have undermined the credibility and effectiveness of the IEBC in the run-up to the 2013 elections.[36] The timing was criticised as much as the partisan nature of the enactment process which many saw as a calculated move tilted to favour the ruling coalition and incumbent who enjoyed a majority in the House.

D. Pre-election Dispute Settlement

According to International Foundation for Electoral Systems (IFES), the effective resolution of disputes and violations throughout the electoral cycle is critical to the credibility of elections, the acceptance of election results and the stability of the election environment.[37] This includes ensuring that EDR mechanisms are not prone to sophisticated political and electoral manipulation.

The Constitution and the Political Parties Act (PPA 2011) give the mandate of pre-election dispute settlement to the IEBC, the Political Parties Disputes Tribunal and the political party internal dispute resolution mechanisms (IDRMs). Article 88(4)(e) of the Constitution grants the IEBC the mandate to resolve disputes arising from and relating to nominations, but excluding election petitions and disputes following declaration of results. This broad constitutional mandate had an effect on the mandate of the PPDT in the run-up to the 2013 elections as it created a jurisdictional overlap between the two institutions in respect of party primary and party list nomination disputes.

Since the IEBC's mandate is donated by the Constitution, while that of the PPDT is donated by statute,[38] IEBC's claim to jurisdiction in respect of all nomination disputes prevailed in 2013, with the effect that most pre-election disputes were determined by the IEBC. This allowed the PPDT to also strengthen its institutional and administrative capacity, with the result that it was more significantly involved in

32 Electoral Laws (Amendment) Act 36 of 2016 and Political Parties Amendment Act No 21 of 2016.
33 Act No. 37 of 2016.
34 Election offences were previously set out in Part VI of the Elections Act 2011 and the IEBC was responsible for ensuring prosecution of election offences.
35 Act No. 34 of 2017. The bill was not assented to by the President and entered into force by operation of law as stipulated in Article 116 of the Constitution of Kenya. It was published in the Kenya Gazette on 2 November 2017.
36 EU Election Observation Mission to Kenya (EU EOM) 'Final report' (2013) 1-2.
37 International Foundation for Electoral Systems (IFES) 'Elections on Trial: The Effective Management of Election Disputes and Violations' (2018), 5.
38 Sec 40 of the Political Parties Act No. 11 of 2011.

the 2017 pre-election process. However, the overlapping mandate provided room for forum shopping, with litigants filing matters simultaneously before the two bodies with the aim of seeking the more favourable determination of their matters.

To facilitate clarity of jurisdiction between the two bodies in the run-up to the 2017 general elections, two measures were taken. The first was a legislative measure: the amendment to section 40(1) of the Political Parties Act to include a sub-section (fa) which expanded the jurisdiction of the PPDT to include hearing and determining disputes arising from party primaries.[39] This was bolstered by the publication of the **Elections (Party Primaries and Party Lists) Regulations, 2017,**[40] which in the Regulation 2 distinguish party primaries from nominations. A party primary is defined as 'the process through which a political party elects or selects its candidates for an election but does not include a party list'. This separates the process from that of nomination which is defined by the Elections Act and Elections (General) Regulations as the submission to the IEBC of the names of a candidate in accordance with the Constitution and the Elections Act. This delineates the scope of the PPDT's jurisdiction from that of the IEBC.

The second measure was an administrative one: the signing of a Memorandum of Understanding between the IEBC and the PPDT.[41] The MoU was aimed at providing clear guidance to political parties and candidates on the respective legal mandates of the two institutions. The result was that the PPDT heard and determined a total of 540 disputes; 360 party primary disputes and 234 arising from party list nominations. The IEBC on the other hand handled 350 disputes arising from nominations, 21 party primary disputes and 72 disputes arising from breach of the Electoral Code of Conduct.

Being the first time that the PPDT actively determined party primary and party list disputes, questions arose as to the parameters of the PPDT's mandate. On the jurisdictional overlap, a question arose as to whether the Tribunal could adjudicate over a matter when nomination had already taken place at the IEBC in accordance with section 13 (2) of the Elections Act. The PPDT, in the case of ***Erick Omondi Anyang v Orange Democratic Movement & Another,***[42] the PPDT ruled in respect of a preliminary objection to its jurisdiction, that it still had jurisdiction even where nomination papers had already been presented to the IEBC. This appears to fly in the face of the demarcation of jurisdiction created by the statutory amendments, since dispute subsequent to nomination are the preserve of the IEBC. It was therefore unsurprising that the High Court overturned the PPDT's finding on jurisdiction and found that under section 13 (2) of the Elections Act, the dispute was removed from the purview of the PPDT once nomination had occurred.[43]

The question of jurisdiction arose quite severally in the disputes that came before the PPDT. One aspect of the question was whether all disputes under section 40 of the PPA required to have been submitted to IDRM before being filed at the Tribunal and in cases where IDRM was attempted, whether matters at the Tribunal would be filed as original causes or as appeals against decisions of the party mechanism. On the latter issue, the Tribunal took a flexible approach in the interests of justice. On the former, whereas the Tribunal had in some cases asserted that it had no jurisdiction where IDRM was not exhausted, the High Court ruled that party primaries were not included in the categories of

39 Sec 19, Political Parties Amendment Act No 21 of 2016.
40 Kenya Gazette Supplement No. 62, 21st April 2017.
41 http://www.ppdt.judiciary.go.ke/wp-content/uploads/2017/04/PPDT-IEBC-MOU-28-March-2017.pdf (accessed 11 October 2018).
42 PPDT Complaint No. 326 of 2017; [2017] eKLR.
43 See ODM v Edick Omondi Anyanga & Anor EPA 126 of 2017 [2017] eKLR.

dispute in respect of which IDRM was required to be exhausted.[44]

However, the Court of Appeal distinguished disputes arising out of party primaries which involved a member and a party, between members of a political party, between political parties and between coalition partners as disputes which had to be subjected to IDRM under section 40 (2) of the PPA from dispute that did not fall in any of the above categories, which were exempt from the IDRM requirement.[45]

Party membership and its impact on the jurisdiction of the PPDT also arose in the pre-election period. Questions arose as to whether the Tribunal could exercise jurisdiction over disputes where a candidate lodged a complaint against a party from whose membership it had resigned. In the case of ***Moses Sanyo Kisoro v Jubilee Party of Kenya & Another,***[46] the 2nd Respondent revoked his membership and sought nomination as an independent candidate following refusal by his party to give the candidate a nomination certificate. He later sought to be awarded the certificate by the Tribunal as the rightful winner of the party primary. The PPDT stated that while the candidate could reclaim his membership of the political party, he could not contest as a candidate or rescind earlier resignation. In the words of the Tribunal:[47]

> *An independent or non-party politician is an individual not affiliated to any political party. We hold that the 2nd Respondent having resigned as a member of Jubilee Party on 3rd May, 2017 and registered as an independent candidate ceased affiliation with Jubilee Party. Resignation from a political party takes effect immediately it is received by the Registrar of Political Parties. Therefore, the 2nd Respondent's letter of 9th May 2017 could have revoked his registration as an independent candidate, but it could not immediately have restored him to membership in the party. That was an exercise in futility. The 2nd Respondent has manoeuvred himself into a legal maze.*

The Tribunal therefore directed that the nomination certificate be awarded to the Claimant. In this case, the Tribunal was emphatic that its jurisdiction over a party primary dispute was not affected by the change in status from party member to independent candidate. Therefore, the fact that the 2nd Respondent had resigned and registered his independent candidature did not remove the matter from the jurisdiction of the PPDT as it has a statutory mandate to adjudicate claims between independent candidates and parties.

Another aspect of the jurisdictional question was whether the Tribunal had the mandate to interpret the Constitution when determining disputes before it, or whether it would amount to stepping into a mandate reserved for the High Court. In the case of ***R v Chairman, Political Parties Disputes Tribunal & 2 Others Ex Parte Susan Kahoka Wakarusa,***[48] which concerned the qualification of the *ex parte* applicant to vie for the office of Member of Parliament under Article 99 (2) of the Constitution, the Tribunal had held in favour of the 2nd Respondent that the ex-parte applicant, who still held a public office, was ineligible for nomination by Jubilee Party to vie for the senatorial seat.

44 Joseph Mboya Nyamuthe v Orange Democratic Movement & Another EPA 5 of 2017 [2017] eKLR.
45 Dr. Lilian Gogo v Joseph Mboya Nyamuthe & 4 Others Civil Appeal 135 of 2017; [2017] eKLR.
46 PPDT Complaint No. 217 of 2017; [2017] eKLR.
47 At paras 16-17.
48 [2017] eKLR.

In a judicial review application challenging the decision of the PPDT, the High Court ruled that the Tribunal could only apply the Constitution in matters falling within its mandate under section 40 PPA. It was clear in this case that the dispute involved an independent candidate (the *ex parte* applicant) and a member of a political party (the 2nd Respondent) and therefore did not fall within the purview of section 40. This meant that the eligibility of the *ex parte* applicant was a matter which could only be dealt with by the High Court which had jurisdiction to interpret the Constitution. The High Court deprecated the Tribunal for rendering its decision at a time when the High Court had granted orders halting the proceedings at the Tribunal. In the words of the Court:

> *…the allegations made against the Political Parties Disputes Tribunal is a cause of anxiety as it depicts a scenario where the Tribunal deems itself to be in competition with the High Courts as to who has more "muscle" in certain matters where its decisions have been questioned and are under scrutiny in the High Court. This Court is neither guided by expediency, popularity gimmicks, chest-thumping nor competitive streaks but is guided by and beholden to law and to law only. Where subordinate Courts therefore by their actions step outside the boundaries of the Constitution and the law, this Court has the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws. The High Court orders must be obeyed by the subordinate Courts whether they agree with them or not; whether pleasant or unpleasant. To blatantly ignore High Court orders and expect that the Court would turn its eye away, is to underestimate and belittle the purpose for which the High Court is established.*

The proceedings and orders of the Tribunal were therefore quashed.

The decision provides clarity as to the limits of the interpretative mandate of the Tribunal in disputes falling within its mandate. The High Court distinguished between interpreting the Constitution, which is what Article 99 called for in the present case, and applying the Constitution, which is a power given to subordinate courts and tribunals under Article 20(4) of the Constitution. While the Tribunal has power to apply the Bill of Rights in disputes before it and to promote 'the values that underlie an open and democratic society based on human dignity, equality, equity and freedom', the High Court was emphatic that the interpretative mandate remains the preserve of the High Court, even where political disputes are concerned. It is unfortunate that the issue of the *ex parte* applicant's eligibility for public office was not addressed either by the High Court or by the PPDT (for lack of jurisdiction on the part of the latter).

The decisions of the PPDT were also uploaded onto the Kenya Law website, making them widely available to the public.[49] The publication of decisions by the PPDT accords with international best practice which is aimed at promoting transparency and accountability for decision-making in the EDR process. This accountability builds public trust in the process,[50] which is especially important in electoral disputes due to their public interest nature and the high stakes involved.

49 http://kenyalaw.org/kl/index.php?id=7522 accessed 23 October 2018

50 International Foundation for Electoral Systems (IFES) 'Elections on Trial: The Effective Management of Election Disputes and Violations' (2018), 35.

E. Limitations of the Pre-election EDR Mechanisms

1. Highly Centralised

Concerns have been raised that both the PPDT and IEBC are not effective EDR mechanisms because they are highly centralised, with both being located in Nairobi.[51] The use of courtrooms for hearing of cases also did little to shift mind-sets of potential litigants about the intimidating nature of the Court system. This limits the capacity of potential litigants to access the mechanism from around the country, due to limitations of time and other resources, thus raising procedural justice concerns. For these reasons, the mechanisms in their current form arguably do not meet the purpose for which they were established. More resourcing, decentralisation, less 'elitist' procedures and a massive sensitisation of the EDR mechanisms would go a long way in bridging the expectations.

2. Strict Timelines

The timelines for resolving these disputes also poses an additional challenge to the efficacy of the mechanisms, which are often compounded by capacity constraints. In 2017, the IEBC gazetted the notice for party primaries which were required to be held between 13 April and 19 May 2017. This period was said to include the time for resolving disputes arising from the nomination exercise. The date for nominations was fixed at 8 June and disputes arising out of party primaries were required to have been heard and determined before then. This gave the PPDT less than 3 weeks to determine these disputes. Plans to amend the Political Parties Act to allow for the appointment of 15 *ad hoc* members to sit in different stations around the country to adjudicate over party primary disputes were unsuccessful[52]

The limitations faced by the IEBC in balancing EDR with other pre-election activities were captured succinctly by Maraga CJ & P in his dissenting opinion in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others:***[53]

> ***[155]*** *The second reason why, in my view, IEBC should not have exclusive jurisdiction to determine all pre-election nomination disputes has to do with its mandate. Given IEBC's core mandate, Article 88(4)(e) must be understood to vest it with jurisdiction to determine pre-election nomination disputes in a summary manner and determine the candidates whose names are to appear on the ballot papers in good time for the election. IEBC's primary function or mandate, as is clear from Article 88(4) of the Constitution and Section 4 of the IEBC Act, is the management of elections as well as referenda and not the settlement of electoral disputes. Its added function of settlement of electoral disputes under Article 88(4)(e) of the Constitution is collateral or ancillary to its said primary function. It does not even have enough time for this additional function. Look at the following scenario.*
>
> ***[156]*** *Sixty days prior to any general election, IEBC runs a frenetic schedule of activities. The Elections Act, (Sections 14(1), 16(1), 17(1) and 19(1)), requires IEBC to "publish a notice of the*

51 International Foundation for Electoral Systems (IFES) 'Elections on Trial: The Effective Management of Election Disputes and Violations' (2018) 18.

52 https://www.the-star.co.ke/news/2017/04/14/political-parties-tribunal-wont-resolve-disputes-staff-shortage_c1543411 accessed 23 October 2018.

53 Supreme Court Petition 7 of 2018.

holding of the election in the Gazette and in electronic and print media of national circulation… at least sixty days before the date of the election." After that publication, the PPDT has 30 days to resolve intra-party nomination disputes before the political parties present the names of their respective candidates for election to the six electoral positions. That leaves IEBC with only 30 days to complete the nomination process of one Presidential position; 47 gubernatorial positions; 47 senatorial positions; 290 parliamentary positions; 47 women representative positions; about 1860 MCA positions; and party lists for several other positions. All these activities are besides IEBC's role of ensuring that the Voters Register is revised and up-dated and the tendering for and printing of the ballot papers is completed in good time. That is why, under Section 74(2) of the Elections Act, IEBC has only ten (10) days to settle pre-election nomination disputes. It is common knowledge that it employs a summary procedure in the determination of those disputes.

3. Administrative, Resource and Capacity Constraints

In view of the numerous cases filed at the PPDT, which were to be heard within constrained timeframes, concerns were raised as to the efficacy of the EDR mechanism. Whereas the pre-election EDR mechanisms are expected to aid in reducing the number of disputes that end up in the courts, having so many disputes being heard in the capital of the country; Nairobi by seven members within a few days raises questions as to the qualitative nature of the process. In practice, litigants had limited time to address the members orally on their pleadings. The PPDT also did not have an effective case management system. If the essence of a hearing is that parties are given an opportunity to ventilate their grievances, it is arguable that the mechanism as constituted does not facilitate effective ventilation of disputes by the parties. The centralisation of the PPDT mechanism as well as its impact on alternative dispute resolution mechanisms was noted with concern by IFES.[54]

IFES also expressed concern that this centralisation results in a lack of available remedy, which may lead to increased tension and violence and place significant pressure on the rest of the actors in the justice chain to solve complex legal grievances. The National Democratic Institute (NDI) likewise noted that PPDT was under-resourced and the number of cases filed further challenged its capacity. Even with the extension of time for resolving party primary disputes, it was their view that the petitions did not receive adequate due process at the PPDT, which contributed to the high number of cases that proceeded to the High Court.[55]

4. Perception of Bias

Concerns were also raised about the integrity of the membership and staff of the Tribunal, with claims of some members and staff of the mechanism having been compromised.[56] This affected the perception of the stakeholders on the capacity of the PPDT to provide a much-needed informal forum for resolution of pre-election disputes, and may explain in part the high number of appeals that proceeded to the High Court and thereafter the Court of Appeal. IFES has argued that public

54 International Foundation for Electoral Systems (IFES) 'Elections on Trial: The Effective Management of Election Disputes and Violations' (2018) 18.

55 See National Democratic Institute (NDI) 'Preliminary Statement of the National Democratic Institute's International Election Observer Mission to Kenya's August 8, 2017, Elections' (2017), 8. Out of the 360 party primary disputes, 120 went on appeal to the High Court, 30 went on appeal to the Court of Appeal and one went all the way to the Supreme Court.

56 See 'CJ David Maraga Disbands Political Parties Disputes Tribunal Over Bribery Allegations' https://www.kahawatungu.com/2017/07/25/cj-david-maraga-disbands-political-parties-disputes-tribunal/ accessed 23 October 2018. It is noteworthy that the Tribunal was not in fact disbanded but certain members of the administrative staff were sent on compulsory leave at the time.

perceptions around elections have a tremendous implication for the peaceful transfer of power and the viability of governing institutions, particularly in fragile political contexts.[57]

5. Lack of Effective Remedies

While the orders of the PPDT are enforceable in the same manner as orders of a Magistrate's Court,[58] several challenges affected the enforcement of decisions issued by the Tribunal. Firstly, some of the remedies granted by the Tribunal were declaratory, making it difficult to assess compliance.

Secondly, where parties were directed to conduct fresh nominations, it was difficult to assess the extent to which they conducted the nominations as directed by the Tribunal.[59] Given that time was of the essence, litigants had little time to go back to the Tribunal for enforcement.

It has therefore been recommended that the Tribunal consider the establishment of *ad hoc* panels in various counties to increase access to justice and have disputes resolved on merit within the stipulated timelines. Alternatively, there have been calls to have the dispute resolution mandate of the Tribunal donated to Resident Magistrates, who are present in every county, and who are already trained on judicial processes, rather than have an *ad hoc* Tribunal. This would however lose out on the interdisciplinary composition that is currently present within the Tribunal. The PPDT, if effectively managed, provides a more accessible EDR platform for litigants, and especially for members of marginalised groups due to the reduced formality and cost involved.

Moreover, if the number of disputes filed at the PPDT is anything to go by, it is clear that there remains a lot of work to be done in strengthening a democratic culture within parties, which is a role designated for the Tribunal. While the Political Parties (Internal Dispute Resolution) Model Rules were adopted in 2017, they were not fully utilised due to the proximity of their release to the EDR process, which did not allow political parties sufficient time to internalise them. It is hoped that by strengthening the EDR procedure within IDRMs through the Model Rules[60] will reduce the number of disputes that make it to PPDT and ultimately into the Court system.

To improve EDR within these quasi-judicial mechanisms, it is proposed that a case management system is tested and rolled out early for use by both the IEBC and the PPDT. Further, there is need to allocate more resources, enhance the capacity, and devolve the Tribunal in order to increase access to justice.

F. The Annulment of the August 8 Presidential Election

In exercise of its constitutional mandate to determine disputes arising out of presidential elections, the Supreme Court was invited to determine the validity of the declaration of incumbent president as the winner of the August 8 poll. The Supreme Court found that the August 8 presidential poll was

57 International Foundation for Electoral Systems (IFES) 'Elections on Trial: The Effective Management of Election Disputes and Violations' (2018) 5.

58 Sec 4 (1) PPA.

59 See for example the case of Kennedy Moki v Rachel Nyamai & 2 Others Kitui Election Petition 2 of 2017 which went all the way to the Court of Appeal and the party decided to conduct interviews in the place of fresh nominations as directed.

60 Political Parties (Internal Dispute Resolution) Model Rules, March 2017. Available at www.ppdt.judiciary.go.ke/wp-content/uploads/2017/04/PPDT-EPDR-Model-Rules-Booklet.pdf (accessed 23 October 2018).

so fraught with irregularities and illegalities that no reasonable court, properly applying its mind to the evidence and the law, and to the administrative arrangements which had been put in place by the IEBC, could, in good conscience, rule that they did not matter or that the will of the people had nevertheless been expressed. The IEBC was directed to conduct a fresh election within 60 days in strict conformity with the Constitution and the Elections Act.

Picture 2: The Supreme Court judges in session during the hearing of Raila Odinga's petition last month.

The annulment was not well received by the Executive, and the immediate crackdown of civil society organisations perceived to have been critical of the government through the NGO Coordination Board. On August 14, the Board deregistered the Kenya Human Rights Commission (KHRC) for alleged tax evasion, maintaining illegal bank accounts and irregular hiring of expatriates.[61] A similar fate befell the African Centre for Open Governance (AFRICOG) and the shutdown was only halted by a directive of the High Court and a directive from the Cabinet Secretary of the Interior halting the deregistration pending further investigation. The International Development Law Organisation (IDLO) was also not spared and the crackdown on this organisation in particular was considered a reprisal for its support to the Judiciary in its preparation for electoral dispute resolution.[62]

The nullification of the result by the Supreme Court was used by the opposition to leverage for certain pre-election reforms, what they termed 'irreducible minimums' failure to which they would not take part in the repeat poll on October 26 2017. The incumbent government on the other hand opted to

61 https://www.nation.co.ke/news/kenya-Human-Rights-Commission-deregistered-/1056-4057174-10291od/index.html accessed 3 October 2018.

62 Human Rights Watch 'Kenya, Again, Represses Civil Society' https://www.hrw.org/news/2017/11/07/kenya-again-represses-civil-society accessed 3 October 2018.

flex its muscle in Parliament and used its dominance in both Houses to pass a raft of amendments to election-related laws.[63] Both sides of the political divide sought electoral reforms; the only difference was in their approach.

G. Legislative and Political Context in the Run-up to the Fresh Election

In the first presidential election petition decision rendered on 1 September 2017, with the reasons reserved for 20 September 2017, the Supreme Court found that the election had not been conducted in accordance with the principles provided in the Constitution and other electoral laws and the IEBC was directed to conduct a fresh election in strict compliance with the law. Being the first time that a presidential election result had been annulled in Kenya and the region, there was lack of clarity as to who would be entitled to contest the fresh election. While the IEBC contended that the issue had been settled by the Supreme Court in the **2013 *Raila Case***, and proceeded to gazette only the Petitioner (Mr Raila Odinga) and the 3rd Respondent (Mr Uhuru Kenyatta) as the only candidates, Dr Ekuru Aukot, who had supported petition as an interested party successfully petitioned the High Court for his inclusion in the list of candidates for the fresh election.[64] Eventually all the candidates in the first election, including Mr Cyrus Jirongo who had since been declared bankrupt,[65] were gazetted as candidates for the fresh election held on 26 October 2017.[66]

In what appeared to be a knee-jerk reaction to the decision of the Supreme Court, legislative amendments were proposed to the Elections Act[67] and the Election Offences Act.[68] The amendments, which were championed by Members of Parliament of the ruling Jubilee Party, sought to alter the administrative structure of the IEBC, certain aspects of the electoral process and to introduce new election offences. There was a clear attempt to alter the legal threshold for invalidating an election by amending section 83 of the Elections Act, what the Supreme Court had referred to as the 'fulcrum of the petition'.[69] A Joint Parliamentary Committee (JPC) that was drawn from both Senate and the National Assembly was constituted to spearhead the review process was boycotted by members of Parliament from the NASA coalition. The opposition read malice in the timing of the proposed amendments; they saw it as a calculated move to favour the incumbent who commanded a majority in the House.

Despite calls by the IEBC, the KNCHR, the EU EOM, members of the clergy and of the diplomatic community to not amend the law during the electoral process, Jubilee Party succeeded in fast-tracking the publication and introduction of the Bill in Parliament, and used their numerical strength in Parliament to pass the Election Laws (Amendment) Bill 2017 and the Election Offences (Amendment) Bill 2017 by a majority 144(73%) as against 53 (27%). The MPs from the Opposition staged a walkout from the Chambers.[70]

63 See Elections Law (Amendment) Act 34 of 2017, some of whose provisions have since been rendered unconstitutional in the case of *Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others* [2018] eKLR.
64 See Ekuru Aukot v IEBC & 3 Others High Court Petition 471 of 2017 [2017] eKLR.
65 See Special Gazette Notice No. 10152, Vol. CXIX—No. 153 published on 13th of October, 2017.
66 See Special Gazette Notice No. 10562 Vol. CXIX-NO. 1.
67 Act No. 24 of 2011.
68 Act No. 37 of 2016.
69 The import of these amendments was the subject of the Court's decision in Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR, discussed later in this text.
70 KNCHR 'Still a Mirage at Dusk: A Human Rights Account of the 2017 Fresh Presidential Elections' p 9.

The reforms flew in the face of the Kriegler Commission Report[71] which had noted with concern the preoccupation with electoral law, as though the law were an end in itself, rather than a guideline requiring sound interpretation and enforcement.[72] The fact that the reforms were championed by the incumbent government also stripped IEBC of its role of electoral law reform, a role which the Kriegler Report had isolated as belonging squarely to the electoral management body, and which was to be respected by all stakeholders and government. The fact that the reforms were triggered by an entity with a direct stake in the outcome of the repeat poll meant that the new electoral laws were tainted by partisanship and undermined the values contained in Article 10 of the Constitution, which require, among other things, public participation. The haste with which the amendments were passed did not allow sufficient time for the public to be consulted; it also undermined the predictability of the law, since it was akin to moving the goal post after the ball has been kicked.

Picture 3: IEBC Chairman Wafula Chebukati with former commissioner Roselyn Akombe. Icture from the https://www.the-star.co.ke/news/2018/04/16/iebc-is-cursed-chebukati-must-also-resign-orengo_c1744750

In the run-up to the fresh election, one of the Commissioners, Dr Roselyne Akombe also fled the country and issued a statement slightly over a week to the fresh election asserting that the IEBC faced enormous challenges in the conduct of the fresh election and was unable to conduct credible, free and fair elections. The Chairperson of the IEBC himself acknowledged Dr Akombe's misgivings about the

71 Available on https://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf (accessed 6 January 2019.

72 L Thuo 'Road to repeat poll in Kenya: Is legislative amendment the cure?' http://ohrh.law.ox.ac.uk/road-to-repeat-poll-in-kenya-is-legislative-amendment-the-cure/ accessed 3 October 2018.

capacity of the IEBC to mount credible, free and fair fresh elections and conceded that he could not guarantee a free and fair election.[73] This was the last straw that broke the camel's back; the damning self-admission of incompetence left the electoral management body reeling for want of credibility.

In the intervening period, the opposition issued a press statement to the effect that the IEBC could not be trusted to conduct a free, fair and credible election. As a pre-condition for participating in the fresh elections, the NASA coalition had issued a statement setting out certain 'irreducible minimums' which they required the IEBC to address before the election. When these went unaddressed, Hon. Raila Odinga indicated that he had withdrawn his candidature for the fresh election scheduled for 26 October 2017. The IEBC on the other hand relied on their press statement issued on 11 October drawing the attention of Hon Odinga to the procedure in Regulation 52 of the Elections (General) Elections requiring that resignation be tendered within 3 days of nominations using the prescribed Form 24A. It was therefore the IEBC's position that the resignation letter had no legal effect. In response, the NASA team asserted that Regulation 52 was not applicable to the fresh election as no nomination exercise had been conducted and therefore, in accordance with the finding in the ***2013 Raila Odinga Case***, the withdrawal of Hon Odinga meant the vacation of the election and the conduct of fresh nominations as provided for in Article 138 (8) (b) of the Constitution.

This followed an announcement by the Kisumu governor, Hon. Peter Anyang Nyong'o Anyang Nyong'o that following withdrawal of Hon Raila from the presidential race, elections would not take place in Kisumu County as scheduled by the IEBC.[74] This would result in a political showdown punctuated by violent protests and excessive use of tear gas. According to KNCHR, 25 new deaths were recorded in the period between 1 September 2017 and 25 October 2017. There were over 100 injuries treated and discharged at various hospitals in Kisumu and Nairobi City Counties. Eleven (11) cases of police injuries were also recorded. The cases were recorded during the anti-IEBC demonstrations.[75]

On the eve of the fresh election, the Supreme Court, which was scheduled to sit to hear a petition seeking to stop the fresh election, failed to sit to hear the case citing the lack of quorum.[76] The decision may have been attributable in part to concerns about the safety of the judges of the Supreme Court, given that the Deputy Chief Justice's driver had been shot at the previous evening.[77]

H. Fresh Election

The period preceding the fresh election was rocked with tension and legislative uncertainty, ushered in by the enactment of the Election Laws (Amendment) Act 2017.[78] The Act amended the Elections Act

73 See excerpts of his statement on <https://www.reuters.com/article/us-kenya-election/kenyan-election-head-no-guarantee-vote-will-be-free-and-fair-idUSKBN1CN0K3> accessed 28 February 2018.

74 KNCHR, 'Still a Mirage at Dusk: A Human Rights Account of the 2017 Fresh Presidential Elections' .p 24.

75 KNCHR, Still a Mirage p 19. There are numerous reports capturing the violence that attended the fresh election. These include KNCHR 'You've got brains, we've got brawn' on violence at the University of Nairobi; Silhouettes of Brutality available on http://www.knchr.org/Portals/0/KNCHR_Silhouettes_of_Brutality.pdf which documents instances of sexual and gender-based violence.

76 See Petition No. 17 of 2017 before the Supreme Court of Kenya at Nairobi was brought before the Supreme Court by 3 petitioners Mr. Khelef Khalifa, Mr. Samwel M. Mohochi and Mr Gacheke Gachihi relied on the following grounds and arguments in their petition: 1. Violation of the principles of a free and fair election and electoral process; 2. Impartiality, neutrality, efficiency, accuracy, accountability and Preparedness and/or lack of preparedness by the 2nd Respondent; 3. Lack and failure of operational transparency, Intimidation and improper influence; 4. Prudent Use of State Resources 5; Universal suffrage

77 https://www.standardmedia.co.ke/article/2001258320/deputy-cj-philomena-mwilu-s-driver-shot-in-an-attack-along-ngong-road (accessed 16 February 2019)

78 Act No 34 of 2017.

2011, the Election Offences Act 2016 and the IEBC Act 2011. Whereas the President did not assent to the law, it entered into force by operation of law in accordance with Article 116 of the Constitution.

As is common with repeat elections, there was low voter turnout, which impacted on the integrity of the election. Moreover, due to the violence experienced in some regions with threats meted out against IEBC officials conducting the fresh election, 25 constituencies did not participate in the fresh election, giving rise to the challenge in ***John Harun Mwau & Others v IEBC & Others*** **Presidential Election Petitions 2 & 4 of 2017** about the incompatibility of the fresh election with Article 138 (2) of the Constitution, requiring a presidential election to be conducted in every constituency. The merits of the arguments in that case are discussed below.

> *The constitutionality of the Election Laws (Amendment) Act 34 of 2017 was also challenged at the Supreme Court and in the High Court, and the apex court deferred making a finding on constitutionality to the High Court under Article 165 (3) (d) of the Constitution in* ***Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others*** **Nairobi High Court Petition No. 548 of 2017***.*

I. Post-Election EDR

The Supreme Court heard and determined one election petition in respect of the August 8 election. Following a nullification of the result of that election, two other petitions (Petition 2 and Petition 4 of 2017) were heard and determined.

A total of 388 election petitions were filed in the High Court and Magistrates Court respect of the August 8 elections. Of these, 174 related to county elections, 125 related to Parliament (15 concerned senatorial elections, 12 concerned the election of woman representative and 98 challenged elections of Members of the National Assembly) and a total of 89 petitions were filed (both in the High Court and Magistrates' Court) in respect of party lists.[79] The main issues isolated from the decisions of the courts are analysed later in this text.

Picture 4: On 26th October2017 rowdy youths barricaded the road leading to Ogango Primary School Polling Center, retrieved from https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1031/Still-a-Mirage-at-Dusk-A-Human-Rights-Accounts-of-the-2017-Fresh-Presidential

79 Status Report on the Election Petition Appeals Filed at the Court of Appeal and at High Court following finalization of the 388 Election Petitions (As At 20th April 2018) available on https://www.judiciary.go.ke/?wpdmpro=status-on-elections-petition-appeals-as-at-april-20 (accessed 24 October 2018).

As provided for in section 75 of the Elections Act and Rule 6 of the Elections (Parliamentary and County Elections) Petition Rules 2017 (Election Petition Rules), the Chief Justice, vide a Gazette Notice of October 5 2017, published the list of select judges and magistrates to preside over county and national assembly petitions.

The 2017 EDR cycle was the second one in the post-2010 EDR framework and had the advantage of lessons learnt from the 2013 cycle. However, the terse relationship between the Judiciary and the other arms of government continued to have an impact on the capacity of the Judiciary to deliver on its mandate. While the cases were heard within constitutional timelines in the election courts, financial constraints occasioned by budget cuts had an impact on the efficacy of the appellate courts to finalise on election appeals. Although the Judiciary had requested 31.3 billion in the 2018/19 cycle, it was only allocated 17.3 billion, which hampered its plans for modernisation and automation, seen as critical to resolution of disputes, including electoral ones.[80] Limited resources also hampered an efficient monitoring of the progress of election petitions since it affected the capacity of the JCE Secretariat to communicate effectively with the various stations for updates.[81]

80 For the impact of limited resource allocation on the EDR process, see the Judiciary Committee on Elections Annual Report 2017, 37. It is available on https://www.judiciary.go.ke/download/jce-annual-report-2017/ (accessed 5 December 2018).

81 Ibid.

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We reiterate that the responsibility to verify results is not a creation of this Court but an imperative of the Constitution and Section 39(1C) (b) of the Elections Act. The verification required of the 1st and 2nd respondents is meant to ensure accuracy or prevent fraud and also to confirmation [sic] that the candidate to be declared president-elect has met the threshold set under Article 138(4) of the Constitution. It is therefore the duty of the 2nd respondent, to bring to the attention of the public, any inaccuracies discovered by the verification of Forms 34A and Forms 34B even as he declares the results as generated from Forms 34B to generate Form 34C. The effect of such inaccuracies on an election depends on their gravity or otherwise and the 2nd respondent must state whether the discrepancies affect the overall results or not. The institution vested with the mandate to make a determination of the effect of the inaccuracies is an election Court, a matter clearly settled by both the Court of Appeal in the ***Maina Kiai decision*** *and in this Court's Judgment.*

Supreme Court Election Petition 1 of 2017

Raila Amolo Odinga & Another v IEBC & 2 Others Presidential Election Petition 1 of 2017

Supreme Court of Kenya at Nairobi
Coram: Maraga CJ, Mwilu DCJ & V-P, Ibrahim, Ojwang, Wanjala, Ndungu, Lenaola, SCJJ

Judgment Allowing Petition

Date 20 September 2017

General election — presidential election — standard of proof — burden of proof — meaning of section 83 of the Elections Act — threshold for invalidating presidential election result — undue influence — constitutionality of section 26 of the Leadership and Integrity Act —computation of rejected votes in final result — meaning of fresh election

Summary of facts:

The Petitioners and the 1st Interested Party asserted that the conduct of the August 8 2017 General Election violated the principles of a free and fair election and that the electoral process did not accord with the Constitution, electoral laws and regulations. They asserted that the Respondents committed errors in the counting and tabulation of results and committed irregularities and improprieties that significantly affected the election result. The Petitioners also contended that the Respondents illegally declared as rejected an unprecedented and contradictory number of votes which had an impact on the result. The Petitioners and 1st Interested Party also took issue with the entire process of relaying and transmitting election results which they said failed to comply with the requirements of the law.

In relation to compliance with the Constitution and related electoral laws, the Petitioners contended that the Independent Electoral and Boundaries Commission (the IEBC) failed to conduct the election in an 'accurate, verifiable, secure, accountable and transparent manner' as required by Article 86 and the conduct of the election was therefore invalid and a usurpation of the will of the people. It was further averred that the principles of a free and fair election as set out in Article 81 of the Constitution were flouted and that the IEBC committed massive systemic and systematic irregularities which went to the heart and core of holding elections.

The Petitioners also sought the nullification of the election result on the basis of alleged use of intimidation and coercion of public officers and improper influence of voters. They alleged that the 3rd respondent not only coerced chiefs in Makueni county to vote for him, but that under the guise of launching official state projects and making reparations to the victims of the 2007 post-election violence, he caused several advertisements to be made in the electronic and print media which were contrary to the Election Offences Act and issued cheques to internally displaced persons. The Petitioners also took issue with some cabinet secretaries having campaigned for the 3rd Respondent and sought a declaration of unconstitutionality of section 23 of the Leadership and Integrity Act, which exempted cabinet secretaries from the obligation of impartiality under Article 232 of the Constitution.

In relation to the process of relaying and transmission of results, the Petitioners impugned the delay in the transmission of results which, contrary to section 39 (1) (C) of the Elections Act, did not include a simultaneous electronic transmission of results from the polling stations to the national tallying centre. Moreover, it was their contention having the primary and secondary disaster recovery sites hosted

by an external contractor, OP Morpho SAS, rather than the Communications Authority of Kenya (CAK) as proposed, opened up the system to unlawful interference and manipulation by outsiders. Taken together with the delay in the procurement and testing of the technology used in the election, it was the Petitioners' case that the conduct of the election was not simple, accurate, verifiable, secure, accountable and transparent, contrary to Article 81 (e) (iv) and (v) of the Constitution. Moreover, the Petitioners impugned the process of announcing the results for compliance with the law on the basis that the IEBC had announced results on the basis of Forms 34B, without receiving all Forms 34A, particularly because in some instances the results in Forms 34B were different from those in Forms 34A; thereby compromising the credibility of the presidential election.

On the errors in the voting, counting and tabulation of results, the Petitioners and 1st Interested Party asserted, *inter alia*, that the IEBC deliberately inflated votes cast in favour of the 3rd Respondent, that the IEBC illegally established ungazetted polling stations which were manned by ungazetted returning and Presiding Officers, that some of the forms supplied by the IEBC had irredeemable irregularities and that there were some discrepancies between results as contained in the forms and those contained on the IEBC portal.

The Petitioners and 1st Interested Party also contested the quantity of rejected votes, which accounted for at least 2.6% of the total votes cast, asserting that it was too high and had an effect on the result. They urged the Court to reconsider its finding in *Raila Odinga v Independent Electoral and Boundaries Commission & 3 Others SCEP 5 of 2013* and rule that rejected votes are to be considered in the computation of the voting threshold under Article 138 (4) of the Constitution.

The Petitioners and the 1st Interested Party also sought to have the Court depart from the interpretation of section 83 of the Elections Act which it had adopted in 2013 in *the Raila Odinga case.* The Court had earlier ruled that the test for invalidation of a presidential election result was a conjunctive one - that the Petitioner had to demonstrate that, not only was there non-compliance with the Constitution and electoral laws, but also that the non-compliance had affected the election result. The Petitioners also urged the Court to review the standard of proof in election petitions established in 2013 and rule that the applicable standard of proof in the presidential election petition is on a balance of probabilities.

In response, the Respondents and 2nd Interested Party maintained that the IEBC had conducted the elections in accordance with the Constitution, the IEBC Act, the Elections Act, the Elections (General) Regulations and other laws. They contended that the Respondents had not demonstrated how the electoral process failed to accord with the governing law. They maintained that the results were accurately collated, tallied and declared.

Concerning the process of relay and transmission of results, it was contended that the process was 'simple, accurate, verifiable, secure, accountable, transparent, open and prompt' and that it complied with the Constitution, section 39 1 (C) of the Elections Act and the ***Maina Kiai*** decision.

It was further contended on behalf of the IEBC that there was no obligation to ensure simultaneous transmission of images of Forms 34A at the same time as the data was entered into the Kenya Integrated Electoral Management System (KIEMS) kits. The Court was therefore urged not to attach any sanctions to the failure to simultaneously transmit Forms 34A.

The Respondents also denied the legal status of the data entered into the KIEMS kits and controverted

the Petitioners' allegation that there were discrepancies between the results as entered into Forms 34A and the 'statistics' in the KIEMS. In any case, it was asserted that where any such discrepancies might exist, the same were inadvertent and the result of human error and had no material effect on the outcome of the presidential election. It was their case that the results were announced on the basis of Forms 34 B, which were prepared from Forms 34A; therefore, they were not affected by any errors that may have occurred at the time of entry of the data into the KIEMS kits.

On the allegation of intimidation and improper influence or corruption, the 1st Respondent maintained that it had taken action against the 3rd Respondent by writing to the Directorate of Public Prosecution directing them to take action. On behalf of the 3rd Respondent, it was asserted no chiefs were ever intimidated in Makueni; rather a warning had been issued to the effect that public officers ought not to be involved in campaigning for any politician. It was also maintained that the incumbent government had not engaged in advertisement of government projects in order to influence voters; rather, in publishing the projects it had been involved in, the government was only giving effect to the right of Kenyans to information, which right is not suspended during the election period. Moreover, payments made to internally displaced persons were made by an independent government agency, and no evidence was adduced to the effect that persons who benefited from the payments were induced to vote for the 3rd Respondent. On the constitutionality of section 14 of the Election Offences Act, which does not bar cabinet secretaries from campaigning during their term in office, the Respondents urged that the matter was pending in the High Court and asserted that the High Court was the proper forum for ventilating the constitutionality of the said provision.

In relation to the allegation that there had been substantial non-compliance with the law and improprieties that affected the results, it was the Respondents' case that the alleged irregularities were not proved, and any inconsistencies in the statutory forms were minor and therefore could not have materially affected the results when taken together.

On the question of rejected votes, it was contended that the rejected votes accounted for 0.54% of the total votes cast, rather than 2.6% as alleged by the Petitioners to have been the figure on the public portal. It was contended on behalf of the 1st Respondent that the figures on the public portal were merely statistics, and therefore could not serve as proof of rejected votes. They also urged the Court to retain its interpretation of rejected votes established in the 2013 *Raila Odinga* case as the correct interpretation of the law.

On the interpretation and application of section 83 of the Elections Act, the Court was urged to find that non-compliance with the law alone was not sufficient to invalidate a presidential election if it could not be demonstrated that the non-compliance also materially affected the election result. The Respondents urged the Court to stand by the precedent established in the 2013 *Raila Odinga* case and to uphold the election result unless it could be demonstrated either that legal votes had been rejected or that illegal votes had been allowed which had had an effect on the election result. It was their case that the election had been conducted substantially in accordance with the Constitution and therefore should be upheld.

In response to the allegations of irregularities, the Respondents denied that ungazetted polling stations were used, that returns were filed by persons who had not duly been appointed as Presiding Officers and that there were instances when a Presiding Officer was in charge of more than one polling station. It was also asserted that all statutory forms were signed and stamped as required by law. The Respondents

also denied the Petitioners' allegation that some forms did not have security features and that some ballot papers did not contain serial numbers. It was the 1st Respondent's case that all ballot papers and statutory forms had specific security features, which security features were not a requirement of the law but rather used by the 1st Respondent out of abundance of caution. The Respondents also denied that the results were manipulated in favour of the 3rd Respondent and the 3rd Respondent maintained that there was no pre-conceived constant percentage between the 1st Petitioner and 3rd Respondent's results. On behalf of the 3rd Respondent, it was urged that where there were any irregularities, the same were human and inadvertent, and did not in any way affect the results. It was therefore their case that the petition did not have merit and they urged the Court to dismiss it.

Before the determination of the substance of the petition, the Court had to determine several interlocutory applications, including *amici* applications. Two amici briefs were accepted. The first amicus, the Attorney-General, was admitted and his participation limited to advising the Court on the proper constitutional and legal standard applicable in the conduct of presidential elections under Articles 81 and 86 of the Constitution; the effect of the amendment to electoral laws post 2013 on the conduct of presidential elections, how the Court should treat rejected/spoilt votes in ascertaining total votes cast, the proper constitutional and legal threshold for invalidating a presidential election and the remedies the Court can grant in determining a presidential election petition. The Law Society of Kenya (LSK), the second amicus, was limited to making submissions in regard to the interpretation of Section 83 of the Elections Act.

Issues for determination

From the submissions of the parties, the Court identified the following issues for determination: whether the presidential election was conducted in accordance with constitutional principles and electoral law; whether there were irregularities and illegalities committed in the conduct of the presidential elections; if there were any irregularities and illegalities, whether they had an impact on the integrity of the election and what consequential orders and reliefs the Court could grant, if any. Before determining these substantial issues, the Court identified the following preliminary issues for determination: the burden and standard of proof in an election petition; whether rejected votes ought to be factored in determining whether a candidate has met the 50% +1 threshold and the threshold for invalidating a presidential election result.

Determination of the Court

On the burden of proof, only the 3rd Respondent submitted. The Court was urged to find that in an election petition, the results as declared by the Returning Officer are presumed to be correct and that the Petitioner had to prove that not only was there non-compliance with election law, but that the non-compliance affected the election results. The Court ruled that since there is a well-established common law principle that the person who asserts a fact must prove it, the burden rested with the Petitioners to demonstrate the non-compliance with the law or irregularities sufficient to nullify an election result to the satisfaction of the Court. The Court, however, went further to assert that whereas the legal and evidential burden rests with the Petitioner at the onset of the trial, depending on the manner he discharges it, the evidential burden keeps shifting and its position at any time would be determined by ascertaining who would stand to lose if no further evidence were introduced.

As for the standard of proof, the Court rejected the Petitioners' invitation to overrule its position in the 2013 *Raila Odinga* case and find that the standard is on a balance of probabilities. It was also not persuaded by the Attorney-General's argument that the standard lies between balance of probability to beyond reasonable doubt depending on the allegation of irregularity or non-compliance with

electoral laws. The Court found, having reviewed decisions from various jurisdictions that three main categories of standard of proof emerge: a criminal standard of proof beyond reasonable doubt applicable when allegations of commission of criminal or quasi-criminal acts are made in a petition; a civil standard of balance of probabilities applicable in jurisdictions like England irrespective of the allegations made; and an intermediate standard of proof above the balance of probability but not as high as beyond reasonable doubt, such as was applied in our jurisdiction in the 2013 *Raila Odinga* case. While acknowledging that it could indeed overrule its position in the 2013 *Raila Odinga* case, the Court was persuaded that due to the great public importance attached and public interest nature of election petitions, the legal principle remains that the standard of proof is higher than a balance of probabilities but lower than beyond reasonable doubt and where allegations of a criminal or quasi-criminal nature are made, they must be established beyond reasonable doubt.

On the question of valid versus rejected votes, the Court sought to determine the meaning of 'votes cast' as used in Article 138 of the Constitution in the computation of the voting threshold required for one to be declared elected as President. The Petitioners not only argued that the percentage of rejected votes was unrealistic, but also urged the Court to depart from its position in the 2013 *Raila Odinga* case and find that 'votes cast' in its ordinary sense means all ballot papers put in the ballot box, irrespective of whether or not they were later rejected.

The Court distinguished a ballot paper from a vote, with the former being the instrument in which a voter records his choice and the vote being the actual choice made by the voter. The Court asserted that a ballot paper does not become a vote merely by being inserted in the ballot box as it may later be rejected. Therefore, a purposive interpretation of Article 138 (4) led to only one logical conclusion: that votes cast can only mean valid votes. The Court therefore upheld its finding in the 2013 *Raila Odinga* case.

The third preliminary issue for determination, referred to as the fulcrum of the petition, was the meaning of section 83 of the Elections Act i.e. the threshold for invalidating a presidential election result. The Petitioners urged the Court to depart from its finding on the meaning of section as adopted in the 2013 *Raila Odinga* case, where it had made a tangential interpretation of the provision while addressing the question of burden and standard of proof. The Supreme Court had stated that to invalidate an election result, a Petitioner would have to demonstrate not only that there was non-compliance with the written law relating to the election, but also that the non-compliance affected the election result. The Petitioners argued that the test was onerous and made it almost impossible to challenge an election result in court. It was further asserted that the position taken in that case undermined article 2 of the Constitution, as it would allow a violation of the Constitution to stand so long as it could not be demonstrated how it affected the outcome of the election. It was their case that a purposive interpretation required that the test be disjunctive, i.e., that one prove either non-compliance with election law or that there were irregularities that affected the election result.

The LSK argued that section 83 is not applicable where there is a violation of the Constitution or a substantive provision of election laws and Regulations. The Respondents, the Attorney-General and 2nd Interested Party urged the Court not to depart from the interpretation adopted in 2013.

The Court evaluated section 83 against the counterpart provision in section 28 of the repealed National Assembly and Presidential Elections Act (NAPE Act). It also reviewed section 37 of the Representation of the People Act of the UK and its interpretation in the case of ***Morgan v Simpson*** which had been adopted in the 2013 decision and followed in the ***Hassan Ali Joho & Another v***

Suleiman Said Shahbal & 2 Others [2014] eKLR and ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others [2015] eKLR*** appeals. It found that the test in the English statute was a conjunctive, requiring both proof of non-compliance and the effect of irregularities on the election result, while both the repealed section 28 of NAPE Act and section 83 of the Elections Act adopted a disjunctive test. The authorities from Nigeria, Ghana, Zambia and the UK which had been cited were therefore inapplicable. Moreover, the Court found that section 83 does not require that election be conducted substantially in compliance with the law, unlike many of the provisions in other jurisdictions. In addition, it requires that an election comply with the principles laid down in the Constitution in order to be valid. However, the Court was keen to maintain that not every irregularity would invalidate an election result. It read the words 'if it appears' as contained in section 83 as implying a requirement that any irregularities be substantial.

The Court therefore ruled that the two limbs of section 83 ought to be applied disjunctively and a Petitioner could succeed in voiding an election where they satisfactorily proved either that the conduct of the election substantially violated the principles laid down in the Constitution and other written laws on elections or that the election was marred by irregularities and illegalities that affected the result of the election, even though it was conducted substantially in accordance with the principles laid down in the Constitution and other written laws on elections.

On the main issues for determination, in determining whether the presidential elections had been conducted in accordance with the Constitution and electoral law, the Court interrogated whether the 2nd Respondent had declared the results of the presidential election before receiving all the Forms 34A and whether all the Forms 34A had been electronically transmitted from the polling stations to the National Tallying Centre. The Court faulted the 1st Respondent for failing to ensure that all Forms 34A were electronically transmitted to the national tallying centre as is required by section 39 (1) (C) of the Elections Act and found that this could not be explained by a failure of technology as alleged by the 1st Respondent. Further, the 1st Respondent admitted that at the time of declaration of results, it had not received Forms 34A from 5,015 polling stations representing up to 3.5 million votes. No plausible explanation was offered for the discrepancy in the results as contained in the scanned Forms 34A and those contained in the KIEMS kits and transmitted electronically to the national tallying centre. The 1st Respondent also failed to allow the Petitioners access to the system to confirm the authenticity of the transmissions made to the constituency and national tallying centres. The 1st Respondent had therefore failed to discharge its burden by demonstrating that it had conducted the elections in accordance with the Constitution and other written law.

The Court also found that the Chairperson of the IEBC declared results without having received all Forms 34A. He also failed to justify declaration of results based on a copy of Form 34 C. Since polling station is the 'true locus of the free expression of the will of the voters', declaring results on the basis of Forms 34B without reference to Forms 34A was unjustifiable. Having reviewed the principles in Articles 81 and 86 of the Constitution, the 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections, since it was neither transparent nor verifiable.

The Court therefore concluded that the 1st Respondent committed illegalities and irregularities of such a substantial nature that no court, properly applying its mind to the evidence and the law as well as the IEBC's administrative arrangements, could in good conscience declare that they did not matter and that the will of the people was expressed nonetheless.

As to the impact of the irregularities and illegalities on the integrity of the election result, the Court defined illegalities as 'breaches of the substance of specific law' and irregularities as the 'violation of specific regulations and administrative arrangements'. On the question of whether the 3rd respondent had violated section 14 of the Election Offences Act by allowing publication of government projects and achievements on a public portal during the campaign period, the Court deferred to the jurisdiction of the High Court since a matter on the same issue had been filed there as ***Apollo Mboya v A-G & Others Pet 162 of 2017*** and ***Jack Munialo v A-G & Others Petition 182 of 2017*** to preserve the prospect of appeal all the way to the Supreme Court if need be. It did however note that section 14 (3) in no way requires an account of state resources attached to the presidency and therefore does not explicitly require the President to account for and refrain from misusing public resources during campaigns. On the allegations of undue influence through making payments of IDPs or threats to chiefs in Makueni against campaigning for the opposition, the Court found that the Petitioners had not adduced sufficient evidence to establish undue influence. Moreover, the Court declined to declare section 23 of the Leadership and Integrity Act unconstitutional, in so far as the Act exempts cabinet secretaries from the obligation to remain impartial by not campaigning for a candidate in an election while in office, since the Petitioners had not pleaded this prayer from the beginning.

On irregularities, the Court found that the Form 34C which was used to declare the presidential election result was not the original one and the original form was never availed despite a court direction and without explanation by the IEBC. The Court also found that the results could not be authenticated since the form did not have security features. The Court also faulted the 2nd Respondent for failure to fill the takeover section and asserted that this cast doubt as to the verification process required to be done by Article 138. Some of the statutory forms inspected were also not signed, others were not stamped, some were copies and others were missing security features, despite the averment on behalf of the 1st Respondent that all forms contained these features. Taken together, the Court concluded that the discrepancies were widespread.

As to their impact on the integrity of the election result, the Court ruled that the illegalities and irregularities committed by the 1st Respondent were of such a substantial nature that no court, properly applying its mind to the law and the evidence as well as the 1st Respondent's administrative arrangements could in good conscience declared that the will of the people was expressed. It concluded that the 1st Respondent failed to demonstrate that in substance and form, the electoral process and results were simple, yet accurate and verifiable and the declared result as therefore rendered invalid, null and void. The Court allowed the Petitioners prayers for a declaration that the irregularities and improprieties in the election were substantial and they affected the results; a declaration that all the votes affected by each of the irregularities be struck off from the final tally of the presidential election; a declaration that the presidential election was not conducted in accordance with the Constitution and applicable law, thus rendering the result invalid; a declaration that the 3rd Respondent was not validly elected as the president-election and that the declaration was invalid, null and void and an order directing the 1st Respondent to organise and conduct a fresh presidential election in strict conformity with the Constitution and the Elections Act.

Raila Amolo Odinga & Another v IEBC & 2 Others

Presidential Election Petition 1 of 2017

Supreme Court of Kenya at Nairobi
Coram: Maraga CJ, Mwilu, DCJ & V-P, Ibrahim, Ojwang, Wanjala, Ndungu, Lenaola, SCJJ

Ruling on Scrutiny

28 August 2017

Access to information relating to the hardware and software used in the conduct of the Presidential election, particularly in transmission of results — access to and scrutiny of certified copies of Forms 34A, 34B and 34C — leave to file further affidavits

Summary of facts

In their petition challenging the August 8 2017 election, the Petitioners also made prayers for scrutiny. Thy contended that a scrutiny of the total rejected and spoilt votes would confirm that 395, 510 votes had been unlawfully deducted from the 1st Petitioner and added to the 3rd Respondent. It was also alleged that there was a discrepancy in the rejected and spoilt votes as shown in Forms 34 B and the public portal, with the portal showing a higher number.

The Petitioners also contended that the data and information recorded in Forms 34A at individual polling stations was not entered into the KIEMS kits accurately and transparently and that in more than 10,000 polling stations, the data entered into the KIEMS kits was inconsistent with the data on Forms 34A. Further, it was the Petitioners' case that the results declared in Forms 34B were inconsistent with the results in Forms 34A and that in excess of 14,000 fatally defective returns from polling stations accounting for over 7 million votes were entered into the vote tally without verification.

They therefore prayed, *inter alia*, for an order of scrutiny of the rejected and spoilt votes, an order for scrutiny and audit of all returns of the presidential election, including but not limited to Forms 34A, 34B and 34C and an order for scrutiny and audit of the system and technology used by the 1st Respondent in the presidential election, including but not limited to the KIEMS kits the servers and the portal.

The Petitioners also filed a separate Notice of Motion setting out in detail the access they required. The Court noted that three kinds of prayers were sought by the Petitioners: access to information relating to the hardware and software used in the conduct of the Presidential Election and particularly in transmission of results; access to and scrutiny of certified copies of Forms 34A, 34B and 34C and leave to file further affidavits.

In the affidavits filed in support of the application, it was contended that the elections technology used was compromised and used in a manner not intended by the law to interfere with the outcome of the presidential election.

The Petitioners also contended that the 1st Respondent had declined to respond to numerous requests made by NASA for information which was critical to demonstrate that the 1st Respondent had not conducted a free, fair, secure, verifiable, accountable and transparent election. The Petitioners also relied on the analysis of Dr Otumba and a report dated 17 August 2017 to the effect that it was impossible to verify individual results obtained from any individual polling station and that the

data showed a programmed data transmission system which had no characteristic of randomness, which was indicative of unreal and cooked figures. They prayed that the orders sought be granted expeditiously in light of the limited time for the determination of the presidential election petition and urged that no prejudice would be occasioned to the Respondents in granting the orders.

On the question of spoilt and rejected votes, the Petitioners contended that their analysis showed that 395,510 votes could not be accounted for and this indicated manipulation and alteration of rejected and spoilt votes during tallying of votes. The presidential election returns were therefore made in absolute breach of the mandatory provisions of sections 39 (1) (C) of the Elections Act and the Elections (Technology) Regulations. Further, the Petitioners urged that the KIEMS was designed in such a manner that ensured that text results could not be transmitted without images on the prescribed form which contained the total results in every polling station. In the end, their view was that the evidence pointed to interference with the KIEMS, fraud in the filing of Forms 34 A, 34B and 34C and the KIEMS was not secured as required by law and was therefore breached and/or deliberately compromised and therefore used in a manner not intended by law. A scrutiny of the IEBC system, logs and returns was therefore imperative.

The Petitioners, relying on the Supreme Court decisions in the ***Munya*** and ***Nick Salat*** decisions, submitted that they were entitled to a scrutiny under section 82 (1) of the Elections Act as they had laid a sufficient basis by the evidence they had submitted. They argued that the computer and system logs requested were permanent and left a perpetual trail which was relevant in determining the issues raised in the petition. They also urged that sections 2 and 4 of the Access to Information Act 2016 entitled them to the information sought as a matter of right and that the Court invoke Articles 50 and 259 of the Constitution to grant the orders sought.

The 1st and 2nd Respondents opposed the application in a Replying Affidavit sworn by the 1st Respondent's legal officer. They argued that the application sought to expand the scope of the petition in an unconstitutional manner by introducing new evidence after the period established by Article 140 had lapsed. They maintained that no basis had been laid for scrutiny under section 82 of the Elections Act and the Petitioners were looking for evidence which should otherwise have been sought prior to the filing of the petition. They contended that the grant of the information sought would likely compromise the integrity and security of the information technology systems and compliance with the orders sought would be onerous in view of the strict timelines provided by the Constitution for the hearing and determination of the petition. It was their position that the information sought could have been availed through a different avenue under Regulation 15 of the Elections (Technology) Regulations 2017, which had not been complied with. They relied on the Court of Appeal decision in ***Nicholas Salat v Wilfred Rotich Lesan & Others*** **CA 228 of 2013** and the High Court decision in ***Hassan Mohamed Hassan & Another v IEBC & 2 Others*** **Garissa High Court Petition 6 of 2013** for the assertion that an order of scrutiny should not be granted where a basis had not been laid.

The 3rd Respondent filed an affidavit in reply sworn by Brian Omwenga, a technology advisor employed by Jubilee Party in which he deprecated the 1st Petitioner for laying great emphasis on the results being streamed in on an electronic display at Bomas of Kenya and on an online portal since there was no requirement in law that the 1st Respondent exclusively use electronic systems to transmit results, so long as whatever system was use was simple, accurate, verifiable, accountable and transparent.

Moreover, section 44A of the Elections Act granted the 1st Respondent discretion to use a complementary

mechanism either where technology failed or where it did not meet the constitutional imperative of a system that is 'simple, accurate, verifiable, accountable and transparent'.

It was contended that the election was conducted within the law, a fact confirmed by independent observers such as the Elections Observation Group (ELOG). Further, it was asserted that the results were sent electronically in accordance with the ***Maina Kiai*** decision and the Elections (General) Regulations and that results from all 290 constituencies were conclusively tallied, collated and announced.

The 3rd Respondent maintained that there was no legal requirement that the 1st Respondent avail Forms 34 A to any presidential candidate for verification. The 3rd Respondent reiterated that the 1st Respondent did not have telecommunication facilities of its own and while it relied on Safaricom Ltd, Airtel Kenya Ltd and Telkom Kenya Ltd to provide transmission and technological services, whose technology was nevertheless susceptible to failure, sabotage or human error.

That for the above-cited reasons, the 1st Respondent had put in place a complementary mechanism for voter identification and results transmission to ensure compliance with Article 38 of the Constitution. This fact was confirmed by the High Court in ***National Super Alliance Kenya v Independent Electoral & Boundaries Commission & 2 Others*** Constitution Petition No. 328 of 2017, and upheld by the Court of Appeal.

The 3rd Respondent further argued that the 1st Respondent had, pursuant to Regulation 21 of the Elections (General) Regulations, posted publicly a list of 11, 000 polling stations without 3G coverage, and in those instances, the Forms 34A would be ferried physically to the CTCs or transmitted electronically in places where there was 3G network coverage.

It was the 3rd Respondent's case that even if the Petitioners were granted access to the information and equipment sought, the 1st Respondent would require 14 days to avail them as the computer logs, for example, ran into approximately 100,000 pages.

Finally, the 3rd Respondent asserted that the application and prayer for leave to file additional affidavits was a fishing exercise designed to help the Petitioners engage in a wild goose chase for information, which was meant to affirm their bias and conspiracy theories and hacking, which had been discredited by experts. They therefore prayed for the application to be dismissed with costs.

Issues for determination

The Court framed three issues from the prayers sought by the Petitioners: access to information relating to the hardware and software used in the conduct of the Presidential Election and particularly in transmission of results; access to and scrutiny of certified copies of Forms 34A, 34B and 34C and leave to file further affidavits. It opted to deal with the second issue first and the right to information in a peripheral manner as implicit in scrutiny was that the right to information first be granted.

Determination of the Court

The Court reviewed the law on scrutiny as set out in section 82 of the Elections Act as read with Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules. The reference to the Election Petition Rules was by way of comparison only since Supreme Court (Presidential Election Petition) Rules were silent on the question of scrutiny.

In addition to the above-cited provisions, the Court observed that there had been consistent

jurisprudence from the courts on how the law on scrutiny should be applied in electoral matters. The Court highlighted jurisprudence from the High Court, Court of Appeal, Supreme Court and the Indian Supreme Court, and found that the principles on scrutiny were consistent.

Applying the law and principles as well as the law on access to information as contained in the Constitution and Access to Information Act 2016, the Court ruled that the Petitioners had clearly stipulated their intention for scrutiny and the kind of information they intended to access. They had also set out the parameters of the intended scrutiny to include all rejected votes and spoilt votes, the returns of the Presidential election including but not limited to Forms 34 A, 34B and 34 C and the KIEMS kit, the servers and website/portal.

During the hearing of the application, the Court inquired into the timing for the implementation of the orders sought should the prayers be granted. While the Petitioner and the 1st Respondent submitted that the orders could be complied with in a matter of hours, the 2nd Respondent maintained that the orders would be impracticable to implement. They cited the fact that KIEMS kits were stored in constituencies and that access to KIEMS kits could not be done without creating a backup, neither could access to software be done in a brief time to argue that the entire exercise would take up to 3 weeks.

Concurring with the 3rd Respondent that a party was bound by their pleadings and that scrutiny of the forms used or technology could only be ordered where there was sufficient reason, the Court asserted that any prayer resulting in the expansion of the Petitioners' case by and which was not in the petition was a fishing exercise and would not be allowed.

The Court analysed each of the prayers made by the Petitioners, to ensure that only those orders which were practicable, reasonable and helpful in reaching a just and fair determination of the petition were to be granted.

In relation to the prayer that the 1st Respondent be compelled to give access to the Court and the Petitioners certified copies of Forms 34 A, 34B and 34C used to generate the final tally of the presidential election and the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones, the Court found that since there was no objection from the 1st Respondent and it was assured that the forms could be availed in 48 hours, there was no reason not to grant it.

in relation to prayer 3, which sought several orders relating to access to the 1st Respondent's electoral technology system and access and supply of a large number of software and hardware, the Court noted that the access had the potential of compromising the integrity and security of the 1st Respondent's system and that of individuals. Further, some of the orders sought went outside the purview of the Petitioners' case. The Court indicated that it would only grant orders where there was absolute confidentiality of passwords and usernames, locations of servers, identity of password holders, IP addresses and software running applications, among other things.

The prayer that the Petitioners be granted unfettered access to relevant persons and systems at Safran in order for IT experts to fully understand the KIEMS was not granted. The Court ruled that this software company was based in France and was not party to the proceedings and therefore it was impractical to demand that the Petitioners be granted access to persons and systems related to it as this would unnecessarily delay the hearing and determination of the petition.
On the filing of further affidavits in relation to the information obtained from the scrutiny, the Court

observed that in light of the time left for hearing and determining the petition, such an order would only delay the proceedings and prejudice the Respondents who would not be able to respond to the issues raised therein. The Court therefore disallowed prayer 7 in this regard.

On the question of the manner in which Forms 34A were handled, the Petitioners had claimed that the Forms 34A were not captured, stored and transmitted in the expected timeframe, which claim was partly captured in prayer 3 (g) of the application. The Court therefore ordered that the 1st Respondent supply the Petitioner and 3rd Respondent scanned and transmitted copies of Forms 34 A and 34 B for their scrutiny.

The Court issued final orders that the Petitioners and the 3rd Respondent be granted a read only access, including copying where necessary, to

(a) Information relating to the number of servers in the exclusive possession of the 1st Respondent.
(b) Firewalls without disclosure of the software version.
(c) Operating systems without releasing the software version.
(d) Password policy.
(e) Password matrix.
(f) System user types and levels of access.
(g) The IEBC Election Technology System Redundancy Plan comprising of its business continuity plan and disaster recovery plan.
(h) Certified copies of certificates of Penetration Tests conducted on the IEBC Election Technology System prior to and during the 2017 General and Presidential Election including:
    (i) Certified copies of all reports prepared pursuant to Regulation 10 of the Elections (Technology) Regulations , 2017; and
    (ii) Certified copies of certificate(s) by a professional(s) prepared pursuant to Regulation 10(2) of the Elections (Technology) Regulations, 2017
    (iii) Specific GPRS location of each KIEMS Kit used during the Presidential Election for the period between and including 5th August, 2017 and 11th August, 2017.
(j) Certified list of all KIEMS Kits procured but not used and/or deployed during the Election;
(k) Polling station allocation for each KIEMS Kit used during the Presidential Election;
(l) Technical Partnership Agreement(s) for the IEBC Election Technology System including but not limited to:
    (i) List of the technical partners;
    (ii) Kind of access they had; and
    (iii) List of APIs for exchange of data with the partners
(m) Log in trail of users and equipments into the IEBC Servers.
(n) Log in trails of users and equipments into the KIEMS Database Management Systems.
(o) Administrative access log into the IEBC public portal between 5th August 2017 to date.
(p) The information listed in (m), (n) and (o) above shall be issued in soft copy to the Petitioners and 3rd respondent.
(q) Certified photocopies of the original Forms 34A's 34B's and 34Cs prepared at and obtained from the polling stations by Presiding Officers and used to generate the final tally of the Presidential election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake forms from the genuine ones.
(r) Forms 34A 34B and 34 C from all 40,800 polling stations.
(s) Scanned and transmitted copies of all Forms 34A and 34B.

The Court directed that the Registrar of the Supreme Court be assisted by as many judicial officers and

staff as necessary to supervise access to the certified copies of Forms 34A and 34B by the Petitioners and 3rd Respondents at such venue as was to be determined in consultation with the parties. The Court further directed that a report on that exercise and related issues by filed by the Registrar by 5 p.m. on 29 August 2017 and that parties were at liberty to submit on that report at the end of the hearing. The Court also directed that an ICT officer designated by the Court from among its ICT staff and two independent IT experts appointed by the Court supervise access to the technology and a report on that exercise and related issues be filed by the said officer and experts by 5.00 p.m. on 29th August 2017; parties would also be at liberty to submit on it at the end of the hearing.

> In relation to the scrutiny exercise, the Court further directed that priority be given to
> *(1) 292 Polling stations as deponed to at paragraph 12 of Norman Magaya Affidavit sworn on 23rd of August 2017;*
> *(2) 688 polling stations as deponed to at paragraph 15 of Omar Yusuf Mohammed affidavit sworn on 24th August 2017;*
> *(3)14,078 polling stations as deponed at paragraph 70 of Dr. Nyangasi Oduwo's affidavit dated 18th August 2017*

For each of the above exercises, the Court directed that parties were entitled to a maximum of two agents/experts, who were to comply with the directions of the Registrar and the ICT officer at all times to ensure an expeditious conclusion of the scrutiny exercise.
No orders were made as to costs.

Raila Amolo Odinga & Another v IEBC & 2 Others Presidential Election Petition 1 of 2017

Supreme Court of Kenya at Nairobi
Coram: Maraga CJ, Mwilu, DCJ & V-P, Ibrahim, Ojwang, Wanjala, Ndungu, Lenaola, SCJJ

The Clarification of Judgment Ruling

17 October 2017

> *Which results between those declared in Form 34A at the polling station and Form 34B at the constituency tallying centre the Chairperson of the IEBC should rely on in declaring the result of the presidential election — whether the IEBC Chairperson can, during verification, vary results in Forms 34B where there are inconsistencies between Forms 34A and Forms 34B.*

Summary of facts

Following the delivery of the reasons for the judgment on 20 September 2017, the Chairperson of the IEBC (the 2nd Respondent) approached the Supreme Court under a certificate of urgency seeking a correction or clarification of the judgment in two respects: first, which results between those declared in Form 34A at the polling station and Form 34B at the constituency tallying centre he should rely on in declaring the result of the presidential election and second, whether the IEBC Chairperson can, in verification of results as required by the Constitution, vary results in Forms 34B where there are inconsistencies between Forms 34A and Forms 34B.

Having reviewed the decision in the ***Maina Kiai*** case as well as the detailed judgment of the Court delivered on 20 September, particularly paragraph 294 of the same, the 2nd Respondent expressed concern that whereas it appeared that it he was not at liberty to ignore any discrepancies in the tallies as contained in Forms 34A as read against Forms 34B, there was an omission by the Court in providing direction as to what the chairperson of the IEBC was to do in the event of a discrepancy. The relevant paragraph provided as follows:

> But be that as it may, how spectacularly re-assuring to the Kenyan people would it have been if the 2nd respondent, on that night of August 11 2017, had commenced the declaration of the results, with these words:
> *"Fellow Kenyans, the results I am about to declare, are exclusively based on Forms 34B which I have received from all the 290 constituency tallying centres country-wide. I have not verified these results against those tabulated on Forms 34A from all the 40,800 polling stations countrywide. This may sound strange, but I am simply doing this in compliance with the Court of Appeal's decision in* ***Maina Kiai.*** *This decision by the Appellate Court requires me to treat the results as tabulated by the various returning officers, as final and not to attempt, to verify them against the electronically transmitted Forms 34A. You will therefore, have to bear with me, as Court Orders must at all times, be obeyed. However, all hope is not lost, since I have availed all the Forms 34A on our Public Portal. Any candidate, election observer, or member of the public, is free to download these forms and compare the results thereon against the ones I am about to declare. If such an exercise should reveal serious discrepancies, then one can petition the Supreme Court to scrutinize them, and even annul them, since the Supreme Court has original and exclusive jurisdiction over such disputes…"*

Moreover, he sought the Court's guidance as to what Form between the 34A and 34B ought to be used to declare results where there was a discrepancy between the two. Counsel for the 2nd Respondent urged that it was necessary to avoid a situation where the 2nd Respondent would be made to read incorrect results and await an inevitable petition arising out of such action, particularly given the highly emotive nature of elections.

It was contended by the Petitioners, the 1st and 2nd Amici that the Court did not have jurisdiction to entertain the application as the applicant/2nd Respondent was trying to reopen the decision of the Supreme Court through the backdoor. Whereas section 21(4) granted the Court jurisdiction to correct its decision, what the applicant was seeking was not a correction by a clarification of the intention of the Court. The 1st and 2nd Respondent conceded that what was sought was not a correction of the judgment as provided for in the Supreme Court Act. However, given the great public interest in the election, they urged the Court to not dismiss the application but rather to clarify the intention of the Court in its decision delivered on the 20th of September.

Determination of the Court

On the first issue, the Court ruled that the duty of the 2nd Respondent was to bring to the attention of the public any inaccuracies discovered during verification of Forms 34A and Forms 34B even as he declared results as generated from Form 34B to generate Form 34C. Where there were any discrepancies, it was the role of the 2nd Respondent to state whether the discrepancies affected the overall result.

On the second issue, the Court ruled that the 1st and 2nd Respondents cannot correct any errors identified in Forms 34B nor amend the same where there are discrepancies with the results in the relevant Forms 34A; their role was to simply expose such discrepancies and leave the resolution of the matter to the Supreme Court.

Ekuru Aukot v Independent Electoral & Boundaries Commission & 3 others Petition 471 of 2017

Coram: Mwita J

Judgment Allowing Petition

11 October 2017

Whether 2013 Raila decision had interpreted Article 140 (3) of the Constitution-Meaning of fresh election-candidates in fresh election- whether the Petitioner's rights under Articles 27 and 38 had been violated by the failure of the 1st and 2nd Respondents to gazette his name as a candidate for the fresh election

Summary of facts

The Petitioner approached the High Court following the striking out of an application he had filed at the Supreme Court seeking an interpretation of Article 140(3) of the Constitution as to the meaning and effect of the term 'fresh elections'. The Supreme Court found that interpretation of the Constitution was a matter which the Constitution had reserved for the High Court, under Article 165 (3) (d), save for the instances set out in Articles 163 (3) and (6). Having noted that the matter ought to have been filed in the High Court, the Supreme Court struck out the application, thereby necessitating the filing of the present petition.

The Petitioner, relying on Articles 27, 38(1) and 140 (3) of the Constitution took issue with the failure by the 1st and 2nd Respondents to gazette his name as a candidate for the fresh election scheduled for 26 October 2017. He also filed a supplementary affidavit averring that he had recanted his public statement conceding defeat on the basis that it had been based on a misrepresentation by his chief agent.

The 1st and 2nd Respondents contended that the Supreme Court did not, in its decision nullifying the first election, provide guidelines as to how the fresh election ought to be conducted. It was also asserted that there was a lacuna in the law as the only election that the Elections (General) Regulations 2012 (as amended in 2017) had anticipated are those contemplated in Article 138 (5) of the Constitution. They argued that upon consultation with legal counsel, the 1st and 2nd Respondents were advised that the matter had been addressed in the 2013 ***Raila Odinga*** case**,** and it is in this regard that the 3rd and 4th Respondents were gazetted as the only candidates in the fresh election. It was their case that the decision to gazette only two candidates was done in good faith.

The 3rd Respondent's case was that the Petitioner had no legitimate right to participate in fresh elections since he had only been an interested party in the petition and he had conceded defeat. Furthermore, he asserted that the 1st Respondent had acted in accordance with the Supreme Court decision in gazetting candidates and that the observations of the Supreme Court on fresh elections were not *obiter* as they were made after the Court was invited to give directions in line with the reliefs declared by the Constitution.

On his part, the 4th Respondent supported the petition and asserted that the gazette notice was discriminatory, unconstitutional and invalid for excluding the Petitioner from the elections. It was also their assertion that the 2013 ***Raila Odinga*** case was distinguishable from this petition and affirmed the jurisdiction of the High Court to determine this matter.

The Attorney-General filed grounds of opposition contesting the jurisdiction of the Court to determine the matter and asserted the issue of what amounts to a fresh election was determined in the 2013 ***Raila Odinga*** case.

The Court directed the parties to make submissions on the applications during the hearing of the hearing of the main petition in order to expedite the determination of the matter.

Determination of the Court

On the question of jurisdiction, the Court took the view that if the 2013 ***Raila case*** determined the question of eligibility for a fresh election, the High Court did not have jurisdiction to entertain the matter. The present petition, not being a question as to the validity of the presidential elections, but a question on the interpretation of what constitutes a fresh election, the matter was not within the jurisdiction of the Supreme Court. Only the High Court was vested with original jurisdiction to interpret the Constitution.

To determine whether the ***2013 Raila case*** determined who would be eligible to contest a fresh presidential election, the Court had to determine whether the statements of the Supreme Court formed part of the reason for the decision of the Court i.e. the ratio, or whether they were *obiter* statements. A review of the statements, and particularly the use of the term 'suppose' before addressing each possible scenario, indicated that the observations of the Supreme Court as to who would be entitled to contest a fresh presidential election were an expression of opinion, and therefore *obiter* statements. The other issue for determination was whether the Petitioner had contested the invalidated election in court. The Petitioner had been admitted as an interested party. The Court found that to the extent that he had supported the petition, the Petitioner had contested the election and was therefore entitled to benefit from that decision.

The Court was also asked to determine whether the Supreme Court, in the 2013 ***Raila case*** had interpreted Article 140 of the Constitution. The High Court found that the Supreme Court lacked jurisdiction to interpret the provision; that the text relied on was *obiter*, having been given at the request of the Attorney General and not in response to a pleaded issue; and that the disposition of constitutional interpretation issues must be formidable in that the principles transcend the case at hand and are applicable to all comparable cases. Since the issue had been approached in a hypothetical manner, the Court ruled that the Supreme Court was merely expressing an opinion. Moreover, the Supreme Court had taken the opinion that the definition of 'fresh election' as used in Article 138 (5) should be imposed on Article 140. The High Court contended that that could not have been the intention of the draftsman, as if it was, the draftsman would have captured it in clear terms and in any case, different scenarios are envisaged by the two provisions.

As to whether the Petitioner's rights under Articles 27 and 38 had been violated by the failure of the 1st and 2nd Respondents to gazette his name as a candidate for the fresh election, the Court assessed whether the gazette notice distinguished between presidential candidates, whether such differentiation amounted to discrimination, and if so, whether such discrimination was unfair. If the Petitioner succeeded in demonstrating that the differentiation amounted to discrimination, the burden shifted to the 1st and 2nd Respondents to demonstrate that the discrimination was justifiable. The Court, after reviewing various international and regional instruments on the question of discrimination found that it was obliged to take an approach to constitutional interpretation that most favoured the enforcement of the Petitioner's rights to equality and non-discrimination. It concluded that the exclusion of the

Petitioner from the ballot in the fresh elections amounted to a violation of his political participation rights, which was also unfair and therefore discriminatory.

Since the Petitioner had participated in the presidential election petition that nullified the election and supported the petition, and having offered a reasonable explanation for his statement conceding defeat, the Court found that in the circumstances, he could not have been said to have conceded defeat. The Petition was therefore merited and the Court issued a declaration that failure by the 1st and 2nd Respondents to include the Petitioner in the fresh elections was a violation of his rights under Articles 27, 38 and 140 (3) of the Constitution and a further order compelling the 1st and 2nd Respondents to immediately issue a fresh Gazette Notice or amend the Gazette Notice dated 5 September 2017 to include the Petitioner as a presidential candidate for the Thirdway Alliance Party in the fresh election scheduled for 26 October 2017.

Presidential Election Petitions November 2017

John Harun Mwau & Others v IEBC & Others Presidential Election Petition 2 & 4 of 2017

Supreme Court of Kenya at Nairobi
Coram: Maraga CJ, Mwilu, DCJ & V-P, Ibrahim, Ojwang, Wanjala, Ndungu, Lenaola, SCJJ

Judgment dismissing Petitions

11 December 2017

Whether fresh nomination was required for repeat presidential election-effect of nullification of presidential election on nominations-impact of the defined timeframe under Article 140 (3) of the Constitution on the holding on the conduct of nominations-the effect of a declaration of invalidity of a presidential election under Article 140- locus standi under Article 140 (1) of the Constitution-the legal effect of the withdrawal of a presidential candidate before an election-meaning of conduct of elections in strict compliance with the Constitution and electoral law-the legal consequences of not holding a presidential election in each constituency under Article 138 (2) of the Constitution-the effect of the Election Laws (Amendment) Act on the fresh presidential election-whether the fresh presidential election and its results were legitimate and credible-what orders the Court should issue

Summary of facts

Following the fresh election conducted on 26 October 2017 and the declaration of the chairperson of the IEBC that the 3rd Respondent had won the election with 7,483,895 out of the 7,616,217 votes cast, two petitions were filed on 6 November 2017. The first petition (Petition 2 of 2017) was filed by John Harun Mwau (hereinafter 1st Petitioner) while the 2nd (Petition 4 of 2017) was filed by Mr Njonjo Mue and Mr Khelef Khalifa (hereinafter the 2nd and 3rd Petitioners). By an order of the Court on14 November 2017, the two petitions were consolidated under Petition 2 of 2017.

The 1st Petitioner's case was premised on the failure by the 1st and 2nd Respondents to conduct a fresh nomination for the presidential elections held on 26 October 2017, which he contended rendered the election null and void and therefore the 3rd Respondent was not validly elected as President. It was also contended that the election was not conducted in accordance with the principles in Articles 81 (d) and (e) of the Constitution. He asserted that given the prevailing conditions, the 1st and 2nd Respondents ought not to have proceeded with the fresh election. The petition raised five main issues: whether the 1st Respondent was required to conduct fresh nominations prior to the presidential election held on 26 October; whether nominations conducted for the presidential elections held on 8 August were valid after nullification of the presidential election on 1 September; the impact of the defined timeframe under Article 140 (3) of the Constitution for the holding of a fresh election on the conduct of nominations; the effect of a declaration of invalidity of a presidential election under Article 140 and whether the 1st and 2nd Respondents disobeyed the Court order directing them to conduct the election in strict compliance with the Constitution and applicable laws.

The 2nd petition was largely centred around universal suffrage and the requirement under Article 138 (2) of the Constitution, which requires the presidential election to be conducted in every constituency. The Petitioners took issue with the failure by the 1st and 2nd Respondents to conduct fresh presidential elections in 27 constituencies, asserting that it was a violation of Articles 47 (1) and (2) of the Constitution. The petition also took issue with the conduct of elections on 28 October in

Turkana Central and Fafi Constituencies, which they contended undermined the quality of the vote and was in direct contravention of article 81 (d) as read with Article 138 (2) of the Constitution. They also contended that the elections were marred with irregularities and illegalities that the election itself and the results were not credible in law and in fact.

The 1st and 2nd Respondents asserted that the fresh election was conducted in strict conformity with the Constitution and related laws. It was deponed that there were only sixty days available for the conduct of the fresh election and as such, it was impracticable to conduct fresh nominations. Time was therefore of the essence insofar as procurement of ballot papers and election material was concerned. It was their case that they had conducted the fresh election in strict compliance with the Constitution the ***2013 Raila case***, the ***Ekuru Aukot case*** and related electoral laws.

Without a legal framework in place for the conduct of a fresh election under Article 140 (3) of the Constitution, the 1st and 2nd Respondents averred that they sought legal advice and were informed by their counsel that the ***2013 Raila case*** had determined that not only were fresh nominations not required but that the persons who would be entitled to participate in the fresh election were those who had participated in the petition and the president-elect.

The 1st Respondent also asserted that the context made it impracticable to conduct fresh nominations, as the fresh election had to be conducted within 60 days. There was therefore insufficient time for submission of nomination rolls, party membership lists, and submission of symbols by independent candidates and registration of candidates for elections. The 1st Respondent also relied on the ***Ekuru Aukot*** decision to the effect that no new nomination was required for the fresh election.

It was also the 1st Respondent's case that they took direction from the High Court decision in the ***Ekuru Aukot case*** as to who would be eligible to take part in the fresh election, where it was ruled that all the candidates in the invalidated election were eligible to take part in the fresh election. Mr Jirongo's name was retained on the ballot papers because he had managed to secure a stay of the bankruptcy orders which would have otherwise rendered him ineligible.

The 1st Respondent also argued that in the absence of a reference to 'fresh election' in the definition of a presidential election under section 2 of the Elections Act, discretion was granted under Regulation 89 of the Elections (General) Regulations as to which rules to apply in the conduct of a fresh presidential election.

The 3rd Respondent asserted that the High Court had duly followed the 2013 ***Raila Odinga Case*** and ruled that no fresh nominations were required for the repeat election. It was asserted that a fresh nomination was not indispensable to the conduct of a fresh election under Article 140 (3) of the Constitution.

On the question of the withdrawal of one candidate from the fresh election, it was the 1st Respondent's case that with the exception of Regulation 52, which allows withdrawal of within 3 days of nomination, the law did not contemplate the withdrawal of a candidate from an election. The letter written by the Right Honourable Raila Odinga withdrawing from the process was therefore of no legal effect as it did not comply with the prescribed format. This was reiterated by the 3rd Respondent who further asserted that Article 138 (8) of the Constitution only envisages cancellation of an election upon the death of a candidate or where no candidate was nominated, neither of which had occurred.

On the question of postponement of elections in some constituencies, the 2nd Respondent averred that the postponement was necessitated by serious breaches of the peace in 25 constituencies to enable a reorganisation of election infrastructure and to put in place security measures as contemplated by Section 55B of the Elections Act, as read with Regulation 64A of the Election (General) Regulations, 2012. When these breaches persisted, it became impossible to hold elections in the affected areas. However, since section 55 B (3) of the Elections Act permits the return of an election where it is satisfied that the result will not be affected by possible voting outcomes in areas where elections had been postponed, it was the 2nd Respondent's position that the declaration of results was well within the law. The delayed elections in Turkana East and Fafi constituencies was said to have been occasioned by heavy rains and flooding prior to the election.

Having failed to agree on the issues for determination, the Court allowed the parties to submit on the proposed issues and isolated the following: the locus standi of the Petitioners under Article 140(1) of the Constitution; whether the petitions were filed in the public interest; the legal effect of the withdrawal of a presidential candidate before an election; whether the 1st and 2nd Respondents conducted the presidential elections in strict conformity with the Constitution and applicable laws; whether the fresh election met the constitutional threshold of a free and fair election under Article 81 of the Constitution; the legal consequences of not holding a presidential election in each constituency under Article 138 (2) of the Constitution; whether the presidential election held on 26 October was marred with illegalities and irregularities; the effect of the Election Laws (Amendment) Act on the fresh presidential election; whether the fresh presidential election and its results were legitimate and credible, both in law and in fact; and what orders the Court should issue.

Determination of the Court

On the first issue, it was contended that the Petitioners lacked *locus standi* to file the petition, as they had not exercised their rights under Article 38. It was asserted that Article 140 (1) only grants locus to persons who had voted, and not merely to registered voters. The Court reviewed Article 140 as well as Article 260 of the Constitution. The former entitles every person to file an election petition challenging the presidential election, while the latter defines person to include a natural as well as a juristic person. Having found that there was no substantiation of the allegation by the 3rd Respondent as to the ineligibility of the Petitioners, the Court dismissed their claim and found that the Petitioners had *locus standi* to file the petition.

On the question of whether the Petitioners were acting in the public interest, it was the 3rd Respondent's contention that the Petitioners were not acting in the public interest but rather masquerading while acting as mouthpieces of the 4th Respondent. The Petitioners maintained that they were acting in their own interest and in the interest of other aggrieved voters and were not championing any political cause. The Court ruled that the matters raised in the petitions fell well within the scope of public interest litigation and declined to lay down hard and fast rules on the admittance of cases to avoid fettering the discretion of other superior courts.

On the question of compliance with the Constitution as regards nominations, the Court was invited to find that the 1st and 2nd Respondents did not comply with the directive of the Court to conduct the repeat election in 'strict conformity with the Constitution and applicable laws' by not conducting fresh nominations before the fresh election. The Petitioners contended that the nomination process was such a critical procedure that a failure to conduct nominations vitiated the electoral process. The Petitioners contended that Articles 137 and 138 as read with Section 14 of the Elections Act required nominations before every presidential election. The Respondents position was that no nominations

were required for the repeat election since the nomination process had not been challenged by the Petitioners in the first petition, neither had the Court taken issue with it.

In assessing whether fresh nominations were required, the Court reviewed the purpose of nomination in a presidential election and the standing of the ***2013 Raila Odinga & Ekuru Aukot 2017*** decisions on fresh nominations. In determining the purpose of a nomination, the Court reviewed the requirement for a nomination under Article 137 and the process of nomination under Article 138. It determined that the nomination process is not just a formality, or an exercise in futility; but a process through which candidates are identified for participation in an election, subject to being qualified under the law for the elective seats they seek. Nomination was therefore a critical component of the electoral process, and could not be dispensed with save for lawful cause.

As to whether a nomination process was required prior to the repeat election, the Court reviewed section 14 of the Elections Act which was cited by the Petitioners as a foundation for the holding of nominations before all presidential elections. It also appraised the constitutional provisions on presidential elections and isolated five circumstances when presidential elections were required to be conducted. The Court found that whereas the term '*whenever a presidential election is to be held*' had been used in that section to signal that a nomination was required for all the instances when a presidential election was held, nominations were only required in three instances: in the case of a general election, where no candidate had met the constitutional threshold under Article 138 (5) and where there was a vacancy in the office of the President. It was the Court's finding that the failure to recognise nomination in respect of an election under Article 140 (3) was not an oversight on the part of the drafters but a proper appreciation of the law. Since each presidential election was conducted under different circumstances, each had to be appraised separately.

The election conducted under Article 140 (3) was not a stand-alone election; rather it was anchored on an 'initial' election. Since the nomination process had not been the subject of contest in the petition that nullified the August 8 election, the Court deemed it illogical for a person who was not a candidate in the August 8 election to be a contestant in the repeat election and to compel candidates to take part in a fresh nomination exercise when the process had not been in issue in the petition challenging the initial election. A purposive interpretation, predicated upon the Constitution's intent of assuring an unbroken governance process, led to the conclusion that the nominations held in respect of the August 8 elections remained valid; therefore no fresh nomination were required for the repeat elections held on October 26 2017. Mr Jirongo's inclusion in the ballot papers was also valid since the High Court had granted him a stay of the Bankruptcy Order, effectively rendering him qualified to vie.

As to the standing of the ***2013 Raila Odinga & Ekuru Aukot 2017*** decisions on fresh elections, in particular the identification of candidates for the fresh election, the Court found that the 2013 ***Raila*** case had limited the number of candidates based on the context in which the elections were being held. A further review of the ***Ekuru Aukot*** decision indicated that the High Court, even though it only directed the inclusion of Dr Aukot, contemplated the availability of an opportunity for every other person who had contested the August 8 election to participate in the fresh election. The 1st and 2nd Respondents could therefore not be faulted for failure to carry out fresh nominations and for the inclusion of all the candidates in the August 8 elections.

The next issue for determination was the legal effect of the withdrawal of a presidential candidate before an election. The Petitioners faulted the IEBC for retaining Hon Raila Odinga's name on the ballot paper after he issued a letter dated 10 October withdrawing his candidature. The Respondents

on the other hand relied on the press statement issued by the 1st Respondent on 11 October drawing the attention of Hon Odinga to the procedure in Regulation 52 of the Elections (General) Elections requiring that resignation be tendered within 3 days of nominations using the prescribed Form 24A. It was therefore the Respondent's case that the resignation letter had no legal effect. In response, the Petitioners asserted that Regulation 52 was not applicable to the fresh election as no nomination exercise had been conducted and therefore, in accordance with the finding in the ***2013 Raila*** case, the withdrawal of Hon Odinga ought to have led to the vacation of the election and the conduct of fresh nominations as provided for in Article 138 (8) (b) of the Constitution.

While the High Court had found that the analysis of the Supreme Court on the conduct of a fresh election in the 2013 Raila case was *obiter*, it was also aware that the decision of Mativo J was the subject of an election appeal. While respecting the principle that the Supreme Court ought to defer to the jurisdiction of superior courts in respect of matters pending before the latter, it found that the determination of the effect of withdrawal and the question of nominations were no ordinary matters and could therefore not await the outcome of the appeal. The Court went on to hold that nevertheless, the finding in the 2013 decision ought to be departed from as it was made *per incuriam*. This was because Article 138 (8) (b) only contemplated the cancellation of an election in three instances: when no person had been nominated within the nomination period, where the candidate for election as President or Deputy-President died before the scheduled election date or where a candidate scheduled to be declared elected as President died. Since withdrawal was not one of the scenarios contemplated by Article 138 (8) (b), withdrawal did not constitute a basis for cancellation of the election.

Moreover, given that Regulation 52 was not applicable to the fresh election, the Court found that the writing of a formal letter by Hon Odinga constituted a substantive and legally effective withdrawal from the elections. However, the 1st and 2nd Respondents were not at fault for including his name on the ballot paper since the withdrawal could not in law have led to the cancellation of the election and a candidate was at liberty to withdraw at any time before an election, when it would not always be possible for the IEBC to remove their name from the ballot paper.

To determine the next issue, i.e. whether the election met the constitutional threshold established under Article 81, the Court considered it necessary to determine whether every citizen's right to vote without unreasonable restrictions was afforded and whether the election was free from intimidation, improper influence, or corruption and whether there were any acts of violence or election offences committed by the 3rd Respondent. This included the issue of the alleged use of government resources to advertise by the 3rd Respondent. The Court noted that there were incidences of violence which prevented the conduct of the fresh election and threatened officials, voters, electoral infrastructure and private property. Nevertheless, the Court found that neither the State nor the IEBC or any other state organ failed to fulfil its duty to guarantee the right to vote, but rather, measures had been put in place to guarantee the enjoyment of this right. The failure to vote in certain areas was therefore occasioned by unidentified private citizens and political actors. However, the election could not be impugned on this ground alone.

The Court also rejected the assertions of improper influence of the Judiciary and voters by the 3rd Respondent following the nullification of the August 8 election because the Petitioners did not provide proof of the intimidation of the Judiciary or voters. The Court found that it was not enough to plead such a grave matter without providing tangible evidence as to how the electoral process was affected. The Court also ruled that the Petitioners also failed to adduce evidence as to the carrying out of campaigns by cabinet secretaries and nothing was laid before the Court to demonstrate that

in the 60 days preceding the fresh election, the 3rd Respondent had advertised government projects contrary to the directive of the High Court in ***Apollo Mboya v Attorney General & 15 Others*****,** Petition No. 162 of 2017 issued on 19 October 2017. The Court also concluded that the Petitioners failed to adduce evidence that that the IEBC, in the conduct of the fresh election was not impartial or free from political independence, as no proof of this was availed.

As to the legal effect of the postponement of elections in some constituencies, the Court had been urged by the Petitioners to find that irrespective of the source of the violence, the occurrence of violence itself was enough to vitiate an election, as Article 138 (2) requires that the presidential election be held in every constituency. The 1st and 2nd Respondents on the other hand cited section 55 B of the Elections Act as the legislative authority for postponing elections in the 25 constituencies since the provision allow postponement where it is impossible to hold the same for among other reasons, a likelihood of a breach of the peace. Regulation 87 of the Elections (General) Regulations, also gives the IEBC discretion to declare the result without results from certain constituencies where it is certain that the result will not be affected by the omission. The Court therefore ruled that the declaration of the result by the IEBC, without results from 25 constituencies, was nevertheless in accordance with the Constitution.

On the extent to which illegalities and irregularities were a factor in the election, the Petitioners had taken issue with the appointment of some presiding and returning officers and argued that the election had in some constituencies been conducted by persons who were not qualified. They also took issue with the relocation of polling stations in some constituencies which they alleged was arbitrary and deprived some citizens of the right to vote. It was also the Petitioners' case that about 28% of the voters could not be identified biometrically on voting day, that there were discrepancies in the voter turnout declared by the IEBC, that the IEBC had failed to transmit both the text and images of Forms 34 A, that the Biometric Voter Register (BVR) used by the IEBC was not secure and that the Electronic Voter Identification (EVID) had been used to manipulate voter turnout. The Court, having weighed each of these allegations against the responses and material evidence provided by the IEBC, concluded that despite the far-reaching allegations of irregularities made, each of the allegations was sufficiently rebutted by the replying affidavits and submissions made by counsel. Without evidence of these assertions, the Court ruled that the allegations did not meet the standard of proof required in election petitions and consequently, the burden of proof did not shift to the 1st and 2nd Respondents at any time during the trial.

The penultimate issue for determination was the effect of the Election Laws (Amendment) Act No. 34 of 2017, which the Court was urged by the Petitioners to find was intended to diminish the role of technology in elections, thereby opening up the results to manipulation and indicate to voters the impossibility of challenging the results of a presidential election. The Court noted that the law did not come into effect until 2 November 2017, whereas the fresh election had been conducted on 26 October 2017. The applicable law for the fresh election could therefore only have been the 2011 statute when assessed against the rule of construction that statutes should not be given retrospective operation, in the absence of a special legislative indication to the contrary. As to the validity of section 83 of that amended law, which the Court was asked to declare unconstitutional, the Court noted that the matter was pending in the High Court as ***Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others*** **Nairobi High Court Petition No. 548 of 2017.** In keeping with its practice of not taking away the jurisdiction vested in other superior courts, and particularly

because this was not a matter in respect of which the Constitution had reserved for the jurisdiction of the Supreme Court, the Court deferred to the jurisdiction of the High Court in determining the constitutionality or validity of section 83 of the new law.

Finally, the Court was required to determine whether the presidential election and subsequent results were legitimate and credible. The Petitioners cited violence as restricting the right to vote and asserted that eh 1st and 2nd Respondents had not conducted the elections in accordance with the principles contained in Article 81 of the Constitution. It was their case that the voting environment as a whole was not conducive to the proper conduct of a fresh presidential election and faulted the 1st and 2nd Respondents for proceeding to conduct that election. To assess legitimacy, the Court asserted that the election had to be assessed within recognised legal practice, the operative law and governance institutions and within the context of a stable socio-political order and the economic dynamics sustaining the economy. On the question of credibility, the Court was guided by an assessment of whether there was valid preparation, whether the election was conducted as prescribed by law, whether discretion was properly exercised and whether a candidate was duly elected declared.

The Court found that only failure of the conduct of the election would constitute lack of legitimacy as it would have occasioned such uncertainty and appearance of crisis as would have affected the social, economic and political engagement of the whole population. The Court also faulted the Petitioners for making generalised allegations of violence and intimidation. In the assessment of the Court, the Petitioners were under a burden to lay objective evidence to sustain each of their allegations, rather than making generic claims. Since none of the allegations of irregularities and illegalities were at play in a significant manner in the view of the Court, the elections had met the requisite threshold of legitimacy and credibility. The Court was also not satisfied that the low voter turnout was sufficient by itself to invalidate an election. Since the threshold under Article 138 (4) requires the winner to have garnered a majority of the votes cast, to invalidate the election result due to voter turnout was in the assessment of tantamount to depriving citizens who vote of the benefit of their franchise. Having taken cognisance of the world-wide phenomenon of low voter turnout in repeat elections, and while acknowledging the importance of having as many people as possible participating in an election, the Court ruled that the voter turnout had no direct connection to the validity of the election.

As to the costs of the petition, the Court reiterating the public interest nature of presidential election petitions, directed that each party bears its own costs.

County Election Petitions

Petitions Concerning Elections of Governors

Kiplagat Richard Sigei & 2 Others v IEBC & Another Kericho High Court Election Petition No. 1 of 2017

High Court of Kenya at Kericho
Coram: Muya J

Ruling on Failure to Deposit Security for Costs

7 December 2017

Consequence of want of service of a petition-effect of failure to deposit security for costs within 10 days of lodging petition-costs

Summary of facts

The 2nd Respondent/Applicant filed a Notice of Motion pursuant to Order 19 rule 3 and Order 51 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Sections 77 (i), (ii), 78 (1), (2), b, (3), 79 (a), 80 (3), 84 of Elections Act 2011 and Rule 13 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 seeking to have the petition struck out for want of service within 2 days of filing and for failure to deposit security for costs within 10 days of lodging the petition.

The Applicant asserted that the petition was an abuse of the process of the Court and no prejudice would be suffered by the Respondents, as the petition was merely a fishing expedition. The Applicant also urged that busybodies ought not to be allowed to meddle with a successful party after an election, and this was the reason that the law required security for costs.

The petition had sought a declaration that the 2nd Respondent was not validly elected as Bomet governor, that the irregularities and improprieties in the Bomet County election were significant and affected the integrity and quality of the election and result, an order allowing the Petitioners or their agents to audit the KIEMS and servers relied on by the 1st Respondent, an order directing the results of the audit to form part of the proceedings and directing the 2nd Respondent to conduct fresh elections in strict conformity with the Constitution as well as the costs of the petition. They asserted that the results transmission system had failed and there was therefore incorrect tallying, that votes exceeded registered voters in some polling stations, that false entries had been made and that there was violence and intimidation of the supporters of NASA and affiliated parties.

Issues for determination

The Applicant prayed that the Court determine whether the Respondents had failed to comply with the mandatory requirement for service and whether the Respondents had failed to comply with the mandatory requirement to deposit security for costs as contained in The Elections Act 2011 as read with the Elections (Parliamentary and County Elections) Petition Rules 2017. The Applicant also prayed for an order for costs for abuse of court process.

Determination of the Court

On the first issue, the Court reviewed Article 87 (3) of the Constitution which allows for either direct service or by advertisement in a newspaper with national circulation, which requirement is reiterated in section 77 (2) of the Elections Act. Rule 10 of the Elections (Parliamentary and County Elections) Petition Rules as read with Legal Notice 117 of 2017 requires that the service be effected within 15

days of lodging the petition. It was the Applicant's case that she had never been served personally, neither had an affidavit of service been filed.

The Court was guided by the decision of the Court of Appeal in ***Rozaah Akinyi Buyu v IEBC & 2 Others Kisumu Civil Appeal No 40 of 2013*** where it had been held that service was so fundamental to the petition that failure to serve went to the root of the petition and the petition could not stand. It was satisfied that there was no service and service on the liaison office in Bomet did not count as personal service.

On the second issue, the Court found that section 78 was instructive. Section 78 requires that security for costs be deposited within 10 days of lodging the petition. Section 78 (3) further states that where no such deposit is paid, and an objection is lodged which is not removed, no further proceedings shall be heard on the petition and the Respondent may apply for dismissal of the petition and payment of their costs. Since no attempt was made to pay the security and the Respondents conceded as much, and no attempt was made to seek an extension of time to comply with the requirement, failure to pay costs was fatal to the petition.

On the question of costs, the Court was guided by the provisions of section 84 of the Elections Act which allows the Court to make a determination of costs of and incidental to the petition and directs that costs shall follow the cause. Since the Respondents had caused the Applicant to incur expenses, the costs were awarded to the Applicant. However, since the Respondents had in the latter stages of the petition extended an olive branch to the Applicant with the hope of getting the costs waived, the Court allowed the parties to negotiate an out of court settlement in so far as the costs were concerned, failing which the costs would be taxed by the Deputy Registrar.

Peter Odima Khasamule v Independent Electoral and Boundaries Commission (IEBC) & 2 Others Busia High Court Election Petition 4 of 2017

High Court of Kenya at Busia
Coram: Kiarie Waweru J

Judgment Dismissing Petition

12 February 2018

Effect of malpractices during campaign period-effect of malpractices during the voting process-effect of malpractices during tallying at Teso South and Butula Constituency Tallying Centres-whether IEBC conducted elections substantially in compliance with the Constitution and related election laws-costs of the petition

Summary of facts

The Petitioner identified himself as the County Campaign Manager for Dr Paul Otuoma, one of the 7 candidates in the gubernatorial elections in Busia County. It was his case that the election of the 3rd Respondent was not valid as a result of malpractices committed during the campaign period and during the voting process, use of county resources and personnel during campaigns, campaigning on voting day, malpractices at Teso South and Butula Constituency Tallying Centres, harassment and intimidation of the presiding and returning officers, which were all alleged to have affected voting and final results.

The Respondents on the other hand asserted that the election was conducted in accordance with the law and therefore represented the will of the people.

Issues for determination

The Court identified the following issues for determination: whether there were malpractices committed during the campaign period and if so, their effect; whether there were malpractices committed during the voting process and if so, their effect; whether there were malpractices committed during tallying at the Teso South and Butula Constituency Tallying Centres and if so, their effect; whether there was intimidation and harassment of Presiding Officers and returning officers and if so, their effect; whether the IEBC conducted the gubernatorial election in Busia County substantially in compliance with the Constitution and electoral laws and who pays the costs of the petition.

In determining each of these issues, the Court bore in mind that as ruled in the ***2013 Raila Odinga*** case¸ the burden of proof lies with the Petitioner, and depending on how he discharges it, it could shift and does keep shifting throughout the trial.

On the first issue, the Petitioner asserted that the 3rd Respondent and his agents, campaigners and supporters committed multiple election offences and malpractices during campaigns. Firstly, the Petitioner claimed that they linked the Petitioner and his campaign team to Jubilee party yet Dr Otuoma was an independent candidate. It was alleged that this was intended to cause him to lose the election unfairly as Jubilee was unpopular in Busia County. However, the Court found that since the Petitioner did not know who published the false information, did not witness the distribution of

the damning leaflets and newspaper cuttings and did not report the three suspects he alleged were responsible to the police, there was no link of the distribution to the 3rd Respondent. There was also no evidence to corroborate the allegation by the Petitioners' witnesses and supporters that the 3rd Respondent had alleged in a campaign rally that Dr Otuoma was a Jubilee candidate.

Secondly, it was also alleged by the Petitioners that the 3rd Respondent and his agents had been involved in bribery during the campaigns. The Petitioner asserted that the 3rd Respondent had bribed members of the Abamenya clan and that his campaigner Patrick Olasa had been seen distributing beef, sugar and money to voters at Poa Petrol station. The Court found this evidence unconvincing on the basis that the Petitioner did not give an approximate number of members of the clan that had been bribed, nor was there any witness called to support the claim. There was also no evidence of a police report of an alleged bribery incident at Bulemia by the 3rd Respondent. Moreover, while the Petitioner alleged that the 3rd Respondent had been involved in treating voters at Butula Polytechnic, there was no proof of the slaughtering of bulls or distribution of money to attendees.

Thirdly, it was alleged by several witnesses that the campaigns had been marred by threats of violence against them. A review of the evidence given by PW3, 4, 6, 8, 10, 11 and 12 indicated that it was not credible as none of the witnesses who testified gave proof of a police report of the incidents.

Fourthly, the Petitioner also alleged incidents of oath taking by persons posing as Marachi elders, PW 14 testified that he did not know who had conducted the oathing ceremony nor could he identify the persons who participated in the said ceremony. Citing the case of ***Wilson Mbithi Munguti Kabuti & 5 Others v Patrick Makau King'ola & Another*** **[2013] eKLR,** the Court concluded that failure to report criminal offences occurring during campaign periods cannot be remedied by the courts unless there is concrete proof.

On the allegation that there had been bias and preferential treatment by the 1st Respondent in the training of the 3rd Respondent's agents, the Petitioner asserted that the Butula Constituency Returning Officer had stayed at the Western Ambience Hotel which was owned by a supporter of the 3rd Respondent and that his stay there had therefore compromised the discharge of his duties. The Court dismissed the allegation on the basis that there was no evidence that the 2nd respondent's discharge of duty had been compromised, especially since he was new to Busia County and could not have been expected to know about the ownership of the hotel.

Finally, on the allegation that Dr Otuoma's agents were denied badges and letters to allow them access to polling stations, it was confirmed that whereas the same had been issued late on the evening preceding the election, this delay was occasioned by the late submission of agents' names to the IEBC and therefore the 1st Respondent could not be faulted.

On the second issue, the Petitioner alleged that campaigns proceeded on voting day at certain polling stations, that there was voter bribery, that the 1st Respondent had issued marked ballot papers, the Presiding Officers and clerks had been campaigning for the 3rd Respondent and that some of Dr Otuoma's agents were locked out of polling stations.

As for the allegations of voter bribery, the Court ruled that the Petitioner was not a truthful witness as in the supporting affidavit, he had averred that voter bribery had occurred in his polling station, Lwanya Primary School, but in his testimony he indicated that the incident was at Lwanyange Primary School. His evidence was further watered down by the fact that the alleged incident was not reported.

Further, evidence of other witnesses that voter were bribed in voting queues and that the matter was reported to the police who took no action was refuted by the Presiding Officer who accounted for his movements. The Court also found the evidence incredible since the Petitioner was inside the polling station and it was not clear how he could have witnessed the events occurring outside. The evidence of PW7 of incidents of bribery, which were allegedly witnessed by the Presiding Officers was ruled incredible since he did not report it immediately and it was unlikely that the police would witness a crime and do nothing about it.

On the allegation that there was campaigning on election day, the Court ruled that there was no evidence that voters in queues were bribed nor was there a police report to this effect. The same fate befell the allegations of transportation of voters to polling stations on behalf of the 3rd Respondent where there was lack of proof that it was done on behalf of the 3rd Respondent.

Regarding the assertion that there was campaigning by Presiding Officers and clerks for the 3rd Respondent, the Court found that there was no evidence to support the allegations as there was no official named to substantiate this allegation and therefore a blanket allegation was insufficient for a finding that these officials were known associations of the 3rd Respondent.

Regarding the allegation that the 1st Respondent issued marked ballot papers to voters, the Court accepted the 1st Respondent's evidence that the issue had been addressed and settled at polling stations and ruled to be an issue of ballot papers containing a faint hyphenated printer mark. It was agreed with the agents that they would only consider voting marks during tallying.

The Petitioner also alleged that assisted voting had been enforced arbitrarily and in an opaque manner by Presiding Officers. The Court ruled this allegation false as it was demonstrated that Presiding Officers had reached a consensus with the agents as to the number of agents to witness assisted voting to avoid crowding. Since there was no evidence that the arrangement entered into with the agents was contrary to the law, that the procedure was opaque or that any person's right had been breached, this allegation was dismissed.

Finally, while it was alleged that county resources and personnel had been used in the elections, the Court declined to make a finding for the reason that while the allegation had been raised during the framing of issues, it had not been pleaded. Making a determination on it would be tantamount to widening the scope of the petition, which would be contrary to the rules of pleadings as contained in rules 8 and 12 of the Elections (Parliamentary and County Elections) Petition Rules 2017.

The third issue for determination is whether malpractices had been committed during the tallying at Butula and Teso South Constituency Tallying Centres. The Court found that the Petitioners' witnesses gave contradictory evidence as to the occurrences at St Joseph's Amukura and while there was a threat of eruption of chaos, it was minor and did not affect the results as declared. On the allegation that in Butula Tallying Centre there had been unauthorised server access and use of different IP addresses contrary to the static IP address allocation for the KIEMS Kits, this ground was abandoned by the Petitioners as no evidence was availed and therefore no finding could be made in this regard by the Court.

On the fourth issue for determination, the Court found that allegations of harassment of election officials were also unsubstantiated as the evidence of the Petitioners was refuted by that of the Returning Officers.

Having analysed all the evidence of the Petitioners and the standard of proof in election petitions, the Court concluded that the elections had been conducted in accordance with electoral law and procedures. The Court ruled that the 3rd Respondent had been validly elected as the governor of Busia County and the petition was therefore dismissed, with costs being capped at Kshs 4,000, 000.

Peter Odima Khasamule v Independent Electoral and Boundaries Commission (IEBC) & 2 Others Civil Appeal Election Petition No. 4 of 2018

The Court of Appeal at Kisumu
Coram: Githinji, Okwengu & Mohammed, JJ.A.

Ruling Striking Out Appeal

21 June 2018

Failure to file an appeal within the stipulated time-effect on Notice of Appeal

Summary of facts

The appellant, Peter Odima Khasamule filed a Notice of Appeal on 19 February 2018 indicating his intention to appeal the decision of the High Court rendered on 12 February 2018. They took no further step in the proceedings and a Notice to Show Cause was issued requiring the Appellant to demonstrate why the Notice of Appeal ought not be struck out for want of prosecution. Neither the Appellant nor his advocates appeared for the hearing.

The Court found that the failure to file an appeal within the 30 days stipulated by section 85 (1) (a) of the Elections Act as read with Rule 8 (5) of the Court of Appeal Election Petition Rules 2017 rendered the Notice of Appeal futile.

The appeal was therefore struck out in accordance with Rule 84 of the Court of Appeal Rules as read with Rule 4 (2) of the Court of Appeal (Election Petition) Rules, 2017 (Election Appeal Rules) with no order as to costs.

Lenny Maxwell Kivuti v IEBC & 3 Others Embu High Court Election Petition 1 of 2017

High Court of Kenya at Embu
Coram: Musyoka J

Judgment Allowing Petition

22 February 2018

Scrutiny and recount-effect of unpleaded irregularities revealed during scrutiny and recount on validity of election result-effect of the report of the Deputy Registrar on process of scrutiny-nullification of election result

Summary of facts

The Petitioner was among six candidates for the gubernatorial seat in Embu county in which the 3rd Respondent had been declared as duly elected with 97760 votes against the Petitioner's 96775 votes. The Petitioner took no issue with the process of voting which he described as smooth and peaceful, but alleged that the process of counting and tallying was fraught with irregularities which included the inflation of votes in favour of the 3rd Respondent, the swapping of the votes of other candidates with those of the 3rd Respondent, the doctoring of results, tampering of results to reflect the fictitious figures, submission of statutory Forms 37A which had not been signed by agents and the barring of agents from participating in the counting and tallying process.

He prayed for a re-tally of the votes in two polling stations in Mbeere Constituency, scrutiny and recount of all the votes cast within Manyatta and Runyenjes constituencies, nullification of the declared results and a declaration that the Petitioner was validly elected as governor of Embu County.

It was the 1st and 2nd Respondents' case that the election was conducted in accordance with the relevant electoral laws, and the 3rd and 4th Respondents separately averred that the entire electoral process was free and transparent and their declaration as victors followed a proper counting process.

During the hearing, the Petitioner testified that he had won the said gubernatorial election but he believed that his victory was stolen. While he took no issue with the voting process, he believed that there were gross errors in the counting and tallying process. He alleged that in Manyatta and Runyenjes constituencies the total votes cast exceeded the number of registered voters, that there were disparities between the figures appearing in the portal and those declared in respect of some constituencies, that there were discrepancies between Forms 37A and 37B in some instances, that in some cases the Forms 37A were altered and that the votes cast in respect of the gubernatorial election varied from those cast for other electoral positions.

The Petitioner also took issue with the fact that some Forms 37A were not stamped and sought a scrutiny and recount to establish whether the figures contained in the tamper proof envelopes, which were the actual totals, tallied with the results as declared. He expressed confidence that should a scrutiny and recount be allowed, he would emerge victorious. He also alleged that his agents were discriminated against in the issuance of Forms 37A by the Presiding Officers and in some cases, that they were not allowed to sign the forms and in some cases, they were signed by persons purporting to be his agents. He also alleged that some polling stations had returned identical results, which could

only lead to the inference that the results were doctored. He also faulted the lack of signatures on some Forms 37A alleging that this meant that the results had not been authenticated.

It was also the Petitioner's case that in some polling stations, the votes had been inflated in favour of the 3rd Respondent while some of his votes had been taken away. According to his testimony, the votes as recorded by his agents were different from the votes as declared and he wanted a scrutiny and recount to correct the errors. He did however concede on cross-examination that there were errors across the board which affected all the candidates during transposition from Forms 37A to Forms 37B. He also conceded that some of the agents he had previously denounced and who had signed the forms were his own agents and abandoned the allegation that officials of the 1st Respondent had put water in ballot boxes when the 1st Respondent explained what happened and demonstrated that ballot papers were stored in tamper proof envelopes. He denied the assertion by counsel for the 3rd Respondent that even after a recount, the 3rd Respondent would still be ahead. He asserted that an audit of Forms 37 A, 37B and 37C was insufficient and that a scrutiny and recount were the only way to resolve the discrepancies. The Petitioner's assertions were supported by the testimonies of some his agents, who pointed to discrepancies between the votes recorded and the votes declared.

The 2nd Respondent testified on behalf of himself and the 1st Respondent. He was the County Elections Manager and County Returning Officer in Embu County. He testified that no fraud occurred in the County Tallying Centre and the Forms 37C were generated from Forms 37B which were prepared by Constituency Returning Officers. He maintained that he did not alter the results as he did not have the authority to do so. He denied the allegation that the votes cast in Manyatta and Runyenjes Constituencies exceeded the total number of registered voters. While acknowledging that there were errors in the transposition of results, he asserted that nevertheless the errors did not affect the results. He denied the allegation that he had inflated results in favour of the 3rd Respondent and asserted that while there were variances between the results cast for Governor and Woman Member of Parliament, the margin was not 10,000 votes as alleged by the Petitioner. He did however concede to this disparity during cross-examination. Their case was corroborated by the Returning Officer for Runyenjes Constituency, who denied that there were more votes cast than registered voters or that agents had been denied access to the forms or that the results had been inflated in favour of any candidate. She asserted that there was no obligation to withhold declaration of results in the absence of some agents and confirmed that she had directed Presiding Officers to declare results where agents were absent. She also conceded that she was aware of an error in relation to Ugeru polling station, but since she was not allowed to alter the results as declared by Presiding Officers, she declared the results with knowledge of the error where the Petitioner was awarded 8 extra votes.

The Constituency Returning Officer for Mbeere South also testified and while conceding to several errors in the constituency results, maintained that they were inadvertent and attributed them to fatigue. While conceding that the results in respect of Kaweru and Munyori polling stations were identical for all the candidates, she asserted that this was not unusual. The Returning Officer for Manyatta Constituency testified along similar grounds.

The 3rd Respondent denied having been given any undue advantage by the 1st Respondent. He maintained that while he was aware of 300 votes had been erroneously awarded to him, he maintained that he had been awarded extra votes in several polling stations or that there had been alteration of Form 37A. The 4th Respondent elected not to call any witnesses and to instead rely on the evidence on record.

At the close of oral hearing, the Petitioner filed an application for scrutiny and recount. A partial scrutiny was granted which as limited to recount of ballots in specified polling stations in Mbeere South, Manyatta and Runyenjes constituencies, which was extended by six polling stations at the request of the 3rd Respondent. The Court also allowed a re-tally of Forms 37A, 37B and 37C in respect of polling stations which were not subject to the recount. Following the exercise, the Deputy Registrar compiled a report which was filed in court together with original forms used in the partial scrutiny which had been duly filled by hand and signed by the agents of all the parties and the Deputy Registrar.

The results of the recount and re-tally indicated that the Petitioner had garnered 96989 votes against the 3rd Respondent's 97771. The results of the recount and re-tally indicated that the Petitioner had garnered 96957 votes against the 3rd Respondents 97685. While submitting on the scrutiny and recount exercise, counsel for the Petitioner maintained that there were irregularities in respect of 258 out of 356 polling stations. He submitted that this was indicative of the mess in counting and tallying. It was also submitted that out of another 18 polling stations where the ballot papers in the box exceeded those indicated in the counterfoils, and another 11 which had issues. For this reason, the final result could not be ascertained. Counsel for the Petitioner urged the Court to exclude the affected results from the 29 polling stations and declare the Petitioner the winner on the basis of the remaining results. In the alternative, he urged the Court to nullify the entire election result and order a fresh election.

The 1st, 2nd and 3rd Respondents opposed the prayer for nullification, as it had not been contained in the original petition. Since the Petitioner had prayed for scrutiny and recount, which had been granted, they asserted that it was not open to him to turn his back on those results and seek nullification where he had only sought declarations. The submissions on the new issues, such as counterfoils, were matters that they had not had a chance to respond to. Counsel for the 3rd Petitioner in particular submitted that the report of the Deputy Registrar was binding and asserted that even where there were irregularities but the outcome had not changed, the inescapable conclusion was that the Court ought not interfere. Counsel for the 4th Respondent associated herself with the submissions of the other Respondents.

Since the first two prayers had been spent and the next three were predicated on them, the Court found that these prayers had been effectively disposed of by the scrutiny and recount exercise. The Court considered it prudent to address the question of nullification of results in the additional 29 polling stations raised by the Petitioner. While the weight of authorities in civil matters, as exemplified by the case of ***Mr Charles C. Sande v Kenya Cooperative Creameries Limited*** **Mombasa Civil Appeal No. 154 of 1992,** ***Nairobi City Council v Thabiti Enterprises Ltd*** **(EA) 1995-98) 231** and ***David Sironga ole Tukai v Francis arap Muge & 2 Others*** **(2014) eKLR** led to the conclusion that a court does not have jurisdiction over a matter unless it is specifically pleaded, the Court noted that election petitions are matters *sui generis.* It noted the general rule enunciated in ***Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others*** **Election Petition No. 3 of 2013** that a court should proceed with caution in respect of matters unearthed during a scrutiny so as to not allow unpleaded matters to form the basis for a nullification of the election. The Court established that from the existing case law, there were three approaches to unpleaded material unearthed during scrutiny and recount that could be discerned: to ignore such material and proceed to dismiss the petition where the Petitioner fails to prove allegations made in the pleadings (see Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **Supreme Court Petition No. 2B of 2014**); to allow a party to pose questions on the unpleaded material and the Court then makes a finding on the effect of the irregularities on declared results (see ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** **[2014] eKLR**) or thirdly, to refuse to turn a blind eye on serious electoral malpractices or irregularities exposed during scrutiny and recount merely because they were not pleaded (see ***Moses***

Masika Wetangula v Musikari Nazi Kombo & 2 Others **[2015] eKLR**). According to the Court, all three approaches led to the conclusion that the Court could review material revealed during scrutiny or recount which was unpleaded and decide one way or another.

The Court reviewed section 83 of the Elections Act and assessed that an election could be invalidated when it was conducted substantially in compliance with the Constitution and electoral laws but was fraught with irregularities and illegalities which affected the result of the election. Since no one took issue with the conduct of the election, the Court was satisfied that the voting process complied with the Constitution and related laws. However, following the scrutiny and recount process, the Court noted that the material generated by the scrutiny revealed irregularities or non-compliance with the law on elections. It therefore considered it prudent to determine whether the election should be invalidated as a result of the irregularities or errors or non-compliance with the law.

The Court evaluated each of the irregularities unearthed by the scrutiny. Firstly, contrary to Regulation 81 (1) of the Elections (General) Regulations, all the ballot papers used in the election, both valid and rejected, were not sealed in the ballot boxes. Since the ballots cast were less than the actual number of counterfoils used, it could not be ascertained whether the missing ballot papers were valid, rejected or spoilt and where they were valid, in whose favour they had been cast.

Secondly, used counterfoils had not been sealed and put in ballot boxes. This meant that the exact number of ballot papers used could not be ascertained as the recount had been effected only against Forms 37A but the results contained in the Forms 37A could not be verified using the counterfoils. Thirdly, the Court noted from the Deputy Registrar's report that Forms 37A in respect of12 polling stations were missing and that in respect of another 12 polling stations, the Forms 37A were completely illegible. Since the Form 37A is the basis of declaration of results, illegibility or absence of the Form made it such that there could not be any results to declare. This meant that results in respect of the affected polling stations could not be authenticated.

The Court also noted with concern that there were ballot papers in some ballot boxes whose serial numbers did not match the counterfoils. This meant that the excess 111 ballot papers did not issue from the ballot booklets for the relevant polling stations as they could not be traced to the counterfoils of used ballot papers found in the ballot boxes. The inference to be made was that their presence in the ballot boxes could only have been introduced unprocedurally, with the effect of subverting the will of the people. Therefore, the Court ruled that the excess votes were not authentic and they ought not have been in the system, and any outcome arrived at with the votes being taken into account could not be fair or authentic or verifiable.

While the Petitioner urged the Court to exclude the affected results and proceed to declare him the winner based on the remaining results, the Court declined to make such a finding, as it would amount to disenfranchising the voters in the affected polling stations. In the alternative, the Petitioner prayed for a nullification of the entire election. The Respondents objected on the basis that this prayer had not been pleaded. The Court, having determined that it could rule on unpleaded material revealed during a recount, and further that the revealed irregularities viewed globally would affect the final outcome of the election, concluded that the irregularities, errors or non-compliance during collating, counting and tallying fundamentally undermined the electoral process. Therefore, the result could not be said to be accountable, verifiable or accurate. Such a result could therefore not be said to reflect the will of the people of Embu County.

Consequently, the petition was allowed, with the results of the gubernatorial election in Embu County being nullified and an order issued directing that a fresh election be held. I addition, costs were awarded to the Petitioner which were capped at KES 3,000,000, with KES 2,000,000 being paid by the 1st Respondent and 1,000,000 jointly by the 3rd and 4th Respondent. A certificate in accordance with section 86 was also to issue to the relevant Speaker.

Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 others Nairobi Election Petition Appeal 6 of 2018

Court of Appeal at Nairobi
Coram: Ouko, Musinga and Sichale JJ.A

Judgment Allowing Appeal

17 August 2018

Effect of reliance by trial court on handwritten copies of forms used by Deputy Registrar during recount instead of the Deputy Registrar's report-the proper exercise of discretion in granting a prayer for scrutiny-impact of determining petition beyond matters specifically pleaded and contained in Deputy Registrar's report-impact of interference with election material by a party-impact of narrow margin on an application for scrutiny and recount-burden and standard of proof

Summary of facts

Following the decision of the High Court rendered on 22 February 2018 nullifying the election of the appellant as the governor of Embu County,the Appellant lodged an appeal with the Court of Appeal, citing 23 grounds of appeal. In their written submissions, they condensed these grounds into seven clusters.

Firstly, it was the Appellant's case that the learned Judge erred in failing to refer to the Deputy Registrar's report and instead relying on handwritten copies of forms allegedly used by the Deputy Registrar and which, unlike the report, did not form part of the Court record; moreover, they were aggrieved that despite the 1st Respondent's prayer for examination of the packets of counterfoils being denied, the trial Judge made significant findings on the alleged irregularities on the missing counterfoils based purely on the handwritten notes of the Deputy Registrar.

Secondly, the Appellant was aggrieved by the decision of the learned Judge in sanctioning of the unlawful execution by the 1st Respondent of the *ex parte* orders of Muchemi J; that the abuse of the orders went to the core of electoral integrity and the 1st Respondent ought not have been allowed to benefit from abuse of the orders by tampering with electoral material.

Thirdly, the Appellant submitted that the trial Judge erred in holding the evidence tabled sufficient for the grant of an order of scrutiny and recount whereas no basis was laid save for a narrow margin and it was therefore a fishing expedition; in addition, it was their case that the 1st Respondent did not provide evidence to justify an order of re-tallying.

Fourthly, the Appellant contended that the trial Judge erred in determining the petition on the basis of matters beyond those pleaded in the petition, the evidence and even beyond his own ruling on scrutiny and recount and which went against the scrutiny report.

Fifthly, it was the Appellant's case that the trial Judge erred in concluding that there were irregularities that violated Regulation 81 (2) of the Elections (General) Regulations with regard to sealing of counterfoils to the ballot boxes, despite evidence to the contrary and that the Judge misconstrued the said provision and ought to have considered and applied Regulation 73(4) instead.

Finally, the Appellant submitted that the learned Judged misapplied the principles of standard and burden of proof in not finding that the burden of proof lay with the 1st Respondents to establish the alleged irregularities and in failing to find that the allegation of the 1st Respondent that the votes cast in Manyatta, Runyenjes and Mbeere South Constituencies exceeded the total number of registered voters was rebutted by entries in Forms 37B and 37C and the testimonies of the 2nd and 3rd Respondents' witnesses to the effect that those who voted were less than the registered voters.

The 2nd and 3rd Respondents' filed a cross-appeal whose grounds were largely that the trial Judge enlarged the petition by considering new issues which had not been pleaded in the petition and new evidence tendered during submissions, that the learned Judge expanded the purpose and intent of scrutiny beyond what is provided for under section 82 of the Elections Act, that it was not proven statistically how the final outcome of the election had been compromised by irregularities and that the trial Judge erroneously exercised his discretion in condemning the 3rd Respondents to meet the costs of the petition. They prayed for a setting aside of the judgment of the High Court and dismissal of the petition with costs to the 2nd and 3rd Respondents.

The 4th Respondent's appeal was grounded on the fact that while the trial Judge had indicated that he would answer the question of interference by the 1st Respondent with electoral material following the orders of Muchemi J in the judgment, he later ruled the issue irrelevant. Therefore, it remained unresolved whether or not Muchemi J had jurisdiction to entertain the application given that she had not been a gazetted Judge for that election. The 4th Respondent also asserted that the trial Judge erred in allowing scrutiny and recount based solely on the narrow margin and faulted the trial Judge for going beyond his limit, particularly because in their view, the application for scrutiny and recount was a fishing expedition and therefore the grant of the application was in their view an error.

In response, the 1st Respondent maintained that he had laid a sufficient basis for scrutiny, given that the gap in votes between himself and the appellant was a paltry 985 votes and therefore the trial judge had properly exercised his discretion in granting the orders.

He also denied having tampered with electoral material and asserted that the same had been in the custody and care of the 3rd Respondent and 24 hour security and therefore that the orders of Muchemi J on preservation of the integrity of the election material had been complied with.

On the assertion that the trial judge went beyond the pleadings, the 1st Respondent maintained that the Judge relied in part on the Deputy Registrar's scrutiny report; that the irregularities and illegalities detailed in the Deputy Registrar's report had been exhaustively pleaded in the petition and that in any case, the 'handwritten notes' formed part of the Deputy Registrar's report and in fact the typed report was drawn from the handwritten one. The 1st Respondent maintained that he had proved beyond reasonable doubt how irregularities affected the final result and that drawing from the scrutiny exercise, it could not be established with certainly the actual numbers, making the election not verifiable, accountable, secure and transparent.

The 1st Respondent, drawing from the three schools of thought identified by the trial judge on unpleaded matters disclosed during scrutiny, urged the Court not to turn a blind eye on serious electoral malpractices or irregularities simply because they were not pleaded. he maintained that the election remained to be invalided since it demonstrably violated the principles of the Constitution and other laws relating to elections.

The Court reviewed principles relating to determination of electoral disputes before making its substantive determination on the issues presented to it. It noted that the Court of Appeal only has the powers to hear appeals from the High Court on matters of law only as set out in section 85A of the Elections Act. Having looked over the interpretation of the provision by the Supreme Court in the case of ***Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 others*** **[2014] eKLR**, it found that the present appeal was properly before the Court.

Secondly, the legal threshold for invalidating an election petition, also referred to as the legal fulcrum is as established in section 83 of the Elections Act. However, that provision must be weighed against Articles 81 and 86 of the Constitution requiring free and fair elections effected by an electoral system which is accurate, simple, verifiable and transparent; with results being declared promptly and every effort made to eliminate electoral malpractice. Nevertheless, it had to be borne in mind that electoral officials are human and prone to error and therefore not all instances of non-compliance would invalidate an election if it could be shown that the election was conducted substantially in compliance with the Constitution and electoral laws or that the non-compliance did not affect the outcome of the election.

Thirdly, as stated in both the ***2013 Raila Odinga case*** and the ***2017 Raila Odinga case***, the burden of proving non-compliance with the Constitution or any other written law lay with the person alleging the non-compliance.

Fourthly, the Court reiterated the principle of pleadings as enunciated in the case of ***Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others*** **[2014] eKLR,** that a party, while at liberty to formulate and present his case in his own way, was bound by his own pleadings and could not raise a new case without amendments. Where no amendments were made, the Court was bound by the pleadings placed before it.

The Court evaluated the 1st Respondent's case at the trial, where he had been emphatic, in his prayer for scrutiny and recount, that the outcome of the two processes would reveal that he had won the election. He testified as much during the hearing. A limited order of scrutiny had therefore been granted in respect of specified polling stations in Mbeere South, Manyatta and Runyenjes constituencies. The order of the Court had clearly stipulated that the findings of the Registrar on the scrutiny would form part of the record of the Court. The Court had in its discretion extended this order to include a re-tallying of Forms 37A for all the polling stations in the three stipulated constituencies where a recount had not been ordered which was limited to tallying the figures against forms 37B and 37C.

Since the decision to grant or deny an order of scrutiny is an exercise of judicial discretion, the Court of Appeal, citing the Supreme Court decision in ***Gatirau Peter Munya V Dickson Mwenda Kithinji & 2 Others*** **[2014] eKLR**, stated that when an order is made granting or denying scrutiny, it will not easily be overturned, unless it can be demonstrated that it resulted in an injustice or was exercised without basis. The appellate court found that the trial judge had judicially exercised his discretion to grant scrutiny and therefore that ground of appeal failed.

The Court noted that following the scrutiny and re-tallying exercise and the report of the Deputy Registrar, the results did not change in terms of the party who had more votes. The Court also agreed with the trial judge that the report dispensed with the 1st Respondent's first two prayers. In the view of the appellate court, the 1st Respondent's case collapsed with the scrutiny report as despite contending that his votes had been understated in some polling stations, the Court concluded that the Appellant

would still have been ahead. The Appellate court also agreed that the next three prayers were hinged on the prayers for scrutiny and recount and were effectively disposed of with the Deputy Registrar's report, as the Appellant was still the winner. In their view, that ought to have ended the matter.

However, since the trial judge, basing his decision on ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*** [2015] eKLR, had gone beyond the pleadings and the evidence to the handwritten notes where he identified irregularities, the Court of Appeal reviewed the principles on scrutiny and recount as enunciated in various decisions. Citing ***Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others*** **Election Petition No. 3 of 2013** and ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** **[2014] eKLR,** the Court restated the general principle that scrutiny and recount are not designed to uncover new evidence not pleaded or raised during the trial. While the trial judge had relied on the 2015 ***Wetangula case*** decided by the Supreme Court, the Court of Appeal was emphatic that the latter decision did not overrule the previous two decisions for two reasons: firstly, in the ***Okoth Obado*** **case**, the Court was dealing with illegalities i.e. treating and bribing of voters not an irregularities and the Court had stated that it could deal with such when they arose in the course of a trial. Secondly, the Court distinguished the *Wetangula decision* on the basis that the illegality had in fact been pleaded and evidence presented.

Having reviewed paragraphs 150-153 of the Supreme Court decision in the ***Okoth Obado*** **case,** the Court restated the position of the apex court that it was only in cases where the Trial Court had granted an order of scrutiny, recount or re-tally *suo moto* that irregularities other than those which were pleaded could be relied on in the final determination and only if the parties were also granted an opportunity to ask questions on the new findings. In cases where a party had alleged non-compliance with any written law on elections, that party was bound by their pleadings and the burden was on such a party to table proof and if they desired to raise new issues, they could only do so by amending the petition.

Citing the decision of the Supreme Court in ***Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR***, the Court emphasised the importance of scrutiny, of taking the scrutiny report into consideration in arriving at it determination, of allowing parties to interrogate any newly discovered irregularities and the burden of the Petitioner of demonstrating how any newly discovered irregularities affected the results. It was only when that was done that the Court could make a determination on the petition. In the trial at the High Court, the found that the 1st Respondent himself identified the irregularities and the Court considered and rejected them. The Appellate Court therefore found that the trial judge had erred in law by delving into matters which were neither pleaded nor argued before him.

The Court then considered the merits of the grounds upon which the trial judge invalidated the appellant's election. There were four main grounds cited from a review of the report. The Court of Appeal ruled that there was no basis for concluding that the failure to seal used ballot papers and counterfoils in the ballot boxes, that the failure to locate some Forms 37A in the ballot boxes and the presence of ballot papers in 12 ballot boxes whose booklets could not be located and the alleged excess of 111 ballot papers were irregularities of such a magnitude that they seriously undermined and affected the election result. The conclusions of the trial judge that the vote difference between the appellant and the 1st Respondent were 'in the region of 566, 700,800, 4000 and 10,000' were, in the view of the Court of Appeal unsupported by empirical proof and no reference was made to any specific polling station. There was also no specific reference made to the specific 18 polling stations where it was found that the ballots cast exceeded the number of ballots reflected in the counterfoils

or that the ballot boxes did not have the requisite Forms 37A. In addition, no names were given of the 11 polling stations where it was alleged that the ballot boxes did not have the used counterfoils and 216 others where it was asserted that there were more used counterfoils than there were ballot papers found in the ballot box.

The Court faulted the 1st Respondent and the trial judge for being preoccupied with the narrow margin of votes between the Appellant and the 1st Respondent. Citing the Supreme Court decision in the ***Munya*** case, the Court of Appeal asserted that margins were only an issue in elections other than a presidential election where it was alleged that the counting, tallying, errors or other irregularities had affected the outcome of the election, and particularly where the results were contested on allegations of counting or tallying errors. If a scrutiny or recount did not alter the final result, the margin of victory, however narrow, was immaterial. This in their view was bolstered by the fact that the Constitution requires, at Article 180(4) that the winner be determined on the basis of being the candidate with the greatest number of votes.

In determining whether the election result ought to have been nullified, the Court of Appeal reiterated the position of the Supreme Court in ***the 2017 Raila case,*** that the burden of proof was on the 1st Respondent to demonstrate either that the conduct of the election substantially violated the Constitution or other electoral laws or that although it was conducted substantially in accordance with the Constitution, it was marred with irregularities or illegalities that affected its outcome. The Court found that the 1st Respondent's allegations that the total votes cast in the 3 contested constituencies exceeded the number of registered voters were rebutted by the IEBC and their witnesses. In the view of the Court, the 1st Respondent therefore failed to discharge the burden of proving to the required standard the alleged irregularities. The learned judge had therefore erred in invalidating the appellant's election as governor of Embu County.

The appeal was therefore allowed. The judgment of the High Court issued on 22 February 2018 and subsequent orders were set aside. The Court further awarded the costs of the appeal and the cross appeal to the Appellant to be met by the 1st,, 2nd, 3rd and 4th Respondent but capped at KES 1, 500, 000. The cost of the Petitioner were awarded to the Petitioner and the 2nd, 3rd and 4th Respondents to be shared equally and capped at not more than KES 3,000,000, subject to taxation.

Nathif Jama Adan v Ali Bunow Korane & 2 Others Garissa Election Petition 2 of 2017

High Court of Kenya at Garissa
Coram: C Kariuki J

Ruling on Application to Withdraw Petition

2 February 2018

Application for withdrawal of petition-effect of non-publication of the notice of withdrawal of petition application and non-prosecution of the same-impact of application for substitution while application for withdrawal is pending

Summary of facts

The Petitioner contested the declaration of the 1st Respondent as the governor of Garissa County. An application for joinder was filed on 31 October 2017 and fixed for hearing on 1 December 2017. On 1 December 2017, the Petitioner indicated that he intended to withdraw the petition. The respondents and the party seeking joinder did not object to the application so long as due process was followed. They also indicated that they would not be seeking costs. The matter was fixed for mention on 11 December 2017 when it was confirmed that the application for withdrawal had been filed on 8 December 2017. It was agreed that the Respondents would file their responses while the Petitioner filed his formal application for withdrawal. All the applications were fixed for hearing on 2 February 2018. Before the set date, four applicants lodged an application for substitution which was fixed for directions on 15 January 2018. On the material date, it was confirmed that the Respondents had not filed responses to the earlier application nor had the Petitioner filed an application for withdrawal as had been agreed by all the parties. The Court fixed the two applications for hearing on 24 January 2018, with the parties all agreeing to file their submissions.

On the set hearing date, neither the Petitioner nor his advocate appeared. The Court directed that the hearing proceed in their absence. The 1st Respondent, in a Replying Affidavit filed in response, opposed the two applications on the basis that rule 24 (1) of the Election Petition Rules requires that substitution only be considered after the hearing of an application for withdrawal. It was their assertion that substitution was premature, particularly because the petition had not been prosecuted. They urged that both the application and the petition be dismissed for want of prosecution since there were fixed timelines within which the petition was required to be heard and determined. Moreover, the Court was urged to find that substitution could not be considered in the event of a failure to prosecute the petition.

In the alternative, the Court was urged to find that an unprosecuted application could not be considered for failure to comply with the procedure before an application for withdrawal can be considered with Rule 21 of the Elections (Parliamentary and County Elections) Petition Rules.

On the other hand, the Court was urged not to strike out the application for withdrawal and the application for substitution on the strength of the authority ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others*** **Nairobi Election Petition 14 of 2017,** where Mabeya J. upheld the affidavit of a witness who was no longer available to testify. The Court was urged to deal with the application for withdrawal and that of substitution together and find that since the applicants

in the second application were willing to comply with the guidelines under Rule 24, the petition should not be struck out.

On the failure to publish the notice of intention to withdraw, the Court was urged to find that it was a mere technicality curable under Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules 2017 and that the Court had relied on the said rule under similar circumstances in the case of ***Onchieku v IEBC and Others.*** The Court was urged not to sacrifice substantial justice at the altar of procedural technicalities.

Issues for determination

The Court identified the following issues for determination: what were the appropriate orders to make in light of the non-publication of the notice to withdraw the petition application and the failure to prosecute the same; what was the status of the substitution application and what orders ought to be made as to costs.

On the first issue, the Court noted that withdrawal of a petition was not granted as a matter of course, but rather the leave of the Court was required. The Court cited the case of ***Peter Gatirau Munya vs Independent Electoral and Boundaries Commission, Meru County Returning Officer & Kiraitu Murungi (2017) eKLR,*** to the effect that election petitions are litigation *sui generis* and brought inherently in the public interest and therefore could not be withdrawn at the behest of the Petitioner, or even with the consent of the parties. The Court also relied on the decision in ***Ombati Richard v IEBC & 2 Others (2017) e KLR*** to the effect that the requisite procedure must be followed in withdrawing a petition. The Procedure is set out in Rules 21 and 22. Since the application for substitution can only be ordered where the application to withdraw by the Petitioner has crystallised, the substitution of the Petitioner in this case remained unripe as the withdrawal had not lawfully been done to completion. The Court distinguished the authority in ***Onchieku v IEBC & Others,*** which allowed application for substitution to proceed on merit before publication on the basis that the publication was done before the application for substitution was canvassed. In the present case, the notice for withdrawal was never published, neither was the application prosecuted. The application could therefore neither be sustained nor prosecuted by the Court. The request for substitution was therefore premature and could not be granted.

As for the fate of the petition, the Court cited the decision in ***Japhet Muroko and Another Vs IEBC & Others*** **Nairobi Election Petition 23 of 2017** to the effect that where a Petitioner discloses disinterest in prosecuting his petition, the Court is entitled to strike it out. Accordingly, both the application to withdraw and the petition were struck out for want of prosecution. The application for substitution was also struck out for being unripe and each party directed to bear their own costs, since the Respondents had consented to the withdrawal of the petition.

Joseph Oyugi Magwanga & Another v IEBC & 3 Others Homa Bay High Court Election Petition 1 of 2017

High Court of Kenya at Homa Bay
Coram: Karanja J.

Judgment Allowing Petition

20 February 2018

Whether election was conducted in accordance with the Constitution — whether there was compliance with the law in the conduct of the elections — whether non-compliance materially affected the results — validity of declaration of candidate as winner

Summary of facts

The first Petitioner was a gubernatorial candidate in the August 8 poll in Homa Bay County in which the 3rd Respondent was declared winner. The 2nd Petitioner and 4th Respondent were running mates to the 1st Petitioner and the 3rd Respondent respectively. The 1st Petitioner was dissatisfied with the results as declared by the 1st Respondent (the IEBC) on several grounds, including allegations of illegal appointment of County Deputy Returning Officers and Presiding Officers, illegalities and irregularities in the collation, tallying and transmission of results, voter suppression, discrepancy between declared and actual results as tallied by the Petitioners, alleged alterations of Forms 37A and alleged bribery and other election offences by the 3rd Respondent.

On the first ground, it was the 1st Petitioner's contention that the IEBC did not publish the list of returning officers as is required by law and that persons allied to the 3rd Respondent were appointed. The 1st Petitioner also contended that the ODM nomination exercise was a sham and marred with irregularities occasioned by the 3rd Respondent who colluded with the ODM presiding and returning officers to stuff ballot boxes. The 1st Petitioner also contended that the said nomination exercise had been challenged at the ODM Nomination Dispute Resolution Panel, which had nullified the 3rd Respondent's nomination. However, the 3rd Respondent had proceeded to resign from the part and vie as an independent candidate. The 1st Petitioner also contended that the said officers were later appointed as Presiding Officers in the general elections, and were alleged to have been involved in electoral malpractices and fraud.

On the alleged legal and procedural flaws in the conduct of the election, it was contended that the IEBC breached Articles 81 and 86 of the Constitution as read with section 39 of the Elections Act either deliberately or by failing to transmit results from the constituency tallying centres using the prescribed form, and thereby exposing the process of collation and tallying of results to manipulation. It was alleged that the entire election process was marred with irregularities and that the credibility of the process was therefore put into question by the glaring and qualitative anomalies.

The Petitioners also contended that there was voter suppression which violated the rights of the people to exercise their rights without undue influence and which invalidated the election of the 3rd Respondent.

In relation to the alleged variation between the declared result and the actual results, it was contended that from the parallel results collated by the Petitioners, there were massive numerical discrepancies

in the results as declared by the IEBC and which affected the results to their disadvantage. It was their view that an analysis of the field agents' notebooks, the Forms 37A issued by the Presiding Officer, the forms pinned to the polling stations and those delivered to the constituency tallying centre revealed that the Petitioners had won the election. The Petitioners also outlined in their petition polling stations in respect of which they alleged there was a variance between the results as declared and those declared at the Constituency Tallying Centre, and that the variance was of one hundred to two hundred votes in favour of the 3rd Respondent. It was the Petitioners' case that these alterations occurred in all eight constituencies and were evidence of collusion between the 3rd Respondent and the IEBC to subvert the will of the people and a violation of the Constitution.

It was the Petitioner's assertion that since the 3rd Respondent benefited from the illegal allocation of votes in his favour, they were entitled to a scrutiny to reveal the true results which they alleged would demonstrate that the 1st Petitioner had won the election.

As for the alterations of Forms 37As, it was alleged that some alterations were done contrary to election regulations as they were not countersigned by Presiding Officers; that most of them were made in favour of the 3rd Respondent and therefore gave him an unfair advantage and that most of them were made in ink on the counterfoil and not reflected in the original copies.

The Petitioners also impugned the results on the basis that in some polling stations, the Forms 37A were altered without countersignatures by some Presiding Officers and that some forms were not signed neither did they have the IEBC stamp. They further alleged that some forms had different signatures by the same Presiding Officer and further questioned the credibility of the result on the basis that more votes were cast for the presidential election than for the gubernatorial election, yet an equal number of ballot papers was issued for all elections.

The Petitioners also asserted that the total number of registered voters as captured in Form 37 C differed from the number captured in Form 34 C and from that captured on the IEBC portal and that no explanation for this disparity had been offered by the 1st Respondent. It was also contended that some Forms 37A were uploaded in blank form but the total figure retained in order to conceal discrepancies in the votes announced.

In relation to the transmission of results, the Petitioners contended that when the results started streaming in at their tallying centre, they demonstrated that the Petitioners were faring well and there were no variances between the results as transmitted and their own tallies. However, later on the IEBC portal changed and maintained a constant difference of 52% in favour of the 3rd Respondent against the 1st Petitioner's 46% despite fluctuation in the results that streamed in. They further alleged that when the margin was raised with the County Returning Officer, he maintained that he was not in charge of the servers.

The Petitioners also alleged that their agents were kicked out of the tallying centres when they queried the tallying process and their tallies showed that the 1st Petitioner was leading by over 40,000 votes with 90% of the votes having been tallied. However, the IEBC portal stopped streaming results with 39% having been transmitted and they showed that the 3rd Respondent was leading with the same margin from a 15% transmission. Upon inquiry with the County Returning Officer about the delay, the Petitioners pleaded that they were informed that the issue would be taken up with the Constituency Returning Officers. However, upon attempting to inquire with the Constituency Returning Officers through their agents, they were informed that the Constituency Returning Officers had left the tallying

centres at midnight on 9 August 2017, but they did not make it to the County Tallying Centre until midday 10 August 2017, despite their proximity to the same.

The Petitioners also took issue with the use of county government resources to campaign for the 3rd Respondent. The Petitioners pleaded that County Executive Committee members violated section 16 of the Public Officer Ethics Act by actively campaigning for the 3rd Respondent and that they abused their influence and state resources to actively solicit votes for him. They further asserted that they acted in a manner akin to intimidation of the electorate and given the high levels of illiteracy and poverty among Homa Bay votes, it was likely that a substantial number of them were influenced by this improper use of public resources.

In essence, the Petitioners' contention was that the election was riddled with procedural irregularities, and discrepancies which taken together fundamentally affected the credibility and legitimacy of the election both qualitatively and quantitatively. The declaration of the 3rd Respondent as the successful candidate was therefore tainted with irregularities and could not have reflected the overall will of the electorate. The Petitioners therefore prayed for orders that the 3rd and 4th Respondent were not validly elected as governor and deputy governor respectively, that directions be issued to the Director of Criminal Investigations to investigate electoral offences by the Respondents and the Director of Public Prosecution to prosecute them, orders that the Petitioners were validly elected as governor and deputy governor respectively and that they be sworn in or in the alternative, that a fresh election be held and costs of the petition be awarded to the Petitioners.

The Respondents denied the allegations contained in the petition and given in their testimony and that of their twelve witnesses. The Respondents did not testify but six witnesses testified on behalf of the 1st and 2nd Respondents and four on behalf of the 3rd and 4th Respondents.

It was the 1st and 2nd Respondents' case that the election was conducted in accordance with the Constitution, the Elections Act and the rules and regulations made thereunder. It was their assertion that there were no incidents of voter bribery, intimidation or locking out of the Petitioners' agents from polling stations as alleged. They further asserted that the total number of registered voters was 476,875 as published in accordance with the IEBC Act and that after voting, counting, collating and tallying, the 3rd Respondent had been declared the winner with 210, 173 votes against the 1st Petitioner's 189,060, which victory was evidenced in Forms 37A, 37B and 37C.

On the allegation that the results were tampered with, the 1st and 2nd Respondents denied that they altered the results in favour of the 3rd Respondent, or that any of the Petitioner's votes were granted to the 3rd Respondent or that the results as declared in the tallying centre were different from those declared in the polling stations. They dismissed the results supplied by the Petitioners as having no basis and asserted that they were the result of fraudulent alteration of statutory forms by the Petitioners. In relation to the appointment of Presiding Officers and their deputies, the 1st and 2nd Petitioners asserted that the Elections (General) Regulations did not apply to the appointment of Presiding Officers and their deputies, and further, that they played no part in the ODM nomination process. They maintained that the electoral officials were competitively recruited following advertisement in the media and denied colluding with the 3rd Respondent to hire the fourteen officials impugned by the Petitioners.

The 1st and 2nd Petitioners also denied that the elections were marred with legal and procedural flaws, irregularities and illegalities in the collation, tallying and transmission of results and further that they oppressed the participation of the Petitioners' voters. It was their contention that the voter turnout in

Homa Bay was 84% and that the results declared by Presiding Officers in the presence of agents were entered into Forms 37A and duly signed by the Presiding Officer. These results were subsequently entered into Forms 37B at the Constituency Tallying centre and Forms 37C at the county tallying centre. They therefore denied any alteration of the results in favour of any candidate or to the disadvantage of another.

The 1st and 2nd Petitioners also denied the variance of 100 to 200 hundred votes in favour of the 3rd and 4th Respondent or that they violated any law in verifying the tally attributed to the 3rd Respondent and maintained that the 3rd and 4th Respondent were validly elected. They prayed for the dismissal of the petition with costs and that the Court uphold the election of the 3rd and 4th Respondent as governor and deputy governor respectively.

On their part, the 3rd and 4th Respondents maintained that the election was free and fair and conducted in accordance with the Constitution, the Elections Act and the Elections (General) Regulations. They denied any incidents of voter bribery or that the Petitioners' agents were either intimidated or cast out of polling stations. They denied the allegation that the results as declared at polling stations were at variance with the results as declared at the constituency tallying centres and maintained that the assertion that only the 1st Petitioner's and 3rd Respondent's votes has been altered was not only unreasonable but also self-defeating.

They impugned the figures supplied by the Petitioners as the results on the basis that they were not competent to carry out proper tallies and in any case they were biased, having participated in the election. They maintained that these tallies were intended to mislead the Court that there were anomalies in the electoral process and obtain an order for scrutiny, which was a wild goose chase. In relation to the appointment of Presiding Officers, the 3rd and 4th Respondents maintained that the IEBC published the proposed list of Presiding Officer and their deputies fourteen days before their appointment to allow parties to make their representations. They asserted that there was no requirement for public participation in the appointment of Presiding Officers as claimed by the Petitioners and maintained that the IEBC had not colluded with the party presiding and returning officers to rig the election.

The 3rd and 4th Respondents also denied that they fraudulently obtained the ODM nomination ticket as claimed by the Petitioners and maintained that the 3rd Respondent only got the ticket because he won the nomination process. They asserted that it was in fact the first Petitioner who had failed to procedurally leave the ODM party to vie as an independent candidate, resulting in the litigation in ***Nairobi Civil Appeal No. 264 of 2017***, where his independent candidature was questioned.

The 3rd and 4th Respondents also asserted that the Petitioners had not demonstrated how the rights of the electors to vote without undue influence had been violated or which of these violations had been brought to the attention of the 1st and 2nd Respondent and they had refused to act upon them. They maintained the Petitioners did not supply any evidence of their authorised agent who allegedly collected the Forms 37A from the polling stations, that the origin and authenticity of the purported Forms 37A supplied by Forms 37A was suspect and that the variance in the Forms 37A supplied by the Petitioners was obtained with the intention of misleading the Court. They also asserted that the allegation of collusion between the Respondents was baseless, malicious and deliberately misleading to the Court.

The 3rd and 4th Respondents also denied any involvement in the transfer of votes or involvement in any criminal activities. They maintained that since the Petitioners' agents were present in the Constituency Tallying Centre, any manipulation of votes was done by them and any variation was occasioned by the fact that the Petitioners used altered forms in their analysis.

On the allegations of tampering during the transmission of the results, the 3rd and 4th Respondents maintained that this was a replication of the allegation contained in the presidential election petition and was intended to get the Court to make a similar finding along the principle of *stare decisis*, and that in any event, the allegation lacked merit as the Forms 37C were generated from Forms 37B and 37A. Further, they asserted that the allegations of bribery and commission of elector al offences were general and no proof was supplied of the same. They prayed that the petition be dismissed with costs for being vexatious and an abuse of the process of the Court.

Issues for determination

From the pleadings of the parties, the Court identified the following issues for determination: whether the Homa Bay gubernatorial election was conducted in accordance with the Constitution; whether there was non-compliance with the law by the 1st and 2nd Respondents in the conduct of the elections, and if so, whether the non-compliance materially affected the results; whether the 3rd Respondent was validly declared by the 1st and 2nd Respondents as the duly elected governor for Homa Bay county and if not, whether the Petitioners ought to have been declared as validly elected; and whether the Petitioners were entitled to the orders sought in the petition.

The Court considered pillar one and four together. In so doing, the Court evaluated the provisions of Articles 81 and 86 of the Constitution which set out the general principles of an electoral system and on voting respectively and found that the impugned election was conducted largely in a proper and peaceful manner and free from violence, intimidation and any other breaches of the law. Since an election that is largely free, fair and credible until the point of voting cannot be said to be in violation of the law, the Court found that the impugned election was conducted in accordance with the law. The Court ruled that the Petitioner's allegations of breaches of the law both before and on voting day were not proved to the required standard. This was particularly the case in relation to allegations of intimidation of voters and misuse of county resources for campaigns. The Court faulted the Petitioners for not taking issue with the gazettement of the returning officers that they alleged were improperly appointed. The allegations of bribery were also found to be incredible, as none of the videos produced by the Petitioners established the acts of bribery beyond any reasonable doubt.

The Court was guided by the dicta of the Supreme Court in the ***2013 Raila Odinga case and the 2017 Raila*** decision to the effect that not every irregularity or procedural infraction was sufficient to invalidate an election. It had to be demonstrated that the irregularities were of such a profound nature as to affect either the actual result or the integrity of the election. Therefore, as captured in section 83 of the Elections Act prior to the 2017 amendment, where an election was conducted substantially in accordance with the law on elections, it would not be vitiated by a mistake or a breach of the law so long as it did not affect the election result. This was not to be taken to mean that section 83 could be used as a panacea for all kinds of irregularities and an election could be vitiated where it was found that the errors or irregularities materially or fundamentally affected the results. The Court emphasised that the role of proving that the election result was affected by irregularities lay solely with the Petitioners. It was therefore incumbent upon the Petitioners to demonstrate either that the process was flawed to their detriment or that the applicable law, in particular section 39 of the Elections Act, was deliberately or negligently flouted by the 1st and 2nd Respondents.

The Petitioners contended that the 1st Respondent manipulated the results either deliberately and/or negligently by failing to electronically transmit results from polling stations to constituency tallying centres using the prescribed forms thereby exposing the process to manipulation. Their allegation was primarily grounded on the fact that the Petitioners had their own tallying centres from which they could

monitor the results transmitted by the 1st Respondent's portal and verify them against results captured using their own 'servers'. Since the Constitution granted the 1st Respondent exclusive jurisdiction to hold elections for all elective positions, private tallying centres were not legally recognised and since the obligation to electronically transmit results was limited to presidential elections under section 39 (1) (C) of the Elections Act, the alleged irregularities in the transmission of results were not valid and in any case, were not proved. The Court also found that the Petitioners failed to prove that any person was prejudiced y the alleged omission to electronically transmit the results.

The Court also chose to address limbs two and three together as they related to irregularities in the statutory forms used to declare results. The Petitioners' gravamen was that there was substantial non-compliance with the electoral laws by the 1st and 2nd Respondents in the counting, tallying and declaration of results such that the process was married with substantial irregularities which affected the credibility of the election and its outcome.

The Court restated the position in the ***2017 Raila Odinga case*** as well as the ***Maina Kiai*** decision where the primacy of Form 37A, which is generated at the polling station, also known as the 'true locus for free exercise of the voters' will' was established. These decisions also firmly established the finality of the results as declared at the polling station. This therefore meant that any irregularities in Forms 37A would have an effect on Forms 37B and 37C as the latter were generated from the former. The Court noted with concern that despite irregularities such a alterations and/or cancellations of figures in results, discrepancies in the forms and irregularities relating to ballot boxes and seals set out in the Petitioners' pleadings, which demonstrated substantial non-compliance with electoral laws by the 1st and 2nd Respondents, their responses constituted mere denials which were discredited by the Petitioners during cross-examination.

The allegations established by the Petitioners and their witnesses included failure to sign statutory forms by Presiding Officers, lack of stamps and security features on the statutory forms, broken ballot boxes and some locked with unsecured rather than IEBC seals, alterations in the result forms which were not countersigned by the Presiding Officers and declaration of results in respect of non-existent polling stations. None of the Presiding Officers for the polling stations in respect of which the results were impugned was present to testify, which then meant that the burden of proof, which had shifted to the 1st and 2nd Respondents once the evidence of irregularity was established, remained undischarged. The assertion by the 1st and 2nd Respondents that the documents produced by the Petitioners were a forgery was not proved since they did not produce any original documents to refute this assertion. The net effect of the failure to discharge this burden was that there were two sets of results, each said to have originated from the 1st and 2nd Respondents, with one showing that the 3rd Respondent emerged winner, and the other that the 1st Petitioner won.

This meant that the gubernatorial election result in respect of Homa Bay county was indeterminate. In respect of the third limb, the Court therefore found that there was non-compliance by the 1st and 2nd Respondents with electoral laws and consequently, the 3rd Respondent was not validly elected as governor of Homa Bay county. However, the 1st Petitioner could not be declared as validly elected because the process was flawed. The Court therefore ordered a fresh election with costs of the Petitioners, capped at KES 6 million to be borne by the 1st and 2nd Respondents (KES 4 million) and the 3rd and 4th Respondents (2 million). A certificate was also to issue under section 86 of the Elections Act.

Cyprian Awiti & Another v IEBC & 3 Others Kisumu Election Petition Appeal 5 of 2018

Court of Appeal at Kisumu
Coram: Waki, Sichale & Otieno-Odek JJ.A

Judgment Dismissing Appeal

19 July 2018

Interpretation and application of secton 83 of the Elections Act as read with the Election Laws (Amendment) Act 34 of 2017 — whether trial court erred by not laying down its tools when it made a finding that the Homa Bay gubernatorial election was not conducted substantially in accordance with the Constitution and electoral laws — effect of using the phrase "irregularities must have effect on the results" instead of "affect the results" — whether trial court erred in failing to consider the Deputy Registrar's scrutiny and recount report — whether trial cout erred in its findings on failure to call witnesses — whether trial court judgment was inconsistent in light of Articles 81 and 86 of the Constitution as read with section 83 of the Elections Act — whether trial court erred in finding that the declared results were not accurate, credible and verifiable — whether the appellate court can re-evaluate evidence to determine whether declared results were accurate and verifiable — costs

Summary of facts

Following the gubernatorial elections for Homa Bay county on 8 August 2017, the 1st and 2nd Respondents declared the 1st appellant as the duly elected governor of the county. The 3rd Respondent was a candidate n the elections. At the Trial Court, the election court was asked to determine the legal, accurate and verifiable result of the Homa Bay gubernatorial election and the winner of the election. The 3rd Respondent asserted that as per his tally, the true result was that he won the election. The 1st and 2nd Respondents contended that only the IEBC had constitutional and legal authority to declare an election result; that the appellant was the winner of the election and that the 3rd respondent had no legal authority to tally and declare any result. The Trial Court nullified the declaration of the 1st appellant as the governor-elect and directed that a fresh election be held. Aggrieved by the judgment, the appellants lodged this appeal. The 1st and 2nd Respondents filed a cross appeal and the 3rd and 4th Respondents filed a cross-appeal on costs.

Issues for determination

From the Record of Appeal, Cross-Appeal and submissions of the parties, the Court identified the following issues for determination: whether the Trial Court properly interpreted and applied section 83 of the Elections Act as read with the Elections (Amendment) Act 34 of 2017; whether the Trial Court erred by not laying down its tools when it made a finding that the Homa Bay gubernatorial election was conducted substantially in accordance with the Constitution and electoral laws; whether the Trial Court erred in using the phrase 'irregularities must have effect on the results' instead of 'affect the results'; whether the Trial Court erred in failing to consider the Deputy Registrar's scrutiny and recount report dated 24 January 2018; whether the Trial Court erred in its findings on the failure by the appellants as well as the 1st and 2nd Respondents to call witnesses; whether the judgment by the Trial Court was inconsistent in light of Articles 81 and 86 of the Constitution as read with section 83 of the Elections Act; whether the Trial Court erred in finding that the declared results were not accurate, credible and verifiable; whether the appellate court could re-evaluate the evidence

to determine whether the declared results were accurate, credible and verifiable; whether the Trial Court erred in relying on documents tendered by the 3rd and 4th Respondents as 'true results' for the Homa Bay gubernatorial elections; whether the Trial Court erred in nullifying the declaration of the 1st Appellant as the governor-elect for Homa Bay County; whether the 3rd and 4th Respondents were entitled to relief to be declared the duly elected governor and deputy governor of Homa Bay county respectively; and whether the costs awarded by the trial judge were excessive or on the lower side.

On the first issue, the Court reviewed the Trial Court's judgment and could not find any part where section 83 was applied conjunctively. The Court therefore ruled that section 83 was applied disjunctively as asserted by the appellant. The Court however disagreed with the appellant that the Trial Court should have appliedee section 83 conjunctively as per Election Laws Amendment Act 34 of 2017. The Court reviewed the dicta of the Supreme Court in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank and Two Others SC Civil Application No. 2 of 2011*** and ***John Harun Mwau & Others v IEBC & Others Presidential Election Petitions 2 & 4 of 2017*** to the effect that where the words used in a provison are prospective and do not contain a hint of retrospectivity, the Court ought not to impart retrospectivity into the language of the statute; and that election petition disputes must be resolved by the election law that existed on the date of the elections. The cout therefore found the submission that the Trial Court ought to have applied the amended section 83 unmerited and that the trial judge did not err in applying section 83 as it existed on August 8 2017.

On the second issue, it was urged by the appellants that the judgment of the Trial Court was in two parts: in the first part, which they argued was correct, the trial judge held that the gubernatorial elections were conducted substantially in accordance with constitutional principles. In the second part, which they argued was erroneous, the Trial Court found that there were irregularities that vitiated the elections. They argued that this approach was wrong and that once the Trial Court found that the election was conducted in compliance with constitutional principles and the law, it was not open to the Trial Court to prevaricate and find that there were irregularities and illegalities in the conduct of the election. The appellate court disagreed and ruled than inquiry into the effect of electoral irregularities and other malpractices was still necessary where an election court had concluded that non-compliance wth the law relating to the election did not offend Constitutional principles or electoral law. Where an election court had made a determination that an election was conducted substantially in accordance with the principles laid down in the Constitution and electoral law, it was incumbent upon the Court to inquire into how any proven irregularity affected the result of the election, as was stated by the Supreme Court in the ***2017 Raila Odinga*** case.

On the question of whether the Trial Court erred in using the phrase "irregularities must have effect on the result" instead of "affect the result", the Court noted that the explicit wording in section 83 was to the effect that irregularities 'affect the result of the election'. The Court further observed that the terms have an 'effect on the result' and 'affect the result' had different meanings and the correct test being that used in section 83, the Trial Court ought to confine itself to determining whether irregularities 'affected the result'. The Court was aso guided by the decision of the Court of Appeal of Tanzania in the case of ***Mbowe v Eliufoo*** **[1967] EA 240,** where Georges J stated at page **242:**

> *In my view in the phrase "affected the result" the word "results" means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a*

substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular noncompliance of the rules.

Having reviewed the judgment of the Trial Court to determine whether in totality the use of the phrase 'effect on the result' led to a wrong conclusion and determination by the Trial Court, the appellate court found that the Trial Court, in evaluating the evidence correctly, laid emphasis on whether the irregularities were so substantial that they affected or had an effect on the results in a substantial manner. In so doing, no error of law was committed by the trial judge in stating that the irregularities should affect or have effect on the result in a substantial manner. This ground of appeal was therefore found to be without merit.

On the question of whether the Trial Court erred in failing to consider the scrutiny and recount report dated 24 January 2018, the Court noted that the Deputy Registrar submitted two reports, dated 21 November 2017 and 24 January 2018 and the 3rd and 4th Respondents had submitted their observations on those reports on 21 December 2017 and 31 January 2018 respectively. The Court further observed that the contents of the deputy registrar's reports and their probative value were contested. The appellants took issue with the fact that the Court did not consider that following the scrutiny and recount report of 24 January 2018,the Appellant had not only remained the winner but his tally had gone up by 14 votes. The Court had instead chosen to rely on the 3rd and 4th Respondent's report dated 31 January 2018. It was asserted that the latter report had no probative value as its author had not been cross-examined, while the report of the Deputy Registrar had been submitted soon after the scrutiny exercise, making it direct evidence with a high probative value.

The Court noted that the report of the Deputy Registrar dated 24 January 2018 was not referred to in the Trial Court's judgment. The appellate court emphasised that its concern was not with the contents of the reports but rather with their probative value and their binding nature upon the Trial Court. Having reviewed jurisprudence both from the High Court and the Supreme Court, it was noted that reports from judicial scrutiny and recourt must be considered and evaluated by the Trial Court. In their analysis, while such reports were not binding on the Trial Court, the Court was not at liberty to ignore, overlook and fail to refer to the report. The Trial Court was therefore required to analyse the report and either adopt its findngs or discount the findings of the Registrar. Whichever approach it took, the Court was required to give reasons for either adopting or discounting the report of the Deputy Registrar. The appellate court noted that failure to refer to the scrutiny and recount report after ordering scrutiny *suo moto* was one of the reasons why the Supreme Court decision in the ***2013 Raila Odinga*** case was discredited. Having noted the omission to consider the report dated 24 January 2018, the Court had to determine whether it amounted to a fundamental error of law. In light of the emerging jurisprudence requiring the Trial Court to consider and evaluate the scrutiny and recount report, the Trial Court erred in law in failing to consider and evaluate the report dated 24 January 2018. It was not open to the Trial Court to ignore or gloss over the said report; there had to be a demonstration of convincing analysis, evaluation and findings of fact.

On the fifth issue, the Court was required to determine whether the Trial Court erred in drawing an adverse inference against the appellants and the 1st and 2nd Respondents for failing to call their agents and Presiding Officers respectively. The Court, having reviewed jurisprudence on this issue, noted that an adverse inference would ordinarily not be drawn simply because a respondent had chosen not to call any or some witnesses. The legal burden rested with the Petitioner and the Trial Court ought not to draw an adverse inference where a respondent, who has no legal burden to prove any fact, fails to call a witness or witnesses. The critical question was whether from the evidence tendered before the

Trial Court, the evidentiary burden had shifted to the 1st and 2nd Respondents to warrant that they disprove facts established by the 3rd and 4th Respondents in the original petition. The appellate court found that the evidentiary burden shifted to the IEBC for several reasons: the Trial Court established as a fact that documents put in evidence by the 3rd and 4th Respondent emanated from the IEBC; that there were some irregularities in the documents tendered in evidence by the IEBC; that there was prima facie evidence that the results declared at the polling station were different from those declared at the constituency tallying centres and the county tallying centre and there was prima facie evidence on record that some statutory declaration forms were not signed by Presiding Officers and that some forms had no stamps.

Nevertheless, the appellate court found that the Trial Court erred in drawing an adverse inference that failure to call agents and Presiding Officers was fatal. While some evidence had been laid before the Trial Court that required explanation or clarification by the IEBC, it was not the law that such explanation or clarification could only be offered by agents or Presiding Officers. Other cogent, convincing and corroborative evidence to explain or clarify any irregularity could be led by the IEBC. Moreover, the IEBC was under no legal burden to prove that an election was conducted substantially in compliance with constitutional principles and election law. However, if a *prima facie* case was laid against it, the evidential burden shifted and failure to discharge this burden would convert the *prima facie* evidence into evidence proving the disputed fact. The appellate court, guided by its earlier decision in ***John Munuve Mati v Returning Officer Mwingi North Constitutency, Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu*** **[2018] eKLR**, held that the Trial Court erred in holding that the Presiding Officers who conducted the elections on behalf of the IEBC ought to have been called to testify on the results in disputed polling stations since it does not invariably follow that failure by a respondent to call a witness means that the petition must be allowed.

On the question of whether the judgment of the Trial Court was inconsistent in light of Articles 81 and 86 of the Constitution as read with Section 83 of the Elections Act, the Court considered that the Trial Court was faced with the qualitative and quantitative aspects of the conduct of the elections. The qualitative and quantitative aspects had four distinct stages: the qualitative or quantitative aspects of nomination, eligibility and qualification of candidates to vie for elections (pre-selection nomination disputes); qualitative or quantitative aspects of the conduct of the election on polling day from the opening to the close of the polling station; the qualitative or quantitative aspects of post-polling activities up to the formal declaration of results (including tallying, verification, transposition and transmission of results, filling and signing of statutory result forms at each polling station and at constituency, county and national levels); and the qualitative or quantitative aspects of post-declaration of results relating to custody and integrity of election materials until hearing of an election petition, if any. Any tampering would affect the quantitative and qualitative aspects of the election nd vitiate the integrity of the declared results.

After finding that the conduct of the election on the voting day was free and fair, the Trial Court had to determine whether the post-poll process of collating, tallying, transposition, signing of the statutory forms and final declaration of results was free and fair. Guided by the decision of the Supreme Court in the ***2017 Raila Odinga*** case, the Court found that there was no merit in the appellant's allegation that the judgment of the Trial Court was inconsistent. The appellant's argument did not take into account the fact that there were four distinct stages in determining the qualitative aspects of the conduct of the election. However, since, as was ruled by the Supreme Court a determination of the impact of the irregularities on the result becomes necessary where it is found that an election was conducted substantially in compliance with the principles in the Constitution, the Trial Court properly

considered the qualitative aspects of the conduct of election to determine if the post-balloting process of collation, tallying, transposition and declaration of results substantially complied with Articles 81 and 86 of the Constitution.

On the question of whether the Trial Court erred in relying on documents tendered by the 3rd and 4th Respondents as "true" results and ignored documents tendered by the 1st and 2nd Respondents, the appellants and the 1st and 2nd Respondents contended that Form 37As tendered in evidence by the 3rd and 4th Respondents were hearsay documents; that they were forgeries and that the Trial Court erred in relying on forged documents. Conversely, the 3rd and 4th Respondents contended that Forms 37A tendered in evidence were not hearsay because they were true carbon copies of the originals given to their agents at the polling stations by the Presiding Officers of the IEBC. The Trial Court found that the documents originated from the 1st and 2nd Respondent since they had in their written submissions stated that all Forms annexed in volume 4 of the 3rd and 4th Respondents bundle originated from the polling stations and had all the requisite features. They went on to contend that the forms were later altered by the 3rd and 4th Respondents. This submission by the 1st and 2nd Respondent confirmed the Trial Court's finding that the 3rd and 4th Respondent's documents were authentic and therefore the Trial Court did not err in finding that the documents tendered in evidence by the 3rd and 4th Respondents were authentic and came from the IEBC. Having established the authenticity of the forms supplied by the 3rd and 4th Respondents, the Court found that the original statutory forms ought to have been produced in court by the IEBC to establish the contents of the statutory forms used to declare results and to ascertain the accuracy and verifiability of the results at each polling station. The Court also considered the documents relevant and admissible since the documents were primary documents within the meaning of section 65 (2) & (3) of the Evidence Act and through the doctrine of *res gestae* under section 6 of the Evidence Act and as documents prepared in the course of business of IEBC.

Next, the Court evaluated whether the Trial Court erred in nullifying the election based on generalised findings. The appellants contended that the trial judge erred to the extent that he did not state how the identified irregularities affected the result of the election in violation of section 83 of the Elections Act. Having reviewed the judgment of the Trial Court, the appellate court found that the trial judge did indicate how the identified irregularities affected the result of the election. The Judge made express findings of fact that the irregularities were qualitative in nature and they affected the credibility of the process of tallying and declaration of results. The Trial Court concluded that due to the established irregulartieis, the gubernatorial election was indeterminate and that the entire process of counting, tallying and declaring the result as conducted by the 1st and 2nd Respondents was a sham. The appellate court therefore found unmerited the ground of appeal that the Trial Court did not show how the irregularities affected the result. The determination of the Trial Court was qualitative in nature and the credibility and integrity of the declared results was found wanting.

On the question of the alleged forgery of the documents tendered in evidence by the 3rd and 4th Respondents and the evidentiary burden of proof, the appellants contended that the Trial Court erred in failing to find that the documents were forgeries and that the IEBC had failed to prove that the forms were forged. They further argued that the Court erred in holding that the Forms were forgeries since the IEBC did not provide the originals and yet the Court had on 7 and 15 November 2017 ordered access to all the original forms and a report on that dated 23 November 2017 was prepared and filed by the Deputy Registrar. It was submitted in the cross appeal that the Forms 37A had been altered, which allegation amounted to a criminal ofence pursuant to section 13 (j) of the Election Offences Act. It was urged that the Trial Court failed to consider that the allegations of alteration were criminal in nature and that both the burden and the standard of proof lay with the 3rd and 4th Respondents, who

did not adduce any evidence to prove that any of the officers or agents of the 1st Respondent altered any Form 37A. Therefore, the trial judge erred in shifting the burden to the 1st and 2nd Respondent to disprove the allegations of alteration of Forms 37A. The Trial Court considered and discounted both the Deputy Registrar's report of 21 November 2017 indicating that all original forms had been accessed by the Court as well as the testimony of DW11 that the Petitioner's copies of Forms 37A were forgeries. The appellate court therefore had to determine whether it had jurisdiction to re-evaluate the evidence on record and compare the Trial Court's findings on forgery with the Deputy Registrar's report. It was guided by the Supreme Court dicta in the ***Frederick Otieno Outa v Jared Odoyo Okello & 4 others [2014] eKLR*** and the ***Munya*** case to the effect that the appellate court could only interfere with findings of fact if the trial Court's conclusions were based on no evidence, or where the conclusions were not supported by the established facts or evidence on record, or where the conclusions were so perverse, or so illegal, that no reasonable tribunal would arrive at the same.

Having examined the record and established that the Deputy Registrar's report of 1 November 2017 did not address the forgery anddid not state whether the documents perused and accessed by the parties were the documents tendered in evidence by the 3rd and 4th Respondents, the appellate court found that it was proper to re-examine the finding of fact of the Trial Court. The evidence of DW11 was discredibed since whe was not a handwriting expert and the documents used in her analysis were provided by the appellants with no access to the originals. The copies were received from agents that she never met and she did not procure the forms she analysed. She also concluded that there was a variance between the documents presented by the appellants and those produced by the 3rd and 4th Respondents.

Since a document examiner cannot give a credible opinion when there are no original documents which form the basis of any comparison, DW11 did not supply any cogent evidence supporting any of her conclusions. Accordingly, the Court upheld the fnding of fact by the Trial Court that DW11 lacked the necessary qualification to impugn the documents and more importantly, she never saw an original document.

On the allegations of alterations of Form 37A ad which ones between the 1st Respondent's Form 37As and the 3rd and 4th Respondents Form 37As were altered and by whom, the appellate court noted that although the Trial Court established that there were differences in the entries, it was not established which forms were altered between those of the 1st Respondent and those of the 3rd and 4th Respondents. In the absence of a finding of fact as to whose Form was altered, the appellate court found that the Trial Court did not err in failing to find that the 3rd and 4th Respondents and PW 13 had committed an electoral offence. In any event, with the amendment to section 87 of the Elections Act, the Trial Court has no jurisdiction to make a determination that an election offence has been committed. The Court can only recommend that an electoral malpractice may have been committed and refer the matter to the Director of Public Prosecutions of further investigation.

The appellate court moved to determine whether the Trial Court's findings of fact were supported by the evidence on record. After reviewing witness testimony, the Court ruled that there was evidence on record to support the trial judge's finding that there were differences in figures and results on Forms 37A as tendered by the 1st and 2nd Respondent compared wth the entries in Form 37As submitted by the 3rd and 4th Respondents. Some of the Forms 37A were not signed by either the presiding or deputy Presiding Officer. This fact was acknowledged by the Deputy Registrar in her report and left to the Court to determine. The appellate court noted that the requirement that the forms be signed was couched in mandatory terms. Nevertheless, the appellate court found that the burden to successfully

challenge the non-existence of a signature in Form 37A and its authenticity if any rested with the person alleging the omission. Further, the Court asserted that it was not manifestly clear how failure to sign the Forms would quantitatively affect the result of the election and this had to be demonstrated. Since the Trial Court did not consider this aspect and there was no specific finding how the absence of the signatures of some Presiding Officers affected the result of the election, the Court concluded that prima facie the unsigned statutory forms could not authenticate the results of the election at the specific polling stations.

On the alleged failure to stamp, the Trial Court had made a finding of fact that some Forms 37A produced by the IEBC did not bear IEBC stamps. According to PW13, 311 Forms 37A were not stamped, but the Petitioner's observation report of December 2017 revealed that only8 forms did not bear a stamp. Due to the contradictory evidence on the number of Form 37As that were not stamped, the CoA found that the Trial Court was enjoined to evaluate and determine if failure to stamp the Forms affected the result. The CoA considered persuasive the decisions in ***Kalla Jackson Musyoka v Independent Electoral & Boundaries Commission (IEBC) & Another [2018] eKLR*** that the lack of stamp on the statutory forms did not affect the results of the elections; ***Mark Nkonana Supeyo & Another v Independent Electoral and Boundaries Commission & 2 Others [2018] eKLR*** that in the absence of proof of any prejudice suffered by failure to stamp the requisite form, the omission cannot per se stand on the way of the electorate to frustrate the will of the people especially when the result in the specific polling station including the votes garnered by each candidate is not in question and ***IEBC v Stephen Mutinda Mule & 3 Others [2014] eKLR*** where it was held that there was no statutory requirement for stamping of Forms. Further, the appellate court endorsed the finding of Kimondo J in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko and Others Nairobi High Court E.P. 5 of 2013 [2013] eKLR*** on the absence of a stamp on a signed form:

> *I am not trivializing the matter. Obviously, the stamp creates the aura of an official document. But it would be a fallacy to throw out a form for want of a stamp when the maker (the Presiding Officer or Deputy) have signed it." See generally Regulation 79; See also IEBC & another -v- Stephen Mutinda Mule & 3 others, Nairobi, Court of Appeal, Civil Appeal 219 of 2013[2013] eKLR.*

The appellate court concluded that the Trial Court erried in failing to determine the specific number of Forms 37A that were not stamped and further in failing to determine how failure to stamp Forms 37A affected the result.

The Court also evaluated the assertion that the trial judge erred in holding that the Deputy Registrar's report of 21 November 2017 corroborate the findings of irregularities. The Court examined the Trial Court's findings to assess whether the findings that some ballot boxes were broken and a considerable number secured with unofficial seals were corroborated by the Deputy Registrar's report. The Court found that the findings were uncorroborated by the said report as there was no evidence of interference with the contents of the ballot boxes. There was also no evidence that the results of the election were affected by the presence of unofficial seals, cracks in the lids of the ballot boxes or different colours of the lid of ballot boxes. The Deputy Registar's reort indicated that a negligible number of boxes had broken seals that had not been properly affixed or were not in tact. While there was evidence or suspicion of interference or attempted interference with the contents of the ballot boxes, suspicion is not sufficient to vitiate an election.

As to whether there were two sets of results, the Court opined that any result tabulated, tallied or tendered before the Trial Court by a party other than the IEBC was not the official declared result and coul not be one set of election result, since election law did not recognise the concept of 'true results' but only 'declared results'. The officially declared result was the result declared by the IEBC as the only competent and lawful authority to declare results. To that extent, the Trial Court erred in law when it held that there were two sets of results.

On the issue of whether the Trial Court erred in relying on Mr Ombogo's testimony and ignoring the result forms tendered by the IEBC, and on the alleged irregularities in the result forms, the appellate court noted that these were qualitative findings on the integrity and credibility of the declared results. To determine whether the declared results were affected by irregularities or whether there was evidence that the process was flawed, the Court would have to delve into facts, which it did not have jurisdiction to do. The Court therefore found that all the allegationsin the memorandum of appeal and cross appeal inviting it to re-evaluate the evidence on record and determine the credibility of witnesses had no merit and were outside the jurisdiction of the Court.

On whether the 3rd and 4th Respondents were entitled to be declared duly elected, the Court assessed the fact that the scrutiny and recount exercise did not show the 3rd and 4th Respondents as apparent winners of the election and that the 3rd and 4th Respondens urged that they be declared winners based on the results of PW 13. It was the view of the Court that no person other than the IEBC could provide any electoral results that an election court could use to declare any person a returned candidate.

Moreover, the Court was satisfied by the finding in ***John Oroo Oyioka v IEBC & Others***, that even where the criteria in **Section 80 (4)** of the Elections Act are met, a winner could not be declared if the impugned election was fundamentally flawed. Since the Trial Court had made findins of fact that there were other flaws and irregularities disclosed in the tallying process that made it indeterminate who the winner was, the learned judges of appeal declined to grant an order declaring the 3rd and 4th respondents as having been duly elected in the Homa Bay gubernatorial elections.

Respondents and PW13 (Gordon Ombogo) committed an electoral offence, the Court reviewed the jurisdiction granted under section 87 of the Elections Act. Since the jurisdiction of an election court was limited to determining whether an electoral malpractice may have been committed, it had no jurisdiction to determine whether in fact an offence had been committed. By extension, the appellate court had no jurisdiction to determine that an election offence had been committed as prayed by the 1st and 2nd Respondents.

As prayed in the cross appeal, the Court assessed whether the award of costs by the Trial Court was excessive. The Court observed that even though the costs had been capped at KES 6 million, the costs were subject to taxation and it was therefore possible that the costs be taxed at less than the capped amount. The appellate court compared costs taxed in this petition with those in other gubernatorial petitions. While cognisant that no two cases were similar, and there was no one straight jacket figure of costs that ought to be awarded in gubernatorial elections, or any elections, the Court asserted that each case had to be looked at individually. However, when compared with judicial decisions emanating from the 2013 and 2017 election petitions, it was the view of the Court that costs capped at KES 6 million were on the excessive side. Since the award of KES 2 million against the appellants compared favourably with costs awarded at the High Court in other gubernatorial election petitions, the Court ruled that the contention that the costs were excessive was without merit. On the other hand, the costs awarded against the 1st Respondent at KES 4 million, were considered excessive compared to the total

costs awarded in other gubernatorial elections. This sum was therefore reduced to KES 3 million. The Court therefore ordered that the appellants pay the 3rd and 4th Respondents costs at the High Court capped at KES 2 million and that the 1st Respondent pay costs to the 3rd and 4th Respondents at the High Court capped at KES 3 million. The costs were therefore reduced from 6 million to 5 million.

Cyprian Awiti & Another v IEBC & 3 Others Supreme Court Petition 17 of 2018

Supreme Court of Kenya
Coram: Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ

Judgment allowing Appeal

7 February 2019

Jurisdiction of the Supreme Court over electoral matters — whether the Appellate Court erred in failing to consider the scrutiny report following passed over by the Trial Court — whether Supreme Court ought to undertake examination of scrutiny report — rights to fair hearing under Articles 25 (c) and 50 of the Constitution — whether there was violation of Article 88 (4) of the Constitution by preferring election data records of candidates rather than official records of IEBC — costs

Summary of facts

The present appeal was lodged following the decision of the Court of Appeal issued on 19 July 2018 upholding the finding of the Trial Court nullifying the Homa Bay gubernatorial election because of irregularities. The appellants contended that the Court of Appeal had misinterpreted its jurisdiction under section 85A of the Elections Act; that it had improperly interpreted and applied past decisions on the conduct of elections; that the Court had misapplied Articles 81, 86 and 87 of the Constitution; that the Court had misapplied section 82 of the Elections Act and made a contradictory interpretation of Articles 81, 86 and 87 of the Constitution by not taking into account material evidence that had been overlooked by the trial judge and despite finding that the oversight constituted a fundamental error of law; that the Court of Appeal erred in law in failing to consider the scrutiny report of 24 January 2018 which showed that the gubernatorial election was free, far, transparent and verifiable; that there had been a violation of the Petitioners' right under Article 27 of the Constitution in applying different standards of proof; that the Court of Appeal infringed the Petitioners' rights under Article 50 of the Constitution by shifting the burden of proof to the Petitioners and the 1st and 2nd Respondents while failing to ensure that the 3rd and 4th Respondents had established a claim that the IEBC had acted in collusion with the Petitioners and authorised a forged set of Forms 37A; that the appellate court erred in law and infringed the Petitioners' rights under Articles 27, 47 and 50 of the Constitution by affirming a trial court decision based on documents which had neither been filed nor served upon the Petitioners; that the Court of Appeal erred in law and violated the Petitioners' rights under Articles 27, 47 and 50 of the Constitution by affirming a trial court decision which had been founded upon a report of the 3rd and 4th Respondents which was unknown to the Respondents and thus affirmed a decision of the Trial Court which excluded the Deputy Registrar's duly authorised scrutiny report; and whether the Appellate Court erred in law by misinterpreting and misapplying section 83 of the Elections Act and endorsing annulment of the Petitioner's election purely based on generalised allegations.

Issues for determination

Whether the Supreme Court has jurisdiction to hear and determine the matter; whether the Appellate Court erred in failing to consider the scrutiny report upon finding that the Trial Court had glossed over the report; whether it was necessary for the Supreme Court to undertake an examination of the scrutiny report; whether there was a violation of the appellant's rights of fair hearing under Articles 25 (c) and 50 of the Constitution by failing to consider material evidence lawfully recorded, and whether

the material would shed light on the condition of irregularity; whether there was a violation of Article 88 (4) of the Constitution in preferring election data records of the 3rd and 4th Respondents in place of the results held by the IEBC; appropriate reliefs and orders as to costs.

On the first issue, the Court restated the 4-part criteria for the jurisdiction of the Supreme Court in election appeals as set out in ***Zebedeo John Opore v. Independent Electoral and Boundaries Commission and 2 Others,*** SC Petition No. 32 of 2018. Since the core question in the appeal was the relevance of the scrutiny report of 24 January 2018 to the disposal of the dispute and it was shown that the trial judge overlooked the report, a fact which was confirmed by the Court of Appeal but not acted upon on the basis of lack of jurisdiction, the Court found that this was a clear case of interpretation and application of the Constitution, particularly Article 86 (a) and Article 10 (2) (2). It therefore fell within the jurisdiction of the Supreme Court under Article 163 (4) (a) of the Constitution. Moreover, by virtue of sections 20 and 21 of the Supreme Court Act and Rule 3 (5) of the Supreme Court Rules the Court had an obligation to consider whether the Trial Court's conclusions that the alleged irregularities had affected the election results were valid and warranted the annulment of the election.

On the question of whether the Appellate Court erred in failing to consider the scrutiny report upon finding that the Trial Court had glossed over the report, the Court noted that the scrutiny report was vital for the evaluation of the 3rd and 4th Respondent's allegations of election irregularity. Nevertheless, the Court did not refer to the scrutiny report, despite the fact that it was ordered by the Court and was made with the input of all the parties, when the Court cited electoral irregularities as a basis for nullifying the election. This was a definite and glaring error in the finding of the Trial Court and was the basis of the present appeal.

On appeal, while the CoA appreciated the serious consequence of the omission in relation to ascertaining the merits of the case, it sustained the Trial Court's finding on the basis that it lacked jurisdiction to disturb the findings of the Trial Court on the basis that it was a matter of fact. The Supreme Court found that the appellate court had overlooked the essence of questions of law flowing from the constitutional process and from the rights and obligations annexed to the electoral process. It found no basis for the Court of Appeal to abdicate its jurisdiction, particularly after it had ascertained that the Trial Court had made errors of law.

Next the Court determined whether it was necessary to undertake an examination of the scrutiny report, Assessing the facts of this case against the criteria for what amounts to a matter of law under section 85A of the Elections Act as articulated in ***Munya***, the Court noted that it was quite evident that the conclusions of the trial judge were not supported by any evidence from the scrutiny report. It was therefore a tenable proposition that hardly any reasonable tribunal would have arrived at the conclusion that the trial judge did, as his conclusion did not rest on the scrutiny report. This was therefore clearly a question of law going to the mandate of the Court of Appeal.
In addition, in the absence of the findings of the scrutiny report, the Trial Court had no reference in assessing the magnitude of the impact of any electoral irregularities such as may have prevailed upon the electoral outcome. There was therefore no legal basis for the annulment, which was a crucial issue of law that the Court of Appeal overlooked as well.

The apex court considered it untenable that the Appellate court had limited judicial options in light of such error of law. Having taken a definite stand and drawn precise conclusions on the probative value of the evidence, it was improper for the Court of Appeal to make a find that it would be overstepping its jurisdiction under section 85A of the Elections Act by adverting to matters of fact. This was because

the finding of the Trial Court or an observation of a scrutiny report based on its own ruling was a matter of law, falling well within the jurisdiction of the Court of Appeal.

In addition, the apex court found that neither the High Court nor the Court of Appeal accorded deference to the *prima facie* legitimacy of official records emanating from the IEBC, to the established procedure for evaluating evidence bearing upon claims of irregular conduct of election or to the relevant law regarding proof in election petitions.

On the question of costs, the 3rd and 4th Respondents had urged the Court to review the costs awarded by the Court of Appeal, arguing that the appellate court had erred in failing to certify costs for four advocates and in capping the costs at KES 5 million. It was their case that mounting election petitions required a lot of labour, care and attention on the part of counsel and taken together with their significance for the public interest, election petition proceedings inherently bore elevated values.

The Court, in making its determination noted that the general implication of costs in election petitions was sufficiently notorious to commend itself to judicial notice. It was therefore apposite to formulate guiding principles for the award of costs in election petitions and the following were proffered:

*(a) the general rule that **"costs follow the event"** is applicable in election matters in which no special circumstances are apparent;*
(b) however, an election Court holds discretion in reserve, for awarding costs as merited by the occasion;
(c) a discretion vests in the Election Court to prescribe a ceiling for the award of costs;
(d) in setting a ceiling to the award of costs, the Election Court stands to be guided by certain considerations, namely:
(i) costs are not to be prohibitive, debarring legitimate litigants from moving the judicial process;
(ii) inordinately high costs are likely to compromise the constitutional right of access to processes of justice;
(iii) costs are not to bear a punitive profile;
(iv) Courts, in awarding costs, are to be guided by principles of fairness, and ready access to motions of justice;
(v) costs are intended for decent and realistic compensation for the initiatives of the successful litigant;
(vi) costs are not an avenue to wealth, and are not for enriching the successful litigants;
(vii) the award of costs shall not defer to any makings of opulence or profligacy in the mode of conduct of the successful party's cause.

In its final orders, the Court disallowed the 3rd and 4th Respondents' prayer that the IEBC conduct a fresh election and that the election only include candidates who took part in the original election. The Court also disallowed the 3rd and 4th Respondents' prayer that they were duly elected as governor and deputy governor respectively. The 1st and 2nd Respondents' cross appeal was also disallowed. The petition of appeal was allowed, the decision of the Court of Appeal set aside with the effect that the results for Homa Bay county gubernatorial election as declared by the IEBC stood as valid. The Court directed that the 3rd and 4th Respondents bear the appellants' costs in the High Court, Court of Appeal and Supreme Court in accordance with the principles of courts set out above.

Martha Wangari Karua & Another v IEBC & 3 Others Kerugoya High Court Election Petition 2 of 2017

High Court of Kenya at Kirinyaga
Coram: Gitari J

Ruling on Application to Strike Out Petition

15 November 2017

The timing of an application for striking out — compliance of a petition with the Election Petition Rules — consequences of non-compliance — effect of failure to quote provisions on the alleged violation of the Constitution.

Summary of facts

The 3rd and 4th Respondents filed an application under Article 159 (2) of the Constitution Rules 4 and 5 of the Elections (Parliamentary and County Elections) Petition Rules. They sought orders striking out the petition and the supporting affidavits for non–compliance with Rule 8 (1) of the Election Petition Rules for not setting out with reasonable precision the provisions of the Constitution alleged to be violated, contrary to the finding of the Court of Appeal in the ***Anarita Karimi Njeru*** and ***Mumo Matemu*** cases. They asserted that the failure to comply with requirements were substantive and went to the root of the petition, and that they amounted to a violation of their rights to fair hearing under Article 50 of the Constitution.

In respect of Rule 8 (1), it was the 3rd and 4th Respondents' case that the failure to comply with the Rule was fatal and went to the root of the petition and could not be cured by amendment, since the window for amendment had lapsed. They cited the decision in ***Jimmy Mkala Kazungu v Independent Electoral and Boundaries Commission and 2 Others*** **Mombasa High Court Petition No. 9 of 2017** where the petition was struck out for failure to comply with Rule 8 (1).

In relation to rule 8 (1) (c), the 3rd and 4th Respondents urged the Court to find that the failure to indicate the results and the date of declaration was substantive as results went to the heart of the dispute and the date of declaration would allow the Court to determine whether the petition was filed within 28 days as required by Article 87 (2) of the Constitution. On the timing of the application, the 3rd and 4th Respondents asserted that the same was filed on time as the pre-trial conference had not been concluded.

They urged the Court to find that the deficiency went to the jurisdiction of the Court and to allow it would be to occasion them prejudice, as it would amount to amending the petition. On the question of public interest, the 3rd and 4th Respondents asserted that it was a diverse concept. Since the process of election was set out in Article 87 and Parliament enacted legislation required which defined the substance of a petition, where those components were absent, there was no petition. They urged that it was in the public interest that there be compliance to safe resources in respect of time and other resources and it was therefore in the public interest for the Court not to hear a petition which had not complied with the law.

The Petitioners filed Grounds of Opposition wherein they maintained that the Petition had complied with Rule 8 (1) of the Election Petition Rules, that the 3rd and 4th Respondents had misapprehended

the overriding objective of the Rules, that the application was ill-timed for not having been filed contemporaneously with the petition, that the import of the Court ruling delivered on 23 October 2017 was that there was a duly filed petition on record disclosing a *prima facie* case, and therefore the application was intended to embarrass the Court process, and that the petition was not a private litigation but concerned the public interest.

It was their case that the petition offended Rule 15 (1) of the Election Petition Rules as it was filed after the pre-trial conference. They maintained that since the petition had already been fixed for hearing, witnesses prepared and the IEBC ordered to facilitate scrutiny of the KIEMS kits and statutory forms, to allow the petition to be struck out would be to backtrack on the orders of the Court.

The Petitioners also argued that the 3rd and 4th Respondents had misunderstood the overriding objectives of the Rules as set out in Rule 4 (1) as read with Article 159 of the Constitution which mandates the Court to do substantive justice rather than giving undue regard to procedural technicalities. They urged the Court to assess whether the petition had given notice or communicated the prayers and not to allow sovereign will to be stifled by a mistake in the filing of the petition. Since the petition indicated when the election was held and that the 3rd Respondent had been declared the winner, the result of the election and the declaration thereof had been established.

The Petitioners admitted that Rule 8 (1) (d) had not been complied with but maintained that no prejudice was occasioned as the 3rd Respondent had annexed her certificate of election. They urged the Court to take notice of the date of declaration that the 3rd Respondent had supplied and which was gazetted. They prayed that the Court advance the rule of law and disregard technicalities on cases that advanced public interest and dismiss the application.

Issues for determination

The Court identified three issues for determination: the timing of the application, whether the Petition had complied with the rules and what were the consequences of non-compliance and failure to quote provisions on the alleged violation of the Constitution.

On the first issue, the Court noted that the application had been filed under certificate of urgency to arrest the ruling delivered on 23 October 2017. However, the Court directed the parties to serve. It also noted that while the pre-trial conference had taken place, the issues had not been settled on and it was agreed to settle them at the beginning of the hearing. The Court further stated that the application was based on points of law, which could be raised at any stage. Citing Rule 15 (1), the Court stated that the rule was clear that the only stage at which an interlocutory application may not be brought is after the conclusion of the pre-trial conference and after the hearing of the petition. The Court also cited the case of ***Mable Muruli v Wycliff Ambesa Oparanya &3 Others Election Petition 5 of 2013*** where it was stated that the only exception to this rule was those applications which by their nature could not have been brought before the commencement of the trial of the election petition.

The Court found that the timing of the application was proper since that the pre-trial concluded once the contested and non-contested issues were determined, which would then pave the way for the hearing. The Court was emphatic that a ruling granting the Petitioner some orders under an interlocutory application did not amount to a commencement of the trial. Where the orders were not founded on a valid pleading, they could not be allowed to stand, as these were preliminaries to commencement of the trial. Where applications are filed, they must be determined before the hearing

of the main petition, which was the stage at which the petition was. The Court therefore found that the application as not overtaken by events.

On the issue of whether the Petition had complied with the rules and what were the consequences of non-compliance, the Court assessed whether the non-compliance was a substantive issue or a procedural technicality curable under Article 159 (2) (d) of the Constitution and Rule 5 of the Rules. The Court also considered the overriding objective as set out in Rule 4 (1) of the Election Petition Rules. The Petitioners admitted to not having complied with Rule 8 (1) (d). As for Rule 8 (1) (c), the Court noted that neither the Petition nor the Supporting Affidavit contained the results. The Petitioners submitted that an affidavit of the Respondent had tabulated the results. However, rule 8 (1) (c) required that the results be tabulated in the petition and nowhere else. This burden was on the Petitioner to submit the results and it did not shift to the Respondents. The Petitioners urged the Court to distinguish the case from that in ***Jimmy Mkala v IEBC & 2 Others Msa EP 9 of 2017,*** where the Court had struck out the petition for non-compliance with Rule 8 (1), for reliance on the ***John Mututho v Jane Kihara & 2 Others (2008) eKLR*** case, a pre-2010 decision.

Having considered the authorities, the Court noted that the decision of Thande J in the ***Jimmy Mkala*** case had resulted in the striking out of the petition even though the results had been declared in the affidavit. The Court also noted that while it was enjoined to determine the petition without undue regard to technicalities, a determination had to be made as to what would pass for a technicality due to non-compliance and what was substantial compliance. If the non-compliance went to the root, then Article 159 (2) would not apply; neither would Rule 5, since there was no valid petition for determination. The Court ruled that what it was dealing with was not a procedural lapse, but a substantive issue which went to the root of the dispute.

Since Rule 8 was couched in mandatory terms, non-compliance meant that there was no dispute over which the Court could exercise jurisdiction. Therefore the Court held that the petition had not complied with Article 87 (2) of the Constitution and Rules 8 (1) (c) and (d) of the Election Petition Rules.

Consequently, the Court found that Article 159 (2) (d), Rule 5 (1) and Rule 4 (1) would not aid the Petitioner as the just, expeditious, proportionate and affordable resolution of disputes in this case would only be achieved in the Court not using its time and resources in dealing with a dispute that failed to comply with the express provisions of the rules. The petition was hopeless as the Petitioners, unlike in the ***Mkala and Issa Kombe cases,*** had not stated the date of declaration and results in the affidavit. Though Rules 8 (1) (c) and (d) were rules of procedure, they were intertwined with the substance of the case. The Court stated that it could find nothing to salvage the petition. The petition was therefore struck out, with costs to the Respondents capped at KES 10,000,000.

Martha Wangari Karua v IEBC & 3 Others Nyeri Election Appeal 1 of 2017

Court of Appeal at Nyeri
Coram: Warsame, Musinga, Ouko JJ.A

Judgment Allowing Appeal

2 March 2018

Compliance of a petition with Rule 8 (1) of the Election Petition Rules — effect of non-compliance

Summary of facts

Aggrieved by the decision of the High Court issued on 15 November 2017 striking out the petition,the Appellant lodged an appeal wherein she challenged the decision and orders of the High Court on 14 grounds. The gist of the appeal was that the trial judged had erred in striking out the appeal after conducting the pre-trial hearing and fixing the case for hearing; by elevating rules of procedure above Article 159 of the Constitution, the Elections Act and Election Petition Rules; in finding that the appellant was required to tabulate the figures received by each candidate yet it was the statutory function of the 1st Respondent, published in the Kenya Gazette and of which the Judge should have taken judicial notice; and by declaring that the failure to do so went to the jurisdiction of the Court. The appellant therefore argued that there was a miscarriage of justice and that the capping of costs at KES 10 million for a matter which did not proceed to full hearing was punitive.

Issue for determination

After hearing the oral submissions of the parties, the Court isolated the main issue for determination as whether the petition filed in the High Court complied with the provisions of Rule 8(1) of the Election Petition Rules, and if not, the consequences or effect of such non-compliance. The appellant urged the Court to endorse the finding that failure to comply with mandatory provisions of rule 8 (1) did not render a petition effective. The respondents on the other hand urged that the line of authorities where the Court had saved defective petitions failed to consider the import of Article 87 of the Constitution, particularly Article 87 (2) which requires petitions to be filed within 28 days of declaration of results by the IEBC. The provision also required the enactment of legislation for timely resolution of electoral disputes and the manner of service of an election petition.

To understand the effect of non-compliance, the Court evaluated the purpose of pleadings in an election petition. These it outlined as providing an opportunity to the respondents to see the case alleged against them, and secondly, to set out with sufficient clarity the dispute and enable the Court to properly appreciate and adjudicate the matter. Thirdly, pleadings were considered necessary to assess whether the petition substantially complied with the provisions of the law.

The Court noted that it was not contested that the result of the election and date of declaration were not provided by the appellant in the petition or any of the supporting documents. However, this information was comprehensively provided by the respondents. Consequently, at the time the petition was struck out by the Court for not supplying the results and the date of declaration, all the information required by rule 8 (1) was before the Court.

The Court also reiterated the obligation of parties to an election petition or their advocates, as set out in Rule 5 of the Election Petition Rules, to assist the Court in furthering the overriding objectives set out in rule 4, i.e. the just determination of the dispute and the efficient and expeditious disposal of the petition. The 2nd Respondent had, through a replying affidavit attached a copy of the declaration of results for Kirinyaga County and averred that the 3rd respondent had garnered 161, 343 votes against the Petitioner's 122,091. The 3rd Respondent had been declared the winner and issued with a certificate dated 10 August 2017. This information was undisputed as it was brought before the Court by the IEBC in exercise of its statutory duty. The appellate court was therefore baffled as to why the Trial Court ignored the information simply because it did not come from the Petitioner. Since the date of declaration was known as 10 August 2018, it was clear that the petition was filed within 25 days of the declaration of results.

The Court of Appeal was also puzzled by the trial judge's conclusion that it was impossible to tell whether the petition had been filed within time. It was their assessment that the construction assigned by the Trial Court to the said rules was too artificial and absurd, and that a plain and ordinary construction ought to have led to the conclusion to sustain the petition and determine it on merit, unless it was irredeemably defective. Further, the Court urged that it was necessary for the Trial Court to address its mind to the reasonableness and implication of sustaining a petition against the effect of an abrupt termination of the same. The appellate court considered it unfortunate that the petition had been terminated for non-compliance, without the Court addressing its mind to the nature, extent and import of such a route.

The Court also pointed out that failure to comply with rule 8(1) did not mean that the petition was invalid since a reading of Article 159 (2) and the Elections Act was to the effect that unless the results and the date of declaration could not be ascertained, the condition was satisfied. The Court found nothing in the language of the statute to suggest that the documents on the file courtesy of any other party than the Petitioner can or should be ignored in order to give life to Rule 8 (1) (c) and (d). The Trial Court was therefore required to place substantive justice over procedural considerations, particularly in election petitions, which are in the nature of public interest litigation.

The Court of Appeal was also unconvinced that allowing introduction of the date of declaration and the results would be tantamount to amending the pleadings out of time. Since the alleged omission was information available to the parties, the Court analogised this to a situation where a non-existent question was raised by the respondents and answered by the Trial Court in a manner prejudicial to the rights of the appellant, making it a distinction without a difference. The Court was also not satisfied that the omission went to the root of the Court's jurisdiction, as the petition did not concern the date of the declaration or the fact that the 3rd Respondent had been declared winner, but rather was centred around the manner in which the 3rd Respondent won the election. Since the jurisdiction of the Court stemmed from Article 87 (2) of the Constitution as read with section 75 of the Elections Act, the failure to comply with the rules did not affect the right of the Court to make a determination on the petition. the Court adopted the reasoning in the COA decision in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others*** **[2013] eKLR** to the effect that deviations from procedure which did not go to the root of the jurisdiction of the Court or occasion a miscarriage of justice ought not to be elevated to a criminal offence attracting a heavy punishment of the offending party. Since procedural rules are meant to facilitate adjudication of disputes, courts should elevate substantive justice over procedural rules, which was the basis for the statement in Article 159 (2) that disputes be determined without 'undue regard' to technicalities.

The Court endorsed the approach taken by Korir J in ***Samwel Kazungu Kambi & Another v Independent Electoral & Boundaries Commission & 3 Others*** **[2017] eKLR** to the effect that the Court ought to be mindful that the current constitutional dispensation requires substantive justice and that unless an election petition was so hopelessly defective that it could not communicate all the Petitioner's complaints and prayers, the Court should ensure that the petition is heard and determined on merit. A similar line of reasoning was adopted by Maina J in ***Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 Others*** **2017 eKLR.**

The Court was however keen to make it clear that a petition could not be struck out at all for a procedural infraction, where the same goes to the root of the dispute. The Court stated that in instances such as when filed outside the constitutional and statutory timelines, the election petition was irredeemably defective. The Court therefore found that the exercise of discretion was erroneous as it was unreasonable to allow a party to complain about irregularities which the respondents had corrected and particularly after the pre-trials were done and the dates for substantive hearing fixed. The omission by the Petitioner was not incurable under Article 159 of the Constitution, and the Court ought to have addressed its mind to the gravity of the allegations contained in the petition before striking out the same.

On the question of costs, the Court considered the amount of 10 million capped by the Trial Court against the fact that the matter had not proceeded to full hearing and the parties had only attended court 8 times. In light of the jurisprudence from the 2013 elections, which sought to stem the practice of awarding large sums in costs which were punitive and an impediment to the right to access justice, the Court considered the sum of 10 million excessive, especially since it was unclear how this figure was arrived at. In the interests of not discouraging citizens from filing petitions, the Court ruled that having found that the trial judge had erred in striking out the petition, the award of costs could not stand. The costs were awarded to the appellant and capped at KES 2 million.

Samwel Kazungu Kambi v Nelly Ilongo & 2 Others Malindi High Court Election Petition 4 of 2017

High Court of Kenya at Malindi
Coram: W Korir, J

Judgment Dismissing Petition

21 February 2017

Constitutional and legal threshold for an election in Kenya

Summary of facts

The Petitioner contested the declaration of the 3rd Respondent as the governor of Kilifi County by the 1st Respondent citing massive malpractices and irregularities during and after the voting day. He asserted that the election was so badly conducted that it did not matter who won or was declared the winner of the election.

He cited specific instances of irregularities including the fact that a yellow Isuzu Canter was intercepted leaving the county tallying centre ostensibly to dispose of garbage but later found to have been ferrying assorted election material and that upon informing the 1st Respondent, the election exercise at the county tallying centre was suspended. However, the Petitioner's agents were not allowed into the tallying centre once the tallying exercise was suspended, neither were they informed of the manner in which the process resumed.

The second incident cited was that of the arrest of three Presiding Officers at Lagos Bar, Kaloleni, where officers were allegedly caught marking and stamping ballot papers for the gubernatorial and senatorial elections. The third incident relied on by the Petitioner was the arrest and prosecution of three IEBC officials in Malindi constituency for committing election offences. The fourth incident was the alleged bribery of teachers by the 3rd Respondent at a teachers' meeting held at the Coast Palace Hotel, Mariakani about 3 weeks to the election. The Petitioner contended that the 3rd Respondent handed teachers KES 1,000 each for lunch and promised them jobs as officials of the 2nd Respondent during the elections. It was his case that indeed some teachers were offered jobs as presiding and deputy Presiding Officers and clerks of the 2nd Respondent, and these were among the officers arrested during the Lagos Bar incident.

The Petitioner also accused the 1st Respondent of being in constant communication with the 3rd Respondent during the voting period and of condoning, abetting or personally committing some of the serious offences and malpractices witnessed during and after the election.

The Petitioner also took issue with the relay and transmission of results from polling stations to the CTC, alleging that the data and information recorded in Forms 37A was not accurately and transparently entered into the KIEMS kits at the individual polling stations; and that the information on Forms 37A was not consistent with that in Forms 37B and that the results in Forms 37B were materially different from the results relayed by the 2nd Respondent.

It was also the Petitioner's case that the election contravened Article 81 of the Constitution and the sections 39, 44 and 44A of the Elections Act, as there were numerous instances when the 1st and 2nd

Respondents inflated results in favour of the 3rd Respondent, which affected the result. He asserted that the voting, counting and tallying of election results failed the constitutional test as the results were no accurate or verifiable and irregularities and illegalities resulted in the contravention of the Constitution and electoral law.

He therefore sought the following orders: that the Kilifi gubernatorial election was not conducted in accordance with the Constitution and applicable law, thereby rendering the result null and void; that the 3rd Respondent was not validly declared as the governor-elect Kilifi County and that the declaration was null and void; an order directing the 2nd Respondent to organise and conduct a fresh gubernatorial election in Kilifi county in strict conformity with the Constitution and Elections Act; a declaration that the degree and extent of electoral offences and malpractices perpetrated by and/or attributable to the agents of the 2nd Respondent and the 3rd Respondent invalidated the said election and were in breach of Article 86 of the Constitution; a declaration that each of the Respondents jointly and severally committed offences, malpractices and/or irregularities and costs of the petition.

In response, the 1st and 2nd Respondent denied the Petitioner's allegation and maintained that the election was conducted in accordance with section 83 of the Elections Act. In response to the specific incidents of irregularities alleged by the Petitioner, they averred that the yellow Canter incident was manipulated by the Petitioner to lend credence to a conspiracy to disrupt the election process. However, it was their case that they had officially contracted the vehicle to move excess election material from the CTC to the 2nd Respondent's warehouse about 500 m away. They further alleged that the Petitioner and a large crowd of people exhibited violent and aggressive behaviour towards the 1st Respondent as well as the Kilifi North Constituency Returning Officer which caused the exercise to be temporarily suspended, but the said exercise was resumed as provided for in law and no authorised agents were barred from the tallying centre as alleged.

On the second incident cited, the 1st and 2nd Respondents denied all incidents of malpractices at Lagos Bar and averred that election officials were prosecuted for dereliction of duty on a complaint lodged very early in day and their conduct therefore could not have affected the outcome of the election.

They also denied any discrepancies in the results as alleged by the Petitioner and maintained that the election was conducted in strict compliance with the law and in a neutral, efficient, accurate, accountable, free, fair, impartial and credible manner. They therefore urged the Court to dismiss the petition with costs.

The third Respondent responded to the petition in two parts. The first part raised point of law, where two objections were raised: that the Petitioner failed to state the results of the election and that the Petitioner failed to make the deputy Governor a Respondent to the petition. A ruling was delivered on the first issue where the objection was dismissed. On the second issue, it was agreed that the Court would address the objection in the main judgment.

The 3rd Respondent denied all the allegations in the petition and maintained that he had no knowledge of the incident involving the officers of the 2nd Respondent at Lagos Bar. On the prosecution of officers of the 2nd Respondent in Malindi over alleged election offences, the 3rd Respondent asserted that their prosecution was not proof of guilt and commission of election offences could only be established by a conviction. He admitted to having addressed a meeting of teachers in the county on his education policies but denied giving teachers money or promising them jobs with the 2nd Respondent.

The 3rd Respondent denied any unlawful or improper communication between himself and the officials of the 2nd Respondent and further denied committing, aiding or abetting any crimes or malpractices before, during or after elections. He therefore urged the Court to declare him as duly elected in a free, fair, transparent, credible and valid election and that the petition be dismissed with costs. While the 3rd Respondent swore an affidavit in support of his response, it had no evidentiary value since he did not testify.

The Petitioner had also made two separate applications during the proceedings: one seeking the preservation of election material and the other seeking scrutiny and recount. It was agreed to reserve the hearing of the applications until after the witnesses had testified. The 3rd Respondent also filed an application seeking to have the petition struck out for failure to state the results of the election complained of. By another Notice of Motion, the 3rd Respondent sought to have the petition struck out for non-joinder of the deputy governor. The parties agreed that the 3rd Respondent's application would be addressed at the conclusion of the trial.

The Court dealt with the Petitioner's two applications as a single application for information, scrutiny and recount. The Petitioner's case was based on an allegedly compromised process of voter identification, relay and transmission of election results and the commission of serious election offences and malpractices. He maintained that the information sought would aid the Court in determining the prayer for scrutiny and recount.

The application was opposed by all the Respondents who asserted that it was misconceived and a fishing expedition, there being no sufficient basis laid for the grant of the orders. They maintained that no material particulars about the polling stations in respect of which election results were disputed were provided and therefore the Court had no jurisdiction to grant the reliefs sought. Moreover, it was their argument that due to the large difference in votes between the contestants, no useful purpose would be served by granting the relief sought.

The Court evaluated the provisions on scrutiny and recount as contained in section 82 of the Elections Act and Rules 28 and 29 of the Election Petition Rules alongside the jurisprudence of the Supreme Court in the ***2013*** and ***2017 Raila Odinga cases***. The jurisprudence of the Supreme Court was to the effect that whereas an application for scrutiny and recount can be made at any time during the trial but before judgment, and the Court may also grant such an order on its own motion, such an order may not be granted without sufficient basis and his basis is established by way of pleadings or affidavits or evidence during the hearing of the petition.

The Court also noted a new trend where a Petitioner would request information and simultaneously make an application for scrutiny and recount. Citing the Supreme Court in the ***2017 Raila Odinga case,*** the Court asserted that ideally the two applications should be made together as implicit in an application for scrutiny is a request for information to be granted before scrutiny and recount can be initiated. Since an application for information is also an application for preservation of evidence, the Court opined that such an application must be dispensed with during pre-trial and its outcome ought not to affect the application for scrutiny which comes after the hearing of the evidence.

Having reviewed the facts of the case, the Court formed the opinion that orders of scrutiny and recount were not available in respect of this matter. This was because most of the incidents cited occurred after the polling day and some even after declaration of results at the polling stations. With the results already being in the public domain, scrutiny would not have achieved much, amounting to a waste

of the Court's time and resources. In relation to the allegation that some voters had been allowed to vote without validation of their registration details, the Court ruled that since voting proceeded by secret ballot, the ballot papers cast could not be linked to particular voters and therefore it could not be determined who they voted for. Scrutiny would therefore have been a futile exercise. The Court concluded that the Petitioner had not laid a sufficient basis for scrutiny and therefore the application was dismissed. The request for information therefore served no purpose and was declined.

On the non-inclusion of the deputy governor as a respondent, the Court reviewed the decisions of other courts including that of Muchelule J in ***Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 Others*** **[2017] eKLR,** Achode J in the case of ***Hassan Omar Hassan & Another v Independent Electoral & Boundaries Commission & 2 others*** **[2017] eKLR** and Thande J in ***Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 4 Others*** **[2017] eKLR.** The first two did not consider it necessary to include the deputy governor as a respondent in a petition to invalidate the governor, since the deputy governor was nominated by the governor and therefore their election was hinged on that of the governor. However, Thande J was of a contrary opinion and which Korir J endorsed.

The Court took the view that the deputy governor was elected in their own right under Article 180 (5) and (6) of the Constitution. The learned judge went on to hold that the manner in which the Constitution is drafted does not envisage a situation where the election of the deputy governor remains undisturbed following the nullification of the election of the governor. Therefore, where one seeks to remove a governor from office through an election petition, the deputy governor ought to be made a respondent to the petition. This is because a successful petition affects the election of both the governor and the deputy governor. Therefore, failure to cite the deputy governor as a respondent rendered the petition incurably defective since it sought the invalidation of the deputy governor through the backdoor. Such a petition could therefore only be amended, if the constitutional timeline for filing had not lapsed, or struck out.

Having found that the deputy governor is elected, the only way to challenge their election is through an election petition. Therefore, the Court agreed with Thande J that failure to make a deputy governor as a respondent in a petition challenging the election of a governor was a fundamental defect leading to striking out of the petition, since the election of the governor and that of the deputy governor were inseparable. Furthermore, to make a decision on the election of the deputy governor without affording them a hearing would be a grave error and a breach of the right to fair hearing. The 3rd Respondents application was considered merited. However, given that the Court had concluded taking evidence by the time it rendered its determination on the application, it proceeded to consider the merits of the petition.

Issue for determination

The Court identified the main issue for determination as whether the election of the 3rd Respondent met the constitutional and legal threshold for elections in Kenya.

The Court reviewed the legality of the suspension of activity at the county tallying centre, the Court found that while the regulations only address suspension of voting at the polling station, the 1st Respondent had not acted irregularly in suspending the process at the tallying centre upon consultation with the Vice-Chair of the Commission. The 1st Respondent cited incidents of violence which caused them to fear for their own safety and which were instigated by the Petitioner and his supporters. Since the tallying process had not begun at the time of the directive, and the declaration of results

had occurred at all polling stations, the Court found that the suspension had no impact on the result. Moreover, since the Petitioner was found to have directed his agents not to return to the county tallying centre, he could not allege omission of his agents at the same time.

In relation to the Canter incident, the Court found the account of the 1st and 2nd Respondent credible in that the vehicle in question was transporting unused election materials to the IEBC offices. Since the counting, tallying and declaration had already been concluded at the polling stations, and the results were already in the public domain, the Court found it difficult to understand how the declared results could have been replaced with other results. Moreover, as pointed out by counsel for the 3rd Respondent, the Petitioner did not provide any particulars about the election materials and how they had allegedly been used to rig the elections. The Court asserted that to allege that these post-declaration incidents had affected the result of the election was to fail to appreciate the centrality of the polling station in the election as determined in the ***Maina Kiai*** case.

On the arrest of IEBC officials in Malindi for allowing voters to vote without validation of their credentials using KIEMS kits, the Court found from the evidence on record that some clerks had indeed been charged as alleged; however, the guilt of the clerks was to be determined by the Court handling the criminal trial. As to the impact on the gubernatorial election, the Court found that despite the Petitioner's allegations of widespread irregularities, the incident affected 3 out of 998 polling stations in Malindi constituency, and it could therefore not be used to make a finding in respect of all the other polling stations.

On the Kaloleni bar incident, the Court found that the Petitioner adduced no evidence to support the allegation. There was no report either by the Petitioner or his agents to the effect that the figures were tampered with at the time of signing them at polling stations. The allegation of manipulation of results at Lagos Bar was made in ignorance of the COA decision in ***Maina Kiai*** and in any event, there was no evidence to connect any illegality with the results of the election.

On the alleged discrepancies between Forms 37A, 37B and 37C, the Court ruled that the discrepancies pointed out by the Petitioner were not so perverse and systematic as to give the impression that the 2nd Respondent and its officials intended to rig the election. The Court was therefore not persuaded that the inconsistencies in the results rendered the election unverifiable.

On the alleged bribery incident at Coast Palace Hotel, PW3, who was a Presiding Officer, testified to having received KES 1000 but denied having received it from the 3rd Respondent. He also denied having been promised a job with the 2nd Respondent by the 3rd Respondent. The Court was urged by the 1st and 2nd Respondents to find that the witness had recanted his statement, and the 3rd Respondent maintained that the KES 1000 given attendees of the meeting was in lieu of lunch since no lunch had been provided by the organisers.

The Court, noting the criminal nature of the allegation, found that the Petitioner had not discharged the burden of proof by demonstrating that the money had been given by the 3rd Respondent to influence voters to vote for him or manipulate anyone to vote in his favour. the allegation therefore failed.

In relation to other alleged irregularities, including mishandling of voters requiring assistance, presence of pre-marked ballots and an unsigned Form 37B in respect of Kaloleni North constituency, the Court found that in respect of the first two allegations, the Petitioner did not adduce sufficient evidence. On the last allegation, it was conceded by the Returning Officer that they did not sign Form 37B.

However, even with the exclusion of results from that area, the 3rd Respondent was still in lead. This allegation was therefore dismissed.

On the question of costs, the Court awarded costs to the Respondents, with 2.2 million going to the 1st and 2nd Respondents and 1.8 million going to the 3rd Respondent. The Court used the power donated to it by Rule 30 (1) of the Election Petition Rules to direct that those would be the total costs payable and the sum would therefore not be subject to taxation by the Deputy Registrar.

David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others Kajiado High Court Election Petition 2 of 2017

High Court of Kenya at Kajiado
Coram: Onyiego J

Ruling Allowing Substitution of Petitioner

6 November 2017

Threshold for withdrawal of a petition — threshold for substitution of Petitioners in a petition

Summary of facts

The Petitioner filed the present petition seeking to nullify the Kajiado gubernatorial election on the basis that there were serious and glaring inherent contradictions, inconsistencies, irregularities and discrepancies.

When the matter came up for pre-trial conferencing, counsel for the Petitioner expressed the desire of the Petitioner to withdraw the petition and requested to be allowed time to make a formal application in that regard. The Petitioner filed the said application and in his supporting affidavit indicated the application to withdraw was made of his own free will and in the interest of cohesion in Kajiado county and no agreement was entered into in relation to the withdrawal. In a joint response, the 1st and 2nd Respondents conceded the application.

Upon publication of the notice of intended withdrawal, the applicants sought to be enjoined as Petitioners citing public interest. They maintained that a grave injustice would be occasioned to the public who had not been consulted before the decision to withdraw and alleged that the Petitioner had been compromised by defecting to another political party while at State House as evidenced by photographs they adduced.

During the hearing of the two applications, counsel for the intended Petitioners submitted that the applicants were resident and registered votes of Kajiado county and that they had the locus to take over as Petitioners. He urged that this being public interest litigation, it ought not be terminated without consulting the people of Kajiado. He maintained that the Petitioner had been compromised. Counsel for the 1st and 2nd Respondents opposed the application for substitution on the basis that the intended Petitioners had failed to demonstrate that they had locus since they had not supplied proof that they were registered voters. He also submitted that no basis had been laid to show that the intended Petitioners would be prejudiced by the withdrawal and hey had not deposited security for costs or provided proof of their ability to pay costs.

Counsel for the Petitioner urged the Court to find that the application for withdrawal was not influenced by any compromise and it was voluntary. Lastly, he submitted that the intended Petitioners had failed to demonstrate by way of voter's cards that they were voters and indeed voted during the August 8 election. Counsel for the 3rd, 4th and 5th Respondents associated themselves with the Petitioner's submissions.

Issues for determination

The Court identified the following issues for determination: whether the Petitioner had met the threshold for withdrawal of a petition, whether the intended Petitioners had met the threshold for substitution as Petitioners in the place of the Petitioner and who would bear the costs.

The Court evaluated law governing withdrawal of petitions as set out in Rules 21 and 22 of the Election Petition Rules and asserted the unfettered discretion of the Trial Court to grant leave to withdraw as long as it was satisfied that the application was *bona fide*. On the first issue, the Court found that other than the allegations of compromise, the Petitioner had met the requisite conditions for withdrawal under the said rules. The application was also not opposed since both sides agreed to have the matter withdrawn with no order as to costs. In reviewing the alleged proof that the Petitioner had been compromised upon defecting to Jubilee Party, the Court ruled that the attached photographs had not met the standards of production as set out in section 106 (B) (4) of the Evidence Act to confirm their authenticity and they were therefore inadmissible. The Court found that the allegation that the Petitioner had been compromised was unsubstantiated since change of a political party alone was insufficient to infer a compromise. The Respondent adduced no proof that the Petitioner had entered into any kind of undertaking to withdraw the petition.

The Court restated the right of the Petitioner under Article 36 of the Constitution to freedom of association and the right to political participation under Article 38 which entitled him to form, join or take part in the formation, activities of and recruitment for a political party. Therefore, neither going to State House nor joining another political party were unconstitutional. In any event, the Court asserted that a Petitioner who was no longer willing to prosecute a petition that he had filed could not be compelled to continue so long as the conditions for withdrawal were met. The application for withdrawal was therefore merited.

On the second issue, the Court evaluated the qualifications of the intended Petitioner under Rules 24 and found nothing that required the intended Petitioner to be a registered voter or to have voted in the particular election in order to qualify as a Petitioner. The Court cited Articles 22 and 258 of the Constitution which allow a person to file a public interest litigation on behalf of themselves and others. Since no such restrictions were included in the law, the Court found that nothing barred the applicants from being substituted in the petition. Given that the Petitioners had indicated that they were adults of sound mind and that they were registered voters and indeed voted in the August 8 elections, it was incumbent upon the 3rd Respondent (the IEBC) who are the custodians of the voter's register to rebut this assertion with evidence to the contrary. No such evidence was availed.

The Court further found that the applicants had locus to be enjoined in the petition as they demonstrated a *bona fide* claim that the elections in Kajiado County were not conducted in accordance with the law. Given the public interest in the petition and the fact that the Court had no reason not to exercise its unfettered discretion in their favour, the application for substitution was allowed, subject to a deposit of security for costs of KES 500,000 within 3 days. The applicants were also granted two days from the date of the ruling to file and serve their affidavits in support of the petition provided that they did not introduce new issues which would change the character of the petition. The Respondents were granted corresponding leave to file their responses if need be within 2 days of service.

Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others Voi Election Petition 1 of 2017

High Court of Kenya at Voi
Coram: EKO Ogola J

Ruling Striking out Petition

15 January 2018

Jurisdiction — jurisdiction of the High Court under Articles 165(3)(d)(ii) of the Constitution —body tasked with the authority to investigate and authenticate academic qualifications — whether an election court has jurisdiction to investigate, authenticate academic qualifications and recommend prosecution — whether issues in petition sub judice in light of concurrent constitutional petition

Summary of facts

The 1st Respondent (the governor-elect) raised a preliminary objection on among other grounds that the issue ought to have been addressed by the IEBC before the elections in accordance with section 74 of the Elections Act, the EACC under the Anti-Corruption and Economic Crimes Act and the Director of Public Prosecution under Article 157 of the Constitution. He contended that the High Court did not have jurisdiction to entertain the petition, as it did not challenge the electoral process, and only sought to challenge the academic qualifications of the 1st Respondent. The 2nd Respondent also raised a preliminary objection that the matter was *sub judice* as a similar matter was pending before the High Court in Nairobi as ***Ethics & Anti-corruption Commission v Granton Graham Samboja & Kenyatta University*** **Constitutional Petition No. 382 of 2017**.

Issues for determination

Having considered the submissions by the parties, the Court identified the issues for determination as: Whether the Court had the requisite jurisdiction to hear the Petition and whether the Petition was a premature invocation of this Court's jurisdiction under Articles 165(3)(d)(ii) of the Constitution; whether pursuant to Articles 82(1)(b) and 88(4) (d), (e) and (k) of the Constitution the body with the authority to investigate and authenticate academic qualifications of the 1st Respondent was the 2nd Respondent; whether the Election Court had the jurisdiction to investigate, authenticate the academic qualifications and recommend prosecution of the 1st Respondent and whether the issues raised for determination in both the Application and the Petition were res subjudice in light of the proceedings in **Milimani Law Courts Constitutional Petition No. 382 of 2017** ***Ethics & Anti-corruption Commission v Granton Graham Samboja & Kenyatta University***.

Ogola J evaluated the decisions of the High Court in ***Kituo Cha Sheria v John Ndirangu & Another*** **[2013] eKLR,** ***Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others,*** **Nakuru Election Petition No. 12 of 2013; [2013] eKLR** and ***Godffrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others*** **[2015] eKLR** and was persuaded by the reasoning of Emukule J in the ***Karanja Kabage*** case. He further cited the Supreme Court decision in ***Hassan Ali Joho & Another v Suleiman***

Said Shahbal & 2 Others[82] to the effect that once a candidate was declared a winner in an election, the mandate of the Returning Officer and the IEBC terminated and jurisdiction shifted to the election court. The Court therefore ruled that it had the requisite jurisdiction to investigate all aspects of the election in order to determine whether the 1st Respondent was validly elected and therefore had the jurisdiction to hear and determine the petition.

On the question of *sub judice,* the Court noted, firstly, that Petition 382 of 2017 had been filed before the elections, but it was centred on the same issue i.e. whether the 1st Respondent possessed adequate academic qualifications to have been nominated to vie for the gubernatorial seat in Taita Taveta County. It acknowledged that to allow the petitions to continue with the possibility of conflicting decisions portended potential embarrassment for the courts. Secondly, the Court was swayed by the fact that all the criminal investigative agencies were involved in Petition 382 of 2017, including the EACC, the DPP, the Directorate of Criminal Investigations, the Attorney-General as well as Kenyatta University which allegedly issued the disputed degree. On the contrary, only Kenyatta University was party to the present petition, and even then, only as an interested party, and therefore was relegated to the periphery.

Thirdly, the Court took cognisance of the time frames within which election petitions are required to be heard and determined and the remaining time for the hearing of the petition would not afford sufficient time to investigate, hear and determine the issue. It reached the conclusion that continuation of the proceedings would be an exercise in futility, but of even greater concern was the potential absurdity of inconsistent outcomes that might have ensued from concurrent proceedings, and the potential damage that would occasion the 1st Respondent. The Court concluded that the interest of justice tilted in favour of the issue of academic qualifications of the 1st Respondent being investigated and tried in Petition 382 of 2017 in Nairobi. The preliminary objections were therefore upheld and the petition therefore struck out.

82 [2014] eKLR.

Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed & 2 Others Nairobi Election Petition 14 of 2017 (Consolidated with Garissa Petition 3 of 2017)

High Court of Kenya at Nairobi
Coram: Mabeya J

Judgment Allowing Petition

12 January 2018

Electoral malpractices and offences and their impact on the outcome of election — qualification to vie for elective office — whether 1st Respondent validly elected — costs of petition

Summary of facts

Following the general election on August 8, the 2nd Respondent declared the 1st Respondent the winner of the Wajir gubernatorial election with 49,079 votes against his closest rival, the 2nd Petitioner who garnered 35,572 votes. Being dissatisfied, both Petitioners, who were candidates in the said election, filed a petition challenging the declaration.

They contended that the 1st Respondent was not constitutionally and statutorily qualified to participate as a candidate in the gubernatorial election since he did not meet the requirements under section 22 of the Elections Act. This was because the degree certificate from Kampala University submitted to the 3rd Respondent was a fraud. They therefore contended that the 3rd Respondent erred in clearing him to contest in the gubernatorial election.

It was also the Petitioners' case that the 2nd and 3rd Respondents committed grave errors, fraud, illegalities and irregularities which contravened the letter and spirit of the Constitution and electoral laws since there was unprocedural assisted voting by Presiding Officers who inquired loudly from voters the preferred candidates, in breach of Articles 38 and 81 of the Constitution; in so doing, they had violated Regulation 72.

The Petitioners also alleged that the 2nd Respondent relied on unauthenticated results from various polling stations to declare the 1st Respondent the winner of the impugned elections and that there were various irregularities on the Forms 37A including being undated, unsigned, unstamped, alterations which were not countersigned, exacerbated by the ejection of their agents from the polling stations.

The Petitioners also took issue with the votes cast in certain polling stations which they alleged exceeded the number of registered voters as listed in the 3rd Respondent's public portal. It was also their case that the 2nd and 3rd Respondent made false entries and lost some KIEMS equipment, thereby undermining the Wajir gubernatorial election results. In particular, they cited Tarbaj, Wajir East, Wajir West and Eldas constituencies as having experienced orchestrated, pre-determined manipulation of results by the 3rd Respondent, with the result that there was a striking similarity between the figures, which was not scientifically or logically possible and which affected the true outcome of the elections by affecting a total of 13, 632 votes.

The Petitioners also accused the 2nd and 3rd Respondents of breaches of sections 44 and 44A of the Elections Act since there was no electronic transmission of results from the polling stations to the constituency tallying centres; that due to failure to use technology, elections were not free and fair.

The Petitioners also contended that the 1st Respondent bribed voters and that the 2nd and 3rd Respondents failed to secure ballot papers and boxes, which resulted in unmarked ballot papers being found in the possession of an unauthorised person. They also contended that there was violence and intimidation in Wajir East Tallying Centre and because of these irregularities, the 1st Petitioner's chief agent did not sign the results. They sought various declarations, including a declaration that the 1st Respondent was not validly cleared to contest, a nullification of the election and costs.

While the 1st Respondent filed a Replying Affidavit and witness statements, he did not appear in court and therefore was not cross-examined on the contents of his affidavit. In his response, the 1st respondent dismissed the allegation of his non-qualification and produced pleadings from a matter undertaken in the High Court of Uganda wherein a complaint challenging his degree was dismissed. He asserted that a similar complaint to the 3rd respondent had been dismissed. The 1st Respondent maintained that the election was conducted diligently, efficiently and in fidelity to the Constitution and the law, especially considering the late enactment of laws as well as late procurement of election materials.

The 1st Respondent also denied the allegations of irregular and unlawful assisted voting as well as the allegations of inaccurate vote counting and tallying, and failure to sign Forms 37A and he produced copies of signed Forms 37A for some of the impugned polling stations. He asserted that there was no constitutional requirement for electronic transmission of results and that the petition was devoid of merit.

The 2nd and 3rd Respondents maintained that they complied with section 44 of the Elections Act in the use of the KIEMS kit. On the qualification of the 1st Respondent, the 2nd and 3rd Respondent averred that the 1st Respondent produced a degree from Kampala University, which is recognised by the Commission for University Education. Since no complaint was received regarding the alleged non-qualification, nothing turned upon that allegation.

The 2nd and 3rd Respondents denied all the allegations of irregularities and maintained that there was no evidence of breach of Regulation 72. They also denied incorrect tallying of votes on the part of their officers or that there were polling stations where the votes cast exceeded the registered voters and they supplied figures in support of their position. They also refuted any claims of manipulation of the KIEMS equipment or that they failed to secure ballot papers and boxes or that there was any election violence or intimidation. They prayed for the election to be upheld and petition dismissed with costs.

Issues for determination

At the pre-trial conference, the parties agreed on the following broad issues for determination: Whether the Gubernatorial Election for Wajir County held on 8th August, 2017 was in accordance with the Constitution and electoral laws; whether there were any electoral malpractice and/or offences during the Wajir County Gubernatorial Election held on 8th August, 2017 which affected the outcome of the Gubernatorial Election; whether the 1st respondent was lawfully qualified to vie for the Wajir Gubernatorial Election on the 8th August, 2017; whether the 1st respondent was validly elected as Governor for Wajir County in the Election held on 8th August, 2017 and who should bear the costs of the Petition and what should be the instructions fee on the Petition.

The Court dealt with the 1st and 2nd issues together and made the following conclusions: there was irregular, unprocedural assisted voting which seriously compromised the principle of secrecy of the ballot; there was no proof that there were instances where the total number of votes cast exceeded the registered voters on the identified polling stations; due to lack of training some of the Presiding Officers exhibited sheer incompetence with some failing to sign statutory forms, failing to countersign alterations; some sealing all the results in the ballot boxes, and the like. The IEBC's officers were supplied with faulty equipment which affected the accuracy and efficiency of the election. There were discrepancies and inaccuracy in the number of votes cast revealed in the scrutiny report but it did not reveal a systematic scheme or pattern and abnormal high voter turnout was not proved. Violence and intimidation was not proved. In respect of Wajir East, the trial judge found that the Returning Officer had acted *ultra vires* by taking over the process of vote tallying and declaration of Wajir East Tallying Centre, but this did not affect the results of the election. The Court also found that ballot boxes previously sealed at the polling station were irregularly opened and this interfered with the integrity and credibility of results at two polling stations. The Court also noted that there was failure to electronically transmit results both to the constituency and county tallying centres but found no evidence that this had affected the results. The Court found that the allegations of voter bribery by representatives of the 1st Respondent were failed *in limine* and the allegations of ejection of the 1st and 2nd Respondents from polling stations were not proved.

On the qualification of the 1st Respondent, the Petitioners alleged that the 1st Respondent was not qualified under section 22 (2) of the Elections Act to participate in the Wajir gubernatorial election since the degree certificate from Kampala University which the 1st Respondent had submitted to the 3rd Respondent for his clearance was a fraud. In the premises, the 2nd and 3rd respondent had erred in clearing to contest for the seat of Governor. They contended that the 1st Respondent had neither sat for 'O' nor 'A' level exams and therefore could not have been enrolled in any university for a degree course. It was also submitted that by 3 September 2014, the 1st Respondent admitted to the Parliamentary Departmental Committee on Defence and Foreign Relations, during an interview for the position of ambassador that he had not yet acquired a degree.

To support their assertions, the Petitioners produced a copy of the Bachelor of Business Administration degree certificate from Kampala University dated 1 March 2012, the booklet containing a graduation list for the same date, minutes from the Parliamentary Department Committee meeting held on 3 September 2014 together with proceedings of the National Assembly of 10 September 2014 for the adoption of the report of the Committee. The 1st Petitioner was emphatic that since the 1st Respondent hailed from Wajir, many people knew he had never attended any university. Counsel for the Petitioners asked the Court to take cognisance of the fact that the 1st Respondent, despite refuting the Petitioners' claims neither availed himself for cross-examination nor rebutted the Petitioners' claims.

The 1st Respondent contended that the question of his educational requirements had been litigated upon and decided by the Ugandan High Court in ***Abdirahman Mohamed Abdille v Kampala University & Abedi Mohamed Mohamud*** **Uganda High Court Misc Application No. 366 of 2017** where the complaint was dismissed and he supplied an order from the High Court of Uganda dismissing the judicial review application. He urged that the issue of his clearance was a pre-nomination matter and ought not have been raised in a petition. Counsel for the 1st Respondent submitted that the Petitioners had not challenged the 1st Respondent's educational qualification before his electoral victory or initiated investigations with the EACC, the DCI, the Commission for Higher Education or Kampala University, but placed reliance on the Hansard Report referring to a post-graduate degree which the 1st Respondent was at the time pursuing and in due course obtained.

Secondly, counsel urged that one cannot be disqualified from participating in an election on grounds of ineligibility unless all possible avenues for appeal have been exhausted. Therefore, the 1st Respondent was not ineligible to vie merely because of being adversely mentioned in an inconclusive report. He relied on among others, the decision of the High Court in ***Michael Wachira Nderitu & 3 Others v Mary Wambui Munene [2013] eKLR*** for the proposition that the responsibility for inquiring and determining the suitability and eligibility of candidates for elective office lies with IEBC; IEBC had in this case satisfied itself that the IEBC had met the educational requirement.

Thirdly, counsel for the 1st Respondent asserted that the Petitioners could not contest the eligibility of the 1st Respondent's nomination during the Petition because independent institutions such as the IEBC and EACC had jurisdiction over such disputes. Since the IEBC's Dispute Resolution Committee had determined the issue and the Petitioners had not contested the validity of that determination, it was not open to the Court to supervise the decision of the Committee but rather to determine to validity of the August 8 election. Citing the decision of ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others***,[83] he also urged that there had to be conclusive proof of the allegations, which had not been adduced and urged that once a degree is shown to have been conferred, it cannot be questioned.

The 2nd and 3rd Respondent denied wrongly clearing the 1st Respondent for nomination and produced a Master's Degree in Business Administration dated 12 March 2015 from Kampala University and a Letter of Recognition by the Commission for Higher Education dated 11 January 2013 stating that Kampala University is a recognised university in Kenya. In the circumstances, they contended that they had properly and procedurally cleared the 1st Respondent to vie for the gubernatorial seat. They urged that they had complied with section 22 (2) of the Elections Act and that the complaint before the 3rd Respondent's DRC had never been prosecuted.

On the question of jurisdiction, the Court reviewed Article 88 (4) (e) of the Constitution as read with section 74 of the Elections Act as well as ***Jared Odoyo Okello v IEBC & 3 Others***[84] cited by the 1st Respondent in support of the assertion that the High Court lacked jurisdiction to determine the eligibility of the 1st Respondent. It was urged that if dissatisfied with a decision of the IEBC, the proper forum to appeal to was the High Court, not an election court.

Mabeya J distinguished the ***Jared Odoyo*** case on the basis that a determination had been made by the IEBC which had not been appealed against and that was the basis for the determination that the election court lacked jurisdiction. However, there was no proof that a complaint had ever been prosecuted before the IEBC and a determination made in the present case. The appellants could therefore not be said to be appealing against the decision of the Committee in the petition.

The Court was persuaded by the reasoning of Kimondo J in ***Kituo Cha Sheria v John Ndirangu Kariuki***[85] that elections were a process, and the High Court was not divested of jurisdiction in nomination matters where the IEBC failed to exercise its mandate. Therefore, the election court had jurisdiction to audit the entire process, provided the issue had been raised in the election petition. On the question of whether questions of eligibility were the preserve of the IEBC, as stated by the High Court in the ***Michael Wachira*** case, the Court found that the said authority was distinguishable

83 [2013] eKLR.
84 [2013] eKLR.
85 [2013] eKLR.

on the basis that the Court there was considering whether an aspirant was eligible to run for the seat of Member of the National Assembly rather than the validity of an election, as was the case in this election petition. Therefore, the fact that the IEBC had the responsibility to determine whether he was qualified in law to vie did not preclude the election court from satisfying itself that a candidate was eligible to stand for election when the issue arose.

The Court therefore assessed the Petitioners' allegations against the fact that the 1st Respondent did not specifically deny these allegations in his Replying Affidavit and neither did he show up for cross-examination during the trial and reached the conclusion that the Petitioners had shifted the evidentiary burden of proof to the 1st Respondent. The letter from the Commission for Higher Education only served to confirm that Kampala University was recognised; it did not confirm the validity of the certificate produced by the 1st Respondent. Moreover, the Court noted that the matter in Uganda had been dismissed on a technicality: that the advocate had filed the suit without the requisite authority. The issue of authenticity was therefore never determined. The Court also took judicial notice that one could not obtain a Master's degree without having a Bachelor's degree and it was unlikely that the 1st Respondent obtained a Master's degree in 2015, when he had admitted in September 2014 that he had not obtained any degree. The 1st Respondent also proffered no explanation as to why his name was missing from the graduation list, or proof that the disputed degrees were genuinely issued to him. As for the report of the Parliamentary Departmental Committee on Defence and International Relations, the Court ruled that 'serious but firm allegations' had been made against the 1st Respondent, who did not deny or rebut them. The minutes and report were, contrary to the submissions of counsel for the 1st Respondent, conclusive evidence that the 1st Respondent appeared before the Committee to be vetted for an ambassadorial position and that during the vetting, he informed the Committee that he was yet to graduate. The Court therefore distinguished the ***Peter Gichuki*** case on inconclusive reports and found that as of 8 August 2017, the 1st Respondent did not have the academic qualifications to vie for the gubernatorial position. He was therefore not legally cleared to vie as he was unqualified under section 22 (2) of the Elections Act.

In conclusion, the Court found that secrecy of the ballot was violated since the record of the election through the prescribed Forms 37A, 37B and 37C was neither accountable nor credible and the elections could not be verified as a result of the irregularities committed by the 2nd and 3rd Respondent. The Court deprecated the election officials for being incompetent or negligent and their conduct for making elections unaccountable and unverifiable. Therefore, the election was not conducted in accordance with the Constitution and the law as the totality of irregularities were so grave that they affected both the credibility of the election and the results of the election itself and no reasonable tribunal could uphold the election. The 1st Respondent was therefore not validly elected as the governor of Wajir County.

Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others Election Petition Appeal 2 of 2018

Court of Appeal at Nairobi
Coram: **Waki, Makhandia & Kiage, JJ.A**

Judgment Dismissing Appeal

20 April 2018

Constitutional and statutory qualifications for elective office — whether the High Court has jurisdiction to inquire into a candidate's nomination to vie for elective office

Summary of facts

The appellant approached the Court of Appeal seeking to overturn the decision of the Trial Court on several grounds: that the trial judge erred in law in assuming jurisdiction and re-opening matters which ought to have been dealt with at the nomination stage i.e. whether the appellant had been awarded a recognised degree by Kampala University; that the learned judge erred in fact and law by not appreciating sufficiently that the 1st and 2nd Respondents were obliged in law to prove their accusations; that the learned judge erred in fact and law in not holding that the appellant was validly nominated to contest the position of governor, Wajir county; that the trial judge erred in fact and law in not appreciating sufficiently that the clerical irregularities did not affect the outcome of the election or confer any numerical advantage of the appellant and that the trial judge erred in fact and law in holding that the appellant was not validly elected governor, Wajir County.

The 1st and 2nd Respondents filed a notice of motion under Rule 19 (1) of the Election Appeal Rules 2017 and Rule 86 of the Court of Appeal Rules wherein they sought prayers that the Court be pleased to direct that grounds 2, 3, 4 and 5 of the Memorandum of Appeal be struck out for contravening section 85A of the Elections Act and in any event the Court lacked the jurisdiction to inquire into the matters set out in grounds 2, 3, 4 and 5 of the Memorandum of Appeal.

For expeditious disposal of the appeal, it was agreed to address the motion together with the substantive appeal.

Issues for determination

While it appeared that the appellant impugned the Trial Court decision on both law and fact, the parties agreed that the appeal hinged on two legal issues only: whether the appellant met the constitutional and statutory qualifications to vie for the position of governor and whether the High Court had jurisdiction on inquire into the appellant's nomination to vie.

Beginning with the second issue, the Court reframed the Appellant's contention as follows: that once the IEBC cleared the appellant as a candidate to contest the election for Governor, Wajir County, that clearance had a finality that the election court could not go behind to enquire into. He relied on the decisions of Muchelule J in ***Jared Odoyo Okello v IEBC & 3 Others***[86] and Mabeya J in ***Josiah Taraiya***

86 [2013] eKLR.

Kipelian Ole Kores v Dr David Ole Nkedienye & 3 Others[87] for the proposition that where the law provides a detailed procedure for pre-election dispute resolution, the same must be followed and that it would be a usurpation of jurisdiction for the High Court to inquire into pre-election disputes reserved for another body. He asserted that challenges mounted by third parties against his qualification both in the Uganda High Court and before the IEBC were effective determinations of the issue since they were as good as final judgments unless set aside. The trial judge noted that the complaint before the IEBC was neither prosecuted nor was a decision made thereon; the 2nd and 3rd Respondents could therefore not be said to be appealing against a decision of the Committee to the High Court.

The Court of Appeal agreed with the learned judge and found that since the 2nd and 3rd Respondents were not parties to the challenge before the IEBC, it would be an injustice and an absurdity to bind them with the failure to prosecute the said complaint. The ***Jared Odoyo*** case was therefore properly distinguished. In the view of the COA, the question of jurisdiction lay in a determination of whether the election was a process or a specific event. In the words of the Court:

> *The answer to the jurisdictional question lies in a determination of whether an election is a process straddling the entire electioneering period from registration of votes to declaration of results; or the specific event of voting and determining a winner on election day. And we think it is not a difficult question to answer. There is a substantial body of law that is quite categorical and authoritative that election is a process and not an event and that being so, the High Court, as an election court, is possessed of jurisdiction to enquire into matters nomination. In* ***KITUO CHA SHERIA v JOHN NDIRANGU KARIUKI [2013] eKLR*** *Kimondo, J after acknowledging other dispute resolution procedures, still recognized the High Court's jurisdiction to intervene. He gave the hypothetical example that if by negligence or otherwise a non-citizen was nominated for election and was elected, it would be perfectly in order for the Court to right the wrong. We need only add that citizenship is not the only qualification that may justify, indeed necessitate and compel such intervention as the case before us so amply demonstrates…Suffice to say that nominations or determinations of qualification to run are part of the "continuum" consisting in "a plurality of stages" that make up an election as expressed by the Supreme Court in* ***ADVISORY OPINION NO. 2 OF 2012 IN THE MATTER OF THE GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND SENATE****. As such, qualifications are a valid contested point outside the framework of the events of election date but which may yet be legitimately enquired into by an election court…*

The Court therefore ruled that the Trial Court was properly seized of the matter.

> *On the basis of law and plain common sense, we are fully persuaded that an election court has jurisdiction to enquire into a question as to the qualification of a candidate which goes to his eligibility to vie in cases such as was before the learned Judge where the matter had not been dealt with finality by any other body constitutionally or statutorily mandated to do so. The learned Judge, committed no error holding that he had jurisdiction. He had.*

On the eligibility of the appellant, the COA noted that a determination of this issue was dispositive of the entire petition at the Trial Court and of the appeal. It further assessed that while counsel for the appellant attempted to portray the case as one of fraud or forgery, the Court's assessment was that the dispute was about whether the appellant had the requisite degree qualification to run for

87 Nairobi High Court Petition 6 of 2013.

governor under section 22 (2) of the Elections Act. It was noted from the evidence tabled before the Trial Court that there was no evidence to demonstrate that the Appellant had completed high school and therefore he did not possess qualifications that would have facilitated his admission to university. Moreover, the Appellant had told a Committee of the National Assembly on 3 September 2014 under oath that he was yet to graduate and there was a Parliamentary record to this effect. He indicated to the Committee that he was pursuing a degree in business administration and a diploma in international relations. After his posting to Riyadh, there was no evidence of his attending classes at the university in Kampala until he came to contest the gubernatorial seat. Furthermore,the Appellant indicated in his self-declaration form for purposes of being cleared to contest that his highest educational qualification was a Bachelor's degree but produced to the IEBC, contemporaneously, a Master's degree certificate dated 12 March 2015. The appellant did not provide any evidence that he engaged in any full time accelerated post-graduate studies to qualify him for that Master's degree, nor did his name appear in the university's graduation booklet. Since he did not appear to testify and be cross-examined on his affidavit, his replying affidavit did not respond to the Petitioners' allegations with any degree of seriousness. The Trial Court also noted that the Appellant did not specifically deny any of the allegations but stated that the issue had been litigated by the Ugandan High Court and dismissed. This casual response to the allegations, taken together with his failure to attend court to be cross-examined on the affidavit robbed his affidavit of any probative value.

The Court of Appeal found that the trial judge could not be faulted in his assessment of the evidence, and in finding that the Petitioners had established a *prima facie* case on the invalidity of the degree, which shifted the evidential burden of proof to the appellant. In the absence of evidence to the contrary by the Appellant and in light of his absenteeism from the trial, the Court of Appeal, citing the decision of the Privy Council in ***GIBBS v* REA [1998] AC 786** and the English High Court in ***RAJA v VAN HOOGSTRATEN* [2005]** E WHC 2990 (Ch) found that the Trial Court was left with no choice but to draw an adverse inference and find that the Petitioner had provided sufficient evidence on which to find for them against the appellant.

Since his qualifications were matters within his personal knowledge, only he could have testified as to whether he went to high school, the grades he obtained, when he enrolled at the university, what course he studied and for what duration. Further, only he could have provided details as to his student number, his lecturers, his grades, his date of gradution and the strange absence of his name from the graduation list for the day the degree certificate he produced related to. In addition, only he could explain why he stated under oath to a Committee of Parliament that he was enrolled at Kampala University and yet to graduate in 2014 yet he ostensibly graduated on 1 March 2012. Finally, only he could have explained how if he was yet to graduate in 2014 as per his testimony, he somehow had a Master's degree certificate issued in March 2015 and somehow forgot that he had the said certificate when he filed the self-declaration form in 2017 when he stated that his highest degree was a Bachelor's degree. The Appellant was reasonably expected to depose to these issues in his affidavit or answer those questions in cross-examination, yet he chose not to.

The appellate court found that the Trial Court had a firm basis for holding that the Appellant failed to show that he obtained the two degrees from Kampala University and that the Petitioners had proved their allegation to the required standard. Consequently, the election of the Appellant had to be invalidated and the appellant being unqualified could not hold on to his false victory by pointing to the margin of his vote *vis-à-vis* his other competitors; he ought not have been in the race to begin with and his alleged victory was a distortion of reality and a subversion of the electoral process. It was therefore unnecessary to delve into the other grounds of appeal.

> *The effect of our upholding of the learned Judge on the question of the appellant's lack of academic qualifications is that it renders our examination of the other grounds of appeal quite superfluous. The reason is quite simple, whether the election was properly conducted or was fraught with irregularities of so grave a character that they affected not only the credibility of the election but the results of the election as well so that no reasonable tribunal can uphold them, as the learned Judge found, it must stand invalidated because the person declared the winner, namely the appellant, was not qualified to vie and was not validly elected. That being the inescapable adjudicative result, we do not see any utility in embarking on a forensic examination of the other grounds in pursuit of a merely didactic of academic aim.*

The appeal was therefore dismissed with costs to the 2nd and 3rd Respondents. The cross-appeal consequently stood dismissed with no order as to costs.

Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others Supreme Court Petition 7 & 9 of 2018 (consolidated)

Supreme Court of Kenya at Nairobi
Coram: Maraga, CJ & P, Mwilu, DCJ & VP; Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ

Ruling Allowing Additional Evidence

28 September 2018

Jurisdiction of the Supreme Court to grant leave for adduction of additional evidence by appellant — circumstances under which additional evidence may be allowed

Summary of facts

The Notice of Motion application, which was opposed by the 1st and 2nd Respondent and supported by the 3rd and 4th Respondent, sought an order that the Court be pleased to take additional evidence identified in the Appellant's supporting affidavit to achieve the ends of justice. The application was premised on the grounds that the evidence would assist the Court reach a just determination of the issue of the appellant's academic qualification; that the appeal on the question of the Appellant's education was founded on the fact that he had two degrees presented at both superior courts even though his intention was to demonstrate at the hearing of the petition that Parliament had waived this requirement in respect of the 2017 elections; that the legitimacy of his degrees was nonetheless erroneously impeached by the appellate court; that the law empowered the Court to delve into all disputes and ascertain the real issues before it and administer substantive justice; that the delay in filing the additional evidence was a result of a pre-trial conference conducted by the trial judge on 9 October 2017 wherein the parties entered into a consent admitting all documents on record, including the Appellant's degree without the requirement for strict proof; that it is in the interests of justice to allow further evidence be adduce for a fair and just determination of the matter; that the Respondents stood to suffer no prejudice if the orders were granted; that the Appellant stood to suffer permanent prejudice extending beyond the political sphere if his academic *bona fides* were impeached without considering the fresh evidence sought to be adduced and that the Court had the jurisdiction to grant the orders sought in the interests of justice and affirmation of the Appellant's rights under Articles 28, 38 (3) & (6), 43 (1) (f) and 81 of the Constitution.

Issues for determination

From the parties' submissions and pleadings, the Court isolated the following issues for determination: whether the Court had jurisdiction to grant leave for the Appellant to adduce additional evidence contained in his supporting affidavit; if so, under what circumstances the Court could allow additional evidence and whether leave to admit additional evidence should be granted in this matter.

Before addressing the issues listed above, the Court reiterated its position on the constitutionality of section 85A of the Constitution, which limits appeals to the Court of Appeal to points of law only. The Court found no basis for departing from its dicta in ***Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others***, SC Petition No. 6 of 2017 and in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others,*** SC Petition 2B of 2014 [2014] eKLR to the effect that there was a clear legislative intent to limit appeals to the Court of Appeal to matters of law only.

On the question of whether the Court had jurisdiction to grant leave to the Appellant to adduce additional evidence contained in his supporting affidavit, the Appellant submitted that Article 163(8) of the Constitution provided a basis for this additional evidence. He further urged that rule 18 of the Supreme Court rules grants the Court the power, when there is sufficient reason, to call for additional evidence. This rule therefore gave a party provision to invoke the jurisdiction of the Court to admit additional evidence.

The 1st and 2nd Respondents however maintained that allowing additional evidence would be contrary to section 85A of the Elections Act and the principles of timelines and timeliness adopted by the Court and would also be prejudicial to them.

The Court opined that rule 18(3) of the Supreme Court Rules, which granted the Court power to allow additional evidence for sufficient reason was not a legislative accident. The Court distinguished the facts of the case from the facts in ***Chris Munga N Bichage v Richard Nyagaka Tong'i & 2 Others*** [2015] eKLR (***Bichage***) where an application to allow admission of a supplementary affidavit filed out of time was disallowed on the basis that the document sought to be introduced was already on record and therefore its admission lacked a proper basis. In the present case, the Appellant sought to introduce two degree certificates as well as a letter of recognition from the Commission for Higher Education. The Court was alive to the fact that without the requisite academic credentials, he would not have been entitled to vie for governor under section 22 (2) of the Elections Act and indeed this was the basis for the nullification of his win. Having reviewed previous decisions, it reached the conclusion that it was obligated to do justice in the matter and indeed it had jurisdiction to entertain applications for additional evidence, even though this jurisdiction was to be exercised sparingly. The Court therefore considered it prudent to evaluate the evidence on record at both superior courts to determine whether their findings were sustainable.

On the question of the circumstances under which additional evidence should be admitted, the Court reiterated that such applications would not be granted in all instances. The Court reviewed jurisprudence from England, Uganda and India and concluded that it could, in exceptional circumstances and on a case-by-case basis, exercise discretion to call for and allow additional evidence to be adduced. It went further to lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows: that the additional evidence be directly relevant to the matter and in the interest of justice; that it be such that if given, it would influence or impact upon the result of the verdict, although it need not be decisive; where it is demonstrated that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce additional evidence; where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit; the evidence must be credible in the sense that it is capable of belief; the additional evidence must not be so voluminous as to make it difficult or impossible for the other party to respond effectively; whether a party would reasonably have been aware of and procured the further evidence in the course of trial as an essential consideration to ensure fairness and process; where the additional evidence discloses a strong *prima facie* case of wilful deception of the Court; the Court must be satisfied that the additional evidence is not utilised to remove lacunae and fill gaps in evidence but that the further evidence is needful; a party who has been unsuccessful at trial must not seek to adduce additional evidence to make a fresh case, fill up omissions or patch up the weak points in her case on appeal; and the Court will consider the proportionality and prejudice of allowing the additional evidence. The latter would require the Court to assess the balance between the significance of the additional evidence and the swift conduct of litigation together with any prejudice that might arise from the additional evidence.

Even with the statement of these principles, the Court was emphatic that it would only allow additional evidence on a case-by-case basis and even then, sparingly, with abundant caution.

As to whether leave to file an additional affidavit ought to be granted in the present case, the Court was persuaded that the Appellant was not accorded a fair hearing either at the Trial Court or at the Court of Appeal. The Court found that the Trial Court disregarded the consent at the pre-trial conference to admit documents on record without strict proof and the Appellant erroneously equated 'cross-examine' with 'strict proof'. As a result,the Appellant was unable to properly defend his academic credentials. This meant that the Superior Courts did not do justice to his case. The Court was therefore inclined to remedy the situation.

The Court also found it curious that while the appeal before the Court of Appeal contained several grounds of appeal, the appellate court chose to settle on only one issue for determination: whether the Appellant had the requisite academic qualifications to vie for the office of governor. Since the additional evidence sought to be adduced was directly relevant to the single issue before the Court and would most likely impact on the appeal by removing any vagueness or doubt over the status of the Appellant's academic qualifications, it had a direct bearing on the suit.

The Court was therefore persuaded that denying the additional evidence would deny the Appellant a fair trial, a non-derogable right under the Constitution. The Court was also satisfied that the additional evidence would not be prejudicial to any party and would be in the interests of justice as it would allow a proper judicial finding on the issue before the Court. The application was therefore allowed and the Respondents were allowed to respond to the additional evidence by way of affidavit.

Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others Supreme Court Petition 7 of 2018

Supreme Court of Kenya at Nairobi
Coram: Maraga, CJ & P, Ibrahim, Ojwang, Wanjala, Njoki & Lenaola SCJJ

Judgment Allowing Appeal

15 February 2019

Jurisdiction of the Supreme Court in election appeals — whether an election court has jurisdiction to entertain a nomination dispute in light of Article 88 (4) (e) of the Constitution and section 74 (1) of the Elections Act — whether the Supreme Court has jurisdiction to entertain issues not addressed by the Court of Appeal — whether the appellant had the requisite academic qualifications to vie for the position of Governor for Wajir County.

Summary of facts

The appellant had appealed to the Court of Appeal challenging the decision of the election court for assuming jurisdiction in respect of a pre-election nomination dispute which under Article 88 (4) (e) of the Constitution was reserved for the IEBC. The appellant had also faulted the Trial Court for finding that the irregularities committed impugned the credibility of and affected the result of the election. The 3rd and 4th Respondents also cross-appealed, disputing the finding that the conduct of the election was fraught with irregularities and illegalities which undermined its integrity and affected the results.

The Court of Appeal in its finding concurred with the High Court in finding that the appellant did not possess the requisite academic qualifications to contest the election and in so doing, considered the other grounds of appeal and cross-appeal moot. The appeal was therefore dismissed with costs and the cross appeal with no order as to costs.

Two appeals were thereafter filed to the Supreme Court. Petition 7 of 2018 was filed by Mohamed Abdi Mahamud (the appellant) while the Petition 9 of 2018 was filed by Patrick Gichohi and the IEBC (the 3rd and 4th Respondents). The two appeals were consolidated by an order of the Court on 11 June 2018. However, the 3rd and 4th Respondents consequently applied to withdraw Appeal 9 in its entirety, which application was allowed.

The gist of the appellant's appeal was the superior courts' findings that election courts have jurisdiction to entertain pre-election nomination disputes. The appellant contested the finding that he lacked the academic qualifications to contest in the said election, that the respondents had discharged their burden and standard of proof and that the conduct of the elections was so fraught with illegalities and irregularities that they undermined the integrity of the elections and affected the results. The appellant also faulted the CoA for failing to consider all the grounds of appeal and cross appeal before it.

The Court, by an order dated 28 September 2018, also granted the appellant leave to adduce additional evidence on his academic qualification to contest the election and allowed Ahmed Ali Muktar, the deputy governor of Wajir County, to be joined as an interested party to the appeal.

The 1st and 2nd Respondents on the other hand filed a Notice of Affirmation of the Court of Appeal's decision, pursuant to Rule 39 of the Supreme Court Rules, in which they asserted that since the

findings of the superior court were all supported by the evidence on record, the Supreme Court could not re-open and overturn the concurrent findings of the Superior Courts. They maintained that the appeal and the Appellant's election were untenable.

The 1st and 2nd Respondents, following the decision of the Court to allow the tendering of additional evidence by the appellant, also filed an application to have the appellant either tender his evidence *viva voce* or be cross-examined on the contents of his affidavit. They asserted that since they and their witnesses had orally testified and being cross-examined on the contents of their affidavits, they ought to be given an equal opportunity to test the veracity of the additional evidence. However, the Court declined to allow the 1st and 2nd Respondent's application on the basis that no value would be added by cross examining on the additional evidence; rather, it was asserted that that would stretch the hearing of the appeal "to unreasonable levels".

Issues for determination

The Court identified the following issues as arising for determination: whether the Supreme Court had jurisdiction to entertain this appeal; whether the High Court, sitting as an election Court, had jurisdiction to entertain a pre-election dispute arising from nominations, notwithstanding the provisions of Article 88 (4) (e) of the Constitution, and Section 74(1) of the Elections Act; whether the Supreme Court had jurisdiction to determine issues that were never addressed by the Court of Appeal; and whether the appellant had the requisite academic qualification to vie for the position of Governor for Wajir County.

On the question of jurisdiction, on one hand, it was argued by the 1st and 2nd Respondents and the Interested Party that the main ground on which the decision of the superior courts was based was the appellant's lack of academic qualifications to vie for elections under section 22 of the Elections Act. Citing the decision in ***Aviation and Allied Workers Union of Kenya v Kenya Airways Ltd & 3 Others*** [2017] eKLR, it was contended that this did not involve the interpretation or application of the Constitution. On the other hand,the Appellant argued that the appeal was well founded on Article 163 (4) (a) of the Constitution and because of the finding by the trial curt that the election had not been conducted in accordance with the Constitution and election law, the Supreme Court was clothed with jurisdiction under Article 163 (4) (a) of the Constitution to determine the appeal. The Court ruled that since it was being called upon to determine whether an election court had jurisdiction to determine pre-election disputes notwithstanding Article 88 (4) (e) of the Constitution, this was a clear case requiring the Court to interpret and apply the Constitution. The Court therefore had jurisdiction to determine the appeal.

On the second issue, the Court noted the conflicting jurisprudence on the question on the jurisdiction of an election court in relation to pre-election disputes and reviewed the principles established in ***Silverse Lisamula Anami v Independent Electoral and Boundaries Commission & 2 Others*** **SC Petition No. 30 of 2018** and in ***Sammy Ndung'u Waity v IEBC & 3 Others*** **Supreme Court Petition 33 of 2018** to clarify the inconsistencies. In the first decision, the SC ruled that an election court could only look into a pre-election matter where the issues raised had not been conclusively determined on merit by the IEBC, PPDT or the High Court sitting as a judicial review court or in exercise of its supervisory jurisdiction under Articles 165 (3) and (6) of the Constitution. Where there had been a determination, the election court could not assume jurisdiction as an appellate entity since such jurisdiction was not conferred by the Constitution.

In the ***Sammy Waity case,*** the Court called for called for a holistic and purposive reading of the Constitution, with no provision being read to render another inoperable. It established certain guidelines for determining whether an election could exercise jurisdiction over a pre-election issue: (i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance; (ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the Election Court; (iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the constitutional timelines; (iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the Election Court; (v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition; (vi) in determining the validity of an election under Article 105 of the Constitution, or Section 75 (1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the Petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.

Applying these to the present case, the Court found that the High Court and the Court of Appeal erred in holding that they had jurisdiction to determine the question of the appellant's eligibility. Since the appellant by his own admission was aware of the lack of qualification of the appellant since 2013 and had not taken up the matter with the IEBC but opted to wait until he had lost the election to challenge the appellant's eligibility, allowing the exercise of jurisdiction in such a case would be to render dispute resolution bodies such as the IEBC otiose but would also be unworkable in light of the fact that electoral disputes have to be resolved within certain timelines. Nevertheless, this did not prevent him from presenting the dispute to the High Court sitting as a judicial review court or in exercise of its supervisory jurisdiction under Articles 165 (3) and (6) of the Constitution at any time, since the judicial process is never closed. This would also preserve the authority of the Court to deal with 'tragedies' occasioned by ineligible persons slipping through the vetting process and getting elected when they were brought to the attention of the Court. This would mean that if the matter was known beforehand, it would go to the High Court in exercise of its supervisory jurisdiction, but if not, an election court would have jurisdiction. This in the view of the Court would provide a holistic and purposive way forward and preserve the pre-election constitutional mandate of the IEBC, the efficacy of the election court and the authority of the Constitution.

On the question of whether the Court had jurisdiction to determine issues that were never addressed by the Court of Appeal, the Court was asked to determine the issues which were left unaddressed by the Court of Appeal. The Court, however, took the view that in the absence of a determination by the Court of Appeal on an issue, no appeal could lie to the Supreme Court. The Court cited its previous decision in ***Basil Criticos v IEBC & 2 Others*** **[2015] eKLR** where the Court pondered what it would be sitting on appeal over in the absence of a judgment by the Court of Appeal in which constitutional issues were canvassed. It was clear that the Supreme Court could not exercise jurisdiction in such circumstances.

Having determined the first three issues, the majority found that the Court had to down its tools and could not consider the fourth issue.

The question of whether the appellant possessed the requisite academic qualification to vie for office was dealt with by Maraga CJ & P. before addressing the question of eligibility, the Chief Justice addressed the questions of jurisdiction to entertain the appeal and whether an election court could exercise discretion over a pre-election nomination dispute. On the first limb, the CJ ruled that since the appellant's academic qualification for election was central to the High Court's determination that the election was not conducted in accordance with the Constitution and the law, and further, that the secrecy of the ballot was breached thus violation Article 81 (e) (l) of the Constitution, there were clear issues of constitutional interpretation and application and the Court had jurisdiction over the appeal.

On the question of the election court's jurisdiction over pre-election matters, the Chief Justice disagreed with the majority decision that the IEBC should have exclusive jurisdiction over pre-election nomination disputes such as this one. Firstly, academic qualification to contest an election, while it is a statutory requirement under section 22 (1) (b) (ii) of the Elections Act, is anchored in the Constitution. Any disputes on qualification or eligibility to view would invariably challenge the integrity or validity of that election and therefore go to the root of an election. Therefore, while the IEBC has jurisdiction to handle such disputes, a purposive reading of the Constitution would show that other courts would also have jurisdiction to entertain such disputes. This opinion was endorsed by Lenaola J in his dissenting opinion.[88]

Secondly, given that IEBC's core mandate was to manage elections and referenda and not to resolve disputes, the settlement of disputes was only collateral or ancillary to its function in that it had to determine the candidates to appear on the ballot papers in time for the election. This is done within the constraints of a hectic schedule in the run up to the elections, with the result that the IEBC uses a summary procedure to determine nomination disputes that come before it.

Thirdly, since nomination disputes often challenge the IEBC's own earlier decisions, such as the acceptance of a candidate for nomination, the election court's jurisdiction cannot be ousted, particularly in cases such as this one where the matter had not been determined on merit before the IEBC for want of prosecution, and was therefore not *res judicata.*

Having reviewed the evidence, the Chief Justice was satisfied that the appellant did not possess the academic qualifications necessary to vie for the gubernatorial elections. The Dean's list relied on by the appellant as proof of graduation was considered problematic as it was not proof of graduation, neither had it been prepared by the Dean as is customary. The appellant also failed to supply any proof of having paid school fees. The Chief Justice also considered it determinative that the letter from the Ugandan Ministry of Internal Affairs that the appellant did not travel to Uganda between 2009 and 2012.

The Court found untenable the allegations by the Deputy governor that he should be declared the governor in light of the finding on the ineligibility of the appellant.

88 At paras 194-200 of the decision.

On the question of whether the Supreme Court could determine matters left unresolved by the Court of Appeal, the Chief Justice ruled that while in fact the finding of that irregularities and illegalities were committed were moot upon the finding of ineligibility of the appellant, it was nevertheless necessary to make a finding on this omission for two reasons: the Court had been urged by the appellant to assume the jurisdiction of the Court of Appeal as mandated by Sections 20 and 21(3) of the Supreme Court Act as well as Rules 3(5) and 18 of the Supreme Court Rules, 2012; and it was necessary to determine the matter for ease and expeditious disposal and because it was of jurisprudential moment and national importance. The Chief Justice therefore confining himself to section 85A, re-evaluated the evidence of irregularities and illegalities and found that since they were not rebutted by the IEBC, they were sufficient to vitiate the election. He therefore opined that even if the appellant was eligible to vie for office, he would still have nullified the election on the basis of the irregularities and illegalities.

In his dissenting opinion, Lenaola J, while agreeing that the Supreme Court ought to have exercised jurisdiction over this matter, given that the IEBC had not and it was therefore not *res judicata*, did not agree with the Chief Justice on the determination of issues not addressed by the Court of Appeal. Since an appeal proceeds from the Court of Appeal, in exercising its appellate jurisdiction under the Constitution, the issues for determination must involve these which came up for determination by the Court whose decision was impugned.

The following were the final orders of the Court: the Petition of Appeal was allowed, and the judgment of the Court of Appeal of 20 April 2018 set aside. The declaration of the IEBC in respect of the governor for Wajir County was upheld with each party directed to bear their own costs.

Wavinya Ndeti & Another v IEBC & 2 Others Machakos Election Petition 1 of 2017

High Court of Kenya at Machakos
Coram: Muchelule J

Judgment Dismissing Petition

9 February 2018

Irregularities and illegalities — whether constitutional principles violated during election — election offences and their impact on the validity of the election — qualification of the 3rd Respondent within the meaning of section 15 of the Election Offences Act — costs

Summary of facts:

The 1st Petitioner was a contestant in the Machakos gubernatorial election where the 3rd Respondent was declared the winner with 249,603 votes against the 1st Petitioner's 209,141 votes. The 2nd Petitioner was her running mate. The Petitioners took issue both with the conduct of the election and the declaration of results. They alleged that there was irregular appointment of county government workers as election officials, that there were inconsistencies and anomalies in Forms 37A, that some forms 37A were missing, that some Forms 37B lacked security features, that there were deliberate omissions in vote counting and transmission of results, that there were variances in the number of total votes cast, that more than one agent for the 3rd Respondent was admitted at polling stations and tallying centres and in some cases only the 3rd Respondent's agents were admitted, that Forms 37A were not duly stamped or closed to prevent tampering after declaration; that Forms 37A were not signed by candidates or agents; that non-participating candidates' agents signed declarations of results; that there were alterations and tampering of Forms 37A and ungazetted and designated returning officers or Presiding Officers conducted the election.

The Petitioners also claimed that several election offences were committed including the issuance of more than one ballot paper to voters, bribery by the 3rd Respondent's agents, voter bribery and undue influence, the use by the 3rd Respondent of county government vehicles during campaigns, that three Presiding Officers were found with unsealed ballot books on 10 August 2017 in Athi River, contrary to the requirements of the law and that Presiding Officers were found with two ballot books with several ballot papers marked in favour of the 3rd Respondent, which incident was reported to the police.

The Respondents denied the allegations of commission of illegalities, irregularities and improprieties as well as the commission of election offences. Each respondent maintained that the election was free, fair and credible and that the results reflected the will of the people of Machakos County. Further, it was pleaded that the election accorded with the Constitution and election laws and therefore the results as declared were valid. The Respondents prayed for the petition to be dismissed with costs.

Issues for determination

Counsels for the parties agreed on the following issues for determination: whether there were irregularities and illegalities committed in the gubernatorial election and if so, whether they were substantial enough to affect the validity of the elections; whether constitutional principles were violated during the election; whether election offences were committed during the election and how they affected the validity of the election; whether the 3rd Respondent was qualified in terms of section

15 of the Election Offences Act to contest the gubernatorial election; whether the 3rd Respondent was validly elected, the amount of costs and who would pay them.

The Court began by setting out the principles governing elections and electoral dispute resolution in Kenya before addressing the issues raised in the petition. These principles were agreed on by the parties in their respective submissions.

On the issue of whether election offences were committed, and whether they affected the validity of the election, the Court assessed each of the allegations of illegality to determine whether the offences were established to the required standard. The Court reiterated that proof of an election offence was sufficient to invalidate an election. Firstly, in respect of the allegation that a polling clerk at Kenyatta Stadium polling station stream 2 was caught on camera having issued more than one ballot paper to voters, the Court acknowledged that section 5 (n) of the Election Offences Act read together with Regulation 59(3) made it an offence to vote more than once in any election. Further, section 6 (k) of the same Act made it an offence for the polling clerk to collude with the party or candidate for whom more than one vote was being cast by a voter. Section 19 of the same Act also made it an offence to aid, abet, counsel or procure the commission of an offence. All the Respondents denied the allegation and the 3rd Respondent in particular asserted that the Commission had not ordered or procured the commission of any offence by its officers.

In evaluating the evidence, the Court noted that the name of the clerk who had allegedly been caught on camera issuing more than one ballot paper was not disclosed, no camera evidence was tendered and no voters was called to testify that he had been given more than one vote or voted twice. Moreover, the Petitioners' agent for Kenyatta Stadium polling station was not called to substantiate the claim. The Court therefore found that the allegation was not proved.

Secondly, it was alleged that the 3rd Respondent's agents were caught on camera bribing voters using motor vehicle registration number KBN 174U at Athi River polling station, contrary to section 9 of the Election Offences Act. The 3rd Respondent denied knowledge of the incident and denied owning the said vehicle. The Court noted that the 1st Petitioner was not at the polling station at the time and therefore could not have witnessed the incident. However, the person who witnessed the incident was not called to testify. Since it would not have been difficult for the Petitioners to obtain records of the ownership of the vehicle at the Motor Vehicle Registry, the Court found that the offence was not proved.

Thirdly, the Petitioners alleged that on 10 August 2017, three Presiding Officers were found with ballot books each of 50 ballot papers from three polling stations at Vocational Training Tallying Centre in Athi River. It was their case that these ballot books, the particulars of which were given in the petition, were unsealed and outside the ballot boxes, contrary to section 6 of the Election Offences Act. The Petitioners further alleged that the President officers were found with the 2 ballot books numbers 7659 and 7657 for the gubernatorial election, that there were marked ballot papers in the books and that each ballot paper was marked in favour of the 3rd Respondent. The Petitioners reported the incident to the CID at Athi River which was marked as OB 37 of 10 August 2017. These allegations were denied by the 3rd Respondent. The Court concluded that since the 1st Petitioner did not personally witness the incident, and the person who witnessed the incident was not called to testify and further no successful prosecution had ensured from the CID report, the claims were not materially substantiated.

On the allegation that public officers were engaged in the activities of a political party contrary to section 15 of the Election Offences Act, the Petitioners pleaded that the 3rd Respondent enlisted or caused to be enlisted several public officers from Machakos County government to act as hi agents as well as those of his political party, Maendeleo Chap Chap, of which he was the party leader. The Petitioners supplied a list of 59 names of county government public officers who had allegedly acted as agents of the 3rd Respondent and/or the party. Among these officers were Urbanus Musyoka and Kennedy Auma. While the name Urbanus Wambua Musyoka appeared on the list, Kennedy Auma's name did not. The 1st Petitioner also attached to her supporting affidavit the 3rd Respondent's list of tallying centre agents dated 29 July 2017 containing Urbanus Musyoka's name but with Kennedy Auma's name missing. Since the latter's name was not pleaded no evidence was admissible in that regard.

In response, the 3rd Respondent stated that he did not participate in the recruitment of agents; that they were recruited by the CEO of the party, Mary Mueni Mutuku. He denied committing any offence under section 15 (1), 2 & 3 of the Act. He testified he stated that he was not aware of any employee of the county who was an agent in the elections. He also denied that the names in the petition were of his agents. He stated that none of these were his agents. Form 37B for Mavoko constituency tallying centre had the name Urbanus Wambua Musyoka of ID card No. 20236674 having signed as tallying agent for Maendeleo Chap Chap party. He went on to state that Urbanus Wambua Musyoka was a common Kamba name. The chief officer Urbanus Wambua Musyoka did not testify to confirm or deny that he participated in the election as an agent, or at all. He did not testify to confirm or deny that the ID card he carries was number 20326674.

Citing the decision of the Court of Appeal in ***Mwangi & Another v Republic*** **[2004]2KLR 32,** the Court observed that in a case dependent on circumstantial evidence, each link in the chain had to be closely and separately examined to determine its strength before the whole chain could be put together and a conclusion drawn that the chain of evidence as proved was incapable of any other explanation or reasonable hypothesis other than that the accused was guilty of the charge. This could have been achieved if the Petitioners had sought the employee records of Chief Officer Urbanus Wambua Musyoka to ascertain whether or not he was the holder of ID Card No. 20326674. The Court also opined that there was a possibility that the Urbanus Wambua Musyoka who was the agent of the party at Mavoko carried a name similar to that to the chief officer at the county. Therefore, the Court found that it was not proved beyond doubt that the 3rd Respondent engaged as his agent a public officer employed by the county.

Fourth, it was alleged that the 3rd Respondent bribed voters to influence them to vote for him by ferrying them to polling stations and giving them money to vote for him. It was also contended that the 3rd Respondent had on various occasioned convened meetings of county government employees threatening them with the loss of their jobs if they did not vote for him, and that he arranged for each employee to receive KES 1,000 as an inducement to vote for him. Though the 1st Petitioner attached a bundle of affidavits marked "WN29" from the alleged employees, the documents were struck out and none of the alleged employees testified on these claims. The 1st Petitioner also contended that the 3rd Respondent gave loans of KES 500 and 1000 to traders with a promise that the rest would be disbursed when he was re-elected.

These allegations were denied by the 3rd Respondent, who testified that he had an ongoing project for small scale traders which preceded the election and was ongoing even during the EDR process, and therefore was unrelated to the election. Since no trader was called to testify to show that loans were given and were linked to the election, the 1st Petitioner did not witness the voter bribery or ferrying

of voters and no evidence of the alleged meetings convened for county employees was tendered, the allegations were not established.

The Petitioners also claimed the use of public resources for the purposes of campaigning contrary to section 14 of the Election Offences Act. The petition claimed that the 3rd Respondent used 10 county government vehicles to campaign during the election, and in evidence, the 1st Petitioner stated that videos of these vehicles were taken. However, she did not produce the videos and did not say that she personally saw the vehicles. No witness was called to say that he/she saw any of these vehicles used in campaign. The 3rd Respondent denied using public vehicles and maintained that the only vehicles he used were those of his friends and supporters as well as those rightly attached to him as governor. The Court therefore found that this claim was not proved.

The next issue for consideration was whether the election was marred with irregularities and illegalities and whether these substantially affected the validity of the election results. Before making its determination in this regard, the Court noted that the Petitioners had only called two witnesses: the 1st Petitioner and Christopher Mutinda, who was not an agent of the 1st Petitioner but employee of Machakos County Government and who testified to the 3rd Respondent's recruitment of county government employees to be election officials. The 1st Petitioner testified that she had cast her vote at Athi River Social Hall and thereafter went to the tallying centre to monitor the remainder of the election process. It was from there that she received reports of how the election was proceeding from her 1332 agents. She had a chief agent named Ngovi who was not called to testify. The Form 37 C declaring results for Machakos County was signed by Wiper Agent Margaret Nzioki, indicating that she was accepting the results as declared on behalf of the party. The 1st Petitioner denied that she was a party agent and asserted that she was the agent for the Wiper Party's woman representative candidate. It was the 1st Petitioner's testimony that her chief agent, Ngovi was present during the signing of the Form, but did not sign it. The Court found it curious that Ngovi was not called to testify, yet his affidavit was filed with the petition and he would have been the best placed to indicate the reasons for failure to sign. The Petitioners also did not indicate why they did not call him, leading to the presumption that had he been called, he would have given information adverse to the Petitioners' case. The Court also opined that Margaret Nzioki ought to have been called to explain why she conceded to results that her party and candidate later disowned. The Court was baffled by the decision of the Petitioners to only call 2 witnesses, yet they had filed 34 affidavits in total.

The Petitioners had also filed, simultaneously with the petition, an application for scrutiny of all the original Forms 37A, B and C and pursuant to that production, leave to use an aid or reading device to assist in distinguishing the fake forms from the genuine ones. However, the Petitioners did not prosecute the application for scrutiny and it was therefore considered abandoned. With that, the Court lost an opportunity to gain impressions of the validity of the process (see ***Philip Mukwe Wasike v James Lusweti & 2 Others [2013] eKLR***) and the Petitioners lost the opportunity to examine the copies of the results of each polling station in which the results of the election were in dispute. The Petitioners would also have had a chance to examine all the original Forms 37A in respect of the disputed polling stations against Forms 37B and finally against the results in the original Form 37C. The Court also lost the opportunity to test the allegations of irregularities and breaches of electoral law with the non-prosecution of the application for scrutiny. The Court pondered whether the Petitioners feared that the scrutiny would have confirmed the results declared in the gubernatorial election held on 8 August 2017.

On the specific irregularities, the Petitioners alleged that there were inconsistencies and anomalies in Forms 37B, in particular that the figures in respect of Mwala Constituency did not add up. The Petitioners questioned the authenticity and integrity of the results declared and asserted that there were discrepancies in the votes cast for the 1st Petitioner and the 3rd Respondent. It was their case that the difference in the total votes shown in Form 37B was 21, 423 votes while the actual difference ought to have been 8, 181 and therefore, the 1st Respondent relied on the wrong totals in declaring the 3rd Respondent as the winner.

In the view of the Court, the alleged inconsistencies and anomalies for the county, and for Mwala Constituency in particular could have been resolved by scrutinising all the result forms and by a recount of all the votes cast. The Petitioners did not call their chief agent to testify on the alleged inconsistencies, but chose to rely on an analysis prepared by one Dr Noah Akala on the results of the Machakos gubernatorial elections as posted on the IEBC portal, the Forms 37 A to C as well as other election materials. The analysis showed that no data was entered in respect of 109 polling stations, that 5 polling stations had a higher voter turnout than registered votes, that there was a mismatch in the total votes cast for 1157 out of 1332 stations and that on checking the Forms 37A received from the Petitioners' agents against the Forms 37A received from the IEBC portal and those from the 2nd respondent, there was revealed glaring differences and inconsistencies between the Forms ranging from the Presiding Officers and the deputy Presiding Officers not signing, mismatch in the tallies, and different Forms signed by different Presiding Officers and deputy Presiding Officers, all affecting 50,000 valid votes.

The Mwala Constituency Returning Officer and the Machakos County Returning Officer testified that all the results from the Forms 37A as tallied in Form 37B showed that the 3rd Respondent garnered 42, 629 votes (not 21, 369 as alleged) and the 1st Petitioner garnered 20, 846 votes. The Respondents denied any inconsistencies in the Forms or results and asserted that neither the Petitioners nor their agents had filed a complaint with the IEBC on the alleged inconsistencies and anomalies.

The Court considered it material that Dr Akala was not called to testify and that the alleged analysis was not produced in evidence. While Dr Akala swore an affidavit, indicating that the Petitioners intended to call him as a witness, the Petitioners did not indicate why he was not called to testify. The Court therefore found that the allegation was not materially substantiated.

On the claim that some of the Petitioner's agents were chased away in over 300 polling stations meaning that they were not issued with Forms 37A; that some stations did not have Forms 37A; that in at least 86 polling stations Forms 37B were filled without reference to Forms 37A and that results declared in Forms 37B could not be verified and their integrity ascertained, the Court noted that the 1st Petitioner testified that she was notified that her agents were denied access. This meant that she did not witness the denial of access or their being chased away. Since those who were chased away were not called to testify as to their being denied Forms 37A, the Court found that the claim was not proved. Similarly, the Court considered unproved the allegation that more than one agent for the 3rd Respondent was allowed into the polling stations.

On the allegation that some Forms 37B did not have security features, and that returns made using Forms 37B were not in the prescribed format contrary to Regulation 87 (1) (b) of the Elections (General) Regulations, the Petitioner contended that the deliberate use of inconsistent and different forms showed a lack of consistency and impartiality and it was intended to manipulate the results. The IEBC countered this by asserting that only Forms 37A had security features and as for Forms 37B

and 37C, the IEBC had provided an Excel format to be use to capture data and generate either Forms 37B and 37C. On the allegation that the results on Form 37C did not include a tabulation of results from all polling stations as in the prescribed format, the Court agreed with the Respondents that this issue was not pleaded and therefore it could not be raised during submissions. Further, the results on Form 37 C were acknowledged by Wiper Party. Since Forms 37A contained the primary results in a gubernatorial election, the results could not be varied by the constituency returning officer and any mistakes could not be corrected by IEBC officials. In any case, had the Petitioner pursued scrutiny, most of the issues raised herein would have been resolved.

While it was alleged that there were variances in the total votes cast for the six elections, the Petitioners did not call any witness to testify to the issue. There was also no evidence tendered to show how many people voted in each of the six elections or how the votes in the gubernatorial election differed materially from those in other elections. The Court therefore found that this allegation was not proved.

While the Petitioner also took issue with the fact that some Forms 37A were stamped rejected yet the votes were still counted, the Court also accepted the Respondents explanation that the stamping was done in error and in any case, the Forms had been signed by agents.

The Court also found unproved the allegation that some result forms were signed by non-participating agents as no agent was called to testify to this fact and in the majority of the forms the reasons for failure to sign by agents were given.

The Court also found unsubstantiated the evidence of alteration of some Forms 37A without countersigning and reiterated that any doubts as to the authenticity of the results would have been resolved by scrutiny.

The Court also evaluated whether the principles laid down in the Constitution were violated during the election. The Petitioners complained that the 1st Respondent had appointed over 300 county government employees as election officials; that the said employees were public officers then working under the 3rd Respondent as the incumbent governor; that the appointment was done with his approval in violation of the Code of Conduct for employees of the 1st Respondent and offended Article 81; that the independence of the 1st Respondent was compromised and therefore the election did not meet the requirement of being free and fair. PW2, the secretary of the Kenya County Government Workers Union Machakos branch and an employee of the county government testified that county employees had participated in the elections as the 1st Respondent's officials, which was an election offence. He however did not supply the list of employees. The 1st and 2nd Respondents denied the allegation and maintained that proper recruitment procedure was followed and the list of proposed officials was shared with political parties and displayed at the constituency offices, but no complaint was lodged. The 3rd Respondent denied knowledge that any county employee worked as an election official and stated that he was not involved in the recruitment of election officials.

The Court found that it was not shown by the Petitioners that the said employees did not act impartially or sought to influence the election. The Petitioners also did not call evidence to show where the said employees were deployed or how they compromised the election to favour the 3rd Respondent, if at all. The Court therefore found that the allegation of commission of election offences was not proved to the required standard as it was not proved that the said employees did anything to compromise the election or put in doubt the independence of the 1st Respondent in conducting the election.

On the other irregularities cited, the Court found that the Petitioner did not show that any voter was turned away; that any non-registered person voted; that more people than were registered voted; that any election official sought to influence any voter to vote in a particular way; that any candidate or agent was denied a recount of votes; that polling stations closed earlier than the time allocated or that there was violence, intimidation or campaign at any station. The Court therefore found that the petition lacked merit and the Machakos gubernatorial election was conducted in a free, fair, credible and transparent manner and results declared reflected the will of the people of Machakos county. The petition was therefore dismissed with costs of KES 5 million to the 1st and 2nd Respondents and KES 5million to the 3rd Respondent.

Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 Others Nairobi Election Appeal 8 of 2018

Court of Appeal at Nairobi
Coram: Ouko, (P), Warsame & Gatembu, JJ.A

Judgment Allowing Appeal

8 June 2018

Whether appeal properly before the Court in light of section 85A of the Elections Act which limits appeals to matters of law — whether election court erred in holding that election of governor Machakos county was conducted in accordance with the Constitution —engagement by IEBC of public workers in elections — verifiability of results declared by county returning officer — breach of section 15 Election Offences Act

Summary of facts

The appellants were dissatisfied with the decision of the trial judge dismissing the petition filed at Machakos. The appeal was centred on the question whether the Trial Court erred in ruling that the Machakos gubernatorial election was conducted in accordance with constitutional principles. While the Appellants raised 39 grounds of appeal, they were condensed into the following: that based on the evidence presented before the election court, it should have held that the appellants discharged their burden of proof in establishing that the election was not conducted in accordance with constitutional principles under Articles 81 and 86; that having regard to the appointment of county workers as returning and polling officers, the election was not in fact conducted by an independent body and was accordingly not free and fair; that in light of the election offences committed, the election court should have upheld the Appellants' plea that the 3rd Respondent was not eligible to contest the election, having knowingly aided in contravention of section 15 (1) of the Election Offences Act.

Issues for determination

The Court identified the following issues for determination: whether the appeal was properly before the Court in light of section 85A of the Elections Act that limits the mandate of the Court of Appeal to matters of law; and whether the election court erred in holding that the election of governor Machakos County was conducted in accordance with Articles 81 and 86 of the Constitution. Under the second issue, the Court addressed the question whether public workers were engaged by the IEBC in the conduct of the election and if so, whether the election was conducted by an independent body and administered in an impartial, neutral and accountable manner and was free and fair; whether the results as declared by the county returning officer were verifiable and whether the election court erred in rejecting the Appellants' claim that public officers acted as agents of the 3rd Respondent or his sponsoring political party in breach of section 15 of the Election Offences Act.

On the first issue, the Court assessed that since appeals under section 85A of the Elections Act were restricted to points of law, in order to succeed, an appellant had to go beyond asking the Court to re-assess the evidence and demonstrate that the assessment of the evidence by the Trial Court was wrong. Since the appeal raised questions whether the election court properly considered whether constitutional principles were violated during the impugned election; whether there were illegalities

and irregularities in the conduct of the election and if so whether the results were affected; whether the declaration of results was itself constitutional and valid; whether election offences were committed and the impact on the validity of the election, these issues were in the view of the Court within the province of "matters of law" and the appeal was therefore properly before the Court, in line with the pronouncement of the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***.

On the second issue, whether the trial Judge erred in holding that the election of governor of Machakos County was conducted in accordance with Articles 81 and 86 of the Constitution, the Court found that Articles 81 and 86 of the Constitution demanded that the IEBC be subject to the norms of fairness and to not act arbitrarily. Further, it was in furtherance of free and fair elections that no party be given undue advantage and that no party derives an unfair benefit by the act or omissions of the IEBC. On the question of employment of county employees as election officials, in respect of which the Trial Court had found that evidence of the 300 alleged officials was not adduced, the Court found that the Appellants had supplied particulars of 167 employees. However, it agreed with the Trial Court that the Appellants had failed to demonstrate how the engagement of the employees compromised the election. Furthermore, the Court could not find any law that barred the IEBC from engaging public officers as election officials. This ground therefore failed. Nevertheless, the Court urged the IEBC not to engage persons who might have conflicts of interest and who might undermine the independence and integrity of the election and encouraged the IEBC to adopt a policy of requesting particulars of employment to this end.

As regards the complaint of engagement of public officers as agents of the 3rd Respondent, which is an offence under section 15 (1) of the Election Offences Act,the Appellant had supplied particulars of county officials who were appointed to serve as agents of the 3rd Respondents. The 3rd Respondent had denied the allegations, maintaining that he had warned county officials against engaging in politics and asserted that the appointment of agents was done by the chief executive officer of the party, one Mary Mutuku. The Appellants had taken issue with one Urbanus Wambua Musyoka who had signed the Form 37B in respect of Mavoko Constituency on behalf of the 3rd Respondent's sponsoring party. The 3rd Respondent maintained that the name was a common one in the county and there was no proof that the Urbanus Wambua Musyoka who signed the form as an agent was the same county employee listed in the Appellant's affidavits. The Trial Court had ruled that the Appellants ought to have taken advantage of Article 35 of the Constitution to request information from the county as to whether the Urbanus Wambua Musyoka who had signed the Form 37B was the same one who was listed as the Chief of Public Works in Machakos County. In the absence of this, the Trial Court had ruled that there was no definitive evidence that it was one and the same person.

The appellate court found that the Trial Court had misdirected itself on the question of burden of proof by requiring the Appellants to confirm the identity of the said Urbanus Wambua Musyoka from the county employment records. Following the dicta of the Supreme Court in the ***2017 Raila Odinga*** case, the Court of Appeal ruled that the existence of Urbanus Wambua Musyoka as an agent was established by the Appellants and the burden then shifted to the Respondent to rebut that evidence. This was because the evidential burden rested on the person who would lose if no further evidence were adduced. The Appellants had therefore proved that Urbanus Wambua Musyoka, a public officer, had acted as an agent of the 3rd Respondent's party, contrary to the law.

On the verifiability of the election results, the Appellants contended that the Trial Court erred in holding that the county returning officer was not concerned with Forms 37A in declaring the

gubernatorial election and in finding that the allegation that the prescribed Form 37C was not used had not been pleaded and therefore no submissions could be made on it. It was their contention that the use of the prescribed form 37C containing results of all polling stations was mandatory and failure to make reference to Forms 37A in preparing the said Form 37C made the results unverifiable and unconstitutional.

The Respondents maintained that this issue had not been pleaded and that there was substantial compliance in the declaration of results since Form 37C was not in the prescribed format but rather an Excel spreadsheet. The Trial Court had found that the issue of validity of Form 37C was not pleaded, that the results had been acknowledged by the Appellants' sponsoring party, and that since Form 37A contains the primary results, they could not be altered by the constituency or county returning officer. Therefore, the returning officer does not deal with Form 37A in putting together results in Form 37C. Having reviewed the averments in the petition, the Court found that the complaints regarding the validity of Form 37C and the declaration of results were anchored in the petition and the Respondents had due notice of the grievances; further the judgment itself acknowledged that the Appellants' grievance was with the results as declared in Form 37C. The issue was therefore sufficiently pleaded.

As to whether the results as declared by the 2nd Respondent met the constitutional threshold of verifiability; whether the returning officer was under a duty to make reference to Forms 37A and whether the declaration ought to have been in the prescribed form. The Court evaluated the provisions of Article 86(c) of the Constitution, which requires the Returning Officer to openly and accurately collate and tally results from every polling station, section 39 (1) (B) of the Elections Act which requires the county returning officer to collate, tally and declare results from constituencies in the county using the prescribed form and Regulation 87 (1) of the Elections (General) Regulations which require the county returning officer to, *inter alia*, declare in Form 37C the votes cast for each candidate in each polling station.

The Court therefore agreed with the Appellants that the verification role included the task of verifying that the results delivered by the constituency returning officer in Form 37B were an accurate record of the results tallied, verified and declared at the respective polling stations and therefore the county returning officer had to be concerned with Forms 37A as the primary documents that capture the results at the polling station. Therefore, this requirement to declare results from each polling station was mandatory and failure to reflect the results from polling stations, as asserted by Mabeya J in ***Ahmed Abdullahi Mohamad & Another v Mohamad Abdi Mohamed & 2 Others*** **[2018] eKLR**, made the results unaccountable and unverifiable. The dictum of the Supreme Court in the ***2017 Raila Odinga*** case to the effect that the declaration form at the polling station was the primary document, and the basis for all subsequent declarations, therefore applied with equal force to gubernatorial elections. The Court was not persuaded that there was a distinction between the role of the national returning officer and that of the county returning officer in verification since both had to give primacy to the results as declared in the polling stations.

The Court disagreed with the Respondents' assertion that the complaint in respect of Form 37C was simply a matter of form since forms were an integral part of an election and the outcome depended largely on the information in the forms used in the electoral process. It found that had the form used by the returning officer contained all the requisite information, section 72 of the Interpretation and General Provisions Act would have come to the aid of the Respondents, as the substance would have been unaffected. Since the excel spreadsheet did not contain all the requisite information and no explanation was rendered for the failure to use the prescribed form, the election results failed the

constitutional test of verifiability and the declaration that the 3rd Respondent was duly elected had no legal basis. Consequently, the appellate court ruled that the trial judge had erred in holding that the election was conducted in accordance with the constitutional principles under Articles 81 and 86 of the Constitution.

On the question of whether the 3rd Respondent was ineligible to contest the election on account of having committed election offences as stipulated in section 15 (3) of the Election Offences Act, the Court ruled that the evidence presented before the election court did not establish to the required standard i.e. beyond reasonable doubt, that the 3rd Respondent knowingly aided in the contravention of the Election Offences Act, and therefore there was no basis for the declaration that he was not eligible to contest in the elections.

The appeal therefore succeeded in part with the result that the judgement of the Trial Court was set aside and a declaration issued that the Machakos gubernatorial election was not conducted in accordance with constitutional principles, thereby rendering the election void. The IEBC was directed to organise and conduct a fresh gubernatorial election for Machakos County in conformity with the Constitution, the Elections Act and the Regulations.

Alfred Nganga Mutua & Anor v Wavinya Ndeti & Anor Supreme Court Petition 11 of 2018 as consolidated with Petition 14 of 2018

Supreme Court of Kenya
Coram: Maraga, CJ & P, Ibrahim, Ojwang', Njoki & Lenaola SCJJ

Judgment Allowing Appeal

21 December 2018

Competency of appeal — scope of Court of Appeal's jurisdiction under section 85A of the Elections Act — burden and standard of proof in electoral disputes —whether appellate court paid undue regard to procedural technicalities contrary to Article 159 (2) (d) of the Constitution and nullified election conducted substantially in compliance with the law on elections on minor and immaterial irregularities not affecting election result.

Summary of facts

Two appeals were filed against the decision of the High Court nullifying the gubernatorial election in Machakos County and directing that the IEBC conduct a fresh election in strict conformity to the Constitution, Elections Act and Regulations. The first appeal, Appeal No. 11 of 2018, was lodged by Alfred Mutua, the 1st Appellant, while the 2nd, No. 14 of 2018 was lodged by the IEBC and Machakos County Returning Officer, the 2nd and 3rd Appellants respectively. By consent, the two appeals were consolidated and Appeal 11 became the lead file. The Court also granted conservatory orders staying the execution of the decision of the Court of Appeal pending the hearing and determination of the appeal.

The golden thread in both appeals was to fault the Court of Appeal for paying undue regard to procedural technicalities, nullifying an election conducted substantially in compliance with the Constitution and the law on elections based on unsubstantiated irregularities which did not affect the election result; misapprehending the burden and standard of proof in election petitions and for considering matters of fact contrary to section 85A of the Elections Act.

Issues for determination

The Court isolated the following issues for determination: whether the appeal as competent; whether contrary to section 85A of the Elections Act the Court of Appeal had misapprehended the issues of burden and standard of proof in electoral disputes; whether contrary to Article 159 (2) (d) of the Constitution, the Court of Appeal had paid undue regard to procedural technicalities and nullified an election which had been conducted in substantial compliance with the Constitution and the law on elections on minor and immaterial irregularities which did not affect the election result.

On the first issue, the Court found that since the fulcrum of the appeal was the verifiability of the election results under Article 86 (a) of the Constitution, the appeal was brought as of right under Article 163 (4) (a) of the Constitution and was therefore competent. The competency of the appeal was also impugned on format and piecemeal filing of the record of appeal. Relying on the decision in ***Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 Others [2014] eKLR,*** the Respondents asked the apex court to strike out the appeal on the basis that the application for stay had been filed without

substantive proceedings and the appellant had failed to give a concise presentation of the arguments supporting each of the grounds in the petitions of appeal. The Respondents also took issue with the appellants' submissions exceeding the maximum 15 pages, which in their view rendered the appeal incurably defective.

The Court distinguished the ***Yusuf Gitau Abdallah case*** on the basis that in that case the Petitioner had purported to appeal a High Court decision directly to the Supreme Court without any other proceedings filed or anticipated. Since in the present case the 1st Appellant's application for stay of execution as filed pending the filing of an appeal and the appeal was filed within the prescribed 30 days, the irregularity in the form of the petition and the piecemeal filing of the record of appeal, while to be frowned upon, were excusable under Article 159 (2) (d) of the Constitution. The appeal was therefore competently before the Court.

On the second issue, the Court reiterated the scope of appeals under section 85A which limits appeals to matters of law and the dicta of the Supreme Court in the **Munya** case which limited the engagement of facts by an appellate court to satisfying itself '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 on them'. The Court also reiterated that section 85A ought not be invoked to strike out appeals on account of inelegance in the drafting of the memorandum of appeal.

Having reviewed the record, the Court reached the conclusion that the Court of Appeal limited its engagement to the determination of whether the Trial Court properly evaluated the evidence on record to determine if the conduct of the election fouled the principles laid down in the Constitution; whether there were irregularities and illegalities in the conduct of the election and if so whether they affected the election results; whether the declaration of results was itself unconstitutional and whether or not the 1st appellant committed election offences, and if so, what impact they had on the validity of the election. Since the Court of Appeal did not veer into credibility of witnesses or the calibration of evidence and reach its own conclusion, it did not exceed its jurisdiction under section 85A of the Elections Act.

On the principles of free and fair elections as required by Article 81 of the Constitution, the Supreme Court agreed with the Court of Appeal that the Trial Court had erred in holding that the Respondents had not given particulars of the Machakos County employees that the IEBC had engaged in the conduct of the election. These particulars had been listed in paragraph 64 of the petition and the 1st Respondent's affidavit. The Court added that as determined by the COA, save for involvement in partisan politics, the IEBC's conduct of the election was not compromised in the absence of any law that prohibited public officers from being engaged as election officials or evidence of anything the employees of Machakos County government engaged in the election did or omitted to do that compromised their neutrality. The apex court, however, held a divergent opinion on the finding that the IEBC's engagement of Urbanus Wambua Musyoka as an agent of Maendeleo Chap Chap, the 1st Appellant's party, compromised its independence. It opted to consider this issue alongside burden and standard of proof.

On burden and standard of proof, the apex court noted that the COA had concurred with the Trial Court that the 1st Appellant's party had engaged Urbanus Wambua Musyoka as an agent; therefore, the 1st Appellant was absolved of culpability in the engagement of Urbanus. The COA had also faulted the Trial Court for creating doubt in the identity of Urbanus Wambua Musyoka by suggesting that the Respondents should have invoked Article 35 of the Constitution and obtained county government

records to corroborate the allegation that the said Urbanus Wambua Musyoka was an employee of Machakos County government. It ruled that by establishing that Urbanus Wambua Musyoka ID No. 20326674 was engaged by the 1st appellant's sponsoring party as its agent in the election and that he signed Form 37B in respect of Mavoko Constituency, the respondents had discharged their burden of proving that he was one and the same person as the Chief Officer of the Machakos County Government and with that burden had shifted to the 1st appellant to rebut that allegation, by referring to the County records which were at any rate under his control.

The Supreme Court disagreed. The apex court, noting that the allegation amounted to the commission of an election offence, proof of which was required to be beyond reasonable doubt, the Court of Appeal erred in finding that the said Urbanus Wambua Musyoka was one and the same person as the Chief Officer of the Machakos County Government. The Court found that beyond making this allegation in the petition and supporting affidavit, the 1st Respondent had not provided any proof of the allegation that the Urbanus Wambua Musyoka was one and the same as the Chief Officer Machakos County government. The Court asserted that a mere allegation could not be proof, leave alone proof beyond reasonable doubt. In the view, the learned trial judge was right in finding that the Respondents had not discharge their burden to the required standard, and there was no anomaly in the suggestion that to discharge their burden of proof, the Respondents should have invoked Article 35 of the Constitution, and obtained records from Machakos County verifying the allegation. Therefore, the CoA erred in basing its nullification of the 1st Appellant's election partly on that ground.

On the legality of the Form 37C used in the declaration of election results, the Court found that three issues arose with regard to the impugned form. Firstly, the appellants impugned the propriety of the Respondent's challenge of the form as in their view the issue was not pleaded. The Respondents maintained that the issue was pleaded. The Court found that the issue was pleaded in paragraphs 73 and 76 of the petition before the Trial Court and dismissed the Appellant's challenge on this ground. Secondly, the Court noted that a point was raised on the identification of the correct Form 37C used to declare results. The Respondents asserted that the correct form was the one contained on pages 2426-2446 of Volume 5 of the Record of Appeal in Petition 14 which omitted results from 145 polling stations. It was also urged that if the County Returning Officer had all Forms 37A during declaration, the results would have been transposed to Form 37C and a note made in the handover section.

The appellants on the other hand contended that the correct form was the one on page 2126 of Volume 5 of the record of appeal filed by the Respondents with no results from polling stations. The CRO maintained that she had all the Forms 37A when she was declaring the results. The Court noted that the Form 37C on pages 2426-2446 of Volume 5 of Petition 14 was not signed by either the CRO or the agents; the one on page 2126 on the other hand was signed by both. Therefore, the latter was the correct one as the 1st Respondent's agent would not have signed a form with erroneous results. The Court cited the Ghanaian decision in ***Nana Addo Dankwa Akufo-Addo & Others v John Dramani Mahama & Others Presidential Election Writ 11/6/2013*** in support of the positon that by appending his signature, the 1st Respondent's agent was serving notice to the principal and general citizenry of integrity in the conduct of the election. Since the Respondents had abandoned their application for scrutiny in the Trial Court, there was no basis to find the election unverifiable.

Thirdly, the Court was called upon to rule on the non-compliance of the impugned Form 37 C with the prescribed form and the effect of its use in the declaration of results. The Appellants conceded that the form was not in the prescribed format but argued that the omission was immaterial as Regulation 87 (2) (b) (iii) of the Elections (General) Regulations was *ultra vires* section 39 (1) (B) of the Elections

Act. They maintained that it was only in presidential elections that the national returning officer was required to tally and aggregate on Form 34 C results on Form 34A from the polling stations; the County Returning Officers were not required to concern themselves with the results on the "A" forms. The Respondents countered this by asserting that Regulation 87 (2) (b) (iii) was not *ultra vires* section 39 (1) (B) but an amplification. Since it was couched in mandatory terms failure to tabulate on Form 37C results from all polling stations must have resulted from not having Forms 37A from various polling stations accounting for 55,000-100,000 votes and therefore the omission was a deliberate cover up intended to mislead. They argued that the omission not only rendered data on results unverifiable but also affected the substance of the entire election.

The Court evaluated whether this omission was material and whether Regulation 87 (2) (b) (iii) was *ultra vires* section 39 (1) (B). Citing the Indian Supreme Court decision in ***Jyoti Basu & Others v Debi Ghosal & Others*** **(1982) AIR 983** to the effect that electoral law is a special jurisdiction and interpretation is confined within the parameters of the Constitution and relevant electoral statutes, the Court reiterated that electoral statutes had to be given their ordinary meaning and strictly interpreted to define the rights of parties. The Court noted that it was not in dispute that Form 37C did not comply with Regulation 87 (2) (b) (iii). The only issue was whether it was *ultra vires* section 39 (1) (B) of the Elections Act.

The apex court disagreed with the COA that the provisions of section 39 of the Elections Act with regard to the handling of results in presidential elections applied *mutatis mutandis* to other elections. Read as a whole, the section made a distinction between presidential elections and other elections. Section 39 (1) (B), which provided for the declaration of the results from gubernatorial, senate and woman representative to the National Assembly elections made no reference to polling stations but only mandated the declaration of final results from constituencies in the county. Therefore, the Court ruled that the CRO did not have to review the figures in the "A" forms but tally and collate figures in the "B" forms to the "C" forms. The COA thus erred in finding that the CRO must be concerned with Forms 37A since the requirement of results from polling stations in Regulation 87 (2) (b) (iii) was not contained in the parent statute. Given that legislation which conflicts with the parent statute is *ultra vires* (***Kenya Country Bus Owners' Association (through Paul G Muthumbi, Samuel Njuguna and Joseph Kimiri) v Cabinet Secretary for Transport and Infrastructure and 5 Others JR Petition No 2 of 2014 as consolidated with R v The Chairman National Transport & Safety Authority & 3 Others Miscellaneous Application 464 of 2013),*** Regulation 87 (2) (b) (iii) was *ultra vires* section 39 (1) (B) and was therefore null and void *ab initio.*

The Court therefore assumed it never existed and therefore the 3rd Appellant was right in ignoring it and omitting from the impugned Form 37C the column with results from polling stations. The Court evaluated the provisions of section 72 of the Interpretation and General Provisions Act and section 26 of the Statutory Instruments Act which stipulate that an instrument or document is not void by reason only of deviation from the prescribed form where the deviation has no effect on the substance of the instrument or document nor was it calculated to mislead. In light of section 72 of the Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, even if the Regulation was not *ultra vires*, the Court agreed with the appellants that the variation on Form 37C in this case was minor and the omission was inconsequential.

Contrary to the finding of the COA that the omission was not simply a matter of form but went to the verifiability of the result, the Court found that the COA erred for two reasons: firstly, that the transposition of the results onto Form 37 C would not be the only way of verifying the results of the

election, even if Regulation 87 (2) (b) (iii) were not *ultra vires*. The requirement of verification under Article 86(a) of the Constitution as read with Regulation 76 provides for verification of the votes cast at the polling station. Ballot papers are held up to indicate in whose favour they have been marked and counting is also done openly. The candidates and their agents are also given an opportunity to countersign the results forms. Since there was no indication, through failure to sign the results forms, that the results at the polling stations were disputed, the Court was unable to find that the deviation from the impugned Form 37C used by the 3rd Appellant to declare results affected the verifiability of those results. The Forms 37A from all the polling stations had also been deposited in court following an order in this regard. Given that the Respondents had abandoned their prayer for scrutiny, no doubt was cast on the results in those forms and there was therefore no basis for finding the results unverifiable. Unverifiability, the Court ruled, could not be pegged only on failure to transpose the polling station results on Form 37C and in the view of the Court, the Respondents had misapprehended verifiability as determined in the ***2017 Raila Odinga case.*** In any event, the facts were different from the ***Raila case*** since not all Forms 34 A were delivered to the returning officer making it impossible to verify the results.

Secondly, the Court of Appeal did not indicate whether or not the deviation on the impugned Form 37C affected the substance or was in any way calculated to mislead and if so, how. The apex court therefore ruled that even if Regulation 87 (2) (b) (iii) were not *ultra vires* section 39 (1) (B) of the Elections Act, the deviation on the impugned Form 37 C was immaterial.

In a Concurring Opinion, Njoki SCJ adopted a different line of reasoning on the effect of unpleaded matters. The learned judge disagreed with the majority finding that the allegations surrounding the impugned Form 37C were anchored in the petition and the other parties had due notice of the same. The learned judge endorsed the finding of the trial judge that in fact the allegations were unpleaded. The pleadings were in her view vague, and did not have a reasonable degree of precision alluding to the improper format of the said Form. She asserted that pleadings were not only binding on the parties but also on the Court and a court could not delve into unpleaded matters. It was therefore her conclusion that the matter was not properly before the Court of Appeal and ought not have been considered.

By a majority, the Court found that the Court of Appeal erred in holding that the Machakos County gubernatorial election was not conducted in accordance with constitutional principles thus rendering it null and void. The appeal was therefore allowed with the result that the judgment of the Court of Appeal was set aside and that of the High Court reinstated. The declaration of election results by the IEBC was affirmed. Costs would follow the event.

Joel Makori Onsando & 2 Others v IEBC & 3 Others Kisii High Court Election Petition 3 & 7 of 2017 (consolidated)

High Court of Kenya at Kisii
Coram: Omondi J

Ruling Striking Out Petition

6 December 2017

Withdrawal of petition — allegations against persons not party to a petition — effect of failure to comply with Rule 8 (1) of the Election Petition Rules — whether defects in a petition can be cured by Article 159 (2) (d) of the Constitution — jurisdiction over pre-election disputes — failure to enjoin deputy governor

Summary of facts

The Court consolidated Petition 7 of 2017, which had been filed by Justry P Lumumba Nyaberi, a candidate in the Kisii gubernatorial election, with Petition 3 of 2017, filed by two voters challenging the election of James Elvis Omariba Ongwae, the 3rd Respondent, as governor. Petition 3 was declared the lead file and Justry Lumumba became the 3rd Petitioner.

Consequently, the 3rd Petitioner informed the Court of his intention to withdraw from the proceedings and published the notice of intention to withdraw in the dailies as required by the rules. The application was fixed for hearing on 29 November 2017, but the 3rd Petitioner expressed his wish not to participate in the hearing and his presence was dispensed with. The 1st and 2nd Petitioners were allowed to proceed with their case with the understanding that since the 3rd Petitioner's case was to begin on 29 November 2017, no prejudice would be occasioned to them. However, the two Petitioners abruptly closed their case, and the Court allowed the 1st and 2nd Respondents to commence theirs. On 29 November 2017, the 3rd Petitioner appeared in court citing a change of heart and expressing a desire to continue with the petition. It was at this juncture that a preliminary objection was raised.

Counsel for the 3rd Respondent, Mr Omogeni SC urged that the petition was incompetent as it contained complaints against two individuals who were not named in the body of the petition, and no complaints were directed against the 3rd Respondent. He pointed out that some paragraphs of the petition referred to the 5th Respondent, whereas the 3rd Petitioner had only named 3 Respondents. Counsel also referred to allegations made against Royal Media Services and Standard Group, who the 3rd Petitioner cited for abetting offences committed by a Laban Chweya, was cited as the 3rd Respondent. The 3rd Petitioner also claimed that RMS had interfered with election results.

Counsel took issue with the fact that the 3rd Petitioner had referred to Charles Birundu and Laban Chweya in the petition, who were not named as respondents and who were members of Wiper Democratic Party. It was urged that the Court had no jurisdiction to deal with the petition as it made no allegations against the 3rd Respondent and further, it violated the election petition rules, making it incurably defective. Mr Omogeni urged that the petition be struck out for want of form as was the case in ***Martha Wangari Karua & Another v IEBC & 3 Others [2017]*** and that it could not be aided

by Article 159 (2) (d) of the Constitution since the Petitioner had wantonly defied the election petition rules and it would amount to giving effect to a petition that has an anarchical defect.

Counsel for the 3rd Petitioner, Mr Sonye, conceded that there was an error in the body of the petition but urged that it was a typing error and urged the Court to allow him to amend the paragraphs referring to Laban Chweya to replace them with the name of the 3rd Respondent-James Ongwae Omariba-but to leave the references to Charles Birundu intact.

The Court considered the objective of pleadings, which it cited as to give the adversary fair notice of the case against them and for this reason, parties are bound by their pleadings. It was therefore a rule of pleadings that a party could not adduce evidence or adopt a line of defence which was not set out in the pleadings. Pleadings have a bearing on the evidence to be presented, and the reliefs must flow from the pleadings. The response also flows from the pleadings and the pleadings eventually have a bearing on the scope of the judgment of the Court.

The Court also referred to Rule 8 of the Election Petition Rules which set out the details with which a petition must conform. It then proceeded to evaluate whether the defects pointed out by Mr Omogeni were of such a technical nature that to entertain them would result in not delivering substantive justice. While acknowledging the views of different courts to the effect that the requirements of the said rule were not mere technical requirements setting out procedural details and which spell out the form and content of petitions but are also substantive and go to the root and substance of the issues being contested, the Court took the view that each element of Rule 8 must be evaluated on its own merit to ensure that procedural justice is not deferred to in preference to substantive justice.

The Court considered each of the lapses cited by the 3rd Respondent and whether they could be salvaged under Article 159 (2) (d) of the Constitution. The Court was guided by the definition of 'procedural technicality' set out in ***James Mangeli Musoo v Zeetec Limited*** **[2014] eKLR** and was satisfied that introducing strangers to a petition and having a host of complaints against them while referring to one of them as the 3rd Respondent could not be procedural technicality. This was because the Respondents had crafted their responses and prepared their defences in line with what was raised and the 3rd Respondent simply had to deny the allegations since he was not mentioned in the grievances. This was a factual substantive lapse going to the root of the petition, and to ignore it and wish it away as a mere procedural technicality would be to make a mockery of legal sensibilities in an electoral dispute. To proceed with the complaint in that form would be a waste of time since it was clear whom the complaint was against.

The Court then assessed whether the petition could be cured by amendment. From a reading of section 76 (4) of the Elections Act and the decision of the High Court in the case of ***Ramadhan Seif Kajembe v Returning Officer Jomvu Constituency & 3 Others Msa Election Petition 10 of 2013,*** a petition may be amended with the leave of the Court either within the time for presentation of a petition under the Act or at any other stage during the proceedings where no prejudice would be occasioned to the other parties. In the present case, the Court was satisfied that the amendment sought would entirely change the character of the petition and occasion prejudice to the respondents and would require significant amendment of the responses. Allowing an amendment would be unfair and unjust to the Respondents and Article 159 (2) (d) of the Constitution could not come to their aid as the procedural omission impacted on the just determination of the dispute and would be tantamount to entertaining incompetent pleadings.

The Court also evaluated the various claims of breach of the Electoral Code of Conduct and the Media Code of Conduct by Royal Media Services, Standard Group. It was alleged that Laban Chweya and Charles Birundu had breached the former by issuing press statements yet they were members of the Petitioner's political party, namely WIPER. The impugned media stations were accused of covering unauthorised statements by the said Laban Chweya and Charles Birundu 12 hours before the election in violation of the Electoral Code of Conduct and abetting the said individuals by allowing broadcasts after the window for campaigning had closed. It was submitted by the Respondents that there were various for a where claims for damages for the above breaches could be lodged. The Court evaluated the provisions of the Constitution, the Political Parties Act and the Media Act concerning jurisdiction over pre-election disputes. Disputes regarding violations of the Electoral Code of Conduct fell within the jurisdiction of the IEBC under section 74 of the Elections Act and the Rules and Procedures for the Settlement of Disputes 2012. Secondly, the Media Council Act established a Complaints Commission to receive complaints and investigate allegations against journalists and media enterprises. Any aggrieved person could also lodge a complaint to the Commission under section 34 of the Act. The filing of the claim before the electoral court therefore meant that the dispute was before the wrong forum.

Further, the allegations made against the two individuals were made against them by the 3rd Petitioner as a candidate of the Wiper party, making the dispute one between party members. Under the Political Parties Act, disputes between party members were to be tabled before the internal dispute resolution mechanism of the party before being brought to the Political Parties Disputes Tribunal if need be. None of these avenues was ever exhausted.

The Court also evaluated the omission by the 3rd Petitioner to name the deputy governor of Kisii County as a respondent to the petition. The Court was urged to find the omission fatal to the petition and a breach of Article 50 of the Constitution. It was argued that Article 180 of the Constitution does not separate the election of the deputy governor from that of the governor and that if the governor ceased to hold office, the deputy governor would ascend to the governor's office. To hear the petition without the deputy governor would therefore create a constitutional crisis since an election could not issue orders nullifying the election of such a deputy governor. The Court was urged to take cognisance of the fact that the IEBC does not hold a separate election for the deputy governor and that since the deputy governor does not ascend to office without an election, he cannot be removed on a whim.

The Court, having evaluated Article 182 (2) of the Constitution, found that since the deputy governor was to assume office whenever a vacancy occurred in the office of governor for the remainder of the term, to condemn a deputy governor unheard and to expect him to vacate office in the event of the governor losing his position would be defeating the constitutional provisions and violating his right to be heard under Article 50 of the Constitution. The Court was emphatic that it is imperative that a person who is likely to be adversely affected by a decision be heard.

While cognisant of the jurisprudence of Ong'udi J in ***Kithinji Karanja v Martin Nyaga Wambora & 2 Others [2013] eKLR*** and Achode J in ***Hassan Omar Hassan v IEBC & Others Mombasa Election Petition 5 of 2017*** that the deputy governor was not a necessary party to a petition since their nomination was not in question and they could not survive if he governor were removed, the Court was persuaded by the reasoning of Thande J in ***Mwamlole Tchappu Mbwana v IEBC & 4 Others Malindi Election Petition 5 of 2017*** that the deputy governor is a necessary party to an election petition seeking to nullify the election of the governor and their non-joinder resulted in a fatal defeat. Consequently, the Court found that there were a myriad of defects with the petition to the extent

that an amendment or invoking Article 159 (2) (d) of the Constitution could not offer a cure. The Preliminary Objection was therefore upheld and the petition dislodged from the proceedings with costs not exceeding KES 500,000 being awarded to the Respondents.

Timamy Issa Abdalla v IEBC & 3 Others Malindi High Court Election Petition 3 of 2017

High Court of Kenya at Malindi
Coram: Chepkwony J

Judgment Dismissing Petition

2 March 2018

Whether election conducted in accordance with electoral laws — irregularities and illegalities —right to vote — whether irregularities and/or illegalities materially affected the results — burden of proof — reliefs — costs

Summary of facts

The Petitioner was a candidate in the Lamu gubernatorial election where he was defending his seat. He sought a declaration invalidating the election of the 3rd and 4th Respondents on the basis that the 1st and 2nd Respondents failed to conduct the same according to the Constitution and consequently, it was marred with irregularities which caused it to cease to be credible, free and fair and therefore alleged that it failed to meet the constitutional and statutory thresholds. He enumerated several instances which in his view entitled the Court to conclude likewise and invalidate the election and consequently nullify the declaration of the 3rd Respondent as the duly elected governor for Lamu County and call for a fresh election for the gubernatorial election in Lamu County as per the grounds set out in paragraphs 8 to 46 of the petition.

He sought several orders including an order for scrutiny and recount of votes in disputed polling stations listed in the petition; an order for scrutiny and recount of all rejected votes totalling 797 to establish the validity or otherwise of the rejection; a declaration that from the available evidence and anomalies cited in the petition, the Lamu gubernatorial election as not conducted in accordance with the mandatory provisions of the Constitution, the Elections Act and the Rules and Regulations thereunder and was therefore invalid, null and void; a declaration that the 3rd and 4th Respondents were not validly elected as governor and deputy governor respectively; an order that a fresh election be held for the position of governor and deputy governor respectively in Lamu County; in the alternative and upon the results of the vote scrutiny and recount, the Court be pleased to declare the Petitioner as the validly elected governor of Lamu County; the costs of the petition be awarded to the Petitioner and paid by all the Respondents and any other order that the Honourable may deem fit and just to grant. The Respondents maintained that the election was free and fair, having been conducted in accordance with the Constitution and that the result of the election reflected the will of the people of Lamu County. They denied all the allegations in the petition and prayed that the petition be dismissed with costs to the Respondents.

Issues for determination

The Court identified the following issues for determination: whether the Lamu gubernatorial election was conducted in accordance with the principles laid down by the Constitution, Elections Act and the Regulations thereunder; whether there were any irregularities or illegalities in the conduct of the Lamu County gubernatorial election which would have affected the outcome; whether any registered voters were irregularly and illegally deprived of their right to vote contrary to the Constitution, the election laws and Election (General) Regulations 2017; whether irregularities and/or non-compliance

with the law, if at all, materially affected the results; whether the Petitioner has discharged the burden of proof against the Respondents; what order and reliefs the Court should grant if any; and who would bear the costs of the petition and to what extent.

On the alleged deprivation of the right to vote, the Petitioner called witnesses who testified that their names were omitted from the voter register, the KIEMS kits were not functioning and the Presiding Officers opted not to use the manual register but rather to turn them away; that they were registered in certain polling stations but on voting day found their names appearing in other polling stations in the county and that they had applied to be transferred to other polling station but on polling day found that the transfers had not been effected.

The Court noted that the 1st Respondent had put in place an elaborate system that enabled any person to verify if they were duly registered as voters, including via SMS. Since none of the witnesses adduced evidence to confirm that they verified their voter status through inspection of the voter register, which was the only way that a voter could verify their status and not merely production of a voter's ID, no quality evidence was adduced to support this claim.

As for the unauthorised transfer of voters, the law provided for notification of the commission in the prescribed manner 90 days before date of the general election of the intention to transfer to another polling station, which procedure was to be effected using Form C. this would require a complainant to state the area they were registered in, that they inspected the registered and then applied for change and produce Form C to elicit a response from the IEBC. None of the witnesses who testified produced such a form or stated that they ever inspected the register to confirm their registration as voters. Even PW86 who adduced a letter addressed to the chairperson of the IEBC indicating that he was registered at Shella Primary but found his name appearing in Mkomani Ward during verification did not adduce evidence to show that he formally applied to be transferred to Shella Ward as per the Regulations. The IEBC asserted that he submitted his complaint too late in the day for any changes to be effected. The Court therefore found that the evidence deponed to in regard to this irregularity failed to meet the required standard of proof and was therefore rejected. The Court agreed with the Respondent that it was speculative for the Petitioner to presume that the 85 persons who alleged deprivation of their right to vote would have voted for him in view of the procedure of voting by secret ballot used in Kenya. The allegation therefore failed for want of proof.

The Court also assessed the alleged lack of impartiality, transparency, fairness, neutrality and improper influence on the part of the 4th Respondent. It was alleged that the 4th Respondent had an unfair advantage in the election, having previously served as a Constituency Returning Officer and Elections Coordinator in Lamu County. The Court noted that the Petitioner did not demonstrate how the 4th Respondent was involved in the voter registration, voter identification or tampering with the voter's register so as to demonstrate that he interfered with the election officials or process so as to affect the results of the election. The Court also noted that the Petitioner did not object to the participation of the 4th Respondent when he expressed his intention to vie for office either before the IEBC or before the PPDT. Since the 4th Respondent had a right to vie or participate in the political contest under Article 38 of the Constitution so long as he met the requirements under section 43 (5) of the Elections Act requiring a public officer intending to contest in an election to resign from such office at least 7 months before an election, which was done by the Respondent, no law was violated. The Petitioner also failed to show how contesting in an area where he had worked as a registration officer and Constituency Elections Coordinator with the persons charged with conducting the election had vitiated fairness, impartiality, transparency, neutrality and integrity of the said election. This

was because the Petitioner failed to show how the 4th Respondent influenced the said officials to the extent that the Petitioner suffered unfair advantage. The Court therefore found the allegations of the Petitioner with regard to bias and unfair advantage to have been based on unfounded fears and suspicions which could not be substantiated or relied on by the Court. The allegations were therefore rejected and subsequently struck out.

The Petitioner also took issue with the swapping of the Lamu East and Lamu West Constituency Returning Officers without gazette notice. He urged the Court to find that anything and everything that was done by the two officials in connection with the August 8th 2017 election declared illegal, null and void, since it vitiated the integrity of the election. DW2, who had been gazetted to serve in Lamu East, produced an email to the Regional Coordinator dated 28 September 2017 requesting to be transferred to Lamu West and which was allowed. Moreover, the Court found that the Petitioner did not, upon cross-examination, demonstration how the conduct or results of the election and the right of the voters were affected or vitiated in Lamu County. The claim was therefore found to be lacking in merit and dismissed accordingly. The fact that the change was not published in the Kenya Gazette did not vitiate it since the gazette notice is a formal expression of the existence of the notice or law in question; it does not constitute the notice or the law itself but rather is the official announcement of its existence or coming into force. The validity or otherwise of the law was therefore not resident in the Gazette but the persons tasked with the responsibility to make such law or issue notices in accordance with the law and the Constitution. The Gazette merely conferred a seal of authority to the existence of the notice or the law.

On the alleged use of pre-marked ballot papers at 10 polling stations marked in favour of the 3rd Respondent, the Petitioner and his witnesses that voting proceeded using ballots marked in favour of the 3rd Respondent in some polling stations, including Mapenya Primary School. The Presiding Officer in charge of this station also attested that she saw the pre-marked ballots. It was the Respondent's assertion that what were on the ballots were not marks in favour of any candidate, but rather printing marks which affected only the presidential election. It was further asserted that when the marks were noticed, a memorandum of understanding was entered into between the IEBC and party agents as to how to proceed with the affected ballot papers. The Respondents also asserted that for verifiability, the Lamu West Returning Officer was consulted before the agreement was entered into on the way to proceed. The Court also noted that at the end of voting and counting of votes, the agents present for all the candidates signed Form 37A for the said polling stations to confirm the results. The Court ordered a scrutiny for a limited number of polling stations including Mapenya Primary School which revealed that the voting was without incident and no Presiding Officer made any remarks regarding the presence of pre-marked ballot papers. Form 37A was also signed by agents and the Presiding Officer. There were no comments by agents, candidates or the Presiding Officers, with the only incident recorded being that the marks on the ballot papers were a result of printing ink. Since the Presiding Officer in charge of Mapenya Primary School Stream 1 had admitted during cross-examination that she and her team had agreed to make note of the marks and accept the ballot papers as properly marked notwithstanding the marks, after consulting the Lamu West Returning Officer, the Court deprecated her for swearing an affidavit to attest to a fact that she knew was not correct. The Court found that she had committed perjury and recommended that the matter be investigated by the County Director of Criminal Investigations in Lamu and thereafter referred to the Director of Public Prosecutions for appropriate action, recommendation or guidance if found culpable. The recommended action was in the view of the Court meant to protect the future integrity of the electoral system. The Court also held that the Petitioner had not proved that there were pre-marked ballot papers used and this ground was dismissed.

The Petitioner also alleged lack of transparency during the sorting and counting of votes. He contended that Presiding Officers in various polling stations did not display marked ballot papers during sorting and counting in breach of Articles 81 and 86 of the Constitution and the Elections (General) Regulations. In response, the Respondents' witnesses testified that Presiding Officers properly displayed the ballot papers. They also contended that the Petitioner did not specify the polling stations where the irregularity is said to have occurred, nor was there a report by any agent to this effect, rendering his evidence insufficient.

The Court therefore found that by signing Forms 37A by the various agents for the Petitioner without raising any complaint, it was made clear that the validity of the results was confirmed and the irregularity complained of had no impact on the outcome of the elections. The allegation was therefore not proved to the required standard and the same was dismissed.

The Court also assessed the allegation by the Petitioner that some people were allowed to vote without verification at Kizingitini polling station. This was said to be contrary to the Elections Act and the Elections (General) Regulations. The Respondents however contended that the Petitioner had adduced contradictory evidence, with one witness asserting that there was lack of verification, while the other alleging that an official had issued more than one ballot paper to a voter. The Court found that the allegation was not proved on the basis that the Petitioner was not present at the polling station and the two witnesses who testified gave contradictory information and while the matter had been reported to the police, there was no report of the outcome of the investigation at the time of the petition. This ground was therefore not sufficient to invalidate the election, as the impact on the election was not proved.

On the Petitioner's assertion that voters in need of assistance were not assisted as required by law, the Petitioner enumerated the particular polling stations he alleges this irregularity occurred and tendered several witnesses to this effect. The Petitioner contended that Presiding Officers either assisted voters in a rushed manner or declined to allow voters with signed ID cards to vote on the basis that they were literate. This was refuted by defence witnesses who testified that there was consensus reached with agents that voters with signed IDs would be regarded as literate and therefore not entitled to be assisted and further, that regulation 72 (3) entitled Presiding Officers to make such necessary and respectful inquiries into a voter's IQ as to establish that he or she qualifies to be an assisted voter. Moreover, contrary to the allegation that Jubilee agents were the only ones allowed to witness the assisted voting, the Respondents asserted that only two agents were allowed to witness at a time due to limited space at the voting booth. The Court also found incredible the Petitioner's testimony that assisted voters were being directed to vote for the 3rd Respondent instead of the Petitioner since there were other symbols that a voter could use to identify their candidate of choice other than the name and further, it was unlikely that the Petitioner could be mistaken for another candidate being the immediate former governor. Since the Petitioner did not call assisted voters to testify but agents who in any case had signed Forms 37A without objection, the Court found that the allegation was not proved.

The Petitioner also took issue with the number of rejected votes, cited as 797 votes, many of which he asserted were marked in his favour. The irregularity was said to have occurred at Mapenya Primary School and Kizingitini polling station. The Court ordered a scrutiny to verify these allegations but it was noted by the Deputy Registrar that none of these allegations were recorded on Form 37A. Moreover, no objection was raised by the Petitioner's agents during the process of counting. The allegation was therefore dismissed.

On the alleged use of Form 36B instead of 37B to declare the gubernatorial election results, the Petitioner took issue with the fact that the Returning Officer at Lamu East Constituency collated and declared results in Form 36B which is intended for results for Member of the National Assembly results. This, in the view of the Petitioner, rendered the results null and void. It was also the Petitioner's case that the 1st and 2nd Respondents did not dispute this irregularity; that they admitted that Form 37B was destroyed in the printer. The Petitioner also attacked the form by stating that it lacked security features.

The Court ordered a scrutiny of the Forms 37A in Lamu East on its own motion. In all 40 polling stations, it was established that the Presiding Officers, agents and parties signed the forms without noting any negative comments while others affirmed that the election was free and fair. The numbers tallied during scrutiny were the same ones reflected in the said form 36B. The Court concluded that the scrutiny report revealed very minor errors in very few aspects which in fact did not affect the outcome of the election as recorded on Form 37As in the polling stations where the scrutiny was conducted.

Finally, the Court assessed the Petitioner's allegation of variance in vote tallies for various elective positions. The Petitioner contended that there were discrepancies in the total vote tally for the various elective positions i.e. presidential, senatorial, gubernatorial and women representative in Lamu County. He and his witnesses testified that some voters were given more or less ballot papers which caused the disparity in the number of voters who cast their votes for each elective post. In turn, the Respondents maintained that the presidential election had an extra polling station being Hindi prison which had 17 registered voters who voted only for the presidential position; that the stray votes for different elective positions were not reflected in Forms 37A and that there was a difference in the number of rejected votes between various elective posts. They contended that if indeed some voters had been issued with more or less ballot paper than they were entitled to, this was a criminal act which ought to have been reported to the police. However, there was no evidence to this effect adduced by the Petitioner's witnesses. The Court found the Respondents' explanation that the discrepancy could have been caused by stray ballots, rejected votes or even errors in the recording of votes cast in the statutory forms convincing. Moreover, the number of affected votes was not specified to enable the Court to determine whether it affected the result since the Petitioner did not call those who were not issued with ballot papers to confirm this allegation especially given that they were deprived of their right to vote. The Court therefore found that the Petitioner's evidence was not substantiated effectively.

The Court declined to address itself to allegations of ejection of agents from polling stations and tallying centres; issuance of excess or less ballot papers; collation and tallying issues; chaos and commotion in some centres; presence of unauthorised persons in polling stations and tallying centres; abdication of duty by IEBC officials; claims of discrimination against voters on the basis of tribe and voter bribery since they were not pleaded.

Having considered the evidence on every issue raised in the petition, the Court found that the Petitioner raised irregularities or malpractices or breaches which were not substantive enough to affect the integrity of the process or results of the election of the governor Lamu County to result in nullification of the same. The Petitioner having failed to discharge the burden of proof with respect to the allegations set out in the petition by failing to demonstrate how the irregularities and malpractices affected the election process or results, the petition was dismissed with costs of KES 6 million to the 1st and 2nd Respondents and KES 6 million to the 3rd and 4th Respondents.

Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others Mombasa Election Appeal No. 4 of 2018

Court of Appeal at Mombasa
Coram: Visram, Karanja & Koome, JJ.A

Judgment Dismissing Appeal

9 August 2018

Extension of time to file application — compliance with Election Appeal Rules — appeals on mixed facts and law —impact of unqualified advocate on appeal d documents — application of section 83 of the Elections Act —burden and standard of proof — whether irregularities and illegalities affected results of election —costs

Summary of facts

The appellant challenged the decision of the High Court dismissing his petition challenging the election of the 3rd and 4th Respondents as the governor and deputy governor of Lamu County respectively. Before the appeal could be heard, an application was filed by the 3rd and 4th Respondents challenging the competency of the appeal. At the direction of the Court, the application and substantive appeal were canvassed together.

The application sought orders that the Court be pleased to extend time within which the 3rd and 4th Respondents were supposed to file the application and that the application be deemed as properly filed within the Court's timelines and that the Notice of Appeal dated 6 March 2018 be struck out. The first prayer was anchored on the ground that the application had not been filed within 7 days of service of either the Notice or Record of Appeal as required by Rule 19 of the Election Appeal Rules. Nevertheless, the 3rd and 4th Respondents urged that the COA was clothed with discretionary power under Rule 17 to extend timelines prescribed under the Election Appeal Rules.

The second prayer was anchored on the ground that the Notice of Appeal was filed in the election court as opposed to the COA contrary to Rule 6 of the Election Appeal Rules. Moreover, the Notice of Appeal indicated that it was against 'the whole judgment' of the election court, thus calling upon the Court to inquire into issues of both fact and law, contrary to section 85A of the Elections Act. The net effect of this, it was argued by the 3rd and 4th Respondents, was to render the Notice valid and to divest the Court of jurisdiction under section 85A. Moreover, it was contended that the Notice and Record of Appeal were drawn by Mr Aboubakar, who at the time did not hold a current practising certificate since his status was reflected in the LSK advocates search engine as 'inactive'.

The appellant opposed the application on the basis that it was a non-starter, having been filed out of time contrary to Rule 19 of the Election Appeal Rules and that Rule 17 could not be invoked to extend time as sought by the 3rd and 4th Respondents.

Mr Aboubakar deposed that he had applied for and paid for his current practising certificate for the year 2018 in time and had sent the payment to the LSK and he attached a letter dated 15 May 2018 issued by the LSK to the effect that he had been certified to act as an advocate in 2018. However, by

a subsequent letter dated 24 May 2018 annexed to the 3rd Respondent's further affidavit in support of the application that Mr Aboubakar had applied and paid for his practising certificate on 27 April 2018 and it was from that date that he was certified to practise as an advocate.

The Appellant also deposed that the Notice of Appeal was filed both in the election court and in the Court of Appeal. He argued that in any event, the effect of the non-compliance as alluded to by the 3rd and 4th Respondents lay within the Court's discretionary remedy and urged the Court not to strike out the appeal since it would be tantamount to denying him the right to be heard.

Counsel for the 3rd and 4th Respondents submitted that the COA had unfettered discretion under Rule 17 (1) of the Election Appeal Rules to either extend or reduce timelines set under the Rules for sufficient reason. He also asserted that under Rule 5 of the Election Appeal Rules, the COA is empowered to determine the effect of non-compliance with the said Rules and that the Court could exercise its discretion to extend time within which the 3rd and 4th Respondents could file the application since Rule 19 was not couched in mandatory terms. It was argued that the fact that the application was raising a jurisdictional issue was sufficient to warrant the Court to exercise its discretion in favour of the said respondents.

It was argued that the Notice of Appeal was rendered invalid by being filed in the election court and that being the primary document in an appeal, it also had the effect of nullifying the Record of Appeal which was subsequently filed. It was contended that in the absence of a valid Notice of Appeal, there was no proper basis upon which the Court's jurisdiction could be anchored. It was also argued that the Notice of Appeal was incapable of being cured by Article 159 (2) (d) of the Constitution and more so, Rule 6 was couched in mandatory terms.

On the question of the counsel for the Appellant's practising certificate, it was submitted that since a practising certificate took effect on the date of issue, Mr Aboubakar did not have a valid practising certificate and that the fate of the appeal was that it ought to be struck out in its entirety.

In support of the application, it was contended that the Court's power to enlarge time under Rule 17 was circumscribed so that the COA could not extend timelines set by the Constitution or Elections Act but in the present case, the Court could extend time since it was not prescribed by the Constitution or the Elections Act. It was also argued that it would not interfere with the timelines for disposing of an election appeal as stipulated under section 85A of the Elections Act, and that the application raised fundamental issues which went to the validity of the proceedings before the Court. The decision of the COA in ***Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 Others*** **[2017] eKLR** was cited in support of the prayer for extension of time since in that case the COA had extended time for the filing of a Notice of Appeal.

In the view of the COA, the central thread running through the application and the Appellant's opposition was the effect of non-compliance with the Election Appeal Rules. The Court opined that the effect of non-compliance could only be determined on a case by case basis being guided by the overarching objectives in the administration of justice that lay more emphasis on substantive justice. Rule 5 of the Election Appeal Rules provides that the effect of any failure to comply with the Rules was a matter for the determination at the Court's discretion subject to the provisions of Article 159 (2) (d) of the Constitution and the need to observe the timelines set by the Constitution or any other electoral law.

The Court ruled that it was clothed with discretionary power under Rule 5 of determining the effect of 'any' non-compliance. The Court therefore rejected the assertion by the 3rd and 4th Respondents that the Court could only exercise its discretion where the Rule which is the subject of non-compliance is couched in permissive as opposed to mandatory terms. However, just like any other judicial discretion, it ought not to be exercised capriciously or arbitrarily but judiciously, while paying regard to the overriding objective and the constitutional timelines for the resolution of electoral disputes.

Having regard to the above-cited principles, the Court found it prudent to extend time for the filing of the application. This was because it challenged the competency of the appeal before the Court, which extended to the jurisdiction of the Court to entertain the appeal. The Court asserted that it was common ground that an objection on jurisdiction could be raised at any time and that the minute such an objection was raised, the Court ought to consider it before embarking on the merits of the matter before it.

The Court assessed that the validity of the appeal was attacked on three fronts: firstly, that it did not comply with Rule 6 of the Election Appeal Rules, hence it was invalid. It was undisputed that the Notice of Appeal was filed in the election court contrary to Rule 6. As for the effect of the non-compliance, the Court was persuaded that Rule 5, despite being couched in mandatory terms, entitled the Court to exercise its discretion to invoke the jurisdiction of the Court. The effect of non-compliance with Rule 6 was a matter to be assessed in the circumstances of the case and in the present case, the Notice of Appeal was lodged simultaneously in the election court and in the Court of Appeal within the requisite time frame. This mitigated the anomaly of filing in the election court. Moreover, no prejudice was occasioned to the Respondents since they were served timeously with the Notice and therefore the Court exercised its discretion to save the Notice as opposed to declaring it invalid.

Secondly, the Notice was challenged on the basis that it raised issues of fact, which fell outside the Court's jurisdiction as stipulated under section 85A of the Elections Act. This was because Notice of Appeal indicated that the appellant was appealing against the whole judgement of the election court, which in the view of the 3rd and 4th Respondents raised issues of facts since the whole judgment was based on facts and law.

The Court noted that the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR*** determined what amounts to a point of law under section 85A. Whether the manner in which the appellant had crafted the Notice of Appeal divested the Court of jurisdiction under section 85A had also been considered in several COA decisions, and two schools of thought emerged. The first school of thought held that where an appeal is purportedly anchored on mixed grounds of law and fact, it is unsustainable and was exemplified by the decisions in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others*** **[2018] eKLR (Mohamed Abdi Mahamud case),** ***Apungu Arthur Kibira v IEBC & 2 Others*** **Kisumu Election Petition Appeal No. 11 of 2018 &** ***Lesirma Simeon Saimanga v IEBC & 2 Others*** **[2018] eKLR (Lesirma case)**. The second school takes a more liberal approach which involves looking beyond the craftsmanship of the Notice of Appeal or grounds of appeal to determine whether there are points of law raised and address its mind on the same. Such was the approach taken in ***Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 Others*** **Mombasa Election Petition Appeal No. 1 of 2018 as consolidated with Election Petition Appeal No. 3 of 2018 &** ***Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others*** **[2018] eKLR (Babu Owino case)**.

The Court considered the latter approach more persuasive and it resonated with the approach taken in the ***Wavinya Ndeti*** appeal, that section 85A should not be used as a blanket 'no entry zone' to keep the Court from considering grounds of appeal simply because the memorandum of appeal referred to errors of facts and law. The Court agreed that it would be imprudent to shut out a litigant purely because of inelegance in drafting since justice must prevail at all times and it therefore behoves the Court to undertake a delicate examination to ensure that appeals are not rejected outrightly and without proper examination. The Court also noted that there are times when points of law are difficult to separate from factual determination and since the line is opaque, circumspection is necessary. The Court declined to strike out the Notice of Appeal without evaluating each of the grounds of appeal.

On the question of Mr Aboubakar's qualification, and the validity of the Notice and Record of Appeal drawn by a person alleged not to have a valid practising certificate, the Court considered it settled that the propriety of a legal document could not be called into question simply on the ground that it was drawn by a person who did not hold a valid practising certificate at the time. This was the finding of the Supreme Court in the case of ***National Bank of Kenya Ltd. v Anaj Warehousing Ltd*** **[2015] eKLR** and codified in the 2017 amendment to the Advocates Act which introduced section 34B (2), upholding the validity of such documents. It was noteworthy that while Mr Aboubakar did not have a valid practising certificate at the time of drawing the Notice and Record of Appeal, he did have the same when he first appeared before the Court. The Court found that all in all, the 3rd and 4th Respondents' application lacked merit and it was dismissed. The Court proceeded to determine the substantive appeal.

The appeal was premised on 41 grounds. The Court began by addressing the question of jurisdiction which was raised again by the Respondents. The Court found, as was stated by the COA in Kisumu in ***Cyprian Awiti & Another v IEBC & 3 Others Election Petition Appeal No. 5 of 2018***, that what amounts to a point of law is not the appellation given by the party raising it. Having restated the dicta of the Supreme Court in the ***Munya*** case as to what amounts to points of law, it asserted that it was up to the COA to look at the 41 grounds of appeal to determine which of them raised issues of law and consider them. In the view of the Court, the points of law raised could be summarised as follows: Whether the learned Judge erred in applying Section 83 of the Elections Act conjunctively; whether the learned Judge erred in her interpretation and application of the burden and standard of proof in an election dispute; whether the learned Judge erred in concluding that the election was conducted in accordance with the principles laid down in the Constitution, Elections Act and Regulations made thereunder; whether the learned Judge erred in finding that the illegalities and irregularities set out and established by the appellant did not affect the results of the election; and whether the learned Judge erred in the exercise of her discretion by capping the costs at KES12,000,000.

On the first issue, the Court ruled that the applicable test under section 83 was the disjunctive standard established by the Supreme Court in the ***2017 Raila Odinga case***. The Court stated the trial judge had correctly appreciated the standard of invalidity.

The second and third issue were addressed together as the determination of the question of burden of proof would determine whether the election was conducted in accordance with the Constitution. This entailed an evaluation of the alleged irregularities and illegalities that it was contended the trial judge did not take into account. On the question of denial of the right to vote, the Court held that it could not reopen issues of fact as it was beyond the jurisdiction of the appellate court to step into the shoes of the Trial Court and make findings on factual issues.

On the allegation of lack of impartiality and transparency based on the 4th Respondent being an employee of the 1st Respondent prior to the election, the COA agreed that the burden of proving that the participation of the 4th respondent placed the appellant at a disadvantage lay with him. Since the trial judge held that the perceived lack of impartiality had not been established and was based on mere suspicion and unfounded fear, the COA declined to interfere with this finding of fact. A similar finding was made on the issue of swapping of deputy constituency returning officers, the use of pre-marked ballot papers, variation of votes cast in different elective seats and the alleged failure of Presiding Officers to facilitate assisted voters and display votes to agents during the sorting out and counting of votes. On each of these issues, the burden lay with the appellant to prove those allegations. It is only after the appellant had made out a *prima facie* case that the respondents would have been required to rebut the same as stated in ***John Lokitare Lodinyo v Independent Electoral and*** **Boundaries Commission & 2 Others Kisumu Election Petition 24 of 2018**. The Court therefore rejected the contention that an adverse inference ought to have been drawn by the failure of the 1st Respondent to call the Presiding Officers from the identified polling stations.

On the question of voters voting without verification, the Court noted that the evidence led by the Appellant was contradictory and it was unclear how many voters had been cleared without verification. While it was undisputed that a polling clerk by the name Nafia was arrested at Kizingitini Secondary School, no evidence was tendered as to the outcome of the police investigations of the incident. The trial judge was therefore not to be faulted for finding that the allegation had not been proved.

On the use of Form 36B to collate results for Lamu East Constituency, while in the Appellant's opinion the use of the wrong form nullified the results, the learned judge had found that the use of Form 36B did not affect the results for the said constituency. The Court also found that this was a finding of fact and it could not interfere with it. Moreover, section 26 of the Statutory Instruments Act was clear that deviation from a prescribed form did not render it void so long as the deviation did not affect the substance thereof or was not calculated to mislead.

The Court also addressed the allegation that the Court did not address the scrutiny report. The Court considered the allegation untrue since it was clear the trial judge had referred to it in the judgment. The fact that the learned Judge's observation or conclusion on the said report did not conform to what the appellant thought did not negate the fact that she took the report into consideration. While it was alleged that some Form 37As were missing and others illegible, this was not proved during scrutiny. The allegations were therefore unsubstantiated.

All in all, save for the issue of costs, the appeal was found to be without merit and dismissed.

On the issue of costs, the COA was guided by its dicta in the ***Martha Karua*** appeal as well as ***Dennis Magare Makori & Another v The Independent Electoral and Boundaries Commission & 3 Others Kisumu Election Petition Appeal No. 22 of 2018,*** to the effect that the Court was to be guided by the principles of fairness, justice and access to justice and costs should not seek to punish an unsuccessful litigant. The Court also bore in mind costs awarded both in election courts and appellate courts in comparable disputes, and found that the award of KES 12 million was excessive, even bearing in mind the number of witnesses who testified, the complexity of the matter and the time involved in the preparation for the petition. The COA ruled that the trial judge's discretion was not exercised properly and the costs of KES 12,000,000 were capped at KES 3,000,000 to be paid equally between the 1st and 2nd Respondents on one part and the 3rd and 4th Respondents on the other.

Josiah Taraiya Kipelian Kores v Joseph Ole Lenku & 4 Others Kajiado Election Petition 2 of 2017

High Court of Kenya at Kajiado
Coram: Onyiego J

Judgment Dismissing Petition

25 January 2018

Effect of non-compliance with the Constitution and electoral laws on the validity of the results — illegalities and irregularities — validity of 1st Respondent's election — power of an election court to nullify results — reliefs and costs

Summary of facts

The petition challenged the gubernatorial election in Kajiado County. The 1st Respondent was declared the winner by the 4th Respondent. Dr David Ole Nkedianye filed a petition on 7 September 2017 challenging the election on the grounds that the election was marred with irregularities and illegalities and that the elections were not conducted in a free and fair manner as contemplated by the Constitution and related legislation. The allegations were denied by all the Respondents who maintained that the election was conducted in a free and fair manner and in accordance with the Constitution. When the matter came up for pre-trial conference, the original Petitioner sought leave to withdraw the petition, citing unity and the need to enhance cohesion among the people of Kajiado County. The application for withdrawal was consequently filed. Five days later, the 1st Petitioner filed an application seeking to substitute the original Petitioner pursuant to Rule 24 of the Election Petition Rules asserting that the election petition could not be defeated or compromised at the altar of personal interest by the original Petitioner who had in any case defected to Jubilee Party. The application was allowed with the substituting Petitioners directed to deposit the requisite security for costs and file further supporting affidavits in support of the petition.

The Petitioners filed an application seeking preservation and scrutiny of all election materials, submission of Forms 37A & 37B and all SD cards to the Deputy Registrar for safe custody. However, this application was compromised by consent, with the prayer for scrutiny being abandoned. Instead, parties by consent agreed on the submission to the Deputy Registrar for safe custody of 19 SD cards in respect to the disputed stations, Forms 34B from all Kajiado Constituencies, original Forms 35B, 36C, 37C and 38C and that the Petitioners to submit a list of the 670 polling stations reflected in Dr.Noah Akalas's affidavit sworn on 6th September 2017.

During the pre-trial conference, the Petitioners elected to give their testimony without calling any witness. The 1st and 2nd Respondents proposed to call three witnesses besides their testimony and the 3rd, 4th and 5th Respondents indicated that they were to call one more witness in addition to the evidence of the 4th and 5th Respondents. Parties filed a joint list of 10 issues for determination but the Court reduced the same to six.

Issues for determination

Whereas the parties settled on a joint list of issues for determination, the Court isolated the following six: whether the Kajiado gubernatorial election was conducted in accordance with the Constitution, electoral laws and regulations; whether the Kajiado County gubernatorial election was conducted in

a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and electoral laws; whether the non-compliance with the Constitution and electoral laws affected the validity of the results; whether the illegalities and irregularities complained of affected the results; whether the 1st Respondent was validly elected as governor and if not, whether the Court can nullify the results and whether the Court could issue any other relief, including costs.

Since the first three issues were intertwined, the Court opted to deal with them together. The Court reviewed the allegations by the Petitioners of manipulation of electronic results, where the Petitioners relied on an unsigned report of Dr Noah Akala synthesized from the Supreme Court order of partial scrutiny and access to the IEBC server. The 3rd to 5th Respondents took issue with the document since it was unsigned, undated and did not contain the name of the author, and further, the alleged expert was not called to testify, contrary to section 35 of the Evidence Act. The Court agreed that found that the scrutiny exercise ordered in the presidential election petition and the analysis whose author had not been ascertained neither had he testified was not applicable to the petition since there was no scrutiny ordered after the Petitioners abandoned that prayer.

In respect of the allegation that five polling stations had more votes cast than registered voters, i.e. Ongata Rongai, AIC Primary School, Namunyak Primary School, Noonkopir Secondary School and Olchorro Primary School, the Court perused Forms 37A and Forms 37 B supplied by the 3rd to 5th Respondents. It found that there were no polling stations which registered more votes cast than registered voters. The Petitioners admitted upon cross-examination that they had never seen the Forms 37A and 37B and that they did not know the difference between a polling centre and a polling station. The Petitioners had simply relied on Dr Akala's analysis which was inadmissible. This ground therefore failed.

The Petitioners had also alleged that 64 out of 797 polling stations with a total of 32,889 registered voters did not have results. Rather than list the 64 impugned stations, the Petitioner listed 15 and stated that these were among others that did not have results. They merely relied on Dr Akala's analysis. On the other hand, the 1st and 2nd Respondents adduced a breakdown of the streams in the 15 listed stations together with the registered voters and votes cast. The 4th Respondent also attached Forms 37A from the 15 listed polling stations together with Forms 37C to confirm that results from all 797 polling stations were declared. The Court therefore ruled that the allegation was not proved.

The Petitioners further claimed, again placing reliance on the Supreme Court analysis, that results from 167 polling stations in Kajiado North Constituency were illegally deleted, hence manipulating results in favour of the 1st Respondent. The 3rd to 5th Respondents filed a detailed response explaining the circumstances under which results from less than 20 polling stations were deleted on 15 August 2017. The Returning Officer Kajiado North Constituency, who testified as DW7 denied that there were 167 deletions and explained that she had by mistake uploaded Forms 37A from 20 polling stations and sent them to the National Tallying Centre (NTC) instead of archiving them by Electronic Data Management Systems (EDMS), which testimony was corroborated by DW8, the 3rd Respondent's IT expert. DW7 asserted that the exercise had no impact on the gubernatorial election result as the same had been announced on 10 August 2017.

The Court found that the Petitioners did not tender any proof as to whether the deletions were done before or after the declaration of results. The Court was therefore constrained to accept the explanation offered for the deletions by the 3rd to 5th Respondents. In any case, section 39 (1) (C) only required electronic transmission of presidential election results, hence the error was apparent. The

ground therefore failed. In any event, the Petitioners were at liberty to report DW7 for commission of an election offence by an IEBC official under section 6 (j) of the Election Offences Act. Having considered all the allegations of violation of the Constitution and electoral laws, the Court found that the Petitioners had not demonstrated a violation of their rights under Articles 38 (2) and (3) of the Constitution or non-compliance with Article 86 by transmission of unverified results. The Petitioners also failed to prove that the voting method used was not simple, accurate, verifiable, secure, accountable or transparent.

As to whether irregularities and illegalities complained of affected the validity of the results, the Petitioner raised queries concerning the validity of five Forms 37B. Some of the forms were not stamped and did not have handover notes. The Petitioners also took issue with the fact that some were not signed by party agents. Some of the Forms, such as the one relating to Kajiado South did not have security features and the Forms 37B in respect of Kajiado West and Kajiado East did not have handover notes. The Court noted that while there were irregularities in the forms, there was no dispute as to the results as collated in the forms. The explanations given by the Returning Officers as to the disparities between the forms used and the statutory forms were considered plausible. The Court also noted that no one challenged the results as declared using Forms 37A. The Court also noted that failure to fill in the handover section of the Form was not fatal. This ground therefore failed.

With respect to anomalies and discrepancies in Forms 37A, the Petitioners alleged that in respect of 15 polling stations, there were no signatures by the presiding and deputy Presiding Officers on Forms 37A; that 26 polling stations contained altered figures and results; that 6 forms did not have an IEBC impression; that 3 forms bore the IEBC rejected stamp; 5 forms were not stamped by any party agent; 14 forms were signed only by Jubilee agents and 51 forms were not signed by ODM agents. They argued that these omissions amounted to serious irregularities capable of vitiating an election under section 83, and therefore the results of the gubernatorial election were not accurate, verifiable, secure, accountable and transparent. Counsel for the 1st and 2nd Respondents did not respond to the specific allegations of irregularities but simply term the allegations as generalized and unfounded claims, which had not been pleaded in the petition to begin with. Counsel for the 3rd to 5th Respondents concurred and further asserted that the Petitioners had not proved that the irregularities complained of were so substantial as to invalidate the results. The Court ruled, in relation to the unsigned Forms 37A that there was nothing in the law that required both the presiding and deputy Presiding Officer to sign. Where neither had signed, the Court, drawing from the ***2017 Raila Odinga case*** ruled that the same were void *ab initio.* However, only 3 polling stations were affected by this irregularity and therefore the votes affected were only a minimal margin compared to the difference of 28,348 votes between the winner and the second candidate. According to the Court, it would be a travesty of justice and a mockery of the will of the people to vitiate an election result because of an election irregularity committed in only 3 polling stations with a total of less than 2000 votes out of 797 polling stations with over 500, 000 voters.

On the absence of security features, the Court ruled that the use of computer generated Form 37B due to failure of the printing machine to generate the standard form was insufficient to warrant an overturn of valid results captured in Form 37A. Guided by the dicta of the Supreme Court in the ***2017 Raila Odinga case***, the Court asserted such an order could only follow where there was no plausible explanation proffered for the discrepancy. Since both DW6 and DW7 who were returning officers gave what the Court considered a plausible explanation of the facts and circumstances under which the altered forms were used. The Court therefore ruled that the omission was not so substantial as to invalidate the election results and in any case, there was no mandatory legal requirement that Form 37B have certain security features.

In relation to the failure to sign the Forms 37A by some agents, the Court noted that there are various reasons for failure to sign by agents. However, there was no excuse for the Presiding Officers to fail to indicate the reasons for the absence or failure by an agent to sign. Nevertheless, this omission along was not sufficient to vitiate a validly conducted election, especially in light of the fact that only a negligible number of stations, i.e. 5, was affected by the omission.

The Petitioners also took issue with some forms not being stamped. They alleged that out of the five Forms 37B from five constituencies, Form 37B for Kajiado East and six Forms 37A did not bear a stamp. The 3rd to 5th Respondents contended that there was no mandatory legal requirement that forms be stamped. While agreeing with the Respondents, the Court asserted that stamping was intended to safeguard and authenticate the form. Nevertheless, the Court was guided by the decision of the Court of Appeal in ***Independent Electoral and Boundaries Commission and Another vs Stephen Mutinda Mule and 3 Others*** **(2014) eKLR** to the effect that there was no statutory requirement that forms be stamped. The Court noted that only one Form 37B and six Forms 37A out of 797 Forms 37A were not stamped ad which the Returning Officer said was an omission. There was therefore no collective, systemic, systematic or widespread act of not stamping forms, which justified the possibility of human error, which was insufficient to nullify an election.

On the alleged alteration of figures in Forms 37A from 26 polling stations, the Court noted that this was not a ground in the petition but had been gleaned from Forms 37A attached to the 1st Respondent's response. However, having perused the forms one by one, the Court found that the errors were minor arithmetic errors, and affected only 25 forms out of a total of 161, about 15%, which would not affect the overall outcome and were therefore insufficient to void an election. The majority of these alterations were also countersigned. The Court concluded that the Petitioners had not demonstrated how these minor alterations in 26 Forms 37A against 797 forms affected the outcome. The Court was satisfied that the arithmetic errors point out were not substantial enough to invalidate the election exercise.

The Court also assessed the Petitioners' allegation of discrepancies in the entries in Forms 37A, 37B and 37C. The issue had arisen during the cross-examination of DW6 who attributed the discrepancies to human error while entering the results. The Court noted that the discrepancies related to 6 out of 797 polling stations; this meant that they were quite minimal and not significant to invalidate the results and the variances were not systematic enough to favour any particular candidate so as to imply manipulation.

The Petitioners had also contended that Forms 37A from 3 polling stations bore the IEBC stamp marked 'rejected'. It was alleged that this affected the validity of results as Regulation 78 was only applicable to ballot papers. The Court ruled that the use of the rejected stamp on Form 37A was an error which was neither fatal nor prejudicial to the overall outcome of the election results.

Finally, the Court assessed the Petitioners' allegation of harassment or obstruction of ODM agents, denying them the opportunity to witness the announcement of results. No witness was called to testify to this claim, neither was any claim made to any lawful authority. Since neither the time nor the specific polling stations where the harassment occurred was indicated, the Court found that the claim lacked merit as it was a general allegation without proof.

The Court concluded with a general assessment of whether the Petitioners had discharged the burden of proof that the said electoral irregularities and other malpractices were of such a substantial nature as to vitiate the gubernatorial election results in Kajiado County. In the view of the Court the Petitioners

were under an obligation to satisfy the Court that as a result of non-compliance with the law relating to elections, the elections were not conducted in accordance with constitutional principles and written law or that the non-compliance did affect the election results. The Petitioners therefore did not meet the conditions set by the Constitution and section 83 of the Elections Act. The Court found that there was no proof that elections were not free from improper influence or corruption or that the irregularities were of such a magnitude as to have affected the general results. Therefore, the Court ruled that the elections were held in compliance with the law and any minor irregularities or imperfections could not warrant a nullification of the results. The 1st respondent was validly elected as governor Kajiado County. Consequently, the Petitioner's reliefs and/or prayers one to five were dismissed.

On the question of costs, the Court ruled that considering that the Respondents had to face two sets of Petitioners, a substantial amount must have been incurred. The Petitioners were directed to meet the costs of the petition capped at KES 2.5 million to the 1st and 2nd Respondents as one set and a similar amount to the 3rd, 4th and 5th Respondents as another set.

Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 4 Others Mombasa Election Petition 5 of 2017

High Court of Kenya at Mombasa
Coram: Thande J

Ruling Striking Out Petition

16 November 2017

Whether Preliminary Objection raised pure points of law — consequences of failure to state date of declaration of election results — whether deputy governor is a necessary party to a petition challenging election of governor

Summary of facts

The petition challenged the election of the 5th Respondent as the governor of Kwale county. Before the petition could be heard, two preliminary points of law were raised by the 5th Respondent. Firstly, it was asserted that failure to enjoin the deputy governor to the petition within 28 days of declaration of the results rendered the whole petition incompetent, as it was a violation of the deputy governor's rights to fair hearing under Article 50 of the Constitution. Secondly, it was argued that the Petition and the Supporting Affidavit did not state the date of declaration of the results of the election and this rendered the petition incompetent.

The Petitioner contended that the Preliminary Objection did not raise pure points of law and therefore did not meet the threshold in the ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*** case. The Petitioner asserted that where any fact had to be proved or was subject to judicial discretion, an interlocutory application had to be filed. Non-compliance with the Rules was according to Rule 5 subject to judicial discretion in terms of Article 159 (2) (d) of the Constitution.

The Respondents on the other hand contended that the question of the date of declaration of the election results was not merely procedural, but it went to the root of the petition and jurisdiction. They also asserted that non-joinder of the deputy governor within 28 days was a jurisdictional issue. The preliminary objection therefore met the threshold in the ***Mukisa Biscuit*** case as it could determine the petition at the preliminary stage. The Court ruled that since the issue for determination was whether the Court had jurisdiction to hear the petition on account of failure to comply with Rule 8 of the Election Petition Rules and to enjoin the deputy governor, the objection to the Court's jurisdiction could not be subject to judicial discretion and no facts needed to be ascertained. The Court was therefore not persuaded that the issues herein ought to have been raised by way of motion.

On the second issue, i.e. consequences of failure to state date of declaration of the results of the election, the Court noted that it was not disputed that the date of declaration of the election result was omitted in the petition. The 5th Respondent contended that the failure to state the date of declaration of the results in the petition and supporting affidavit contravened Rules 8 and 12 of the Election Petition Rules and rendered the petition incompetent. The Petitioner on the other hand urged the Court to find that the results were disclosed as they were on Form 37C annexed to his affidavit.

The Court, reviewing the relevant rules, asserted that the requirement to state the date of declaration of the election results both in the Petition and the Supporting Affidavit was couched in mandatory terms. Neither the petition nor the supporting affidavit stated the date when the result was declared. The Petitioner had also conceded that there was in fact noncompliance with the law in this regard. Section 2 of the Elections Act defined 'election results' as the declared outcome of the casting of votes by voters at an election.'

What was contained in the petition did not meet the threshold of election results as defined by the Elections Act. The annexure marked MTM 4, which the Petitioner maintained was Form 37C, could not come to the aid of the Petitioner since it was not annexed to the affidavit, not having been expressly referred to therein, and it therefore could not be deemed to be part of the petition as per ***Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*** **[2014] eKLR.**

The Court asserted that rules of procedure in electoral disputes were not mere technical or procedural requirements but they went to the root and substance of the matters prescribed upon. They were therefore not to be treated as optional as each provision in the Rules was intended to achieve a required result. The provision requiring the date of declaration of the election result was intended to assess whether a petition was filed within time. Without the date of declaration, it would be difficult to determine whether the petition was filed within time and by extension, whether the Court had jurisdiction to determine the petition. The Court further stated that the provisions in the Rules had to be considered mandatory, otherwise they risked being rendered otiose.

It therefore ruled that to proceed with a petition in which the date of declaration of the results and the results had not been pleaded would run the risk of the Court abandoning its role an independent and impartial arbiter and descending into the arena of conflict. The Court therefore found that the petition was incompetent for not having stated the date of declaration of the election. The Court could not shut its eyes to the omission.

The third issue for determination was whether the deputy governor was a necessary party to the petition. The 5th Respondent was of the view that the deputy governor was a necessary party to the petition and once elected could only be removed from office by an election petition. Therefore, non-joiner of the deputy governor would result in a violation of their right to fair trial enshrined in Article 50 of the Constitution, which is non-derogable. To the contrary, the Petitioner submitted that the deputy governor was not a necessary party and further that he was not elected but was only a nominee of the governor. The deputy governor was therefore at liberty to apply to be enjoined to the petition as a party or file a separate constitutional petition to protect her rights. The Petitioner also asserted that he had no complaint against the deputy governor.

The Court evaluated the provisions of Article 180 of the Constitution on the election of a governor. Firstly, the Court rejected the assertion that the deputy governor is nominated and not elected, since Article 180 (6) of the Constitution makes it clear that there is no separate election, and the person nominated by the elected governor is declared to have been elected as deputy governor.

Secondly, the learned Judge asserted that it would be contrary to the rules of natural justice to condemn a party unheard. The Court restated the steadfastness with which the right to be heard for a person likely to be adversely affected by a decision had been upheld by the courts in ordinary litigation and asserted that the same steadfastness ought to be applied to electoral disputes. The Court further opined that to hear the petition without the participation of the deputy governor would be to go against the

principles of natural justice and any such decision, no matter how "right" it would appear, must be declared to be no decision.

Thirdly, and citing the decisions of the Supreme Court in ***Moses Mwicigi & 14 Others v IEBC & 5 Others*** **[2016] eKLR** and the older COA decision in ***Kipkalya Kiprono Kones v R & Anor ex-parte Kimani wa Nyoike & 4 Others*** **[2006] eKLR,** Thande J was emphatic that a deputy governor, having come into office through the law can only be removed from office through a process set out in law, i.e. an election petition. The Court maintained that to assert that the deputy governor need not be a party to the proceedings would offend electoral law as the occupant of an office established by law can only be removed by a procedure known to law, i.e. through an election petition.

In response to the assertion that since the Petitioner had no case against the deputy governor, there was no need to enjoin them, the Court analysed the provisions of Article 180 (6) of the Constitution by dint of which upon the election of a governor, the deputy governor was also declared to have been elected and issued with a Form 37D. The Court queried the process, instrument or order through which the certificate of election issued to the deputy governor would be vacated if they were not made a party to the proceedings.

The Court was emphatic that without making the deputy governor a party to such a proceeding, the holder of that office was well within their rights to decline to vacate office upon the nullification of the election of the governor. This reasoning was founded on the fact that Article 182 (1) of the Constitution only makes provision for vacancy in the office of the governor and in such instances, the deputy governor is entitled to assume office under Article 182 (2) of the Constitution. There is therefore no law that bars the deputy governor from assuming office of the governor upon a vacancy in that office arising by virtue of a nullification of the election of the governor. The Court concluded that failure to cite the deputy governor as a respondent and to comply with the mandatory provisions of Rules 8 (1) (c) and (d) and 12 (2) (c) and (d) of the Election Petition Rules rendered the petition incurably defective, and it was struck out. Costs were awarded to the Respondents and capped at KES 2.5 million, subject to taxation.

Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 7 Others Election Petition Appeal 4 of 2018

Court of Appeal at Mombasa
Coram: Visram, Karanja & Koome, JJ.A

Ruling Dismissing Application for Substitution in Appeal

17 May 2018

Whether an appellant intent on withdrawing an election petition appeal can be substituted by another person

Summary of facts

The appeal followed the ruling of the election court in Mombasa Election Petition 5 of 2013 striking out the petition. The petition had challenged the conduct of the gubernatorial elections in Kwale County, citing multiple irregularities and malpractices. The election court, however, upheld a Preliminary Objection challenging the competency of the petition for non-compliance with Rule 8 (1) (c) and (d) of the Election Petition Rules and for non-joinder of the deputy governor.

The appellant lodged an appeal with the Court of Appeal in December 2017 but expressed an intention to withdraw the same through a notice to the Deputy Registrar of the Court in February 2018. The notice was served upon the Respondents and a few days later a formal consent was filed by the parties signalling an intent to withdraw the petition.

The applicants, who described themselves as registered voters in Kwale County filed an application pursuant to Articles 22, 23, 38, 81, 159 and 259 (1) of the Constitution and sections 3, 3A, 3B of the Appellate Jurisdiction Act, the Court of Appeal (Election Petition) Rules 2017 and Rules 21, 22, 23 and 24 of the Election Petition Rules. They sought to be substituted as appellants and Petitioners to the appeal and petition respectively. They averred that they were instrumental in the coordination of numerous meetings all over Kwale County and it was from these meetings that they discerned that the declaration of the 5th Respondent as the Governor did not represent the will of the electorate. As a result, the majority of the electorate, including the applicants, nominated the appellant to file an election petition challenging the election. When the petition was struck out, the electorate nominated the appellant again to lodge the present appeal and that they had learnt with surprise of the appellant's intention to withdraw the appeal through a newspaper advert. They contended that the appellant had not sought the consent of the either the electorate or the applicants to withdraw the appeal, yet they had an interest in the adjudication of the same. They urged that it was in the interests of justice and fairness that the application be allowed, subject to any directions the Court would give.

The appellant opposed the application on the basis that once the consent to withdraw the appeal was filed, the appeal stood automatically withdrawn. He therefore contended that the application was a non-starter seeing as it was filed subsequent to the withdrawal. The appellant also maintained that he never instituted the appeal in a representative capacity but in his own capacity and urged that the applicants had not established *locus standi* in the appeal.

The 1st to 4th Respondents filed grounds of opposition to the application to the effect that the Court lacked jurisdiction to entertain the application; that the applicants had not demonstrated their interest in the apian and that the application was misconceived.

The 5th Respondent also opposed the application and asserted that the assertions that applicants were registered voters, participation in the election, nominated the appellant to file the petition and the appeal and represented the interests of the majority of the voters aggrieved with the outcome of the election were all points of contention. He maintained that the petition which was the subject of appeal was not withdrawn but struck out by the election court in November 2017.

During submissions, counsel for the appellant reiterated that the appellant was not keen on prosecuting the appeal and prayed for the release of the security for costs deposited by the appellant. Counsels for the Respondents supported the withdrawal and argued that their clients had signed a formal consent to that effect.

Counsel for the applicants argued that the Constitution granted all Kenyans a right to participate in free and fair elections, and every person falling within the categories listed in Article 22 could enforce that right. He argued that whereas the Election Appeal Rules provided for substitution, the procedure applicable in the election court should be applicable to the Court of Appeal *mutatis mutandis*.

In the alternative, counsel urged that the lacuna ought to be addressed in line with Article 22 (4) of the Constitution which entitles a party to commence proceedings and to have the matter heard and determined by the Court notwithstanding the absence of the Rules contemplated by Article 22 (3). Counsel maintained that the Court had the requisite jurisdiction by virtue of Articles 164 (3) (a) and 22(4) of the Constitution and section 85 A (1) of the Elections Act to entertain the application. Counsel cited several authorities, including ***Abdikhaim Osman Mohammed & Another v Independent Electoral and Boundaries Commission & 2 Others [2014] eKLR*** in support of the proposition that electoral disputes were not disputes *in personam* but in *rem* and that they involved not just the parties before the Court but the entire electorate. They urged that this entitled them to take part in the appeal.

Counsel also urged that election petition proceedings, being *sui generis*, could not be withdrawn without the leave of the Court. This, they urged, was to prevent collusion by parties to withdraw the petition to the detriment of voters and cited the Supreme Court of India decision in ***Bijayawanda Patwak v Satrug-Hna Saha AIR 1963 S.C. 1566 AT 1569*** to buttress this point. In any case, they urged that they were qualified as intended appellants within the meaning of section 2 of the Court of Appeal Rules, which defined an intended appellant to mean any person aggrieved by a decision of the superior court.

The applicants also took issue with the consent in question which they urged had not complied with Rule 96 (3) of the Court of Appeal Rules which required that such a consent be executed by all the parties. They urged that since they were parties to the proceedings, their consent was required and in any event, the consent required to be adopted as an order of the Court to take effect, which it had not. They urged that the security for costs deposited by the appellant in both the election court and the Court of Appeal not be released so as to satisfy any costs which might become payable at the conclusion of the application, appeal and even the petition and for the application to be allowed.
Counsel for the 1st to 4th Respondents, in opposing the application, argued that the procedural rules governing election petition appeals were the Election Appeal Rules and the Court of Appeal Rules, which were a complete code. Since there were no provisions on withdrawal of election petition appeals

under the Election Appeal Rules, by virtue of Rule 4 (2) of the Court of Appeal Rules, the applicable provision was Rule 96 of the Court of Appeal Rules, which delineated the procedure for withdrawing an appeal.

Counsel maintained that the consent to withdraw the appeal had been signed by the parties to the appeal, which parties were generated from their participation in the election court. Since by their own admission the applicants had not participated in the election court, there was no requirement for them to execute the consent in question. Counsel further argued that the filing of the consent divested the Court of jurisdiction to make any substantive orders, save for an order striking out the appeal under Rule 96 (3). Since the application was filed subsequent to the consent of withdrawal, it followed that the Court lacked jurisdiction to entertain the application.

It was further argued that the rules of procedure applicable to the Court did not provide for substitution of parties in an election petition appeal and since electoral disputes were *sui generis*, they could only be determined within the confines of self-contained electoral laws. It was therefore not open to the Court to accede to the applicants' invitation to invoke the Election Petition Rules, which were clearly inapplicable to the appeal, as to do so would be tantamount to the Court donating to itself jurisdiction that it did not have, contrary to the Supreme Court decision in ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR***.

Counsel urged caution in applying an open door policy by allowing any person to appeal against the decision of the election court in the guise of public interest litigation, which according to the Court of Appeal decision in ***Centre for Rights Education and Awareness & 2 Others v John Harun Mwau & 6 Others [2012] eKLR,*** might have the unintended consequences of prolonging litigation, overstretching judicial resources and clogging up the courts, thus delaying finalisation of cases.

Counsels for the 5th Respondent adopted a similar line of reasoning and reiterated that the law did not make any provision for substitution of an appellant either in the Act or the rules governing the procedure of the Court. Substitution was only provided for under Rule 99 of the Court of Appeal Rules in the case of death of an appellant or respondent. It was argued that an application to substitute a Petitioner could only be made in the election court where a Petitioner had made an application to withdraw the petition, which was not the case here.

Counsel also emphasised the centrality of timelines in the adjudication of electoral disputes and urged the Court to resist the Applicants' invocation of public interest to revive an otherwise dead dispute. It was urged that the time for hearing and determining the petition had lapsed in March 2018 and therefore even if the Court was minded to refer the matter back to the election court, its jurisdiction to entertain the petition had been exhausted. Moreover, the Court had no jurisdiction to extend time limited by the Constitution and statute.

On the question of jurisdiction, it was asserted that the Court was restricted to matters of law with respect to the ruling of the election court striking out the petition. Therefore, even if the Court were persuaded that the applicants had made a case for substitution, the orders sought could not be issued; at best the Court could only make recommendation for legislature to address the legislative gap.

In determining the application, the Court considered the answer to the pertinent issue as lying with the interpretation of the relevant electoral provisions. Having reviewed the Election Appeal Rules and the Court of Appeal Rules, the COA found that they made no provision in respect of substitution

of an appellant who wished to withdraw an appeal. Substitution was only envisaged in Rule 99 of the Court of Appeal Rules upon the demise of a party. The Court declined the invitation by the applicants to import the provisions of Rule 24 of the Election Petition Rules because those rules were only applicable to petitions in the election court, and the omission of a provision on substitution both in the Election Appeal Rules and in the Court of Appeal Rules must have been deliberate. The Court also opined that it could not have been the intention of the Rules Committee, contrary to the argument by the applicants, that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 be applicable. As it stood, the Court found that there was no rule which sustained or justified the application for substitution.

Further, the Court opined that even if it had jurisdiction to entertain the application, where the appellant had complied with the procedure for withdrawal of an appeal under Rule 96, the leave of the Court was not required to withdraw the appeal, unless the withdrawal was objected to by a party to the appeal, which was not the case. The effect of the filing of the consent with the Deputy Registrar was to strike the appeal from the list of pending appeals. The appeal had therefore ceased to exist at the time the application for substitution was made.

The application was therefore dismissed with costs to the appellant and the Respondents. The appeal was also struck out and security for costs directed to be refunded to the appellant.

Petitions Concerning Elections of Members of the County Assembly

Joseph Kiragu Muthura v Pius Njogu Kathuri & 2 Others Kerugoya Magistrates' Court Election Petition No. 1 of 2017

Chief Magistrates Court at Kerugoya
Coram: Hon. Soita, CM

Ruling on Application to Strike Out Petition and Extension of Time to File Responses

27 October 2017

Whether 'affidavits' commissioned by an advocate without a practising certificate were valid — whether court should extend time for filing response to petition — whether the Court should strike out the petition.

Summary of facts

The petition related to the election of Member of the County Assembly, Thiba Ward, Kirinyaga County. This ruling related to two applications which the parties agreed to argue simultaneously. The first application was filed by the Petitioner and sought to have the response filed by the 1st Respondent and his witnesses struck out for being filed out of time. The Petitioner averred that the response and the witness affidavits were filed two days out of time and without the leave of the Court as required by Order 50 Rule 2 of the Civil Procedure Rules.

The second application was by the 1st Respondent and it sought enlargement of time within which the 1st Respondent was to file his response to the petition and witness affidavits and that the response to the Petitioner and affidavits filed by his witnesses be deemed as duly filed. He asserted that the petition came to his attention late and that the delay in filing the response was due to unavoidable circumstances and challenges in contacting his witnesses and preparing affidavits since the witnesses were not from the same area. He asserted that the Court had wide discretion in enlarging time and admitting the documents filed under the circumstances in the interests of justice.

The 1st Respondent also sought to have the petition declared fatally defective and struck off accordingly. The 1st Respondent averred that the petition was fatally defective and incompetent in law on the basis that the affidavits in support of the petition were not attested by a person authorised by law by virtue of not holding a practising certificate since 2011.

The Court first addressed the question of competency of the petition. The 1st Respondent averred that the affidavits were commissioned before a person who was not qualified by virtue of not holding a valid practising certificate and a letter from the LSK was annexed confirming that the said advocate had last taken out a practising certificate in 2011. The Court noted that this position was not challenged by the Petitioner or the advocate himself and was therefore persuaded that the person who commissioned the affidavits had no practising certificate and was therefore not empowered to administer oaths.

The Court was guided by the decision of the Supreme Court in ***National Bank Of Kenya Ltd Vs Anaj Warehousing Ltd*** **[2015] eKLR** where the apex court validated a document executed by an advocate without a practising certificate on the basis that invalidation would result in unjust enrichment. The

Supreme Court differentiated between documents prepared by an advocate who did not hold a current practising certificate, which did not become invalid under section 34 (1) (a) of the Advocates Act, and those prepared by unqualified persons such as non-advocates, advocates whose names had been struck off the roll of advocates, which were void for all purposes.

Since in the present case the commissioner for oaths was still an advocate and had not been struck off the roll, there was some latitude to excuse affidavits attested to by him, especially considering that they were drawn by the Petitioner's advocate, whose capacity, competence and validity in legal practice had not been questioned. Because the affidavits required independent attestation, the Petitioners had in the view of the Court found themselves at the mercy of an advocate who did not volunteer information that he was not licensed to practise an advocate and therefore was not empowered to administer oaths at that particular time.

The Court found that the Petitioner and his witnesses ought not to shoulder any blame for the attestations and it would not be in the interests of justice to block the Petitioner from having his day in court so that the issues he had raised could be determined on merit. The Court considered this an apt case for invocation of the Oxygen principle set out in Rule 4 of the Election Petition Rules, especially considering the public interest nature inherent in election petitions. The Court found no merit in the application to strike out the petition.

On the application for enlargement of time, the 1st Respondent explained the delay in filing the response. He cited several authorities for his assertion that the Court had unfettered discretion to enlarge time. The Court found that even in election petitions, the Court retained unfettered discretion to extent time where the other party would not suffer prejudice except where the Constitution and the Elections Act had expressly barred extension due to strict timelines. The Court was persuaded by the finding of Ochieng J in ***Kalimbo Naveed v Boy Juma Boy & Others*** **Mombasa Election Petition 5 of 2013** where the Court found that to allow such an application would not prejudice the Petitioners but to disallow the same would leave the Respondents as lame ducks as they would have no material of a factual nature to rely on in their defence. The Court therefore exercised its discretion to extend time for filing the responses and to deem the response duly filed and properly on record. The Petitioner's application was therefore dismissed and the 1st Respondent's application partially allowed with no order as to costs.

Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 Others Kerugoya Election Appeal 1 of 2017

High Court of Kenya at Kerugoya
Coram: Gitari J

Judgment Allowing Appeal

13 December 2017

Whether 'affidavits' commissioned by an advocate without a practising certificate were valid — whether the Court should strike out the petition.

Summary of facts

The appellant appealed against the decision of the election court seeking that the orders of the Chief Magistrate refusing to strike out the entire petition be set aside, and that the 1st Respondent's petition filed in the lower court be struck out in entirety with costs to the Applicant.

The appellant had filed an application seeking, *inter alia*, that the petition be declared fatally defective in law and struck out accordingly. The main ground in support of the prayer was that the affidavits in support of the petition were attested by a person not authorised by law to practise as such by virtue of not holding a valid practising certificate since 2011. The Chief Magistrate had dismissed the application on the ground that it lacked merit, necessitating the present appeal.

The appellant contended that the affidavits of the Petitioner and his witnesses were commissioned by an advocate who at the time did not possess a practising certificate. A letter from the LSK had been adduced in this regard showing that the advocate last took out a practising certificate in 2011 and therefore was practising law unlawfully. The appellant contended that the Magistrate was wrong to allow the Petitioner to proceed with a petition that did not comply with the Oaths and Statutory Declarations Act, Order 19 of the Civil Procedure Rules and Rule 12 of the Election Petition Rules, and that such a petition cannot be allowed to overturn the declaration of the appellant as duly elected.

The Appellant sought the determination of the legal status of an oath administered by a person who is not a holder of a valid practising certificate and the legality of the document prepared by such a person and admissibility under sections 24 and 30 of the Advocates Act, which states that only an advocate who is a holder of a practising certificate from January to December of each year has capacity to administer oath. He submitted that the impugned advocate, having practised without a certificate for seven years, had no capacity to administer the oath, with the consequence that the affidavits were not valid, the petition was not compliant and could not be cured under Article 159 (2) (d) of the Constitution. It was the appellant's case that an election petition being a special proceeding, there must be strict compliance with the law and the rules and prayed that the appeal be allowed and the petition struck out. The appellant relied on among other authorities, the case of ***Omusotsi v The Returning Officer and Another*** **High Court Election Petition No. 21 of 2017** where the petition was struck out because the affidavits were not commissioned by an advocate permitted to practice law.

It was submitted for the 1st Respondent that the advocate who had commissioned the affidavits had not been struck off the Roll and it was not denied that he was a Commissioner for Oaths. It was also urged that the person who had drawn the affidavits and the petition was a competent advocate. Counsel

also submitted that the ***Omusotsi*** case was distinguishable from the present case and relied on the Supreme Court decision in ***National Bank of Kenya v Anaj Warehouse Limited*** **Petition No. 36 of 2014,** where the Court held that documents drawn by an advocate without a practicing certificate are binding upon the client. He further submitted that the Court could not interfere with exercise of discretion by the Magistrate and that the defect was curable under Article 159 of the Constitution and Order 19 rule 7 Civil Procedure Rules, which allows Court to receive affidavits notwithstanding defects and technicalities. The Court was urged to dismiss the appeal.

Issues for determination

From the submissions of the parties, the Court isolated two issues for determination: whether 'affidavits' commissioned by an advocate without a practising certificate were valid and whether the Court should strike out the petition.

On the first issue, it was clear that the affidavits had been sworn before a lawyer who did not hold a practising certificate, and had not obtained it since 2011. The law required that only practising advocates may be appointed as commissioners for oaths. Since a lawyer needed to be a practising advocate to be appointed a commissioner for oaths, the impugned lawyer could not exercise the powers of a commissioner.

Since affidavits form the substance of the evidence to be adduced by witnesses in an election petition, they are crucial evidence and it is therefore crucial that they comply with the Oaths and Statutory Declarations Act, Order 19 of the Civil Procedure Rules and Rule 12 (14) of the Election Petition Rules.

The 'affidavits' filed by the Petitioner and his witnesses were not affidavits since they were not administered by a person authorised to do so. They had not complied with the Oaths and Statutory Declarations Act as the person who administered them was not appointed by the Chief Justice as required. This meant that the affidavits amounted to mere statements of facts which did not attain the threshold of affidavits. The affidavits were also defective since the person who purported to commission the affidavits was also not a holder of a practising certificate and therefore had no capacity to administer oaths.

The Court assessed the Supreme Court decision in ***National Bank of Kenya Ltd. v Anaj Warehousing Ltd*** **[2015] eKLR** where the apex court had stated that no instrument becomes invalid under section 34 (1) of the Advocates Act by reason of being prepared by an advocate who did not hold a current practising certificate. On the contrary, documents prepared by other categories of unqualified person, such as non-advocates whose names have been struck off the Roll of Advocates, are void for all purposes.

However, the Court here distinguished the ***National Bank case*** on the basis that the Court was not dealing with commissioning of affidavits by an unqualified person. In the view of the Court, signing or witnessing a document was different from administering oaths. The Court was persuaded by the High Court decision in ***Omusotsi v The Returning Officer and Another*** **High Court Election Petition No. 21 of 2017** where the petition, which was not supported by the affidavit of the Petitioner as required by Rule 12 (1) (b) of the Election Petition Rules, was declared incompetent and consequently struck out. The Court also considered persuasive the Supreme Court decision in ***Prof Syed Hug v Islamic University in Uganda*** **C.A. No. 47 of 1995,** where the Court ruled that the documents prepared, signed and filed by an advocate without a practising certificate were invalid and of no legal effect as no court could sanction or condone an illegality brought to its notice.

While Order 19 Rule 7 of the Civil Procedure Rules allows a court to receive any affidavit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form or technicality thereof, the Court found that for a document to be admitted under this Rule, it had to be a sworn affidavit. In the present case, the affidavits could not be said to have been sworn since they were not commissioned by person authorised to administer oaths. The defect was therefore one of form and not a technicality. Since there was no affidavit in the first place, Order 19 Rule 7 was not applicable, thus rendering the documents filed mere statements. There was therefore no legal basis for the election court to hold that the application to strike out had no merit since the petition was not supported by valid affidavits as required by the Elections Act and Election Petition Rules.

On the second issue, the Court reiterated that affidavits were mandatory by dint of Rules 8 and 14 of the Election Petition Rules. Since affidavits formed part of the pleadings, where they were defective, the petition could not stand. Defective affidavits went to the root and content of the petition. Whereas in similar cases election courts have allowed parties to file additional affidavits, the learned judge deprecated the election court for allowing the defective affidavits to remain on record, rather than giving the petition some life. Such an exercise of discretion was in the view of the learned judge misdirection, and amounted to proceeding with an incompetent petition. The Court therefore interfered with the exercise of discretion to direct that the order of the Trial Court be set aside and the petition be struck out. Since the Petitioner was in the view of the learned judge responsible for the circumstances he found himself in, he should suffer the consequences. The petition was therefore struck out with costs to the appellant capped at KES 50,000.

Musee Mati v Baridi Felix Mbevo & Others Kitui Magistrates' Court Election Petition No. 1 of 2017

Chief Magistrate's Court at Kitui
Coram: Hon. J. Munguti P M

Judgment Allowing Petition

31 January 2018

Whether elections were conducted in a free, fair, accurate and verifiable and transparent manner — whether elections were marred with irregularities — whether the 2nd and 3rd Respondent were functus officio after declaring results and issuing certificate in an election — whether IEBC could be directed by the Court to produce Forms 36A — costs

Summary of facts

The Petitioner was a candidate for the MCA seat in Mutonguni Ward in Kitui West Constituency. He filed the petition on the basis that he had won the elections but the second respondent denied him victory after he awarded the certificate of elected member of County Assembly to the 1st Respondent. The Petitioner immediately lodged a complaint with the 2nd Respondent who agreed to a re-tallying after notifying all the candidates and their agents. The re-tallying was conducted on 11 August 2017 in the presence of all candidates and the results showed that the Petitioner had won contrary to the entries in Forms 36B.

The Petitioner asserted that the re-tallying showed that he had garnered 3,330 votes against the 1st Respondents 3,319 votes and he ought to have been declared the winner. He maintained that the 2nd Respondent refused to nullify the results even after realising the certificate had been issued to the 1st Respondent erroneously as he had not won the elections. He therefore sought a determination that the 1st Respondent was not duly declared winner, a determination that the Petitioner was the valid winner, a declaration that the certificate of election issued to the 1st Respondent was null and/or cancelled, a determination that the Petitioner be issued with the certificate of election, a determination that the gazette notice declaring the 1st Respondent validly elected be declared null and void to that extent only and that the Petitioner be awarded costs of the petition.

The first respondent, on being served, responded by filing a preliminary objection, which objection was opposed and the Court proceeded to dismiss the same. The 1st Respondent maintained the petition was bad in law and defective for failing to comply with mandatory requirements of the law by failing to set out the results for each candidate. He also asserted that the results announced showing the 1st respondent as the winner captured the will of the people of Mutonguni. He also denied that there were any irregularities in the tallying of results or that any complaint was ever lodged after the announcement or that the other candidates were informed of the re-tallying exercise. He also asserted that the re-tallying had produced suspect results as results for all candidates had changed. He also pleaded that the election ended with the issuance of the certificate to the 1st Respondent as there was no law that allowed a Returning Officer to recall a declaration of results or issue another certificate and the tampering with results during re-tallying amounted to an election offence and disentitled the Petitioner from being a candidate. The 1st Respondent therefore prayed for the petition to be dismissed with costs to the Respondents and a declaration that the 1st Respondent was duly and validly elected as the MCA Mutonguni Ward.

The 2nd Respondent maintained that it discharged its duty under Regulation 87 of the Elections (General) Regulations by declaring the winner, and transmitting the results to the 3rd Respondent who gazetted the 1st Respondent as the winner. It was the 2nd and 3rd Respondent's case that the elections were free, fair and credible and there was no lawful basis for the grant of the orders sought by the Petitioner. They also asserted that the alleged re-tallying was not official and conducted after the 1st Respondent had been declared winner and issued with a Form 36 C. they maintained that they had no power to nullify, recall or cancel an election in which a declaration had been made and a certificate issued and that with the gazettement of the 1st Respondent, the petition had been overtaken by events. They also asserted that the Court lacked jurisdiction to determine this petition.

Issues for determination

After considering the issues as they had been framed by the parties, the Court narrowed them down as follows: whether the elections were conducted in a free, fair, accurate and verifiable and transparent manner; whether there were any irregularities; who bore the burden of proof and whether it was discharged in the petition; whether the 2nd and 3rd Respondents became *functus officio* after declaring and issuing a certificate in an election; whether it was in order for the Court to order the 2nd and 3rd Respondents to produce Form 36As; and who was entitled to costs.

On the first and second issues, the Court noted that there was no major issue apart from the complaint by the Petitioner that there was a lack of transparency on the part of the 2nd and 3rd Respondents after they failed to listen to his complaints during the tallying. The Respondents maintained that the election was conducted in accordance with Article 81 of the Constitution and that the 1st Respondent was validly elected as MCA Mutonguni Ward, Kitui West Constituency.

As to whether there were irregularities that affected the outcome of the election, the while the Respondents asserted that there were no anomalies, the Petitioner maintained that there were anomalies in the tallying process and that the 2nd Respondent hurriedly generated Form 36B and proceeded to issue a certificate to the 1st Respondent. The Petitioner's complaint led to a re-tallying which showed that he had won by 11 votes, but the 2nd Respondent maintained that the elections were over and his only reprieve would be in filing an election petition.

The Petitioner also produced a letter authored by the 2nd Respondent recalling the certificate issued to the 1st Respondent, which the 2nd Respondent admitted to signing but said that he had locked it away in a cabinet and did not know how it had leaked to the public. The Court considered it curious that the 2nd Respondent had signed the letter knowing that it was illegal and irregular and questioned whether he had been coerced. The Court also considered it strange that despite blaming his deputy, he neither tabled evidence that he took any disciplinary action nor reported him to his employer for breach of confidentiality or insubordination. A careful consideration of the evidence led to the conclusion that the 2nd Respondent had willingly signed and released the letter to be served upon the 1st Respondent but chose to deny it for reasons that were not explained. The Court therefore found that the Petitioner had proved the existence of an irregularity which affected the outcome of the elections.

On the question of burden of proof and whether it had been discharged, the Court restated the position of the Supreme Court in the ***2013 Raila Odinga case*** that the burden of proof lay with the Petitioner. To discharge this burden, the Petitioner had produced the letter dated 11 August 2017 authored by the 2nd Respondent and Form 36B for Mutonguni which was duly signed and stamped by the IEBC. All these documents showed that he had garnered 3,330 votes against the 1st Respondent's 3,319 votes.

While the 1st Respondent contended that the re-tally was illegal, the Court noted that Regulation 80 of the Elections (General) Regulations allows re-tallying to be done up to two times upon a complaint being lodged. While the 2nd and 3rd Respondents argued that the Petitioner had not discharged the burden of proof since he had not filed results, the Court noted that the 2nd and 3rd Respondents had failed to file results with the Court either voluntarily or when ordered to do so by the Court. Therefore, when the Petitioner filed results, the burden shifted to the 2nd and 3rd Respondents to rebut the Petitioner's assertions. The Court found that the Petitioner had discharged the burden by showing that he had garnered 11 more votes than the 1st Respondent had, and ought to have been declared the winner, the narrow margin notwithstanding.

On the question of whether the 2nd and 3rd Respondents became *functus officio* after declaring the 1st Respondent winner and issuing a certificate, he court evaluated the decision of the High Court in ***Steven Kariuki v George Wanjohi and 2 Others*** **Election Petition No. 2 of 2013** where the Court ruled that the IEBC was not *functus officio* after declaration and a certificate can be cancelled even after its issuance and gazettement if there are justifiable reasons submitted based on the IEBC's residual power provided under Articles 1, 2, 38, 81 and 82 of the Constitution. The Court found that the 2nd and 3rd Respondents did not become *functus officio* after declaring and issuing the certificate to the 1st Respondent.

On the fifth issue, whether it was in order for the Court to direct the 2nd and 3rd Respondents to file Forms 36A, the Court found that the IEBC was under an obligation to file results because it had filed a response claiming that the re-tallying was not official. Since the Petitioner provided evidence that the 2nd Respondent had commenced the re-tallying exercise and the 2nd Respondent had not demonstrated that he had filed a complaint on how the signed letter recalling the certificate issued to the 1st Respondent had found its way into the public domain, the Court found in favour of the Petitioner. The Court issued the following orders: that the 1st Respondent was not duly and validly declared as the winner of Mutonguni Ward MCA election; that the Petitioner was the duly and validly elected winner of the MCA election of Mutonguni Ward, Kitui West Constituency; that the certificate issued to the 1st Respondent was declared null and void and/or cancelled; that the Petitioner be issued with a certificate of elected member of the county assembly for Mutonguni Ward, Kitui West Constituency; that the Gazette Notice which declared the 1st Respondent as validly elected Member of the County Assembly for Mutonguni Ward was declared void to the extent of deleting the name of the 1st Respondent; and a certificate of determination issue to the Speaker of Kitui County Assembly in accordance with section 86 of the Elections Act.

On the question of costs, the Court ruled that the 2nd and 3rd Respondents were the author of the Petitioner's misfortune and caused the 1st Respondent to also defend the petition after being sued by the Petitioner. The 2nd and 3rd Respondents were therefore condemned to pay costs assessed as follows: for the Preliminary Objection and the 3 applications, the Court awarded costs of KES 125,000 for each of the applications and a further KES 500,000 for the petition making a total award of KES 1,000,000 (one million). These costs were to be paid by 2nd and 3rd Respondents jointly and severally. The 1st Respondents costs were assessed at KES 500,000 to be paid by the 2nd and 3rd respondents jointly and severally.

Baridi Felix Mbevo v Musee Mati & 2 Others Kitui Election Petition Appeal 1 &2 of 2018 (consolidated).

High Court of Kenya at Kitui
Coram: Mutende J

Judgment Allowing Appeal

8 March 2018

Whether petition was incurably defective — burden and standard of proof — whether trial court determined petition on the basis of evidence and material that was inadmissible — whether decision to declare 1st Respondent winner contravened section 80 of the Elections Act — whether the 3rd Respondent had power to deal with disputes arising after declaration of results — costs

Summary of facts

Two appeals were filed against the judgment of the election court. The first appeal was filed by Baridi Felix Mbevo, whose election as challenged, where he challenged the whole judgment on 26 grounds, which the Court summarised as follows: that the Election Petition was incurably defective; that the learned Magistrate determined the Petition on the basis of evidence and material that was inadmissible; that the decision to cancel the Appellant's Certificate of Election and to declare the 1st Respondent (Musee Mati) as the duly elected Member of County Assembly contravened Section 80 of the Elections Act; that the 3rd Respondent had no power to deal with disputes that arise after declaration of results; and that the trial Court unlawfully lowered the standard and shifted the burden of proof.

The second appeal was filed by the Returning Officer and the IEBC and it raised 27 grounds of appeal which the Court summarised as follows: that the Election Petition was sustained in total disregard of Rules 8(1) and 12(1) of the Election (Parliamentary and County Elections) Petition Rules 2017 (Rules); that the trial was not managed in accordance with Rule 15 of the Rules; that the standard of proof was lowered to benefit the Petitioner; that the trial Magistrate erred in law by holding that costs be paid to the 2nd and 3rd Respondents (Appellants).

The Court directed that the two election petitions be consolidated and canvassed through written submissions.

Counsel for Baridi Felix Mbevo submitted that the election court had erred by sustaining a petition which was incurably defective for failing to set out the names of the candidates and the results of the election in the body of the petition, contrary to Rules 8 and 12 of the Election Petition Rules.

Counsel for the IEBC concurred that the defect was incurable under section 76 (4) of the Elections Act since 28 days had lapsed since the declaration of the results.

Counsel for Musee Mati maintained that even though he did not state the results of all the candidates, the results garnered by himself and Baridi Felix Mbevo, which were the subject matter of the appeal, were clearly stated. Moreover, it was submitted that that names of the candidates who had contested the election had been clearly stated.

The Court noted that indeed all the candidates who took part in the election were listed alongside the results of Musee Mati and Baridi Mbevo. Since Rule 5 (1) of the Election Petition Rules gives the Court discretion to determine the effect of any failure to comply with the Rules, in accordance with Article 159 (2) (d) of the Constitution, the Court found that both the failure to cite all the results as well as the failure to name the Returning Officer did not substantially affect the substance of the petition. The petition was therefore properly before the Trial Court.

On whether the Learned Magistrate misdirected himself in law and lowered the standard of proof in his analysis of the discrepancies of results during declaration and the making of wrong entries, it was argued that the documents relied on by the Petitioner before the Trial Court ought not have been admitted into evidence and reliance on the document by the Trial Court led to the wrong conclusions. It was contended that the document downloaded from the IEBC portal was provisional within the meaning of Regulation 82 of the Elections (General) Regulations and the Petitioner ought to have used Form 36A which is what was used to declare results. The decision in ***Jackton Nyanungo Ranguma v IEBC & 2 Others*** **Kisumu Election Petition 3 of 2017** was relied on for this assertion.

The Court, having evaluated Regulation 82 and the ***Ranguma*** case reached the conclusion that there was no reliance on the documents used to declare the results and since the results from the IEBC portal are provisional, the resultant analysis using the forms allegedly printed from the IEBC portal led to the wrong conclusions. The Court therefore found that the learned Magistrate erred in admitting printouts from the IEBC portal as they lacked accuracy and could not be verified.

It was also submitted that the Trial Court misdirected itself by determining a petition on non-existing power of the IEBC to recall or cancel a certificate issued after declaration of the results. They maintained that that the Returning Officer and his Deputy were *functus officio* and they could not re-tally, cancel or declare a parallel winner as this would be in contravention of Article 88 (4) (e) of the Constitution. It was further submitted that the Court had relied on the decision of the High Court in ***Steven Kariuki v George Wanjohi and 2 Others*** **Election Petition No. 2 of 2013** which had been overturned by the Court of Appeal, and the decision upheld by the Supreme Court. The High Court concurred that from the decision of the Supreme Court, it was apparent that once a declaration of results had been made, any alteration would be done after being considered by the election court. The IEBC had no authority to address the issue as it was *functus officio* and the Trial Court had misdirected itself in basing its decision on a case which had been overturned.

It was also contended that the burden of proof did not shift from the Petitioner, as he did not satisfy the Trial Court to warrant the orders of invalidating the election. It was further argued that the Trial Court did not fulfil the requirements of section 80 of the Elections Act as did not order a scrutiny before declaring the Petitioner as winner and therefore the declaration was in excess of power and a violation of the law. In so doing, the Trial Court failed to adequately deal with the issue of numbers and the arithmetic error and therefore arriving at the wrong finding.

The Court noted that the Petitioner had not queried the election process, only the tally. The margins between the two top candidates were also narrow. In the view of the Court, this was a case ripe or scrutiny and the Trial Court ought to have invoked powers vested in it by section 82 (1) (b) of the Elections Act to order scrutiny; that a scrutiny of Form 36A would have shed light and even verified the total tally of votes garnered by each candidate.

The Court restated the standard of proof in election petitions, which is higher than on a balance of probabilities, but lower than beyond reasonable doubt. The burden lay with the party that brought the claim and to discharge it, he was obliged to provide sufficient evidence to persuade the Court to hold that he had proved the allegations raised in the petition. The main piece of evidence was the re-tally analysis of results and votes coupled with the documents allegedly downloaded from the IEBC and the letter prepared by the Deputy Returning Officer. In the view of the High Court, these documents did not discharge the burden of proof as the documents generated from the portal gave a provisional tally and could not be held to give an accurate tally of votes.

On the question of costs, it was submitted that there was no justifiable reason given by the Trial Court for ordering the 2nd and 3rd Respondents to pay the costs and that the costs ought to have been awarded to the party who won the case. Their assertion was that the Petitioner filed to prove that the election was not conducted in accordance with the Constitution or that non-compliance substantially affected the results of the election.

The Court evaluated various decisions on the question of costs and opined that the award of costs is discretionary and costs will flow from the result of the litigation; a successful party was entitled to costs. In awarding costs, the Court would take into account the parties' participation in terms of research, preparation of pleading and time spent on hearing of the case and making submissions. Contrary to the arguments by counsel for Mr Mati, the Court found that there was no requirement for deposit for security for costs when making an election appeal.

From the foregoing, the Court found the appeal merited and the judgment of the Trial Court was set aside. The Court found that without Forms 36A, it was impossible to tell who won the elections and therefore it was only fair that the said elections be annulled to pave way for fresh elections. The IEBC was directed to conduct fresh elections for Member of County Assembly, Mutonguni Ward, Kitui West Constituency in line with the Constitution, Elections Act and Regulations. The certificate directed to be issued to Musee Mati was also set aside. On costs, Musee Mati was ordered to pay Baridi Felix Mbevo the costs of the incurred at the lower court to be taxed but capped at KES 300,000. Musee Mati was ordered to pay Baridi Felix Mbevo the costs of the appeal to be taxed but capped at KES 600,000. Musee Mati was ordered to pay the IEBC costs incurred in the appellate court, to be taxed but not exceed KES 300,000.

Kitavi Sammy v IEBC & 2 Others Kitui Magistrates' Court Election Petition 2 of 2017

Chief Magistrate's Court at Kitui
Coram: Hon. Murage, CM

Ruling Striking Out Petition

24 November 2017

Whether omission to state results and the manner declared was fatal to the petition

Summary of facts

An application was filed by the 3rd Respondent seeking to strike out the petition because it was incurably defective for not stating the results of the elections as declared by the Constituency Returning Officer. It was averred that neither the petition nor the supporting affidavit stated the results or the manner in which they were declared. It was therefore contended that the petition contained mere allegations unsupported by evidence and ought to be struck out as the Petitioner had ample time to amend his pleadings but had failed to do so. The application was supported by the 1st and 2nd Respondents in their grounds of affirmation where they asserted that the petition was fatally defective for flouting the mandatory provisions of Rule 8 (1) of the Election Petition Rules.

The Petitioner conceded the omission but maintained that it was not a sufficient ground for striking out the petition. The Petitioner also maintained that the IEBC was required to file all the results during the hearing and it would therefore be premature to strike out a mater which could be determined by evidence. The Petitioner further submitted that this was a matter of form and not substance and the same could not be cured by the evidence of the IEBC.

Issue for determination

Having found that it was undisputed that the petition and the supporting affidavit did not state the results and the manner declared, the issue for determination in the view of the Court was whether the omission was fatal or curable. The Court evaluated Rules 8 and 12 of the Election Petition Rules and found that they placed the burden on the Petitioner to provide information while filing the petition. This information was intended to put on notice the Respondents on the nature of the petition and relief sought. The requirement that the IEBC provide results did not shift that burden.

The Court considered the provisions mandatory. This meant that a petition without results was incomplete. The Court also asserted that election petitions are not ordinary cases and there is a timeframe within which they have to be determined under section 75 (2) of the Elections Act. The Court also noted that the Election Petition Rules have simplified the procedure for litigants by stating what a petition should look like. Since the objective of the Rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes, failure to comply with the Rules would have a bearing on the determination of the petition. An election petition was also time bound constitutionally and had to be determined within 6 months; the rules were therefore facilitative in that respect as they gave clear guidelines. Nevertheless, there was provision for amendment where necessary.

Counsel for the Petitioner in his submissions urged the Court to consider Article 159 (2) (d) of the Constitution and section 80 of the Elections Act which granted the Court discretion. They also relied

on the decision in ***Charles Kamuren v Grace Jelagat Kipchoim & 2 Others Eldoret Election Petition No. 1 of 2013*** for the proposition that a court should not be quick to strike out a pleading but should consider whether striking out would accord with the overriding objective of legislation. However, the Court noted that Achode J in that case had proceeded to find that whereas justice should be done to all the parties and striking out should be a measure of last resort, the timeline prescribed by statute did not give the Court authority to extend the prescribed timeline. The Court, which was dealing with an application to extend time for service of the petition, found that the argument that the Court not have undue regard to procedural technicalities could not aid the petition as the failure to serve within the prescribed time could not be cured under Article 159 (2) (d).

The jurisprudence from the 2013 elections demonstrated that some courts had taken a contrary view of the matter. Kimondo J in ***William Kinyanyi Onyango v IEBC & 2 Others Nairobi Election Petition Appeal 2 of 2013*** had stated that a narrow and strict interpretation of the rule may occasion serious injustice. Nevertheless, this ought not to be taken to mean that procedural rules would not apply in all cases; only that the courts ought to guard against trumping substantive justice.

Having noted that there were two opposing views of whether failure to comply with the mandatory provision was fatal or not, the Court opined that it was up to each court must consider the merit of each application and the omissions complained of.

In the view of the Court, where a party chose or otherwise failed to comply with Rule 8 (1) and Rule 12, it rendered the petition incompetent. The results and the manner declared were material to the petition and the rules were expressed in mandatory terms. It must have been the intention of Parliament that the Rules be followed; otherwise, they would have simply offered a guideline. For this reason, the parties had no choice but to comply. The Court therefore found that the Petitioner failed to comply with the mandatory provisions, rendering the petition incurable defective. The petition was therefore struck out with costs to the Respondents.

Kitavi Sammy v IEBC & 2 Others Kitui Election Petition Appeal 3 of 2017

High Court of Kenya at Kitui
Coram: Mutende J

Ruling Striking Out Appeal

20 March 2018

Consequences of non-compliance Rule 34 (5) of the Election Petition Rules — whether the appeal complied with section 75 (4) of the Elections Act

Summary of facts

The appeal challenged the decision of the Chief Magistrate's Court striking out the election petition he had filed challenging the election results and subsequent declaration of Katumo Boniface Kilungya as Member of the County Assembly, Kyangwithya West Ward.

The 1st and 2nd Respondents filed a Notice of Motion seeking orders striking out the Memorandum of Appeal on the grounds that the appeal was not served upon the 1st and 2nd Respondents in accordance with Rule 34 (5) of the Election Petition Rules. It was asserted that the appeal was served outside the 7-day period mandatorily stipulated by the Rules. Further, the application sought a striking out of the appeal on the basis that it faulted the decision of the election court on errors of fact contrary to section 75 (4) of the Elections Act and therefore, the High Court lacked jurisdiction to entertain the appeal. It was argued that it was in the interests of justice that the appeal be struck out.

Counsel for the Appellant filed a Replying Affidavit where they deponed that it was a requirement for the Memorandum of Appeal is served within 7 days of filing. It was their case that the failure to serve the 2nd and 3rd Respondents was occasioned by a busy schedule in handling a number of election petitions upcountry and he has served the applicants upon touching base in Nairobi. He argued that the grounds provided did not suffice for the grant of the orders sought and the delay was excusable as it did not prejudice the Applicant in any way and was served before the Court was gazetted to hear the Appeal, at least 40 days before the matter was listed for directions. Further, with the enactment of Article 159 of the Constitution, courts ought to strive to sustain rather than strike out pleadings on purely technical grounds.

In the assessment of the Court, two issues arose for determination: the consequences of non-compliance with Rule 34 (5) of the Election Petition Rules and whether the appeal filed complied with section 75 (4) of the Elections Act.

The Appellant admitted that Rule 34 (5) was flouted but since the 3rd Respondent was served, there was substantial service. It was argued that the omission was a technicality and ought to be overlooked by the Court to ensure that justice was served; it was their submission that justice would be done if the appeal was sustained.

The Memorandum of Appeal was served on the 1st and 2nd Respondents 20 days outside the stipulated period. In considering whether the Appeal ought to be struck out for non-compliance with the Rules, the Court was required to consider the explanation given and whether it was just to do so. This was

because Rule 5 (1) of the Election Petition Rules grants the Court discretion to determine the effect of any failure to comply with the Rules, in accordance with Article 159 (2) (d) of the Constitution. To exercise this discretion, the Court had to look at the overriding principles set out in the Rules. Election Rules were however to be given strict interpretation. The Court opined that facilitating a just resolution of an election petition would call for the Court to ensure that justice is done even if technicalities were disregarded. This would mean that the intent and purpose of the substantive law is upheld.

Nevertheless, in the circumstances, the Court had to interpret the law strictly and found that the failure to serve the appeal within time was detrimental to the Appellant. This was because counsel for the Appellant, while seeking a discretionary order, indicated that he had been handling several election petitions upcountry, which had been explained to counsel for the 1st and 2nd Respondents. Counsel for the Appellant maintained that he had exercised due diligence and served the Applicant when he touched base in Nairobi. However, counsel failed to establish the allegation that he had other cases in other courts, for example by attaching cause lists or any other evidence to suggest that he was indeed representing other parties before other courts. Moreover, nothing was stated to suggest why a process server was not retained by the Appellant to discharge the responsibility of serving the Memorandum upon the 1st and 2nd Respondents. The Court therefore found that the explanation given by counsel for the Appellant did not fall within the criterion of plausibility acceptable to the curt and was dismissed. Since the Memorandum of Appeal was served on the 3rd Respondent in time but not the 1st and 2nd Respondents, it was not properly served and it was therefore rendered incompetent.

The second issue was whether the Appeal complied with section 75 (4) of the Elections Act which stipulates that appeals to the High Court shall be on matters of law only. It was argued that the grounds of appeal set out in the Memorandum of Appeal sought to challenge the decision of the lower court on the basis of both law and fact contrary to the provisions of section 75 (4). Counsel for the Appellant did not submit on this issue. The Court noted that it was undisputed that the appeal challenged the decision of the lower court on factual issues. There was however, a ground which referred to actual rules and would have been considered to determine how the facts were considered by the Court which was a point of law. That ground would have been salvaged by Rule 5 (1) of the Election Petition Rules. However, since the circumstances prevailing rendered the appeal incompetent, it had to fail. The appeal was therefore struck out with orders to the Respondents.

Hassan Jimal Abdi v Ibrahim Noor Hussein & Others Wajir Magistrates' Election Petition No 3 of 2017

Wajir Magistrates Court
Coram: Hon Amos Mokoross

Judgment Allowing Petition

6 November 2017

Jurisdiction — whether voting was irregularly conducted beyond legally allowed time — whether there was ballot stuffing in favour of the 1st Respondent — whether the re-opening of sealed ballot boxes was irregular — whether results were altered in favour of the 3rd Respondent — whether irregularities and illegalities if any affected the integrity and outcome of the election — appropriate orders — costs

Summary of facts

The petition challenged the election of the 1st Respondent as the Member of County Assembly for Batalu Ward, Wajir West Constituency. The Petitioner contended that the elections were tainted with illegalities that affected the will of the voters. The Petitioner also accused the 2nd and 3rd Respondents of colluding with the 1st Respondent to give him undue advantage and to make false entries.

He contended that the Batalu polling station was open beyond hours authorised by law, that there was ballot stuffing in Batalu and Basineja polling stations, that some Presiding Officers were calling for identification numbers of persons who had not voted, that the Presiding Officer at Batalu blocked the Petitioner's agent from recording serial numbers used on seals of ballot boxes, that Forms 36 A were put in ballot boxes which were later reopened and that alterations were made on Forms 36A which were intended to trigger a win for the 1st Respondent.

The 1st Respondent contended that voting was conducted incompliance with the Constitution and electoral laws and he had been unequivocally chosen as their representative. He also contended that the process of tallying and announcement of results was done in a free and fair manner and that he won the election with 1099 votes against the Petitioner's 946 votes.

The 2nd and 3rd Respondents also asserted that the election was conducted in a simple, free, fair, transparent and verifiable manner. They maintained that they adhered to the Constitution and Electoral Code of Conduct and that the will of the people ought not to be set aside unless it was shown that the Constitution and electoral laws were not followed.

They also contended that the only votes who voted past 5pm were those already on the queue; that there was no ballot stuffing at Batalu, that no one voted after the counting of votes at Batalu, that no alterations were made to Form 36A, that no ballot boxes were opened and that the Petitioner's allegations were hearsay. They therefore joined the 1st Respondent in praying for a declaration that the election was valid and that the 1st Respondent was duly elected as Member of County Assembly for Batalu Ward.

Issues for determination

Following submissions by the parties, the Court isolated the following issues for determination: whether this court has jurisdiction to determine this matter; whether the officials of the 3rd Respondent irregularly conducted voting in Batalu polling station beyond the legally allowed time; whether the agents of the 3rd Respondent engaged in acts of ballot stuffing in Batalu polling station and Basineja Polling Station in favour of the 1st Respondent; whether the officials of the 3rd Respondent irregularly re-opened sealed ballot boxes for Batalu Polling Station and Basineja Polling Station; whether the officials of the 3rd Respondent altered results in Form 36As in Batalu Polling Station and Basineja Polling Station in favour of the 1st Respondent; whether the irregularities and illegalities if any, impacted on the integrity and outcome of the election; whether the orders sought should be granted; and who should bear the costs.

On the first issue, the Court noted that Rule 8 did not indicate the format in which the election results should be pleaded and did not specify whether one should just mention the winner of plead the whole list of candidates. In light of this ambiguity, the Court considered it untenable to hold the petition fatally defective. The Court also opined that the issue ought to have been brought to the fore at the onset and not during submissions as was done by the 1st Respondent. Moreover, the parties had demonstrated that they had understood what the petition was about and therefore to challenge the jurisdiction of the Court on the basis of a defective petition at the conclusion only clouded the issues and did not go to the root of the petition. The Court therefore declined to entertain an objection to its jurisdiction on this ground.

On the question of whether the officials of the 3rd Respondent irregularly conducted voting in Batalu polling station beyond the legally allowed time, the Court noted that the Petitioner had placed a lot of reliance on the polling station diaries, which demonstrated that 73 people remained in the queue at 5 p.m. This in the view of the Court did not by itself show that voting was allowed to go on beyond the time allowed by law. This was because Regulation 66 allowed polling stations to remain open after 5 p.m. to accommodate voters still on the queue at the stated time. Since the standard of proof in election petitions is above a balance of probabilities but below beyond reasonable doubt, mere assertions without concrete proof would not suffice. The Court therefore agreed with the Respondents that the Petitioner had failed to prove that the polling stations were kept open beyond permitted hours.

On the issue of whether the agents of the 3rd Respondent engaged in acts of ballot stuffing in Batalu polling station and Basineja Polling Station in favour of the 1st Respondent, the Court noted from the cross-examination of the Petitioner that despite allegedly seeing voters standing around a KIEMS kit holding a piece of paper with ID numbers, it was clear that he had not been close enough to see what was written therein. The Petitioner had also relied on the KIEMS kit report for the assertion that ballot boxes were stuffed, which report indicated that the number of identified voters was 429 whereas according to the announced results the number of valid votes cast was 464. He asserted that the 35 extra votes was evidence of ballot stuffing. The Respondents argued that the results reflected in the KIEMS kit differed because the responsible polling clerks did not validate and complete the process. The Court, having reviewed the KIEMS report, noted that the Petitioner's allegations of the discrepancy in valid votes cast were true, but was reluctant to state that there was in fact ballot stuffing. On the face of it, the differences could have occurred due to lack of validation, and errors do occur due to human folly. The Court therefore found that for purposes of the petition, it had not been proved to the required standard that there was ballot stuffing.

On the issue of whether the officials of the 3rd Respondent irregularly re-opened sealed ballot boxes for Batalu Polling Station and Basineja Polling Station, the Court observed that the opening of the ballot boxes for the two polling stations was undisputed by the Respondents, but they argued that it was necessary in order to retrieve Form 36Awhich were locked in those boxes. They argued that the opening was necessitated by human error and contended that no prejudice was occasioned to the other parties, particularly because the opening was carried out in the presence of members of the public and the parties to the petition.

The Court took guidance from the decision of the High Court in ***Ahmed Abdullahi Mohamed and Anor v Hon. Mohamed Abdi Mohamed and 2 Others Election*** **Petition number 14 of 2017 eKLR** which related to the opening of ballot boxes in respect of the gubernatorial elections in same two polling stations. The Court in that case found that a reading of Regulations 81, 83, 86 and 93 of the Elections (General) Regulations showed there was no authority to open ballot boxes once they are sealed at the polling station without an order of the Court. The Court therefore found that the Returning Officer and the IEBC had acted *ultra vires* by breaking open ballot boxes at the tallying centre after they had been properly sealed at the polling station. This was so irrespective of the amount of consensus by electoral officers and agents/candidates. Since the act of voting was an expression of the sovereign will of the people, no one was allowed to tamper with material that contained that sovereign act without the authority of a court of law, and it did not matter that the Returning Officer only wanted to retrieve the results from the ballot boxes. Since the decision of the High Court was unambiguous and binding on the lower court, the learned Magistrate rule that the opening of the ballot boxes for Batalu and Basineja polling stations was proved and was not warranted by a court of law.

On the question of whether the officials of the 3rd Respondent altered results in Form 36As in Batalu Polling Station and Basineja Polling Station in favour of the 1st Respondent, the Court considered this the pillar of the petition. In its ruling on the application for scrutiny, the Court had already made a finding that there were alterations apparent on the face of the forms. The Respondents argued that the alterations were the result of human error and further, that they did not materially alter the result. The Court agreed to the extent that they did not mathematically alter the overall winner, but disagreed on the materiality of the alterations. The Court was guided by the decision of the Court of Appeal in ***Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others Civil Appeal No 38 of 2013*** where the Court had stated that to determine whether the results as declared in an election ought to be disturbed, the Court ought not only look at who got the highest number of votes but also consider whether the grounds as raised in the petition challenge the entire election process and lead to a conclusion that the process was not transparent, free and fair.

The Court agreed with the Petitioner that when the alterations in Form 36A for the two polling stations were analysed against the KIEMS report and the findings from the recount and scrutiny, several pertinent issues arose which could not be answered as an innocent error. In Batalu polling station, the figure of 502 was superimposed over 487 and all the votes were tallied in favour of the 1st Respondent. During scrutiny, the total number of votes cast was found to be 487, which was the figure recorded in the KIEMS kit for the total identified voters. The 1st Respondent had garnered 484 out of the 487 and while the Petitioner had been allocated zero votes, he was found to have one. There were 15 additional votes in the final Form 36A and the Court considered it unlikely that this could be ascribed to possible innocent or human error to the said inflation. The Court found that the alteration and attendant inflation pointed to a deliberate scheme to alter results in favour of the 1st Respondent. The Court also found that there was an inexplicable miscounting of votes and ascribing of two votes validly cast for different candidates as belonging to the 1st Respondent. This led to a strong impression

that the Presiding Officer and/or his subordinates had already made a foregoing conclusion as to who should win the election. The Court was unable to ascribe any innocence to their actions.

At Basineja, the valid votes cast were indicated in Form 36A as 464 and it was discernible that a figure of 439 votes had been superimpose over 464 on the form. While the Respondents attempted to explain the alteration as an error occasioned by a clerk who had slept during the counting exercise, but the Court still entertained doubts after reviewing the KIEMS report and the report on scrutiny. The KIEMS report showed that the total number of voters identified was 429, which contradicted the figure of 464 which was indicated as the total number of votes cast and garnered by the 1st Respondent. These differences were in the view of the Court irreconcilable and pointed to serious mischief at the polling station, especially considering that the same alterations appeared on Forms 35A and 34 A from the same station, leading to the conclusion that the results were altered to arrive at the figure of 464. The concerned Presiding Officer when called to the stand could not give a good explanation for the alterations on the results of the presidential and member of National Assembly elections. In the end therefore, his explanation that the alterations were caused by a sleeping clerk did not pan out. It was also clear that the alterations made in Basineja were in favour of the 1st Respondent. The alterations were also not countersigned. The Court therefore found that the alterations were irregular and raised serious questions regarding the veracity and authenticity of the results.

As to whether the irregularities and illegalities, impacted on the integrity and outcome of the election, the Court considered two issues to be of concern: the irregular opening of ballot boxes in Basineja and Batalu and the alterations made in Form 36 A in favour of the 1st Respondent. The Court found that both irregularities affected the integrity of the election. The Court noted that the alterations were made to favour the 1st Respondent and occurred in polling stations in his strongholds. The two impugned polling stations accounted for ¾ of his winning votes. The effect of the irregularities could therefore not be gainsaid.

The Court therefore found that the elections at Batalu ward could not be said to accord with the constitutional dictates of a simple, accurate, verifiable, secure, accountable or transparent election. Since it was not credible, free and fair, the petition was found to be merited an allowed. The 3rd Respondent was directed to conduct a fresh election for Member of County Assembly for Batalu Ward pursuant to the Constitution and the electoral laws.

On the question of costs, since the agents of the 3rd Respondent decided to open the ballot boxes and who caused the offending alterations on the Forms 36A for the impugned polling stations, the 3rd Respondent was ordered to pay costs capped at KES 300,000 for the Petitioner and 100,000 for the 1st Respondent.

Ibrahim Noor Hussein v Hassan Jimal Abdi & 2 Others Garissa Election Appeal 4 of 2018

High Court of Kenya at Garissa
Coram: Dulu J

Judgment Dismissing Appeal

19 July 2018

Jurisdiction — whether the memorandum of appeal was defective for being on law and facts — whether the petition before the Trial Court was fatally defective for not stating the results of the election — whether the Presiding Officer of the election was biased for being a voter — whether the election was void as a consequence of opening the ballot boxes without a court order — whether the Magistrate took into account extraneous matters and evidence and failed to take into account relevant facts, evidence and submissions and arrived at a wrong decision — legal effect of the errors found in the scrutiny — Costs

Summary of facts

The appeal was filed by Ibrahim Noor Hussein as the appellant, and Hassan Jimal Abdi, Returning officer, Wajir North constituency and Independent Electoral and Boundaries Commission as the 1st, 2nd and 3rd respondents respectively.

The appellant contested that the learned Magistrate at the principal Magistrate court, was wrong both in law and fact to rely on facts not produced before the Court to reach a decision in the election petition. He further asserted that the Magistrate made a mistake in law and fact by failing to take into account that the present clerical irregularities, or lack thereof, did not alter the election results and/or place the appellant at a favourable position in terms of figures. He also questioned the jurisdiction of the Court in the matter and that invalidating the election of the appellant to the position of Member of County Assembly after recounting the votes was like taking away the people of Batalu Ward's right, freedom and power.

The counsel for the 1st respondent argued that the appellant's submissions were unfounded since they were majorly if not all, based on facts and not law and supported the same using section 75 of the Elections Act. On the same note, they asserted that there exist two tests that must be wholly satisfied in order for an election to be considered valid, viz, the qualitative and quantitative tests as stipulated in articles 81 and 86 of the Constitution.

The 2nd and 3rd respondents supported the appeal and relied on the submissions of the appellant counsel. They cited section 75 (4) of the Elections Act and the Supreme court decision on Gatirau Peter Munya (supra), while addressing the issue of jurisdiction. They indicated that appeals to the Court were only on points of law but decisions issued by trial courts without being substantiated by evidence, or were perverse or illegal were points of law.

Issues for determination

The Court identified seven (7) issues for determination: Whether the memorandum of appeal is defective for being on law and facts; Whether the petition before the Trial Court was fatally defective for not stating the results of the election; Whether the Presiding Officer of the election was biased for

being a voter; Whether the election was void as a consequence of opening the ballot boxes without a court order; Whether the Magistrate took into account extraneous matters and evidence and failed to take into account relevant facts, evidence and submissions and arrived at a wrong decision; What is the legal effect of the errors found in the scrutiny and Costs.

On the first issue, the High Court found that it had jurisdiction by citing the case of the ***Owners of the Motor Vessel Lilian 'S' vs Caltex Ltd [1989] eKLR***, which prescribes that without jurisdiction a court of law has to down its tools, and take no further step in the matter. It also highlighted section 75 (4) of the Elections Act as the law which sets the standards of appeal in that court, indicating that the appeal should only be based on matters law. It is on this statutory provision, and the case laws of ***Zacharia Obado vs Edward Akongo Oyugi & 2 Others [2014] eKLR, Hon. Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 Others – Election Appeal No. 2 of 2018*** and ***Hon. Sumra Irshadali Mohamed v IEBC & Another, Nairobi Court of Appeal Election Appeal No. 22 of 2018*** that some of the grounds presented by the appellant were struck off. The three cases as highlighted were interpreted to build on each other and point out to the fact that the mere appearance of the words "law and facts" in the introductory line of the ground of appeal is not fatal if in fact the issue in the ground is an issue of law.

On the second part of the determination, the honourable judge stated that by looking at the circumstances of the case, and the non-inclusion of the results for the other contenders who were not party to the proceedings did not in any way constitute a fatal defect. In this regard, the Judge relied on the Court of Appeal decision in the case of ***Martha Karua vs IEBC & 3 Others [2018] eKLR*** and another more recent decision of the Court of Appeal ***Hon. Sumra Irshadali Mohamed vs IEBC & Another – Election Petition No. 22 of 2018*** decided on 6th July 2018.

The Court addressed itself to the third issue for determination by asserting that in matters bias, substantial evidence should be produced to prove the same. Consequently, the argument was set aside by the Judge who indicated further that there was no law or legal principle stipulating that a presiding officer or any other election official is barred from voting.

In reference to the fourth issue, the Judge considered two cases of ***Ahmed Abdullahi Mohamed & Another vs Hon. Mohamed Abdi Mohamed & 2 Others – Election Petition No. 14 of 2017,*** and that of ***Richard Nchapi Leiyagu vs IEBC & 2 Others – Civil Appeal No. 299 of 2013 [2014] eKLR.*** The former stated that opening of sealed ballot boxes without a court order was a fatal defect and could vitiate an election, whereas the latter stated that such opening of ballot boxes though illegal might not be fatal. The Judge concurred with the Trial Court that, the illegal act of opening the secured ballot boxes without a court order and without any convincing justifiable reason rendered the election a nullity, which distinguishes the case from the Leiyagu case determined by the Court of Appeal, as there was more than one illegality in the case.

The Court determined the 5th issue by asserting that the trial Magistrate made a mistake by using evidence that were not pleaded into the case and using it to make a decision. The Judge noted that the learned Magistrate should have instead adopted the legal reasoning and decision of the High Court case, called the *ratio decidendi*. In conclusion, the Judge observed that the error of the Trial Court did not materially affect the entire judgement, as the findings of the two polling stations scrutinized were distinct.

The Judge shed some light into issue six by observing that the people of Batalu Ward's rights were not violated since the Magistrate was perfectly entitled to consider whether the numbers disclosed from the scrutiny and recounting were supported by a valid process. The Judge therefore concurred with the Magistrate that the election results did not meet the required constitutional and legal standards. In consideration of the above foregoing, the appeal was dismissed with costs being awarded to the 1st respondent and bearers of the costs being the appellant and the 3rd respondent, and IEBC jointly and severally, and was capped at KES 300, 000/=

Abdia Mohammed Oshow v IEBC & 3 Others Marsabit Magistrates Court Election Petition 2 of 2017

Coram: Hon. Boaz Ombewa, PM

Ruling Striking Out Petition

19 December 2017

Whether petition was filed out of time — jurisdiction of election court over party list disputes

Summary of facts

The petition was filed on 22 September 2017 challenging the Gender Top Up nominations to Mandera County Assembly. They sought orders that the 1st and 2nd Respondents avail all the rightful party lists for nomination of specials seats for the impugned nomination, and a declaration that the non-compliance, irregularities and improprieties in the party list nomination were so substantial that they affected the gazettement thereof. They also prayed that the Court declare that the 3rd and 4th Respondents were not validly gazetted to the Mandera County Assembly and consequently nullify the said nomination. Further, the Petitioner prayed that the Court declare the Petitioner as validly nominated or in the alternative, that the Court order a fresh submission of party list nominees for the Gender Top Up list in respect of Mandera County to the 1st Respondent by the 2nd Respondent. They also prayed for the costs of the petition.

In addition to the responses, two Preliminary Objections were filed. The 1st Respondent's Preliminary Objection impugned the petition as being fatally defective and unconstitutional for having been filed outside the timelines stipulated under Article 87 (2) of the Constitution and section 76 (1) (a) of the Elections Act. The application also asserted that the Court lacked jurisdiction to hear and determine the petition as it was filed outside the mandatory constitutional and statutory timeline, the Gazette Notice nominating the 3rd and 4th Respondents having been issued on 28 August 2017. They therefore prayed that the petition be dismissed with costs.

The 3rd and 4th Respondents filed a joint Preliminary Objection wherein they asserted that the Court lacked jurisdiction to try matters concerning political party nominations in view of the mandatory provisions of sections 39-41 of the Political Parties Act as read together with section 27 of the Elections (Party Primaries and Party List) Regulations 2017 and the Elections Act. Further, it was argued that the Court had no jurisdiction to hear and determine an election petition which did not exist, having been filed outside the timeframe stipulated under Article 87 (2) of the Constitution, section 36 (1) of the Elections Act 2011 and Rule 19 (1) and (2) of the Election Petition Rules.

In response, the Petitioner filed grounds of opposition asserting that the preliminary objections were incompetent and an abuse of the process of the Court and were in contravention of the provisions they were anchored on. It was averred that the PO did not comply with the mandatory provisions of the Law and could not be ventilated for the orders sought. They prayed for the PO to be dismissed with costs to the Petitioner.

In their submissions, the 1st Respondent urged the Court to dismiss the petition for having been filed outside the mandatory constitutional and statutory time frame of 28 days. They submitted that the petition was filed 35 days after publication of the Gazette Notice 8380, contrary to Article 87 (2) of the

Constitution and section 76 (1) (a) of the Elections Act which require a petition to be filed within 28 days of the date of declaration of results or publication in the Kenya Gazette in case of nominations. The 2nd, 3rd and 4th Respondents urged the Court to dismiss the petition for being a nullity, having been filed outside the timeframe provided by the Constitution and Elections Act. It was their case that the Court lacked jurisdiction to entertain a petition filed outside the mandatory 28 days.

The Petitioner in response urged the Court to dismiss the Preliminary Objections. She sought to distinguish declaration of results as used under Article 87 (2) of the Constitution and publication as used in section 76 (1) (a) of the Elections Act. Counsel for the Petitioner argued that an election was a process which ended with the announcement of the winner. Counsel for the Petitioner further argued that the nomination was not an election and therefore the 28 days' timeline did not apply. Since there was no declaration of results which is a public announcement of the winning candidate pursuant to Regulation 73 of the Elections.

That this Petition arises out of Party nominations and there is no declaration of results which is a public announcement of the winning candidate pursuant to Regulations 73 of Election (Parliamentary and County Assembly) Regulations.

It was further submitted on behalf of the Petitioner that this Petition was filed in good time and that this court has special jurisdiction to hear and determination which jurisdiction is conferred by the Constitution.

Issues for determination

The Court identified two issues for determination: whether the preliminary objections raised were proper and whether the Petition was filed outside the time frame provided for under the Constitution and the Elections Act, and if so what is the effect thereof.

On the first issue, the Court was guided by the decision in ***Mukisa Biscuit Manufacturing v West End Distributors Ltd (1969) E.A 696*** where it was held that a preliminary objection must raise pure points of law. Since the Respondents had relied on the provisions of the Constitution and the Elections Act which they contended provided a timeframe within which an election petition had to be filed, the Court found that the preliminary objections were proper as they were premised purely on points of law. If allowed, they had the effect of disposing of the petition.

On the second issue, the Court noted that it was not in dispute that the petition was filed on 2 October 2017. Given that the Gazette Notice on the nomination of the 3rd and 4th Respondents as MCAs was issued on 28 August 2017, the petition was filed about 35 days after the gazette notice. This was clearly outside the 28 day timeframe provided by Article 87 (2) of the Constitution and section 76 (1) (a) of the Elections Act. These provisions are couched in mandatory terms.

The Petitioner sought to distinguish between declaration of results of an election and publication of the gazette notice signifying the nominations of members of county assembly. According to the Petitioner, the nominations were not elections and therefore the term declarations could not refer to it. The Court took the view that there were two modes of elections: one by universal suffrage and the other by nomination. Drawing from the dicta of the Supreme Court in ***Moses Mwicigi and 14 Others v Independent Electoral and Boundaries Commission and 5 Others*** **(2016) eKLR,** the Court asserted that the Gazette Notice was a signifier of the completion of the 'election through nomination' and finalised the process of constituting the county assembly in question. The publication of the

Gazette Notice marked the end of the mandate of the IEBC and shifted any consequential dispute settlement to the courts. It also served to notify the public of persons who had been 'elected to serve as nominated members' of a county assembly. The Court also cited the decision in ***Anami Silverse Lisamula v Independent Electoral and Boundaries Commission and 3 Others*** **(2014) eKLR** in which the Court upheld the principle that an election petition must be filed within the timelines prescribed by the Constitution established in the ***Joho and Mary Wambui*** decisions. These decisions were binding on the Court.

The Court also reviewed Rule 19 (1) of the Election Petition Rules which made it clear that the election had no power to extend time within which a petition could be filed since the timelines were fixed by the Constitution and Elections Act. While the Petitioner had asserted that the Court had jurisdiction under Article 105 of the Constitution, it was clear that the provision only conferred jurisdiction upon the High Court and in relation to parliamentary election petitions. The decision of Mshila J in ***Orie Rogo Manduli vs Catherine Mwangola & Others [2013]eKLR*** where it was held that Article 90 presupposes that nominations to party lists of members are an election and therefore any dispute after gazettement can only be resolved by the High Court in accordance with Article 105 of the Constitution was therefore inapplicable.

It was clear that the Court lacked jurisdiction to hear the petition on the grounds that it was filed outside the mandatory constitutional and statutory timelines. The Court ruled the petition fatally defective, thereby upholding the preliminary objections and striking it out with costs to the Respondents capped at KES 250,000.

Mariam Abdi Mohamud v IEBC & Anor Nairobi Milimani Commercial Magistrates Court Election Petition No. 20 of 2017

Milimani Commercial Magistrates Court
Coram: Hon Wanjala

Judgment Allowing Petition

14 December 2017

Whether Petitioner was a Kenyan citizen and member of PNU — whether interested party submitted the Petitioner's name in its list to the 1st Respondent — whether there were any objections to the Petitioner's inclusion on the list — whether the Respondent allocated seats to all political parties — whether the 1st Respondent discriminated against the Interested Party — reliefs — costs

Summary of facts

The Petitioner, a member of the Party of National Unity (the Interested Party), challenged the Gender Top up List for nomination to Wajir County Assembly. The Petitioner challenged her exclusion from the list and sought orders to nullifying Gazette Notice 8380 gazetting the nominated members of county assembly and directing that the IEBC reconstitute the list to include the name of the Petitioner in compliance with the Law. The Petitioner also sought the costs of the petition. The Petitioner averred that she had been nominated by the Interested Party at position one on the list and that the Interested Party submitted its list to the Respondent (the IEBC) who confirmed it and published it in the Sunday Nation Newspaper for 23 July 2017 and in the IEBC portal. The allocation was based on the number of seats that the party had won and the Petitioner averred that PNU had won 3 seats, evidenced by the Gazette Notice published on 22 August 2017. However, when a Gazette Notice allocating party lists to the respective parties was published on 28 August 2017, the Interested Party was not allocated any seat, which affected the legitimate expectations of the Petitioner. The Petitioner averred that the omission was discriminatory. The Interested Party wrote to the Respondent on 30 August 2017 seeking a review and correction of the list but the Respondent failed to rectify the error, necessitating the filing of the petition and the reliefs sought.

In their response, the Respondent admitted that they were under a duty to supervise party list nominations which were to be on the basis of proportional representation by use of party lists and averred that it complied with Article 90 of the Constitution. The Respondent further averred that it complied with the prescribed formula under Regulation 56 (2) of the Elections (General) Regulations 2012 in allocation of seats to respective political parties, which was to divide the number of seats won by a political party by the total number of seats multiplied by the seats available for allocation in the respective house. The Respondent also admitted that the Interested Party submitted its party list which was published both in the Sunday Paper for 23 July and online portal and that the Petitioner's name appeared first on the Interested Party list and maintained that it complied with Regulation 56 (2) and on that basis urged the Court to dismiss the petition with costs.

In their response and supporting affidavit, the Interested Party asserted that the Petitioner was an active and dedicated member an on that basis the Interested Party had included her in the Gender

Top Up list for Wajir County Assembly and forwarded the list to the Respondent. The Interested Party confirmed that it had won 3 elective seats and therefore ought to have been allocated at least to party list seats, as was the case with ODM, WDM, and Narc-Kenya which had won a similar number of elective seats and had been allocated two seats each. The Interested Party confirmed having written to the Respondent requesting a review and correction of the mistake but the Respondent had declined. They maintained that the Respondent's actions discriminated against candidates, including the Petitioner and the Respondent had not given any reason why it had failed to allocate party list seats to the candidates whose names had been submitted by the Interested Party, despite qualifying for the same. The Interested Party therefore prayed for the petition to be allowed.

Issues for determination

Since the Respondent and Interested Party did not file their list of issues, the Court isolated the following as identified by the Petitioner: whether the Petitioner was a Kenyan Citizen and a member of Party of National Unity and a female adult resident in Wajir county; whether the interested party submitted the Petitioner's name in its gender top-up list submitted to the Respondent and published in the Sunday Newspaper on 23rd July 2017 and in the Respondent's online portal of party list seats; whether at any point after the Petitioner's name was submitted by the interested party to the Respondent, the latter raised any objection in respect of the Gender Top Up List of the interested party/the Petitioner's name before and after the 8th August general elections; whether the Respondent allocated party List seats to the other political parties (apart from the interested party) which won elective seats in Wajir County and whether the interested party was allocated any party list seat either in the gender top up list or marginalized seat in Wajir County after the 8 August General elections; whether the interested party herein was entitled to party list seats in Wajir County; whether the Respondent discriminated the interested party and its members including the Petitioner in failing to allocate any party list seats to the interested party; whether the Petitioner was entitled to any reliefs for the Court and whether the Petitioner was entitled to costs of the petition.

On the first issue, the Court found that the Petitioner had proved that she was a Kenyan citizen, a member of the Interested Party and a resident of Danaba Ward, Wajir County since he attached a copy of her National identity card, a copy of her PNU membership card and the fact that these facts were corroborated by the Interested Party in the supporting affidavit of the Secretary-General of the party.

On the second and third issues, the Court found that the Petitioner had proved the submission of her name to the Respondent by attaching a copy of the Sunday Nation of 23 July 2017 and a print out of the party list from the Respondent's online portal to prove that her name was indeed submitted by the interested party to the Respondent. The submission was corroborated by the Interested Party who averred that they submitted their party list to the Respondent, which was confirmed by the Respondent and published as stated by the Petitioner. The Interested Party informed the Court that it had submitted its list 55 days to the general election, which was confirmed by the Respondent at para 11 of their response to the petition. The Respondent also admitted that the Petitioner's name appeared in position one of the Interested Party's list. The Court also noted that no objection was raised as regards the party list submitted under section 35 of the Elections Act by the Interested Party.

The Respondent in their response and affidavit sworn by Salome Oyugi, their legal officer, averred that they used the prescribed formula as prescribed in Regulation 56(2) of the Elections (General) Regulations, 2012, in allocation of seats to respective parties, and from the Kenya Gazette Notice dated 22 August 2017 on the declaration of persons elected as members of the county assemblies

various political parties won elective seats as follows; PNU the interested party which is the Petitioner's political party won three (3) elective seats of Member of county Assembly within Wajir County being a seat for Korondile ward the elected MCA was Hassan Mohamud Malim, Godoma ward elected MCA was Ahmed Hasan Mohamed and Township ward the elected MCA was Hussein Kassin Sheikh other parties which won elective seats were Orange Democratic movement won three (3) seats in Bute ward, Danaba ward and Wargadud ward, Jubilee party won (5) seats in Barwago, Tarbaj, Burder, Dadaja Bulla wards, Wiper Democratic Movement-Kenya(WDM-K) , won (3) seats in Gurar, Arbajahan, and Hadado Athibohol wards, Party for Development and Reform won (6) seats in Batalu, Sarman, Eldas, Elnur Tula Tula, Habasswein and Lagboghol south wards, Kenya African National Union(KANU) won (2) seats in Malkagufu and Diif wards, and NARC KENYA won (3) seats in Khorof Harar, Elben and Della wards. Based on the number of seats won by respective political parties the Respondent in the Kenya gazette notice dated 28th August 2017 Vol. CXIX-No. 124 on the Elections (Party Primaries and Party List) Regulations, 2017 nominated members to the county assembly the Respondent allocated special seats as follows;

Jubilee party won 4 seats and was allocated (3) special seats, PDR won 6 elective seats and was allocated (3) special seats, NARC-K won 3 elective seats and was allocated (2) special seats, WDM-K won 3 elective seats and was allocated (2) special seats, ODM won 3 elective seats and was allocated (2) special seats, KANU and ANC each won 2 elective seats and each was allocated (1) special seat, PNU the interested party where the Petitioner is a party won 3 elective seats and was not allocated any special seat.

Based on the above facts it is apparent that all political parties that won elective seats in Wajir county based on the two gazette notices stated above were allocated special seats including the political parties like KANU and ANC which won fewer seats compared to the interested party still got special seats while the interested party was not allocated any special seat. On this issue, the Judge found that even the name of the interested party did not even feature in the gazette notice of 28th August 2017 declaring those nomination slots.

The petition was allowed by the Court and an order issued declaring that the Gazette Notice published on 28th August 2017, vide Gazette Notice No. 8380, Vol. CX1X-No. 124, in respect to the Gender Top up List of Wajir County null and void. The Respondent was therefore directed to reconstitute and Gazette the gender Top up List of Wajir County, including the name of the Petitioner Mariam Abdi Mohamud in compliance with the Law.

The Court further directed that the Respondent was to bear the costs of the petition of KES 500,000 payable to the Petitioner.

Hamida Yaroi Shek Nuri v IEBC & 2 Others Milimani Commercial Magistrates Court Election Petition No. 23 of 2017 (Previously Misc. No.5 of 2017)

Milimani Commercial Magistrates Court
Coram: Hon. David Mburu

Judgment Allowing Petition

19 January 2018

Whether the 3rd respondent was validly nominated and subsequently elected as a member of Tana River County Assembly- appropriate orders or reliefs

Summary of facts

The Petitioner approached the Court seeking redress for unfairly being left out of nomination as a member of county assembly by the 2nd respondent and not being gazetted by the 1st respondent.

The Petitioner contested the nomination of the 3rd respondent to the said position stating that the 3rd respondent was not a registered voter hence not eligible for nomination to the said post.

The 1st respondent indicated that the 3rd respondent was a registered voter. Although the Petitioner had adduced cogent evidence to show that the 3rd respondent was not a registered voter, the IEBC failed to provide substantial evidence to prove their point yet the burden of proof had shifted to them.

Issues for determination

Whether the 3rd respondent was validly nominated and subsequently elected as a member of Tana River County Assembly; if the answer is in the negative, what orders or reliefs should the Court grant.

On the question of the eligibility for nomination, the Petitioner adduced screenshots from the 1st Respondent's SMS platform indicating that the 3rd Respondent and the other nominee Catherine Mwaura were not registered voters. The response received from the short messaging service code 70,000 used to check voter registration details from the 1st Respondent also showed that the 3rd Respondent as well as Catherine Muthoni Mwaura who was the 2nd respondent's other nominee were not registered voters. The electronic print outs are also accompanied by a certificate. Conversely, while the 1st Respondent stated in its response to the petition that the 3rd Respondent was a registered voter in Tana River County and invited the Petitioner to strict proof of the converse, the 1st Respondent did not avail any evidence of the registration of the 3rd respondent as a voter. This was despite the fact that they are the legal custodian of the voters register for the Republic of Kenya. The Court also noted that the replying affidavit sworn by the legal officer did not address the issue as to whether the 3rd Respondent and Catherine Muthoni Mwaura were registered voters. The Court found that the IEBC failed to prove that the 3rd respondent was validly nominated and subsequently elected as a member of Tana River County Assembly.

The Court therefore declared the same nomination and election void *ab initio* and directed that the Petitioner was the only candidate qualified to be nominated and elected to the position. The Court therefore directed the 1st respondent to gazette the name of the Petitioner as the rightfully nominated and elected member not letter than 7 days. The 1st Respondent was directed to bear the costs of the Petitioner as it had failed on its constitutional mandates

Amani National Congress Party & Another v Hamida Yaroi Shek Nuri & Another Nairobi Election Petition Appeal 5 of 2018 as consolidated with Appeal 1 of 2017

High Court of Kenya at Nairobi
Coram: Kimaru J

Judgment Allowing Appeal

4 May 2018

Whether the appeal is defective on account of non-compliance with the Law- Whether the appeals were incompetent as a consequence of the Appellants not depositing security for costs prior to their lodging- Whether the appellants should have been allowed time extension to file their responses- Whether the 1st Respondent had failed in discharging the burden of proof

Summary of facts

The two consolidated appeals were lodged by Amani National Congress Party and Faith Tumaini Kombe as the 1st and 2nd appellants respectively, against Hamida Yaroi Shek Nuri and the Independent Electoral and Boundaries Commission as the 1st and 2nd respondents respectively.

The appellants submitted their grievances on being denied more time to submit their replying affidavits and pleadings to the petition at the Trial Court, while acknowledging that the Court had the discretion to extend or reduce the time subject to Rule 19 of the Election Petition Rules and citing the case of ***Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others [2014] eKLR***. They emphasised the provisions of Article 159 of the Constitution and Rule 4 of the Election Petition Rules that the case should have been decided on merit and not procedural technicalities. They also sought a declaration that the Trial Court was misdirected in finding that the 1st Respondent had discharged he burden of proof. They argued that the Trial Court had erred in shifting the burden of proof of demonstrating that the 2nd Appellant was not a registered voter to the 2nd Respondent and denying the 2nd Appellant opportunity to demonstrate that she was a registered voter.

The counsel for the Respondent opposed in stating that the decision of the Trial Court denying the Appellants time extension was made in its lawful discretion as described in ***Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others*** (*supra*) and should therefore not be interfered with except with good reason. The counsel further submitted that the burden of proof on the 1st Respondent could be shifted since he had already established a *prima facie* case against the Appellants and the 2nd Respondent and it thus up to the 2nd Respondent to demonstrate that the 2nd Appellant was not a voter by availing the register of voters.

The Respondent counsel also submitted that the appellants application ought to be struck out since it did not comply with Rule 34 of the Election Petition Rules that required it to contain a certified copy of the judgement and decree, as was also stated in the case of ***Boy Juma Boy & 2 Others vs Mwambole Tchappu Mbwana & Another [2014] eKLR***; and Section 78 of the Elections Act requiring them to deposit security for costs. He urged to dismiss the appeal as was in its power under Section 79 of the Elections Act.

Issues for determination

The considered the following issues (4) for determination: Whether the appeals should be dismissed on the basis of not having a certified copy of the judgement and decree; Whether the application should be dismissed on account of the appellants not depositing security for cost prior to the case; Whether the Trial Court ought to have allowed the Appellants to file their replying affidavits and pleadings out of time; and Whether the Trial Court was misdirected in finding that the 1st Respondent had discharged her burden of proof.

On the first issue, the Court, in taking the guidance of Rule 4 of the Election Petition Rules that promoted determination based on merit and not technicalities, decided that the explanation given by the Appellants for failing to file the certified copy of the decree was satisfactory since it was not in their control when the Magistrate would sign and certify the same. It thus extended the Appellants time to submit the certified copy of the decree and deemed it properly filed.

As regards the second issue, the Court noted that the Respondents' argument was based on Section 78 of the Elections Act that places the requirement of paying security for costs on Petitioners and not Appellants. The Appellants were therefore under no obligation to pay the costs.

The Court, on the third issue for determination, stated that the Trial Court erred in restrictively interpreting its discretion to extend the time. It held that it would have been in the interest of justice for the matter to be decided based on merit and not procedural technicalities. It cited the case of ***Raila Odinga & Another vs IEBC & 2 Others [2017] eKLR*** in noting that the Trial Court ought to have considered the prejudice the Appellants would suffer from the decision to lock them out of the proceedings.

On the final issue, the Court held that the Trial Court was misdirected in shifting the burden of proof from the 1st Respondent to the 2nd Respondent and that in failing to allow the 2nd Appellant response on record the Court failed to consider the matter based on its merit. It stated that the 1st Respondent had failed to achieve the required standard of proof and that the 2nd Respondent, who was not directly affected by the decision, could not sufficiently bear the burden of proof. The Court thus decided that the holding that the 1st Respondent had established that the 2nd Appellant was not a registered voter had no basis since the latter was denied opportunity to approve or disapprove the accusations.

In light of the foregoing, the Court allowed the appeal and awarded the costs of the two appeals and the petition before the Trial Court to the Appellants.

Gerald Iha Thoya v Chiriba Daniel Chai & IEBC Malindi Magistrates' Court Election Petition No. 2 of 2017

Resident Magistrates' Court at Malindi
Coram: Hon. Wewa, PM

Ruling Striking Out Petition

20 December 2017

Scrutiny and recount —striking out petition for failure to comply with mandatory requirements

Summary of facts

The Petitioner filed a petition dated 6 September 2017 and sought a declaration that each and all the Respondents jointly and severally committed election irregularities, and that the Petitioner should be awarded costs of the petition and any other relief at the Court's discretion. The Petitioner attached an affidavit of evidence and of witnesses including Philip Thoya Baya and Hamisi Abu Mwambire. An amended petition was filed on 18 September 2017 after a consent was entered by both parties. The substance of the 1st and 2nd Respondents' applications to strike out the petition were based on the amended petition. It was contended that the petition contravened the provisions of Article 87 (2) for failure to state the election results, and further violated Rule 8(1) (c) and (d) and Rule 12 (2) (c) and (d) for failure to declare results. Both the respondents also asserted that the petition was incurably defective.

The Petitioner through the replying affidavit stated that the amended petition was by consent and there were annexures of form 36A's and form 36B's which indicated the total number of votes that were received by each candidate in each polling station and the final votes received as indicated in form 36B. The Petitioner maintained that the arguments were based more on technicalities rather than merits.

Issues for determination

The Court's position after considering the submissions; what is the law on striking out pleadings. The general legal position in striking out pleadings is based on the clarity of the case and the scrutiny of its substance and not the form. Generally, every election petition must confirm to any mandatory requirement set out in the election Act 2011 and the relevant procedural Rules. The said cases of ***Ismail Suleiman and 9 Others- vs- Returning officer Isiolo County and 2 Others*** **Meru Election Petition 2 of 2013** and ***Amina Hassan Ahmed –vs- Returning officer Mandera County and 2 Others*** **Nairobi Election Petition 4 of 2013** were highlighted to shed light into the matter.

It was asserted that the requirements set out in Rule 8 of the Elections (Parliamentary and County election) petition rules 2017 and Rule 7 and the First Schedule to the Supreme Court (Presidential Election Petition) Rules 2017 are not mere technical requirements limited to procedure form and contents of the election petition. This was demonstrated in the case of ***M'nkiria Petkay Shen Miriti v Rangwe Samwel Mbae and 2 Others. Election Petition Meru No. 4 of 2013***.

The Court's position was that the amendment to the petition was by consent and that the amendment of a pleading extinguishes the previous pleading. It further stated that an amended election petition must be supported by fresh affidavits by the Petitioner and the Petitioner witnesses. This was demonstrated in the case of ***Lumbashue Reuben Moriaso Ole vs Kodi Julius Ole and 3 Others in (SRM'S) case***

Narok Election Petition 1 of 2013. It was decided that it is settled in law that filing of an amended pleading extinguishes the earlier pleading. Therefore, by filing the present amended petition the original became extinct. In this regard, a petition cannot be complete without an affidavit in support of the petition and witness affidavits.

The position established was that courts do not allow amendment which seeks to cure a fatal defect i.e. failure to comply with prescribed mandatory requirements. In this regard to omit to file affidavit in support is a fatal defect. This is an election petition whose circumstance is considered to have limited period within which is to be heard and determined by amended petition.

The affidavit in support of the petition and any documents annexed thereof were deemed part of the petition and therefore formed part of the pleadings. Reference was made to the case of ***Gatirau Peter Munya vs Dickson Kithinji and 2 Others Supreme Court petition No. 2B of 2014***. In this case, the threshold of the Law was not attained by the omission.

The Court was persuaded to allow the applications by the 1st and the 2nd Respondents, and the petition was struck out with cost to the Respondents at KES 500,000 for each of the Respondents. The application by the Petitioner of scrutiny and recount was therefore overtaken by the 1st and 2nd Respondents application being allowed.

Gerald Iha Thoya v Chiriba Daniel Chai & IEBC Malindi Election Petition Appeal 1 of 2018

High Court of Kenya at Malindi
Coram: Korir J

Judgment Dismissing Appeal

15 May 2018

Whether the amendment of the petition extinguished the original petition- whether the original petition survived the striking out of the amended petition- The effect of non-compliance by a Petitioner with rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017- The import of Article 105(2) of the Constitution on this appeal- Costs

Summary of facts

The appellant approached the Appellate Court to have the ruling issued by the trial Magistrate Court striking out the election petition with costs be overturned, and the trial Magistrate to be directed to proceed with the hearing within 6months as the Law prescribes. The appellant was discontented with the way the Trial Court reached the decision that an amendment to pleadings, which was based on consent from all parties involved, was tantamount to complete overhaul of the original pleadings, and that the same ought to have been supported by a new supporting affidavit. A matter of contention was also the indication that the Trial Court misapplied Rule 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, and article 159 (2) (d) of the Constitution of Kenya, 2010. The 2nd respondent's notice of motion application was directed by the High Court, with consent from all parties, to be argued together with the appeal. The 2nd respondent had contested that they were not served with the memorandum of appeal within the stipulated time and therefore the appeal could not stand. The notice of motion was dismissed by the Court indicating that the memorandum of appeal is one of the documents found in the record of appeal which was duly served within time, entailing that it was therefore served properly.

The 1st respondent submitted that the appellant was not justified to introduce a new paragraph of vote tally in the amendments, as the same was not included in the original petition and supporting affidavit. The said to them, would constitute violation of rules 7 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 which requires the same to have been done in the original petition. The 1st respondent also insisted that the amendment to the petition was defective as there was non-existence of supporting affidavit. They also stood their ground by stating that an amended petition automatically rendered the original petition useless and non-existent. To support the aforementioned, they cited the case of ***Dhanji Ramji v Malde Timber [1970] E.A. 427*** as their authority.

Issues for determination

The following issues were identified as arising for determination: whether the amendment of the petition extinguished the original petition; whether the original petition survived the striking out of the amended petition; the effect of non-compliance by a Petitioner with rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017; the import of Article 105(2) of the Constitution on this appeal and Costs.

In consideration of the first issue, the Court approached it by indicating that the answer is pegged on the success of the amendment, or its failure like the one before it. Consequently, it acknowledged the significant need to recognise that an amended petition must be anchored on the original petition in order to have some legitimacy especially if the amendment is effected outside the statutory time for filing election petitions. The Court also acknowledged the fact that an amendment is a change or addition designed to improve a document as had stated by the appellant counsel. It reiterated that in amending a pleading, a party is just making the document more accurate or to be in tandem with the changing circumstances of the case. It does not amount to repealing the document. Notably, it decided that an amendment does not therefore entirely sweep away the previous pleading.

Addressing itself to the second issue, the Court found that where an amended petition is struck out, the original petition is not expunged. It is instead brought back to life and if it is capable of being heard, then the election court should hear and determine the same on merit. The Court was guided by the case of ***Phoebe Wangui (Formerly known as Phoebe Wangui Kamore) v James Kamore Njomo, Nairobi High Court Civil Suit No. 367 of 2010.***

On the third issue, the Court found that failure to tabulate the results of the candidates in a petition and or a supporting affidavit is not fatal to the petition particularly where the results are available in the annexures to the supporting affidavit or the responses of the respondents. The guiding case law on the same was cited as that of ***Martha Wangari Karua v Independent & Boundaries Commission & 3 Others Nyeri Election Petition Appeal No. 1 of 2017; [2018] eKLR.***

On the fourth issue while interpreting the spirit of Article 105 (2) of the Constitution of Kenya 2010, the Court stated that once the 6 months of hearing an election petition has lapsed from the date of lodging a petition, it cannot revert the contested election appeal back to the Trial Court for hearing and determination since the timeline is strictly legally provided for under the Constitution and the statute. Even if the appeal is successful as was the case, the Court has no option but to down its tools without prompting. The Court was guided by two main case laws to reach the decision on the same, inter alia, the case of ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others [2014] eKLR*** and the Nigerian case of ***Chief Doctor Felix Amadi & Another v Independent National Electoral Commission (INEC) & Others S.C. of Nigeria Appeal No. 476 of 2011.***

Although the appeal proved that the election court was wrong in dismissing the petition, it had been overtaken by time. The prescribed time for hearing an election had passed. Therefore, the Court had no choice but to dismiss the appeal. It however noted that it would be unfair to let the appellant bear the costs as the case should be, since the election court was erroneous in its decision, and therefore decided that each party was to bear its costs with regard to the appeal and the proceedings before the election court.

The Court also went ahead to recommend that the timeline laws revolving around election petition should be reviewed and/or a window should be given on matters such as the one that was determined for hearing in order for justice to be done, and seen to be done.

Boniface Muisyo Nguli v Independent Electoral and Boundaries Commission & 2 Others Kangundo Magistrates Court Election Petition 1 of 2017

Senior Principal Magistrate's Court at Kangundo
Coram: Hon. Orimba

Judgement Dismissing Petition

9 January 2018

Failure to particularise election results — whether there was voter intimidation or bribery during voting — whether election was carried out in accordance with the law — whether 3rd Respondent was validly elected

Summary of facts

The Petitioner challenged the election of Kamitu Alex who was declared and gazetted winner of the election of Member of County Assembly, Tala ward. The Petitioner alleged that the election was riddled with grave breaches of the Constitution and applicable electoral laws before 8 August 2017 and during tallying of results which affected the legitimacy and/or credibility of the process and the outcome as declared by the Returning Officer.

He averred that the credibility of the outcome of the county assembly election had been gravely compromised and based on available evidence, the 3rd Respondent was not representative of will of the people of Tala Township. The Petitioner further contended that the collation, tallying and verification of County Assembly election results was riddled with major procedural flaws, illegalities and/or irregularities of such a nature and extent as to compromise the credibility of the outcome and/or results declared on the 8 August 2017.

The respondents traversed the Petitioner's petition in whole and affirmed that the election of the third respondent, Mr. Kamitu Alex was within the law.

At the hearing, the Petitioner submitted that in spite of the clear and mandatory provisions of law, the 1st Respondent (IEBC) either deliberately or negligently failed to tally the votes together with the prescribed forms and thereby exposed the collation and tallying process to manipulation and actions that were grossly incompatible with the constitutional electoral principles of accountability, verifiability, security and credibility of the electoral process.

The Petitioner also alleged that the tallying of the results was done without his agents being present and without the prescribed forms hence in his view, the declaration had no basis in law. Further, that having reviewed Form 36B supplied to them by the 1st Respondent, the voter turnout was 10,917 while the total number of votes was indicated as 10,993 creating a numerical discrepancy that fundamentally affected the results to his disadvantage. In addition, in the said Form 36B, the numerical representation of his votes differed from the number in words reading 3181 and 3508 respectively. Moreover, his results as declared by the 2nd Respondent were 3318 votes as opposed to the earlier mentioned 3181 votes. The Petitioner closed his submissions by submitting that the 3rd Respondent was guilty of unduly

influencing voters in run up to the general election and he had not been reprimanded or received as much as a warning from the 1st Respondent.

In response to the Petitioner's allegations, the respondents contended that the Election Petition Rules 2017 require at Rule 8 (c) that an election petition state the results of the election. Further, Rule 12 (2) (c) requires the petition to be supported by an affidavit which shall state the results of the election. It was argued that a perusal of petition and affidavit in support of the petition would confirm that the petition had not stated the results of the election being challenged in any of the two documents. The Respondent relied on the authority in the case of in ***M'nkiria Petkay Shen Miriti vs Ragwa Samuel Mbae and Two Others*** (2013) eKLR, where Lesiit J held that the provisions of Rule 8 are not mere technical requirements but are substantive and go to the root of the issues in an election petition.

The Respondent further submitted in response, that the election of the 3rd Respondent was within the Constitution in articles 81 and 86 on principles governing election and that the Petitioner has not submitted any evidence to show in the contrary. They also submitted that they were guided by the Elections Act during the conduct of elections and therefore the Petitioner's allegations were unfounded. On the issue as to whether there was any voter intimidation or bribery during the voting, the respondents submitted that the Petitioner simply made general allegations in his petition and affidavit on this issue; that no evidence was adduced before the Court on this.

On the allegation that the results of Tala polling station stream 2 would change the overall winner for Member of County Assembly Tala ward, it was contended that the votes cast exceeded the total number of registered voters by 13 votes, and the 2nd respondent who was the returning officer admitted the inconsistency in his testimony during trial. At the hearing of the petition, it was clear that the lost Form 36A had been scanned into the KIEMS kit. The Returning officer confirmed the detail, the Presiding and Deputy Presiding Officers attested to this.

Finally, the Respondents maintained that the 3rd Respondent was validly elected as a Member of County Assembly for Tala ward.

Before the Court made its determination, it clarified the principles in election petitions which are; one, sovereignty of the will of the people. This emanates from the Article 1 of the Constitution under which all powers reside in the people. They may exercise it through their democratically elected representatives. Article 38 and other constitutional provisions safeguard the people's political rights of self-expression. It was reiterated in the case of ***Richard Kalembe Ndile and Another v Patrick Musimba Musau and Others, Machakos High Court Election Petition No.*** **1 (consolidated with Petition 7 of 2013) 2013 eKLR**.

Two, that election petitions are not ordinary civil suits governed by the Civil Procedure Act and Rules. The laws that govern settling of election disputes are enacted in accordance with Article 87 (1) of the Constitution of Kenya 2010 as was stated by the Court of Appeal in the case of ***Benjamin Ogunyo Andama vs Benjamin Andola Andayi*** **Civil Application No. 24 OF 2013 CUR 11/13.**

Three, that as in all litigations, a Petitioner is bound by his pleadings. It is common that a Petitioner will file a petition and will in the course of the proceedings veer away from the initial track. The Court referred to the case of ***Mahamud Muhumed Sirat vs Hassan Abdirahman and 2 Others*** **Nairobi Petition 15 OF 2008 (2010) eKLR**.

In making its determination, the Court assessed whether the results of Tala polling station stream no. 2 (which had an inconsistency of 13 votes) would have changed the overall winner for Member of County Assembly Tala Ward. In finding in the negative, the Court stated that a careful perusal of the figures for the said polling station in form 36A would reveal that even if the figures were to be added to the final tally, it would not have changed the overall winner for the Member of County Assembly Tala ward.

Secondly, the Court found that there was no voter intimidation since the Petitioner lacked proof of the same. Thirdly, the Petitioner had adduced no evidence to prove that Article 81 of the Constitution was not adhered to by the 1st Respondent during the conduct of the said election. The Court also dismissed the fourth and the fifth issues for lack of any evidence by the Petitioner to prove that the 3rd respondent was not duly elected by the law. The Court dismissed the petition in accordance with section 75(3) of the Elections Act and awarded costs of KES 2,000,000/- to the Respondents.

Keronche Maranga Sammy v Independent Electoral and Boundaries Commission & 2 Others Kisii CMCC Petition 7 of 2017

In the Chief Magistrates Court of Kenya at Kisii
Coram: S.N Makila

Judgment Dismissing Petition

23 February 2018

Burden and standard of proof — whether illegalities, irregularities and malpractices were so substantial as to affect the outcome of the election — whether 3rd Respondent was duly elected — consequence of failure to state date of declaration and results of the election in the petition — costs

Summary of facts

The Petitioner filed a petition seeking the following orders: that there be scrutiny and recounting of all votes cast at the election in Nyaribari Masaba constituency for the seat of the member of national assembly; (ii) that there be a determination that the said Ntabo Benson Ongeri was not duly elected; (iii) that there be a determination that the manner in which the election was conducted by the 1st and 2nd respondent violates the Petitioner's constitutional rights.

The Petitioner alleged both electoral offences and violation of various election regulations by the respondents. The Petitioner alleged that the 3rd Respondent engaged in bribery through fundraising activities. The Petitioner also alleged that he was barred from campaigning in some zones and was attacked in some places during his campaigning. He further asserted that his agents were chased away from witnessing the election exercise at some polling stations.

The Petitioner also contended that there were alterations of figures recorded in Form 36As of Kiomiti Primary School polling station 2, Gateri Primary School, Riasibo Primary School and Riatirimba primary, without the corresponding countersigning by the respective Presiding Officers.

The 1st and 2nd Respondents aver that the Petitioner has raised complaints against the Presiding Officers and other persons in relation to the conduct County elections for Gesusu Ward held on 8th August 2017 without enjoining them as respondents in the petition. The 1st and 2nd Respondents aver that the voting in all polling stations in Gesusu ward was free and fair. Further that the counting of votes and declaration of results of Gesusu Ward was conducted as provided by the law.

The 1st and 2nd respondent also asserted that the County election of Gesusu ward was conducted in accordance with the principles laid down in the Constitution and the Election Laws and Regulations save for minor arithmetic and clerical errors which did not in any way change or affect the outcome and declaration of the 3rd Respondent as the duly elected member of the County Assembly for Gesusu ward.

The 2nd respondent maintained that the voting, counting and transmission of the votes was conducted in all the polling stations as provided by the law and evidenced by the Forms 36A to the petition

attached to his affidavit. He stated that all the results from the polling stations were properly and accurately verified, tallied and announced in accordance with the provisions of the law as evidenced by Form 36B. Upon the declaration of the results for Gesusu ward, he issued the 3rd Respondent with Form 36C the certificate of an elected member of the County Assembly.

Further, it was his assertion that any errors in the recording and/or tallying of the votes did the affect the results declared. He further averred that the 3rd Respondent was validly elected as a member of the county assembly for Gesusu ward.

The 3rd Respondent averred that he was declared the winner in the said elections having garnered a majority of the votes as compared to other contesting candidates who included the Petitioner. Having garnered the majority votes of 1898 as compared to his closest challenger who garnered 1273 votes, the returning officer was within the law in declaring and returning him as the duly elected member of County Assembly for Gesusu Ward.

Moreover, it was their case that the declaration of the 3rd Respondent as winner of the said election was lawful, legal, and met all the standards of a free, fair, transparent and credible election. The 3rd Respondent averred that his closest challenger had 1273 votes and he thus won with a margin of 623 votes, which the Petitioner has not challenged. He denied involvement in any acts of illegalities complained of by the Petitioner. He denied that his agents were involved in the chasing away of the Petitioner's agents from the named polling stations.

The 3rd respondent denied the allegation that he bribed voters either personally or through agents at Kiamokama, Gesusu and Masabo as claimed by the Petitioner. The 3rd respondent also denied having any role in the alleged illegalities committed by a polling clerk and in any event such an incident is only claimed to have occurred at Chironge Primary School which, in any event, was not his 3rd respondents' stronghold. The 3rd respondent asserted that any of the clerical errors complained of did not affect the declared results of the said election.

The 3rd respondent averred that he did not benefit from the alleged issuance of double or triple ballot papers at Chironge Primary School polling station since he did not get majority votes at the said station. The 3rd respondent denied any difference in votes cast in different elective seats within Gesusu Ward and stated that this court lacked the jurisdiction to inquire on the other elective seats in the said general elections other than that for the member of County Assembly.

The Court was of the view that the Petitioner had proved that there was electoral malpractice and offences at Chironge Primary School polling station. However, the Court concurred with the respondents that the Petitioner's allegation was largely based on hearsay and cannot be relied on, as the same cannot be substantiated. Hearsay evidence was not admissible under Section 63 of the Evidence Act.

The Court considered whether the above mentioned electoral malpractices more so by the polling clerk of Chironge ward convicted of an election offence at by the Keroka court, affected the outcome of the election to the detriment of the Petitioner. The Court determined that the impropriety of the polling clerk at the said ward and the two votes rejected ballot papers could not have made a difference in the votes garnered by the Petitioner as to affect the overall outcome of the elections of Gesusu ward. The Court thus found that the Petitioner did not present sufficient evidence to the required standard in support of his allegations that the respondents and /or their agents committed acts of electoral

impropriety. The Petitioner's allegation did not meet the legal standard of proof as required in the ***Kiarie Waweru case*** (supra) for proving electoral malpractices to warrant the nullification of the election herein. Furthermore, the electoral offence proved for Chironge ward did not in the Court's view affect the outcome of the election to the detriment of the Petitioner and to the benefit of the3rd respondent herein as is required by section 83 of the Elections Act.

The Court concluded that the election of Gesusu ward for the seat of the member of county assembly was done in accordance with both the Constitution and the Elections Act. In the Court's view, in as much as there were some irregularities and mistakes, such irregularities and mistakes did not substantially or materially affected the result. The Court therefore found that the 3rd Respondent was validly elected member of the county assembly for Gesusu ward.

The Court further held that the petition did not comply with the provisions of Rule 8(1) (c) and (d) of the Rules. Guided by the findings of the High Court in the ***Martha Wangari Karua case*** where the learned judge held that "The non-compliance is substantive and cannot be cured under Article 159(2) (d) of the Constitution", the Court dismissed the petition and awarded the respondents costs at KES 200,000 for the 1st and 2nd Respondents and a similar amount for the 3rd Respondent.

Elizabeth Jebet Korir v Independent Electoral and Boundaries Commission and 2 Others Kajiado CMC Election Petition 2 of 2017

In the Chief Magistrate's Court of Kajiado
Coram**:** Hon. M. Kasera

Judgment Dismissing Petition

23 January 2018

Whether the 3rd Respondent was validly elected under Article 177 as read with Article 90 of the Constitution — whether the 1st Respondent disobeyed its mandate under Article 90 of the Constitution

Summary of facts

The Petitioner filed a petition against the 3 respondents seeking orders that the election of special seat member of county assembly must conform with the constitutional principles of ethnic minorities and marginalized groups; (ii) the Petitioners right to be nominated to the county assembly had been infringed ;(iii) the nomination and subsequent gazettement of the 3rd Respondent be nullified and (iv) the Independent Electoral and Boundaries Commission nominate and gazette the Petitioner as ODM member of County Assembly representing the ethnic minority of Kajiado County Assembly.
The Petitioner contended that the 3rd Respondent was not a member of ODM at the time of her gazettement on 28/8/2017. The same was confirmed by a letter from Registrar of Political Parties dated 22/9/2017 which was never contested by the 3rd Respondent and a letter from Legal Officer for ODM dated 5/11/2017 in which it was confirmed that the 3rd Respondent applied for membership on 30/8/2017 and was later issued with certificate of life membership on the 3rd day of November, 2017. Other than the letters, the actual documents have not been tendered in court to form part of the evidence.

The Petitioner also contended that the 3rd Respondent was not eligible for nomination by the party as she was not an ODM party member at the time of submissions of the party list to the 1st Respondent as well as during the gazettement of the party list by the 1st Respondent on the 28/8/2017 as substantively discussed by the Petitioner.

The Petitioner therefore submitted that the purported nomination of the 3rd Respondent was unlawful. The Petitioner relied on the case of ***Moses Mucigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR*** at paragraph 94 and 95 the Court held that the IEBC did not have jurisdiction to direct political parties on the manner in which they prepare a party list. The decision of the Supreme Court was binding on all lower courts including until overturned by the Supreme Court.

The Petitioner submitted that the dispute in this election petition does not overturn the Dispute Cause No. 2 of 2017 – **Daniel K. Osoi v ODM and IEBC** which decision is null and void as the Court lacked jurisdiction to entertain the dispute.

The 1st Respondent submitted that the burden of proof lies squarely on the Petitioner when she broached the allegation of electoral breach, misconduct and or irregularities on the part of the 1st Respondent. He who alleges must prove.

The 3rd Respondent in her response to the petition denied all the allegations of facts set out by Petitioner. In her further response to paragraph 18 of the petition she relied on Article 90 (2) (c) in letter and spirit for obvious reasons except County Assembly party list from reflecting the regional and ethnic diversity of the people of Kenya.

The 3rd Respondent averred that the procedures were followed by the 1st Respondent who informed political parties to present their party list which 2nd Respondent provided 45 days to the date to the election as stipulated in section 55 (3) of the Elections (General) Regulations 2012. The 2nd Respondent re-submitted its final party list to the 1st Respondent on 19th July, 2017. The list was published on 21/7/2017. There was a complaint on the list for Kajiado by Daniel Kosoi which was heard and determined on 26/7/2017. 2nd Respondent conceded to complaint and undertook to present the list forwarded by the complainant on or before 28/7/2017. The list which was later provided which put 3rd Respondent as first on the list.

The Court found that it had jurisdiction to hear and determine an election petition. The Court also found that the 3rd respondent therefore met the criteria for nomination stipulated under section 34 (8) of the Electoral Act 2011 which provides: "A person who is nominated by a political party under subsection 2, 3 and 4 shall be a person who is a member of political party on the date of submission of the party list by the political party."

Ethnicity and regional balance was found by the Court to be a factor for consideration in nominating persons into the party list. The Court also found that the 3rd Respondent was duly and lawfully nominated by ODM party as a member of Kajiado County Assembly as section 34 (8) of the Elections Act 2011 which provides that: "A person who is nominated by a political party under subsection 2, 3 and 4 shall be a person who is a member of the political party on the date of submission of the party list by the political party.". Having found that the 3rd Respondent was a member of ODM as at the time application was made, she was therefore duly and lawfully gazette by the 1st Respondent.

The Court found that the Dispute Resolution in Cause No. 2 of 2017 was properly handled and within Article 88 (4) and section 74 of Elections Act. This court therefore has no jurisdiction to overturn the decision in Daniel Osoi – Dispute Resolution Cause No. 2 of 2017 in any other way than by appeal. After the 1st Respondent Dispute Resolution in Daniel Osoi and the consent thereof, the 1st Respondent gazetted the final list as submitted by the 1st Respondent. The Court also found that the list was valid as final list by Chairman Kajiado County Assembly – Daniel K. Osoi. The 1st and 2nd Respondent therefore complied with the provisions of Article 90, 177, 88 (4), section 34 and section 74 of the Elections Act 2011.

The Court therefore held that Election petitions are not ordinary suits but disputes in ream of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Additionally, Election petitions should be proved by cogent credible and consistent evidence. The burden of proof in election petition lies with the Petitioner as he is the person who seeks to nullify an election.

The Petitioner thus failed to discharge the burden of proof. The petition was therefore dismissed with costs to the 1st and 3rd Respondent.

Hamdi Ahmed Ali v Victoria Cheruto Limo & 2 Others Garissa Magistrates' Court Election Petition 5 of 2017

In the Chief Magistrate's Court at Garissa
Coram: J. J. Masinga

Judgement Allowing Petition

6 March 2018

Gender top up list nominations — who was entitled to be nominated

Summary of facts

The Petitioner approached court seeking the nomination of the 1st respondent to the County Assembly of Garissa nullified. The 1st respondent had been nominated as the Kenya Patriots Party gender special seat nominee (gender top-up) as provided for under Article 177(1) (b) of the Constitution.

The Kenya Patriots Party (K.P.P) invited applications for individuals wishing to be considered for nomination representing special interest groups to the County Assembly of Garissa. The party forwarded 10 nominees to the 2nd respondent (IEBC) within which list, the 1st respondent was number 1 and the Petitioner 3rd. vide gazette notice 8380, the 2nd respondent published the list of nominees to the County Assembly of Garissa but K.P.P nominees had been excluded. Later, vide Gazette Notice No 8752 corrigenda in Gazette Notice No 8380, the 2nd Respondent published a Notice which indicated that the 1st Respondent had been nominated to be the member of the County assembly of Garissa in the category of special seats (Gender top-up). This led the Petitioner to challenge the same in this petition. The Petitioner argued that on the nomination list published by the party on 19th July 2017, he was first on the list with the 1st respondent being third. Three days later, the 2nd respondent published a final list where the Petitioner was now third and the 1st respondent first. The party wrote to the 2nd respondent urging them to revert to the initial list, such being ignored. After the publication of the two gazette notices, the party wrote again to the 2nd respondent urging that the 1st respondent's name be expunged from the list and substituted by that of the Petitioner as was by priority in the party list of nominees. The second respondent did not respond.

During submissions, she argued that the 1st respondent being a non-resident of Garissa County, did not qualify for nomination to the County Assembly of Garissa. The Petitioner thus alleges collusion and fraud on the part of the 1st and 2nd respondents. In support, he claimed there was fraud for two reasons. Firstly, that contrary to Regulation 10 of the Elections (Party Primaries and Party List) Regulations, 2017, the nomination of the 1st respondent was not sanctioned and therefore null and void. Secondly, that contrary to Rule 8 (1) of the Rules of Procedure in Settlement of Disputes, Legal Notice 139/2012, the 2nd respondent failed to act on the letter from the K.P.P notifying it that the party's nomination list was disputed. Further argument presented was that the 2nd respondent as custodian of the original list, in failing to present it as evidence, acted contrary to section 64 of the Evidence Act and the Court of Appeals decision in ***Kenneth Nyaga Mwige v Saustin Kaguta & Two Others [2015] eKLR***.

In response, the 1st Petitioner argued that she applied for consideration for nomination under the gender category, in which she claimed she was first. She averred that when the list of nominees was uploaded to the 2nd respondents C.R.M.S system, her name was first in the gender category. She

challenged the aversion of the Petitioner that the 2nd respondent published a list of nominees in which she was third and the Petitioner first. Instead, when Gazette Notice No 8752 corrigenda in Gazette Notice No 8380 was published, her name had been added to the County Assembly of Garissa nominees under the gender top-up category. She presented evidence by way of testimony of K.P.P party employees who were in charge of uploading the lists who denied the lists provided by the Petitioner as being the lists uploaded to the 2nd respondent's system.

During submissions, the 1st Respondent argued that under Article 193 (1) of the Constitution, section 25, 34 (4) (6A) and (6B) of the Elections Act, 54 (5) of the Election (General) Regulations and Gazette Notice No 5735 on the law guiding Party Lists on nomination of member of the County assembly there existed no requirement as regarding residence of the nominee. She argued that no challenge had been raided as regards requirements actually in the aforementioned provisions of law. She argued that there was no proof presented that the list relied on by the Petitioner was authentic. She a further argued that failure to enjoin the K.P.P was fatal to the petition and in support cited section 16 of the Political Parties Act No 11 of 2011 and the decision in ***Helena Kisiku Kitheka vs IEBC [2018] eKLR***. She argued that allegations of fraud were baseless as the 1st respondent was on leave during the time she supposedly used her position in the Party's ICT department to list herself as first in the nomination list. She put the Petitioner to strict proof arguing that she had a duty to prove that beyond reasonable doubt citing ***Musikari Nazi Kombo-vs-Moses Masika Wetangula & 2 Others [2013] e KLR*** in support.

The 2nd Respondent's case was as follows. They testified and presented evidence that the party lists published were as submitted by the party. These lists had the Petitioner as third and the 1st respondent as first. Since parties were allocated nomination slots in proportion to their numbers after the election, K.P.P was allocated one seat. This seat went to the 1st respondent in order of priority in accordance with section 38(8) of the Election's Act.

During submissions, the 2nd respondent submitted that the Petitioner was not entitled to be nominated reiterating that in the list uploaded, the 1st respondent was first. It was submitted that the nomination of the 1st Petitioner was conducted in accordance to election laws, and that there was no proof of collusion as alleged. It was submitted that responsibility for disputes as regards party lists was on the party. Further it was submitted that the petition is vague, lacks particulars and offends Rule 8 of the Elections (Parliamentary and County Elections) Petition Rules 2017.

The NCIC as interested party submitted that as a member of the 2nd largest ethnic group in Kenya, the 1st respondent was not fit to represent a marginalized community.

In its determination, the Court reduced the major issue of contention to who between the Petitioner and the 1st respondent was better suited to represent the people of Garissa. In the courts view, the issue of ethnicity in counties could not just be wished away. In justification, the Court argued that article 90(2) of the Constitution exempts counties from the requirement that party lists reflect ethnic and regional diversity, but rather that section 7 of the Election's act demands that County Assemblies reflect cultural and community diversities in the County. The Court contrasted the Petitioner, a person who grew up in, was a member and resident of Garissa County to the 1st respondent; a non-resident who had by admission, testified that she was a registered voter in Uasin-Gishu County and had provided a less than satisfactory response when asked how long she had been in Garissa County.

The Court proceeded to caution that the point was not that persons of different ethnic communities can represent other ethnic communities. However, the issue in question was the extent of the representative being in touch with the local community, which in this case, evidently was non-existent. The Court thus argued that it would be unfair to the women of Garissa County to allow them to be represented by a person who was not familiar with their peculiar needs and interests. The Court therefore found that the nomination offended articles 90(2) of the Constitution and section 7 of the Elections Act. The Court nullified the nomination and consequently the election of the 1st respondent.

Yaite Philip Okoronon v Jakaa Gardy Odara & Another Busia Chief Magistrates Court Election Petition 8 of 2017

In the Chief Magistrates Court at Busia
Coram. Hon. GN. Wakahiu

Judgement Dismissing Petition

20 February 2018

Whether the election was conducted in accordance with the Constitution, Election Laws and Election Regulations — whether the 1st Respondent was validly elected — what consequential orders should this court should make.

Summary of facts

The Petitioner, after the August 8th 2017 general elections, approached the Court seeking a declaration that Jakaa Gardy Obara was not duly elected and the election for Member of County Assembly in Bunyala North was void.

In the petition, it was by consent that the parties agreed that the following issues should be determined by the Court; first; whether the election of MCA Bukhayo North Walatsi Ward was conducted in accordance with the Constitution Election Laws and Election Regulations. Second, whether the 1st respondent was validly elected as the MCA Bukhayo North Walatsi Ward. Third, what are the consequential orders that this court should make.

In the submissions, the Petitioner's Counsel stated that in support of the Petition, the Petitioner swore an affidavit in accordance with the Rules and also filed those of his witnesses. He said that Phillip Yaite, the Petitioner, who was also a candidate in the same race for Member of County Assembly brings the Petition in such capacity and lists 3 broad grounds namely that of; i) Violence and intimidation; ii) Voter bribery; iii) Negligence on part of I.E.B.C officials in handling the said election.

He stated that the Petitioner avers further in his Petition that there occurred evident electoral malpractices and illegalities that compromised the election of the declared candidate, Gardy Jakaa Obara, and therefore the election is voidable on those grounds. It was the Petitioner's submission that Gardy Jakaa Obara was declared the winner with 1, 910 votes, while the second runners up got 1, 994 votes. Phillip the Petitioner got 1, 612 votes in the ward.

Counsel for the Petitioner reiterated in his submission that not only were there proven instances of violence affecting voters, and voting pattern in the said ward, but such violence had the net effect of discouraging eligible voters from voting thus affecting the whole exercise. That some of the willing voters were therefore disfranchised cannot be gainsaid. He said that the Petitioner through his witnesses PW2, PW3 and PW4 demonstrated that indeed violence existed and were perpetrated by known supporters of the M.C.A elect, Gardy Jakaa Obara.

For instance, the testimony of PW2 who confirmed that he was a contestant for the MCA seat. He garnered 1,694 votes according to IEBC declared results. He was number 2 in the race.

He however has not filed an election petition challenging those results. Testified that he went to at least 6 polling stations and saw a woman being beaten as an act of violence and reported the same to the police on the election day.

Further to bake their case, counsel for the Petitioner adduced that total declared votes cast were put at 7307. However, upon Recount it was established that the same was 7294. This also differs from what was observed in form 36 A's which is 7318. This makes a difference of 24 votes 7318 – 7294. Counsel posed a questioned to the Court that what is the position to be believed? He arrived at a conclusion that the I.E.B.C did not conform to law by being accountable and there exist doubt which can only be resolved by an order for fresh elections.

In regard to the witnesses of both parties testifying, the Court proceeded to analyze the evidence and law applicable in the petition. One of the graceful stands that the Court took was that election is a cycle and not an even. In support of this was the case of ***Presidential Petition No. 1 of 2017, in which the Supreme Court of Kenya*** (SCOK).

There are many other authorities which speak to this proposition. In ***Kanhiyalal Omar v. R.K. Trivedi & Others and Union of India v. Association for Democratic Reforms & Another***, the Supreme Court of India, for example, stated that the word 'election' is used in a wide sense to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. These stages include voter registration; political party and candidate registration; the allocation of state resources and access to media; campaign activities; and the vote, count, tabulation and declaration of results.

In the respondents' response, it was their principle submission that first, burden of proof in an election petition lies with the Petitioner. That he (the Petitioner) must establish and prove all the allegations leveled against the Respondents regarding the conduct of the elections and the results announced thereafter. He affirmed that the first issue in an election petition is the issue of burden of proof. That a party who alleges the basic facts upon which his case is premised has the burden to prove those facts. Therefore, counsel maintained that the Petitioner herein has the burden to adduce evidence to support his assertions as contained in the petition. Counsel relied on the case of **Raila Odinga & Others vs. IEBC & Others Petition No. 5 of 2013**.

Second, the standard of proof, Counsel explained that standard of proof is the extent to which the Petitioner should go to sufficiently persuade the Court to interfere with the election results declared. He cited Section 83 of the Elections Act which lays down the standard of proof required in election petitions in Kenya. The section narrates that;

> ***"no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election."***

The counsel maintained that the threshold set in section 83 of the Elections Act has made it trite law that the standard of proof in election cases is higher than in other civil cases. Thus it is higher than proof on a balance of probabilities but below proof beyond reasonable doubt applied in criminal cases. In ***Hassan Mohammed Hassan vs IEBC & 2 Others EP NO. 1 OF 2013*** at page 7 in which it was held as follows;

> ***" the standard of proof cannot be the usual standard of proof on the balance of probabilities applicable in civil cases. Such a standard in election petitions must be higher..."***

To further support this position, Mulenga JSC of the Supreme Court of Uganda, in the case of ***Col (RTD) Dr. Kiiza Besigye vrs Yoweri Kaguta Museveni in Presidential Election Petition No. 1 of 2001*** delivered himself on the issue of proving to the satisfaction of the Court as follows;

"**I do share the view that the expression proved to the satisfaction of the Court connotes absence of reasonable doubt. The amount of proof that produces the Court's satisfaction must be that which leaves the Court without reasonable doubt**."

It was the respondents' submission that, it follows that breach of the regulations or procedure laid down by the law which did not interfere with the democratic choice of voters will not persuade the Court to interfere with an election result. Hence, unless the irregularities, malpractices and illegalities proved by a Petitioner are such that they actually interfered with the free choice of the voters, the Court ought not to interfere with the existing choice of the said voters.

He insisted that the burden is upon the Petitioners to prove that non-compliance has not only taken place but also has substantially affected the results and thus, there must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election.

In dismissing the assertion of violence, counsel simply identified that what PW2 testified was hearsay and not what he saw.

Counsel concluded by stating that on all the allegations of malpractices, illegalities and irregularities by the Petitioner, including allegations of violence, bribery, negligence and breach of the law; no attempt was made by the Petitioner nor his witnesses to prove the same. That the Petitioner began and finished with a mere generalized mention of the same in his petition. He said that from the record, there is no cogent, credible or consistent evidence to prove any of the allegations of non-compliance made by the Petitioner.

The Court in determining the issue on whether there was violence, the Court said that violence falls among what the Elections Act has grouped as election offences. These offences are not to be casually treated as they have disastrous consequences if proven. In ***Hassan Mohammed Hassan vs. Independent Electoral and Boundaries Commission & 2 Others*** (2013) E.P NO.1 OF 2013 the Court wisely noted that 'violence and intimidation amount to criminal conduct (...) That mere or sketchy and generalized allegations are not sufficient to prove the serious criminal acts. The Court determined that adequately dispensed with the standard of proof required for such a claim. I note with certainty that the allegation of violence and intimidation is a serious allegation which has disastrous ramifications. The standard of proof for such a claim is that of beyond reasonable doubt.

The Court also arrived at the same conclusion of the Petitioner did not meet the standard of proof to suffice voter bribery.

In determining whether the election was conducted in a free, fair, transparent and accountable manner, the Court had the following to say:

> *…IEBC strived to protect the will of the people, it accorded every party a fair stage to participate in the election and then counted the votes and made a declaration on the winner. The Petitioner was also issued with all the form 36As as required and did not raise any issue. The process is deemed to have adhered to the laid down laws and the Constitution substantially…*

Therefore, the Petitioner's proposition of calling the elections a sham and that the election is deemed to have adhered to the laid down laws and the Constitution substantially.

Basing its judgement on the decision of the Supreme Court of Uganda in the **Besigye vs. Museveni (supra)** the Court held that the Petitioner tables no evidence to show that the irregularities, inconsistencies and flaws substantially affected the principles governing elections and thus could not affect the outcome of the election.

Even though the Court identified errors and inconsistencies with the different forms filled 36A and 36B, the Court arrived at a conclusion that they were not substantial as to affect the election and therefore the Petitioners did not have sufficient evidence. The Court used the holding of Majanja J in ***Richard Kalembe Ndile and Another v Patrick Musimba Musau at Machakos High Court Petition 1 of 2017 (Unreported)***:

> *…under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.*

Thus, despite of the inconsistencies the will of the voters was considered to be the candidate who got the highest number of valid votes cast. It cemented the decision with the case of ***Nicholas Salat vs IEBC &Others in Election Petition no.1 of 2013,*** that legal sufficiency in the election to mean that an election was conducted in a free, fair and credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of any errors, mistakes or irregularities. It means that if there were any such errors, mistakes or irregularities they were not of such magnitude that they substantially affected the results.

The Court dismissed the petition and declared that the Respondent was validly elected as the Member of County Assembly, Bukhayo North Walatsi Ward in Busia County.

Kapusia Ole Saloni v James Kipas & 2 Others Narok Magistrates' Court Election Petition 3 of 2017

Chief Magistrates Court in Narok
Coram: H. M. Nganga

Ruling on Application to Strike Out Petition

23 November 2017

Whether an interlocutory application can be brought after pre-trial conferencing — failure to particularise election results

Summary of facts

The matter came up for hearing on 22 November 2017. However, the 1st Respondent had filed a Notice of Preliminary Objection dated 17 November 2017 and filed on 20 November 2017 arguing the Petitioner had failed to comply with the mandatory provisions and requirements of Rule 8(1) (c) of the Election (Parliamentary and County Elections) Petition Rules, 2017 (herein after "Election Petition Rules 2017") having failed to state and or tabulate the results of the impugned elections , the entire Petition is ex- facie incurably defective and therefore incompetent.

The Court had to determine whether the Preliminary Objection was properly before the Court. It was submitted that the Preliminary Objection should have been raised during the pre-trial stage in accordance with Rules 15(1) and (2) of the Election Petition Rules. In particular, Counsel contended that Rule 15(2) dictated that the Court should not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition. The Court found that the preliminary objection had been raised at the proper time. The counsel submitted that the Preliminary Objection did not specify the orders sought and that the Objection stated that the Petition filed herein was incurably defective. The import of those words was that, if the objection was upheld, the Petition would be rendered incurably defective and it followed that the only consequence would be to strike out the Petition. The Court however found that it raised points of law on non- compliance with Rule 8 (1) (c) of the Election Petition Rules and therefore accorded with the holding in the celebrated case of ***Mukisa Biscuit Company vs Westend Distributors Limited (1969) EA 696***. It was therefore properly before the Court.

On the issue of compliance, the Court stated that the contents and form of an election petition were contained in Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules 2017 which requires that election results and their date and manner of declaration be particularised.

Counsel submitted that the results were nevertheless stated in the Petitioner's supporting affidavit sworn on 6 September 2017. The Court found that the Petitioner failed to state the results of the election in the Petition filed. As correctly submitted by Counsel for the Respondents, the Petition could only be amended if the leave of the Court was obtained within 28 days of the declaration and the window had long been shut. There was no compliance with the requirement that the results be partcularised in the petition but a proposal on the amendment of the same.

However, on the question on the consequences of non-compliance, it was held that no prejudice would be occasioned to the petition as the same had been mentioned in the affidavit. Although affidavits are not usually deemed to be pleadings, the affidavit in support of an election petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings. This was the holding in the cases (***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Supreme Court Petition No. 2B of 2014***; ***Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission & 8 Others, Election Petition (Nairobi) No. 1 of 2013***). The preliminary objection was dismissed.

Mohamed Abass Sheikh v Independent Electoral & Boundaries Commission (IEBC) & 2 Others Meru CMCC Election Petition 2 of 2017

In the Magistrate's Court at Meru
Coram: Hon: Mrs. L. Ambasi

Judgment Dismissing Petition

15 February 2018

Jurisdiction of an election court over a party list dispute

Summary of facts

The Petition was filed on 13 September 2017 alleging that the Petitioner had been denied his constitutional right under article 171 (1) of the Constitution to be validly nominated as representing the Minority in the County Assembly of Meru as the 1st Respondent had unlawfully gazetted the nomination of the 2nd and 3rd Respondents as representing minorities in Meru. He contested the validity of their nomination vide Kenya Gazette Notice Number 8380 dated 28th August 2017. He alleged that the two respondents could not be said to represent the minority. The 1st Respondent submitted that the election had been conducted fairly in accordance to the party list.

The main issue raised was on the jurisdiction of the Court to determine this Petition. All the Respondents submitted that in the instant Petition, this Court has no jurisdiction to grant the Petitioner the orders sought because the Petitioner did not exhaust all available legal mechanisms and avenues, and he ought to have filed his claim with the Political Parties Disputes Tribunal (PPDT), the IEBC Nomination Disputes Committee and/or the Jubilee Party's Internal Disputes Resolution Committee. It was also contended that the candidates who had been gazetted were not eligible and or validly nominated for the stated categories.

The Court ruled that other than the Elections Act and the Independent Electoral and Boundaries Commission Act, the Political Parties Act was enacted as an Act of Parliament to provide for the registration, regulation and funding of political parties, and for connected purposes. On this basis, Section 39 (1) of the Act establishes a Tribunal to be known as the Political Parties Disputes Tribunal. The jurisdiction of the Tribunal is provided for under Section 40 of the said Act.

The Court asserted that the existence of Articles 165 and 258 of the Constitution was not a substitute or a means of excluding other dispute resolution organs and agencies from exercising their statutory duties. Citing ***Peter Ochara Anam & 3 Others v Constituencies Development Fund Board and 4 Others, Kisii High Court Petition No 3 of 2010,*** the Learned Judge observed that jurisdiction was everything and where the law established a procedure for resolving a dispute, that procedure had to be followed. While the Court had jurisdiction under the Constitution, that did not take away the obligation to ensure that procedure was followed.

The learned judge found that the Court was not the appropriate forum for handling the issues brought out in the Petition as it was a dispute in regard to the nomination of a candidate. The petition was dismissed.

Parliamentary Election Petitions

Clement Kungu Waibara v Annie Wanjiku Kibeh & Another Kiambu Election Petition 1 of 2017

High Court of Kenya at Kiambu
Coram: Ngugi Joel J

Judgment Allowing Petition

1 March 2018

Whether the tallying of votes was conducted in an impartial, neutral, efficient, accurate or accountable manner — election offences

Summary of facts

The Petitioner vied for election as the Gatundu North Member of the National Assembly as an independent candidate. At the end of the election, the 1st Respondent was declared by the 2nd Respondent as duly elected with 39,447 votes, against the Petitioner's 9,314 votes. The Petitioner filed a petition challenging the election of the 1st Respondent on about 31 grounds.

He sought the following prayers: a declaration that the 1st Respondent was not validly elected; a declaration that the Petitioner was the validly elected representative for Gatundu North Constituency or in the alternative, an order that a fresh election for Gatundu North Constituency be held; an order of scrutiny and recount and/or re-tallying of all the votes to ascertain the actual winner; a declaration that the election for Gatundu North and the subsequent tallying and declaration of results and certificate issued to the 1st Respondent was invalid, null and void for not being free, fair, credible, verifiable and transparent and for lacking credibility; a declaration by the Court whether an electoral malpractice of a criminal nature occurred; that the declaration of results for Gatundu North Constituency made on August 10 and the certificate issued pursuant thereto and subsequent Gazette Notice of 22 August 2017 declaring the 1st Respondent as Member of National Assembly for Gatundu North be quashed and nullified and that the Respondents bear the cost of the petition.

The Petitioner also prayed for such other costs and consequential directions as the Honourable Court would deem fit taking into account all the circumstances of the case. For ease of analysis and to avoid an unnecessarily lengthy judgment, the Court lumped together the allegations with the responses of the respondents and its findings on each of the issues.

Firstly, the Petitioner alleged, *inter alia*, that the KIEMS kit contained different results from those in the hard copies because the hard copies had been tampered with. He therefore prayed for access to the KIEMS kits in respect of certain polling stations and a KIEMS reader. This order was granted by the Court, but the Petitioner did not present any evidence in this regard during the hearing of the petition. The Court therefore found that the claim was without merit.

Secondly, the Petitioner alleged that tallying of votes had been marred with violence, intimidation and improper influence from the 1st Respondent and her supporters to facilitate transfer of his votes to the 1st Respondent and further, that his agents were violently chased away in Gatunguru and Nyamathumbi and that his supporters were chased away and not allowed to vote in Mataara Primary School. The Respondents refuted these allegations and since the Petitioner was not present in these polling stations but relied on the testimony of his Chief Agent who neither swore an affidavit nor testified, the Court

found that on a balance of probabilities, the allegations were not proven. Furthermore, these allegations were not captured in the polling station diaries (PSDs) neither were they reported to the police and therefore they appeared for the first time in the petition.

Thirdly, the Petitioner contended that his votes had been deliberately allocated to the 1st Respondent during counting and tallying. He cited various streams in Mutuma Primary, Ndekei Primary School and Mataara Primary where he alleged his agents were chased away and his votes allocated to the 1st Respondent. Since the Petitioner was not present in any of the stations and none of his agents testified, the Petitioner's evidence was merely hearsay. Moreover, none of the allegations of reallocation of the Petitioner's votes to the 1st Respondent were proved during the scrutiny of the votes cast in Mutuma and Ndekei Primary Schools where the alleged transfer of votes happened. The scrutiny which took place in 29 Polling Stations out of a total of 126 Polling stations did not reveal any such pattern of reallocation of the Petitioner's votes to the 1st Respondent. It was only in 3 instances when votes marked in favour of the Petitioner were counted in favour of the 1st Respondent and in one instance a vote marked in favour of the 1st Respondent was counted as the Petitioner's.

Fourthly, the Petitioner alleged that his agents were denied entry into Mangu Primary School (streams 1 and 2) and Nyamatumbi Primary School (stream 1), ostensibly because there were other independent agents at the polling stations yet there were only two independent agents against 6 independent candidates. The Petitioner also alleged that his agents were denied access to 3 other polling stations and in respect of 5 others, only the 1st Respondents agents were allowed in. The 2nd Respondent denied any such refusals and asserted that none of the agents had lodged a formal complaint and neither did the Petitioner prior to filing the petition. The Court ruled that the fact that there was no independent evidence from an agent who had been denied entry weakened the allegation considerably. The fact that the Petitioner deposed to and testified as to what the agents told him meant that his evidence on this matter was hearsay. Moreover, since there was no trail of the complaint, either with the Returning Officer or with the Police, this was a clear indicator that this was not an issue on voting day. The allegation as therefore not proved to the required standard. Similarly, the Court found incredulous the allegation that the Petitioner's agent was not allowed to observe the sealing of ballot boxes and to confirm the emptying of the boxes before the voting process began since the Petitioner had earlier contended that the agent was not even allowed into the said polling station.

In addition, the Petitioner alleged that there was a KIEMS kit malfunction at Gikindu Primary School, which made it impossible for many voters to vote. The 2nd Respondent admitted the hitch but insisted that it was fixed and all voters who turned out to vote managed to do so. The Court found that the available evidence did not support the Petitioner's allegation since there were 581 registered voters and 489 of them cast valid votes, while one vote was rejected. This brought the voter turnout to 84%, which was consistent with the other polling stations in the constituency, with the average turnout standing at 87%. The technological hitch therefore did not appear to have affected voting.

The Petitioner further alleged that the KIEMS kit malfunctioned in Kawira, Ihiga-ini, Muirigo and Njatha-ini plling stations, but no evidence was provided to prove this allegation. Moreover, since the turnout did not show any significant drop compared to other polling stations, the Court found that this allegation was not proved.

The Petitioner also alleged that his agents were forced to take a 30-minute break before the tallying and tabulation of votes cast, which in his view affected the credibility of the process. The Court could find no evidence in this regard as no such record was contained in the PSDs, nor was there

any logical link between the break and the vote counting and lack of credibility of the elections. The claim therefore failed.

The Petitioner also complained about the Presiding Officer at Mwea Primary School influencing the choice of assisted voters by not reading out all the names on the ballot paper. However, the source of this information was not disclosed by the Petitioner. Since the Petitioner was not present but was reporting what he had been told by others who did not themselves testify, it was mere hearsay. Moreover, such an allegation needed further corroboration which was absent since no agent protested, reported or recorded such an incident during voting.

On the allegation that unauthorised persons were allowed to participate in the tallying of votes and that the process of tallying and tabulation began 10 hours after close of voting at Gatunguru polling station, the Court found that no evidence was placed before the Court to substantiate the claims beyond the Petitioner repeating what he was told. The fact that no report or protest was registered at the time of the alleged infractions was to the Court a powerful indicator that the allegations were not credible. The Petitioner also alleged that they were denied copies of Form 35A which bore official results recorded by Presiding Officers. However, no agent testified that they were denied Forms 35A and the Petitioner's affidavit had several Forms 35A attached to it. This meant that the Petitioner received copies of these forms. The Court also found no evidence that Forms 35A were not displayed on the door of the polling stations as required by law or that several ballot boxes were open upon arrival at the tallying station beyond the Petitioner's assertions.

The Petitioner also contended that the 1st and 2nd Respondents used illegal and fake ballot papers in favour of the 1st Respondent and that counterfeit ballot papers pre-marked in favour of the 1st Respondent had been discovered. However, these claims were firmly refuted by the 2nd Respondent, which was confirmed by the Deputy Registrar's report on the scrutiny carried out in 29 polling stations that al the ballot papers scrutinised were genuine. The Petitioner also failed to supply evidence in support of his assertions that the Presiding Officer at Huruma Kieni Primary School intentionally spoilt votes or that the 1st and 2nd Respondents promoted electoral malpractices including creating non-gazetted polling stations and centres. Given the seriousness of the electoral offences alleged, the standard of proof required was beyond reasonable doubt. This was restated in the ***2017 Raila Odinga*** case. The only available evidence was that of the Petitioner claiming to have been told by persons unavailable to testify. The Court ruled that the Petitioner had not met the standard of proof on allegations which were of a criminal and quasi-criminal nature.

Finally, the Petitioner contended that the tallying and collation of votes was not conducted in an impartial, neutral, efficient, accurate or accountable manner and did not meet the legal requirements. Among other irregularities, the Petitioner cited lack of official IEBC stamps on some Forms 35A; some Forms 35A being signed and dated the day after the election; that at Mataara, the valid votes cast were 477 but 478 were recorded in Form 35A; that tabulation of results at all polling stations was not prompt and accurate; that some statutory forms lacked the required signatures; that some ballot boxes lacked the required seals and that the Form 35 B in respect of Gatundu North Constituency did not include results from Gikindu Primary School as reflected in Form 35A for that polling station. Having set out the standards that must be met before an election result can be invalidated, the Court set out to find out whether one or more of three thresholds for invalidating an election result stipulated above had been met. The Court reviewed the scrutiny report prepared by the Deputy Registrar as well as each of the PSDs to make its own assessment of the irregularities. The Court identified 21 irregularities from the 123 PSDs availed. No explanation was rendered by the 2nd Respondent as to

why the 3 missing PSDs were not availed. The Respondents also maintained that any irregularities which may have occurred in the conduct of the election could be explained by human error. They urged the Court to declare these errors minor and find that the Gatundu North Constituency election was conducted in accordance with the Constitution and the Elections Act and regulations and a valid declaration of the outcome of the election made.

Despite the numerous allegations made by the Petitioner, the Court found that the entire petition hinged on whether the IEBC conducted the elections in such a manner that one could objectively say that it was conducted in accordance with the Constitution, statute and other laws. While acknowledging that no election could be perfect, the Court cautioned against allowing elections to stand which did not meet the test of integrity. To do so would, in the view of the Court, be to give judicial blessings to an election in which the IEBC botched the processes with seemingly systemic carelessness and nonchalant mediocrity, thereby surrendering Kenyans' search for electoral justice to the gods of impunity. This would paralyse all efforts made at building a sound and excellent electoral justice system in the country and signal our acquiescence to the narrative that we are unable to demonstrate fidelity to the rules of the game which we painstakingly write for ourselves.

The Court reached the conclusion that the election for Member of the National Assembly for Gatundu North was conducted so badly that it was not substantially in accordance with the law as to elections, and therefore, the election was vitiated, irrespective of whether the result was affected or not.

Nonetheless, the Court was clear that no wrongdoing had been found attributable to the 1st Respondent; she was merely a victim of the 2nd Respondent's failure to conduct the election in accordance with the law. However, over and above the moral culpability of the agents and employees of the 2nd Respondent in conducting an election marred with irregularities, a person or group of people were able to break open ballot boxes for at least two polling stations and steal at least 332 votes. Such persons needed to be prosecuted and punished in accordance with the law. While the evidence did not point to any specific perpetrator, seven persons were considered of interest and the Court recommended an investigation into their conduct. This recommendation was influenced by the fact that they had chain of custody of the ballot materials, the alleged appearance of the materials in public spaces and their eventual appearance in the petition, making it apparent that they were either responsible for the theft of at least conspired to steal the votes. The Presiding Officers of Mutuma Primary School (stream 2), Ndekei Primary School (stream 1) and Mungai Primary School (stream 2) were responsible for giving an account of why counted votes did not make their way to the County Returning Officer; the Constituency Returning Officer who received sealed ballot boxes; to the extent that the theft happened after receiving ballot boxes, he might have been responsible; the Constituency Logistics Officer who had custody of the ballot boxes for 7 days before they were taken to the warehouse for safe-keeping; the County Logistics Officer who took custody of the ballot boxes pending their production in court; and the Petitioner who exhibited the stolen votes in his election petition and who did not explain how he came into contact with the stolen material, suggesting the commission of an election offence.

On the costs of the petition, the Court used the discretion donated by Rule 30 (1) (a) to cap the total costs payable and to direct that they would not be subject to taxation by the Deputy Registrar. The Court further directed that since the 1st Respondent was not found culpable and had conducted themselves with utmost professionalism and integrity during the proceedings, their costs would be paid by the 2nd Respondent, and the same were capped at KES 3million. As for the Petitioner, the Court found that he unnecessarily prolonged the proceedings by their style of litigation and making

numerous and wild allegations, many of which were unfounded. While he was the victorious party, his costs were capped at KES 1.5 million.

The Court therefore issued the following orders: a declaration that the election of the Member of the National Assembly for Gatundu North contravened the Constitution and statutory provisions governing elections; that the 1st Respondent was not validly declared the elected Member of the National Assembly for Gatundu North and the declaration issued by the 2nd Respondent was therefore null and void; a certificate to the 2nd Respondent and Speaker of the National Assembly conveying the determination of the Court; that the determination of the Court be transmitted to the Director of Public Prosecutions for investigation and possible action on the electoral malpractices identified in the judgement and an order directing the 2nd Respondent to hold a fresh election in conformity with the Constitution, the Elections Act and regulations made thereunder and the costs would be paid by the 2nd Respondent in the terms set out above.

Annie Wanjiku Kibeh v Clement Kungu Waibara & Another Nairobi Election Petition Appeal 20 of 2018

Court of Appeal at Nairobi
Coram: **Nambuye, Gatembu & Murgor, JJ.A**

Judgment Allowing Appeal

31 July 2018

Whether an election court can order scrutiny when no specific polling stations were pleaded — whether the Trial Court established a new test to invalidate elections which displaced the two tests applicable to section 83 of the Elections Act — whether finding of trial court was based on unpleaded or unproved material — whether decision to nullify election was based on historical context rather than proven facts — whether trial court misapprehended the law in nullifying the election

Summary of facts

The appellant was aggrieved by the decision of the High Court nullifying her election as Member of the National Assembly for Gatundu North Constituency. It its decision, the Trial Court after evaluating the evidence had reached the conclusion that the election was conducted so badly that it was not substantially in accordance with the law on elections. Her grounds of appeal were that the Trial Court failed to consider whether any irregularities affected the outcome of the election; misinterpreted section 83 of the Elections Act; wrongly conducted an inquiry with the Deputy Registrar in the absence of the parties; wrongly nullifying the election on the basis of errors in polling station diaries without considering their impact on the results as contained in Forms 35A; disregarded Forms 35A; determined the petition based on unpleaded issues thus expanding the scope; disregarded the scrutiny of 23 November 2017; wrongly held that there was a statutory requirement to stamp result declaration forms; improperly applied the per se test and held that proof of the per se test would result in nullification without considering section 83 of the Elections Act; failed to apply section 83 of the Elections Act to proven irregularities; failed to exclude/subtract from the final count results contained in the Forms 35A, thus trivialising the results; failed to apply the principle of stare decisis; wrongly found that the 2nd Respondent had failed to provide Form 35A for certain polling stations; and committed a perverse error of law by subjecting the Appellant to an unfair trial contrary to Article 50 (1) of the Constitution.

The 1st Respondent filed an application to strike out the Notice of Appeal and the entire appeal as well as a cross appeal on two issues: whether the appellant was eligible to contest for the seat of member of Parliament for Gatundu North Constituency; and whether the 1st Respondent should be excluded from the investigations in to an election offence ordered by the learned judge.

The Court considered the 1st Respondent's Notice of Motion seeking to strike out the appeal and concluded that the grounds pleaded were mainly concerned with the form and not the substance of the Notice of Appeal. Moreover, counsel was unable to articulate in what specific respects the Notice of Appeal fell short of the legal requirements. The Court took the view that the matters raised did not go to the root of the appeal and could be overcome by Article 159 (2) (d) of the Constitution. Since the question of whether Rule 6 of the Election Appeal Rules had been complied with was not specifically pleaded, the Notice of Motion was dismissed.

The 2nd Respondent also filed a cross appeal arguing that the trial judge: misdirected himself on the law on validity and nullification of Elections in Kenya having introduced and used the "per se" test to nullify the Election; misapplied the principle of the burden and standard of proof in Election Petitions; misdirected himself on the principle of Judicial Restraint as regards the balance between preserving the will of the people as expressed by the majority of voters; misapprehended the law on scrutiny; misdirected himself by enlarging the Petition and considering new issues which were not pleaded in the Petition; erred in obtaining further submission from the Deputy Registrar on the Scrutiny report dated 23rd November, 2017 without according the 2nd Respondent an opportunity to reply; misdirected himself by relying on alleged errors in Polling Day Diaries to nullify the election which errors had not been specifically pleaded; exceeded his jurisdiction by conducting after close of hearing an exclusive suo muto analysis/ scrutiny of all form 35As and polling Day Diaries; failed to accord the 2nd Respondent the right to reply to the twenty-one parameters; x) disregarded in totality all the evidence adduced at trial and relying solely on his suo muto analysis/ scrutiny of all form 35A and Polling Day Diaries in nullifying the election; failed to determine whether the finding of non-compliance of the law and irregularities was occasioned by either outright negligence and deliberate action by the 2nd Respondent or by innocent mistake and human error and whether the said non-compliance and irregularities was substantial to nullify the election; failed to find that the Petitioner benefited from illegalities he committed by being in possession of ballot materials contrary to the Law; erred in finding that the 2nd Respondent failed to produce Polling day diaries for Gatei Primary School, Kanyambi Primary School and Maria-ini Primary School and Form 35A for Maria-ini Primary School, yet there was no application and or order seeking such production; erred in finding that it was a statutory and or legal requirement to; countersign alterations on form 35A and that the form 35s ought to be stamped by IEBC stamp.

Issues for determination

The Court stated that the appeal turned on the question whether the tallying and collation of votes for Member of the National Assembly for Gatundu North Constituency was carried out in an impartial, neutral, efficient, accurate or accountable manner and whether it met the legal requirements.

Since the appeal and the matters raised in the 2nd Respondent's cross appeal were concerned with similar issues, the Court considered it prudent to merge and determine them as follows: whether an election court can order scrutiny when no specific particulars were pleaded; whether the Trial Court established a new test to invalidate elections which displaced the two tests applicable to section 83 of the Elections Act; whether finding of trial court was based on unpleaded or unproved material; whether decision to nullify election was based on historical context rather than proven facts; whether trial court misapprehended the law in nullifying the election.

On the question of whether an election court had improperly ordered scrutiny when no specific polling stations were pleaded, the Court noted that the Trial Court had declined to grant the 1st Respondent's prayer for scrutiny in the entire constituency and instead granted a limited order of scrutiny of 10 polling stations identified in consultation with the parties. The Court reviewed the existing principles on scrutiny as set out in section 82 of the Elections Act and Rules 28 and 29 of the Election Petition Rules as read with the jurisprudence in ***Matiba v Moi & 2 Others, 2008 1 KLR 670, William Maina Kamanda vs Margaret Wanjiru Kariuki & 2 Others (2008) eKLR, Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission SC Petition No. 23 of 2014*** and ***Ledama ole Kina vs Samual Kuntai Tunai & 10 Others, [2013] eKLR.*** Applying the principles to the present case, the Court noted that it was clear that for an order of scrutiny to be granted, it was necessary for the Petitioner to specify the polling stations to which scrutiny was to be confined in

the petition, affidavits in support of the petition and the evidence. Further, it was necessary for the pleadings including the petition and the affidavits to particularise the Petitioner's case with clarity and to lay a basis for which polling stations would undergo scrutiny. Moreover, the election court had to provide reasons for granting an order of scrutiny. The Court therefore found that the learned judge had disregarded the existing principles in ordering scrutiny.

Since the Court did not indicate that the order of scrutiny was granted suo moto, it could only be inferred that the application was made in relation to the 1st Respondent's application. It was therefore necessary for the court to satisfy itself that the petition and the supporting affidavits set out the complaints requiring investigation with specificity and identified the polling stations to which the complaints could be attributed. An analysis of the petition and supporting affidavit revealed that the 1st Respondent made numerous and random allegations, from which the trial judge selected two on which he based his order of scrutiny: the claim that there were fake ballot papers and that ballot stuffing had taken place. However, the Court did not identify the polling stations and instead polling stations were selected in consultation with the parties. The Petitioner's pleadings did not reveal the polling stations where these alleged malpractices occurred. Since the allegations were random, arbitrary and unspecific, and no polling stations where alleged illegalities occurred could be ascertained from the pleadings, scrutiny ought not have been ordered as no basis was laid for it. In the view of the Court, this had the hallmarks of a 'grand fishing expedition, and an incredible journey into the unknown. The Court therefore found that the Trial Court's exercise of discretion in granting scrutiny was done injudiciously and in contravention of the laid down principles and it was therefore necessary to interfere with it.

The Court also assessed the decision of the Trial Court to carry out an independent forensic audit on Forms 35A and B yet, this was not an issue that was pleaded by the 1st Respondent, and neither was there any application or an order suo moto made by the Court to conduct it. The Court noted that the trial judge carried out the audit without affording the parties a chance to address him on its conduct or its scope, whether suo moto or otherwise. The Court also failed to avail to the parties an opportunity to address him on the outcome of the audit. In light of Articles 25 and 50 of the Constitution, the Court considered that it was wrong for the learned judge to undertake the forensic audit unknown to the parties.

The next issue for determination was whether the learned judge sought to establish a new standard to invalidate elections which displaced the already existing qualitative and quantitative standards set out in Articles 81 and 86 of the Constitution and section 83 of the Elections Act. The appellant contended that the per se standard introduced by the trial judge was a strict and unwieldy standard with such a low tolerance threshold that even the slightest transgression would lead to a nullification of the election. The learned judge had in his judgement stated that in his view, Articles 81 and 86 of the Constitution themselves provide a per se standard for invalidating an election without having to test the allegations against section 83 of the Elections Act.

The appellate court understood the Trial Court to be saying that in addition to Articles 81 and 86 of the Constitution and section 83 applicable to breaches arising under any written or legislative law, there was a more stringent standard for nullifying elections, so that the threshold requirements for nullifying an election for constitutional breaches were lowered. This in their view begged the question whether in addition to the standards established by Articles 81 and 86 and section 83 of the Elections Act, there was another standard (the per se standard, any breach of which would immediately nullify an election.

The Court evaluated the decision of the Supreme Court in the 2017 ***Raila Odinga*** case where the apex court had found that an election had to be one that meets the constitutional standards and it had to be one that was both quantitatively and qualitatively in accordance with the Constitution, meaning that section 83 of the Elections Act had to be applied to the provisions of the Constitution. Despite this clear standard, the learned judge had sought to introduce a low threshold for nullifying elections. Since in terms of the SC decision in the ***2017 Raila case*** any nullification of an election had to be on the basis of substantial violation of the principles laid down in the Constitution as well as other written law, or that, although the election was conducted substantially in accordance with the principles laid down in the Constitution and other written law, it was subject to irregularities and illegalities that affected the result of the election; that is, the qualitative and quantitative standards, to the extent that the learned judge disregarded the threshold that the violation be substantial before an election could be voided, the Court took the view that he misapplied the law.

On the question of whether the learned judge relied on the historical context of elections in Kenya to nullify the elections for Gatundu North Constituency rather than the facts of the case,the Appellant argued that this was not a matter which was pleaded by the 1st Respondent and no expert witness had been called to testify on the history of elections in Kenya, nor did section 60 of the Evidence Act empower a court to take judicial notice of the history of the country. The Court evaluated the SC decision in ***Munya*** as well as its earlier decision in the ***Maina Kiai*** case on the importance of historical context in the interpretation of legal provisions. It reached the conclusion that courts are mandated to take into account the historical context behind the provisions of the Constitution, which background was integral in the interpretation. The Court found that in undertaking a historical detour into the electoral provisions, the learned judge sought to outline the basis of their enactment, the history of the electoral misconduct by the body charged with managing elections and electoral lawlessness, the current legal provisions were enacted to ensure adherence to the rule of law in the electoral process and system. To apply the electoral standard to judging the integrity of elections, it was necessary to have the history that produced the law firmly embedded in our minds.

The Court considered that the learned judge rightly kept in focus the historical contextual background in interpreting the electoral provisions of the Constitution and there was no merit in the complaint that he erred in keeping in view the historical context underlying the constitutional principles on elections. The Court also considered unfounded the Petitioner's allegation that the historical context was applied to nullify the election without due regard for whether the illegalities alleged to have been committed were proved, since the learned judge concluded that failure by the IEBC to strictly comply with the Constitution and statutory laws was informed by a history of electoral injustice. The Court concluded that the election was nullified on the basis of irregularities and missing ballot material.

On the question of whether the Trial Court misapprehended the law in nullifying the election, the Court reiterated that the learned judge wrongly applied the strict and severe standard which he referred to as the per se standard to nullify the elections. An application of the correct standard as set out in the Constitution and section 83 led to a different conclusion.

The reasons for nullification of the election included missing ballot papers and the identified administrative and procedural irregularities concerning Forms 35A. In the view of the Court, nothing demonstrated that there was substantial violation of the principles laid down in the Constitution and other written law as to demand nullification of the election. In addition, the irregularities and illegalities alleged were both insufficient and too insignificant to affect the result of the election. By nullifying the election, the trial judge failed to appreciate that the overwhelming majority of votes attained by the

appellant was a manifestation of the will of the people of Gatundu North Constituency. The appeal was therefore allowed and the judgment and decree of the High Court set aside. The appellant was declared the validly elected Member of the National Assembly for Gatundu North Constituency and the appellant and 2nd Respondents were awarded the costs in the High Court and in the Court of Appeal.

Clement Waibara v Annie Wanjiku Kibeh & Anor Supreme Court Petition 24 of 2018

Supreme Court of Kenya
Coram: Maraga, CJ & P; Ibrahim, Ojwang, Wanjala, Njoki Ndungu & Lenaola, SCJJ

Judgment Dismissing Appeal

18 January 2019

Jurisdiction — whether the Appellate Court properly applied Articles 81 and 86 of the Constitution — whether the Appellate Court misapprehended the object of Section 83 of the Elections Act

Summary of facts

The Petitioner, being aggrieved by the decision of the Court of Appeal upholding the election of the 1st Respondents, filed a petition at the Supreme Court faulting the Appellate Court decision on the following grounds: that the Appellate Court misdirected itself and applied wrong principles in interpreting the values that underpin Articles 10, 81 86 and 249 of the Constitution, to the prejudice of the Petitioner; that the Court of Appeal erred in law, by holding that issues of scrutiny were not pleaded, yet the petition and its final prayers requested scrutiny; that the Court of Appeal erred in law, and misdirected itself on the issue of scrutiny, in the context of Section 82 of the Elections Act; that the Appellate Court erred, by failing to appreciate that the Order for scrutiny had been obtained by consent, and was unchallenged; that the Court erred in law, by finding and holding that illegalities and irregularities had not been pleaded; that the Court of Appeal was wrong in faulting the trial Court in its findings on a partial scrutiny; that the Appellate Court erred by holding that, of the 30 grounds raised by the Petitioner, only one was established as a proper basis of the cause; that the Court of Appeal perverted the interpretation and application of Articles 10, 81, 86 and 249 of the Constitution, by holding that the trial Court was justified in invoking historical reminiscence, as a basis of interpretation of Articles 81 and 86, even as it found fault with that Court for putting up novel theory unknown to the law; that the Court of Appeal failed to appreciate that the trial Court had duly addressed its mind to the law on scrutiny, and had applied the scrutiny report in good faith, as part of the adjudication process in an election petition; that the Court of Appeal erred by holding that the errors in the electoral process were merely administrative and procedural, yet such errors offended the letter and spirit of Articles 10, 81, 86, 249 of the Constitution; that the Court of Appeal erred by departing from well settled jurisprudence regarding errors and violations that distorted the election outcome.

The Petitioner therefore prayed that the Court issue a stay against execution and judgment of the decision of the Court of Appeal pending final determination of an application for stay; that the judgment and decree of the Court of Appeal be set aside and the judgment and decree of the High be reinstated; that a declaration e issued that the election for Member of the National Assembly, Gatundu North Constituency was so badly conducted, contrary to the Constitution and electoral law that it was a nullity; an order that the 1st Respondent was not validly elected and the costs of this appeal, costs in the Court of Appeal and costs in the High Court be awarded to him. He further prayed that the recommendation by the Trial Court that he be probed by the Director of Public Prosecutions be quashed.

The 1st Respondent filed a cross appeal asserting that the Appellate Court erred in law for faulting the Trial Court for declining to exercise jurisdiction to determine whether the 1st Respondent had been a county assembly member who abdicated his position before seeking a parliamentary seat and in faulting the trial judge for determining an application for additional evidence.

Issues for determination

On the question of jurisdiction to entertain the appeal, the Court evaluated the principles on appeals to the Supreme Court on electoral matters set out in ***Zebedeo John Opore v. Independent Electoral and Boundaries Commission and 2 Others*** Supreme Court Election Petition No. 32 of 2018. It found that a limited number of the issues raised in the petition did involve constitutional interpretation and application, such as the application of section 83 of the Elections Act and the conduct of elections in relation to the terms of Articles 81 and 86 of the Constitution. Where issues raised in the appeal and cross appeal fell outside the Court's mandate, the same were omitted from the Court's determination.

On the question of whether the Appellate Court properly applied the standards in Articles 81 and 86 of the Constitution, the Court noted that the Trial Court and interpreted section 83 of the Elections Act as incorporating three criteria for annulling an election: where the electoral system or conduct of the election falls short of the contemplated standards; where the conduct of the election qualitatively departs from written law and where there are irregularities and illegalities in the conduct of the election. Of the three standards, the Trial Court had considered the first a *per se* standard which if established, led to nullification of an election without the need to consider section 83 of the Elections Act. The Appellate Court deprecated the Trial Court for proceeding from such a postulate and found that it was necessary to ascertain whether the irregularities and illegalities had affected the election outcome.

The Supreme Court agreed with the Court of Appeal's assessment that the Trial Court ought to have ascertained whether the irregularities revealed in the process of scrutiny affected the outcome of the election. It found that it was inapposite for the Trial Court to determine the dispute on the basis of any conjecture, however logical.

As to whether the Court of Appeal rightly upheld the election of the 1st Respondent, the Court considered that the basis for the Trial Court's annulment of the election was that the electoral process was marred by irregularities. However, the Court found that the Appellate Court correctly held that the audit conducted by the Trial Court was not an integral element in the lawful proceedings of the Court and therefore could not constitute a basis for annulling the election. The Court concurred with the Appellate Court that irregularities and illegalities were not a sufficient basis for annulling the election if it was not established that they affected the election outcome. The Court of Appeal therefore rightly upheld the 1st Respondent's election. Consequently, the petition and cross appeal were disallowed and the declaration of the results by the IEBC in respect of the seat of Member of the National Assembly, Gatundu North Constituency affirmed. The 2nd Respondent was directed to bear their own costs as well as those of the 1st Respondent's in the appeal as well as in the courts below and the appellant would bear his own costs.

Mbaraka Issa Kombe v IEBC & 3 Others Malindi Election Petition No. 10 of 2017

High Court of Kenya at Malindi
Coram: Otieno J

Ruling Striking Out Petition

2 November 2017

Whether Petition complied with Rules 8 and 12 of the Election Petition Rules — effect of failure to comply with the Election Petition Rules

Summary of facts

The 4th Respondent filed an application seeking to strike out the petition on the basis that it failed to state the date of declaration of results contrary to Article 87(2) of the Constitution, that it contravened rules 8 (1) (c) and (d) and 12 (2) (c) and (d) of the Elections (Parliamentary and County Elections) Petition Rules by failure to declare the results and failure to observe the above election petition rules. The 4th Respondent relied on several authorities in support of his application, including ***Ali Hassan Joho v Suleiman Shabhal & 2 Others [2014] eKLR*** where the Supreme Court held that where a petition challenged the result of an election, the quantitative breakdown of the votes cast was a key component in the cause so that one could see at a glance who the winners and losers were and the number of votes.

The Petitioner filed Grounds of Opposition and a Replying Affidavit where he contended that the application was misconceived, mischievous, made in bad faith, frivolous and vexatious since the affidavits filed in support of the petition contained particulars and that the Court was enjoined by Article 159 (2) (d) of the Constitution to excuse minor deviations from the requirements of the Rules made under the Elections Act. Citing the decision of Lesiit J in ***Mercy Kirito Mutegi v Beatrice Nkatha Nyaga [2013] eKLR*** where the Court declined to strike out a petition under similar circumstances**,** the Petitioner argued that a failure to set out results did not prejudice the Respondent because the results could be obtained from the IEBC. The Petitioner also asserted that the error did not go to the root of the matter so as to render the petition fatally defective and therefore ripe for striking out.

Issues for determination

From a review of the pleadings and written submissions, the Court identified the following issues for determination: whether the Petitioner complied with the dictates of Rules 8 and 12 of the Election Petition Rules; the effect and ramification of failure to comply with the Rules; the fate of the petition upon the determination of the foregoing two questions and what orders ought to be made on costs.

On the first issue for determination, the Court noted that rules 8 and 12 were identical with the only difference being that one sets out the contents of a petition and the other an affidavit respectively. The Court stated that the rules made it mandatory for the particulars listed in both the petition and the affidavit in support. A review of the petition showed that there was no compliance with Rule 8 (1) (c) and (d) since neither the full results nor the date of declaration were disclosed. The Court ruled that the requirement of the rule, as interpreted in the ***Joho* case,** meant 'a quantitative and numerical composition', i.e. the outcome for each candidate participating in the election. It was therefore not

enough to state who won the petition and by how many votes; the law imposed a duty on the Petitioner to set out and tabulate in the Petition the complete result of the election as declared by the Returning Officer.

Even if the Court found that the failure to declare results could be excused, it ruled that the date of declaration had to be stated to compute time so that the Court could establish when the time to file would start and end. The Court relied on the Court of Appeal decision in the ***Mututho v Kihara case*** **[2008] 1KLR** for the proposition that a failure to state the result rendered the petition incurably defective. Having found that the Petitioner failed to state the results and date of declaration, which particulars were mandatory, and since it was bound by the Court of Appeal decision, the Court ruled that the petition was incurably defective and struck it out. The costs of the petition were capped at an all-inclusive sum of KES 2.5 million to be paid by the Petitioner in two equal parts since the 1st -3rd Respondents filed one response while the 4th Respondent had his own representation.

Mbaraka Issa Kombe v IEBC & *2* Others Malindi Election Petition Appeal 3 of 2017

Court of Appeal at Malindi
Coram: Visram, Karanja & Koome JJ.A

Judgment Allowing Appeal

10 May 2018

Effect of failure to comply with Rule 8 (1) of the Election Petition Rules

Summary of facts

The appellant challenged the decision of the Trial Court striking out the petition for failure to state the results and date of declaration both in the petition and supporting affidavit as required by the Rule 8 (1) (c) and (d) and 12 of the Election Petition Rules. The appellant urged that the trial judge erred in law in finding that there was non-compliance with Rule 8 of the Election Petition Rules without considering the full meaning and import of the rule in line with Articles 259, 159 (2) (d), 50, 38 and 78 of the Constitution.

Counsel for the Petitioner pointed out that paragraph 5 of the petition set out the names of all the 6 candidates and the total votes garnered by the 3rd Respondent, while paragraphs 4 and 11 indicated that the results were declared on 11 August 2017. Moreover, the Petitioner had annexed Form 35B to his Supporting Affidavit which was the 1st Respondent's declaration of results as contemplated by section 39 of the Elections Act. Therefore, it was their case that failure to comply with the procedural requirements of Rule 8 (1) (c) and (d) did not prejudice the Respondents and was curable under Rule 5 of the Election Petition Rules.

The Petitioner also faulted the trial judge for misinterpreting the Supreme Court decision in ***Joho v Shabhal***[89] and for relying on the case of ***John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others***[90] which was made before the promulgation of the Constitution and was therefore not good law. The appellant also took issue with the award of costs which they considered excessive. Citing the Court of Appeal decision in ***Martha Wangari Karua v IEBC & 3 Others,***[91] counsel for the Petitioner faulted the trial judge for exercising his discretion in the manner he did and urged the Court to allow the appeal.

On the other hand, the Respondents argued that the Elections Act and Election Petition Rules were derivatives of Article 87(1) of the Constitution and therefore failure to comply with the mandatory provisions thereunder was tantamount to failure to comply with the Constitution. The Respondents also contended that the date of the election, the date of declaration of the results and the particulars of the results were key ingredients in challenging a petition and that the absence of those ingredients not only rendered the petition defective but also disregarded the Respondents' right to a fair hearing. It was their case that annexing Form 35 to the supporting affidavit was not sufficient, since the provision

89 [2014] eKLR.
90 [2008] 1 KLR.
91 [2018] eKLR.

made it mandatory for the particulars to be stated in the body of the petition. Moreover, they urged that the omission was in no way a technicality but it went to the root and substance of the petition, as found by the Supreme Court in the ***Joho*** case.

The Respondents further argued that the Petitioner could not take refuge under Article 159 (2) (d) of the Constitution since, as opined by Kiage JA in ***Nicholas Kiptoo Arap Korir v IEBC & 6 Others*** **[2013] eKLR**, its provisions were never 'meant to aid in the overthrow or destruction of the rules of procedure and to create an anarchical free-for-all in the administration of justice'. Kiage JA had further asserted that the rules and timelines made the process of judicial adjudication and determination fair, just, certain and even-handed and such an even-handed and dispassionate application of the rules gave assurance that there was a clear method in the manner in which things were done so that outcomes could be anticipated with a measure of confidence and certainty. Counsel for the Respondents urged the Court to find that the omissions went to the jurisdiction of the election court.

Since section 85 (1) (A) of the Elections Act restricted the appeal to points of law, the Court was called upon to determine whether the trial judge exercised his discretion properly. In the view of the Court, whether the non-compliance warranted striking out of the petition or saving of the same could only be determined on a case by case basis. In addition to the constitutional timeline, the Court was guided by Rule 4 of the Election Petition Rules, which require courts to give effect to the overriding objective. In totality, the Court would have to assess the nature of the non-compliance and whether it went to the jurisdiction of the Court or occasioned prejudice to the other party.

The Court acknowledged that the Rules require that the results appear on the face of the petition, and that election results mean the declared outcome of the casting of votes by voters in an election. The Court also noted that the Appellant, save for naming the candidates who vied, only set out the results of the 3rd Respondent in the petition. However, unlike the Trial Court, the COA found that the non-compliance did not render the petition defective. This was because the Appellant disclosed the declared result in the affidavit supporting the petition by annexing Form 35. The Court took the view, citing the decision of the Uganda Court of Appeal in ***Castelino v Rodrigues (1972) EA 233,*** which was reiterated in the ***Mwenda v Munya*** decision in the Supreme Court, that as a rule, reference to an annexure has the effect of incorporating the contents of the annexture in the document. Therefore, the supporting affidavit was part and parcel of the petition and the reference of the annexure in question to the supporting affidavit incorporated the contents of Form 35 into the petition.

Consequently, the Court found that the trial judge erred in ignoring the appellant's supporting affidavit and Form 35 annexed thereto. While the results were not set out on the face of the petition, neither the Court nor the Respondents were in the dark regarding that issue. Therefore, the omission neither went to the jurisdiction of the Court or to the root of the dispute nor did it prejudice the Respondents. The Court also ruled that the Trial Court had erred in relying on the decision in ***John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others*** **[2008] 1KLR** which was decided under the previous constitutional dispensation and the repealed NAPE Act. Moreover, the facts in the cited decision were distinguishable from those in the present case since the petition in the former did not set out the election results at all, thereby placing the Court as well as other parties in a position of uncertainty with respect to the issue in dispute. The Court also found that contrary to the finding of the learned trial judge, the petition did state the date of the election as well as the date of declaration thereof at paragraphs 4 and 11. For the above-stated reasons, the appellate court reached the conclusion that the learned trial judge misdirected himself in striking out the appellant's petition and the appeal was consequently allowed.

The appellate court therefore ordered that the ruling be set aside in its entirety, that the costs of the application striking out the petition be in the petition and that Election Petition 10 of 2017 be heard and determined on merit in Malindi before any judge with jurisdiction other than the trial judge. The costs of the appeal were awarded to the appellant as against the 3rd Respondent and capped at KES 500,000.

Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 Others Kakamega High Court Election Petition 12 of 2017

High Court of Kenya at Kakamega
Coram: Sitati J

Ruling Striking Out Petition

23 October 2017

Effect of failure to comply with Article 87 (2) of the Constitution

Summary of facts

The 3rd and 4th Respondents filed a Notice of Preliminary Objection and Notice of Motion seeking to strike out the petition on the following grounds: that the petition, which was dated 7 September 2017, was filed outside the stipulated constitutional timeline of 28 days from the date of declaration of results, which was 9 August 2017. Further, the Respondents urged that Rule 19 of the 2017 Election Petition Rules, which allows an election court to extend or limit the time within which an act or omission shall be done under the Rule was clear that the power to extend time did not apply to the period within which a petition was required to be filed, heard or determined.

The application was supported by the affidavit of the 3rd Respondent , who swore on her own behalf and that of the 4th Respondent and who confirmed that she declared the 1st Respondent as the winner of the election for Member of the National Assembly for Butere Constituency, having garnered 18, 235 votes on 9 August 2017, between 10 pm and 11 p.m. she also deponed that she issued a duly signed Form 35 C to the 1st Respondent on the same day, which showed that the results were declared on 9 August 2017. Therefore, the petition should have been filed on 6 September 2017 and not 7 September as the Petitioner had done.

In their written submissions, the 3rd and 4th Respondents maintained that the date of declaration of the results was the date when the Returning Officer issued Form 35C to the winner, as held in the Supreme Court decision in ***Joho v Shabhal [2014]eKLR,*** which in the instant case was 9 August 2017. They also maintained that declaration took place in a plurality of stages, culminating in the issuance of the Form 35C, following which the results could not be altered and therefore that set into motion the time frame within which to lodge an election petition. The 3rd and 4th Respondents also argued that they were the only ones allowed by law to declare results, irrespective of whether agents were present and whether they had signed the relevant forms, and they placed reliance on Regulation 83 of the Elections (General Amendment) Regulations 2017. As to whether the Preliminary Objection constituted a point of law, they submitted that there was no dispute that the election results were declared on 9 August 2017. The 3rd and 4th Respondents therefore prayed for the Preliminary Objection to be upheld and for the petition to be dismissed with costs.

The 1st Respondent filed written submissions and authorities in support of the Notice of Preliminary Objection and the application. His submissions were largely similar to those of the 3rd and 4th Respondents, with a few additional authorities such as ***Anami Silverse Lisamula v IEBC & 3 Others***

[2014] eKLR and ***Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*** **[2014] eKLR** in support of the proposition that petitions filed outside the 28 days circumscribed by Article 87 (2) of the Constitution are a nullity.

The Petitioner opposed the Preliminary Objection and application by filing Grounds of Opposition where he contended that the Preliminary Objection was misconceived and incompetent and was grounded on contested facts. The Petitioner contended that the declaration of the 1st Respondent as the winner was done on 10 August when the Form 35B was signed by the agents and therefore time started to run from 10 August, from which date computation should be done. The Petitioner further contended that the validity of the certificate issued to the 1st Respondent on 9 August 2017 by the IEBC and whether there as a declaration of results at all was disputed and therefore the Court ought to exercise its discretion in determining the issue. The determination of whether the petition had been filed out of time was therefore an evidentiary one and not a pure point of law. The Petitioner therefore urged that the application was premature and would delay the fair and just determination of the substantive petition and ought therefore be dismissed with costs.

The 2nd Respondent opposed the application largely around similar grounds, asserting that the application sought to preliminarily litigate an issue that was in dispute, i.e. the date of declaration of results. He urged that the date of declaration was uncertain since the Returning Officer purportedly signed the Declaration Forms on 9 August but the agents signed on 10 August 2017. He urged that the Court take judicial notice that agents sign the results before the results are declared and which therefore meant that the date of declaration could not be stated with certainty due to the gross negligence of the 3rd and 4th Respondents. He prevailed on the Court not to allow the 3rd and 4th Respondents to create a crisis and then purport to benefit from it and further argued that the application did not meet the threshold of a Preliminary Objection. He prayed that the application be dismissed with costs.

In the analysis of the Court, it was clear from the authorities cited that there was no debate about the import of Article 87 (2) of the Constitution, which rendered any petition filed outside the 28-day period a nullity. The issue which the Court had to determine was whether the present petition was a nullity for having been filed on 7 September instead of 6 September 2017, based on the date when the agents signed the Form 35 B as argued by the Petitioner and 2nd Respondent.

The Court agreed with the 3rd and 4th Respondents that the Petitioner and 2nd Respondent's argument could not be upheld as the Returning Officer, who is the person authorised to declare the results, did so declare and issue the certificate to the winner on 9 August 2017. It was therefore immaterial whether the agents had signed the statutory form or were present nor that the tally was not correct or was the subject of a contest between the loser and the winner. The Court ruled that the Petitioner had attempted to donate to himself and his agents powers that did not belong to them: that of determining when election results would be declared. The Court found that if such a situation were to be allowed, chaos would descend upon the system and the provisions of Article 87 (2) of the Constitution and section 77 of the Elections Act would be rendered redundant.

Having determined the date of declaration of results, the Court then assessed whether the petition was filed within the 28-day timeline envisaged by the law. The Court opined that the use of the word 'shall' in Article 87(2) indicated that the provision was cast in stone and there was no discretion granted to the Court to expand that time under the Election Petition Rules as clearly stipulated in Rule 19 (2). The petition was therefore a nullity and the Court considered itself bound by the host of Supreme Court authorities cited by the applicants. Since elections were matters of great public interest,

anyone seeking to challenge an election had to meet the cost of doing so, including complying with the strictures of the law. The Preliminary Objection was therefore upheld and the petition struck out with costs to the 1st, 3rd and 4th Respondents.

Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 Others Election Petition Appeal 3 of 2017

Court of Appeal at Kisumu
Coram: E. M. Githinji, Hannah Okwengu & J Mohammed JJ.A

Judgment Dismissing Appeal

14 May 2018

Whether trial court properly exercised its discretion in failing to find that the preliminary objection was based on contested facts — whether trial court failed to apply Article 259 of the Constitution in interpreting Article 87 (2)

Summary of facts

The appellant lodged an appeal against the decision of the Trial Court based on six grounds. The appellant urged that the learned judged erred in law by: failing to properly exercise her discretion and failing to find that the preliminary objection was based on contested facts; failing to consider the decision of the Supreme Court in the case of ***Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*** **[2015] eKLR**; failing to consider that Form 35C is a legal instrument which should be generated from a validly executed Form 35 B and that the Form 35B contained fundamental irregularities and illegalities which rendered the date of declaration uncertain or improbable; failing to appreciate that anomalies in the preparation of Form 35B and the validity and authenticity of the issuance of Form 35 C were legal issues and were properly before the Court and matters for determination by an election court; failing to comply with Article 259 of the Constitution in interpreting Article 87 (2) and in failing to address or make a finding on the issues of tallying, verification and declaration and their relevance.

Counsel for the appellant submitted that, among other things, the date of the declaration was a disputed fact and could only be determined by the election court upon adduction of evidence at the trial of the petition on merit. It was also the appellant's case that the electoral process was completed on 10 August 2017, when the agents signed Form 35 B, not on 9 August 2017 when the Form 35 C was dated. They therefore argued that there was no valid declaration as contemplated by the law for the proper running of time and the learned trial judge unduly limited her discretion by only looking at Form 35 C and disregarding the provisions of Article 159 (2) (d) and (e) of the Constitution.

Counsel for the 1st Respondent cited the decision of the Supreme Court in the ***Joho*** case on the meaning of declaration of election results and asserted that any event occurring after the declaration was inconsequential since the role of agents could not stop the Returning Officer from declaring results. It was their case that the contention that agents had to sign before issuance of the certificate by the Returning Officer was not based on law and the Court was being called upon by the appellant to determine issues of fact.

Counsel for the 2nd Respondent neither filed written submissions nor attended the hearing.

Counsel for the 3rd and 4th Respondents maintained that there was no dispute that the results were declared on 9 August 2017; that the issue raised by the appellant was an interpretation issue; that failure to sign the Form 35 B by agents did not invalidate the results; that he agents witnessed Form 35 B after declaration of results and the election court had no discretion in respect of petitions filed

outside the 28 day window. Having reviewed Article 86 (c) of the Constitution, section 39 A (i) of the Elections Act, Regulation 83 of the Elections (General) Regulations which set out the duties of the Returning Officer and the ***Joho*** case on the meaning of 'declaration of results', the Court held that the declaration of election results is both a constitutional and statutory function exclusively conferred on the Returning Officer. This function is to be performed in the presence of candidates or agents and observers, if present, with the corollary that the functions can still be validly carried out if the candidates or agents and observers are absent at the tallying centre.

The Court also acknowledged the plurality of stages in the declaration of results as set out in the ***Joho*** case, and maintained that the statutory forms filled at every stage bore legal force. However, for computation of time in respect of filing an election petition, the final certificate constituted the declaration of results in accordance with Article 87 (2) of the Constitution. The appellate court distinguished the present case from the ***Wetangula*** case relied on by the appellant on the basis that in the latter, there was evidentiary dispute a to the date of declaration of results and the declaration form was missing, while in the present case, both Forms 35 B and 35 C were present. It was also not contended that there was execution of another Form 35 B or 35 C or a public declaration of results by the Returning Officer on 10 August 2017. The official forms therefore spoke for themselves and were verified by the affidavit of the Returning Officer.

It was therefore clear that the election court arrived at the correct decision in law that the declaration of results was done by the Returning Officer on 9 August 2017 when she signed and publicly declared the results an disused Form 35 C. The appellate court was also satisfied that the election court properly computed time for filing the petition and held that the petition filed on 7 September 2017 was filed outside the 28 days allowed by law. In any case, the Trial Court had no discretion in the matter as the time limit was primarily prescribed by the Constitution with no provision for extension of time as was held by the Supreme Court in the case of ***Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*** **[2014] eKLR.** The appeal was therefore dismissed with costs to the 1st, 3rd and 4th Respondents. No orders as to costs were made in respect of the 2nd Respondents as he did not attend the hearing of the appeal.

John Munuve Mati v RO Mwingi North & Others Kitui Election Petition 3 of 2017

High Court of Kenya at Kitui
Coram: Mutende J

Judgment Dismissing Petition

31 January 2018

Whether elections were free, fair, accountable, transparent and credible and conducted in accordance with Articles 81 and 86 of the Constitution — whether there were substantial irregularities and commission of electoral offences during election period that affected credibility of election — whether 3rd Respondent validly elected as Member of National Assembly, Mwingi North Constituency — costs

Summary of facts

The Petitioner contested the election of the 3rd Respondent as Member of the National Assembly Mwingi North Constituency. It was the Petitioner's case that the 1st and 2nd Respondents conducted the elections contrary to and in violation of the Constitution and electoral laws; that they exhibited partiality and lacked neutrality in conducting the elections and were therefore unaccountable; that there was widespread bribery, corruption, intimidation and improper influence during the campaign period by the 3rd Respondent; that there was a lack of transparency and unfairness of the part of the Presiding Officers; that there was systematic propagation of hate speech, violence, stigmatisation and insults, which did not create an atmosphere for the Petitioner to campaign freely.

The 1st and 2nd Respondents filed a joint response maintained that the election was conducted strictly in compliance with the law, fairly and impartially such that there were no issues of impropriety or illegalities.

On his part, the 3rd Respondent asserted that the election was conducted in a free, fair and credible manner and he denied knowledge of alleged partiality, lack of accountability and transparency, unfairness, systematic propagation of hate speech, violence, stigmatisation and insults.

The Court granted the Petitioner's prayer for partial scrutiny and the Deputy Registrar's report formed part of the record of the Court.

Issues for determination

The following were the agreed issues for determination: whether the elections for Member of the National Assembly for Mwingi North Constituency were free, fair, accountable, transparent and credible and conducted in accordance with the principles laid down in Articles 81 and 86 of the Constitution, electoral laws and regulations; whether there were substantial irregularities and commission of electoral offences during the election period and/or exercise that affected the credibility of the election and the result of the elections; whether the 3rd Respondent was validly elected as Member of the National Assembly, Mwingi North Constituency and the orders to be made in relation to the costs of the petition.

The Petitioner contended that during the training of Presiding Officers, they were misled to assist voters to vote for a candidate representing the 'Kamba Community/Party' over the Kikuyu Community/Party. A polling agent at Ngalange Primary and another a Kalwa Primary alleged that the Presiding Officers at their respective stations would also tell voters to vote for the 3rd Respondent who had vied on a ticket of the party of the Kamba people. However, at the end of the voting exercise, they duly signed Form 35A without registering any complaint.

The Court noted that none of the witnesses who testified were at the training of Presiding Officers to testify as to the exact content of the training. There was also no specific identification of persons alleged to have misled assisted voters, and further, no proof that the Presiding Officers in the impugned polling station were recruited for purposes of influencing people to vote for the 3rd Respondent.

The Petitioner also contended that there was a family cartel of the 3rd Respondent that ran the 2nd Respondent's office at Kyuso. While the 3rd Respondent admitted knowing some of the people alleged, he denied having any relationship with them. The Court found that whether the people were related to the 3rd Respondent or not, the Petitioner was bound to prove that they influenced the recruitment and ultimate voting, which he failed to do.

The Petitioner also alleged partiality on the part of the IEBC; that the Returning Officer and her deputy were hosted by the party leader of the Wiper Democratic Movement and they were therefore not present at the training. The 1st Respondent, however, testified that she was present at the training venue, and that she and her deputy were the main trainers. Since this evidence was not controverted by the Petitioner, the Court found that the Petitioner's allegations were merely speculative, and the allegation of partiality was unproved.

The Petitioner also made allegations of voter bribery and undue influence against the 3rd Respondent, including alleged importation of maize treated by a sorcerer, and which was subsequently distributed by the family of the 3rd Respondent to influence people to vote for him. The Court found that the burden was on the Petitioner to prove that maize was indeed imported, that it was imported by the 3rd Respondent and subsequently distributed by his family to influence people to vote for him, which duty was not discharged.

The Petitioner also contended that the 3rd Respondent openly gave money for distribution to voters at Gai Primary School polling station. However, these allegations were denied by the 3rd Respondent's witness and since the Petitioner did not call direct evidence to establish the allegation, the evidence tendered by witnesses called by the 3rd Respondent was not controverted. While the Petitioner called a witness who testified that she was promised money and given KES 500 to vote for the 3rd Respondent, the Court found that the allegation was not proved as the Petitioner failed to prove the giving of the bribe in order to confirm the allegations. Further, on the allegation that the 3rd Respondent's campaign team and his brother issued a cheque for purposes of assisting the community to purchase land for the local school, the Court noted that it was a blank cheque, and while one of the signatures bore resemblance to the 3rd Respondent's name, there was no proof that it had been authored by the 3rd Respondent.

The Petitioner also alleged that there was intimidation and hate speech on account of the leader of the Wiper Democratic Movement Party branding him an enemy of the Kamba people who had betrayed them by virtue of his party. However, no evidence was adduced n this regard and therefore the Court ruled the assertion unproved.

The Petitioner also complained of various election irregularities which affected the credibility of the elections and the results. It was the Petitioner's case that at Tseikuru Primary School, the Wiper Democratic Movement Party Leader gave money to people on the queue and asked people to vote for the 3rd Respondent. However, the witness who deposed this in an affidavit contradicted himself in cross-examination and further, was shown to have signed the Form 35A without commenting on the alleged incident. The Petitioner also alleged that there were pre-marked ballots which were stuffed into ballot boxes at Nyama-Nzei and Kisuluni Primary School polling stations. However, no comment on this incident was made when the agents signed Form 35A. The Court therefore considered this allegation unproven.

The Petitioner also contended that persons who were not registered were allowed to vote, that there was manual identification of voters and that the Deputy Returning Officer had transported some forms in her car. The Court pointed out that it was not enough for the Petitioner to come up with the allegations; it was incumbent upon him to adduce evidence to prove them, which he failed to do. The Petitioner also took issue with some of the forms not having been signed by his agents and others not being signed by Deputy Presiding Officers. The Court ruled that the absence of these signatures did not invalidate the forms.

The Petitioner also alleged that in some instances the votes obtained by each candidate did not correspond with the votes cast, that in some instances the name of the polling station was not indicated on the form, that one Form 35A was not stamped, that 'ECK' seals were used to lock ballot boxes, that the results at Twimyua polling station were tampered with due to a malfunction in election technology, and that motor vehicle registration number KCK 584L was found carrying an empty ballot box. The Court assessed the irregularities alleged to determine whether they affected the election results. The failure to stamp the forms was considered discretionary and therefore could not invalidate the election. The malfunction at Twimyua polling station was shown by the 1st Respondent to have been rectified and voting resumed. An explanation was also rendered for the vehicle which was carrying the empty ballot box, which the 1st Respondent indicated had been contracted to carry the same. For the erroneous recording of votes cast for each candidate, the Court ruled that no one was shown to have benefited from the same and therefore the alteration was not shown to be deliberate.

Overall, the Court found that the Petitioner had not discharged the burden of proof that was upon him. The election was therefore verifiable and credible and the 3rd Respondent was validly elected. The petition was dismissed with costs to the Respondents, capped at KES 1 million for the 1st and 2nd Respondents and 1 million for the 3rd Respondent.

John Munuve Mati v RO Mwingi North & Others Nairobi Election Petition Appeal 5 of 2018

Court of Appeal at Nairobi
Coram: Warsame, M'Inoti & Otieno-Odek JJ. A

Judgment Dismissing Appeal

22 March 2018

Failure to comply with timelines for filing and serving Notice of Appeal under Rule 6 (2) of the Court of Appeal (Election Petition) Rules 2017 — effect of failure to serve Notice of Appeal — whether Rule 6 (2) of the Election Appeal Rules 2017 is inconsistent with Section 85 (1) (a) of the Elections Act — whether Court of Appeal Rules 2010 are inconsistent with Election Appeal Rules 2017 — whether in law the KIEMS kit is part of the register of voters — whether trial court erred in evaluating evidence-

Summary of facts

Following the decision of the High Court dismissing his petition, the Appellant filed a Memorandum of Appeal wherein he raised the following grounds of appeal: that the learned judge erred in law in holding that the Appellant had not discharged the burden of proof; that the learned judge erred in law in not taking into account the uncontroverted evidence of the Petitioner given that the 1st and 2nd Respondents did not call any Presiding Officer to testify; that the conclusion arrived at was not supported by the analysis of the evidence of the learned judge; that the learned judge erred in law in failing to appreciate and consider the law that the KIEMS kit and not manual register of votes was applicable in conducting the elections, and therefore erred in not ordering a scrutiny of the KIEMS kit when ordering scrutiny.

All the parties filed interlocutory applications: the Appellant sought an extension of time for filing and serving the notice of appeal and an order to deem the notice of appeal on record as duly filed and served despite being filed outside the 10-day timeline stipulated by the Court of Appeal Rules 2010. The 1st and 2nd Respondents applied to strike out the Notice of Appeal for having been filed out of time contrary to Rule 6 (2) of the Court of Appeal (Election Petition) Rules 2017. The 3rd Respondent also applied to strike out the notice of appeal for the additional reason that the same was not served upon him either personally or through substituted service as required by the Rules. To facilitate the timely and orderly hearing and determination of the appeal, the Court directed the parties, with their consent, to file written submissions on both the appeal and the applications, and to have them determined simultaneously in the judgment.

The Court determined the applications as preliminary issues. Counsel for the Appellant urged the Court to extend the time for lodging and serving the notice of appeal on the basis that section 85 (1) (a) of the Elections Act requires an appeal to the Court of Appeal to be filed within 30 days of the High Court judgment. He submitted that rule 6 (2) of the 2017 Rules was inconsistent with section 85 (1) (a) of the Elections Act which provided a 30-day period for filing an appeal to the Court of Appeal; therefore, the 7-day period stipulated in rule 6(2) was inconsistent with the 30 days provided in the Elections Act and that subsidiary legislation could not override an express provision of statute. He also submitted that Rule 6 (2) was in conflict with Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules 2017 which provide that appeals from petitions concerning membership of

the National Assembly, Senate or County Governor are to be heard and determined under the 2010 Court of Appeal Rules. Further, he argued that under rule 75 of the Court of Appeal Rules 2010, a notice of appeal was required to be filed within 14 days of the date of the decision appealed from, and there was therefore a conflict between the Election Petition Rules 2017 and the 2017 Court of Appeal rules and in that case, the former had to prevail as they were the 'special law' governing election petitions. In light of the object of the 2017 Rules to facilitate the just, expeditious and impartial determination of election petition rules and the fact that the failure to comply with the 2017 Rules is to be determined at the Court's discretion subject to Article 159 (2) (d) of the Constitution and the need to observe the timelines set by the Constitution and electoral law,the Appellant urged the Court to exercise discretion under rule 6 (5) and extend time within which to file the notice of appeal and deem the notice of appeal to have been filed on time.

On the other hand, the 1st and 2nd Respondents opposed the application on the basis that the Notice of Appeal was filed 6 days out of time, which meant that the Court had no jurisdiction to hear and determine the main appeal. They further asserted, citing the decisions in ***Abok James Odera T/A A.J. Odera& Associates*** **Nairobi Civil Appeal No. 161 of 1999** and ***Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others*** **[2014] eKLR,** that the notice of appeal had a central role in the appellate system and without it, there could be no appeal as it was a jurisdictional pre-requisite. They also asserted that the appeal was incompetent, as the notice was not served upon them as required by Rule 7 the 2017 Rules, which required service within 5 days of filing. Counsel for the 3rd Respondent associated herself with the submissions of the 1st and 2nd Respondents.

The Court noted that the appellants and their counsel were unaware of the promulgation of the 2017 Court of Appeal (Election Petition) Rules which were meant to govern the filing of election appeals and had relied on the 2010 Rules.

The Court considered all the submissions of the parties as well the legal framework surrounding election appeals. The Court was persuaded that there was no conflict between the 2010 and the 2017 Rules, and the fact that section 85A required an appeal to be filed within 30 days did not render the filing of a notice of appeal superfluous or illegal. The jurisdiction of the appellate court was invoked by the filing of the notice of appeal, which document informed the parties that the dispute had moved from the trial to the Court of Appeal. Without a notice of appeal, the Court found that appeals would otherwise be conducted in an environment of ambush, totally antithetical to the notions of order that is fundamental to judicial proceedings.

Unlike ordinary appeals regulated by the 2010 Rules, parties do not have the luxury of time when filing an election appeal. The timely resolution of electoral disputes is a dictate of Article 87 of the Constitution and it is for this reason that the Elections Act and Election Petition Rules provide timelines for expeditious disposal of appeals. Moreover, the overriding object of the Rules did not only provide for the just and impartial determination of disputes, but also for their expeditious disposal. The Court also ruled that the applicable rules were the 2017 rules as they were the later in time, and because there was an express provision that in case of any conflict between the two sets of rules, the 2017 Rules would prevail.

The Court further ruled that it had discretion under the 2017 Rules to extend time for filing a Notice of Appeal outside of the 10 days prescribed by the Rules as well as the time to serve the Respondents. The Court considered the fact that no evidence was adduced that any party had been prejudiced by non-compliance with the 2017 and was guided by the three objects of the 2017 Court of Appeal

(Election Petition) Rules i.e. the just, impartial and expeditious determination of appeals, which were to be given equal consideration and would not be compromised if the appeal were determined on merit. The Court also bore in mind the fact that the Supreme Court declined to strike out documents filed or served out of time under the Supreme Court (Presidential Election Petition) Rules 2017 in the ***2017 Raila case.*** The application for extension of time was allowed with no orders as to costs.

On the main appeal, the Court considered each of the grounds of appeal and in line with section 85A, whether the conclusions of the trial judge were based on the evidence on record or whether they were so perverse that no reasonable tribunal would have arrived at them.

The first issue was whether in law the KIEMS kit is part of the register of voters and whether the Trial Court erred in failing to order scrutiny thereof. The Court evaluated section 4 of the Elections Act and asserted that it was manifest that the KIEMS kit itself was not the register of voters. The Trial Court could therefore not be faulted for not treating it as part of the Register of Voters as defined in the Elections Act. The Court also reviewed the record of appeal and held that it was clear that neither the petition nor the application for scrutiny contained an application for access or scrutiny of any of the information contained in the KIEMS kit. Having failed so to plead, the Trial Court could not be faulted for failing to make an order for scrutiny of the KIEMS kit, since parties are bound by their pleadings. This ground of appeal was therefore without merit and failed.

The second ground of appeal was whether the Trial Court erred in evaluating the evidence on record and therefore arriving at the wrong conclusion. The appellant urged the Court to find that the Trial Court erred in not believing the testimony of PW13. Citing the decision of the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji &2 Others*** **[2014] eKLR,** the Court was satisfied that the issue here was the credibility of witnesses, which was an issue within the competence and jurisdiction of the Trial Court. The Court found nothing on record to suggest that the determination of the Trial Court on the credibility of the evidence of PW13 was so perverse that no reasonable tribunal would have come to that decision.

As to whether the Trial Court correctly evaluated the evidence on record, the Appellant contended that the learned judge ignored the evidence showing that Presiding Officers were partial and in favour of the 3rd Respondent. The appellate court found that the advantage the Trial Court had in seeing and hearing the witnesses who testified, which enabled it to weigh the credibility of each witness, could not be glossed over. The Court also noted that there was no evidence on record of any incident of partiality at the polling station and no police report was made either. An incident of the Presiding Officer urging voters to vote for a specific candidate is not one that would have easily passed without notice. The appellate court therefore found that the Trial Court did not err in finding that the allegation of partiality was not proved.

The Court also noted that there scrutiny report did not reveal any substantial irregularity in the declared results and there was therefore no good reason to interfere with the declared results. The Court was also not satisfied, as alleged by the Appellant, that the Trial Court was influenced by extraneous considerations since there was nothing on record to show reliance on extraneous or irrelevant matters.
The Appellant also took issue with the fact that the Trial Court refused to allow his petition, yet the Respondents did not call the Presiding Officers to testify. The Court found that this ground had no merit as the burden of proof lay with the Appellant. It was his duty to call cogent and credible evidence to prove the facts alleged in the petition. As urged by the Respondents, the Court found that it does

not invariably follow that failure by a respondent to call a witness means that the petition must be allowed. The Petitioner was required to first adduce evidence of the nature that would entitle him to judgment if the Respondent did not adduce any evidence in rebuttal.

Having considered the grounds of appeal, the submissions as well as the response, the Court was satisfied that the Trial Court properly found that the election for Member of the National Assembly for Mwingi North Constituency was conducted in accordance with the Constitution and relevant laws. The Court was also satisfied that there was no evidence placed before the Trial Court to justify the election of the 3rd Respondent. The appeal was therefore without merit and the judgment of the Trial Court was upheld. The appellant was condemned to pay the costs of the appeal, which were capped at KES 1 million.

Abdirahman Adan Abdikadir & Anor v IEBC & 3 Others Nairobi Election Petitions 13 and 16 of 2017 (consolidated)

High Court of Kenya at Nairobi
Coram: Mwongo J

Judgment Dismissing Petition

31 January 2018

Whether alleged irregularities affected the conduct and result of the election — whether alleged intimidation of the Petitioner's agents and denial of copies of the result forms affected the conduct or outcome of the election — whether the Petitioner's right to access information under Article 35 (1) of the Constitution was violated — whether the alleged failure of KIEMS affected the conduct and result of the election — whether there was irregular, unprocedural and unlawful assisted voting — whether the alleged electoral offences affected the conduct and result of the election — costs

Summary of facts

Nine candidates contested for the Wajir senatorial election. On 10th August 2017, the 1st respondent, the IEBC, declared Ali Abdullahi Ibrahim of Jubilee party the winner. Abikar Adow Mohamed and Abdirahman Adan Abdikar thus filed petitions on 5th and 6th September 2018. Their prayers ultimately were, inter alia, that the Court should declare that the 3rd respondent was not validly elected as the Senator of Wajir County and that the 1st respondent should be ordered to conduct a fresh election in strict conformity with the Constitution and the Elections Act.

The first Petitioner's grounds for impugning the election were as follows: first, that the electoral process was not conducted in a free, fair, transparent verifiable and accountable manner contrary to Articles 10, 81 and 86 of the Constitution; second, that the 1st and 2nd Respondents engaged in intimidation of the Petitioner's agents; third, that the voting, counting, tabulation, collation and declaration of results was conducted in breach of the principles of a free, fair, transparent and credible election as decreed by Articles 81 and 86 of the Constitution; fourth, the first and second respondents contravened , impinged and violated the Petitioner's right to access information decreed and protected under Article 35(1) of the Constitution of Kenya 2010 contrary to the principles of free, fair, transparent, credible election decreed by Articles 81 and 86 of the Constitution; fifth, that the 1st and 2nd respondents failed to transmit the election results in the manner prescribed by law and; lastly, that the 1st and 2nd respondents engaged in manifold electoral illegalities, offences rendering the entire electoral process null, invalid and void.

On his part the 2nd Petitioner's complaints came under the following heads: first, irregular, unprocedural and unlawful assisted voting; second, incorrect and illegal tallying; third, verifiability of the results; fourth, voting, counting and tabulation of results reflecting the discrepancies; fifth, making false entries and; lastly, striking coincidences and incredible figures/vote result padding/manipulation.

The Petitioners therefore contested the return of the 3rd respondent as the duly elected member of the Senate of Wajir County. It was the Petitioners' case that the election was not conducted in a free, fair,

transparent, verifiable and accountable manner contrary to Articles 10, 81 and 86 of the Constitution. In fact, the 1st Petitioner contended that the voting, counting, tabulation, collation and declaration of results did not conform to the law as required.

The Petitioners also stated that the elections were marred by irregularities as pertains Forms 38 A. They contend that such forms were not stamped; that they had altered results; that there were forms used that do not bear any security features contrary to assurances by the 1st respondent; that there were forms unsigned by agents; forms with signatories forged on behalf of the Orange Democratic Movement (ODM) agents or persons who were not the Petitioners legitimate agents; failure to accurately enter, add and declare the total votes cast for each candidate including the rejected and spoilt votes; and disparities as to the total votes cast for the different electoral positions.

The Petitioners also claimed that the elections were marred by violence and intimidation. Because of the alleged irregularities and election malpractices, the Petitioners contend that the election process for the position of Member of the Senate, Wajir County was invalid.

Issues for determination

The following issues were identified for the Court's determination: whether the alleged irregularities affected the conduct, and by extension, the result of the election; whether the alleged intimidation of the Petitioner's agents and denial of copies of result forms affected the conduct or outcome of the election; whether the Petitioner's right to access information under Article 35 (1) of the Constitution was violated; whether the alleged failure of KIEMS affected the conduct and result of the election; whether there was irregular, unprocedural and unlawful assisted voting; whether the alleged electoral offences affected the conduct and result of the election; what orders should be made as to costs.

Firstly, from the evidence availed by the parties and from the Court's scrutiny of Forms 38 A for the listed polling stations complained about, the Court found that nothing confirmed the veracity of the claims made by the Petitioner under the first issue. Consequently, the Court dismissed the issue having not been satisfied that the allegations by the Petitioners had been proven to the standard of proof required.

Secondly, having carefully assessed the evidence given under the issue of denial of access and intimidation of agents, the Court did not find that overall; the allegation under this head had been proven to the required standard of proof i.e. above balance of probabilities but below beyond reasonable doubt. The Court was therefore unable to find in favor of the Petitioner on this issue and thus dismissed the allegations under this head.

On the third issue, the Court was not satisfied that the errors and omissions highlighted so substantially affect the results, nor that they were massive and widespread with the object of undermining the will of the voters of Wajir. Thus, notwithstanding the findings of irregularities, the Court nevertheless dismissed this ground of the petition.

The Court also found the allegation that the respondents contravened, impinged and violated the Petitioner's right to access to information decreed and protected under Article 35 (1) of the Constitution of Kenya 2010 contrary to the principles of a free, fair, transparent, credible election decreed by Articles 81 and 86 of the Constitution to be a bare allegation and not proved.

With regards to the question of whether the respondents failed to transmit the election results in the manner prescribed by law, the Court found nothing startling or of ill significance that emerged from the exercise that gave rise to even a smidgen of an impression that the results contained either in the ballot boxes or in the forms or in the transmitted information did not reflect the will of the voters who cast their votes in those stations. The Court relied In the decision in *Jackton Nyanungo Ranguma v IEBC and 2 Others* High Court Election Petition (Kisumu) No 3 of 2017 where Majanja J held a similar view, that electronic transmission is only mandatory in presidential elections:

> *38. A reading of section 39(1C) of the Act shows that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the Presidential election. … In all other cases, including the county Governor election, the transmission of results contemplated by section 39(1A) and (1B) of the Act is that the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre. The Constituency Returning officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centers are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C…*

The Court went ahead to find that it was unable to agree with the 2nd Petitioner as regards the question of irregular, unprocedural and assisted voting as the Petitioner had not provided any proof above the balance of probability but below reasonable doubt level, demonstrating the said irregularity and accordingly dismissed the same.

On the second issue of the 2nd Petitioner, the Court agreed with the Respondent's submissions that there is no mandatory requirement for the electronic transmission of results for the senatorial election as already found and held on the same issue in respect of the 1st Petitioner's petition.

Conversely, the Court found that the Petitioner had proven the issue on verifiability of the results. The Court held that the results in the two polling stations identified by the Petitioner could not be verified or authenticated for lack of signatures of both the presiding officer and Deputy presiding officer. The results thereof amounting to 590 valid votes should not have been taken into account.

With regard to voting, counting and tabulation of results reflecting the discrepancies, the Court found that the evidence availed proved none of the allegations and thus failed. The Court also found that despite the drama which the issue on making false entries appears to have caused, the complaint that the results were stolen, manipulated or false entries made at Wajir High School in favor of the 3rd respondent were not substantiated. The allegations can therefore not stand.

Lastly, the Court having perused all the Forms 38 A for the county, did not find a record of any station where the votes were more than the registered voters, and therefore dismissed the allegations under this head.

Accordingly, the Court dismissed the petition with costs to be borne by the Petitioners in equal shares except as otherwise specifically allocated herein or ordered during the proceeding or in interlocutory rulings. Instruction fees were capped at KES 1.6 million per certified counsel.

Bernard Kibor Kitur v Alfred Kiptoo Keter &IEBC Eldoret High Court Election Petition 1 of 2017

High Court of Kenya at Eldoret
Coram: Kimondo J

Judgment Allowing Petition

1 March 2018

Whether election conducted in accordance with the Constitution, Elections Act and Regulations — whether 1st Respondent committed election offences — whether 1st Respondent was validly elected — reliefs — costs

Summary of facts

The petition was originally presented by Robert Kibet Kimei, who applied to withdraw the petition. On 23 November 2017, the Court granted the original Petitioner leave to withdraw from the petition and Bernard Kibor Kitur was substituted as the Petitioner. Only one affidavit was filed in support of the petition, though the substituted Petitioner was allowed to file a supplementary affidavit as long as it was to the greated extent possible word for word, without any additional facts or evidence, as the affidavit of the original Petitioner.

The Petitioner was a candidate in the Nandi Hills National Assembly elections where the 1st Respondent was declared the winner. According to the official notice published by the IEBC in Legal Notice No.2693 published in the Kenya Gazette on 17 March 2017, the official campaing period was to run from 1 June 2017 to 5 August 2017 between 7 am and 6 pm daily.

The Petitioner contended that the 1st Respondent continued campaigning outside the official campaign period. When the Petitioner received information of the 1st Respondent's unauthorised campaigning, he reported it to the Returning Officer who advised him to report the matter to the police. The Petitioner testified that he reported the matter to the Nandi Hills police station.

The Petitioner also alleged that the declared results did not tally with the aggregated results in Forms 35A at Ng'ame Nursery School where the total votes cast exceeded the number of registered voters.

The Petitioner also took issue with the 2nd Respondent for failing to enforce the harmonised campaign schedules, failng to conduct elections in compliance with the Act and Regulations, for declaring the wrong results in Form 35B and condoning election offences committed by the 1st Respondent. In the circumstances, it was his assertion that the outcome did not reflect the will of the people of Nandi Hills Constituency.

The 1st Respondent denied campaigning outside of the gazetted period and dismissed the Petitioner's allegations of bribery and treating of voters as hearsay. He maintained that the elections were conducted in accordance with the law and that the results reflected the will of the people of Nandi Hills Constituency.

The 2nd Respondent also asserted that the election was conducted in accordance with the Constitution and electoral law, that all candidates executed the Code of Conduct and undertook to follow it.

However, during cross-examination, he conceded that there were some irregularities with the forms in that Form 35B for Ng'ame Nursery School was meant for another station Lelwak Primary School. This in his view explained the excess votes cast in related to the registered voters. He testified that the duplication gave the Petitioner an extra 121 votes while the 1st Respondent lost 36 votes. He further stated that he became aware of the anomaly and advised that a fresh Form 35B be prepared but due to public pressure, the chief agents agreed to declare the results as they were. However, he denied that the votes cast exceed the number of registered voters and disputed the claim that he was biased against any candidate. He asserted that elections are not 100% perfect and the error at Ng'ame Nursery School did not affect the overall results.

The Court struck out four witness affidavits which were filed out of time but declined to strike out the petition for non-compliance with the Election Petition Rules. The Court also declined to allow the filing of additional evidence as it would alter the character of the petition and expand the scope of the dispute.

Issues for determination

At the pre-trial conference, the issues for determination were framed as follows: whether the 2nd Respondent conducted the election of Nandi Hills Constitution in accordance with the Constitution, the Elections Act and Regulations; whether the 1st Respondent committed election offences that would justify the grant of the prayers in the petition; whether the 1st Respondent was validly elected as Member of the National Assembly for Nandi Hills Constituency; reliefs and costs of the petition.

The Court considered issues 1-4 to be generally subsumed under the question whether the 1st Respondent was validly elected.

On the question of whether the election was conducted in accordance with the Constitution and election laws, the Court noted that while voting proceeded well on polling day, there were serious anomalies in the results of two polling stations: Ng'ame Nursery School and Lelwak Primary School. Consequently, the number of valid votes exceeded the number of registered voters. The results for Nduruto Primary School were also omitted from Form 35B. The Court accepted the 1st Respondent's submissions that the matter was not pleaded with precision in the petition. However, a perusal of the petition indicated that the petition took issue with 'declaration of wrong results in Form 35B in the final tally of the aggregate vote. The Court therefore tookthe view tha the irregularities was generally pleaded in the petition and therefore it couldnot eb said that the Respondents did not know the case they were confronting in the petition. In the end, however, the anomalies did not materially affect the result due to the wide margin between the Petitioner's and the 1st Respondent's votes.

On the alleged bribery and treating of votes, the Court found that there was scantiness of evidence to prove that the 1st Respondent had bribed and treated voters. The allegations that he had distributed cash, bar soap, sugar and other household goods were not witnessed by the Petitioner and were therefore at best hearsay. Moreover, the claim was not proved to the required standard i.e. beyond reasonable doubt. However, the Court still had to determine whether the 1st Respondent conducted unlawful campaigns between 6 and 8 August and whether this affected the outcome of the election.

The Court was satisfied that the Petitioner discharged the initial evidentiary burden n three ways: firstly, he produced Legal Notice 2693 which demonstrated the official campaign period. Secondly, he pleaded the allegations of unlawful campaigns with precision in his petition and the affidavit of the original Petitioner which remained on record. Thirdly, the Petitioner placed the 1st Respondent

at the scenes of the alleged campaigns in Ainapng'etuny Centre, Labuiywo Trading Centre and Stima School in Ol'lessos in his oral evidence.

While the information on the illegal campaigns was received from the original Petitioner, the Court declined to find that it was hearsay as the affidavit of the original Petitioner remained on the record. The 1st Respondent had responded to it in his response and replying affidavit.

The Court therefore found that the 1st Respondent's conduct tainted the fairness and integrity of the election. By campaigning beyond the authorised period, the contest ceased t be fair, the ground became uneven and the other candidates were left holding the short end of the stick. The absence of public address systems and campaign material did prevent the 1st Respondent from addressing voters in the three centres. By stopping at these centres less than 48 hours before the election, and addressing the public who had gathered there, the 1st Respondent managed to keep his brand alive.

The Court also faulted the 2nd Respondent as the Constituency Returning Officer was notified of the transgressions by the 1st Respondent by phone call and via WhatsApp. He downplayed the communication and directed the Petitioner to file a formal complaint. Since this was a day to the election, the Court found that the Returning Officer played impotent despite his extensive powers under the Elections Act to enforce the Electoral Code of Conduct including directing the arrest of a person found violating the Code.

The Court concluded that the 2nd Respondent did not conduct the elections in accordance with the Constitution and election law and that the 1st Respondent engaged in unlawful campaigns which tainted the fairness and integrity of the poll. The 2nd Respondent was therefore not validly elected as the Member of the National Assembly for Nandi Hills Constituency. In the view of the Court, the fitting remedy was to nullify the election and grant the people of Nandi Hills a fresh opportunity to elect their representative. The Court issued a declaration that the electioof Member of the National Assembly for Nandi Hills Constituency ws not free and fair, that the 1st Respondent was not validly elected and an order directing the IEBC to hold a fresh election in accordance with the Constitution, Elections Act and Regulations. The Petitioner was also awarded costs capped at KES 1 million.

Alfred Kiptoo Keter v Bernard Kibor Kitur & Independent Electoral & Boundaries Commission Election Appeal 21 of 2017

Court of Appeal at Eldoret
Coram: Githinji, H. Okwengu & J. Mohammed, JJ.A

Judgment Allowing Appeal

11 July 2018

Summary of facts

Following the decision of the High Court nullifying the election for Member of the National Assembly, Nandi Hills Constituency,the Appellant lodged the present appeal. The appeal was based on 20 grounds of appeal which were clustered as follows: that the Trial Court misdirected itself on the application of Rule 24 (5) of the Election Petition Rules by allowing the 1st Respondent to adopt the original Petitioner's affidavit and thereby admitting inadmissible evidence; that the Trial Court considered and relied on hearsay evidence on allegations of illegal campaigns; that the Trial Court failed to give due credibility and weight to the evidence of the appellant and his witnesses that no campaigns were held; that the Trial Court lowered the standard and burden of proof; that the Trial Court placed evidential weight to and relied on the contested evidence of the original Petitioner; that the Court admitted the 1st Respondent's supplementary affidavit which was filed out of time and which introduced new facts and allegations; that the Court failed to find that the irregularities complained of were incapable of affecting results; that the Court failed to find the photographic evidence inadmissible.

The 1st Respondent filed a cross-appeal impugning the ruling of 19 December 2017 wherein he contended that the learned judge erred in denying him an opportunity to adduce additional evidence, in striking out the affidavits and by finding that bribery was not proved. The 1st Respondent also filed grounds of affirmation, asserting that there was cogent evidence of bribery and treating of voters and illegal campaigns which had a massive impact on the votes garnered by the appellant.

The 2nd Respondent also filed a cross-appeal assertin that the learned judge erred in law by shifting the evidentiary burden of proof to the respondents before the initial buren was discharged; by faulting the 2nd Respondent for failing to take action regarding the allegations of breach of campaign rules on the basis of a phone call and WhatsApp messages while the procedure for lodging complaints was not followed; by nullifying the election on the basis of hearsay evidence; and by disregarding or failing to properly interpret and apply the provisions of section 83 of the Elections Act.

Counsel for the 1st Respondent also took issue with the appeal as filed, contending that it raised issues of fact, outside the scope of the Court of Appeal. It was their case that the Appellant was asking the Court to re-examine the probative value of the affidavit of the original Petitioner; the weight to be given to the photograph printed by the Petitioner; the determination that the Appellant's appearance after close of the official campaign period amounted to illegal or unlawful campaign; whether addressing a crowd of about 25 would be said to affect the overall outcome of the dispute elections and whether the dispositions on oath could be said to amount to hearsay even after admission by the appellant.

Conversely, counsel for the Appellant submitted that the appeal raised issues of law including the interpretation and application of Rule 24 (5) of the Election Petition Rules, the fate of the affidavit of the original Petitioner, what the supplementary affidavit should contain, shifting of burden of proof, the learned judge's conclusion on evidence, hearsay evidence, interpretation of the law on electronic evidence and the application of section 83 of the Elections Act.

Having assessed both the appeal and the cross appeal, the Court found that it was being invited to find that the election court did not correctly apply the law in arriving at its decision. This did not require the Court to review the evidence, make independent findings of fact and arrive at different findings based on the evidence. The Court was therefore satisfied that the appeal was based on matters of law and thus competent.

The first broad issue for determination was the status of the affidavit of the original Petitioner and the supplementary affidavit of the 1st Respondent and their respective evidential value. The Court reviewed Rules 4 and 12 of the Election Petition Rules, and noted that the latter also imported the provisions of the Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules. From the rules, the Court noted the following. Firstly, the supporting affidavit of a Petitioner was an integral part of the petition. Secondly, although the affidavit of person that the Petitioner intends to call as a witness must be filed at the time of filing the Petitioner's affidavit, such an affidavit does not form part of the petition; it is merely evidence in support of the petition. Thirdly, an affidavit must state the substance of the evidence and be confined to facts the deponent is able to prove of his own knowledge or with the leave of the Court, contain statements of information and belief showng the source and grounds thereof. Fourthly, an affidavit forms part of the hearing of the petition and subject to the discretion of the Court and the consent of the parties, every deponent should attend the hearing of the petition and be examined in chief and cross-examined.

Having found that the affidavit of the Petitioner was an integral part of the petition, the Court found that the finding of the learned trial judge that the petition and supporting affidavit of the original Petitioner remained intact upon withdrawal of the original Petitioner was the correct position in law. However, if the original Petitioner failed to appear for examination in chief and cross-examination, and was not excused by the Court in its discretion or by consent of parties, his evidence, as stated in ***Moses Wanjala Lukoye Bernard Alfred Sambu & 3 Others*** **[2013] eKLR** was of no probative value and the Court ought not consider it. Further, since the 1st Respondent's supplementary affidavit was filed more than 3 months after the petition, it had the character of a witness affidavit and could not lawfully be elevated to the pedestal of a Petitioner. The trial judge therefore misdirected himself in law in requiring the 1st Respondent to adopt, word for word, the original Petitioner's supporting affidavit. The result of the Judge's order was that the 1st Respondent adopted facts which he was not able of his own knowledge to prove, contrary to the law on affidavits. The evidence was hearsay and of no probative value.

The second ground of appeal related to the shifting of the burden of proof in respect of unlawful campaigns. The facts which were relied on to prove the unlawful campaigns were in the affidavit to support the petition sworn by the original Petitioner. When he withdrew from the petition, no party applied that he be summoned to give evidence at the trial; the 1st Respondent chose to rely on the information given to him by the Petitioner in his supplementary affidavit and he did not call any witnesses. The 1st Respondent also admitted that he was not present at the campaigns, did not witness the campaigns and did not take the photograph relied upon by the original Petitioner. On the other hand,the Appellant denied conducting campaigns as alleged and asserted that he exercised

his constitutional right of freedom of association and movement without conducting campaigns. He accounted for his movements at the trial and called witnesses.

Since unlawful campaigns were a breach of the Electoral Code of Conduct, the 1st Respondent and a criminal offence under section 20 (2) of the Election Offences Act, the 1st Respondent was required to discharge a high legal burden before the evidential burden could be shifted to the Appellant. Having found that the Trial Court erred in holding that the affidavit of the original Petitioner was cogent and credible evidence, and that the evidence of the 1st Respondent was direct evidence, the Court found that the 1st Respondent did not prove that the appellant engaged in illegal or unlawful campaigns. Therefore, the evidential burden was erroneously shifted to the appellant.

The Appellate Court also deprecated the Trial Court for giving a very broad meaning to the word 'campaign', which in their view would impinge on a candidate's freedom of movement and association in the 48 hours before an election and unnecessarily expose candidates to criminal sanctions. The word campaign as used in Regulation 2 of the Elections (General) Regulations referred to 'the promotion of a candidate or political party for purposes of an election during the campaign period'. None of the elements of that definition were established. Since the appellant addressed very small groups of people in a constituency with more than 51,000 registered voters, the Court was not satisfied that the conduct of the appellant amounted to a campaign in law.

The last ground of appeal was on the question whether the learned judged failed to consider the provisions of section 83 of the Elections Act to assess whether addressing approximately 25 people had a substantial effect on the overall outcome of the election. The Court noted that the margin of votes between the appellant and the 1st Respondent was 10,051 and that neither Petitioner stted that illegal campaigns had affected the results. The Court deduced that even if the appellant's votes were reduced by 2, 251 votes, which was the number of registered voters in the affected areas,the Appellant would still have had a wide winning margin. It therefore followed that the unlawful campaigns, even if proved, could not have affected the results. The trial judge therefore erred in law in failing to consider and apply the provisions of section 83 of the Elections Act. Had he done so, he would have found that the alleged unlawful campaigns could not have been a ground for invalidating the election of the appellant.

On the ground from the 2nd Respondent's cross appeal that the Trial Court erred in findng that the election was not conducted according to the Constitution and electoral law, since this finding was based on unlawful campaign, the Court ruled that annulling the election based on failure to enforce the Electoral Code of Conduct was neither proportionalnor rational. In any case, the ground of unlawful campaigns was not proved.

On the 1st Respondent's cross appeal, the Court found that the 1st Respondent failed to show that the trial judge did not exercise his discretion judicially, having reard to the object of the rules which is to facilitate a just, expeditious, proportionate and affordable resolution of election petitions. The Court therefore found no merit in the cross appeal.

The appeal was thereore allowed, the judgment of the Trial Court set aside in its entirety and the 2nd Respondent's cross appeal allowed with costs to be paid by the 1st Respondent. The 1st Respondent's cross appeal and notice of affirmation were also dismissed with costs to the Appellant. A declaration was issued that the Appelant was validly elected member of the National Assembly for Nandi Hills Constituency.

Bernard Kibor Kitur v Alfred Keter & IEBC Supreme Court Petition 27 of 2018

Supreme Court of Kenya
Coram: Maraga, CJ & P, Ojwang, Wanjala, Njoki & Lenaola, SCJJ

Judgment Dismissing Appeal

21 December 2018

Jurisdiction — whether Judges of Appeal acted in excess of their jurisdiction by delving into matters of fact — whether Judges of Appeal erred in finding that the substituted Petitioner's evidence amounted to hearsay and that Petitioner failed to shift burden of proof — whether campaigning out of time constituted a ground for nullification of the election

Summary of facts

The Petitioner lodged this petition following the decision of the Court of Appeal overturning that the Trial Court finding declaring the 1st Respondent as the duly elected Member of the National Assembly for Nandi Hills Constituency.

The Petitioner contended that the Court of Appeal improperly assumed jurisdiction by admitting an appeal that mainly dealt with issues of fact. He submitted that the appeal was based on the weight given to the affidavit of the original Petitioner, the weight to be given to the photographs of the original Petitioner, whether the appearance of the 1st respondent after the end of campaigns amounted to unlawful campaigns and whether addressing a crowd of 25 people could be said to affect the overall outcome of the election. He relied on the case of ***Gatirau Peter Munya vs. Mwenda Githinji & 2 Others SC Application No. 5 of [2014]eKLR*** on what amounts to matters of law.

He further submitted that the Court of Appeal improperly denied him the right to avail supplementary affidavits based on the dispositions of the original Petitioner. He further submitted that equality before the law was undermined as he was denied the right to call the original Petitioner to testify by the High Court and confirmed by the Court of Appeal. In support of his application the Petitioner stated that the appeal raised serious questions of law i.e. whether the supplementary affidavits of the Petitioner took the place of the original Petitioner's affidavits, and whether the Court in holding against the Petitioner on account of failure to summon the original Petitioner for cross-examination, when it was the election court that declined to summon him upon application to that effect was objected to by the Respondents. The Petitioner also sought a determination as to whether the Court of Appeal breached Articles 25 (c) and 50 (1) of the Constitution by adopting a different standard and burden of proof and expanding the limits of section 85A of the Elections Act.

The appeal was based on the aspect of his evidence whether it was hearsay and thus required constitutional interpretation after the withdrawal of the original Petitioner.

The 1st Respondent on his part submitted that the appeal did not raise any constitutional grounds. He further submitted that the memorandum of appeal at the Court of Appeal did not require any constitutional application and thus the appeal was not based on any constitutional provision. He further submitted that the Petitioner merely states the provisions of the Constitution without the proof and showing how the Court of Appeal took a trajectory against the provisions of the Constitution.

On the issue of whether the Court of Appeal dealt with issues of fact, the 1st respondent submitted that the Court in ***Zachariah Okoth Obado vs. Edward Akong'o Oyugi and 2 Others (2014)*** dealt with the said issue and the test that has to be met as the 1st respondent was questioning the High Court's interpretation of Rule 24 of the Election Petition Rules 2017. That was based on the question of burden of proof and election offences and the place of supplementary affidavits where there is a substituted Petitioner and the meaning of the term campaign as provided for under section 2 of the Election Act. He therefore disputed that that constitutional provision was infringed by the Court of Appeal. He therefore stated that the Petitioner was afforded the right in accordance with the law of evidence thus both parties afforded the right to fair trial and equal protection of the law.

The first Petitioner further submitted that on the issue of hearsay, section 80 of the Elections Act and Rule 15 (1)(h) contemplate filing of supplementary affidavits and do not foresee any situation of adoption of original affidavits and the High Court in allowing the Petitioner to adopt the said evidence led to an admission of hearsay evidence. On the issue of being denied the right to call the original Petitioner, the 1st respondent submitted that the Petitioner made the said application after the close of his case and it was not possible for the Court grant him the said prayer.

The 2nd respondent submitted that the petition did not meet the criteria in Article 163 (4) (a) of the Constitution as the Petitioner had not identified the specific issues in respect of which interpretation was sought. He further submitted that the petition was predicated on fresh claims not pleaded or considered by the High Court and the Court of Appeal. The 2nd respondent requested the Court dismiss the petition with costs.

Issues for determination

The Court identified the following issues as arising for determination: whether it had jurisdiction over the petition of appeal; whether the Judges of Appeal acted in excess of their jurisdiction by delving into matters of fact, contrary to section 85A of the Elections Act; whether the Judges of Appeal erred in their finding that the substituted Petitioner's evidence amounted to hearsay evidence and that the Petitioner failed to shift the burden of proof; and whether campaigning outside time constituted a ground for nullification of an election.

The Court began with establishing whether the Supreme Court had jurisdiction to entertain the appeal. The Court stated that the test for admitting appeals is provided for under Article 163 (4) (a) of the Constitution and for an appeal to be properly before the Court, it had to involve an aspect of interpretation or application of the Constitution by the superior courts. The Court relied in the case of ***Lawrence Nduttu and 6000 Other versus Kenya Breweries Ltd and Another Supreme Court Petition No. 3 of 2012 [2012] eKLR*** where it was established that a party must be faulting the Court of Appeal's interpretation or application of the Constitution in arriving at a given decision and it used the said provision to dispose of the matter. The party must therefore be faulting the Court of Appeal on the basis of such interpretation.

The Supreme Court observed that a perusal of the records showed that the courts had dealt with the issues of campaigning outside the stipulated time and whether it prejudiced a fair election as decreed by Articles 81 and 86 of the Constitution. The Trial Court had stated that the Respondent's campaign after the end of the stipulated time made the contest unfair, the ground uneven and left the other candidates holding the short end of the stick.

On the other hand, the Court of Appeal never dwelt on the said issue but focused instead on the issue of Electoral Code of Conduct, Regulation 3 of which stipulates that the purpose of the code of conduct is to provide conditions for conducive environment to conduct free and fair elections and climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals.

The Court stated that the above aspiration is provided for under Article 81 and 86 of the constitution on the conduct of elections. Article 84 further mandates political parties comply with the provisions of code of conduct provided for by IEBC and article 88 (4)(i) mandates the IEBC develop code of conduct that will govern elections. The Court asserted that it had on many occasions including ***Munya*** held that there is an interplay between fundamental rights and political rights, particularly those falling under Articles 38, 81 and 82 of the Constitution. In the ***Munya*** case, the Court had ruled that the Elections Act and Regulations were normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution and in interpreting them, a court of law could not disengage from the Constitution. Applying these principles to the present case, the Court found that the Petitioners case had met the provisions of article 163 (4)(a) on jurisdiction and is in the Court for proper determination.

On the issue of assuming jurisdiction contrary to the provisions of section 85A of the Elections Act, the Court found, as stated in the ***Munya*** case, that section 85A is neither a legislative accident nor a routine legal prescription but rather a constitutional element that requires election petitions be dispensed timely. On the issues of petition, the Court found out that the appellate court did not dwell on matters of fact. The Supreme Court drew a distinction between interrogating the veracity of the averments in the affidavit and making a determination as to the place of law of the affidavit in view of the substitution of parties, the latter of which is what the CoA did. It drew the conclusion that in making its determination, the CoA did not delve into matters of fact.

On the question as to whether the Court of Appeal erred by finding that the Petitioner's evidence amounted to hearsay, the Supreme Court restated that electoral litigation affects the interests of the public who have the right to know whether the IEBC duly carries out its responsibilities and whether the person whose election was challenged was validly elected. The Court also relied in the case of ***Joho v Nyange*** that election disputes are not ordinary suits but disputes in rem fought by ordinary parties and therefore such disputes are of great public importance. The Court was of the opinion that in order to protect the rights of individuals provided for under Article 38 and 22 of the Constitution, substitution of parties was important where the original Petitioner wishes to withdraw. That is provided for under Rule 24 of the Election Petition Rules where in the event the original Petitioner wishes to withdraw, a person qualified to be Petitioner can apply to be substituted with the Petitioner and the election court can allow for substitution. The rationale for substitution of a Petitioner is that the Petitioner works to vindicate the rights of every citizen and withdrawal of such petition will affect the right of members of the public. The Court therefore stated that the substituted Petitioner enjoyed the same rights as the original Petitioner including right to challenge and adduce evidence, a tenet of the right to fair hearing.

The Court found that limiting the substituted Petitioner to adopting word for word the averments of the original Petitioner, and compelling him to rely on the facts in the original Petitioner's affidavit, the trial judge erred as it amounted to relying on facts not within his knowledge and which he could not prove which violated the rules of evidence and admitted hearsay evidence. Having found that the evidence relied upon by the Trial Court to come to a determination that the evidentiary burden was duly met and shifted amounted to hearsay, the Court agreed with the appellate justices that the Petitioner's evidentiary burden of proof did not shift to the 1st and 2nd Respondents.

On the issue of campaigning outside the stipulated time, the Court noted that the standard for invalidating an election was as set out in section 83 of the Elections Act i.e. that no election shall be declared devoid by noncompliance with the written law and that so long as it has complied with the constitutional provisions. The standard for invalidation an election was therefore substantial irregularities, malpractices and non-compliance with the law.

The Court noted that the matter at both the High Court and the Court of Appeal turned on the issue of campaigning outside the gazetted period. While the Trial Court had found that the alleged unlawful campaigning affected the 'free and fair' aspect of the election, the Appellate Court was of a different view, finding that it had not been proved in light of the 10,051 margin and the small crowd addressed at the gatherings ad could not have affected the result. The Court of Appeal also reversed the Trial Court's finding on the basis that the Petitioner did not call any witnesses to prove the allegations and bot the affidavit and the oral evidence of the Petitioner was not direct evidence but hearsay.

The Court therefore evaluated whether the issue was substantial enough to nullify an election. Since elections are only voided when they are a travesty or where it is shown that there are considerable irregularities, malpractices or non-compliance with the law, a single issue, even where the effect was criminal, where it did not amount to massive or substantial non-compliance was not enough to dissuade from the fact that an election was conducted according to the law. The Court therefore stated that the election was conducted to a large extent in accordance with the law and the campaign outside the stipulated time did not affect the outcome of the elections.

The Court's verdict was that the election of member of National Assembly for Nandi Hills Constituency was substantially held in accordance with the constitution and the election of the 1st Respondent as Member of National Assembly was upheld. The Court directed that each party bear its own costs.

Sumra Irshadali Mohammed v IEBC & Mawathe Julius Musili Nairobi High Court Election Petition 2 of 2017

High Court of Kenya at Nairobi
Coram: Nzioka J

Judgment Dismissing Petition

2 March 2018

Free and fair elections — whether the tallying of votes was marred with violence, intimidation or improper influence — whether the counting, tallying and/or collation of votes was administered in an impartial, neutral, efficient, accurate and accountable manner — whether the method used in tallying the votes was accurate, verifiable, secure and accountable —irregularities and illegalities — handling of rejected votes — treatment of agents at polling stations — failure of KIEMS Kits and effect on results — impartiality of election officials — whether failure to join the Returning officer as a Respondent to the Petition was res judicata — admissibility of Affidavit sworn by the Returning officer who did not come to testify — whether the 2nd Respondent was validly elected as the member of National Assembly for Embakasi South Constituency — whether the Court should grant the orders sought

Summary of facts

The Petitioner filed the petition contesting the veracity of results declared by the Returning Officer. The Petitioner averred that the results streamed by the 2nd respondent showed that the 1st respondent had garnered 33,880 votes against 33, 708 votes garnered by the Petitioner. The Petitioner further submitted to the Court that violence and intimidation against his agents were witnessed in the election and that KIEMS Kits did not function well at Jobenpha, Cheminade and Mukuru Education Centres; which the Petitioner submitted were his major stronghold areas thereby rendering the voting exercise impossible.

The Petitioner pleaded that there was substantive non-compliance, irregularities and improprieties, and illegalities that rendered the election of the 2nd respondent invalid, null and void. It was his submission that the difference between the votes cast in his favor and the votes cast in favor of the 2nd Respondent was 143 votes which clearly show that the will of the people for Embakasi South Constituency has been torpedoed by the negligence of the 1st Respondent.

The 1st respondent, through a replying affidavit denied the allegations of the Petitioner in entirety, he swore that the 2nd respondent as per form 35B won the elections having garnered a total of 33,174 votes as against the Petitioner's 33,009. In addition, it was contended that a tabulation of forms 35A and 35B revealed that the 2nd respondent won the elections.

The 1st respondent maintained that the counting, tallying and/or collation of votes cast was administered in an impartial, neutral, efficient, accurate and accountable manner that met the constitutional threshold and none of the Petitioner's votes was deliberately and/or erroneously allocated to the 2nd respondent.

Though some arrests were made in the course of the election, the Returning officer deposed that there was no electoral offence committed and/or reported that affected the election of the Member of National Assembly for Embakasi South Constituency. The alleged electoral malpractices cited by the

Petitioner in relation to the arrest of the Deputy Returning officer, was in relation to the Presidential Elections and not the Member of National Assembly.

The Returning Officer denied the allegations of contradictions, inconsistencies, discrepancies, and irregularities in the results announced arguing that the results could be ascertained. He denied the assertion by the Petitioner that the transmission reports from the KIEMS Kits showed that the Petitioner won the elections. He further, averred that if there were any differences in Forms 35A and Form 35B they were attributed to human error and not deliberate actions.

The 2nd Respondent reiterated in its response that the election of the Member National Assembly election for the Constituency was conducted in accordance and in compliance with the constitution, and the law and he was validly declared as the Member of the National Assembly elect.

Issues for determination

The following issues arose for determination: whether the elections were in violation of the Constitution and the other Laws governing the elections; whether the elections were free fair and credible; whether the tallying of votes was marred with violence, intimidation or improper influence by the Respondents and/or the supporters; whether the counting, tallying and/or collation of votes was administered in an impartial, neutral, efficient, accurate and accountable manner; whether the method used in tallying the votes was accurate, verifiable, secure and accountable and/or met the requirement of the law; whether there were substantive irregularities and illegalities that rendered the elections invalid, null and void; whether the rejected votes were improperly handled by the 1st Respondent and gave undue advantage to the 2nd Respondent; whether the Petitioner's agents were denied entrance at the polling stations and/or harassed, obstructed, intimidated or threatened by the 1stRespondent; whether the KIEMS Kits at Jobenpha, Cheminade and Mukuru Education Center were not functioning and whether as a consequence thereof they affected the results; whether the 1st Respondent allowed a partisan Presiding officer at the tallying center who was a member of Wiper Democratic Movement Kenya and whether it affected the results; whether the issue of failure to join the Returning officer as a Respondent in the Petition herein is res judicata; whether the Affidavit sworn by the Returning officer who did not come to testify is admissible in evidence; whether the 2nd Respondent was validly elected as the member of National Assembly for Embakasi South Constituency; whether the Court should grant the orders and/or the prayers sought for in the Petition.

The Court proceeded by referring to the decision of ***Wanguhu Ng'ang'a &AnotherVs George Owiti& Another, Election Petition No. 41 of 1993*** where the Court stated-

> *Election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.*

The Court relied further in the case of ***Joho v. Nyange& Another (2008) 3 KLR (EP)*** **500** where it was held that:

> *The burden of proof in election petitions lies with the Petitioner as he is the person who seeks to nullify an election. While the proof has to be done to the satisfaction of the Court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree is required.*

It was the conclusion of the Court that, for the Petitioner to succeed, he must place before the Court firm or cogent and credible evidence to support the allegations as held in the case of ***Wanguhu Nganga & Another Vs George Owiti & Another, Election Petition No. 41 of 1993.***

First, the Court in determining the issue on counting, tallying and collation of votes and the method used in relation to the same, directed that the guiding principles were set out in Article 86(b) and (c) of the Constitution of Kenya.

Furthermore, Section 39 (1) A and the Elections (General) Regulations 2012 requires under Regulation 75 that the Presiding officer in the presence of the candidates or agents count the votes for the polling station and proceed continuously with the counting.

The Court took cognisance that Forms 35A which feed data into Form 35B were critical for ascertaining *inter alia* the veracity of the alleged sets of results and/or other allegation on counting, tallying or tabulation. The Court found that the allegation of the Petitioner that, in some polling stations Forms 35A were manipulated in the 2nd respondent's favour was not proved, as the Petitioner did not identify the specific Polling station(s) where there was the alleged delay; neither did any of the agents who testified for the Petitioner.

In answering the question whether the counting, tabulation and/or tallying of votes was conducted in such a manner that it had an impact on the results of the elections herein, upon the Court ordering the scrutiny of the votes, the exercise revealed that the Petitioner gained only one vote and the 2nd respondent lost seven votes. The Court held that these results had no significant effect or impact on any of sets of results referred to the petition. The difference between the results announced was 165 votes and the IEBC Portal wass 72 votes, and that if the Court were to consider the variance of 6 votes revealed by scrutiny against 72 of the IEBC Portal or 43 pleaded by the Petitioner, the results would not change as the 2nd Respondent would still have more votes.

In determining the issue whether the election was marred with violence occasioned by the 2nd respondent and or his agents, the Court found that the ground did not have merit as there was no evidence tabled by the Petitioner to demonstrate that in deed there was violence in the polling stations. The Court in reaching a conclusion that it was not evident that the malfunctioning of the KIEMS kit affected results, noted that during cross-examination, the Petitioner admitted that there is no single voter who was denied the right to vote due to failure of the KIEMS kit. Therefore, voting was done in accordance with the law on use of technology as founded on the provisions of Article 86(a) of the Constitution which requires that the IEBC shall ensure whatever method of voting is used, the system should be simple, accurate, verifiable, secure, accountable and transparent.

`The Trial Court came to the conclusion that the evidence adduced to support his Petition was not sufficient to prove allegations on the required standard of proof. The Court stated that the evidence adduced should always support the pleadings.

For the above reasons, the Court held that the Petitioner did not proved malpractices, irregularities, illegalities and/or noncompliance of the law by either of the respondents that would have an effect on the results announced by the 1st respondent.

The Court was informed by the fact that in all results that were availed to the Court, the 2nd respondent maintained the lead and in accordance with the provisions of Section 83 of the Elections Act, no

election should be nullified unless there is proper proof that it was not free, fair and credible. The petition was therefore dismissed and the Petitioner directed to pay costs of KES 3 million to the Respondents.

Sumra Irshadali Mohammed v Independent Electoral and Boundaries Commission & Another Nairobi Election Petition Appeal 22 of 2018

Court of Appeal at Nairobi
Coram: Warsame, Makhandia & Odek, JJ.A

Judgment Allowing Appeal

6 July 2018

Jurisdiction to entertain appeal — non-joinder of the Returnng Offier to the petition — declaration of different sets of results — scrutiny and recount — bias on the part of an official of the IEBC

Summary of facts

Twelve candidates presented themselves for election in the Parliamentary elections held in Embakasi South Constituency on 8 August 2017. The 2nd Respondent Hon. Mawathe Julius Musili was declared the winner having garnerd the highest number of votes tallied, and was consequently gazzetted as the duly elected Member of Parliament of Embakassi South Constituency.

The Appellant being displeased with the outcome petitioned the High Court seeking nullification of the election or in the alternative an order of recount of all the ballots. The Appellant stated that the elections were marred with a lot of discrepancies, and that they were not credible or verifiable. Further he stated that there was a violation of the principle of free and fair elections as stipulated in the constitution. The Appellant alleged that the conduct of the 1st respondent violated Article 73 as read with Articles 81 and 86 of the Constitution, as well as sections 58 and 63 of the Elections Act and Regulations 2017.

The Appellant sought relief that the election of the 2nd respondent be nullified and an order for scrutiny and recount and/or re-tallying of all the votes cast. Alternatively, the Appellant sought an order that a fresh election be held for Embakasi South Constituency. The Trial Court concluded that the irregularities occasioned by the 1st and 2nd respondents were not of such a magnitude as to justify the annulment of the impugned election results.

The Appellant aggrieved by the decision of the Trial Court approached the Court of Appeal to declare the elections results of the Member of National Assembly of Embakassi South as null and void and order for fresh elections.

Issues for determination

The following issues for determination were identified: whether the appeal should be struck out; non-joiner of the Returning Office to the petition; the different sets of results as declared by the 1st Respondent; scrutiny and recount; biason the part of the 1st Respondent

On the first issue, the 2nd Respondent raised issue that the Memorandum of Appeal was fatally defective for having omitted polling station diaries for 221 polling stations in Embakasi despite the

diaries being part of pleadings put in evidence before the Court during the hearing and therefore urged the Court to reject it.

While advancing this position the 2nd respondent relied on the case of ***Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 Others***. In declining to grant this request the Appellate courts relied on the case of ***Wavinya Ndeti & Anor vs IEBC & 2 Others, Election Petition Appeal No.8 of 2018*** to the effect that drafting of pleadings is a technical matter it would be preposterous to shut out a litigant simply on account of inelegance in drafting.

On the question of non-joinder of the Returning Officer, the Appellant postulated that since the returning officer was not party to the first petition at the Trial Court ought to have disregarded the affidavit he swore in support of the 1st Respondents case. The Appellant relied on the case of ***John Munuve Mati vs Returning Officer Mwingi North Constituency.*** The Appellate court was guided by the case of ***Independent Electoral & Boundaries Commission & Paul Musyimi Nzengu [2018] eKLR*** to the effect that iit did not invariably follow that failure by a Respondent to call a witness meant that the petition had to be allowed. The Petitioner had to first adduce evidence to entitle him to a judgment if the REsponent did not adduce evidence in rebuttal. Consequently, this ground was allowed with the Appellate Court finding that the Trial Court erred in allowing the evidence of the returning officer.

On the question of different results being declared by the 1st Respondent, the Court relied on the case of ***Jackton Nyanungo Ranguma vs IEBC*** where a principle was enunciated that even if there was a challenge in the transmission of the results of the election electronically, the same must affect the outcome of the results substantively. The Court considered the trial courts determination and finding on the discrepancies in the results as announced in the forms 35A and that of 34B. The Court also cited Article 86(1) of the Constitution on functions of the IEBC in the timely tabulations and remission of the results. The Court found it suspicious that the original form was not then how comes the copy thereof was provided. The Court held that the results given by the 1st Respondent were not verifiable and was in violation of the mandatory requirements of Articles 81 and 86 of the Constitution, section 39 and regulation 83 of the Elections Act and the Elections (General) Regulations.

The next issue for determination was scrutiny and recount. The Trial Court had directed for scrutiny and recount of the results. Unfortunately it emerged that some of the original forms were missing during the scrutiny exercise. This made the Court to question the integrity of the process citing the Supreme Courts decision in the ***2017 Raila Odinga Case***, and whether the lack of original forms during scrutiny went into the core of the validity of the election.

The Court faulted the Trial Court for not address its mind on the outcome of the scrutiny exercise. In view of the Court the question verifiability of the results of the election could only be determined by considering the outcome of the scrutiny. The Court considered that the Trial Court allowed the petition but on totally different grounds. The results in the opinion of the Court were not verifiable, accurate and transparent as there were discrepancies in the reporting of the results and the absurd outcome of the scrutiny.

The Court relied on the applicable test for bias as outlined in the English decision of ***R vs Camborne Justices; Ex parte Pearce [1954] 2 All ER 850;*** that there is likelihood of bias if in the opinion of right thinking men they think that the fact finder or the arbiter is not impartial. While on proving

existence of real likelihood, the Court cited *R v Rand LR 1 QB 233 Blackburn J* that "a real likelihood" of bias must be proved to have actually existed.

Applying the above highlighted principles to its mind, the Court held that the learned judge did not properly address herself to the evidence before her. The Court opined that if to a reasonable man it appeared that a party who had an interest in the outcome of the election was employed by the 1st Respondent, there was likely than not to be bias. The election therefore in the courts opinion was not conducted in a free and fair manner. The Court therefore found that the particular ground of appeal succeeded.

Consequently, the judgment of the election court was set aside in its entirety; the 2nd Respondent's application dated 10th April 2018 seeking to strike out the appeal was dismissed with costs to the appellant; the appeal was allowed with costs to the Appellant; and the certificate issued by the Election Court pursuant to Section 86 of the Elections Act was set aside and substituted with a Certificate that the 2nd respondent was not validly declared as having been elected as Member of National Assembly for Embakasi South Constituency during the elections held on the 8th August 2017. The 1st Respondent was directed to organize and conduct a fresh election for the position of Member of National Assembly for Embakasi South Constituency in conformity with the Constitution and the Elections Act. The appellant was awarded costs of the petition capped at KES 1.5 million as well as KES 1 million. The appellant as also granted costs of the application and the appeal, capped at KES 1 million.

Mawathe Julius Musili v IEBC & Another Supreme Court Petition 16 of 2018

Supreme Court of Kenya
Coram: Maraga, CJ & P; Ojwang, Wanjala, Njoki & Lenaola, SCJJ

Judgment Dismissing Appeal

21 December 2018

Jurisdiction — whether Appellate Court ated in excess of its jurisdiction — whether Court erred in holding that election results were not verifiable — whether Appellate Court erred in shifting burden of proof in electoral disputes as settled by the doctrine of stare decisis— whether issue of non-joinder of the Returning Officer was res judicata — whether Appellate Court erred by finding that there was bias on the part of an official of the 1st Respondent

Summary of facts

The appeal followed the decision of the Appellate court in which the election of the Appellant herein as Member of National Assembly for Embakasi South Constituency in Nairobi County was invalidated. The Appellant was declared duly elected as the Member of the National Assembly following the General Elections of 8 August 2017 having garnered 33,174 votes against the 2nd Respondent who garnered 33,009 votes. The 2nd respondent consequently approached the High Court seeking that the said election be nullified. In the said petition, the High Court identified 13 issues for determination including whether there were substantive illegalities and irregularities to warrant nullification of the election and whether the 2nd respondent herein was therefore the validly elected member of National Assembly for Embakasi South Constituency. The High Court, on 2 March 2018, dismissed the petition, and confirmed the appellant as the Member of the National Assembly for Embakasi South Constituency.

Aggrieved by this decision, the 2nd respondent appealed to the Court of Appeal. Therein, he sought the same declarations that the Appellant was not the validly elected Member of National Assembly and instead, that he was the only elected member of National Assembly for Embakasi South Constituency. The appellate court determined that there were five issues for determination.

On these issues, the Court of Appeal found as follows. First, it declined to strike out the memorandum of appeal. Second, it found that be erroneous for the trial Court to refer to the Returning Officer's affidavit, which lacked the consent of the parties terming it a misconstruction of legal and evidentiary burdens of proof. Third, the Court agreed with the appellant, that the results given by the 1st Respondent were not verifiable, and were in violation of the requirements of Articles 81 and 86 of the Constitution, Section 39 of the Elections Act, and Regulation 83 of the Elections (General) Regulations. Fourth, the Court faulted the 1st respondent for not bringing all evidence before it as uncovered by the scrutiny and vote recount. Fifth, the Court found that there was likelihood of bias by the 1st Respondent during the election. The Court of Appeal consequently nullified the election directing the 1st respondent to conduct a fresh election.

Aggrieved,the Appellant approached the Supreme Court by dint of Article 163 (4) (a) of the Constitution of Kenya 2010; Section 15 (2) of the Supreme Court Act (Cap 9A, Laws of Kenya); and Rules 9 and 33 of the Supreme Courts Rules, 2012 citing 15 grounds of appeal.

On the issue of jurisdiction,the Appellant contended that the supplementary record of appeal was incompetent having been filed out of time. Further, he challenged the memorandum of appeal for raising mixed issues of fact and law thus exceeding the appellate court's jurisdiction. The appellant challenged the re-framing of the issues submitting that it deprived him the right to a fair hearing under articles 25 and 50, and the right to equal protection of the law under article 27 of the Constitution by not upholding the rule that; parties are bound to stick to their pleadings. Further,the Appellant submitted that only one ground of appeal raised an issue of law but was couched in so general terms that it failed to communicate to the appellant and the Court of the specific elements of the High Court's decision being challenged.

The appellant also challenged the non-joinder of the returning officer terming it as failure to uphold rule 2 of the Elections (Parliamentary and County) Petition Rules. The appellant challenged the Court to determine whether it went contrary to section 83 of the Election's Act in failing to consider whether non-compliance with Articles 81 and 86 of the Constitution, and Section 39 of the Elections Act affected the results of the elections. The appellant submits that compelling and credible evidence was required for the Court of Appeal to reverse the factual and legal finding of the High Court, that the appellant was the winner of the election. He also took issue with how the Court pronounced itself on costs. On the issue of bias, he submitted that there was no proof of misconduct by any tallying clerk, or by the Presiding Officer, that affected the results of the election.

The 1st respondent in support of the petition, submitted that the finding that there were four election results went contrary to the position in the case of ***IEBC v. Pauline Akai Lokuruka & Another [2018] eKLR***, which found that the only election result was that declared by the returning officer. He submitted that the 2nd respondent failed in discharging his burden of proving allegations claimed further urging that the 2nd respondent was at liberty to enjoin the returning office if he sought a response from the same. The 1st respondent also challenged jurisdiction of the Court on grounds that it canvassed issues not raised before the other courts. He submitted that the appellate court was right in declining to strike out the memorandum of appeal.

The 2nd respondent claimed that the Court lacked jurisdiction to canvass the issue of non-joinder of the returning officer given that it was determined in the High Court and subsequently not appealed on. He urged the Court to find that the appellant was estopped from claiming an absence of jurisdiction, since he himself had been availed the Court's jurisdiction, during the hearing.

The 2nd respondent submitted that the 1st respondent had acknowledged disparities in the election results. Consequently, he submitted that the burden shifted to it to prove that the election met the requirements of verifiability, accuracy, exactness and fairness. He submitted that the presence of a partisan presiding officer went against his article 38(2) right of fairness in the Constitution. The 2nd respondent contested the allegation that the appellant was denied equal protection and benefit of the law, contrary to Article, 25, 27 and 50 of the Constitution.

Issues for determination

The Court identified the following issues for determination in the present appeal: whether the Court had jurisdiction to entertain the appeal; whether the Appellate Court acted in excess of its jurisdiction; whether that Court erred by finding that the election results were not verifiable; whether the Appellate Court erred in shifting the burden of proof in electoral disputes, contrary to the applicable law and the governing precedent, as settled by the doctrine of *stare decisis* (Article 163(7) of the Constitution);

whether the issue of non-joinder of the Returning Officer was *res judicata*; and whether the Appellate Court erred by finding that there was bias on the part of an official of the 1st respondent.

On the question of jurisdiction, the Supreme Court responded to the 2nd respondent's claim that issues being canvassed had not been in issue before the Superior courts. The Supreme Court conducted a perusal of court records in the High Court and the Court of Appeal found that both analysed the issues of compliance with articles 81 and 86 of the Constitution; Sections 39 and 83 of the Elections Act; and the General Regulations on the conduct of national elections. This was in line with ***Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd. and Another Supreme Court Petition No. 3 of 2012 [2012] eKLR*** and that both superior Courts had taken a trajectory of constitutional interpretation or application (see ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others, Sup. Pet. 2B of 2014 [2014] eKLR***). The Supreme Court thus found that it was tasked with constitutional interpretation of articles 81, 86, 87 of the Constitution and 85A of the Elections Act granting it jurisdiction.

Next, the Supreme Court analysed the issue of whether the Appellate Court exceeded its jurisdiction. Here it tasked itself with determining whether the filing of the supplementary record out of time rendered the appeal incompetent and fatally defective. In addition the Court queried whether the Court erred in failing to reject the Memorandum of Appeal that contained mixed issues of law and fact. The appellant had challenged the supplementary record of appeal filed on 2 May 2018 when the judgement had been delivered on 2March 2018, a time in excess of the 30 days as provided under Section 85A of the Elections Act, and Rule 9 (1) of the Court of Appeal (Election Petition) Rules 2017. The appellate court had declined to strike it out for reasons that the omission did not go to "the root of the appeal, or in any way affect the jurisdiction of the Court."

The Supreme Court began by noting that that the Court of Appeal (Election Petition) Rules, 2017 do not expressly provide for the period for filing a supplementary record of appeal. Further, it noted that the supplementary record of appeal is, however, mentioned in Rule 8(5), in those circumstances in which the High Court does not avail relevant documents. In such a case,the Appellant is allowed to file the record of appeal, followed within seven days by a supplementary record of appeal.

The Court took note that the appellant in the Court of appeal had not sought leave to file the supplementary records of appeal. It also noted the contents of the said supplementary records and that they had been relied upon. The Supreme Court also noted that the Court hearing the appeal is an ideal forum for ascertaining whether the supplementary records introduce new evidence, whether they raise legal issues and whether they are relevant to the matters in controversy in the appeal. The Appellate court had relied to the Supreme Court's decision in ***Lemanken Aramat v. Harun Meitamei Lempaka & 2 Others Petition No. 5 of 2014 [2014] eKLR***, where the net effect was the position that in analysing cases of procedural shortcomings, "a Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character." The Supreme Court took note that the Court of Appeal had taken cognisance of the fact that the appellant therein had not sought leave to file these documents out of time. It was of the view, however, that this procedural infraction occasioned no injustice or injurious prejudice to any party.

The Supreme Court also pointed out that the Court of Appeal Rules 2010 section 92 allowed filing of copies of supplementary records of appeal 'as soon as may be practical'; whereas Rule 79 of the Court of Appeal (Election Petition) Rules 2017 had not specified a time limit to file the same. Based on this, the Supreme Court found that it would not have been proper for the appellant to argue that

the Appellate Court contravened Article 163 (7) of the Constitution by departing from the Supreme Court's precedent in ***Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others, Sup. Ct. Pet. 18 of 2014*** (***as Consolidated with Sup. Ct. Pet 20 of 2014 [2014] eKLR)*** that the timelines in the Constitution and the Elections Act were not negotiable or capable of extension.

On the second question as regards failing to reject the memorandum of appeal for reasons of containing issues of both fact and law, the Court, upon perusal, affirmed that 18 of the 19 grounds of appeal had indeed raised issues of both fact and law contrary to Section 85A of the Elections Act that stipulates that appeals to the Appellate Court 'shall be on matters of law only'. It noted that while the Court of Appeal was cognisant of this, it guided itself by limiting its analysis to issues of law. The Supreme Court therefore referred to its decision in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR,*** upon which it determined that questions that guided its consideration of the Appellate Court's decision was through the following set of questions: *Was the Court cautious enough to limit itself to issues regarding the interpretation and application of the law by the trial Judge, in relation to the petition at the High Court? Did the Judges of Appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?*

The Supreme Court took note that the grounds were reduced to six issues for determination, all being limited to questions of law that the parties proceeded to submit on. Where evidence was analysed, the Supreme Court noted that the Appellate court only sought to establish a question of whether conclusions of the trial judge were supported by evidence before the Court. The Supreme Court thus found that the Judges of Appeal had not descended into the arena of examining the probative value of the evidence presented in the petition, or engaging in the calibration of evidence, with a view to determining the veracity or otherwise of evidence tendered by witnesses.

As regards the third issue for determination being the verifiability of the election results, the Supreme Court found that the issue in question here was the alleged 'recognition' of four separate sets of results by the appellate court. The Supreme Court however noted that this appeared to be the Court pointing out what appeared on record rather than making a pronouncement on the same. On Form 35Bs and the lack thereof of the original copy in the petition, the Supreme Court noted that this being a material document, failure to have it on record was fatal to the validity of the election. The Supreme Court agreed that underpinning the electoral process is the principle of verifiability under article 81(e) of the constitution. The Court noted that because the Form 35B bore the formal results, failure to file it meant it is impossible to state with certainty and clarity what the contents of the original Form 35B showed, and whether the certified copy was a true copy of the original. Therefore, the result of the election was uncertain, a situation further compounded on by the presence of divergent sets of 'results'. The Supreme Court took issue with the fact that the 1st respondent failed to provide the same document even after being ordered to do so by the Trial Court terming it as a dereliction of constitutional duty on their part.

On the fourth issue in question regarding the burden of proof, the submissions of the appellant and the 1st Respondent had been that the prevailing position was that the record contained by the 1st respondent was the true and accurate record and burden lay with the 2nd Respondent to prove otherwise. The appellate court found that whereas the 2nd respondent had discharged its legal and evidentiary burden, there in the absence of the validated Form 35B from the 1st respondent, there was no basis of verifiability for Form 35C. the Trial Court found that the burden thus shifted to the

1st respondent who was to call the Returning Officer to disprove the same, something which did not happen despite filing a lengthy affidavit.

The Supreme Court noted that before the Trial Court not only did the 1st respondent not call the returning officer as a witness, but that he did not also proceed to call any witness. The replying affidavit of the returning officer was consequently struck off the record for being of no evidentiary value. The Supreme Court further noted that Rule 15 (3) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 provides that a respondent's replying affidavit forms part of the record of the trial, and a deponent may be cross-examined by the Petitioners and re-examined by the Respondent. It thus noted that failure of a party to call a witness entitled the Court to draw an adverse inference from the absence of the witness.

It noted the common law tradition of cross-examining a deponent, finding that the failure of a party to avail himself or herself, to affirm the content of depositions in affidavit, is destined to minimize the probative value of the affidavit evidence. The Court noted that the adverse inference drawn was that should the returning officer testified, his testimony would have been unfavourable to IEBC. The Supreme Court noted that while reasons being provided for the absence may have persuaded the Court to 'look the other way', none was offered by the 1st respondent in this case.

Section 107(1) and (3) of the Evidence Act and ***Raila Odinga and Others v. Independent Electoral and Boundaries Commission and 3 Others, SCK Petition No. 5 of 2013 [2013] eKLR*** were quoted by the Supreme Court to buttress the matter of evidential burden of proof which though it rests on the Petitioner, depending on the effectiveness with which he or she discharges this, it keeps shifting and ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made. The Supreme Court acknowledged that the burden to prove that it was impossible to know who won the election due to differing results had been discharged by the 2nd respondent and had consequently shifted to the 1st respondent. The Court found that the 1st respondent had not satisfactorily explained itself.

On the fifth issue of whether non-joinder of the returning officer was res judicata, the Supreme Court determined as follows. The appellant had contended that the same rendered the appeal incurably defective for failing to uphold Rule 2 of the Elections (Parliamentary and County) Petition Rules. The Supreme Court found that the matter was determined by the Trial Court without an appeal being proffered against the same making it res judicata.

On the sixth issue of whether the question of bias of the presiding officer was a question of fact, the Supreme Court determined as follows. The 2nd respondent had challenged the presiding officer given that she belonged to the same party as the appellant. Whereas the Trial Court held that it was of no consequence finding that, it was impossible to ascertain "whether the presence/conduct of the partisan officer had an impact on the results" the appellate court found that the Trial Court had misdirected herself on the evidence before her. The Supreme Court refused to be persuaded by the argument that this amounted to the appellate court delving into questions of fact. The Court instead found that The tenor of the Appellate Court's finding was that it would appear to the reasonable man that the 1st respondent, who bore a constitutional charge to remain impartial, had on the contrary, employed a person who had an interest in the outcome of the election.

The Supreme Court, in conclusion, thus found that the election had not been conducted substantially in accordance with the Constitutional Charter, and the organic statute law incorporated within its

ambit. It follows that the position taken by the Appellate Court was wholly meritorious. The appeal was therefore disallowed and the 1st Respondent directed to organise and conduct a fresh election for the position of Member of the National Assembly for Embakasi South Constituency, in conformity with the Constitution and the Elections Act.

Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others Mombasa Election Petition 7 of 2017

High Court of Kenya at Mombasa
Coram: Njoki Mwangi J

Ruling Allowing Scrutiny

12 January 2018

Whether the applicant has established a sufficient reason for scrutiny and recount of votes- Costs

Summary of facts

The petition was filed by Mohammed Mahamud Ali, the Petitioner, against the Independent Electoral and Boundaries Commission, Aisha Abubakar, Changamwe Constituency Returning Officer and Omar Mwinyi Shimbwa, the 1st, 2nd, and 3rd Respondents respectively.

The Petitioner urged the Court, pending the hearing and determination of the petition, to issue an order for scrutiny of all polling stations in Changamwe Constituency in regards to the evidence presented claiming presence of irregularities in the elections.

The Court made it clear from the outset that it would be premature to hear the application herein before the hearing of the petition had begun due to the need for the applicant to lay a firm basis to his application. After hearing the Petitioner and the 1st and 2nd Respondent, the Petitioner revisited his application for scrutiny. They limited their application to 80 polling stations within Changamwe Constituency.

The applicant referred to the holding in ***Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others [2014] eKLR*** as restated in the case of ***Raila Amolo Odinga and Another vs Independent Electoral Boundaries Commission and 2 Others [2017] eKLR*** for the positon that a party can lay a basis for an order of scrutiny by relying on the pleadings, affidavits and evidence during the hearing of the petition. The Petitioner therefore urged that the Court look at the matter on a preliminary basis as it was not called uponto make a final determination on the issues before it at the time of the hearing of the application.

Counsel attached to his submissions a table that outlined the discrepancies with regard to serial numbers of some ballot boxes and serial numbers of some seals as against data of the serial numbers of some ballot boxes and serial numbers of some seals as reflected in polling station diaries produced by the 1st and 2nd Respondents' witnesses. He stated that the discrepancies that applied to 21 polling stations raised suspicion that there has been interference with election materials after the declaration of election results. The applicant also averred in his affidavit that there were anomalies on Forms 35A, in that 32 of them lacked official IEBC stamps and therefore the authenticity of the forms could not be ascertained. The applicant also contended that Forms 35A from 16 polling stations had a lot of alterations which were not countersigned.

The Petitioner also took issue with the fact that Forms 35A from 27 polling stations were not signed by Jubilee party agents, which compounded the evidence of the Petitioner's witnesses that most of the Jubilee party agents were not allowed to undertake their duties.

It was also asserted that Forms 35A from 4 polling stations were affixed with the wrong stamps and therefore the results therein were disputed and that Forms 35A from 9 polling stations were missing important signatory details of the Presiding Officers and party agents and therefore one could not establishe whether they were copies of the original Forsms 35A or they had been doctored.

Counsel for the Petitioner also referred to the evidence of PW 35 who gave pictoral evidence that voters were issued with ballot papers stamped spoilt before they were were cast. An order of scrutiny would therefore establish the veracity of that allegation.

The Petitioner also cited the disparity of over 5,000 votes in the online portal results and the results declared by the Returning Officers as votes cast for the President and those cast for Governor, Member of Parliament, Senator, Woman Representative and Member of County Assembly. Counsel stated that online portal results and results declared in Forms 35B were at variance and that the Returning Officer confirmed the same but maintained that the online portal results were provisional. Counsel for the Petitioner contended that the results for 2 contestants **Patrick K. Ngugi and Godfrey Imbali Mpapale** were reduced by a margin which could be attributed to the increased votes for the 3rd Respondent by an equal margin.

Finally, it was argued that the Returning Officer referred to having made alterations and/or amendments to Form 35B; in that one was prepared on 10 August 2017 and the second one on 13 August 2017. Tied to the foregoing was the issue of the Returning Officer having amended the typed figure of 41,893 votes in Form 37B in respect to the results for the Governor Mombasa County, to 52,804 votes.

Counsel for the Petitioner cited the holding in ***Joho and 2 Others v Nyange and Another [2006] eKLR*** that allowed for scrutiny to be ordered where there is ground to believe there were irregularities in the election process or where there was a mistake on the part of the Returning Officer or other election officials.

The 1st and 2nd Respondents argued that the applicant had not demonstrated sufficient reason to qualify an order for scrutiny as was required in the provisions of Section 82 of the Elections Act and Rules 28 and 29 of the Elections (Parliamentary and County) Petition Rules and as stated in ***Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others [2014]***. Their counsel submitted that the applicant should have givens reasons for the scrutiny and recount in the polling stations in issue as was stated in ***Nicholas Kiptoo Salat vs Wilfred Lesan and 7 Others, Civil Appeal No. 228 of 2013***. Counsel also submitted that the margin of votes between the election candidates was not narrow enough to qualify a recount or scrutiny of the votes, in reference to ***Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others (supra)***.

It was contended that the Petitioner failed to demonstrate the polling stations he visited and found some illiterate voters not being properly assisted by Presiding Officers and chose instead to rely on third parties. It was contended that the 3rd Respondent's witnesses had confirmed that illiterate voters were assisted properly by Presiding Officers according to the Rules.

Counsel for the 1st and 2nd Respondent also contended that the applicant failed to specify the particulars of massive electoral malpractices and irregularities such as denial of the right to vote, lack of verification, lack of stamps on Forms 35A, Forms 35A having different serial numbers, failure to transmit results or discrepancies in voter turnout. Counsel cited the decision of Ongeri J in ***Albeity Hassan Abdalla vs IEBC and 2 Others,*** Malindi High Court Election Petition No. 8 of 2017 where the Court relied on the decision in the 2017 decision in ***Raila Amolo Odinga and Another vs IEBC and 2 Others*** and declined to grant orders for scrutiny to urge that the application be disallowed.

Counsel for the 3rd Petitioner submitted that voters who had been issued with multiple ballot papers were not allowed to cast the extra ballot papers as they were withdrawn by the presiding officers of the respective polling stations. He also asserted that the allegations of ballot stuffing were unfounded and controverted by the Presiding Officer of Chaani Primary School polling station 5 who testified that he did not see anyone carrying out ballot stuffing at the polling station.

On the discrepancy in votes for the different elective posts, counsel argued that the PSD for the said polling station showed that ballot papers were issue to 400 voters for all the elective seats and 396 were cast for Member of the National Assembly. It was argued that the difference could be accounted for by spoilt and/or stray ballot papers.

On the mix up of the lids of the ballot boxes for Senatorial and Member of the National Assembly seats at Kipevu Primary and Umoja Primary Schools, it was argued that the mix-up was inadvertent and the presiding officer at Umoja Primary School agree with the political party agents for voters to be directed to cast their ballot papers in the correct ballot boxes.

On the alleged discrepancy between online portal results and those declared by the Returning Officer, counsel submitted that the online portal results were only provisional as per Regulation 82 and subject to a confirmation procedure under Regulation 76. It was submitted that the alterations made to Forms 35A were countersigned by presiding officers and party agents and errors could not be discounted since the forms were filled by human beings.

It was submitted that Jubilee party agents were not denied entry into the polling stations as shown by the polling station diaries. In any case, the absence of political party agents or candidates at the polling stations could not invalidate the results.

On the alleged stamping of ballot papers as spoilt, it was asserted that no witnesses testified that they were issued with such ballot papers and therefore the allegation could not stand.

On the allegation of lack of IEBC stamps on the face of Forms 35A or the Forms bearing the wrong stamp, it was submitted that the issue was never pleaded but came out in the course of giving evidence by Presiding Officers who testified that stamping was not a legal requirement. Reliance was placed on Regulations 76 and 79 in this regard. On the 0 Forms 35A where the signatory details were missing, since the same were never pleaded and came out during and should therefore be disregarded. The 3rd Respondent urged the Court to decide the case based on its own merits, while citing the case of ***Martha Wangari Karua and Another vs IEBC and 3 Others [2017] eKLR.***

Issue for determination

The Court identified the issue for determination to be whether the applicant had established sufficient reason for scrutiny and recount of the votes cast in Changamwe Constituency.

Since there is no mandatory legal requirement for presiding officers to stamp Forms 35A, the Court declined to make an order for recount and scrutiny of votes for the polling stations listed in annex I and IV.

Annex II contained a list of polling stations where it is stated that Forms 35A had alterations. In order to give the applicant the opportunity to verify whether the said Forms 35A captured the correct number of votes cast in the said polling stations, or whether the alterations were made for an ulterior motive, the Court granted scrutiny and recount for polling stations listed therein.

Annex III contained a list of 27 polling stations in which Forms 35A were not signed by Jubilee party agents. Evidence was adduced that some Jubilee party agents were turned away, rather, chased away from some polling stations. The said party agents who adduced evidence that they were chased away from polling stations or were allowed to enter polling stations late, after voting had commenced, established sufficient reason for this court to grant the orders sought for recount and scrutiny of votes as per the list in Annex III.

Annex V contained a list of polling stations where the details of the signatories are missing. In view of the requirement on Forms 35A for both the Presiding Officer and Deputy Presiding Officer's details to be included in Forms 35A and for them to sign the said Forms, the Court allowed the recount and scrutiny to establish whether there was accountability and transparency in the electoral process in Changamwe Constituency.

In respect of disparities in serial numbers of ballot boxes and seals affixed to apertures of ballot boxes, the applicant supplied to the Court a schedule of 21 polling stations wherein the serial numbers of the ballot boxes and also of serial numbers of seals affixed to apertures of ballot boxes were at variance with serial numbers captured in the polling station diaries and the report filed by the Deputy Registrar as at the time she took custody of the election materials in issue. In order to ascertain the integrity of the election materials contained in the said ballot boxes, the Court allowed the scrutiny and recount of votes in the 21 polling stations. The Court took cognisance of the fact that the 1st and 2nd Respondents had custody of the said materials and the applicant was not aware that some of the serial numbers for ballot boxes captured in polling station diaries differed from the actual serial numbers of the ballot boxes containing ballot papers for the impugned polling stations. The same applies to the serial numbers of the seals affixed to the apertures of some ballots boxes. The issue of a party being bound by his pleadings would not arise in such a situation where the applicant did not possess the said information. Since the Court had ordered for the 1st and 2nd Respondents to hand over the custody of Elections material for the Member of Parliament, Changamwe Constituency to the Court and for the Deputy Registrar to file a report of the said handing over process. This was done. The said report forms an integral part of the Court record and can therefore not be wished away.

On the variance between the figures on the IEBC online portal results and the declared results, the applicant deposed of the variance in the total number of votes declared as cast in favour of the President, the Governor, Woman Representative, and the Senator of Mombasa County, the Member of the National Assembly and the Member of County Assembly for Changamwe Constituency, as compared to those posted on the IEBC portal. The applicant could not fathom how such a variance could have come about since each voter was given 6 ballot papers, with the requirement for the voter to cast one ballot paper for each candidate. In order to bring to rest the issue, as well as the issues of some polling clerks who were caught issuing multiple ballot papers, the mix up of lids of the ballot boxes of the candidates for the Senate and the Member of Parliament, the issue of a voter who was

allegedly seen carrying a green paper bag and another who carried a rucksack, which the applicant purports to have contained ballot papers which the said voters stuffed into the ballot box for the Member of the National Assembly for Changamwe Constituency; it was only reasonable and fair to assuage the apprehension on the part of the applicant on if the elections were conducted properly. On the margin of votes between the Jubilee candidate Abdi Mohamed Daib and the 3rd respondent, Omar Mwinyi Shimbwa, it was submitted that scrutiny should be granted where the margin was narrow. Reliance was placed on the decisions in ***Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others [2014[eKLR*** and ***Philip Munge Ndolo vs Omar Mwinyi Shimbwa and 2 Others [2013] eKLR*** where courts held that where the margin of votes is narrow an order for scrutiny and recount should be granted. The Court ruled that since the Petitioner had pinpointed various irregularities and illegalities which he alleged were committed by the Respondents, the issue of the margin of vote was only one of the considerations that the Court would take into account.

The Court noted that the said irregularities and illegalities were well stated in the petition. It decided that some of the complaints lodged by the applicant were fundamental in establishing validity of the votes cast and determining whether there was accountability and transparency in the electoral process. The Court issued the order for scrutiny and recount in 58 of the polling stations listed in the applications in pursuance of the same.

In cognizance of the aforementioned, the application for scrutiny was allowed with costs being awarded to the Petitioner.

Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others Mombasa Election Petition 7 of 2017

High Court of Kenya at Mombasa
Coram: Njoki Mwangi J

Judgment Dismissing Petition

28 February 2018

Whether the 1st & 2nd Respondents or their officers issued multiple ballot papers during the elections- Whether unauthorized election materials and persons were allowed at the polling stations - Whether the 1st& 2nd Respondents or their officers used faulty KIEMS kits- Whether validly registered voters were denied their right to vote – Whether the 1st and 2nd Respondents or their officers fail to transmit results as required by law- Whether the 1st and 2nd Respondents or their officers made incorrect entries in Form 35As after tallying of the results- Whether the elections were conducted by way of a secret ballot- Whether the 1st and 2nd Respondents or their officers issued ballot papers stamped "spoilt" to voters before casting of their votes- Whether the Form 35As used contained different serial numbers from their duplicates- Whether the 1st and 2nd Respondents or their officers secured the safety of election materials after the elections- Whether party agents in some polling stations were denied entry or ejected- Whether any irregularities and illegalities present impacted the outcome of the election results- Costs

Summary of facts

The petition was lodged by Mohamed Mahamoud Ali, the Petitioner with the Independent Electoral and Boundaries Commission, Aisha Abubakar, Changamwe Constituency Returning Officer, and Omar Mwinyi Shimbwa as the 1st, 2nd and 3rd Respondents respectively.

The Petitioner challenged the validity of the 3rd Respondent's election alleging that the electoral process conducted by the 1st and 2nd Respondents violated Articles 81, 83, 86 and 88 of the Constitution together with the provisions of the Elections Act, the Election Laws (Amendment) Act. Counsel for the Applicant relied on the case of ***Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & Others [2017] eKLR*** in laying down allegations that the elections were not free and fair owing to the irregularities present in the electoral process. Counsel based this argument on the claim the 1st and 2nd Respondents had issued multiple ballot papers during the election, making reference to ***Waititu v. Independent Electoral and Boundaries Commission (IEBC) & Others [2014]*** 2 EA. Counsel also noted the difference between the online portal results and the Form 35A based results together with the difference between the votes cast in various positions and cited the case of ***William Kabogo Gitau vs George Thuo & Others [2010] eKLR***. The Petitioner also submitted that unauthorised persons were allowed into the polling station during the tallying of the votes and that election materials were not properly or safely stored after the elections as required by Regulations 74 and 86 respectively of the Elections (General) Regulations. Counsel for the Petitioner submitted that some voters were wrongly and misled contrary to Regulation 72 of the Elections (General) Regulations and that others received ballot papers stamped "spoilt". Counsel also submitted that the KIEMS machines used were not well kept and as a result, voters were denied their right to vote.

The 1st and 2nd Respondents argued that the Petitioner lacked sufficient evidence to support the claims. Their counsel submitted that the Scrutiny Report testified that the results were managed and released in compliance with the law. They referred to Kasango J, in ***Sammy Ndungu Waity v Independent Electoral and Boundaries Commission & 3 Others,*** **Nanyuki High Court Election Petition No. 2 of 2017** in stating none of the registered voters was denied their right to vote. Counsel quoted Section 39 in explaining the transmission of the results electronically and based its defence against the allegation of denying agents access to polling stations on Regulation 62 of the Elections Act. Counsel also argued that the assistance of voters was lawful under Regulation 72 of the Elections (General) Regulations and was properly conducted.

The 3rd Respondent concurred with the 1st and 2nd Respondents and argued that the Petitioner did not have proof for the allegations made while stating that errors mentioned were clerical and not malicious, making allusion to the Scrutiny Report. Counsel for the 3rd respondent submitted that the 1st and 2nd Respondents acted in their discretion under Regulation 62 of the Elections (General) Regulations in denying the said agents entry to the polling station and that the irregularities so claimed were not sufficient to nullify the elections.

Issues for determination

The Court identified the following (13) issues for determination: Whether the 1st & 2nd Respondents or their officers issued multiple ballot papers during the elections; whether unauthorized election materials and persons were allowed at the polling stations; whether the 1st& 2nd Respondents or their officers used faulty KIEMS kits; whether validly registered voters were denied their right to vote; whether the 1st and 2nd Respondents or their officers fail to transmit results as required by law; whether the 1st and 2nd Respondents or their officers made incorrect entries in Form 35As after tallying of the results; whether the elections were conducted by way of a secret ballot; whether the 1st and 2nd Respondents or their officers issued ballot papers stamped "spoilt" to voters before casting of their votes; whether the Form 35As used contained different serial numbers from their duplicates; whether the 1st and 2nd Respondents or their officers secured the safety of election materials after the elections; whether party agents in some polling stations were denied entry or ejected; whether any irregularities and illegalities present impacted the outcome of the election results and Costs.

The Court considered the first issue to be unproved since the hearing of the involved witnesses' cases was still ongoing in subordinate courts. The Court also dismissed the allegation on entry of unauthorized materials and persons as being unfounded, being countered by documentary evidence, and a non-issue as the party agents allowed into the said polling station was testified to have the requisite documentation.

As regards the third issue, the Court acknowledged that the KIEMS kits uses were faulty in configuration but stated that the allegation of lacking data regarding registered voters was unproved and disqualified the claim.

The Court held the third issue to be unmerited having being satisfied by the submissions of the 1st and 2nd Respondents in response. The Court, in the fourth issue, noted that the evidence availed was not substantial, as required in Section 12 of the Election Petition Rules, to prove ethnic profiling in the electoral process. It dismissed the issue having being convinced that all the registered voters had been allowed to vote.

On the fifth issue on transmission of results, the Court considered the provisions of Regulation 82 of the Elections (General) Regulations and Section 39 of the Elections Act that provided that electronic transmission and publication of results is only mandatory for Presidential elections and that electronically transmitted results were provisional. The online portal results could therefore not be considered final against the declared results that bore no ambiguity. The Court also stated that the difference in votes cast in various positions could not be considered evidence of electoral malpractice on the face of it unless cogent evidence was availed.

On the sixth issue, the Court also found that the claims that the elections were not carried out by secret ballot method were unfounded since no witness was brought to adduce evidence to the allegations of compromised privacy of the voters.

The seventh issue was ruled to be unsubstantiated and unproved since no witness was called to support the claim. The Court noted that the evidence produced by the 1st and 2nd Respondents on the eighth issue successfully counteracted the allegations. It noted that this was further supported by the Scrutiny Report.

In the ninth, issue, the Court stated that the claim of missing ballot boxes was not supported by any evidence and that this was confirmed by the presence of all ballot boxes during the scrutiny and recount of votes. In considering and dismissing the issue of party agents being denied entry to polling stations, the Court quoted the provisions of Regulation 62 of the Election (General) Regulations that disqualified absence of agents as a basis for invalidating election results.

On the twelfth issue, in light of the holdings in the cases of Raila 2017(*supra*) and ***Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR*** together with Section 83 of the Elections Act, the Court concluded that the irregularities so proved were not of sufficient magnitude to invalidate the elections.

In consideration of the above, the petition was dismissed and costs awarded in favour of the Respondents and capped at the sum of KES 8 million.

Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others Mombasa Election Petition Appeal 7 of 2018

Court of Appeal at Mombasa
Coram: Visram, Karanja, Koome JJ.A

Judgment Dismissing Appeal

26 July 2018

Jurisdiction — burden of proof — whether the Trial Court properly appreciated the alleged constitutional and statutory breaches occasioned by the 1st and 2nd Respondents — whther the illegalities and irregularities were of such a magnitude as to justify invalidation of election — costs

Summary of facts

The General Elections of 8 August 2017 were conducted in Changamwe Constituency with several candidates on the race. Mr. Shimba Omar Mwinyi ("the 3rd respondent") garnered the highest number of votes and thus he was declared the winner and his name was subsequently gazetted as the duly elected Member of Parliament for Changamwe constituency.

The second respondent was displeased with the results declared, petitioned the High Court to nullify the election of the Appellant. One of the registered voters Mr. Mohamed Mahamoud Ali ("the appellant"), was not satisfied with the election. He filed an election petition on 6 September 2017 in the Election Court at Mombasa contesting the results.

The Appellant faulted the elections results as not being transparent, verifiable, accurate and accountable as required by Articles 81, 83 and 88 of the Constitution of Kenya. He sought various reliefs before the Trial Court including immediate orders for preservation of election materials, scrutiny of elections materials, declaratory orders of violation of Articles 81 and 86 of the constitution by the 1st and 2nd respondents, a declaration that the 3rd respondent was not validly elected, an order for fresh elections in the subject constituency, and an award of costs of the petition to the appellant. The Trial Court concluded that the irregularities occasioned by the 1st and 2nd Respondents were not of such a magnitude as to justify the annulment of the impugned election results.

The Appellant, aggrieved by the decision of the Trial Court, approached the Court of Appeal to declare the elections results of the member of National Assembly in Changamwe as null and void and order for fresh elections.

Issues for determination

Having considered the pleadings, the submissions by the parties the Court of Appeal settled the followings as issues for determination: jurisdiction of the Court of Appeal to determine the appeal; burden of proof; the Trial Court's appreciation of the alleged constitutional and statutory breaches occasioned by the 1st and 2nd Respondents; whether the alleged irregularities and illegalities were of such a magnitude as to justify the invalidation of the disputed elections.

On the question of jurisdiction, the 1st and 2nd respondents argued that factual issues are a preserve of the Trial Court and not of the Court of Appeal. In support of this position, they relied on section 83A of the Elections Act and cited the decisions in ***John Munuve Mati v Returning Officer, Mwingi North Constituency & 2 Others*** **(2018)** ***eKLR.***

The Court agreeing with the 1st and 2nd Respondents', considered Section 85A (1) of the Elections Act and stated that appeals to the Court of Appeal are limited only on matters of law. This the Court supported with the case of ***Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR***. The Court outrightly detected mischief in the pleadings drawn by the Appellants as the same stated that it was an appeal on points of law and facts. However, the Court cited the case of ***Wavinya Ndeti & Another v. IEBC & 2 Others (2018) eKLR*** and stated that Section 85A of the Elections Act should not shut out genuine grounds of appeal on account of poor drafting of the grounds of appeal. The Court however cautioned itself that it would only consider issues of law.

On the question of burden of proof, the Court considered the case of ***Jackton Nyanungo Ranguma v IEBC and 2 Others (2018) eKLR*** where it stated that in an election petition, the legal burden of proof remains with the Petitioner at all times. The Court was also guided by the Supreme Court's decision in the cases of ***Raila Amolo Odinga & Another v. IEBC & 2 Others (2017) eKLR*** and ***Raila Odinga & 5 Others v. IEBC & 3 Others [2013] eKLR.*** The Court considered the trial judge's finding on the burden of proof and its shifting and held that the trial judge was guided properly in her findings.
On the 3rd issue, the Court considered extensively the evidence placed before the Trial Court on the various electoral malpractices. For instance in the issue of issuance of multiple ballot boxes, the Court agreed with the Trial Court that there was no link between that alleged malpractice and the validity of the elections.

On the issue of improper influence of the voters, the Court concurred with the Trial Court but was inclined with Odunga, J's findings in the case of ***Nuh Nassir Abdi v Ali Wario & 2 Others [2013] eKLR*** that the said malpractice did not substantially affect the validity of the elections.

The Court also addressed other malpractices including: denial of voter's right to vote; discrepancies in number of votes cast with number of voters who turned up to vote in several polling stations; variations in the number of votes cast for different electoral seats when compared; involvement in electoral malpractice by 3 polling clerks; failure by returning officers to give reasons for unsigned Form 35 A; failure by respondents to avail 2 Form 35 B and unused Form 35 A booklets for scrutiny; existence of 2 Form 35B; formatting of KIEMS Kits; failure by respondents to produce polling station diaries; alleged failure by Presiding Officers to swear Oath of Secrecy and alterations that were not countersigned.

Having considered all these malpractices at length, the Court quoted the *Raila Odinga 2013 case* and emphasized that where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections.

As to whether the allege illegalities and irregularities were of such a magnitude as to affect the validity of the election, the Court considered the Courts decision in ***Owino Paul Ongili v. Francis Wambugu Mureithi & 2 Others (2018) eKLR*** on the issue of irregularities and breaches of the law and when they can vitiate the validity of an election. The Court also relied on the Supreme Court Case in ***Raila Odinga 2013 case***. The learned judges, having evaluated the evidence of the malpractices and the

findings of the Trial Court on the same, concluded that irregularities alleged above were not of such magnitude as to justify the invalidation of the disputed elections. The appeal as therefore dismissed. On the question of costs,the Appellant was aggrieved by the Trial Court's award of costs to the respondents capped at KES 8 million. He argued that since the Trial Court had found that there some irregularities, each party ought to have borne its own costs.

The Court relied on the case of ***Albeity Hassan Abdalla v. IEBC & 3 Others (2018) eKLR***, and observed that the general rule is costs should follow the cause. However, the costs should not be excessive and unreasonable so as to shun honest public interest litigants. However, it cautioned that costs should not be used as a scarecrow to chase away deserving litigants from seeking justice or impede access to justice.

Having reviewed the award of costs in similar case, the Court considered the award of KES 8 million excessive in the circumstances. Whereas costs were at the discretion of the Court, it was inevitable to interfere with the order of costs in the appeal. The appellant was directed to bear the costs of the 3rd Respondent capped at KES 1.5 million and those of the 3rd Respondent capped at KES 500,000. In view of the conduct of the 1st and 2nd Respondents which necessitated the filing of the petition and appeal, the Court ruled that they were not entitled to any costs.

Analysis

This section reviews some of the themes identified as arising from the petitions and appeals determined in the 2017 EDR cycle. As far as possible, a comparison has been drawn with the jurisprudence emerging from the post-2013 cycle. While in some cases such as burden and standard of proof, withdrawal of a petition, scrutiny, recount and re-tallying, timelines and election offences, the law and jurisprudence appear to be fairly settled, some of the issues identified call for further introspection and possible clarity from lawmakers and judicial officers in the coming EDR cycle. Of particular concern is the jurisprudence of the Supreme Court surrounding the verification of presidential election results, jurisdiction of election courts over pre-election issues and the scope of appeals to the Supreme Court.

The jurisdiction of the Supreme Court on election appeals, anchored in Article 163 (4) (a) of the Constitution, has raised questions as to the compatibility of this jurisdiction with the legislative intent of timely resolution of electoral disputes. Many decisions at the Supreme Court are determined outside of the 6-month timeframe given to other election courts. This creates a likelihood of rendering illusory the timeframes created by the Constitution and the Elections Act. While the Supreme Court has attempted to circumscribe the appeals that proceed from the Court of Appeal to the apex court, its interpretation of Article 163 (4) (a) has not served to limit much the number of appeals that end up at the apex court.[92]

From the cases reviewed in this section, it would appear that rather than provide clarity and jurisprudential guidance to the lower courts, the decisions of the Supreme Court have caused much disquiet and may need to be reconsidered in the next EDR cycle.[93]

1. The Threshold for Valid Elections in Kenya: The Constitution and Section 83 of the Elections Act

The threshold for the validity of an election flows from the inescapable fact that elections, like any other human endeavour, are not perfect.94 However, given the importance of elections to the governance of a country, there is still need for a 'minimum standard of performance below which, with sufficient evidence, the courts should invalidate an election'.95 For the Court to make such an assessment, two things are necessary: first, an assessment of the conduct of the EMB against the established standards and principles of an election to establish the validity of complaints about the conduct of an election; and second, an assessment of whether the (mis)conduct of the EMB rose to a level that ought to result in the annulment of the election.[96]

92 The author is only aware of one appeal in respect of which the Supreme Court found that it had no jurisdiction in this cycle: Zebedeo John Opore v IEBC and 2 Others Supreme Court Election Petition 32 of 2018.

93 There is at present, for example, an application for the Supreme Court to review its decision in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others Supreme Court Petition 7 of 2018, where the Court by a majority failed to nullify the election of the appellant on account of ineligibility and election irregularities.

94 Aywa 'A Critique of the Raila Odinga vs IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya' in C Odote & L Musumba (eds) Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence (2016), 46, 61.

95 Aywa (as above).

96 Aywa (as above).

This section reviews the jurisprudence under the 2010 Constitution on the legal principles and standards governing elections in Kenya. It assesses the jurisprudence from the Supreme Court in the 2013 and 2017 presidential election petitions to isolate the prevailing standards. It also delves into a discussion of the impact of the Election Laws (Amendment) Act 34 of 2017, which enacted changes to the Elections Act, including section 83. It reaches the conclusion that whereas the Supreme Court may have faltered in the 2013 Raila Odinga Case by not appreciating the constitutional standards for valid elections, then appeared to regain its footing in the 2017 Raila Odinga case by restoring the Constitution to its rightful place as the benchmark for valid elections, it may have inadvertently reverted to the 2013 position in recent cases.

1.1. The 2013 Raila Odinga Case

In a highly criticised decision, the Supreme Court in the ***2013 Raila Odinga Case,*** adopted section 83 of the Elections Act as the standard for invalidating an election.[97] The section read as follows:

> *No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.*

Having reviewed jurisprudence from various jurisdictions, the Court ruled that the test for invalidation of a presidential election result was a conjunctive one, requiring that the Petitioner demonstrates that not only was there non-compliance with the Constitution and electoral laws, but that the non-compliance had affected the election result. In the words of the Court at para 304:

> *Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent? It is this broad test that should guide us in this kind of case, in deciding whether we should disturb the outcome of the Presidential election.*

The apex court in this case focused not on the procedure for conducting elections and the constitutional principles guiding the process as set out in Articles 81 and 86, but rather on the effect of irregularities or non-compliance with the law on the outcome of elections. The Court upheld this approach in determining the appeals in ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others***[98] and ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***.[99]

The 2013 decision was heavily criticised for several reasons. Firstly, it was asserted that by placing reliance on section 83 as the standard of validity, the Supreme Court missed the opportunity to develop a proper constitutional threshold for valid elections.[100] It was argued that with the introduction of the requirement that the election be conducted in accordance with the Constitution and written

97 H Evelyn & W Wanyoike 'A New Dawn Postponed: The Constitutional Threshold for Valid Elections in Kenya and Section 83 of the Elections Act' in C Odote & L Musumba (eds) Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence (2016) 78.

98 Supreme Court Petition No. 4 of 2014 [2014] eKLR;

99 Supreme Court of Kenya Petition 2B of 2014 [2014] eKLR.

100 H Evelyn & W Wanyoike 'A New Dawn Postponed: The Constitutional Threshold for Valid Elections in Kenya and Section 83 of the Elections Act' in C Odote & L Musumba (eds) Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence (2016) 78 80

law, section 83 of the Elections Act did not come into play in a case such as the 2***013 Raila Odinga Case***. That section, it was contended, was only relevant where what was alleged were breaches of other written laws or electoral statutes.[101] The authors maintained that the proper standard for a valid election was that set in Articles 81 and 86 of the Constitution and any election conducted in Kenya after 2010 had to meet that threshold.[102] This approach was well articulated by the COA in ***Ledama Olekina v Samuel Kuntai Tunai & 9 Others,***[103] where in relation to Articles 81 and 86 of the Constitution, it asserted:

> *An election is not an election which is not based on universal suffrage, not by secret ballot, not transparent and free from violence, intimidation, improper influence or corruption; one which is not conducted by an independent body with impartiality, neutrality, efficiency, accuracy and accountability; one where the voting method is not simple, accurate, verifiable, secure, accountable and transparent; one where the structures and mechanisms for eliminating electoral malpractices are not put in place. In sum, an election that goes against the grain as set by the Constitution, and is not free and fair, is invalid, without more. The Constitution does not set the standard. It is the standard. The issue is how ordinary mortals can measure up to that lofty level.*

This approach was taken by the Court of Appeal in ***Dickson Mwenda Kithinji v Peter Gatirau Munya and Others***[104] and ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others***[105] but overruled by the Supreme Court for violating Article 163 (7) of the Constitution and for not evaluating the impact of the alleged irregularities on the outcome of the election.[106]

Secondly, it was argued that the conjunctive test elevated result above process and therefore failed to consider that where the electoral process was flawed, the effect of the irregularity on the result was unknown.[107]

Thirdly, the Supreme Court was also faulted for failing to take into account Kenya's unique history and culture and the obligation imposed upon the IEBC by Article 86 to ensure that voting standards have been adhered to.[108]

Fourthly, the conjunctive standard was also criticised for being perceived as creating the impression that a violation of constitutional principles on the conduct of an election was insufficient to invalidate the election.[109] In fact, it was argued that the provision was itself unconstitutional for excusing election irregularities without clear and objective criteria.[110]

The Respondents in the ***2017 Raila Odinga Case*** urged the Court to stand by the precedent established in the ***2013 Raila Odinga Case*** and to uphold the election result unless it could be demonstrated

101 Evelyn & Wanyoike 'A New Dawn Postponed', 86.
102 Evelyn & Wanyoike 'A New Dawn Postponed', 94.
103 Civil Appeal 286 of 2013.
104 Nyeri Civil Appeal 38 of 2013 [2014] eKLR.
105 Kisumu Civil Appeal 39 of 2013.
106 It is noteworthy that at para 216 of the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* Supreme Court Petition No. 2B of 2014**,** the apex court stated the standard to be that the election must be conducted substantially in accordance with the principles of the Constitution. However, it watered down the standard by requiring proof of the alleged irregularities on the result (see para 218).
107 Evelyn & Wanyoike 'A New Dawn Postponed', 100.
108 Evelyn & Wanyoike 'A New Dawn Postponed', 101.
109 Evelyn & Wanyoike 'A New Dawn Postponed', 107.
110 Evelyn & Wanyoike 'A New Dawn Postponed', 110.

either that legal votes had been rejected or that illegal votes had been allowed which had had an effect on the election result.

1.2. The 2017 Raila Odinga Case

In the main judgment, the Court identified preliminary issues for determination, before giving its finding on the main issues. The third preliminary issue for determination, referred to as the fulcrum of the petition, was the meaning of section 83 of the Elections Act i.e. the threshold for invalidating a presidential election result. The Petitioners urged the Court to depart from its finding on the meaning of the section as adopted in the **2013 *Raila Odinga Case***, where it had made a tangential interpretation of the provision while addressing the question of burden and standard of proof. The Supreme Court had stated that to invalidate an election result, a Petitioner would have to demonstrate not only that there was non-compliance with the written law relating to the election, but also that the non-compliance affected the election result.

The Petitioners argued that the test was onerous and made it almost impossible to challenge an election result in court. It was further asserted that the position taken in that case undermined Article 2 of the Constitution, as it would allow a violation of the Constitution to stand so long as it could not be demonstrated how it affected the outcome of the election. It was their case that a purposive interpretation of the provision required that the test be disjunctive, i.e., that one prove either non-compliance with election law or that there were irregularities that affected the election result. The Petitioners and the 1st Interested Party therefore sought to have the Court depart from the interpretation of section 83 of the Elections Act which it had adopted in the ***2013 Raila Odinga Case.***

The LSK, who had been admitted as *amicus* with their participation limited to making submissions in regard to the interpretation of Section 83 of the Elections Act, argued that section 83 was not applicable where there was a violation of the Constitution or a substantive provision of election laws and regulations. The Respondents, the Attorney-General and 2nd Interested Party urged the Court not to depart from the interpretation adopted in 2013. The Court agreed with the LSK's assessment of the applicability of section 83. At para 374, the Court stated:

> *…In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.*

This finding appeared to give the proper place to the Constitutional principles on elections. The Court affirmed that section 83 only became relevant where non-compliance with the Constitution or electoral law is not alleged.[111]

111 The SC has not always upheld this position. See for example its decision in Clement Waibara v Annie Kibeh & Another SC Petition 24 of 2018, where the Court faults the Trial Court for making a finding nullifying an election for non-compliance with the Constitution without assessing impact of irregularities on the result. In Bernard Kibor Kitur v Alfred Keter & IEBC Supreme Court Petition 27 of

The Court evaluated section 83 against the counterpart provision in section 28 of the repealed National Assembly and Presidential Elections Act (NAPE Act). It also reviewed section 37 of the Representation of the People Act of the UK and its interpretation in the case of ***Morgan v Simpson***[112] which had been adopted in the 2013 decision and followed in the ***Joho*** and ***Wetangula*** appeals. It found that the test in the English statute was conjunctive, requiring both proof of non-compliance and the effect of irregularities on the election result, while both the repealed section 28 of NAPE Act and section 83 of the Elections Act adopted a disjunctive test. The authorities from Nigeria, Ghana, Zambia and the UK which had been cited were therefore inapplicable.

Moreover, the Court found that section 83 does not require that election be conducted substantially in compliance with the law, unlike many of the provisions in other jurisdictions. In addition, it requires that an election comply with the principles laid down in the Constitution in order to be valid.[113] However, the Court was keen to maintain that not every irregularity would invalidate an election result. It read the words 'if it appears' as contained in section 83 as implying a requirement that any irregularities be substantial. Similarly, the COA in ***Hassan Aden Osman v IEBC & 2 Others***[114] restated the rationale for section 83:

> *There is a rebuttable presumption in election matters that the results declared by the electoral body are correct until the contrary is proved. To invalidate an election therefore, is a weighty prospect and it requires compelling and credible evidence because invalidation of an election has wider implications beyond the contestants; the right of the voters to non-interference with their already cast votes without satisfactory reasons.*

The Supreme Court maintained that any interpretation given to section 83 had to be in harmony with the constitutional principles and that section 83 of the Elections Act itself was in harmony with the Constitution, causing it to differ from previous electoral laws since the previous Constitution did not contain any principles on elections. The Court therefore ruled that the two limbs of section 83 ought to be applied disjunctively and a Petitioner could succeed in voiding an election where they satisfactorily proved either that the conduct of the election substantially violated the Constitution or that the election was marred by irregularities and illegalities that affected the result of the election, even though it was conducted substantially in accordance with the principles laid down in the Constitution and other written laws on elections.[115]

According to Ngugi J in ***Clement Waibara v Annie Kibeh,***[116] the implication of the Supreme Court's reading of section 83 was that an election can be nullified under three thresholds: where the electoral system or the conduct of the election does not meet the standards in Articles 81 and 86 of the Constitution (the *per se* constitutional standard); or where the conduct of the election substantially violated written law (the qualitative test under section 83) or where there were irregularities or illegalities in the conduct of the impugned election that affected the outcome of the election (the quantitative test under section 83).[117]

2018, the Court stated that the measure by which an election can be invalidated is section 83 of the Elections Act, with no reference to its earlier assertion that section 83 is only relevant the Petitioner does not allege constitutional violation is not alleged. It therefore appears that the Supreme Court has reverted to its 2013 position inadvertently.

112 [1975] QB 151.

113 Para 194.

114 Nairobi Election Petition Appeal No. 11 of 2018.

115 At para 211.

116 Kiambu Election Petition 1 of 2017

117 At para 18.

Ngugi J went on to assert that whereas much emphasis had been placed on section 83 as the standard of invalidity of an election, the initial *per se* standard was as established in Articles 81 and 86 of the Constitution.[118] Section 83 is therefore the legislative enactment of a constitutional standard. As was previously argued by Evelyn and Wanyoike,[119] Ngugi J reasoned that the threshold for invalidating an election is reached where a party alleges a violation of any of the principles or values specifically mention in Articles 81 and 86 of the Constitution without the need to test the case against section 83 of the Elections Act.[120] He maintained that the standards in Articles 81 and 86 are both qualitative and quantitative, just like the disjunctive standard in section 83 of the Elections Act.[121] The CoA disagreed. In ***Annie Wanjiku Kibeh v Clement Kungu Waibara & Another,***[122] the Court found that the Trial Court had introduced too low a standard and one beyond the parameters of the SC decision in the ***2017 Raila Odinga Case***. The learned judges of appeal stated:

> *…despite the Supreme Court's clear pronouncement of the standards specified by **Article 81** and **86** and **section 83**, the learned judge sought to introduce a low threshold for nullifying elections. But in terms of the Supreme Court decision in the **Raila 2017 case** any nullification of an election must be on the basis of substantial violation of the principles laid down in the Constitution as well as other written law or that, although the election was conducted substantially in accordance with the principles laid down in the Constitution and other written law, it was subject to irregularities and illegalities that affected the result of the election; that is, the qualitative and quantitative standards. So that, to the extent that the learned judge disregarded the threshold that the violation has to be "substantial" before an election can be voided, we are of the view that he misapplied the law.*

At the Supreme Court,[123] it is curious that the SC did not address the question of whether the Trial Court had gone beyond the parameters of the ***2017 Raila Odinga Case*** and established too low a standard for evaluating the validity of an election. The Court framed the issue for determination in this regard as whether the CoA had improperly applied Articles 81 and 86 of the Constitution and whether the Court had misapprehended the object of section 83 of the Elections Act.

The apex court then proceeded to find that since the conduct of the election involved the input of many persons and agencies, including voters, it could not lend itself to any specific formula of correctness and each case had to be assessed on the basis of general standards of compliance and integrity. Instead of pronouncing itself on the validity of the three standards articulated by the Trial Court, the Supreme Court, just like the CoA, proceeded to take issue with the fact that the Court did not ascertain whether the irregularities revealed during scrutiny affected the outcome of the election. Since the dispute was not settled on this basis, the Court found the decision of the Trial Court misguided, however logical. In the words of the Court:

> ***[51]*** *The conduct of an election takes many vital roles and inputs, on the part of a large number of persons and agencies: so that the co-ordinated initiative and outcome, is the basis of the overall integrity that will convey the democratic, electoral intent. This is essentially an episode of administrative ethics, that depends upon the inputs of many, including the voters, by their*

118 See also para 53 of the Wavinya Ndeti appeal, Nairobi EP Appeal 8 of 2018, for a restatement of this constitutional standard of validity.
119 As above, 86.
120 At para 19.
121 At para 20.
122 Nairobi Civil Appeal 20 of 2018.
123 *Clement Kung'u Waibara v Annie Wanjiku Kibeh & Anor* SC Petition 24 of 2018.

> *integrity and conduct. Such a scenario, it is plain to us, would not lend itself to any specific formula of rectitude; and each case stands to be assessed on the basis of general standards of compliance and integrity.*
>
> ***[52]** In view of such considerations, we are in agreement with the Appellate Court's standpoint: that the trial Court ought to have ascertained whether the irregularities revealed by the process of scrutiny, did affect the outcome of the election. It was clearly inapposite to settle the dispute on the basis of any conjecture, however logical.* ***(emphasis added)***

By requiring that the election court always assess the impact of irregularities on the outcome of the election as it did here, even where violations of the Constitution are alleged, the Supreme Court would be reverting to the 2013 position of treating the test as conjunctive. Ngugi J's position as I understand it, is simply that a violation of constitutional principles on election should suffice to invalidate an election, as to rule otherwise would be to sanction violations of the Constitution so long as it cannot be demonstrated that they affected the result, the very absurdity that the Supreme Court was criticised for in 2013. It would appear that this argument was lost on the Court of Appeal and later on the Supreme Court.

The next section evaluates section 83 as amended by Act No. 34 of 2017 to assess the potential impact of the amendment on the test of validity of an election.

1.3. John Harun Mwau & Others v IEBC & Others[124]

The second set of presidential election petitions (2 & 4 of 2017), which were consolidated on 14 November 2017 were filed after the Election Laws (Amendment) Act had been published in the Kenya Gazette on 2 November 2017. The amended provision stated:

> *(l) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-*
> *(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and*
> *(b) the non-compliance did not substantially affect the result of the election.*
> *(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.*

The Court was asked to determine which law was applicable to the petition and to declare section 83 as amended unconstitutional to the extent of its inconsistency with the Constitution of Kenya.

The Court noted that the matter of constitutionality of the amended law was pending in the High Court as ***Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others.***[125] In keeping with its practice of not taking away the jurisdiction vested in other superior courts, and particularly because this was not a matter in respect of which the Constitution had reserved for the jurisdiction of the Supreme Court, the Court deferred to the jurisdiction of the High Court in determining the constitutionality or validity of section 83 of the new law.

124 Petitions 2 and 4 of 2017.
125 Nairobi High Court Petition No. 548 of 2017.

It did however, in relevant excerpts of its judgment, delve into the question of whether the amended law was to operate retrospectively and it stated:

> *[377] The 2nd and 3rd Petitioners plead in paragraphs 74 and 75 of their petition, inter alia, that the Elections Laws (Amendments) Bill, 2017 was intended to diminish the role of technology in elections, open election results to manipulation, and signal to voters that it would not be possible to successfully challenge the results of the fresh Presidential election, even if the same were to be unconstitutional, unlawful or irregular. They state that the said Bill has since become law, with the overt approval of the 3rd respondent, and has been gazetted as Election Laws (Amendments) Act, Number 34 of 2017. Consequent upon that pleading, the Petitioners raise, for determination by this Court (at paragraph 140 of the Petition), the issue that, in light of the amendment of Section 83 of the Elections Act by the Election Laws (Amendment) Act, 2017 after the conduct of the fresh Election, the question: which law is applicable for purposes of determining the present dispute" and, whether Section 83 of the Elections Act as amended is unconstitutional and invalid.*
>
> *[380] It is a conventional rule of construction that, legislation must be addressed to the future, and a statute should not be given retrospective operation, interfering with antecedent rights. We are inclined to the standpoint that, legislation should bear only prospective effect, in the absence of special legislative signal to the contrary. Where a legislative body thus wishes to change the law regarding a past event/action, its intent is to be clear enough. By this principle, where legislation is ambiguous, or silent as to its effective date, it should be presumed to be prospective.*
>
> *...*
>
> *[383] The issue in this petition, however, is that the amended law was not made retroactive by Parliament, and should, therefore, be read prospectively. It is noteworthy that, in addressing the same issue in Moses Masika Wetangula v. Musikari Nazi Kombo [2014] eKLR, the Court of Appeal adopted the dicta in Morgan v. Simpson [1974] 3 All ER 722, and took the position that an election must be guided by the law as it was on the date of the election. The Court thus stated the rationale:*
>
> *"This was a reiteration of the globally established principle that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election."*
>
> *(See also Lon L Fuller "Eight Ways to Fail to Make Law" in Feinberg and Coleman (eds) Philosophy of Law (Thompson Learning, 2000) 91-94.)*
>
> *[384] From the foregoing, we find that the applicable election law, in respect of the conduct of the 26th October, 2017 election was the Elections Act, 2011, the Elections Laws (Amendments) Act, 2017 (Act No. 34 of 2017) not having come into effect as at the time of that election, and the same not having had retrospective application."*

On the contrary, in the minority Concurring Opinion of Njoki Ndung'u SCJ, the Judge proffered a different reasoning on this issue. The opinion addressed the applicability of the amended section 83 to the determination of the petition as well as the constitutionality of the said provision. In her view, whereas all the parties had addressed the Court on the constitutionality of section 83, none had addressed the Court on whether an issue touching on the constitutionality of any law integral to the

determination of a cause before the Supreme Court, although pending before another court, falls for determination by the Supreme Court.

The learned Judge restated the position of the majority decision in the SC ***Petition 1 of 2017*** and asserted that indeed section 83 was the fulcrum of the petition and everything turned on the disjunctive interpretation and application of the section. Citing the Supreme Court decision in the case of ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others***,[126] the learned judge asserted that the context in which the question of interpretation jurisdiction was raised imported 'special permutations' in light of the overall constitutional responsibility and binding authority on questions of law of the Supreme Court over all other courts. This responsibility to interpret the Constitution with finality and to provide guidance on all matters of law for other courts meant that its jurisdiction was an enlarged one, which enabled it to settle the law for the guidance of other courts.

Unlike other courts whose mandate in relation to election appeals was statutory, the Judge emphasised that the mandate of the Supreme Court was founded on Article 163 of the Constitution, which, in the words of the Court in the ***Aramat*** case, conferred 'an unlimited competence for the interpretation and application of the Constitution.' Taken together with the Supreme Court Act, the Supreme Court was granted a 'greater charge' to determine 'questions of constitutional character'.[127] In her view, therefore, the Supreme Court's determination of the constitutionality of section 83 was necessary to complete the exercise of its mandate under Article 163 (3) of the Constitution.

Furthermore, the learned judge distinguished the line of authorities cited wherein the Supreme Court had relegated constitutional interpretation to the High Court as being ordinary matters coming to the Supreme Court by dint of Article 163 (4) (a) or (b) of the Constitution. The learned judge cited the dicta of former DCJ Rawal and Ojwang SCJ in ***Anami Silverse Lisamula v IEBC and 2 Others,***[128] to the effect that the mandate of the Supreme Court to interpret the Constitution must not be curtailed by the 1989 ***MV Lillian case***[129] as that would undermine the essence of the creation of a final court; and that rather than making a prompt finding on jurisdiction, the Supreme Court was under an obligation to not rest until all issues of interpretation and application were resolved.

Therefore to determine a matter in respect of which the Supreme Court had exclusive jurisdiction under Article 140 of the Constitution without determining the constitutionality of section 83 would, in her opinion, be to leave an important issue, indeed the fulcrum of the petition, unresolved, which would be contrary to the objects of the Supreme Court as set out in section 3 of the Supreme Court Act and the very fabric of the Constitution. The learned judge asserted that the indication of the law used in determining the validity of a declaration in a Presidential election was critical for three reasons: the enormous public interest attached; the fact that other courts look up the Supreme Court for guidance on interpretation and application of the Constitution and its interplay with other laws; and to create certainty and predictability in our electoral law and jurisprudence.[130] She then proceeded to analyse the applicability of the amended section 83 to the petition and whether the amended provision was unconstitutional and invalid.

126 Supreme Petition No. 5 of 2014.
127 Paras 88, 101 and 102, the Aramat case.
128 Supreme Court Petition No. 9 of 2014; [2014] eKLR.
129 [1989] KLR 1.
130 At para 467.

On the first issue, Njoki SCJ rejected the parties' arguments in respect of the applicability of the amended section 83 on the basis that counsels for the parties did not consider its import in isolation from the other sections in Amendment Act or distinguish its application from those sections. In this regard, she asserted that section 83 related to the conduct of the Court after an election petition had been filed before it, i.e. the test to be applied in determining an election petition before it. Therefore, since the application of the provision did not follow an electoral event but the declaration by a judicial officer of an election cause, the amended section 83 was the applicable law, not just in the Supreme Court but also in all election petitions and appeals before other courts, since the trigger for its application was the filing of a petition.

On the second issue, the learned judge deprecated the Petitioners for pleading constitutionality as a tangential issue and giving it peripheral treatment in their arguments. While it was urged that the process of enacting the legislation was done hastily and was therefore devoid of public participation and ignorant of the views of important stakeholders, the learned judge ruled that Article 118 (1) (b) of the Constitution was complied with since the Joint Select Committee of the National Assembly and Senate had put in place avenues for public participation through submission of proposals for 3 days preceding the enactment of the law. Lady Justice Njoki also maintained that Parliament was properly exercising its mandate in enacting the said law.

The learned judge was also not convinced that the impugned section was intended to undermine the independence of the Judiciary. She cautioned against holding legislation unconstitutional without a demonstration that it either pursued an unconstitutional purpose or had an unconstitutional effect. Having reviewed the Hansard excerpts from the debate of the bill, the learned judge was satisfied that the purpose of the law was to bring clarity to electoral law and cause it to conform to international best practice. The fact that it went against the precedent of the Court in the ***2017 Raila Odinga Case*** did not, in her opinion, render it unconstitutional.

As to whether the disjunctive approach of the amended provision undermined Articles 81 and 86 of the Constitution, the learned Judge asserted that the amended provision provided a formula for evaluating conduct of an election against the process and the outcome and did not take away the powers of an election court to determine compliance of an election with the purpose and principles of the Constitution. She concluded that there was nothing to demonstrate that the impugned provision was inconsistent with the Constitution.

With due respect to the learned Judge, the reasoning on the applicability of section 83 to all petitions, even if it were sound, can be faulted on the basis that few, if any, electoral disputes were filed after the law came into force. The timeline for filing election petitions relating to other elections had long lapsed by the time the law came into force. To assert its applicability to all electoral disputes would have the effect of creating confusion rather than the guidance that the Supreme Court was expected to provide as the apex court.

This confusion is evident in some of the High Court decisions such as ***Joseph Oyugi Magwanga & Another v IEBC & 3 Others.***[131] Without an evaluation of the decision of the Supreme Court in the ***2017 Raila Odinga Case***, and without delving into the impact of the 2017 amendment,

131 Homa Bay High Court Election Petition 1 of 2017. The application of section 83 in the determination of the petition was challenged both in the Court of Appeal and in the Supreme Court.

the Court weighed the irregularities alleged by the Petitioners against the election result and declared that the Petitioner was required to demonstrate not only non-compliance with the election law but also the extent to which the non-compliance affected the result as this was the proof of the extent of the non-compliance with electoral law. This made the test conjunctive. The Court did not state which version of section 83 it was relying on.

This is contrasted with the decision of Korir J in ***Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,***[132] where the Court was emphatic that the applicable law was section 83 as it stood on 8 August 2017.[133] Neither decision evaluated the constitutional standard of validity as established by Articles 81 and 86.

The Concurring Opinion also fails to address the rule against retrospective application of statutes; that statutes apply prospectively unless there is a clear indication that they were intended to apply retrospectively. There was no indication in the amended statute that it was intended to apply to events occurring before its enactment, and the learned judge also failed to address the argument by the Petitioners that the cause of action leading to the petition arose from the events occurring prior to and on the date of the election, i.e. before the amendment was enacted.[134]

Finally, and probably most importantly, the reasoning does not accord with the supremacy of the Constitution and in particular the principles on elections in Articles 81 and 86. To assert that a determination of the petition could not be done without an interpretation of section 83 would be to ignore the fact that the constitutional standard in Articles 81 and 86 is a ***per se*** standard, non-compliance with which is sufficient to invalidate an election.

1.4. Katiba Institute & 3 Others v Attorney General & 2 Others[135]

This case challenged the constitutionality of amendments to the Elections Act, the IEBC Act and the Election Offences Act which were introduced by the Election Laws (Amendment) Act 34 of 2017. Among the impugned sections was a revised section 83 which provided:

> ***(l) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-***
> ***(a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and***
> ***(b) the non-compliance did not substantially affect the result of the election.***
> ***(2) Pursuant to section 12 of the Interpretation and General Provisions Act, a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.***

The amendment altered the provision by removing the disjunctive word 'or' and replacing it with the conjunctive 'and', requiring both non-compliance with electoral principles and effect on the results to be proved before an election can be annulled. It also introduced the word 'substantially' in the assessment of the effect of non-compliance on the result of an election.

132 Malindi EP 4 of 2017.
133 At para 57 of the judgment. See also *Bernard Kibor Kitur v Alfred Kiptoo Keter & Another* Eldoret Election Petition 1 of 2017.
134 This argument was successfully raised in *Jackton Nyanungo Ranguma v IEBC & 2 Others* Kisumu Election Petition 3 of 2017 and in *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC* Eldoret High Court Election Petition 1 of 2017.
135 [2018] eKLR.

As they did in ***Petitions 2 and 4,*** the Petitioners argued that the introduction of the amendment after the majority judgment in the ***2017 Raila Odinga Case*** changed the invalidity test from a disjunctive one to a conjunctive one, making it difficult to challenge an election even where there was violation of constitutional principles. It was also the Petitioners' case that the amendment was intended to circumvent the Constitution and the Supreme Court decision on the proper conduct of elections, making it more onerous to annul a flawed election.

The learned judge of the High Court, Mwita J, reviewed the findings of the apex court on section 83 in the majority judgment in the ***2017 Raila Odinga Case***. The Supreme Court had maintained that the interpretation given to section 83 had to be in harmony with constitutional principles and therefore an election could be nullified where it was not conducted in accordance with these principles. The Supreme Court had therefore asserted that section 83 was in harmony with the Constitution and this made it different from previous electoral laws since the retired Constitution did not contain any constitutional principles relating to elections. The removal of the disjunctive word 'or' and the introduction of the conjunctive word 'and' together with the introduction of the word 'substantially' was a departure from the constitutional requirements for free, fair and transparent elections and would serve as a drawback to the electoral reforms introduced by the Constitution.[136]

The amended section 83, in the view of the Court, clearly disregarded constitutional principles in considering whether to annul an election, which could not have been the intention of the framers of the Constitution. Given that these were constitutional imperatives, it was not open to Parliament to enact legislation which had the effect of whittling down constitutional principles which had been harmonised and embodied in section 83 prior to its amendment by demanding that failure to comply with the Constitution and electoral law have a substantial effect on the result before an election can be annulled.[137]

The net effect of the amendment was to allow violation of constitutional principles and election laws so long as they did not substantially affect the result. The Court deprecated the amendment for aiming at shielding mistakes that vitiate an electoral process, rather than making elections more free, transparent and accountable. In the Court's view, there was no constitutional rationale in amending section 83 to remove the disjunctive 'or' and replace it with the conjunctive 'and' so that an election could only be annulled where there were failures to comply with the Constitution which substantially affected the results. Such an amendment would negate the principles of the electoral system contained in the Constitution and ignore the constitutional imperatives of free, fair transparent and accountable elections.

Having found that Parliament was under an obligation to defend and protect the Constitution and enact laws in conformity with its values and principles, it was not open to the Legislature to invite the aid of the Statutory Interpretation Act to shield violations of the Elections Act and Regulations enacted to enforce the Constitution. While it was asserted that the Supreme Court had made a finding on the constitutionality of the said section, Mwita J asserted that the opinion of Njoki Ndung'u SCJ was *obiter dictum*, since the majority had ruled to leave the matter for the High Court's determination. It was therefore not binding on the High Court. A declaration was therefore issued that section 83 in its entirety was constitutionally invalid.

136 At para 110.
137 At para 113.

2. Integrity of the Electoral Process: The Role of the IEBC in Verification of Presidential Election Results

One of the most touted value additions of the 2010 Constitution to the electoral framework in Kenya is the introduction of Articles 81 and 86 of the Constitution. These principles are considered both quantitative and qualitative principles, setting out both the qualitative and quantitative requirements that an election must meet. According to Kimaru J in ***William Kabogo Gitau v George Thuo & 2 Others***,[138] cited with approval by Ngugi J in ***Clement Kung'u Waibara v Annie Kibeh,***[139] qualitative requirements evaluate the environment in which the election was conducted to assess whether it was free and fair. The concern for the Court is not the number of votes garnered by the candidate, but the integrity of the process, i.e. the effect of any malpractices on the conduct of the elections. This is because any malpractices affecting the process also affect the results coming from that process and the results are as good as the process leading to the results.[140]

Quantitative requirements on the other hand are concerned with the mathematical or arithmetic calculations of the results of an election. These include counting, tallying, verification and transmission of results. They also deal with the question of whether votes cast were properly labelled as valid, invalid, rejected or stray.[141]

The Uganda case of ***Winnie Babihuga v Masiko Winnie Komuhamhia & Others***[142] is often cited on the importance of the two elements. In that case, Justice Musoke Kibuka expressed himself as follows:

> *The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the Court has to determine whether or not the election was free and fair.*

Even though the 2010 Constitution introduced more elective posts, '[t]he presidency is still indisputably the zenith of political power, the highest constitutional office in the land and a highly prized political office in Kenya.'[143] This increases public scrutiny over the process of voting, counting, tallying, verification and declaration of presidential election results. The country's history of disputes over presidential election results at the point of tallying at the NTC, with allegation of inconsistencies between results declared at the constituency level and those announced at the NTC were the basis for the recommendation for an integrated tallying and transmission system by the Independent Review Committee (IREC).[144] These recommendations were captured in the provisions of the Elections Act requiring the creation of an integrated election management system to facilitate voter registration, identification and electronic transmission of election results[145]

138 [2010] eKLR.
139 Kiambu Election Petition 1 of 2017.
140 Waibara petition, at paras 21-22.
141 Waibara petition, at para 23. See also Otieno-Odek 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?"' 7.
142 HCT-OO-CV-EP-004-2001.
143 FA Aywa 'A Critique of the Raila Odinga vs IEBC Decision in Light of the Legal Standards for Presidential Elections in Kenya' in C Odote & L Musumba (eds) Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence (2016), 46.
144 Kriegler Report, 139; see https://kenyastockholm.files.wordpress.com/2008/09/the_kriegler_report.pdf (accessed 6 January 2019).
145 Sec 39 (1) C as read with sec 44 of the Elections Act on the integrated election management system.

The integrity of an electoral process is affected qualitatively either by the commission of election offences or violation of the principles of due process.[146] This section will focus on the latter.[147] Accuracy of the count is crucial to an election result. The result is therefore affected when the integrity of the electoral process is undermined by irregularities and malpractices, which render legitimacy or reliability of the result and the sanctity of the ballot questionable.[148] These malpractices would include alterations of results after they are declared at polling stations.

Kenya's chequered electoral history has made the question of electoral integrity so vital that it was secured by constitutional principles captured in Articles 81 and 86 of the Constitution. The high stakes nature of the electoral process has always made it such that despite the constitutional and other legal changes adopted through the years, fear of manipulation and interference with the integrity of the electoral process has persisted. This concern was noted by the Report of the Joint Parliamentary Select Committee on the Matters Relating to the IEBC,[149] which recommended that the results declared at the polling station be final due to challenges in electronic transmission of those results to the national tallying centre.

The Report also recommended that the declaration form at the polling station be the primary election form; that the Elections (General) Regulations be amended to provide for conclusive determination of ballots at polling stations, that relevant electoral forms be amended to align with this recommendation and that the Elections Act be amended to provide for the results declared at the polling stations to be final. These recommendations, according to the Committee, were informed by experience where results were altered by returning officers after they had been announced at polling stations, which would cause uncertainty and tension in the electorate.

The case of ***IEBC v Maina Kiai & 5 Others (the Maina Kiai Case)***[150] is now the *locus classicus* on finality presidential election results declared at the polling station.

2.1. The Maina Kiai Case: Finality of Results Declared at the Polling Station

The ***Maina Kiai Case*** arose from the judgment of a 3-judge bench in the High Court where the Petitioners had sought several declarations. Firstly, that constituency presidential election results were final once declared and announced by the respective returning officers. Secondly, that the constituency returning officers had the mandate to declare the final results and that such declaration was not subject to alteration by any person or authority other than an election court. Thirdly, the Petitioners sought a declaration that in so far as sections 39 (2) and 39 (3) of the Elections Act, as read with Regulations 83 (2) and 87 (2) (c) of the Elections (General) Regulations, granted the IEBC power to confirm, alter, vary and/or verify the presidential election results declared at the constituency, the same were contrary to Articles 86 and 138 (2) of the Constitution, and therefore null and void. The High Court granted all three declarations as prayed.

146 DK Maraga 'Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective' in C Odote & L Musumba (eds) *Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence* (2016) 243 272.

147 Election offences are addressed later in this text (see issue 8 in this section).

148 Maraga, as above.

149 The Report of the Joint House Select Committee on Electoral Reforms (Kiraitu/Orengo Report), 16th August, 2016.

150 Nairobi Civil Appeal 105 of 2017.

The IEBC went on appeal against the decision. It was the IEBC's contention that the High Court had misapprehended the law on the declaration of the result of a presidential election and in declaring the said provisions unconstitutional. The impugned provisions had relegated to the chairperson of the IEBC the sole mandate of confirming, varying or verifying the results of the presidential elections. Having reviewed the plurality of stages involved from voting to declaration of results, and the jurisprudence of the Supreme Court in ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, [2014] eKLR*** and ***George Mike Wanjohi v Stephen Kariuki & 2 Others [2014] eKLR*** on the question of declaration of results, the Court was unconvinced by the arguments of the appellants that the results as declared at the polling stations and constituency tallying centres were merely provisional, awaiting verification at the national tallying centre.

The Court was also not persuaded that there was need for the chairperson of the IEBC to verify the results tabulated by employees of the IEBC, asserting that the law provided for means of dealing with malfeasances by such officers, without the need to have a process of verification to assure itself of the competency, proficiency and honesty of its own staff. In any event, the Court reasoned, the IEBC was under an obligation to vet prospective employees to assure itself of their integrity before engaging them. To leave the process from the polling and constituency tallying centres open-ended pending conclusion by the chair of the IEBC would defeat the very mischief that was intended to be cured by electronic transmission of results. At page 32 of the decision, the Court opined:

> *Pursuant to the constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability under the present legal regime, in the presidential election, the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the Presiding Officer. The results announced at each polling station shall be transmitted to the constituency returning officer, who in turn will openly and accurately collate the results from the various polling stations in the constituency and then promptly announce the outcome of the collation. From the constituency tallying centre, the returning officer will electronically transmit the results directly to the national tallying centre... From our own reading of all the provisions under review, the authorities relied on, and bearing in mind the history that we have set out in detail in this judgment, we are convinced that the amendments to the Act were intended to cure the mischief identified by the then former Chairperson of the appellant, and other stakeholders. That mischief was, the spectacle of all the 290 returning officers from each constituency and 47 county returning officers trooping to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced results.*

The Court of Appeal found that to suggest that a law empowered the chairperson of the IEBC to correct, alter, modify or adjust the results electronically transmitted to the national tallying centre from the constituency was to donate an illegitimate power. Such a law would in the view of the Court introduce an opaqueness and arbitrariness to the electoral process, which was the very mischief that the Constitution sought to remedy.

The Court of Appeal concluded that the High Court was not at fault in holding that to the extent that section 39 (2) and (3) of the Elections Act and Regulation 87 (2) (c) of the Elections (General) Regulations provided that the results declared by the returning officer were provisional, and to the extent that Regulation 83 (2) provided that the results of the returning officer were subject to confirmation by the IEBC the same were inconsistent with the Constitution, and therefore null and void.

In the intervening period between the decision of the High Court and the filing of the appeal in the ***Maina Kiai Case***, the IEBC issued a Gazette Notice[151] which amended the Elections (General) Regulations. The effect was to amend the forms used to declare results at the polling station. Form 34, which was previously titled 'Declaration of Presidential Election Results at a Polling Station' was replaced by two forms: 34 A 'Presidential Election Results at the Polling Station' and 34B 'Collation of Presidential Election Results at the Constituency Tallying Centre'. Form 34 C replaced Form 37 as the form to be used to make the final declaration of the presidential election result at the national tallying centre. Regulation 87 was amended to indicate that upon receipt of Form 34A from the constituency returning officer, the Chairperson would 'verify the results against Forms 34A and 34B received from the constituency returning officer at the national tallying centre'. The net effect of these amendments according to the Court of Appeal was to circumvent the finding of the High Court on the unconstitutionality of the impugned sections 39 (2) and (3) and Regulations 83(2) and 87 (2) (c). The IEBC asserted that in a presidential election, the only act that takes place is counting and announcing the results, with verification and tallying being escalated upwards. It was also their submission that the constituency returning officer is not mandated to declare the results of the presidential election, and that the High Court assigned to the constituency returning officer a role not envisaged by the Constitution.

The Court of Appeal acknowledged the significant constitutional role granted by Article 138 (10) of the Constitution to the IEBC as the authority with the ultimate mandate of making the declaration that brings to an end the presidential election process. However, the Court demarcated this role as restricted to tallying all the results 'exactly as received from the 290 returning officers country-wide, without adding, subtracting, multiplying or dividing any number contained in the two forms from the constituency tallying centre.'

> At page 34 of the decision, the Court stated:
> *It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.*

The dicta of the Court represented a restatement of what the Supreme Court had ruled in the case of ***Hassan Ali Joho v Suleiman Ali Shabhal & 2 Others,***[152] where the Court had ruled in paragraphs 68 and 72 on the finality of the declaration:

> *68] Since the Constitution and the Elections Act do not define what amounts to a declaration of election results, the meaning of the term 'declaration' in our opinion can only be inferred from the various contexts in which it has been used in the Constitution, the Elections Act and the Regulations to the Elections Act.*
> *…The word "declared" in the above Article has been used to depict the finality culminating in the declaration of the winner of an election.*
> *72] "Declaration" takes place at every stage of tallying. For example, the first declaration takes*

151 Legal Notice No. 72 of 2017, 21 April 2017.
152 (2014) eKLR.

> *place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County tallying centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results, which could not be altered or disturbed by any authority.*

This finality of results as declared at the polling stations was upheld in various High Court decisions. In ***Jackton Nyanungo Ranguma vs IEBC & 2 Others*** **Kisumu Election Petition 3 of 2017,** Majanja J held that:

> *Even accepting the errors, omissions and inconsistencies highlighted by PW4 and the other witnesses, the legal position remains that the votes as recorded in form 37A are final. Unless forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus the primacy and finality of form 37A.*

Mutende J in ***Baridi Felix Mbevo v Musee Mati & 2 Others***,[153] cited with approval the above decision of Majanja J and deprecated the Trial Court for relying on printouts of the results from the IEBC portal rather than the Forms 36A used to declare the results in allowing the petition. The Court, sitting on appeal then, asserted that since the results from the portal were only provisional from a reading of Regulation 82, the reliance by the Court on the said documents and resultant analysis could only have led to the wrong conclusion. The Court ruled that the trial judge erred in admitting the IEBC portal printouts as they lacked accuracy and could not be verified.[154]

Similarly, Korir J in ***Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,***[155] declined to accept that irregularities occurring after declaration of results at the polling station could have an impact on the outcome of the election.

On the other hand, Karanja J, in ***Joseph Oyugi Magwanga & Another v Independent Electoral and Boundaries Commission & 3 Others,***[156] found that there were many unsigned alterations to Forms 37A. Since it was the primary document in tallying, once it was found wanting in content, any results announced through Forms 37B and 37C were devoid of credibility. The Court therefore proceeded to annul the outcome of the Homa Bay gubernatorial election.

Central to the question of integrity is the meaning of 'verification' as used in the Constitution and interpreted by the various courts. According to the Court of Appeal, the verification anticipated under the Constitution could only relate to either one of two things: firstly, confirming or verifying that the

153 Kitui Election Petition Appeal 1 of 2018.

154 It is curious that in this appeal the High Court did not evaluate the failure by the IEBC to adduce Forms 36A as directed by the Trial Court during the hearing and the impact that had on the determination of the petition. While the IEBC maintained that the Petitioner had not discharged their burden in so far as the results were concerned, they ought not to have been allowed to benefit from their own wrongdoing, i.e. failure to comply with a court order. As was the case in the Supreme Court with the 2017 Raila Odinga case, where an adverse inference was drawn in light of the failure by the IEBC to allow access to servers and access logs, it was open to the High Court in this case to drawn an adverse inference in so far as the results were concerned. It is worth noting, as the Trial Court had stated, that despite alleging that the results on the portal were wrong, the IEBC never supplied any documents to show the actual results.

155 Malindi EP 4 of 2017.

156 Homa Bay Election Petition 1 of 2017.

candidate declared elected president has met the threshold set out in the Constitution; or secondly, accountability of the ballot such as, the number of ballot papers issued to constituencies, the number of ballot papers issued to and correctly used by voters, the number of spoilt ballot papers and the number of ballot papers remaining unused against Form 34. The Court went on to state:[157]

> *Any changes to what was counted, confirmed and verified at the constituency level before transmission is manifestly outside his powers and competence. It could well be tantamount to a serious assault on the will of the people of Kenya and an impermissible breach of the Constitution.*

The Court therefore upheld the interpretation of Article 138 (3) which sets out the role of the IEBC in tallying, verifying and declaring the result to confirming what is received from the constituencies and makes it clear that the Chairperson cannot add, subtract, multiply or divide any number contained in Forms 34A and 34B. The rationale for this position is to create checks and balances on the role of the chair. In the words of the Court: [158]

> *We reiterate, as we conclude that there is no doubt from the architecture of the laws we have considered that the people of Kenya did not intend to vest or concentrate such sweeping and boundless powers in one individual, the chairperson of the appellant. The responsibility of the appellant to deliver a credible and acceptable election in accordance with the Constitution is so grave and so awesome that it must approach and execute it with absolute fealty, probity and integrity. The appellant must in all its dealings be truly above suspicion and command respect of the people of Kenya for whom it acts. Much depends on it, indeed the present and future peace of the country.*

The interpretation given by the Court of Appeal for the term 'verification', with due respect, does not accord with Article 138 (3) of the Constitution. Verification involves a confirmation of accuracy so that when a tally is found to be inaccurate, it ought to have accompanying it a power to correct in order to make it accurate. To say that verification means to confirm either that the President-elect has met the threshold under the Constitution or that the ballot papers are all accounted for does not appear to accord with the meaning intended by the drafters of the Constitution. The words of the Constitution ought to speak to the intention of the drafters.

The COA has maintained its position on the finality of results as declared at the polling station and declined any invitation to rule otherwise. In the ***Wavinya Ndeti*** appeal, the Court stated:[159]

> *'We are not persuaded, as was urged by the respondents that the national returning officer's duty, in as far as verification of a presidential results is concern [sic], is any different from that of a county returning officer. Both are enjoined to pay homage and have regard to the results as declared at the polling station.*

157 At page 36 of the decision.
158 At page 40 of the decision.
159 At para 99.

2.2. The 2017 Raila Odinga Case

The role of the Chairperson of the IEBC came up again in the ***2017 Raila Odinga Case***. The IEBC cited the ***Maina Kiai*** decision as its basis for not complying with the imperative of electronic transmission of results and for declaring results on the basis of Forms 34B without having received all the forms 34A from the polling stations. This argument was deprecated by the Supreme Court in the following terms:

> *[258] Be that as it may, Mr. Nyamodi persistently argued that the conduct by the 1st and 2nd respondents, to wit; of declaring results solely based on Forms 34B without reference to Forms 34A; of not scanning all Forms 34A and simultaneously transmitting them to the NTC; of reconfiguring Form 34C to exclude the Form 34A tally and only include the Forms 34B tally; of introducing the language of "statistics" as opposed to "results"; that all these actions, were necessitated, nay, required by the decision of the Court of Appeal in the **Maina Kiai** decision.*
> *[259] We were at pains to understand how the Court of Appeal decision in that case, could have provided a judicial justification for the conduct of the 1st and 2nd respondents. The Attorney General, appearing as amicus curiae, having been so admitted, and despite having been clearly restrained from submitting on the so called impact of the **Maina Kiai** decision, also appeared to suggest, in his closing remarks that somehow, the Appellate Court's decision in that case, had changed the landscape of the conduct of elections in the Country…*
>
> *[265] Given this very clear elucidation of the law regarding the imperative for electronic transmission of results from the polling station to the NTC, how could the Court of Appeals' decision in **Maina Kiai** have provided a justification for declaring the results of the election of the President without reference to Forms 34A? How was it a basis for the reconfiguration of Form 34C so as to render Forms 34A irrelevant in the final computation of the results? But most critically, how did the Court of Appeal's decision relieve the 1st respondent from its statutory responsibility of electronically transmitting in the prescribed form, the tabulated results of an election for the President from a polling station to the CTC and to the NTC in accordance with Section 39(1C) of the Elections Act?*
>
> *[266] At the end of the day, neither the 1st nor the 2nd respondent had offered any plausible response to the question as to whether all Forms 34A had been electronically transmitted to the NTC as required by Section 39 (1C) of the Elections Act. What remained uncontroverted however, was the admission by Ezra Chiloba, that as of 14th August 2017, three days after the declaration of results, the 1st respondent was not in a position to supply the Petitioner with all Forms 34A. Counsel for the 1st and 2nd respondents, by insisting that the presidential results were declared on the basis of Forms 34B, all of which were available, also implicitly admitted that not all Forms 34A were available by the time the 2nd respondent declared the "final results " for the election of the President.*

So what is the duty of the IEBC where verification of results is concerned? At paragraphs 286 and 293 of its decision, the Supreme Court stated that the role of the Commission was to 'verify the results before declaring them'. It explained verification as ensuring 'that the results declared are the ones recorded at the polling station'. This is a departure from what the Court of Appeal defined as verification: confirming that the president-elect has met the constitutional threshold and that all ballot papers have been accounted for.

The Court also asserted that it was clear that the ***Maina Kiai*** decision did not relieve the IEBC of its obligation to verify the results before declaring them or from the statutory duty of electronically transmitting the results. However, the Court was emphatic that the Commission could not 'vary, change or alter the results' relayed to the NTC from the CTC under the guise of verifying. Where there were any discrepancies noted by the Chairperson of the IEBC in the process of verification of presidential election results, the Supreme Court maintained that the chairperson could not make any alterations but that he had an obligation to invite Kenyans to compare results contained in Forms 34A as availed on the public portal against those declared at the NTC. Where any serious discrepancies were noted, the Chair was to invite any aggrieved party to petition the Supreme Court as the body with original and exclusive jurisdiction over such disputes. In relation to the August 8 poll, the Court hypothesised how such a scenario would have played out:

> ***[294]*** *But be that as it may, how spectacularly re-assuring to the Kenyan people would it have been if the 2nd respondent, on that night of August 11 2017, had commenced the declaration of the results, with these words:*
>
> *"Fellow Kenyans, the results I am about to declare, are exclusively based on Forms 34B which I have received from all the 290 constituency tallying centres country-wide. I have not verified these results against those tabulated on Forms 34A from all the 40,800 polling stations countrywide. This may sound strange, but I am simply doing this in compliance with the Court of Appeal's decision in* ***Maina Kiai.*** *This decision by the Appellate Court requires me to treat the results as tabulated by the various returning officers, as final and not to attempt, to verify them against the electronically transmitted Forms 34A. You will therefore, have to bear with me, as Court Orders must at all times, be obeyed. However, all hope is not lost, since I have availed all the Forms 34A on our Public Portal. Any candidate, election observer, or member of the public, is free to download these forms and compare the results thereon against the ones I am about to declare. If such an exercise should reveal serious discrepancies, then one can petition the Supreme Court to scrutinize them, and even annul them, since the Supreme Court has original and exclusive jurisdiction over such disputes..." [emphasis added].*

What this means is that the role of the chair becomes a rather mechanical one. In fact, in this hypothetical statement, the chair's role does not, when the words of the Court are carefully weighed, even include verification. The chairperson is to treat the results tabulated by the returning officers as final *'and not to attempt to verify them against the electronically transmitted Forms 34A.'* This means that the Chair is not even to compare the Forms 34Bs received from the CTCs with Forms 34As, but he should direct any interested party to do so and where any serious discrepancies are noted, to bring them to the attention of the Supreme Court.

The Court also faulted the Chairperson of the IEBC for having declared results without having received all Forms 34A. It was also their assessment that he failed to justify declaration of results based on a copy of Form 34 C. Since the polling station is the 'true locus of the free expression of the will of the voters', declaring results on the basis of Forms 34B without reference to Forms 34A was unjustifiable. Having reviewed the principles in Articles 81 and 86 of the Constitution, the 2017 presidential election was not conducted in accordance with the principles laid down in the Constitution and the written law on elections, since it was neither transparent nor verifiable.

In the above assessment of the Supreme Court, the chairperson of the IEBC failed in its obligation to verify the results. However, how can the chairperson be faulted for declaring results without having

received all Forms 34A, if he is in fact not required to look at Forms 34A himself, the verification having been done by returning officers?

Moreover, the analysis of the obligation of the chairperson in verifying results adopted by the apex court does not appear to accord with the meaning of verification adopted either in the ***Maina Kiai Case*** or by the Supreme Court itself. How can he assure himself that 'that the results declared are the ones recorded at the polling station' without looking at Forms 34A? To confirm 'that the results declared are the ones recorded at the polling station', which is how the Supreme Court defined verification, requires a comparison of Forms 34A with Forms 34B. It was therefore not surprising that the IEBC sought a clarification of the judgment. This ruling will be discussed in the next section.

Coupled with the obligation to verify the results, the Court found that the IEBC had the responsibility to ensure the verifiability of the system of voting, counting and tallying of results in conformity with Article 86 of the Constitution.[160] The latter obligation required that the IEBC devise and deploy an election system which the voter could understand, as well as access to information crucial to enabling any interested party to crosscheck the results to assure themselves of their integrity and accuracy. The idea behind verifiability, in the words of the Court was that "the numbers must just add up". The Court found that the IEBC failed to fulfil this obligation since, in disregard of the provisions of section 39 (1) (C) of the Elections Act, it failed or neglected to electronically transmit the presidential election results in the prescribed form from many polling stations to the NTC.

2.3. The Clarification of Judgment Ruling

Following the delivery of the reasons for the judgment on 20 September 2017, the Chairperson of the IEBC approached the Supreme Court under a certificate of urgency seeking a correction or clarification of the judgment in two respects: first, which results between those declared in Form 34A at the polling station and Form 34B at the constituency tallying centre he should rely on in declaring the result of the presidential election and second, whether the IEBC Chairperson can, in verification of results as required by the Constitution, vary results in Forms 34B where there are inconsistencies between Forms 34A and Forms 34B.

Having reviewed the decision in the ***Maina Kiai Case*** as well as the detailed judgment of the Court delivered on 20 September 2017, particularly paragraph 294 of the same, the 2nd Respondent expressed concern that whereas it appeared that he was not at liberty to ignore any discrepancies in the tallies as contained in Forms 34A as read against Forms 34B, the Court did not provide direction as to what the chairperson of the IEBC was to do in the event of a discrepancy. Moreover, he sought the Court's guidance as to what Form between the 34A and 34B ought to be used to declare results where there was a discrepancy between the two.

As in the main judgment, the Court deprecated the IEBC for approaching the Court for clarification of an issue which in their view had been settled in the main judgment. To the first question, the response of the Court was as follows at paragraph 60:

> *With due respect, we find this question as framed, either mischievous, or informed by an inexplicable lack of understanding of the Constitution, the Elections Act, and the Judgment of*

160 Para 295 of the decision.

> *this Court, not to mention the Judgments of the Court of Appeal and the High Court regarding the duty of the 1st respondent to verify, accurately tally, and transmit the results of a presidential election coupled with the duty of the 2nd respondent to verify, accurately tally, and declare the results of the election of the President.*

At paragraphs 61-63, the Court faulted the IEBC for assuming that the results in Forms 34A and those in Forms 34B are mutually exclusive, yet Form 34B is the aggregate of Forms 34A. For this reason, the Court could not fathom how it would be a matter of choice as to which results between the two forms the Chair of the IEBC was to declare. This was especially so because the returning officer, before aggregating the results in Forms 34 A into Form 34B verifies the figures in Forms 34A. The Court insisted that it had categorically stated in its judgment that the IEBC (presumably, here the reference was to returning officers) must verify the said results on behalf of the Chairperson against those in the transmitted Forms 34A, making Form 34A "the primary document in the verification process". This part is not difficult to comprehend and so far is in consonance with the dicta in ***Maina Kiai*** and the detailed reasoning of the Court. However, the Court did not stop there. It went on to opine how any discrepancies in the results ought to be handled. It stated as follows:

> *... If the 2nd respondent notices some inaccuracies as brought to his attention by the 1st respondent, what is his duty" Is he not supposed to simply bring those to the attention of the candidates, the public and election observers, even as he declares the final result as aggregated from Forms 34B"*

In my view, this directive is problematic for several reasons. The first flows from an elementary understanding of the term 'to notice'. The Supreme Court asserted that the chair of the IEBC would 'notice inaccuracies brought to his attention…' With due respect to the Court, one cannot notice something brought to their attention by another. The term notice connotes to become aware of, or to observe, or to discern. It is a subjective term, meaning therefore that one cannot notice something pointed out by another. In the explanation given by the Court, the returning officer would be the person who notices the discrepancy, and then brings it to the attention of the chairperson.

The second concern flows from the first, and must be understood in light of the rationale for the decision in the ***Maina Kiai Case***. The Court explained the rationale for the finality of results at polling stations and electronic transmission of the results as the need to counter two mischiefs: the spectacle of 290 returning officers trooping to the national tallying centre with manual results and the '*fear was that some returning officer would in the process tamper with the announced results.*'[161] The Court of Appeal was alive to the reality, which the Supreme Court appears to underplay in its reasoning, that electoral officials, including returning officers, have been known to tamper with results after declaration.[162] It is true that the IEBC is required to vet its officers to assure itself of their integrity, and there are indeed mechanisms to deal with such malfeasances as tampering with results.[163] However, to presume that these returning officers will always be trusted to point out any discrepancies in the results is to place a high level of trust in officials who have had a long history of violating that trust.

161 At page 32 of the decision.
162 Evelyn & Wanyoike 'A New Dawn Postponed', 95-96.
163 See sec 6 of the Election Offences Act.

Thirdly, what becomes of the instances, as was the case with the August 8 poll, where Forms 34A are never availed to the NTC? How does the chair assure himself 'that the results declared are the ones recorded at the polling station'?

Fourthly and probably most importantly, is the practical implication of the Court's directive. The Court restated its position on verification in the following terms at paragraph 64:

> *We reiterate that the responsibility to verify results is not a creation of this Court but an imperative of the Constitution and Section 39(1C)(b) of the Elections Act. The verification required of the 1st and 2nd respondents is meant to ensure accuracy or prevent fraud and also to confirmation [sic] that the candidate to be declared president-elect has met the threshold set under Article 138(4) of the Constitution. It is therefore the duty of the 2nd respondent, to bring to the attention of the public, any inaccuracies discovered by the verification of Forms 34A and Forms 34B even as he declares the results as generated from Forms 34B to generate Form 34C. The effect of such inaccuracies on an election depends on their gravity or otherwise and the 2nd respondent must state whether the discrepancies affect the overall results or not. The institution vested with the mandate to make a determination of the effect of the inaccuracies is an election Court, a matter clearly settled by both the Court of Appeal in the* ***Maina Kiai decision*** *and in this Court's Judgment.*

The Court restricted the role of the Chairperson to exposing the discrepancies and leaving the resolution of any issues to the Supreme Court as the relevant election court. As pointed out by Ongoya,[164] this poses certain practical challenges. It compels the Chairperson of the IEBC to acknowledge the existence of erroneous results and then proceed to *knowingly* declare those results and leave the resolution of the dispute to the Supreme Court. This creates dissonance within the electoral laws framework since the Election Offences Act makes it an offence for an officer of the IEBC to make an entry which they know, or have reasonable cause to believe to be false, or do not believe to be true.[165] Moreover, to require the Chairperson to fill out Form 34C, knowing an entry to be false, is to sanction the commission of an offence.[166] In addition, it is also illogical to compel the making of such an entry, where the Chairperson is fully aware that he will be a Respondent in a subsequent dispute.[167] This appears to be what the Chair was avoiding when he sought a clarification of the judgment.

Both the ***Maina Kiai*** and ***Raila Odinga*** decisions flow from abstract scenarios, and therefore do not provide solutions to the practical absurdities that flow from the decisions of the highest courts. While the Supreme Court may have underplayed the concerns of the Commission as mischievous, it is clear that the ruling of the Court created more questions than it provided answers. It has been criticised for further obfuscating the role of the chairperson of the IEBC, rather than providing the much-sought clarity as to how to handle discrepancies.[168] The ruling also undermines the much-touted finality of presidential election results and it is difficult to reconcile it with the following recommendation from IREC:[169]

164 See E Ongoya 'Protecting the Integrity of the Electoral Process, or Obfuscating the Electoral Process?' (2018) 3 Journal of Law and Ethics 11, 17-18.
165 Sec 6 (a).
166 Ibid.
167 Ongoya, as above, 18.
168 Ongoya, as above, 16.
169 Kriegler Report, as above, 138.

> *IREC recommends that ample time be allowed for verifying provisional results, so that they are declared final/official only once there is no risk that errors may still be found or non-frivolous objections raised. Most countries allow one to two weeks for this – there must be sufficient time to check the provisional results, which are given status as final results only when all objections have been considered, all checks and rechecks conducted and the final verdict issued by the proper authorities. Given a clear explanation of what a provisional result is, there is no problem in making voters understand that election results are so important that they can be declared final only once they have been properly scrutinized and checked.*

2.4. The Election Laws (Amendment) Act 34 of 2017

This statute was published on 2 November 2017[170] following the lapse of the two-week period established in Article 116 of the Constitution for the President to either assent to a law or remit it to Parliament for reconsideration. The constitutionality of the legislation was challenged in the case of ***Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others.***[171] The case challenged the validity of the controversial statute which sought to make significant changes in the management of election results, declaration of results and annulment of election results. One of the impugned provisions was section 39 of the Elections Act, which, *inter alia*, removed the requirement for results to be transmitted in a prescribed form and asserted that where there was a discrepancy between physically transmitted results and electronically transmitted results, the Commission would determine the result which is an accurate reflection of what was tallied and declared at the polling station as the result which would prevail. The Court agreed with the Petitioners that the said provision did not accord with the Constitution, and in particular the principles of verifiability, transparency and accountability of election results.

> *82. The problem in so far as I can see, is with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C) (a). First, there is no requirement for the results to be transmitted in any prescribed form which was an essential requirement in the deleted subsection. This was an essential safeguard that guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This is made even more troubling by the fact that results will also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. This not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.*

At paragraph 85 of its decision, the Court restated the importance of electronic transmission of results to the integrity of the electoral process. It reiterated the Court of Appeal dicta on the rationale in the ***Maina Kiai Case*** for the finality of the declaration at the constituency level by highlighting the potential for mischief that is opened up when results are manually transmitted to the national tallying centre. What the new section 39 (1) (C) (a) sought to do was to elevate manual result transmission over electronic transmission and undermine the verifiability of the results, which is the spirit of Articles 81 and 86 of the Constitution. Such a reversal to the pre-2010 era was in the view of the Court undesirable and could not be allowed to stand. In the words of the Court:

170 Available on http://kenyalaw.org/kl/fileadmin/pdfdownloads/AmendmentActs/2017/ElectionLaws_Amendment_ActNo34of2017.pdf (accessed 17 January 2019.

171 Nairobi High Court Petition No. 548 of 2017.

> *…a law allowing election officials once again to troop to the Constituency and national tallying centres with hard copies of election results in no particular forms, is to take several steps backward from the progress the country had made to guarantee free, fair and transparent elections in conformity with the Constitution. This amendment is clearly against the spirit of Articles 10, 81 and 86 of the Constitution and cannot pass the constitutionality test of validity.*

The Court also took issue with section 39 (1) D as read with section 39 (1) E. While the former, which required tallying, verification and declaration of results at the polling station, appeared on the face of it to be in consonance with Article 138 (3) (c) of the Constitution, when read together with section 39 (1) E, it opened up the potential for mischief. Section 39 (1) E provided:

> *Where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.*

The effect was to create a situation where was potential for conflict between manual and electronically transmitted results, yet the two sets of results were meant to flow from the same process of tallying, verification and declaration. This, in the view of the Court, opened up room for tinkering with the results, thereby was ambiguous. In the words of the Court:

> *91. The Constitution is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) are vague and ambiguous on which results are the accurate record of the election as tallied verified and announced by the Presiding Officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of accuracy and transparency of an election thus open room for speculation and manipulation of election results. The Commission has the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair elections which are the hallmark of a democratic society. I therefore find fault with sections 39 (1D) and 39(1E) of the Act.*

The impugned statute had also sought to amend the requirements on live streaming and transmission of results. Section 39 (1) F provided that the failure by the Presiding Officer to electronically transmit results would not invalidate the results as declared by the presiding or returning officer. Section 39 (1) (G) further provided that the results that appeared on the public portal maintained by the IEBC were 'for public information only' and would not form the basis for the declaration of results by the IEBC.

The Court impugned these provisions since the former absolved officers of the IEBC who failed to transmit results without justification, and further, that the latter section made nonsense of the heavy investment in technology provided for in section 44 of the Act if the intention of the legislature was that the results transmitted from the primary source should not matter. In the view of the Court, live streaming was introduced into the law to allow citizens to compare transmitted results with the declared results, thereby confirming their accuracy. All these provisions taken together had the effect of making a mockery of free, fair and credible elections and undermining, rather than strengthening the electoral process. To the extent that they were inconsistent with constitutional principles, they were declared unconstitutional.

The net effect of the ***Katiba*** decision was to reverse a dangerous trajectory that the legislative landscape had taken following the nullification of the presidential poll in August 2017. It restored the safeguards to electoral process that were introduced by Articles 81 and 86 of the Constitution and the primary undergirding legislation: the Elections Act. What remains to be seen is whether these provisions will be removed from the legislation before the next general election by Parliament.

3. Fresh Election

The 2017 General Elections provided the first opportunity for the conduct of a fresh presidential election in Kenya's history. While the possibility of a fresh election had been alluded to in an obiter statement in the **2013 *Raila Odinga Case***, the Supreme Court did not address the meaning of the term or modalities of organizing the same by the IEBC. Of particular interest was the fact that it was left unclear which candidates would be eligible to contest the fresh election, and further, whether a 'run-off' as contemplated under Article 138 (5) of the Constitution was synonymous with a fresh election as contemplated by Article 140 (3). The nullification of a presidential election result being unprecedented, the lack of clear direction from the Court and the absence of statutory guidance on the same warranted judicial interpretation.

In its determination of the 2017 ***Raila Odinga Case,*** the Supreme Court noted that the parties had not addressed the Court on the question of a fresh election, and therefore it was not proper for the Court to delve into an interpretation of the term. Moreover, it was the Court's view that the matter had been addressed in the 2013 ***Raila Odinga Case*** and furthermore, that the 1st Interested Party, Dr Ekuru Aukot, had made an application to the Supreme Court in relation to the same matter.

3.1. Meaning of Fresh Election

Following the nullification of the August 8 presidential election, the 1st Interested Party, Dr Ekuru Aukot, lodged an application at the Supreme Court seeking an interpretation of Article 140 (3) of the Constitution as to the meaning and effect of the term 'fresh elections'. In its ruling on the application, the Supreme Court found that constitutional interpretation was a matter reserved for the jurisdiction of the High Court under Article 165 (3) (d) and save for the instances set out in Articles 163 (3) and (6), the Supreme Court did not have the mandate of interpretation of the Constitution. Having formed the view that the matter ought to have been filed in the High Court, the Supreme Court struck out the application. The 1st Interested Party therefore filed a petition in the High Court.

To ascertain whether the ***2013 Raila Odinga case*** determined who would be eligible to contest a fresh presidential election, the Court in the ***Ekuru Aukot*** case[172] had to determine the meaning of a 'fresh election', and whether the statements of the Supreme Court formed part of the reason for the decision of the Court i.e. the ratio, or whether they were *obiter* statements. It also had to determine whether the Supreme Court had, in the 2013 decision, interpreted Article 140 of the Constitution.

Having reviewed the Constitution and the Elections Act, the High Court found that the term 'fresh elections' was not defined. A 'run-off' had the dictionary meaning of "a further competition, election, race, etc., after a tie or inconclusive result". Since the former involved the two leading candidates in the presidential election, it was clear to the Court that Articles 138 (5) and 140 (3) did not envisage the

172 Petition 471 of 2017.

same election. In the view of the Court, since on one hand Article 140 (3) dealt with the validity of a presidential election, what was envisaged was a 'completely fresh election'. On the other hand , the term 'fresh election' as used in Article 138 (5) envisaged a run-off between the two leading candidates. This was particularly so because the provisions of Article 140 (3) came into effect after the results of a presidential election were nullified by the Court. This would necessitate a new election. The High Court therefore took the view that the meaning of 'fresh election' as used in Article 138 (5) of the Constitution should not be imposed on Article 140 as had been suggested by the apex court in 2013. Mativo J contended that that could not possibly have been the intention of the draftsman since such an intention ought to have been captured in clear terms, and in any case, the two provisions envisaged different scenarios.

3.2. Candidates in a Fresh Election under Article 140 (3) of the Constitution

As to who was entitled to participate in the fresh election, the High Court had to determine whether the statement of the Supreme Court in the 2013 decision was binding or simply *obiter.* The Court reached the conclusion that a review of the statements, and particularly the use of the term 'suppose' before addressing each possible scenario, indicated that the observations of the Supreme Court in the ***2013 Raila Odinga Case*** as to who would be entitled to contest a fresh presidential election were an expression of opinion, and therefore *obiter* statements. Moreover, the High Court found that the apex court lacked jurisdiction to interpret Article 140 of the Constitution, and in any case, the text relied on by the Respondents was *obiter*, having been given at the request of the Attorney-General, rather than in response to a pleaded issue. Besides, the disposition of constitutional interpretation required that the principles transcend the case at hand and be applicable to all comparable cases. The fact that the Supreme Court had in 2013 addressed the issue in a hypothetical manner indicated that the apex court was merely expressing an opinion.

It was therefore open to the High Court to settle the question of who was entitled to participate in a fresh election under Article 140 (3) of the Constitution. Having established that the apex court had in 2013 conflated a 'run-off' election as envisaged under Article 138 (5) and a fresh election under Article 140 (3), it was also evident that the candidates in the two scenarios could not be identical. Mativo J assessed whether a fresh nomination was required under Article 140 (3). Being cognisant of the 60-day timeline for the conduct of the fresh election, the Court took the view that 60 days was not sufficient for fresh nomination process. It was therefore in the public interest that those who participated in the invalidated election to contest the fresh election.

3.3. Are Fresh Nominations Required in a Fresh Election under Article 140 (3) of the Constitution?

The question of fresh nominations was only cursorily addressed by the High Court in the determination of the candidates in a fresh election under Article 140 (3) of the Constitution in the ***Katiba Case***. Mativo J cited time constraints as the reason for not requiring a fresh nomination process for the repeat election.

The Supreme Court in ***John Harun Mwau & Others v IEBC & Others***[173] was asked to determine, *inter alia*, whether fresh nominations were required following a finding of invalidity under Article 140

173 Petitions 2 and 4 of 2017.

of the Constitution. In assessing whether fresh nominations were required, the Court reviewed the purpose of nomination in a presidential election and the standing of the ***2013 Raila Odinga & 2017 Ekuru Aukot*** decisions on fresh nominations. The Court evaluated the requirement for a nomination under Article 137 and the process of nomination under Article 138 of the Constitution. It determined that the nomination process is not just a formality, or an exercise in futility; but a process through which candidates are identified for participation in an election, subject to being qualified under the law for the elective seats they seek. The Court took the view that nomination was therefore a critical component of the electoral process, and could not be dispensed with save for lawful cause.

Section 14 of the Elections Act had been cited by the Petitioners as a foundation for the holding of nominations before all presidential elections. They had sought to impugn the decision of the IEBC to gazette the candidates for the fresh election without carrying out a fresh nomination exercise. The Court appraised this provision alongside the constitutional provisions on presidential elections and isolated five circumstances when presidential elections were required to be conducted. The Court found that whereas the term '*whenever a presidential election is to be held*' had been used in section 14 of the Elections Act to signal that a nomination was required for all the instances when a presidential election was held, a closer scrutiny revealed that nominations were only required in three instances: in the case of a general election, where no candidate had met the constitutional threshold under Article 138 (5) and where there was a vacancy in the office of the President. It was the Court's finding that the failure by the Act to recognise nomination in respect of an election under Article 140 (3) was not an oversight on the part of the drafters but a proper appreciation of the law. Since each presidential election was conducted under different circumstances, each had to be appraised separately. The Supreme Court therefore built on the foundation laid by Mativo J in the ***Ekuru Aukot*** case by not just relying on the time limitation argument, but clarifying the instances when nominations were anticipated by law.

The Supreme Court went on to hold that the election conducted under Article 140 (3) of the Constitution was not a stand-alone election; rather it was anchored on an 'initial' election. Since the nomination process had not been the subject of contest in the petition that nullified the August 8 election, the Court deemed it illogical for a person who was not a candidate in the August 8 election to be a contestant in the repeat election and to compel candidates to take part in a fresh nomination exercise when the process had not been in issue in the petition challenging the initial election. In their view, a purposive interpretation, predicated upon the Constitution's intent of assuring an unbroken governance process, led to the conclusion that the nominations held in respect of the August 8 elections remained valid; therefore, no fresh nominations were required for the repeat elections held on October 26 2018. The Court also endorsed the inclusion of Mr Jirongo in the ballot papers since the High Court had granted him a stay of the Bankruptcy Order, effectively rendering him qualified to vie.

As to the standing of the 2013 *Raila Odinga & Ekuru Aukot 2017* decisions on fresh elections, in particular the identification of candidates for the fresh election, the Court found that the 2013 ***Raila Odinga Case*** had limited the number of candidates based on the context in which the elections were being held. A further review of the ***Ekuru Aukot*** decision indicated that the High Court, even though it only directed the inclusion of Dr Aukot, contemplated the availability of an opportunity for every other person who had contested the August 8 election to participate in the fresh election. The 1st and 2nd Respondents could therefore not be faulted for failure to carry out fresh nominations and for the inclusion of all the candidates in the August 8 elections.

3.4. Impact of Withdrawal of a Candidate before Fresh Election

One of the Petitioners' grievances in the case of ***John Harun Mwau & Others v IEBC & Others***[174] was that the IEBC erred in retaining Hon Raila Odinga's name on the ballot paper after he issued a letter dated 10 October 2017 withdrawing his candidature. The Respondents on the other hand relied on the press statement issued by the 1st Respondent on 11 October 2017 drawing the attention of Hon. Odinga to the procedure in Regulation 52 of the Elections (General) Elections requiring that resignation be tendered within 3 days of nominations using the prescribed Form 24A. It was therefore the 1st Respondent's case that the resignation letter had no legal effect. In response, the Petitioners asserted that Regulation 52 was not applicable to the fresh election as no nomination exercise had been conducted and therefore, in accordance with the finding in the ***2013 Raila Case***, the withdrawal of Hon. Odinga ought to have led to the vacation of the election and the conduct of fresh nominations as provided for in Article 138 (8) (b) of the Constitution.

While Mativo J had, in the ***Ekuru Aukot Case***, found that the analysis of the Supreme Court on the conduct of a fresh election in the ***2013 Raila Odinga Case*** was *obiter*, the Supreme Court was also aware that the decision of Mativo J was the subject of an election appeal.[175] Despite the fact that the Supreme Court ought to defer to the jurisdiction of superior courts in respect of matters pending before the latter, the apex court ruled that the determination of the effect of withdrawal and the question of nominations were no ordinary matters and could therefore not await the outcome of the appeal. The Supreme Court went on to hold that, nevertheless, the finding in the ***2013 Raila Odinga Case*** ought to be departed from as it was made *per incuriam*. This was because Article 138 (8) (b) only contemplated the cancellation of an election in three instances: when no person had been nominated within the nomination period, where the candidate for election as President or Deputy-President died before the scheduled election date or where a candidate scheduled to be declared elected as President died. Since withdrawal was not one of the scenarios contemplated by Article 138 (8) (b), withdrawal did not constitute a basis for cancellation of the election. The Supreme Court therefore brought to a close the debate as to the impact of the withdrawal of a candidate in the run-up to the fresh election. Moreover, the Supreme Court ruled that given that Regulation 52 was not applicable to the fresh election, the writing of a formal letter by Hon. Odinga constituted a substantive and legally effective withdrawal from the elections. However, the 1st and 2nd Respondents were not at fault for including his name on the ballot paper since the withdrawal could not, in law, have led to the cancellation of the election and a candidate was at liberty to withdraw at any time before an election, when it would not always be possible for the IEBC to remove their name from the ballot paper.

This decision removes the IEBC from the mercy of the candidates in such an election and makes it such that the electoral process is not crippled at the last minute by a candidate (s). While the IEBC should always endeavour to resolve concerns about its capacity to be an impartial facilitator of the electoral process, the Supreme Court struck a balance between the political rights of candidates under Article 38 and the need to ensure that constitutional timelines are adhered to. To rule otherwise would have been to render illusory the 60-day timeline established by Article 140 (3) as there are critical pre-election processes that must be carried out before the fresh election can be held.

174 Petitions 2 and 4 of 2017.
175 This appeal was later withdrawn.

3.5. The Effect of the Election Laws (Amendment) Act 34 of 2017 on the Fresh Presidential Election

As indicated in the background to this Compendium, the period preceding the fresh election was rocked with tension and legislative uncertainty, ushered in by the enactment of the Election Laws (Amendment) Act 2017.[176] The Act amended the Elections Act 2011, the Election Offences Act 2016 and the IEBC Act 2011. Whereas the law was not assented to by the President, it entered into force by operation of law in accordance with Article 116 of the Constitution.

The validity of that legislation was challenged both in ***John Harun Mwau & Others v IEBC & Others***[177] and ***Katiba Institute & 3 Others v Attorney General & 2 Others.***[178] In the former case, the Court was urged by the Petitioners to find that the statute was intended to diminish the role of technology in elections, thereby opening up the results to manipulation and indicate to voters the impossibility of challenging the results of a presidential election.

The Court noted that the law did not come into effect until 2 November 2018, whereas the fresh election had been conducted on 26 October 2018. The applicable law for the fresh election could therefore only have been the 2011 Elections Act when assessed against the rule of construction that statutes should not be given retrospective operation, in the absence of a special legislative indication to the contrary.

As to the validity of section 83 of that amended law, which the Court was asked to declare unconstitutional, the Court noted that the matter was pending in the High Court as ***Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others.***[179] In keeping with its practice of not taking away the jurisdiction vested in other superior courts, and particularly because this was not a matter in respect of which the Constitution had reserved for the jurisdiction of the Supreme Court, the Court deferred to the jurisdiction of the High Court in determining the constitutionality or validity of section 83 of the new law. The findings of the Court on the constitutionality of that legislation, as determined in the 2018 decision in ***Katiba Institute & 3 Others v Attorney General & 2 others,***[180] are addressed in the section on Integrity of the Election.

4. Jurisdiction over Pre-election Disputes

Pre-election disputes are those arising before declaration of results. The post-2010 EDR framework has given the constitutional and statutory mandate of resolution of different levels of disputes to various distinct bodies. The mandate of the IEBC for example, as set out in Article 88 (4) (e) of the Constitution as read with section 74 of the Elections Act, includes the resolution of nomination disputes and ensuring compliance with the Electoral Code of Conduct. Section 74 (3) of the Elections Act provides that a dispute relating to nomination or elections has to be determined before the date of the nomination or election respectively. This includes the question of the suitability and eligibility of candidates to vie for elective office, which, as the High Court settled in the case of ***Michael Wachira***

176 Act No 34 of 2017.
177 Petitions 2 and 4 of 2017.
178 [2018] eKLR.
179 Nairobi High Court Petition No. 548 of 2017.
180 [2018] eKLR.

Nderitu & 3 Others v Mary Wambui Munene,[181] the IEBC, rather than the High Court, has the responsibility to inquire into and determine. The relationship between the PPDT and the Courts is also set out in section 41 (2) of the Political Parties Act.

The courts have been emphatic that litigants cannot bypass the political party mechanism, the PPDT, the IEBC or other pre-election forum prescribed by law and approach the High Court by framing a pre-election dispute as one relating to the interpretation, supremacy or enforcement of the Constitution.[182] A two-fold rationale has been proffered for this: first, that public interest requires citizens to refrain from litigation where the law has created alternative procedures for resolving a particular dispute.[183] Second, that Article 159(2) (c) of the Constitution requires the promotion of alternative dispute resolution procedures by the courts, which cannot be achieved if courts entertained disputes which ought to be resolved in other forums.[184]

In light of this clear demarcation, is the High Court at liberty, during the hearing of an election dispute, to entertain a matter which ought to have been handled at the pre-election stage by another body, such as eligibility for office or a party primary dispute? Or can it make a determination concerning a malpractice or breach of electoral law which is not addressed by the relevant institution and conclusively determined before an election? What weight is to be attached the timelines established for these bodies to resolve those disputes?

It is argued that the jurisdiction of the election court is not ousted because of the Supreme Court dicta in ***Advisory Opinion 2 of 2012***: that elections are not lodged in a single event, but are in effect a process, and there could be a contested question, error, irregularity or serious malpractice prior to an election which could have a bearing on the conduct of the election.[185] This would have an impact on the integrity or credibility of the election whether it arises before or after the date of the election.[186] Moreover, where an election court fails to exercise jurisdiction over a pre-election issue, particularly a malpractice or irregularity occurring prior to the election date, it would incentivise unscrupulous politicians to engage in electoral malpractice prior to the election period.[187]

Jurisdiction over pre-election disputes formed the basis of several election court decisions in 2013. On one hand, there were those election courts that read the provisions of the Constitution and related legislation to exclude the jurisdiction of the High Court where pre-election disputes were concerned. Such was the case in ***Charles Ong'ondo Were v Joseph Oyugi Magwanga & 2 Others***[188] where Maina J declined to entertain the question of the Petitioner's academic qualification to vie for office, on the basis that eligibility was a pre-election issue, which under section 74 of the Elections Act ought to have been determined by the IEBC before the elections. This creates a situation where no challenge can be mounted against a candidate's eligibility where they have been cleared by the IEBC even though they are in fact not qualified to be elected.

181 [2013] eKLR.

182 See Isaiah Gichu Ndirangu & 2 Others v IEBC & 4 Others Nairobi High Court Petition No. 83 of 2015; International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others Nairobi High Court Constitutional Petition No. 552 of 2012.

183 See Judiciary Bench Book on Electoral Disputes Resolution (2017) 32. This rationale has found expression in decisions such as *Francis Gitau Parsimei & 2 Others v The National Alliance Party & 4 Others* Nairobi Constitutional Petitions 356 & 359 of 2012 and *Godfrey Mwaki Kimathi & 2Others v Jubilee Alliance Party & 3 Others* Nairobi High Court Petitions 102 and 145 of 2015.

184 Judiciary Bench Book, 33.

185 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* Advisory Opinion 2 of 2012.

186 Judiciary Bench Book, 33.

187 As above.

188 Homa Bay Election Petition 1 of 2013.

It would be undesirable to uphold such a position as it would go against the spirit of Article 99 of the Constitution, since the aim of the provision was to preclude unqualified persons from holding office. Persons who were not qualified to hold office should not be allowed to remain in office even where elected simply because the vetting agency was negligent in assessing his eligibility. Nevertheless, it would undermine these pre-election EDR mechanisms and allow usurpation of jurisdiction if disputes designated for their determination were heard and determined by the courts. It is therefore necessary to uphold the integrity of the electoral process, without losing sight of the aim of the Constitution and related legislation in divesting EDR jurisdiction from the courts and conferring it upon other quasi-judicial bodies and administrative bodies.

Mabeya J subscribed to this reasoning as well in ***Josiah Taraiya Kipelian Ole Kores v David Ole Nkedienye & 3 Others,***[189] where the Court held that questions of eligibility ought to be determined by the IEBC and where one was dissatisfied with a decision of the IEBC, the proper forum to appeal to was the High Court in its normal jurisdiction, not an election court. Therefore, it was only in cases of outright negligence by the IEBC that an election court could re-open issues relating to nomination.[190] On the other hand, there were those that took cognisance of the inter-twined nature of the various stages of the electoral process, and found that pre-election processes had an impact on voting day, and therefore could be considered in the determination of an election petition. Those of this school of thought included Muchelule J in ***William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 Others,***[191] where the Court ruled that activities during campaigns were the legitimate business of an election court; that what happens prior to actual voting could affect the integrity of the election, thus entitling the Court to deal with pre-election issues.

Kimondo J in ***Kituo cha Sheria v John Ndirangu & Another***[192] asserted that the Constitution had expanded the scope of the Court in a petition and that in determining the question of whether a person had been validly elected, the Court could determine the question of clearance to run. This was so where the relevant bodies failed to give redress, or where there was buck-passing between bodies with similar mandates such as the EACC and the IEBC in that case. In cases of negligence or otherwise resulting in the nomination of non-citizen, the Court was emphatic that the High Court was not divested of jurisdiction and it would be perfectly in order to right the wrong. The Court cited the decision in ***Luka Lubwayo and Another v Gerald Otieno Kajwang and another,***[193] for the proposition that where IEBC had failed to exercise its mandate under statute, the High Court could intervene.

Emukule J in ***Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 Others***[194] was also called upon to determine whether the question of the Petitioner not being validly nominated was a justiciable issue before the Court after declaration of results. The Court, citing the decision of the Supreme Court in ***Advisory Opinion 2 of 2012,*** stated as follows:

189 Nairobi High Court Election Petition 6 of 2013.

190 See also the reasoning of the courts in Republic v The National Alliance Party of Kenya and Another Ex-Parte Dr. Billy Elias Nyonge [2012] eKLR and Diana Kethi Kilonzo and Another v IEBC and Others [2013] eKLR where the High Court assessing the meaning of Article 88 (4) (e) and section 74 (1) of the Elections Act ruled that the IEBC has the exclusive mandate to resolve any dispute in relation to nominations; therefore, it is only after that IEBC mechanism has been exhausted that a party may go to the High Court to challenge the process; and such challenge would be through invoking the supervisory jurisdiction of the Court under Article 165(6) of the Constitution.

191 Kisumu Election Petition 2 of 2013.

192 [2013] eKLR.

193 Nairobi Petition 120 of 2013 [2013] eKLR.

194 Nakuru Election Petition No. 12 of 2013; [2013] eKLR.

> *…an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the Court is bound to examine the entire process upto [sic] the declaration of results. This was acknowledged by the Supreme Court in* ***Advisory opinion No 2 of 2012 In the matter of the Gender Representation in the National Assembly and Senate [2012] eKLR*** *where that Court acknowledged that elections are not an event but a process: a continuum…The concept of free and fair elections is expressed not only on the voting day but throughout the election process from the registration of voters, to the nomination of candidates, casting of the ballot papers and ultimate declaration of the winner. Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament. Consequently the Court is not barred from determining all matters relating to nomination and qualification of candidates for election even though their determination is vested in other bodies where they failed to discharge their mandate as per the law… Therefore in a case where there was clear breach of the law by contravention of the code of conduct or by failure to disqualify a candidate under Section 72 of the Elections Act as a result of which the election was compromised then the Court has to consider these processes in determining the validity of the election of the candidate and in so doing it should be cautious not to usurp the powers of the Second and Third Respondents.*

However, Emukule J went further in this case to make a distinction between instances where a Petitioner had been indolent and not taken advantage of established dispute resolution mechanisms, and instances where the exercise of the mandate of a dispute resolution body has resulted in a breach of the law, necessitating corrective action by the courts. Citing the decision of the Nakuru High Court in ***Republic v The Independent Electoral and Boundaries Commission Ex parte Charles Ondari Chebet,***[195] the Court took the view that pre-election disputes should be determined before the elections due to the limited time frames created for the resolution of such disputes and where this is not done, the aggrieved person had to live with the choices. He was satisfied that the jurisdiction of the High Court would only be invoked after the exercise of the mandate donated to the mandated bodies. In the words of the Court:

> ***2.18*** *Therefore where a matter raised in an election petition filed after the declaration of the results is one which should, properly have been raised earlier and determined by another body then the Court lacks jurisdiction to determine in the course of an Election Petition. The only exception is, where there is a breach of a mandatory provision of the law – for example the registration and election of a non-citizen. Though the power to disqualify such a candidate rests with the Third Respondent, the Court would interfere to right the wrong on the grounds of illegality.*

Odunga J expressed a similar view on the obligation of the IEBC in ensuring electoral integrity in ***Godffrey Mwaki Kimathi & 2 Others v Jubilee Alliance Party & 3 Others***[196] as follows:
In my view the integrity of the electoral process encompasses the integrity of the players thereat and it is the duty of the Commission to ensure that the electoral process it presides over is free, fair and transparent. Therefore integrity of the candidates is part and parcel of the integrity of the electoral

195 Nakuru High Court Judicial Review Application No. 3 of 2013.
196 [2015] eKLR.

process. The Commission cannot conduct a sham or mock elections simply because it does not have the machinery to undertake its legal and constitutional obligations. Therefore where an issue of integrity is properly raised before the Commission, the Commission must make a determination thereon one way or the other. It cannot shirk its responsibility by shifting the onus to other bodies. If it does not fulfil its legal and constitutional obligations, this Court will not hesitate to intervene and right the wrong.

The High Court also dealt with the question of whether a pre-election issue can be raised in an ordinary petition after an electoral cycle. Mumbi J, in ***Commission on Administrative Justice v John Ndirangu Kariuki & Another,***[197] ruled that a question of eligibility to vie could be raised at any time. In declining to strike out a constitutional petition lodged after the election, Mumbi J ruled that if an unqualified person was allowed to vie and elected, the High Court had jurisdiction to determine the issue since to rule otherwise would be to render the Constitution and the Elections Act of no effect. The Court of Appeal took a different view of the matter. In ***John Ndirangu v Commission on Administrative Justice & Another,***[198] the appellate court ruled that whereas the question of the eligibility of the appellant was a critical one, the manner in which the petition was presented violated the mandatory provisions of the Constitution, the Elections Act and the Election Petition Rules as it was not presented within 28 days of the declaration of results as an election petition. Moreover, since the Court had not been gazetted as an election court as required by the rules, it did not have jurisdiction to determine a matter touching on the electoral process such as this one.[199] The ruling of the High Court that it had jurisdiction to entertain the matter was therefore set aside.

The decision of the COA in the ***John Ndirangu*** case resolves the question of how the High Court, in the exercise of its ordinary jurisdiction, would address an electoral dispute, which is *sui generis*, and therefore has a different standard of proof. It reserves post-election EDR for election courts, as designated by the Chief Justice by gazette notice. By ousting the ordinary jurisdiction of the High Court in such matters, it also reserves the power to make orders affecting an electorate such as declaring a seat vacant and ordering a by-election for courts properly designated by the Chief Justice for that purpose. Finally, this decision gives finality to the EDR process; that once the window for election petitions has closed, electoral disputes cannot be litigated through the backdoor by being introduced as constitutional petitions.

In 2017, the election courts were faced with a similar dilemma when pre-election disputes were raised in election petitions. In ***Armstrong Mwandoo Kiwoi & Another v Granton Graham Samboja & 7 Others,***[200] the Court was asked to determine whether the 1st Respondent had met the educational and ethical requirements for holding office. The 1st Respondent was alleged to have vied for office using a disputed academic certificate from Kenyatta University. The 1st Respondent (the governor-elect) raised a preliminary objection on among other grounds, that the issue ought to have been addressed by the IEBC before the elections in accordance with section 74 of the Elections Act, the EACC under the Anti-Corruption and Economic Crimes Act and the Director of Public Prosecution under Article 157 of the Constitution. He contended that the High Court did not have jurisdiction to entertain the petition, as it did not challenge the electoral process, and only sought to challenge the academic

197 [2014] eKLR.
198 Civil Appeal 257 of 2014.
199 See *Kaltuma Abdulahim Maalim v The Speaker County Assembly of Wajir & Others* Garissa Constitutional Petition 15 of 2017 where the Court ruled that a question touching on membership to the county assembly could not be determined in a constitutional petition.
200 Voi Election Petition 1 of 2017

qualifications of the 1st Respondent. It was also the 2nd Respondent's case that the matter was *sub judice* as similar matter was pending before the High Court in Nairobi as ***Ethics & Anti-corruption Commission v Granton Graham Samboja & Kenyatta University*** **Constitutional Petition No. 382 of 2017**.

Ogola J evaluated the decisions in the above-cited cases and was persuaded by the reasoning of Emukule J in the ***Karanja Kabage*** case. He further cited the Supreme Court decision in ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others***[201] to the effect that once a candidate was declared a winner in an election, the mandate of the Returning Officer and the IEBC terminated and jurisdiction shifted to the election court. The Court therefore ruled that it had the requisite jurisdiction to investigate all aspects of the election in order to determine whether the 1st Respondent was validly elected and therefore had the jurisdiction to hear and determine the petition.

On the question of *sub judice,* the Court noted, firstly, that **Petition 382 of 2017** had been filed before the elections, but it was centred on the same issue i.e. whether the 1st Respondent possessed adequate academic qualifications to have been nominated to vie for the gubernatorial seat in Taita Taveta County. It acknowledged that to allow the petitions to continue with the possibility of conflicting decisions portended potential embarrassment for the courts.

Secondly, the Court was swayed by the fact that all the criminal investigative agencies were involved in **Petition 382 of 2017**, including the EACC, the DPP, the Directorate of Criminal Investigations, the Attorney-General as well as Kenyatta University, which allegedly issued the disputed degree. On the contrary, only Kenyatta University was party to the election petition, and even then, only as an interested party, and therefore was relegated to the periphery.

Thirdly, the Court took cognisance of the time frames within which election petitions are required to be heard and determined and the remaining time for the hearing of the petition would not afford sufficient time to investigate, hear and determine the issue. It reached the conclusion that continuation of the proceedings would be an exercise in futility, but of even greater concern was the potential absurdity of inconsistent outcomes that might have ensued from concurrent proceedings, and the potential damage that would occasion the 1st Respondent. The Court concluded that the interest of justice tilted in favour of the issue of academic qualifications of the 1st Respondent being investigated and tried in **Petition 382 of 2017** in Nairobi. The preliminary objections were therefore upheld and the petition therefore struck out.[202]

In ***Joel Makori Onsando & 2 Others v IEBC & 3 Others,***[203] the petition contained allegations against individuals, who were members of the Wiper Democratic Party for alleged breaches of the Electoral Code of Conduct as well as two media houses for breach of the Media Code of Conduct and who were not enjoined to the suit. The Court rehashed the Supreme Court dicta that elections are a cycle and not an event, and within the cycle are events marking progress and structures designed to deal with those events. In other words, the post-2010 legal framework has distilled EDR into distinct watersheds, and granted jurisdiction to various bodies to address them. The disputes against Laban Chweya and Charles Birundu, who were members of Wiper Movement, were required to be lodged at the IDRM. Once this avenue was exhausted, the parties were at liberty to move to the PPDT. The

201 [2014] eKLR.
202 At the time of writing, the petition was still pending hearing and determination by the High Court in Nairobi.
203 Kisii High Court Election Petition 3 & 7 of 2017 (consolidated).

Court noted that the Petitioner did not access any forum available to resolve his concerns about events taking place before polling day. These included the IEBC under section 74 of the Elections Act and the Media Complaints Commission under the Media Council Act for the claims against the cited media stations. The 3rd Petitioner had not demonstrated that he had presented his grievances to the Media Complaints Commission and been rejected before bringing the same to court. The Court was therefore satisfied that the complaints had been lodged in the wrong forum. The 3rd Petitioner's petition (Petition 7 of 2017) was therefore expunged from the proceedings.[204]

On the contrary, the Court declined to strike out a petition in ***Habil Nanjendo Bushuru v. IEBC & 3 Others***[205] where a violation of the Electoral Code of Conduct was alleged on the basis that section 87 granted an election court the mandate to determine whether an election court may have been committed in the course of hearing a petition and recommend prosecutorial action by the DPP. Similarly, ***Mohamed Dado Hatu v Dhadho Gaddae Godhana & 3 others,***[206] the Court declined to strike out a petition challenging the academic qualifications of the 1st Respondent on the basis that the issues were *res judicata* and further that the Court did not have jurisdiction over pre-election issues. The Court noted that while it was true that 3 applications on the same issue had been filed at the High Court, they had all been dismissed for having been filed at the wrong forum. The issues raised therein had therefore never been addressed on merit. On the question of jurisdiction, the Court, while acknowledging the mandate of the IEBC to resolve nomination issues, found that even though the issue of the 1st Respondent's qualification emerged as a pre-election issue, it had escalated into an election petition when the 1st Respondent was declared the winer of the Tana River gubernatorial seat. Since after the general election 'the horse had already bolted', the only place the Petitioner could ventilate the dispute was at the election court. The Court therefore considered itself properly seized of the matter.

The issue arose again in ***Clement Kung'u Waibara v Annie Kibeh***,[207] where the Petitioner alleged that the 1st Respondent had not resigned before vying for elective office and that she had violated the law, the Constitution, regulations and good practice by continuing to draw a salary as a nominated MCA Kiambu until the date of the election. The Petitioner contended that the 1st Respondent had not supplied proof of her resignation and her responses during cross-examination tended to show that she had indeed continued to draw a salary from the county. The Petitioner therefore requested the Court to order the county secretary to avail payroll information, with the aim of establishing the resignation or otherwise of the 1st Respondent as a nominated MCA prior to the election date.

The Court, taking the same approach as Emukule J in the ***Karanja Kabage case,*** found that the Petitioner's claim was time-barred, having been filed long after nominations and the elections and having also been filed in the wrong forum, since nomination disputes ought to have been filed at the IEBC Disputes Resolution Tribunal. The Court therefore declined to exercise jurisdiction on that issue, and especially because such information would not have supported any specific ground for annulment set out in the petition. In the words of the Court:[208]

204 See also Alhad Adam Ahmed v Solomon Odanga Magembe & 3 Others Milimani Commercial Magistrates' Court Petition 14 of 2017 where the petition was struck out for want of jurisdiction in respect of election offences and nomination disputes.

205 Kakamega HCEP No. 8 of 2017.

206 Garsen Election Petition 1 of 2017. The petition was eventually dismissed as the Court found, inter alia, that while the degree held by the 1st Respondent was not the equivalent of a degree obtained in Kenya for purposes of further education, it was nevertheless recognized in the country of issue, Ireland, and was recognised by convention in Kenya by dint of Art 2 (6) of the Constitution.

207 [2018] eKLR.

208 See paras 79-83.

> *I find this argument to be persuasive: it is too late for the Petitioner to raise this argument now- long after nominations and elections were held. The Court would, as a prudential matter, refuse to take jurisdiction to deal with this question at this time. In any event, I note that any information supplied by the County Secretary on the employment and salary of the 1st respondent would not support any specific ground for annulment of the Petition. As such any production and admission of evidence in this regard would impermissibly expand the Petition beyond the constitutional timelines.*

The Court cited the dicta in ***Speaker of National Assembly v Karume***[209] which was restated by a 3-judge bench of the High Court in ***In the Matter of the Mui Coal Basin Local Community,***[210] that where the Constitution or statute creates an alternative procedure or forum for resolving a dispute, a person must use that procedure before approaching the courts. Without a demonstration to the Court that they have exhausted the other forum, the Court cannot seize jurisdiction. Since the Petitioner had not utilised the mechanisms availed to him by the Constitution, neither did he demonstrate that the case fell within the narrow class to which an exception to the doctrine of exhaustion applied, the Court found that the claim failed.

When the matter went on appeal, the CoA faulted the decision of the High Court declining to exercise jurisdiction in respect of the Appellant's qualification. The Court, citing an earlier decision in ***Kennedy Moki v Hon. Rachael Kaki Nyamai & 2 Others,***[211] reasserted that elections were a process and where a question on the validity of a candidate's nomination had been raised in the petition, the Court ought not have declined to exercise jurisdiction. The CoA also found that this was not sufficient basis for declining to allow the application for further documents touching on the Appellant's employment at the county assembly. Nevertheless, taking into account the fact that there was the possibility that any delay in obtaining the documents could extend determination of the petition beyond the constitutional time lines, the CoA found that the Court properly exercised its discretion in disallowing the said application.

In ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others,***[212] the Petitioner alleged that the 1st Respondent was not qualified under section 22 (2) of the Elections Act to participate in the Wajir gubernatorial election since the degree certificate from Kampala University which the 1st Respondent had submitted to the 3rd Respondent for his clearance was a fraud. In the premises, the 2nd and 3rd respondent had erred in clearing the 1st Respondent to contest for the seat of Governor. They contended that the 1st Respondent had neither sat for 'O' nor 'A' level exams and therefore could not have been enrolled in any university for a degree course. It was also submitted that by 3 September 2014, the 1st Respondent admitted to the Parliamentary Departmental Committee on Defence and Foreign Relations, during an interview for the position of ambassador that he had not yet acquired a degree.

To support their assertions, the Petitioners produced a copy of the Bachelor of Business Administration degree certificate from Kampala University dated 1 March 2012, the booklet containing a graduation list for the same date, minutes from the Parliamentary Department Committee meeting held on 3

209 [1992] KLR 21

210 [2015] eKLR.

211 Nairobi Election Petition Appeal No. 2 of 2018. It is curious that the CoA relied on a paragraph of this decision to make its finding that the jurisdiction of the election court is not ousted yet in the Kennedy Moki appeal, a differently constituted bench of the CoA found the appeal to be without merit and ruled that the election court did not have the jurisdiction to determine a nomination dispute. The decision is discussed at length below.

212 Nairobi High Court Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017).

September 2014 together with proceedings of the National Assembly of 10 September 2014 for the adoption of the report of the Committee. The 1st Petitioner was emphatic that since the 1st Respondent hailed from Wajir, many people knew he had never attended any university. Counsel for the Petitioners asked the Court to take cognisance of the fact that the 1st Respondent, despite refuting the Petitioners' claims neither availed himself for cross-examination nor rebutted the Petitioners' claims.

The 1st Respondent contended that the question of his educational requirements had been litigated upon and decided by the Ugandan High Court in ***Abdirahman Mohamed Abdille v Kampala University & Abedi Mohamed Mohamud*** **Uganda High Court Misc Application No. 366 of 2017** where the complaint was dismissed and he supplied an order from the High Court of Uganda dismissing the judicial review application. He urged that the issue of his clearance was a pre-nomination matter and ought not have been raised in a petition. Counsel for the 1st Respondent submitted that the Petitioners had not challenged the 1st Respondent's educational qualification before his electoral victory or initiated investigations with the EACC, the DCI, the Commission for Higher Education or Kampala University, but placed reliance on the Hansard Report referring to a post-graduate degree which the 1st Respondent was at the time pursuing and in due course obtained.

Secondly, counsel urged that one cannot be disqualified from participating in an election on grounds of ineligibility unless all possible avenues for appeal have been exhausted. Therefore, the 1st Respondent was not ineligible to vie merely because of being adversely mentioned in an inconclusive report. He relied on among others, the decision of the High Court in ***Michael Wachira Nderitu & 3 Others v Mary Wambui Munene [2013] eKLR*** for the proposition that the responsibility for inquiring and determining the suitability and eligibility of candidates for elective office lies with IEBC; IEBC had in this case satisfied itself that the IEBC had met the educational requirement.

Thirdly, counsel for the 1st Respondent asserted that the Petitioners could not contest the eligibility of the 1st Respondent's nomination during the Petition because independent institutions such as the IEBC and EACC had jurisdiction over such disputes. Since the IEBC's Dispute Resolution Committee had determined the issue and the Petitioners had not contested the validity of that determination, it was not open to the Court to supervise the decision of the Committee but rather to determine to validity of the August 8 election. Citing the decision of ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others***,[213] he also urged that there had to be conclusive proof of the allegations, which had not been adduced and urged that once a degree is shown to have been conferred, it cannot be questioned.

The 2nd and 3rd Respondent denied wrongly clearing the 1st Respondent for nomination and produced a Master's Degree in Business Administration dated 12 March 2015 from Kampala University and a Letter of Recognition by the Commission for Higher Education dated 11 January 2013 stating that Kampala University is a recognised university in Kenya. In the circumstances, they contended that they had properly and procedurally cleared the 1st Respondent to vie for the gubernatorial seat. They urged that they had complied with section 22 (2) of the Elections Act and that the complaint before the 3rd Respondent's DRC had never been prosecuted.

On the question of jurisdiction, the Court reviewed Article 88 (4) (e) of the Constitution as read with section 74 of the Elections Act as well as ***Jared Odoyo Okello v IEBC & 3 Others***[214] cited by

213 [2013] eKLR.
214 [2013] eKLR.

the 1st Respondent in support of the assertion that the High Court lacked jurisdiction to determine the eligibility of the 1st Respondent. It was urged that if dissatisfied with a decision of the IEBC, the proper forum to appeal to was the High Court, not an election court.

Mabeya J distinguished the ***Jared Odoyo*** case on the basis that a determination had been made by the IEBC which had not been appealed against and that was the basis for the determination that the election court lacked jurisdiction. However, there was no proof that a complaint had ever been prosecuted before the IEBC and a determination made in the present case. The appellants could therefore not be said to be appealing against the decision of the Committee in the petition.

The Court was persuaded by the reasoning of Kimondo J in ***Kituo Cha Sheria v John Ndirangu Kariuki***[215] that elections were a process, and the High Court was not divested of jurisdiction in nomination matters where the IEBC failed to exercise its mandate. Therefore, the election court had jurisdiction to audit the entire process, provided the issue had been raised in the election petition. On the question of whether questions of eligibility were the preserve of the IEBC, as stated by the High Court in the ***Michael Wachira*** case, the Court found that the said authority was distinguishable on the basis that the Court there was considering whether an aspirant was eligible to run for the seat of Member of the National Assembly rather than the validity of an election, as was the case in this election petition. Therefore, the fact that the IEBC had the responsibility to determine whether he was qualified in law to vie did not preclude the election court from satisfying itself that a candidate was eligible to stand for election when the issue arose.

The Court therefore assessed the Petitioners' allegations against the fact that the 1st Respondent did not specifically deny these allegations in his Replying Affidavit and neither did he show up for cross-examination during the trial and reached the conclusion that the Petitioners had shifted the evidentiary burden of proof to the 1st Respondent. The letter from the Commission for Higher Education only served to confirm that Kampala University was recognised; it did not confirm the validity of the certificate produced by the 1st Respondent. Moreover, the Court noted that the matter in Uganda had been dismissed on a technicality: that the advocate had filed the suit without the requisite authority. The issue of authenticity was therefore never determined. The Court also took judicial notice that one could not obtain a Master's degree without having a Bachelor's degree and it was unlikely that the 1st Respondent obtained a Master's degree in 2015, when he had admitted in September 2014 that he had not obtained any degree. The 1st Respondent also proffered no explanation as to why his name was missing from the graduation list, or proof that the disputed degrees were genuinely issued to him. As for the report of the Parliamentary Departmental Committee on Defence and International Relations, the Court ruled that 'serious but firm allegations' had been made against the 1st Respondent, who did not deny or rebut them. The minutes and report were, contrary to the submissions of counsel for the 1st Respondent, conclusive evidence that the 1st Respondent appeared before the Committee to be vetted for an ambassadorial position and that during the vetting, he informed the Committee that he was yet to graduate. The Court therefore distinguished the ***Peter Gichuki*** case on inconclusive reports and found that as of 8 August 2017, the 1st Respondent did not have the academic qualifications to vie for the gubernatorial position. He was therefore not legally cleared to vie as he was unqualified under section 22 (2) of the Elections Act.

215 [2013] eKLR.

Dissatisfied with the finding of the Trial Court, the 1st Respondent went on appeal in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,***[216] where he asserted, *inter alia*, that the trial judge erred in law in assuming jurisdiction and re-opening matters which ought to have been dealt with at the nomination stage i.e. whether the appellant had been awarded a recognised degree by Kampala University and that the learned judge erred in fact and law in not holding that the appellant was validly nominated to contest the position of governor, Wajir County. While there were several grounds of appeal, the parties agreed that the appeal hinged on these two issues.

On the question of jurisdiction, the Court reviewed the decisions of Muchelule J in ***Jared Odoyo Okello v IEBC & 3 Others***[217] and Mabeya J in ***Josiah Taraiya Kipelian Ole Kores v Dr David Ole Nkedienye & 3 Others***[218] relied on by the Appellant for the proposition that where the law provides a detailed procedure for pre-election dispute resolution, the same must be followed and that it would be a usurpation of jurisdiction for the High Court to inquire into pre-election disputes reserved for another body. The trial judge distinguished these decisions on the basis that there had been no complaint heard and determined by the IEBC, unlike the case in the ***Jared Odoyo Case***. While a complaint had been filed before the IEBC, it was neither prosecuted nor a decision made thereon; the 2nd and 3rd Respondents could therefore not be said to be appealing against a decision of the Committee to the High Court. The Court of Appeal agreed with the learned judge and found that since the 2nd and 3rd Respondents were not parties to the challenge before the IEBC, it would be an injustice and an absurdity to bind them with the failure to prosecute the said complaint. The ***Jared Odoyo Case*** was therefore properly distinguished.

In their view, the question of jurisdiction lay in a determination of whether the election was a process or a specific event. In the words of the Court:

> *The answer to the jurisdictional question lies in a determination of whether an election is a process straddling the entire electioneering period from registration of votes to declaration of results; or the specific event of voting and determining a winner on election day. And we think it is not a difficult question to answer. There is a substantial body of law that is quite categorical and authoritative that election is a process and not an event and that being so, the High Court, as an election court, is possessed of jurisdiction to enquire into matters nomination. In* ***KITUO CHA SHERIA v JOHN NDIRANGU KARIUKI [2013] eKLR*** *Kimondo, J after acknowledging other dispute resolution procedures, still recognized the High Court's jurisdiction to intervene. He gave the hypothetical example that if by negligence or otherwise a non-citizen was nominated for election and was elected, it would be perfectly in order for the Court to right the wrong. We need only add that citizenship is not the only qualification that may justify, indeed necessitate and compel such intervention as the case before us so amply demonstrates…Suffice to say that nominations or determinations of qualification to run are part of the "continuum" consisting in "a plurality of stages" that make up an election as expressed by the Supreme Court in* ***ADVISORY OPINION NO. 2 OF 2012 IN THE MATTER OF THE GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND SENATE****. As such, qualifications are a valid contested point outside the framework of the events of election date but which may yet be legitimately enquired into by an election court…*

216 Election Petition Appeal 2 of 2018.
217 [2013] eKLR.
218 Nairobi High Court Petition 6 of 2013.

The Court therefore ruled that the Trial Court was properly seized of the matter.

> *On the basis of law and plain common sense, we are fully persuaded that an election court has jurisdiction to enquire into a question as to the qualification of a candidate which goes to his eligibility to vie in cases such as was before the learned Judge where the matter had not been dealt with finality by any other body constitutionally or statutorily mandated to do so. The learned Judge committed no error holding that he had jurisdiction. He had.*

Taking up the line of reasoning advanced by Emukule J in the ***Karanja Kabage*** case, Muchelule J in the ***Jared Odoyo*** case as well as Kimondo J in the ***Kituo cha Sheria*** case, the COA upheld the reasoning that elections are a process, and whereas different bodies have and should be allowed to exercise pre-election jurisdiction as conferred upon them by the Constitution and related legislation, where there is negligence on the part of such a body, or where the matter is not determined with finality by such bodies, the jurisdiction of the election court is not ousted.

The CoA was reluctant to limit the issues in respect of which the election court may exercise jurisdiction. While acknowledging that questions of citizenship, nominations or qualifications may be some of the issues presenting potential for determination, the Court ruled that anything in the plurality of stages making up an election could be the object of an election court's jurisdiction in a petition filed after the elections. The decision of the Supreme Court in this matter is discussed below.[219]

In a later decision in ***Kennedy Moki v Rachel Kaki Nyamai & 2 Others***[220] the Petitioner challenged the election of the 1st Respondent on the basis that there was no valid nomination and that she had allegedly committed electoral malpractices in the pre-election period, thus rendering her election invalid. It was submitted that the nomination process had been challenged at the PPDT and went on appeal all the way to the Court of Appeal, where Jubilee Party was directed to carry out nominations afresh. The Petitioner's case was that the decision of the Court of Appeal was not complied with. The 2nd Respondent however contended that no report was made to it concerning the manner in which the nomination was done. The Court therefore ruled that it was not demonstrated that the mechanisms laid down in law as provided by the Constitution and Statutes were exhausted. It therefore declined to exercise jurisdiction over the pre-election dispute as in its view, an election court did not have jurisdiction over a pre-election matter. When the matter went on appeal in ***Kennedy Moki v Hon. Rachael Kaki Nyamai & 2 Others,***[221] the Court noted that there was no dispute around the conduct of the election or the declared results. The Petitioner/appellant's gravamen was with the pre-election nomination process. The Court was also cognisant of the dichotomy in judicial opinion as to whether an election court can entertain a pre-election dispute. From a reading of the judgment, it would appear that the appellate court prevaricated on the issue of jurisdiction:

> *54…It would be improper to jump ship and come before the Court of Appeal to determine the validity of the Nomination Certificate issued to the 1st Respondent when the contestation involves issues of fact outside the jurisdiction of this Court. To this extent, we affirm the principle that where there exists sufficient and adequate mechanism to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the Court should not be invoked until such mechanisms have been exhausted*

219 Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others Supreme Court Petition 7 & 9 of 2018 (consolidated).
220 Kitui Election Petition 2 of 2017.
221 Nairobi Election Petition Appeal No. 2 of 2018.

> *...*
> *57. Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional time lines of the jurisdiction of other competent organs, an election court has jurisdiction to hear and determine pre-election nomination disputes if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the Certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate.*
>
> *58. In our view, the provisions of **Article 88 (4) (e)** of the Constitution and **Section 74 (1)** of the Constitution are not clauses that oust the jurisdiction of an election court. **Article 88 (4) (e)** confers jurisdiction of the Electoral Commission in settling of nomination disputes. The said Article does not confer jurisdiction on the Commission to hear election petitions. The Article reserves the jurisdiction of an election court to determine election petitions....*

The Court then acknowledged the longstanding dispute on the nomination of the 1st Respondent which had been the subject of determination by the PPDT, the High Court and the Court of Appeal, all of which had jurisdiction to handle nomination disputes. The decisions of these bodies, in the view of the Court led to the nomination of the 1st Respondent, which nomination was never challenged. Following the IEBC's clearance to vie, several processes had taken place. These included the gazettement of candidates, the holding of general elections and the gazettement of the 1st Respondent as the duly elected Member of the National Assembly for Kitui South Constituency.

> *64. The nomination of the 1st Respondent by the Jubilee Party and her subsequent clearance by IEBC to vie for the election initiated and concluded a constitutional process leading to the conduct of the elections held on 8th August 2017. Taking cue and guided by the Supreme Court dicta, it is our position that in electoral disputes, parties cannot reopen concluded causes of action.*
> *...*
> *67. In the instant case, the nomination certificate issued to the 1st Respondent by the Jubilee Party was not challenged in any proceedings prior to the elections held on 8th August 2017. We are persuaded by the decision in **Jared Odoyo Okello -v- Independent Electoral & Boundaries Commission (IEBC) & 3 Others [2013] eKLR**, where on a similar issue the Trial Court held that election court does not sit to supervise the decision of nomination dispute resolution bodies but to sits to determine validity of the elections. The High Court correctly held that if Petitioner losses an opportunity to challenge the decision of a nominating body, such a Petitioner cannot be heard to raise the issue in an election court. Further, in the instant case, whether or not fresh nomination was conducted is a question of fact outside the jurisdiction of this Court as an appellate court.*
> *68. Of significance and pivotal to this appeal, the conduct of elections held on 8th August 2017 and the declared results thereof are neither challenged nor contested in this appeal. The appellant is not questioning the declaration that the 1st Respondent was the winner of the election for Kitui South Member of National Assembly. Since the declaration of results is not contested, we see no reason to interfere with the declared results that are not in dispute. It follows that this appeal has no merit.*

While on one hand the Court stated at para 57 that issues of eligibility to vie are never removed from the jurisdiction of the election court, and the Petitioner had demonstrated that he had pursued the matter from the PPDT all the way to the Court of Appeal, the Court stated at para 67 that the nomination of the 1st Respondent 'had not been challenged in any proceedings prior to the elections'. It was also asserted that the question of whether fresh nominations had been conducted in accordance with the CoA directive was a question of fact beyond the jurisdiction of the Court.

This decision is also curious in that it relied on the 2013 High Court decision in ***Jared Odoyo Okello v IEBC & Others,***[222] whereas the position taken in that decision was subsequently distinguished and overruled by a differently constituted bench of the CoA in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others.***[223] The dichotomy that appeared to have been settled in the ***Mohamed Abdi Muhamud Case*** seemed to have been restored with the two conflicting decisions of the Court of Appeal.

However, three decisions of the Supreme Court have attempted to provide jurisprudential clarity on this issue and appear to have now settled the matter. The dichotomy in the jurisprudence was acknowledged in the determination of the three cases. In ***Silverse Lisamula Anami v. Independent Electoral and Boundaries Commission & 2 Others,***[224] the Supreme Court appeared to lean towards the second school of thought, limiting the jurisdiction to matters where the relevant body has not yet conclusively determined the issue on merits:

> *How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts? Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically, and that whereas the IEBC and PPDT are entitled, nay, empowered by the Constitution and Statute to resolve pre-election disputes including nominations, there are instances where the Election Court, in determining whether an election is valid, may look to issues arising during the pre-election period, only to the extent that they have previously not been conclusively determined on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the Constitution. Where a matter or an issue has been so determined, then the Election Court cannot assume jurisdiction as if it were an appellate entity, since that jurisdiction is not conferred on it by the Constitution.*

In ***Sammy Ndung'u Waity v IEBC & 3 Others,***[225] the apex court called for a holistic and purposive reading of the Constitution, with no provision being read so as to render another inoperable. At paragraph 67, the Court stated:

> *In our perception, this conflict cannot be resolved by either, discounting [outright] one school of thought, or wholly embracing the other. What is critical is the need to harmonize these well-reasoned opinions, so as to give effect to both Articles 88(4) (e), and 105 (1) (a) of the Constitution, as read with Section 75 (1) of the Elections Act. Doing so would be to stay faithful to the edict that a Constitution must be interpreted purposively and holistically.*

222 Kisumu Election Petition 1 of 2013.
223 Election Petition Appeal 2 of 2018.
224 SC Petition No. 30 of 2018, at para 54.
225 SC Petition No. 33 of 2018.

The apex court set out the following guidelines for determining whether an election court ought to exercise jurisdiction over a pre-election issue:

(i) all pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
(ii) where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, such dispute shall not be a ground in a petition to the Election Court;
(iii) where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution; the High Court shall hear and determine the dispute before the elections, and in accordance with the constitutional timelines;
(iv) where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the Election Court;
(v) the action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of the Constitution, even after the determination of an election petition;
(vi) in determining the validity of an election under Article 105 of the Constitution, or Section 75 (1) of the Elections Act, an election Court may look into a pre-election dispute if it determines that such dispute goes to the root of the election, and that the Petitioner was not aware, or could not have been aware of the facts forming the basis of that dispute before the election.

When the ***Mohamed Abdi Muhamud*** case proceeded to the Supreme Court,[226] the Court applied the above-cited principles and the majority of the judges ruled that both the High Court and the Court of Appeal erred in holding that they had jurisdiction to determine an issue which ought to have been determined before the elections.

For the reason that the appellant by his own admission was aware of the lack of qualification of the appellant since 2013 and had not taken up the matter with the IEBC but opted to wait until he had lost the election to challenge the appellant's eligibility, allowing the exercise of jurisdiction in such a case would, in the view of the Court, be to render dispute resolution bodies such as the IEBC otiose. Moreover, it would also be unworkable in light of the fact that electoral disputes have to be resolved within certain timelines. Nevertheless, the Court stated that this did not prevent the 1st Respondent from presenting the dispute to the High Court sitting as a judicial review court or in exercise of its supervisory jurisdiction under Articles 165 (3) and (6) of the Constitution at any time, since the judicial process is never closed. This would also preserve the authority of the Court to deal with 'tragedies' occasioned by ineligible persons slipping through the vetting process and getting elected when they were brought to the attention of the Court. This would mean that if the matter was known beforehand, it would go to the High Court in exercise of its supervisory jurisdiction, but if not, an election court would have jurisdiction. This in the view of the Court would provide a holistic and purposive way forward and preserve the pre-election constitutional mandate of the IEBC, the efficacy of the election court and the authority of the Constitution.

226 *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others Supreme Court Petition 7 & 9 of 2018 (consolidated).*

In a dissenting opinion, Maraga CJ & P disagreed that the IEBC should have exclusive jurisdiction over pre-election nomination disputes such as this one. Firstly, academic qualification to contest an election, while it is a statutory requirement under section 22 (1) (b) (ii) of the Elections Act, is anchored in the Constitution. Any disputes on qualification or eligibility to view would invariably challenge the integrity or validity of that election and therefore go to the root of an election. Therefore, while the IEBC has jurisdiction to handle such disputes, a purposive reading of the Constitution would show that other courts would also have jurisdiction to entertain such disputes. This opinion was endorsed by Lenaola J in his dissenting opinion.[227]

Secondly, given that IEBC's core mandate was to manage elections and referenda and not to resolve disputes, the settlement of disputes was only collateral or ancillary to its function in that it had to determine the candidates to appear on the ballot papers in time for the election. This is done within the constraints of a hectic schedule in the run up to the elections, with the result that the IEBC uses a summary procedure to determine nomination disputes that come before it.

Thirdly, since nomination disputes often challenge the IEBC's own earlier decisions, such as the acceptance of a candidate for nomination, the election court's jurisdiction cannot be ousted, particularly in cases such as this one where the matter had not been determined on merit before the IEBC for want of prosecution, and was therefore not *res judicata.*

Having reviewed the evidence, the Chief Justice was satisfied that the appellant did not possess the academic qualifications necessary to vie for the gubernatorial elections. The Dean's list relied on by the appellant as proof of graduation was considered problematic as it was not proof of graduation, neither had it been prepared by the Dean as is customary. The appellant also failed to supply any proof of having paid school fees. The Chief Justice also considered it determinative that the letter from the Ugandan Ministry of Internal Affairs that the appellant did not travel to Uganda between 2009 and 2012.

From the jurisprudence in 2017, the dichotomy of jurisprudence seemed to be a contest between facilitating the resolution of disputes that challenge the integrity or validity of an election, particularly those that go to the root of the election such as questions of eligibility, and bringing finality to EDR. From the decisions of the Supreme Court, the scales seem to have tilted firmly towards bringing finality to EDR, even though in some instances it might have tragic consequences. While the ***Mohamed Abdi Muhamud*** case offered the Supreme Court an opportunity to prevent an ineligible person from slipping through the vetting process and holding office, the majority decision evaded the opportunity, ironically citing concerns for timely resolution of disputes, and referred the 1st Respondent back to the High Court in exercise of its supervisory jurisdiction. Given that nearly two years have lapsed since the election, the decision runs counter to the objective of bringing finality to the electoral process. As Maraga CJ noted in his dissent, it was tragic that the Court interpreted Article 88 (4) (e) of the Constitution as a fetter to determine any pre-election nomination dispute and in so doing allowed an obvious illegality to stand.

The conduct of the case at the Supreme Court also left a lot to be desired from the apex court in future cases. By allowing the appellant to file additional evidence without requiring him to be cross-examined on the evidence, a process which he had also managed to elude both at the High Court

227 At paras 194-200 of the decision.

and the Court of Appeal, the Court not only infringed on the Respondents' fair hearing rights but it allowed for evidence that was untested to form the basis of the Court's determination. It was also curious that new evidence was allowed at a second appeal without demonstrating why such evidence could not have been availed earlier.

5. Substantive Justice vs Undue Regard for Procedural Technicalities

It has been gainsaid that Kenya's EDR history has been characterised by 'the elevation of legal and procedural technicalities over substantive justice'.[228] This undermined the ends of justice and hampered the development of sound, consistent jurisprudence on electoral issues. Lack of effective EDR also eroded public confidence in the Judiciary and the refusal by the opposition to approach the courts following the disputed 2007 elections and the ensuing violence were partly attributed to this trend.

In light of the adoption of the 2010 Constitution, one of the issues that emerged from the jurisprudence following the 2013 electoral dispute resolution process was the question of what weight to attach to failure to comply with procedural rules in the process of filing or hearing of an election petition. The introduction of Article 159 (2) (d) of the Constitution brought in the requirement that courts exercise judicial authority without undue regard to technicalities. In the EDR process, this provision carried special import due to our country's history of election petitions being determined largely on technicalities. This reasoning was captured by the Supreme Court in ***Raila Odinga and Others v Independent Electoral and Boundaries Commission and 3 Others [2013] eKLR:***

> *The essence of that [Article 159(2) (d)] is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone, and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case and conscientiously determine the best course.*

Further, in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others,[229] eKLR [2014]***the Supreme Court encouraged courts to overlook procedural pitfalls that do not have a bearing on the jurisdiction of the courts, but which only affect the competence of a court to determine a particular matter.

> *[123] A court dealing with a question of procedure, where jurisdiction is not expressly limited in scope – as in the case of Articles 87(2) and 105(1) (a) of the Constitution – may exercise a discretion to ensure that any procedural failing that lends itself to cure under Article 159, is cured. We agree with learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before a Court, without in any way affecting that Court's jurisdiction to entertain it. A Court so placed, taking into account the relevant facts and circumstances, may cure such a defect; and the Constitution requires such an exercise of discretion in matters of a technical character.*

228 Judiciary Bench Book, 2. See also David Majanja 'Judiciary's Quest for a Speedy and Just Electoral Dispute Resolution Mechanism: Lessons from Kenya's 2013 Elections' in C Odote & L Musumba (eds) Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence (2016) 19, 20.

229 [2014] eKLR.

However, the same Constitution requires that electoral disputes be determined within a restricted timeframe, and there is no room for the extension of these timelines. Moreover, the Supreme Court has enunciated a clawback on Article 159 (2) (d) in the case of ***Moses Mwicigi & 14 Others vs IEBC & 4 Others***:[230] that Article 159 (2) (d) is not a panacea for all situations as to warrant a litigant's indiscretion and does not offer succour to parties who do not show regard for the rules and timelines. The harshness of the restrictive timeframes for the resolution of electoral disputes introduced by the post-2010 legal framework and their possible impact on substantive justice make the exercise of judicial discretion in determination such matters a delicate balancing act. Procedural technicality was defined in ***James Mangeli Musoo vs Ezeetec Limited [2014] eKLR*** in the following terms:

> *A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decision in court matters. Undue regard to technicalities therefore means that the Court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and/or procedural in nature.*

The contexts in which this issue arose include failure to particularise election results, including the date of declaration and the manner declared, failure to enjoin an interested party, failure to draft pleadings according to the rules, failure to call deponents of affidavits for cross-examination, failure to lodge a Notice of Appeal at the Court of Appeal registry, the drafting of pleadings by unqualified persons and determining a petition based on unpleaded irregularities revealed during a scrutiny and recount.

5.1. Failure to Particularise Election Results

On the question of the omission to declare the particulars of election results, including the date of declaration and manner declared, there emerged two schools of thought. The first school of thought, guided by the dicta of the Court of Appeal in ***John Mututho v Jayne Kihara & Others***,[231] considered the requirement to declare the results of the elections mandatory in nature; therefore, a failure to particularise the election results was fatal to an election petition. This school of thought was championed by Onyancha J (as he then was) in ***Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others***,[232] and Karanja J in the case of ***Charles Maywa Chedotum & Another v IEBC & 2 Others.***[233]

The second school of thought, championed by Majanja J in ***Caroline Mwelu Mwandiku v Patrick Mweu Musimba & 2 Others***,[234] and ***Wavinya Ndeti v Independent Electoral and Boundaries Commission & 4 Others***[235] and cited with approval by Kimondo J in ***William Kinyanyi Onyango v Independent Electoral & Boundaries Commission & 2 Others,***[236] considered the failure to furnish results a procedural technicality, that should not stand in the way of substantive justice.

Majanja J, explaining his rationale for sustaining the petitions, acknowledged the mischief that the introduction of that rule (rule 10 of the 2013 Rules, now rule 8) was intended to cure, which was an insistence on strict compliance with form. Acknowledging further the requirement imposed on the

230 [2016] eKLR.
231 Nakuru Civil Appeal 102 of 2008.
232 [2013] eKLR.
233 Kitale High Court Election Petition 11 of 2013.
234 [2013] eKLR (Machakos Election Petition No.7 of 2013).
235 [2013] eKLR.
236 [2013] eKLR.

IEBC by the then Rule 21 (b) to furnish the election court with results within 14 days of being served with the petition, he was satisfied that in the circumstances, no injustice would be occasioned by the failure to set out the results. This reasoning was adopted by Githua J in the case of ***Sarah Mwangudza Kai v Mustafa Idd Salim & Others***[237] and by Lesiit J in ***Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 Others***.[238]

In the 2017 EDR cycle, the former approach was taken in the case of ***Jimmy Mkala Kazungu v Independent Electoral and Boundaries Commission and 2 Others,***[239] where the petition was struck out for non-compliance with Rule 8 (1) even though results were set out in supporting affidavit. In ***Mbaraka Issa Kombe v IEBC & 3 Others,***[240] the election court ruled that the provisions of Rule 8 (1) (c) and (d) and 12 (2) (c) and (d) were mandatory and therefore, while the Petitioner had given a brief overview and grounds in the petition, the results and the date of declaration were not disclosed anywhere. The Court asserted that the Petitioner was under an obligation to give a tabulation of results and date of declaration to allow for computation of time so that the Court could establish when the time for filing would start to run and end. This reasoning was adopted by the High Court in ***Martha Wangari Karua & Anor v the IEBC & 3 Others,***[241] ***Michael Gichuru v Hon. Rigathi Gachagua & 2 Others,***[242] ***Mwamlole Tchappu Mbwana v IEBC & 4 Others***[243] and by the Magistrate's Court in the case of ***Kitavi Sammy v IEBC & Others***[244] and ***Abel Kipkulei Kiptoo v. IEBC & 2 Others.***[245] Consequently, the petitions were struck out.

The latter approach was seen in decisions such as ***Washington Jakoyo Midiwo v IEBC & 2 Others,***[246] ***Thomas Matwetwe Nyamache v IEBC & 2 Others***[247] and ***Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,***[248] where the Court, faced with similar circumstances, declined to strike out the petition. In the ***Kazungu Kambi*** case, Korir J found that there was substantial compliance and therefore the Court declined to strike out petition. While acknowledging the two schools of thought, Korir J asserted that they were both correct to some extent and ruled that there was need to be mindful of the current constitutional dispensation which requires substantive justice to be done. Therefore, unless the petition was so hopelessly defective that it could not communicate the Petitioner's complaints and prayers at all, the Court should make certain that the petition is heard and determined on merits. Omondi J in ***Thomas Matwetwe Nyamache v IEBC & 2 Others***[249] considered that the failure to state the date when the results were declared and how they were declared did not go to the root of the petition. The Court ruled that the omission to state the date of declaration was a procedural lapse and the fact that the date of the declaration was not the fulcrum upon which the petition rested constituted a procedural technicality which did not go to the root of the petition. The Court therefore declined to dismiss it.

237 Malindi High Court Election Petition 8 of 2013.
238 Meru High Court Petition 5 of 2013.
239 Mombasa High Court Election Petition No. 9 of 2017.
240 Malindi High Court Election Petition No. 10 of 2017.
241 Kerugoya High Court Election Petition 2 of 2017.
242 Nyeri High Court Election Petition 2 of 2017.
243 [2017] eKLR (Mombasa Election Petition Number 5 of 2017).
244 Kitui Magistrates' Court Election Petition No. 2 of 2017.
245 Kilifi MCEP No. 5 of 2017.
246 Kisumu Election Petition 2 of 2017.
247 Kisii Election Petition 8 of 2017.
248 Malindi High Court Election Petition 4 of 2017.
249 Kisii Election Petition 8 of 2017.

This approach was also taken by the Magistrates' Court in the case of ***Hassan Jimal Abdi v Ibrahim Noor Hussein & 2 Others.***[250] The Court noted that Rule 8 did not indicate the format in which the election results should be pleaded and did not specify whether one should just mention the winner or plead the whole list of candidates. In light of this ambiguity, the Court considered it untenable to hold the petition fatally defective. The Court also opined that the issue ought to have been brought to the fore at the onset and not during submissions as was done by the 1st Respondent. Moreover, the parties had demonstrated that they had understood what the petition was about and therefore to challenge the jurisdiction of the Court on the basis of a defective petition at the conclusion only clouded the issues and did not go to the root of the petition. The Court therefore declined to entertain an objection to its jurisdiction on this ground.

This conflicting jurisprudence was acknowledged by the Court of Appeal in ***Martha Wangari Karua v the IEBC & 3 Others.***[251] In the assessment of the Court, proponents of the first school of thought consider non-compliance with the said rule to be a violation that goes to the root of the petition, adversely affecting its substance. This meant that non-compliance was an incurable defect as it detrimentally affected the timelines within which an election petition must be heard and determined.[252] The Court classified proponents of the second school of thought as those who acknowledge the mandatory nature of the rules, but who hesitate to take steps to strike out such pleadings by anchoring the petition on rule 4 of the Election Petition Rules and Article 159 (2) (d) of the Constitution.

To understand the effect of non-compliance, the Court evaluated the purpose of pleadings in an election petition. These it outlined as providing an opportunity to the respondents to see the case alleged against them, and secondly, to set out with sufficient clarity the dispute and enable the Court to properly appreciate and adjudicate the matter. Thirdly, pleadings were considered necessary to assess whether the petition substantially complied with the provisions of the law.

The Court noted that it was not contested that the result of the election and date of declaration were not provided by the appellant in the petition or in any of the supporting documents. However, this information was comprehensively provided by the respondents. Consequently, at the time the petition was struck out by the Court for not supplying the results and the date of declaration, all the information required by rule 8 (1) was before the Court.

The Court also reiterated the obligation of parties to an election petition or their advocates, as set out in Rule 5 of the Election Petition Rules, to assist the Court in furthering the overriding objectives set out in rule 4, i.e. the just determination of the dispute and the efficient and expeditious disposal of the petition. The 2nd Respondent had, through a replying affidavit attached a copy of the declaration of results for Kirinyaga County and averred that the 3rd respondent had garnered 161, 343 votes against the Petitioner's 122,091. The 3rd Respondent had been declared the winner and issued with a certificate dated 10 August 2017. This information was undisputed as it was brought before the Court by the IEBC in exercise of its statutory duty. The appellate court was therefore baffled as to why the Trial Court ignored the information simply because it did not come from the Petitioner. Since the date of declaration was known as 10 August 2018, it was clear that the petition was filed within 25 days of the declaration of results.

250 [2018]eKLR.
251 Nyeri EP Appeal 1 of 2017.
252 At page 9 of the decision.

The Court of Appeal was also puzzled by the trial judge's conclusion that it was impossible to tell whether the petition had been filed within time. It was their assessment that the construction assigned by the Trial Court to the said rules was too artificial and absurd, and that a plain and ordinary construction ought to have led to the conclusion to sustain the petition and determine it on merit, unless it was irredeemably defective. Further, the Court urged that it was necessary for the Trial Court to address its mind to the reasonableness and implication of sustaining a petition against the effect of an abrupt termination of the same. The appellate court considered it unfortunate that the petition had been terminated for non-compliance, without the Court addressing its mind to the nature, extent and import of such a route.

The Court also pointed out that failure to comply with rule 8(1) did not mean that the petition was invalid since a reading of Article 159 (2) and the Elections Act was to the effect that unless the results and the date of declaration could not be ascertained, the condition was satisfied. The Court found nothing in the language of the statute to suggest that the documents on the file courtesy of any other party than the Petitioner can or should be ignored in order to give life to Rule 8 (1) (c) and (d). The Trial Court was therefore required to place substantive justice over procedural considerations, particularly in election petitions, which are in the nature of public interest litigation.

The Court of Appeal was also unconvinced that allowing introduction of the date of declaration and the results would be tantamount to amending the pleadings out of time. Since the alleged omission was information available to the parties, the Court analogised this to a situation where a non-existent question was raised by the respondents and answered by the Trial Court in a manner prejudicial to the rights of the appellant, making it a distinction without a difference.

The Court was also not satisfied that the omission went to the root of the Court's jurisdiction, as the petition did not concern the date of the declaration or the fact that the 3rd Respondent had been declared winner, but rather was centred around the manner in which the 3rd Respondent won the election. Since the jurisdiction of the Court stemmed from Article 87 (2) of the Constitution as read with section 75 of the Elections Act, the failure to comply with the rules did not affect the right of the Court to make a determination on the petition.

The appellate court adopted the reasoning in the COA decision in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others*** **[2013] eKLR** to the effect that deviations from procedure which did not go to the root of the jurisdiction of the Court or occasion a miscarriage of justice ought not to be elevated to a criminal offence attracting a heavy punishment of the offending party. Since procedural rules are meant to facilitate adjudication of disputes, courts should elevate substantive justice over procedural rules, which was the basis for the statement in Article 159 (2) of the Constitution that disputes be determined without 'undue regard' to technicalities. The learned Judges of Appeal endorsed the approach taken by Korir J in ***Samwel Kazungu Kambi v Nelly Ilongo & 2 Others*** **[2017] eKLR** to the effect that the Court ought to be mindful that the current constitutional dispensation requires substantive justice and that unless an election petition was so hopelessly defective that it could not communicate all the Petitioner's complaints and prayers, the Court should ensure that the petition is heard and determined on merit. A similar line of reasoning was adopted by Maina J in ***Washington Jakoyo Midiwo v Independent Electoral and Boundaries Commission & 2 Others.***[253]

253 Kisumu Election Petition 2 of 2017.

The Court was however keen to make it clear that it was not to say that a petition could not be struck out at all for a procedural infraction, where the same goes to the root of the dispute. The Court stated that in instances such as when filed outside the constitutional and statutory timelines, the election petition was irredeemably defective. The Court therefore found that the exercise of discretion by the trial judge was erroneous as it was unreasonable to allow a party to complain about irregularities which the respondents had corrected and particularly after the pre-trials were done and the dates for substantive hearing fixed. The omission by the Petitioner was not incurable under Article 159 of the Constitution, and the Court ought to have addressed its mind to the gravity of the allegations contained in the petition before striking out the same.

Similarly, in ***Mbaraka Issa Kombe v IEBC & 2 Others,***[254] the Court of Appeal was called upon to determine whether the Trial Court had exercised its discretion properly in striking out the petition. The COA began by acknowledging that the Rules require that the results appear on the face of the petition, and that election results meant the declared outcome of the casting of votes by voters in an election. The Court also noted that the Appellant, save for naming the candidates who vied, only set out the results of the 3rd Respondent in the petition. However, unlike the Trial Court, the COA found that the non-compliance did not render the petition defective. This was because the Appellant disclosed the declared result in the affidavit supporting the petition by annexing Form 35. The Court took the view, citing the decision of the Uganda Court of Appeal in ***Castelino v Rodrigues,***[255] which was reiterated in the ***Mwenda v Munya*** decision in the Supreme Court, that as a rule, reference to an annexure has the effect of incorporating the contents of the annexure in the document. Therefore, the supporting affidavit was part and parcel of the petition and the reference of the annexure in question to the supporting affidavit incorporated the contents of Form 35 into the petition.

Consequently, the Court found that the trial judge erred in ignoring the appellant's supporting affidavit and Form 35 annexed thereto. While the results were not set out on the face of the petition, neither the Court nor the Respondents were in the dark regarding the results. Therefore, the omission went neither to the jurisdiction of the Court or to the root of the dispute nor did it prejudice the Respondents. The Court also ruled that the Trial Court had erred in relying on the decision in ***John Michael Njenga Mututho v Jayne Njeri Wanjiku Kihara & 2 Others***[256] which was decided under the previous constitutional dispensation and the repealed NAPE Act. Moreover, the facts in the cited decision were distinguishable from those in the present case since the petition in the former did not set out the election results at all, thereby placing the Court as well as other parties in a position of uncertainty with respect to the issue in dispute.

Contrary to the finding of the learned trial judge, the Court also found that the petition did state the date of the election as well as the date of declaration thereof at paragraphs 4 and 11. For the above-stated reasons, the appellate court reached the conclusion that the learned trial judge misdirected himself in striking out the appellant's petition and the appeal was consequently allowed.

The approach taken by the COA appears to be a prudential one, and one that is cognisant of the public interest nature of election petition, which militates in favour of sustaining rather than striking out a petition for non-compliance with procedural rules. While acknowledging the importance of compliance with the rules, the COA also assessed the impact of non-compliance on the parties to

254 Malindi Election Petition Appeal 3 of 2017.
255 (1972) EA 233.
256 [2008] 1KLR.

the litigation to determine whether they were so prejudiced by the omission as to infringe on their rights to fair hearing by precluding them from knowing the case they are called to respond to. This is an undesirable consequence of failure to comply with the rules. Where the COA found that there was no prejudice occasioned to the parties, it declined to strike out the petition.

However, the COA has pronounced itself clearly in the ***Karua*** appeal that an election court should not hesitate to strike out a petition where non-compliance with procedural rules goes to the root of the dispute. While it cited as an example the filing of a petition outside the constitutional timelines, it is likely that a petition that does not disclose the results at all, either on the petition itself or any of the supporting affidavits, and where the said results are not availed by the Respondents as in the two instances above, may be ripe for striking out for violating the right to fair hearing under Article 50 of the Constitution. A violation of the right to fair hearing would, in my view, go to the root of the dispute.

5.2. Failure to Enjoin an Interested Party

Just like the failure to particularise election results, two schools of thought emerged around this omission by a Petitioner. Whereas the majority of the cases in which this was an issue revolved around the failure to cite the deputy governor in a petition challenging the election of a governor, there were instances where the Court had to rule on the failure by a Petitioner to cite the party whose election was challenged.[257]

The first school held that failure to join an interested party as a respondent was not fatal to the petition. In ***Baridi Felix Mbevo v Musee Mati & 2 Others***,[258] the High Court sitting on appeal addressed the question of whether the election court had erred in failing to allow a Preliminary Objection challenging the validity of the petition which did not cite the Returning Officer who had conducted the election. The Court was guided by Rule 5 (1) of the Election Petition Rules, which gives the Court jurisdiction to determine the effect of any failure to comply with the Rules at its discretion and in accordance with Article 159 (2) (d) of the Constitution. The High Court ruled that the omission to name the Returning Officer did not substantially affect the substance of the petition and therefore the petition complied with Rule 8 (1) of the Election Petition Rules. The petition was therefore properly before the Trial Court and this ground of appeal was dismissed. A similar finding was made in ***Sumra Irshadali Mohammed v IEBC & Mawathe Julius Musili.***[259] In the case of ***Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 Others*** **[2017] eKLR,** the Court held that failure to enjoin an interested party, (in this case the deputy governor) was not fatal to the petition since the deputy governor is not directly elected by the voters in the county.

Rule 2 of the Election Petition Rules, by referring to a respondent to include the person whose election is complained of, was therefore taken to mean the governor, since the deputy governor only assumes office under Article 182 where office of governor falls vacant. Therefore, according to Muchelule J, unless an election offence or omission was alleged against the deputy governor during the election of the governor, they were not a respondent to the petition. The governor is made a respondent as they cease to hold office if election is validly and successfully challenged, with the deputy governor being collateral damage. Ong'udi J. previously raised this argument in the case of ***Kithinji Kiragu v***

257 See for example *Joel Makori Onsando & 2 Others v IEBC & 3 Others* Kisii High Court Election Petition 3 & 7 of 2017 (consolidated); *James Kirimi Karubiu v IEBC & Another* Kerugoya Election Petition 3 of 2017.

258 Kitui Election Petition Appeal 1 of 2018.

259 Nairobi High Court Election Petition 2 of 2017.

***Martin Nyaga Wambora & 2 Others* [2013] eKLR**, where she had asserted that the deputy governor was not a necessary party in the following words:

> *This Court's view is that the provision of Article 181 and 182 concern a validly elected Governor. If the election is challenged and the Governor is found to have been unlawfully elected, then it means he/she has to vacate office alongside his/her deputy. The Deputy Governor could not therefore be enjoined as a party as his/her nomination is not in question.*

This argument was adopted by Achode J in the case of ***Hassan Omar Hassan & Another v Independent Electoral & Boundaries Commission & 2 Others.***[260] The learned judge ruled that the joinder of the deputy county governor was not crucial since in the event of an election petition against the election of a governor resulting in the nullification of the results, the deputy suffers the same fate, no matter how compelling their case is, since they would have assumed office by virtue of an irregularly declared ticket.

The competing school, well-articulated by Thande J in ***Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 4 Others,***[261] stood for the proposition that their omission from the petition makes the petition fatally defective. Three reasons were advanced for this position. Firstly, the Court rejected the assertion, espoused in the above-mentioned decisions, that the deputy governor is nominated and not elected, since Article 180 (6) of the Constitution makes it clear that there is no separate election, and the person nominated by the elected governor is declared to have been elected as deputy governor. This line of reasoning was adopted by Korir J in ***Samwel Kazungu Kambi v Nelly Ilongo and 2 Others***[262] in the following terms:

> *93. The makers of the Constitution were then faced with the dilemma of ensuring that the deputy governor received the mandate of the people. Hence the decision to have the deputy governor elected together with governor.*
>
> *94. In order to ensure that the nomination of the deputy governor met the constitutional principle which requires that all holders of elective public offices receive the mandate of the people, two elections were designed. One election is that of the governor which is through the popular vote. The other election is that of the deputy governor which is through nomination by the governor.*
> *…*
> *97. In my view, the manner in which the Constitution is drafted does not envisage a situation in which the election of the governor is nullified and that of the deputy governor remains undisturbed. Two elections are indeed held for the governor and the deputy; one by popular vote and another one by nomination but they are so conjoined to the extent that once the election of the governor is invalidated, that of the deputy governor is also voided. Removal of a governor from office through an election petition may have been one of the reasons behind the enactment of Article 182(4) of the Constitution which provides for the possibility of both the office of the county governor and that of the deputy governor becoming vacant thereby requiring an election for the office of the county governor. It is thus not possible for a deputy governor to stick around once the election of the nominating authority (the governor) is invalidated.*

260 [2017] eKLR.
261 [2017] eKLR.
262 Malindi EP 4 of 2017.

Secondly, Thande J asserted that it would be contrary to the rules of natural justice to condemn a party unheard. At paras 56-58, the Court restated the steadfastness with which the right to be heard for a person likely to be adversely affected by a decision had been upheld by the courts in ordinary litigation and asserted that the same steadfastness ought to be applied to electoral disputes. The Court further opined that to hear the petition without the participation of the deputy governor would be to go against the principles of natural justice and any such decision, no matter how "right" it would appear, must be declared to be no decision. This view was endorsed by Omondi J in ***Joel Makori Onsando & 2 Others v IEBC & 3 Others***[263] and by Mshila J in ***James Kirimi Karubiu v IEBC & Another,***[264] where the petition was struck out for failure to cite the winner of the Kirinyaga senatorial election which was the subject of the petition.

Thirdly, and citing the decisions of the Supreme Court in ***Moses Mwicigi & 14 Others v IEBC & 5 Others***[265] and the older COA decision in ***Kipkalya Kiprono Kones v R & Anor ex-parte Kimani wa Nyoike & 4 Others,***[266] Thande J was emphatic that a deputy governor, having come into office through the law can only be removed from office through a process set out in law, i.e. an election petition. The Court maintained that to assert that the deputy governor need not be a party to the proceedings would offend electoral law as the occupant of an office established by law can only be removed by a procedure known to law, i.e. through an election petition.

In response to the assertion that since the Petitioner had no case against the deputy governor, there was no need to enjoin them, the Court analysed the provisions of Article 180 (6) of the Constitution by dint of which upon the election of a governor, the deputy governor was also declared to have been elected and issued with a Form 37D. The Court queried the process, instrument or order through which the certificate of election issued to the deputy governor would be vacated if they were not made a party to the proceedings. In the words of Korir J, to attempt to nullify the election of a governor without citing the deputy governor would be to attempt invalidation of the election of the deputy governor through the backdoor.

The Court was emphatic that without making the deputy governor a party to such a proceeding, the holder of that office would be well within their rights to decline to vacate office upon the nullification of the election of the governor. This reasoning was founded on the fact that Article 182 (1) of the Constitution only makes provision for vacancy in the office of the governor and in such instances, the deputy governor is entitled to assume office under Article 182 (2) of the Constitution. There is therefore no law that bars the deputy governor from assuming office of the governor upon a vacancy in that office arising by virtue of a nullification of the election of the governor.[267] The Court concluded that failure to cite the deputy governor as a respondent rendered the petition incurably defective, and it was struck out.[268] Korir J reached a similar conclusion in the ***Kazungu Kambi Case:***

263 Kisii High Court Election Petition 3 & 7 of 2017 (consolidated), at paras 61-62.
264 Kerugoya Election Petition 3 of 2017.
265 [2016] eKLR.
266 [2006] eKLR.
267 These arguments were raised by the Interested Party in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* SC Petition 7 of 2018 where he faulted the Trial Court for ordering a by-election on the basis of want of qualification of the governor without considering that his qualifications were intact and he was entitled to assume office under Article 182 (2) of the Constitution (see paras 26 & 27 of the judgment). Maraga CJ & P dismissed these arguments in his dissenting opinion at para 165.
268 The Interested Party in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* SC Petition 7 of 2018 contended that the petition was defective as he had not been enjoined as the deputy governor. The want of joinder was not raised as an issue either at the High Court or the Court of Appeal. While he was admitted as an interested party, the want of form of the petition was not in issue.

> *97. In my view, the manner in which the Constitution is drafted does not envisage a situation in which the election of the governor is nullified and that of the deputy governor remains undisturbed…*
> *98. Therefore, a person who seeks to remove a governor from office through an election petition must make the deputy governor a respondent, for a successful petition not only affects the election of the governor but also invalidates the election of the deputy governor. Failure to include the deputy governor as a respondent will therefore render such a petition incurably defective for it seeks to invalidate the election of the deputy governor through the back door. The fate of such a petition is to have it struck out or amended, if the constitutional timeline for filing it has not lapsed.*
> *…*
> *104. Having established that a deputy governor is elected, the only way to challenge his or her election is through an election petition. As opined by Thande, J, the only way to remove a deputy governor from office is through constitutional provisions. It is not sufficient to say that since the election of a governor has been nullified, then the office of the deputy governor becomes vacant. If this was so, then the impeachment of a governor would lead to the vacation of office by the deputy governor. I therefore agree with Thande, J that failure to make the deputy governor a respondent in a petition challenging the election of a governor is a fundamental defect that would lead to the striking out of the petition…*

The idea that the office of the deputy governor was merely collateral to that of the governor and therefore their fate would abide that of the governor was also rejected in the case of ***Joel Makori Onsando & 2 Others v IEBC & 3 Others.***[269] In asserting this, Omondi J was guided by Article 182 (2) of the Constitution which provides that where a vacancy occurs in the office of governor, the deputy governor would assume office as a county governor for the remainder of the term of the county governor. The petition in this case was also struck out on similar grounds.

As noted by Korir J, the inconsistent jurisprudence of the High Court on this issue is yet to be placed on the table of the higher courts for determination. However, the arguments lodged by Thande J and supported by Korir J appear to accord not only with constitutional principles of dignity and fair hearing, but also with the existing jurisprudence on the removal of an elected official from office. It is noteworthy that in ***Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed &2 Others,***[270] the petition was determined without enjoining the deputy governor as a party. The election was nullified and the finding upheld at the Court of Appeal. It was not until the matter went to the Supreme Court that the deputy governor became party to the proceedings after the Supreme Court granted his application to be enjoined as an interested party. The findings of the two superior courts were eventually overturned by the apex court.[271]

5.3. Failure to Call Deponents of Affidavits for Cross-examination

Affidavit evidence is crucial in the determination of an election petition as they form the basis for auditing the complaints raised in a petition to determine whether an election was conducted in accordance with the Constitution and electoral law. Rule 12 of the Election Petition Rules provides that each witness is required to swear an affidavit which forms part of the record at the hearing and

269 Kisii High Court Election Petition 3 & 7 of 2017 (consolidated), at paras 61-62.
270 Nairobi Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017).
271 See SC Petition 7 of 2018.

is treated as the deponent's evidence in chief for purposes of examination and cross-examination. Nevertheless, the parties may, by consent, accept not to cross-examine the deponent but have their evidence admitted as presented in the affidavits. The rules however make no provision for how the Court is to treat the affidavits of witnesses who are not, without prior consent by the parties, called as witness to test the accuracy of the averments contained in their affidavits.

When the issue came up for determination in 2013 in ***Moses Wanjala Lukoye v Benard Wekesa Sambu & 3 Others,***[272] Gikonyo J. held:

> *The only safeguard design of the law is either the Court does not consider such evidence at all or exercises its discretion under section 80 (1) and (2) of the Elections Act and summon the witnesses. It must be appreciated that rule 12 of the election rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the Petitioner intends to call as a witness. As an election petition is not an interlocutory application, but a substantive cause, affidavit evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If, therefore, it bears repeating, the Petitioner does not call the deponents to testify; their evidence should not be considered, … The Court will not consider the evidence of witnesses who were not called to testify.*

Rather than having the affidavits struck out, the Court in ***Noah Makhalang'ang'a Wekesa v Albert Adome & 3 Others***[273] held that the consequence of failing to have the witnesses called for cross-examination is to have the affidavits treated as inconsequential. The Court stated:

> *In as much as the rest of the Petitioner's witnesses who deponed supporting affidavits were not availed in court for cross-examination for purposes of testing the veracity of their averments, their evidence though forming part of the Petitioner's case may be treated as being inconsequential and devoid of probative value …*

Similarly, in ***Josiah Taraiya Kipelian Ole Kores v Dr David Ole Nkendienye & 3 Others,***[274] the Court was unconvinced by the Petitioner's argument that there was no rule of law that required verbal evidence for an affidavit to be credible. The Court ruled that:

> *…an election petition is no ordinary suit and the facts deponed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross-examination of the deponent. Failure to attend court for the testing of such allegations in such a deposition makes the affidavit just that, mere allegations. It is evidence without any probative value.*

In 2017, ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others,***[275] Mabeya J considered as a preliminary issue the impact of the failure by the 1st Respondent to testify and the failure by the IEBC to call as witness Presiding Officers in respect of stations where the Petitioner alleged undue influence of assisted voters by Presiding Officers. The Court reviewed the jurisprudence of the election courts on this issue from the 2013 EDR cycle as well as the article on 'the empty chair doctrine' ***'Revisiting the Missing Witness Inference – Quieting the Loud Voice from the empty***

272 [2013] eKLR.
273 [2013] eKLR.
274 [2013] eKLR.
275 Nairobi Election Petition 14 of 2017(Consolidated with Garissa HCEP No. 3 of 2017).

Chair' by Robert H. Stier Jr.[276] cited by the Petitioner. The doctrine is to the effect that where a litigant fails to produce an available witness who might be expected to testify in support of their case, the fact finder is permitted to draw an inference that had the witness chair been occupied, the witness would have testified adversely to the litigant.

While acknowledging this traditional view, the Court noted that the inference does not supply affirmative proof but it affects the credibility of the evidence. This was the approach taken in ***Jacinta Wanjala Mwatela v IEBC & 3 Others*** [277] and in ***Noah Makhalang'ang'a Wekesa v Albert Adome & 3 Others.***[278] Departing from the decision of Gikonyo J in ***Moses Wanjala Lukoye v Benard Wekesa Sambu & 3 Others,***[279] Mabeya asserted that such affidavits are not to be struck out or expunged, but without an opportunity to confirm the veracity of the witness testimony through cross-examination, the probative value of such affidavits is watered down and the party against whom allegations are made in the affidavit is denied the right to cross-examine the witness, which denies them their right to fair trial.[280]

This was the approach taken by Ngugi J in ***Clement Kung'u Waibara v Annie Kibeh***[281] and by Onyiego J in ***Josiah Taraiya Kipelian Kores v Joseph Ole Lenku & 4 Others.***[282] In the ***Waibara*** case, affidavits of the Petitioner were struck out for not having been served upon the Respondents on time. In the latter case, the Petitioners sought to rely on the affidavit of Dr Noah Akala Oduwo, who prepared an analysis of results from Kajiado County from the partial scrutiny ordered by the Supreme Court in the ***2017 Raila Odinga Case.*** Both courts proceeded to determine the issues at hand without the said affidavit evidence and where there the Petitioners referred to the said evidence in their petition or evidence, without these witnesses being called to testify, the Court considered their evidence to be of no probative value. Therefore, while the affidavits were not expunged from the record, the Court attached little weight to their contribution to the allegation made in the petitions.

The CoA chimed in on this issue as well in ***Alfred Kiptoo Keter v Bernard Kibor Kitur & Independent Electoral & Boundaries Commission,***[283] where the CoA ruled on the probative value of the original Petitioner who had been allowed to withdraw from the petition but who was not cross-examined on the contents of his affidavit which remained on the record. The Court, citing the case of ***Moses Wanjala Lukoye v Benard Wekesa Sambu & 3 Others,***[284] ruled that it was of no probative value as a result. In ***Sumra Irshadali Mohammed v IEBC & Another,***[285] the CoA faulted the trial judge for making a finding that the evidentiary burden had not shifted despite the fact that the Returning Officer did not appear to be cross-examined on the contents of his replying affidavit. In the view of the Court, failure to appear to be cross-examined meant that there was no response to the petition. Since the issues raised by the Petitioner were of such a nature as to require a rebuttal, the Court took the view that the Trial Court erred in referring to the Returning Officer's affidavit which was not admitted by the parties by consent. The appeal was therefore allowed and this decision was upheld on the further appeal to the Supreme Court.

276 44 Md. L. Rev 137 [1985]
277 [2013] eKLR.
278 [2013] eKLR.
279 [2013] eKLR.
280 At para 42 of the judgment.
281 [2018] eKLR.
282 Kajiado Election Petition 2 of 2017.
283 Election Appeal 21 of 2017.
284 [2013] eKLR.
285 Election Petition Appeal 22 of 2018.

In ***John Munuve Mati v RO Mwingi North & Others,***[286]the Appellant was dissatisfied with the finding of the Trial Court that the Petitioner had not discharged his burden of proof in respect of allegations of partiality on the part of Presiding Officers. The appellant had alleged in his petition that Presiding Officers had during their training been directed to lead voters to cast their votes for the 3rd Respondent's party. It was also alleged that Presiding Officers misled voters requiring assistance to vote for the 3rd Respondent's party as the party representing the Kamba community. These claims were refuted by the 1st and 2nd Respondents. In finding that the allegation was not proved, the Court noted that none of the witnesses who testified were at the training of Presiding Officers to testify as to the exact content of the training. There was also no specific identification of persons alleged to have misled assisted voters, and further, no proof that the Presiding Officers in the impugned polling station were recruited for purposes of influencing people to vote for the 3rd Respondent.

On appeal,the Appellant argued that the trial judge had erred in arriving at such a conclusion whereas the 1st and 2nd Respondents had not called Presiding Officers to testify refuting these allegations. However, the COA was not satisfied that the trial judge had reached the wrong conclusion. The failure to call the Presiding Officers, as had been noted by Mabeya J in ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others***[287] was not substantive proof of the allegation. As urged by the Respondents in this case, the COA found that it does not invariably follow that failure by a respondent to call a witness means that the petition must be allowed. The Petitioner was required to first adduce evidence of the nature that would entitle him to judgment if the Respondent did not adduce any evidence in rebuttal. Since there was no evidence on record of any incident of partiality at the polling station and no police report was made either, which was unlikely given the nature of the allegation, the appellate court ruled that the Trial Court did not err in finding that the allegation of partiality was not proved.

5.4. Failure to Draft Pleadings according to the Rules

As indicated above, the Court has to balance the compliance with the rules and the certainty and predictability created by the rules against the need to ensure that substantive justice is done in considering the impact of non-compliance with procedural requirements. While some judges are emphatic that failure to comply goes to the root of the petition, others favour a more liberal approach, choosing to assess each instance of non-compliance on its merit by assessing whether it goes to the substance of the dispute.

From the 2013 jurisprudence, it appears that the election courts took divergent approaches on the question of failure to comply with the Election Petition Rules. On one hand, there are those who considered a pleading fatally defective for non-compliance with the Rules. Such was the case in ***Ismael Suleiman & Others v Returning Officer, Isiolo County & 4 Others***[288] where a petition accompanied by affidavits which were properly commissioned was struck out. Similarly, in ***M'Nkiria Petkay Shen Miriti vs Ragwa Samuel Mbae & 2 Others***[289] (2013) eKLR, Lesiit J held that the provisions of ***rule 8*** (the then rule 10) are not mere technical requirements but are substantive and go to the root of the issues in an election petition:

286 Election Petition Appeal 5 of 2018.
287 Nairobi Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017).
288 [2013] eKLR.
289 Meru Election Petition of 2013; [2013] eKLR.

> *Rule 10 (now rule 8) are not mere technical requirements laying down procedural form and content of intended election petitions but are substantive as they go to the root and substance of the issues and matters prescribed upon. Since the rules, like the Elections Act are special legislation created to give effect to the overriding objective mentioned in Rule 4, which is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act. Every rule is intended to achieve a required result geared towards, inter alia, expedition in the resolution of petitions.*

In the context of failure to file competent affidavits in support of a petition, some election courts declined to rule that such non-compliance was fatal to the petition.[290] However, the Court of Appeal in ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 Others***[291] found that the requirement that a petition be accompanied by a supporting affidavit was a mandatory requirement.

The rationale for striking out pleadings that do not comply with procedural rules, even in light of Article 159 (2) (d) mandating courts not to pay undue regard to technicalities, was articulated by the Supreme Court in ***Zacharia Okoth Obado v Edward Akong'o & 2 Others***[292] in the following terms:

> *Article 159(2)(d) of the Constitution simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.*

In 2017, the latter approach found expression in ***Joel Makori Onsando & 2 Others v IEBC & 3 Others,***[293] where the Court had to consider a preliminary objection seeking to strike out the petition for various non-conformities to procedure. These included non-compliance with Rule 8, by referring to parties in the petition who were not cited as respondents and failure to enjoin the Deputy Governor. The Court expressed the view that:[294]

> *…each procedural requirement under rule 8 has a different role, and there are certain procedural lapses which may not necessarily go to the substance of the dispute, that to pay strict fidelity to them would result in deferring to procedural justice in preference to substantive justice.*

Similarly, in the case of ***Tom Onyango Agimba v IEBC & 2 Others,***[295] a Preliminary Objection was filed seeking to strike out the petition which inadvertently referred to Hezbon Omondi in the Preamble to the petition, who had been the ODM candidate for the National Assembly election in Embakasi Central Constituency and made references in several portions of the petition to Embakasi Central Constituency. However, in the heading of the petition, the correct constituency was indicated as Embakasi West and the supporting affidavits and the affidavits of all the witnesses the Petitioner proposed to call were made in respect of Embakasi West Constituency, whose election the Petitioner was challenging. The Petitioner contended that the anomalies were the result of a mix-up in the firm of Agimba & Associates Advocates who were also acting for Hezbon Omondi, a candidate for the

290 See for example *Eng. Peter Kimori Maraga & Anor v Joel Omagwa & 2 Others* Kisii Election Petition No.7 of 2013 and *Henry Okello Nadimo v IEBC & 2 others* (2013) KLR, where failure to file competent affidavits was not considered fatal to the petition.
291 [2014] eKLR.
292 [2014] eKLR.
293 Kisii High Court Election Petition 3 & 7 of 2017 (consolidated).
294 At para 23.
295 Nairobi Election Petition 18 of 2017.

Embakasi Central Constituency. The Court was therefore called upon to determine whether the error involving the name Hezbon Omondi and references to Embakasi Central in the body of the petition were fatal to the petition, in light of the explanation rendered by the Petitioner.

The Court ruled that since it was not open to the Petitioner to amend the petition as the 28-day window had expired when the anomaly was brought to his attention, it was understandable why he was unable to file an application for amendment within the strictures of Section 76 (4) of the Elections Act. While it was the duty of the Petitioner's advocate to ensure that the petition met the requirements set by the Election Petition Rules, it was an inescapable fact that blunders occur even with the best of intentions. Since there was no evidence that the Petitioner purposed to overreach or was merely out on a fishing expedition, and there was substantial compliance in terms of content, the Court was inclined to accord the Petitioner the opportunity to have the typographical errors corrected to facilitate a hearing on merit. Moreover, it was clear that no prejudice would be occasioned to the Respondents since they had put in their responses with full knowledge that the petition was in connection with Tom Onyango Agimba, a candidate in the Embakasi West parliamentary elections, and an amendment would therefore not affect or alter the substance of the Petition. In consonance with the constitutional imperative that the Court go for substance rather than technicalities set out in Article 159 (2) (d) of the Constitution, the Preliminary Objection was dismissed and an order given directing that any references to Hezbon Omondi and Embakasi Central be amended to read Tom Onyango Agimba and Embakasi West Constituency respectively.[296]

However, an analysis of the rulings of the courts indicates that a great deal of weight was attached to compliance with the procedural imperatives. Many petitions were struck out for not complying with procedural guidelines stipulated in the Election Petition Rules, and in particular Rules 8 and 12. In ***Joel Makori Onsando & 2 Others v IEBC & 3 Others,***[297] the election court, having evaluated the myriad of defects identified in the petition, found that neither amendment nor invoking Article 159 (2) (d) of the Constitution offered a cure. The Court deprecated the petition for a display and exhibition of scant respect for the rules by the 3rd Petitioner and as such, he was not deserving of any indulgence. The petition was therefore struck out. It was the view of the Court that to allow an amendment would be unfair and unjust to the Respondents and further, that to give a blanket cover invoking Article 159 (2) (d) of the Constitution when the procedural omission had an impact on the just determination of the dispute would be to entertain incompetent pleadings.

In ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others,***[298] the Court noted that the 1st Respondent filed a Replying Affidavit as well as witness affidavits in response to the petition. Despite this being contrary to Rule 11 of the Election Petition Rules, which sets out the format of a response to a petition, the Court treated the Replying Affidavit as a response and allowed the case to proceed on merit. However, COA found that the failure to comply with Rule 11(8) of the Election Petition Rules was 'a grave default that would have entitled, nay required, the learned judge to exclude the appellant from the proceedings as a party.'[299]

296 See also *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC Eldoret High Court Election Petition 1 of 2017* where the Court declined to strike out the petition for non-compliance with Rules 8 and 12.

297 Kisii High Court Election Petition 3 & 7 of 2017 (consolidated).

298 Nairobi High Court Election Petition 14 of 2017(Consolidated with Garissa HCEP No. 3 of 2017).

299 *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* Election Petition Appeal 2 of 2018, at page 17.

In ***David Wamatsi Omusotsi vs Returning Officer, Mumias & 2 Others,***[300] the Court was called to rule on the competency of a petition which was supported by defective affidavits, contrary to the requirements in Rules 8 and 12 of the Election Petition Rules. The Petitioner's supporting affidavit had been commissioned by a law firm rather than a Commissioner for Oaths and the signatures appearing alongside the Commission's stamp were also demonstrated to be forgeries. The witness affidavits were also attached to the Petitioner's supporting affidavit, rather than being filed separately as required by Rule 12 (3). The Petitioner did not make an application to file proper affidavits within the window for filing. Since the Oaths and Statutory Declarations Act requires affidavits to be commissioned by an advocate who is also a commissioner for oaths and not a firm, the affidavit was not properly commissioned. In considering the effect of these defects on the fate of the petition, the Court concluded:[301]

> *An affidavit can only be commissioned by a commissioner for oaths and officials of the Court allowed to do so under the Act…the petition as filed is not supported by the affidavit of the Petitioner as required by rule 12 (1) (b), of the Elections Rules. It does not contain affidavits of the proposed witnesses as required by Rule 12 (4) of the Elections Rules. The petition thereby does not comply with the mandatory provisions of the law. A petition filed without the said documents is not a competent petition. The petition is a still birth that should not be allowed to see the light of day. The petition is accordingly struck out with costs to the Respondents.*

In ***Hamzah Musuri Kevogo v IEBC & 3 Others,***[302] the Court declined to strike out a petition which was supported by an affidavit signed in Nairobi but commissioned in Kakamega, asserting that it was a defect that did not go to the substratum of the petition. In so doing, the Court considered the defect curable under section 72 of the Interpretation and General Provisions Act since it was neither misleading nor prejudicial to the Respondents in their defence. Moreover, the Court asserted that there was nothing in Kenyan law that stipulated limitations on where a commissioner for oaths can take oath. Since he could do so in any part of the country, there was nothing wrong with taking oath in Kakamega where the affidavit was signed in Nairobi.

In ***James Kirimi Karubiu v IEBC & Another,***[303] the validity of the petition was challenged for several reasons: firstly, the Petitioner filed an election petition disguised as a constitutional petition as its principal grievance was that the senatorial elections for Kirinyaga County were not conducted in accordance with the Constitution and electoral laws. Secondly, the petition was unclear as to what remedies were being sought as the Petitioner had listed the prerogative orders of judicial review, punishment for contempt of court, infringement of constitutional rights as well as remedies which could only be granted in an election petition. Thirdly, the Petitioner had not complied with section 78 of the Elections Act which mandatorily required a Petitioner to pay security for costs. Finally, the petition was impugned for failure to cite the winner of the Kirinyaga County senatorial election as a Respondent.

On the first issue, the Court was satisfied that on a perusal of the petition, it was an election petition disguised as a constitutional petition. Moreover, the remedies sought by the Petitioner could only be granted in an election petition. Therefore, it had properly been gazetted as an election petition. Secondly, the Court found that the petition as filed lacked clarity of content from the multiplicity

300 Kakamega High Court Election Petition No. 9 of 2017
301 At para 45.
302 Kakamega Election Petition 11 of 2017.
303 Kerugoya High Court Election Petition 3 of 2017.

of reliefs sought and the petition did not conform to the rules relating to the content of an election petition.

Thirdly, the Petitioner had defaulted in depositing security for costs. Since Section 78 (3) of the Elections Act provided that in the event of such an omission no further proceedings were to be heard on the petition and the Respondent was at liberty to apply to the Court for the dismissal of the petition, and the Petitioner had proffered no excuse for failure to comply nor taken steps to enlarge time for payment, the application for dismissal was merited.

Finally, the Court agreed with the applicant that the petition did not comply with the mandatory provisions of the Rules, as it did not cite the person whose election was challenged. This precluded the winner of the said election from receiving fair notice of the case to enable him to respond and defend his position. Were the Petitioner to succeed, a reversal of the senatorial elections would be prejudicial to the winner. It was therefore incumbent upon the Petitioner to include the winner as a party to the petition and failure by the Petitioner to take steps to remedy the omission by requesting an amendment to cite the winner as a respondent rendered the petition fatally defective.

In ***Jimmy Kazungu Mkala v IEBC & 2 Others,***[304] the Court was invited to strike out the petition on the basis that it did not comply with Rule 8 of the Election Petition Rules. To determine whether the petition was filed in compliance with the Rules, the Court juxtaposed the contents of the petition against the provisions of Rule 8 (providing for the contents of a petition) and Rule 12 (providing for the contents of an affidavit). The Court found that the petition did not meet the mandatory requirements of the Rules, as it did not state the date when the disputed election was conducted. Further, it did not include the name and address of the Petitioner as well as the date of the declaration of the results of the election. Moreover, the petition omitted the name and address of the advocate for the Petitioner being the address for service.

Having found that the petition did not comply with the Rules, the Court considered whether it ought to be struck out. The Petitioner contended that the non-compliance was minor, and in accordance with the ***de minimis non curat lex*** rule, which stipulates that the law does not concern itself with the trivial, the Court should overlook these minor lapses in procedure and uphold the petition. The Court disagreed. The learned judge, citing the decision of Onyancha J (as he then was) in ***Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others,***[305] noted that the omissions, though procedural, were not trivial as the omitted matters were substantive, going to the root and substance of the issues to be adjudicated upon by the Court. Since every provision in the Election Petition Rules was intended to achieve a required result, any deficient compliance would likely lead to delay and injustice.

Since the Rules Committee expended time and effort to draft the Election Petition Rules to ensure that the petition would be as complete as possible and clearly set out the case for the Respondents to respond to with the aim of arriving at a just, expeditious, proportionate and affordable resolution of disputes, any omission was so fundamental as to render the petition fatally defective.

304 Mombasa High Court Election Petition 9 of 2017.
305 [2013] eKLR.

As to whether the Court could exercise its discretion pursuant to Article 159 (2) (d) of the Constitution to excuse minor deviations, the Court was guided by the Supreme Court decision in ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others***[306] and the Court of Appeal decision in ***Nick Salat v IEBC & 6 Others***[307] to the effect that while Article 159 (2) (d) of the Constitution mandated the Court not to pay undue regard to technicalities, it did not take away the obligation of the parties to comply with procedural imperatives. The petition was therefore incurably defective and to allow it to proceed to hearing would be to countenance an abuse of the process. The petition was accordingly struck out.

5.5. Failure to Lodge Notice of Appeal at the Appropriate Registry

The centrality of the Notice of Appeal to the validity of an appeal and by extension to the jurisdiction of the Court was settled by the Court of Appeal in ***Nicholas Kiptoo arap Korir Salat v IEBC & 7 Others***.[308] The Court of Appeal ruled that the Notice of Appeal had a central role in the appellate system and without it, there could be no appeal as it was a jurisdictional pre-requisite. In the case of ***John Munuve Mati v RO Mwingi North & Others,***[309] the CoA reasserted the position that the jurisdiction of the appellate court was invoked by the filing of the notice of appeal, which document informed the parties that the dispute had moved from the trial to the Court of Appeal. Without a notice of appeal, the Court found that appeals would otherwise be conducted in an environment of ambush, totally antithetical to the notions of order that is fundamental to judicial proceedings. In making its finding, the Court rejected the Appellant's argument that the requirement under section 85A that an appeal be lodged within 30 days obviated the need to file a Notice of Appeal in 7 days as required by Rule 6 of the Election Appeal Rules.

The Election Appeal Rules, which came into effect in 2017, amended the practice of filing appeals by requiring that the Notice of Appeal be filed in the Court of Appeal within 7 days of the decision complained of.[310] The Rules thereby shortened the timeframes for lodging the Notice of Appeal from 14 days (which is the standard for other appeals) to 7 days and altered the place of filing from the High Court registry to the relevant Court of Appeal registry. Inevitably, with the Rules coming into effect shortly before the elections, a lack of familiarity with them was bound to result in non-compliance.

In ***Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others,***[311] the Notice of Appeal was filed at the High Court and transmitted by the Court to the Court of Appeal. In determining whether to strike out the appeal, the Court noted that despite the anomaly in the filing, the said Notice was served on time. The appellate court was guided by Rule 5 of the Election Appeal Rules, which empowers the Court to exercise discretion in its determination of such applications and exercise discretion in a manner that would not prejudice the parties and which would allow for determination of a matter on its merits as envisaged by Article 159 (2) (d) of the Constitution. Further, section 72 of the Interpretation and General Provisions Act stipulates that a deviation from the prescribed form does not render a form null and void so long as the deviation does not affect the substance of the instrument or if it was not calculated to mislead. Since the record of appeal was filed within the stipulated period from the date of filing and the 1st Respondent did not suffer any prejudice as a result of the manner in which the record of appeal was prepared and presented to the Court, the CoA invoked the provisions of

306 [2014] eKLR.
307 [2013] eKLR.
308 [2014] eKLR.
309 Election Petition Appeal 5 of 2018.
310 See Rule 6.
311 Nairobi Election Appeal 18 of 2018.

Article 159 (2) (d) of the Constitution, sections 3A and 3 B of the Appellate Jurisdiction Act and Rule 5 of the Election Petition Rules to deem the appeal as properly filed.

In ***Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others,***[312] the Court was urged to strike out an appeal where Notice of Appeal was filed both at the High Court and at the Court of Appeal. The Court was persuaded that Rule 5, despite being couched in mandatory terms, entitled the Court to exercise its discretion to invoke the jurisdiction of the Court. The effect of non-compliance with Rule 6 was a matter to be assessed in the circumstances of the case and in the present case, the Notice of Appeal was lodged simultaneously in the election court and in the Court of Appeal within the requisite time frame. This mitigated the anomaly of filing in the election court. Moreover, no prejudice was occasioned to the Respondents since they were served timeously with the Notice and therefore the Court exercised its discretion to save the Notice as opposed to declaring it invalid.

On the contrary, in ***Apungu Arthur Kibira v IEBC & 2 Others,***[313] the majority held that failure to lodge Notice of Appeal in the Court of Appeal was fatal to appeal and it was therefore liable to be struck out. Otieno-Odek JA, however, in a dissent, made a compelling case for why that ought not to be so. He opined:

> *[14] [T]he filing of a Notice of Appeal at the wrong registry and within the time stipulated for taking any action should not per se render the Notice and Record of Appeal null and void. Before striking out a Notice of Appeal filed at an inappropriate registry, I believe there are various considerations to be taken into account. First, whether the Notice of Appeal was filed and served on time. Second, whether a reasonable person being served with the Notice and reading it understands what it means. How would a reasonable person receiving the Notice take it to mean? If, in all the circumstances of the case and looking at the Notice as a whole, the person served would say to himself: of course it must mean that the Appellant intended to appeal and has filed a Notice of Appeal then, the purpose of the Notice has been achieved. If, on the other hand, a reasonable person served with the Notice would say, I cannot tell from the document itself whether the Appellant intends to appeal and I shall have to make inquiries, then, the Notice is fatally defective. The third consideration is whether the Respondent or person served has suffered any prejudice by the Notice being filed at a wrong registry. If no prejudice has been suffered, the Notice of Appeal filed at a wrong registry should not be null and void.... Fourth, if the Notice of Appeal that was filed at an inappropriate registry was transmitted and received at the correct/appropriate registry, then the Notice should not be incompetent, null and void. In the instant case, there is no evidence that the Notice of Appeal filed at Kakamega was never received at the appropriate Court of Appeal registry within the time stipulated for filing the requisite Notice of Appeal."*
>
> ...
>
> *"[19] [T]he filing of a Notice of Appeal at a wrong or inappropriate registry does not necessarily and automatically affect the competence and validity of the Notice. The rule requiring a party to file a Notice of Appeal at a particular registry or Court is merely directory. An error in designating or filing the Notice at an inappropriate registry should not be fatal to the appeal. The Rule directing a party on where to file a Notice of Appeal is not aimed at creating finality of the Judgment of the trial Court.*

312 Mombasa Election Appeal No. 4 of 2018.
313 Kisumu Election Petition Appeal No. 11 of 2018.

> *[20] Striking out a Notice of Appeal on the basis that it has been filed at a wrong or inappropriate registry annuls, reverses and countermands the right to appeal. The net effect is denial of the right to appeal. The right to appeal, which an intending Appellant has availed him/herself by filing a Notice of Appeal (albeit at an inappropriate registry) is a right not litigated by the appeal. The filing of Notice of Appeal preserves the intending Appellant's right to appeal which he/she has already perfected by filing the Notice of Appeal within the requisite period."*

In ***Lesirma Simeon Saimanga v IEBC & 2 Others,***[314] the CoA struck out an appeal where the Notice of Appeal had been filed at the High Court registry in Nyahururu, following the decision of the election court as opposed to the Court of Appeal in Nakuru in accordance with Rule 6 of the Election Appeal Rules. Since the Notice of Appeal is the primary jurisdictional document giving rise to the Court's jurisdiction, the Court ruled that there was no valid appeal as only a proper Notice of Appeal could give rise to the filing of an appeal.

The apparent dichotomy on how to treat a Notice of Appeal filed outside the ambit of Rule 6 has now been settled by the Supreme Court. In ***Musa Cherutich Sirma v IEBC & 2 Others***[315] the SC declined to overturn decision of CoA striking out an appeal where the Notice of Appeal was filed in the High Court registry rather than the CoA as required by Rule 6 of the Court of Appeal (Election Petition) Rules. This was because the matter fell within the discretion of the CoA and nothing was laid to show that the exercise of the CoA's discretion in striking out the appeal was erroneous.

The Court, while acknowledging both in ***Apungu Arthur Kibira v IEBC & 2 Others,***[316] and in ***Musa Cherutich Sirma v IEBC & 2 Others***[317] that the confusion as to where the Notice ought to be filed was occasioned by the novelty of the Election Appeal Rules, declined to interfere with the CoA's discretion. It opined that now that the parties were aware of the provisions of the Rules, they were likely to comply in the future and there would be little conflicting jurisprudence on the issue.[318]

5.6. Validity of Pleadings Prepared by Unqualified Persons

On one hand, the jurisprudence on this issue in the context of civil proceedings is well settled. The oft-cited decisions in ***Kenya Power & Lighting Company v Chris Mahinda T/A Nyeri Trade Centre,***[319] ***Obura v Koome***[320] and ***National Bank of Kenya v Wilson Ndolo Ayah***[321] have established the invalidity of such documents, with the rationale being that there is need to discourage unqualified persons from repeating the illegal act of drawing legal documents.

On the other hand, election petition proceedings are considered *sui generis* and they can only be determined within the confines of electoral laws. Moreover, inherent within them is a public interest nature of petitions, meaning that decisions of the Court affect more than the parties to the proceedings and extend to a whole electorate. While the practice of having documents prepared by unqualified persons is to be deprecated, since election petitions are actions *in rem*, striking out such documents

314 Nakuru Election Petition Appeal (Application No. 7 of 2018).
315 Supreme Court Petition 13 of 2018.
316 Kisumu Election Petition Appeal No. 11 of 2018.
317 Supreme Court Petition 13 of 2018.
318 At para 60.
319 [2005] 1KLR 753.
320 [2001] 1 EA 175.
321 Civil Appeal No. 119 of 2002 (Unreported).

would have the impact of impeding the Court from having an opportunity to form its impression as to the integrity of the electoral process.

In 2013, several courts grappled with the issue of whether to strike out such pleadings. Mutende J in ***Wilson Mbithi Munguti Kabuti & 5 Others v Patrick Makau King'ola & Another,***[322] while finding that it was an offence under the Advocates Act for an unqualified person to draft pleadings, declined to strike out the petition solely on this ground, preferring to recommend disciplinary action against the advocate to the LSK.

On the contrary, Meoli J declined to uphold a petition so drawn in ***Dobson Chiro Mwahunga v IEBC and Another,***[323] declaring the petition a nullity *ab initio.* The Court stated:[324]

> *[30] The election petition as filed is invalid, a nullity ab initio, incapable of being salvaged by any means, including the Petitioner's belated notice to act in person. There is no competent pleading to proceed upon. I sympathize with his situation and those voters in Kilifi County who threw in their lot with him in instituting the petition, as was their right to do. Having put in time, effort and incurred expenses in pursuit of what the Petitioner believed were proper legal proceedings, he is now faced with the painful spectre of the proceedings unraveling irredeemably before his very eyes…the proceedings have turned out to have been a "hoax". [31]As an individual the Petitioner is not without remedy and he will no doubt take competent legal counsel regarding his next course of action.*

Majanja J took a similar approach, dismissing an appeal against the decision of the Magistrate's Court striking out the petition for being drawn by an unqualified person in ***Abraham Mwangi Njihia v Independent Electoral & Boundaries Commission & 2 Others.***[325] In addition, the Court directed that the costs of the appeal be borne by the said advocate.

In the 2017 EDR cycle, several election courts and the Court of Appeal had occasion to rule on the issue. In ***Joseph Kiragu Muthura v Pius Njogu Kathuri & 2 Others,***[326] the Trial Court was guided by the decision of the Supreme Court in ***National Bank Of Kenya Ltd Vs Anaj Warehousing Ltd*** **[2015] eKLR** where the apex court validated a document executed by an advocate without a practising certificate on the basis that invalidation would result in unjust enrichment. The Supreme Court differentiated between documents prepared by an advocate who did not hold a current practising certificate, which did not become invalid under section 34 (1) (a) of the Advocates Act, and those prepared by unqualified persons such as non-advocates, advocates whose names had been struck off the roll of advocates, which were void for all purposes.

Since in this case the commissioner for oaths was still an advocate and had not been struck off the roll, there was some latitude to excuse affidavits attested to by him, especially considering that they were drawn by the Petitioner's advocate, whose capacity, competence and validity in legal practice had not been questioned. Because the affidavits required independent attestation, the Petitioners had in the view of the Court found themselves at the mercy of an advocate who did not volunteer

322 [2013] eKLR.
323 Malindi High Court Election Petition No. 16 of 2013.
324 At paras 30-31.
325 Nairobi High Court Election Appeal 3 of 2013 [2013] eKLR.
326 Kerugoya Magistrates' Court Election Petition No. 1 of 2017.

information that he was not licensed to practise an advocate and therefore was not empowered to administer oaths at that particular time.

The Court found that the Petitioner and his witnesses ought not to shoulder any blame for the attestations and it would not be in the interests of justice to block the Petitioner from having his day in court so that the issues he had raised could be determined on merit. The Court considered this an apt case for invocation of the Oxygen principle set out in Rule 4 of the Election Petition Rules, especially considering the public interest nature inherent in election petitions. The Court found no merit in the application to strike out the petition.

However**,** the High Court sitting on appeal took a different view of the matter in ***Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 Others.***[327] The Court began by reiterating that affidavits form the substance of the evidence to be adduced by witnesses in an election petition; therefore, they are crucial evidence and they have to comply with the Oaths and Statutory Declarations Act, Order 19 of the Civil Procedure Rules and Rule 12 (14) of the Election Petition Rules.

In this case the 'affidavits' filed by the Petitioner and his witnesses were not affidavits since they were not administered by a person authorised to do so. They had not complied with the Oaths and Statutory Declarations Act as the person who administered them was not appointed by the Chief Justice as required. This meant that the affidavits amounted to mere statements of facts which did not attain the threshold of affidavits. The affidavits were also defective since the person who purported to commission the affidavits was also not a holder of a practising certificate and therefore had no capacity to administer oaths.

The Court assessed the Supreme Court decision in ***National Bank of Kenya Ltd. v Anaj Warehousing Ltd*** **[2015] eKLR** where the apex court had stated that no instrument becomes invalid under section 34 (1) of the Advocates Act by reason of being prepared by an advocate who did not hold a current practising certificate. On the contrary, documents prepared by other categories of unqualified person, such as non-advocates whose names have been struck off the Roll of Advocates, are void for all purposes.

However, the Court here distinguished the ***National Bank case*** on the basis that the Court was not dealing with commissioning of affidavits by an unqualified person. In the view of the Court, signing or witnessing a document was different from administering oaths. The Court was persuaded by the High Court decision in ***Omusotsi v The Returning Officer and Another*** **High Court Election Petition No. 21 of 2017** where the petition, which was not supported by the affidavit of the Petitioner as required by Rule 12 (1) (b) of the Election Petition Rules, was declared incompetent and consequently struck out. The Court also considered persuasive the Supreme Court decision in ***Prof Syed Hug v Islamic University in Uganda*** **C.A. No. 47 of 1995,** where the Court ruled that the documents prepared, signed and filed by an advocate without a practising certificate were invalid and of no legal effect as no court could sanction or condone an illegality brought to its notice.

While Order 19 Rule 7 of the Civil Procedure Rules allows a court to receive any affidavit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form or technicality thereof, the Court found that for a document to be admitted under this Rule, it had

327 Kerugoya Election Appeal 1 of 2017.

to be a sworn affidavit. In the present case, the affidavits could not be said to have been sworn since they were not commissioned by person authorised to administer oaths. The defect was therefore one of form and not a technicality. Since there was no affidavit in the first place, Order 19 Rule 7 was not applicable, thus rendering the documents filed mere statements. There was therefore no legal basis for the election court to hold that the application to strike out had no merit since the petition was not supported by valid affidavits as required by the Elections Act and Election Petition Rules. The appeal was allowed.

In ***David Wamatsi Omusotsi vs Returning Officer, Mumias & 2 Others,***[328] the Petitioner's supporting affidavit had been commissioned by a law firm rather than a Commissioner for Oaths and the signatures appearing alongside the Commission stamp were also demonstrated to be forgeries. Since the Oaths and Statutory Declarations Act requires affidavits to be commissioned by a Commissioner for Oaths, the affidavit did not comply with the mandatory requirements of the Rules and neither did the petition. The omission was considered fatal to the petition which was consequently struck out. This is a departure from the finding of previous election courts that a defective affidavit did not affect the validity of the petition. However, it accords with the CoA decision in ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 Others***[329] that a properly sworn affidavit was a mandatory requirement for a petition to be valid.

In ***Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others,***[330] the Court of Appeal was invited to strike out the Notice of Appeal, and by extension the Record of Appeal on the basis that they had been drafted by an advocate who at the time did not possess a current practising certificate. The Court considered it settled by the Supreme Court in the case of ***National Bank of Kenya Ltd. v Anaj Warehousing Ltd*** **[2015] eKLR** that the propriety of a legal document could not be called into question simply on the ground that it was drawn by a person who did not hold a valid practising certificate at the time. This was codified in the 2017 amendment to the Advocates Act which introduced section 34B (2), upholding the validity of such documents. The Court was persuaded by the fact that while Mr Aboubakar did not have a valid practising certificate at the time of drawing the Notice and Record of Appeal, he did have the same when he first appeared before the Court. The Court found that all in all, the 3rd and 4th Respondents' application to strike out the appeal lacked merit and it was dismissed.

5.7. Effect of Unpleaded Irregularities Revealed during Scrutiny and Recount on Validity of Election Result

The importance of scrutiny has been set out in many election decisions. One of the most cited decisions is that of Omondi J in ***Philip Mukwe Wasike v James Lusweti & 2 Others [2013] eKLR*** which set out the purpose of scrutiny as three fold: assisting the Court to investigate the validity of allegations of irregularities and breaches of the law complained of; assisting the Court to determine the valid votes cast in favour of each candidate: and assisting the Court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.

The question that arose in 2017 is how the Court should deal with irregularities not pleaded by the parties. In ***Mohamed Mahamud Ali v IEBC & 2 Others,***[331] Njoki Mwangi J ordered scrutiny in respect

328 Kakamega Election Petition No. 9 of 2017.
329 [2014] eKLR.
330 Mombasa Election Appeal No. 4 of 2018.
331 Mombasa High Court Election Petition 7 of 2017, at para 3 of the ruling on scrutiny, delivered on 12 January 2018.

of 21 polling stations which although not pleaded, revealed discrepancies in the serial numbers on the ballot boxes and on the seals affixed to apertures of ballot boxes between those recorded in PSDs and those captured in the Deputy Registrar's report upon taking custody of the election material. The Court relied on the SC decision in ***Justice Kalpana H. Rawal vs Judicial Service Commission and 3 Others***[332] where the apex court had stated:

> *…the Court will not determine or base its decision on unpleaded issues. Where however, evidence is led and it appears from the course followed at the trial that an unpleaded issue has been left for the Court to decide, the Trial Court can validly determine the unpleaded issue…*

In ***Lenny Maxwell Kivuti v IEBC & 3 Others***[333] the High Court had to determine the effect of unpleaded irregularities which were also not captured in the Deputy Registrar's report following a scrutiny exercise. The Trial Court based its determination in part on its own observations over and above the report prepared by the Deputy Registrar on the scrutiny exercise.

The Petitioner had asserted that scrutiny would reveal that some of his votes had been deducted and added to the 1st Respondent, and that the outcome of that process would be to show that he should be declared the winner. Following the scrutiny and recount process, the Court noted that the material generated by the scrutiny revealed irregularities or non-compliance with the law on elections. It therefore considered it prudent to determine whether the election should be invalidated as a result of the irregularities or errors or non-compliance with the law.

The Court evaluated each of the irregularities unearthed by the scrutiny. Firstly, contrary to Regulation 81 (1) of the Elections (General) Regulations, not all the ballot papers used in the election, both valid and rejected, were sealed in the ballot boxes. Since the ballots cast were less than the actual number of counterfoils used, it could not be ascertained whether the missing ballot papers were valid, rejected or spoilt and where they were valid, in whose favour they had been cast.

Secondly, used counterfoils had not been sealed and put in ballot boxes. This meant that the exact number of ballot papers used could not be ascertained as the recount had been effected only against Forms 37A but the results contained in the Forms 37A could not be verified using the counterfoils. Thirdly, the Court noted from the Deputy Registrar's report that Forms 37A in respect of 12 polling stations were missing and that in respect of another 12 polling stations, the Forms 37A were completely illegible. Since the Form 37A is the basis of declaration of results, illegibility or absence of the Form made it such that there could not be any results to declare. This meant that results in respect of the affected polling stations could not be authenticated.

The Court also noted with concern that there were ballot papers in some ballot boxes whose serial numbers did not match the counterfoils. This meant that the excess 111 ballot papers did not issue from the ballot booklets for the relevant polling stations as they could not be traced to the counterfoils of used ballot papers found in the ballot boxes. The inference to be made was that their presence in the ballot boxes could only have been introduced unprocedurally, with the effect of subverting the will of the people. Therefore, the Court ruled that the excess votes were not authentic and they ought not have been in the system, and any outcome arrived at with the votes being taken into account could not be fair or authentic or verifiable.

332 [2016] eKLR.
333 Embu High Court Election Petition 1 of 2017.

While the Petitioner urged the Court to exclude the affected results and proceed to declare him the winner based on the remaining results, the Court declined to make such a finding, as it would amount to disenfranchising the voters in the affected polling stations. In the alternative, the Petitioner prayed for a nullification of the entire election. The Respondents objected on the basis that this prayer had not been pleaded. The Court, having determined that it could rule on unpleaded material revealed during a recount, and further that the revealed irregularities viewed globally would affect the outcome of the election, concluded that the irregularities, errors or non-compliance during collating, counting and tallying fundamentally undermined the electoral process. Therefore, the result could not be said to be accountable, verifiable or accurate. The result was nullified and the IEBC directed to conduct a fresh election.

When the matter went on appeal,[334] the CoA differed with the reasoning of the election court. Citing ***Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others*** **Election Petition No. 3 of 2013** and ***Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others*** **[2014] eKLR,** the Court restated the general principle that scrutiny and recount are not designed to uncover new evidence not pleaded or raised during the trial. While the trial judge had relied on the 2015 ***Wetangula Case*** decided by the Supreme Court, the Court of Appeal was emphatic that the latter decision did not overrule the ***Peter Gichuki King'ara*** and ***Okoth Obado*** decisions, for two reasons: firstly, in the ***Okoth Obado case***, the Court was dealing with illegalities i.e. treating and bribing of voters not irregularities and the Court had stated that it could deal with such when they arose in the course of a trial. Secondly, the Court distinguished the *Wetangula decision* on the basis that the illegality had in fact been pleaded and evidence presented.

Having reviewed paragraphs 150-153 of the Supreme Court decision in the ***Okoth Obado*** **case,** the Court restated the position of the apex court that it was only in cases where the Trial Court had granted an order of scrutiny, recount or re-tally *suo moto* that irregularities other than those which were pleaded could be relied on in the final determination and only if the parties were also granted an opportunity to ask questions on the new findings. In cases where a party had alleged non-compliance with any written law on elections, that party was bound by their pleadings and the burden was on such a party to table proof and if they desired to raise new issues, they could only do so by amending the petition.
Further, citing the decision of the Supreme Court in ***Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR***, the Court emphasised the importance of scrutiny, of taking the scrutiny report into consideration in arriving at it determination, of allowing parties to interrogate any newly discovered irregularities and the burden of the Petitioner of demonstrating how any newly discovered irregularities affected the results. It was only when that was done that the Court could make a determination on the petition. In the trial at the High Court, the Court found that the 1st Respondent himself identified the irregularities and the Court considered and rejected them. The Appellate Court therefore found that the trial judge had erred in law by delving into matters which were neither pleaded nor argued before him.

The general rule therefore appears to be that whereas the Court can deal with irregularities whenever they appear during a trial, parties are limited to their pleadings and the Court will only make a determination in respect of the issues which have been pleaded by the parties. Any new issues will only be introduced by amending the pleading. Where scrutiny is granted *suo moto*, the Court is at

334 *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others* Nairobi Election Petition Appeal 6 of 2018.

liberty to form its own impressions on the irregularities revealed during the scrutiny exercise, but parties must be given an opportunity to interrogate the new findings. The Court of Appeal also made it clear that the burden remains on the Petitioner to demonstrate how any newly discovered irregularities affected the results.

6. Timelines and Timeliness

Timeliness in the resolution of electoral disputes is critical to ensure that the outcome of elections is promptly settled. This requires both efficiency in the judicial system[335] and cooperation by the parties to aid the Court in reaching not only a just resolution of the matter, but also an expeditious one.[336] The Court must therefore carry out a delicate balancing act between expeditious resolution of disputes and not impeding access to justice. In ***Hassan Nyanje Charo v Khatib Mwashetani & 3 Others,***[337] the Supreme Court, ruling on an application to extend time for filing an appeal, set out the importance of balance between compliance with timelines and facilitating access to justice as follows:[338]

> *In the emerging jurisprudence, the concept of 'timelines and timeliness' is generally upheld, as a vital ingredient in the quest for efficient and effective governance under the Constitution. However, even as we take account of that context, we remain cognizant of the Court's eternal mandate of responding appropriately to individual claims, as dictated by compelling considerations of justice.*

The timelines for the filing, hearing and determination of election disputes following a declaration of results are firmly fixed in the Constitution,[339] the Elections Act[340] and restated in the Election Petition Rules.[341] The introduction of these timelines followed a historical antecedent of laxity in the handling of electoral disputes. As stated by the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others*** **[2014] eKLR:**

> *Article 87 (1) grants Parliament the latitude to enact legislation to provide for 'timely resolution of electoral disputes'. This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within a reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation.*

Failure to comply with the timelines, at least in so far as the filing of petitions and resolution of the same are concerned, has therefore been elevated to a constitutional matter. Failure to abide by these timelines has implications on whether election courts abide by the constitutional imperative to hear and determine electoral disputes within the timeframes fixed by the Constitution.

335 See Rule 4 (1) of the Election Petition Rules.
336 See Rule 5 (2) of the Election Petition Rules. See also dictum of Ibrahim and Ojwang SCJJ in *Hassan Nyanje Charo v Khatib Mwashetani & 3 others* SC Application 15 of 2014, at para 25.
337 Supreme Court Application 15 of 2014; [2014] eKLR.
338 At paras 31-32.
339 Articles 87 (2), 105 (2) and 140 (2).
340 Sec 75 (2), 75 (4) (b) & 85 A (b).
341 Rule 4.

This section reviews both timelines set out by the Constitution and timelines established by Rules of Procedure. Each has a different outcome of failure where there is failure to comply. Where timelines are fixed by the Constitution or the Elections Act, there appears to be consensus that the election court has no jurisdiction to enlarge time.[342] On the other hand, where the timelines in question are fixed by subsidiary legislation, the election court may exercise its discretion to sustain the petition.[343]

In the latter case, whether the failure to comply with the stipulated timelines warrants the striking out of pleadings has been the subject of extensive litigation, oftentimes with inconsistent jurisprudence. On one hand, as argued by Gitari J in ***Martha Karua & Another v IEBC & 3 Others,***[344] the just, expeditious, proportionate and affordable resolution of disputes under Rule 4 of the Election Petition Rules would only be achieved by the Court not using its time and resources in dealing with a dispute that has failed to comply with the express provisions of the Rules. It has also been argued that failure to comply with the Rules is not curable under Article 159 (2) (d) of the Constitution. As opined by Kiage JA in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others:***[345]

> *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 substantive justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour 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 and circumventing of rules and shifting goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the 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 application are concerned.*

On the other hand, as the COA urged in ***Martha Wangari Karua v the IEBC & 3 Others***,[346] the exercise of such discretion calls for a meticulous balance of the four objectives in Rule 4 of the Election Petition Rules. Therefore,

> *[I]t should not appear as though an election court is simply concerned about expeditious disposal of the election petition by quickly striking it out, without carefully considering whether the decision to strike out the petition is actually just to all the parties concerned, whether it is proportionate and where the same could be avoided.*

The exercise of discretion on this matter appears to be a balance between upholding established

342 See *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* Supreme Court Petition No. 5 of 2014; *Mary Wambui Munene v Peter Gichuki King'ara & 2 Others*, Supreme Court Petition No. 7 of 2014; *Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others*, Supreme Court Petition No. 18 of 2014).

343 See Rule 19 (1) of the Election Petition Rules.

344 Kerugoya Election Petition 1 of 2017.

345 [2013] eKLR.

346 Nyeri EP Appeal 1 of 2017.

principles and procedures, thereby creating certainty of outcomes, and giving effect to a broad sense of justice and fairness. It would therefore give the impression that the effect of failure to comply with timelines is a matter which ought to be determined on a case-by-case basis. The different contexts in which such disputes have arisen are considered below.

6.1. Failure to File Pleadings on Time

As stated above, the timelines for filing petitions are stipulated in the Constitution itself. Where these are not complied with, the Election Petition Rules do not confer on an election court the discretion to enlarge time, with the effect that such petitions are struck out. In the 2013 EDR cycle, the issue was settled in the Supreme Court decisions in the cases of ***Joho v Shabhal,***[347] ***Anami Silverse Lisamula v IEBC & 3 Others,***[348] and in ***Mary Wambui Munene v Peter Gichuki King'ara & 2 Others.***[349] In the latter case, the Supreme Court restated its earlier decision in the ***Joho*** case in the following terms:

> *…for the purpose of this case, we apply the precedent in Joho, taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations in the exercise of our discretion.*

In ***Sila Samuel Mulwa v IEBC & 3 Others***[350] the 4th Respondent filed an application whose main contention was that there were two petitions on record and the 2nd petition was the result of the Petitioner having unprocedurally replaced the original petition filed with the courts with an amended petition filed without the authority of the Court and out of time. The petition challenged the election for Member of the National Assembly, Kaloleni Constituency, whose results had been declared on 10 August 2017. The latest a petition could be filed was therefore 7 September 2017. While the original petition had been filed on 5 September 2017, the amended petition was dated 9 September 2017. The Petitioners maintained that the swopping of the petitions was done with the full knowledge of the Deputy Registrar and that she had discretion to authorise such a swop under Article 159 (2) of the Constitution.

The Court, having reviewed the law and court procedure found that there was no legal backing for the assertion that the Deputy Registrar had power to substitute documents and assign a receipt paid for a different document to a new document. The Court opined that if this practice were allowed to continue unabated, it would cause accounting problems and become an avenue for corruption. The result would be that the law on amendments would die. In the view of the Court, the irregularities in the petition went to the root of the petition and prejudiced the 4th Respondent. The petition was accordingly struck out with costs.

In ***Andrew Toboso Anyanga vs Mwale Nicholas Scott Tindi & 3 Others,***[351] the 3rd and 4th Respondents filed a Notice of Preliminary Objection and Notice of Motion seeking to strike out the petition asserting that the petition, which was dated 7 September 2017, was filed outside the stipulated constitutional timeline of 28 days from the date of declaration of results, which was 9 August 2017. Further, the

347 [2014] eKLR.
348 [2014] eKLR.
349 [2014] eKLR.
350 Malindi High Court Election Petition 11 of 2017.
351 Kakamega High Court Election Petition 12 of 2017

Respondents urged that Rule 19 of the 2017 Election Petition Rules, which allows an election court to extend or limit the time within which an act or omission shall be done under the Rule was clear that the power to extend time did not apply to the period within which a petition was required to be filed, heard or determined.

In response, the Petitioner contended that the declaration of the 1st Respondent as the winner was done on 10 August when the Form 35B was signed by the agents and therefore time started to run from 10 August, from which date computation should be done. The Petitioner further contended that the validity of the certificate issued to the 1st Respondent on 9 August 2017 by the IEBC and whether there as a declaration of results at all were disputed facts and therefore the Court ought to exercise its discretion in determining the issue. The determination of whether the petition had been filed out of time was therefore an evidentiary one and not a pure point of law to be determined through a preliminary objection.

In support of the Petitioner, the 2nd Respondent urged that the date of declaration was uncertain since the Returning Officer purportedly signed the Declaration Forms on 9 August but the agents signed on 10 August 2017. He urged that the Court take judicial notice that agents sign the results before the results are declared and which therefore meant that the date of declaration could not be stated with certainty due to the gross negligence of the 3rd and 4th Respondents. He prevailed on the Court not to allow the 3rd and 4th Respondents to create a crisis and then purport to benefit from it and further argued that the application did not meet the threshold of a Preliminary Objection.

The Court, in evaluating the matter, found that from the authorities cited, there was no debate about the import of Article 87 (2) of the Constitution, which rendered any petition filed outside the 28-day period a nullity. The issue which the Court had to determine was whether the present petition was a nullity for having been filed on 7 September instead of 6 September 2017, based on the date when the agents signed the Form 35 B as argued by the Petitioner and 2nd Respondent.

The Court agreed with the 3rd and 4th Respondents that the Petitioner and 2nd Respondent's argument could not be upheld as the Returning Officer, who is the person authorised to declare the results, did so declare and issue the certificate to the winner on 9 August 2017. It was therefore immaterial whether the agents had signed the statutory form or were present nor that the tally was not correct or was the subject of a contest between the loser and the winner. The Court ruled that the Petitioner had attempted to donate to himself and his agents powers that did not belong to them: that of determining when election results would be declared. The Court found that if such a situation were to be allowed, chaos would descend upon the system and the provisions of Article 87 (2) of the Constitution and section 77 of the Elections Act would be rendered redundant.

Having determined the date of declaration of results, the Court then assessed whether the petition was filed within the 28-day timeline envisaged by the law. The Court opined that the use of the word 'shall' in Article 87(2) indicated that the provision was cast in stone and there was no discretion granted to the Court to expand that time under the Election Petition Rules as clearly stipulated in Rule 19 (2). The petition was therefore a nullity and the Court considered itself bound by the host of Supreme Court authorities cited by the applicants. Since elections were matters of great public interest, anyone seeking to challenge an election had to meet the cost of doing so, including complying with the strictures of the law. The Preliminary Objection was therefore upheld and the petition struck out.

In ***Stephen Kolimuk v IEBC & 2 Others,***[352] the petition was, by the Petitioner's own admission in his supporting affidavit, filed outside the 28 days allowed by law. The petition, which ought to have been filed by 6 September 2017, was filed on 11 September 2017. The petition was accompanied by an application to enlarge time. A Preliminary Objection was filed by the 3rd Respondent arguing that the Court had no jurisdiction to entertain the application to enlarge time as the application offended Article 87 (2) of the Constitution. The 3rd Respondent cited the decision of the Supreme Court in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*** **Supreme Court Petition No. 5 of 2014** for the position that petitions filed outside the 28 day timeline were a nullity *ab initio.* The Petitioner gave reasons for the delay in their supporting affidavit but did not file a response to the Preliminary Objection. The Court, citing the High Court decision in ***Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 Others,***[353] ruled that it had no jurisdiction to enlarge time. Since the petition was filed out of time and the Election Petition Rules did not give the Court discretion to enlarge time, the Court had no jurisdiction. The petition was therefore struck out with costs, capped at KES 2 million, awarded to the Respondents. A similar fate befell the petition in ***Abdia Mohammed Oshow v IEBC & 3 Others,***[354] where the petition was filed 35 days out of time.

In ***Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC,***[355] the High Court upheld a Preliminary Objection challenging 4 witness affidavits filed by the original Petitioner, Robert Kibet Kemei and three of his witnesses for having been filed out of time.

Where timelines are established in the rules, the courts are often willing to grant applications for enlargement of time. Both the High Court and the Magistrates' Court on several occasions allowed the filing of further evidence where it was clear that it would not prejudice the other side.[356] Onyiego J allowed an application for extension of time to file a response in ***Josiah Taraiya Kipelian Kores v Joseph Ole Lenku & 4 Others***[357] and so did Ngaah J in ***Michael Gichuru v Hon. Rigathi Gachagua & 2 Others.***[358] Korir J set out the rationale for allowing an application for extension of time to file a response in ***Rishad Hamid Ahmed v IEBC & 2 Others,***[359] where he asserted that while time is of the essence in election disputes, if the reasons for filing out of time were reasonable, the Petitioners would not be prejudiced by having the respondents heard, and since it would be in the public interest for the respondents to be heard on merit, such applications should be allowed. In ***Kapusia Ole Saloni v. James Kipas Langues & 2 Others***[360] the application was allowed where the proposed affidavits did not materially depart from the grounds pleaded in the petition and where the Court found it would further the overriding objectives of the Rules.

However, an application to file additional evidence was rejected in ***Albeity Hassan Abdalla v IEBC and 2 Others,***[361] since in the view of the Court it would prejudice the Respondents, as it would amount

352 Kapenguria High Court Election Petition 2 of 2017.
353 Kakamega High Court Election Petition 12 of 2017
354 Marsabit Magistrates Court Election Petition 2 of 2017.
355 Eldoret High Court Election Petition 1 of 2017.
356 See *Habil Nanjendo Bushuru v. IEBC & 3 Others* Kakamega HCEP No. 8 of 2017; *Ahmed Abdulahi Mohamad & Another v. Hon. Mohammed Abdi Mahamud & 2 Others* Nairobi HCEP No.14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017); *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 Others* Kakamega High Court Election Petition 6 of 2017;
357 Kajiado Election Petition 2 of 2017.
358 Nyeri High Court Election Petition 2 of 2017. See also the decisions of Kiarie J in *Mary Emase Otucho v. IEBC & Another* Busia HCEP No. 1 of 2017; Cherere J in *Seth Ambusi Panyako v. IEBC & 2 Others* Kakamega HCEP No. 14 of 2017 and Hon Soita in *Joseph Kiragu Muthura v. Pius Njogu Kathuri & 2 Others* Kerugoya MCEP 1 of 2017.
359 Malindi High Court Election Petition 1 of 2017.
360 Narok Magistrates' Court Election Petition No. 3 of 2017
361 Malindi High Court Election Petition 8 of 2017.

to amending the petition after close of pleadings. By the same token, the Court declined to allow such an application in ***Robinson Simiyu Mwanga & Another v IEBC & 2 Others***[362] where it was apparent that the evidence sought to be introduced by the Petitioner was available at the time of filing, it would alter the nature of the petition and prejudice the Respondents by raising new complaints requiring responses within a limited time and further reply by the Petitioners and therefore require an extension of time, thereby impeding the timely resolution of the dispute.

It is curious that in ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,***[363] the Supreme Court allowed an application to file additional evidence by the appellant at the 2nd appeal stage and without granting the 1st and 2nd Respondents' application to have the appellant cross-examined on the contents of the affidavit. Seeing as the appellant in that case had failed to appear to be cross-examined on his qualifications at the Trial Court, he had lost the opportunity to adduce any evidence in support of the claim that he was eligible to vie for office. Seeing as the question of academic qualification is one within his personal knowledge, there was nothing to demonstrate that the evidence allowed to be adduced was not available at the time of the trial or that he could not, with due diligence, have been reasonably expected to adduce the evidence before the Trial Court. Denying the 1st and 2nd Respondents the chance to cross-examine him on the contents of the affidavit not only deprived them of the chance to test this crucial piece of evidence, but it also violated their fair trial rights under Article 50 of the Constitution.

In ***Timamy Issa Abdalla v IEBC & 3 Others***,[364] the Court of Appeal allowed the Respondents' application for leave to file an application challenging the competency of the appeal out of time. Counsel for the 3rd and 4th Respondents submitted, and the Court was persuaded, that the COA had unfettered discretion under Rule 17 (1) of the Election Appeal Rules to either extend or reduce timelines set under the Rules for sufficient reason and Rule 5 of the Election Appeal Rules empowered the COA to determine the effect of non-compliance with the said Rules. Moreover, the Court could exercise its discretion to extend time within which the 3rd and 4th Respondents could file the application since Rule 19 of the Election Petition Rules was not couched in mandatory terms. It was argued that the fact that the application was raising a jurisdictional issue was sufficient to warrant the Court to exercise its discretion in favour of the said respondents.

Overall, it appears that whereas the Court does have discretion under Rule 19 of the Election Petition Rules and Rule 17 of the Election Appeal Rules to extend time for any action requiring to be taken under the Rules, such discretion will only be exercised in favour of the applicant where it is shown that there are good reasons for failure to comply with the timelines, where it does not occasion prejudice to the other party/parties and where it furthers the overriding objectives of the Rules i.e. the fair, just, proportionate and affordable resolution of the issues raised in the petition.

6.2. Failure to File Appeal on Time

In order to bring finality to the post-election EDR process, the Elections Act sets the timelines for not only the hearing and determination of petitions but also of appeals arising from election petitions. The only exception in this regard relates to further election appeals to the Supreme Court under Article 163 (4) of the Constitution, which are not time bound. It would render nugatory the 6 month period

362 Kitale High Court Election Petition 1 of 2017.
363 Supreme Court Petition 7 of 2018.
364 Mombasa Election Appeal No. 4 of 2018.

for hearing election petitions if election appeals were allowed to proceed indefinitely. It is therefore imperative that a Notice/Memorandum of Appeal setting out the grounds of appeal be filed (within 7 days for the Court of Appeal and 30 days for the High Court respectively) as stipulated in the Rules and the substantive Appeal lodged timeously (within 30 days at the CoA and 21 days at the High Court) and served within 7 days of filing.[365]

The consequences of failure to file a notice of appeal on time formed the subject of the Court's determination in ***John Munuve Mati v RO Mwingi North & Others.***[366] The appellate court ruled that it had discretion under the 2017 Rules to extend time for filing a notice of appeal outside of the 7 days prescribed by the Rules as well as the time to serve the Respondents. The Court considered the fact that no evidence was adduced that any party had been prejudiced by non-compliance with the 2017 Rules and was guided by the three objects of the 2017 Court of Appeal (Election Petition) Rules i.e. the just, impartial and expeditious determination of appeals, which were to be given equal consideration and would not be compromised if the appeal were determined on merit. The COA also bore in mind the fact that the Supreme Court declined to strike out documents filed or served out of time under the Supreme Court (Presidential Election Petition) Rules 2017 in the ***2017 Raila Odinga Case.***

In ***Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC***[367] the applicant sought an extension of time to file an appeal against the decision of the Court of Appeal to the Supreme Court. The applicant submitted that the delay in filing the appeal was occasioned by the uncertainty about the computation of time for lodging the appeal to the Supreme Court; whether time was to be computed from the time the Notice of Appeal was lodged at the Court of Appeal or from the time the Notice was presented to the Supreme Court registry. Further, there was uncertainty as to whether the computation of time included public holidays and weekends. The Petitioner further submitted that he presented his documents on 24 August 2018, a Friday, when the Supreme Court was in recess and it was not until Monday when the documents were received and stamped, causing the 30-day period to lapse during the weekend in between. The Court took judicial notice of the fact that indeed the last day when the appeals could be filed fell on 24 August 2018 when the Registry closed at 12 noon yet the appellant had purported to lodge his appeal at 4 p.m. Since there was no inordinate delay in the bringing of the appeal and guided by its earlier decision in ***Charo v Mwashetani & 3 Others***[368] that the Court was under an obligation to take cognisance of its eternal mandate of responding appropriately to individual claims as dictated by compelling considerations of justice, the application was allowed.

In ***Sumra Irshadali v IEBC & Another,***[369] the Court of Appeal declined to strike out an appeal where the supplementary record of appeal was filed 60 days after the judgment of the High Court for reasons that the omission did not go to "the root of the appeal, or in any way affect the jurisdiction of the Court." The fact that the leave of the Court to file these documents out of time was not sought did not in the view of the Court occasion any injustice or injurious prejudice to any party. The Supreme Court[370] endorsed this finding on the basis that the Court of Appeal Rules 2010 allowed the filing of

365 See sec 75 (4) (a) and 85 (1) (a) of the Elections Act as read with Rule 34 of the Election Petition Rules and Rules 6 & 9 of the Election Appeal Rules; the appeal to the High Court is initiated by a Memorandum of Appeal while that to the Court of Appeal is initiated by a Notice of Appeal.

366 Election Petition Appeal 5 of 2018.

367 SC Petition Application 27 of 2018.

368 [2014] KLR-SCK

369 Nairobi Election Appeal 22 of 2018.

370 *Mawathe Julius Musuli v IEBC & Another* SC Petition 16 of 2018

supplementary records of appeal 'as soon as may be practical' while the Court of Appeal (Election Petition) Rules did not specify a time limit for filing the same.

Conversely, in ***Peter Odima Khasamule v Independent Electoral and Boundaries Commission (IEBC) & 2 Others,***[371] the Court of Appeal in Kisumu allowed for the striking out of an appeal where the appellant filed the Notice of Appeal under Rule 6 but took no further step in the proceedings. The appellant also did not respond to the Notice to Show Cause why the appeal should not be struck out for want of prosecution. The Court found that the failure to file an appeal within the 30 days stipulated by section 85 (1) (a) of the Elections Act as read with Rule 8 (5) of the Court of Appeal Election Petition Rules 2017 rendered the Notice of Appeal futile. The appeal was therefore struck out in accordance with Rule 84 of the Court of Appeal Rules as read with Rule 4 (2) of the Election Appeal Rules with no order as to costs.

It would therefore appear that where there is non-compliance with the timelines for filing a Notice of Appeal under the Rules, the courts are prepared to exercise discretion under the Rules for the extension of time. This extension of time would have to be sought by the applicant and good cause for the delay shown, in addition to demonstrating that no prejudice would be occasioned to the Respondents. This liberality did not, however, extend to instances where the Notice of Appeal was lodged at the wrong registry, as discussed above.

6.3. Failure to Furnish Security for Costs within 10 Days of Filing Petition/ upon Filing Appeal

The practice of furnishing security for costs upon lodging a petition predates the current legal regime. The National Assembly and Presidential Elections Act contained a similar requirement.[372] The old provision was divergent from the current one in that it had a different timeline (the deposit had to be made within 3 days of filing a petition) and the amount was fixed at KES 250,000 (in the current law it is staggered depending on the election contested).

The 2017 Election Appeal Rules also contain a requirement for the deposit of a sum of KES 500,000 as security for the appeal upon filing an appeal.[373] However, unlike the Elections Act and Election Petition Rules which specify the time within which costs must be deposited in relation to a petition, there is no specification of the time within which costs must be deposited in relation to an appeal. Where no security is given, the Appellate Court is at liberty, either on its own motion or on the application of the Respondent, to issue an order directing the dismissal of the appeal and payment of the Respondent's costs.

The rationale for the requirement of security for costs was articulated in ***Esposito Franco v Amason Kingi Jeffa & 2 Others***[374] as follows:

> *…the requirement that an aggrieved party remits security for costs upon filing an Election petition is to restrict the would be vexatious litigants from coming to court and ensure that the party who comes to court is serious and will be able to pay the costs in the event he is required to do so.*

371 Civil Appeal Election Petition No. 4 of 2018.
372 See sec 21 of the National Assembly and Presidential Elections Act, cap 7 (repealed).
373 Rule 27.
374 Civil Appeal Application No. 248 of 2008.

Sewe J reiterated the legislative intent of including this requirement upon filing a petition in ***Tom Onyango Agimba v Independent Electoral and Boundaries Commission & 2 Others***[375] by asserting:

> *[14]Clearly therefore, the intention of the legislature was to cure the mischief of vexatious litigants and ward off busybodies from diverting the scarce judicial resources from more deserving court business, as well as ensuring the protection of the rights of the respondents to recompense by way of costs in the event that the petition turns out unsuccessful.*

The balance that must be struck in the EDR process is in facilitating access to justice for intending Petitioners/appellants on the one hand and on the other, protecting would-be respondents from incurring costs and dissuading Petitioners/appellants from filing vexatious proceedings.[376]

One of the contested issues was whether an election court has the discretion to extend time for the furnishing of security for costs where the same is not done within the time stipulated by section 78 of the Elections Act or Rule 27 of the Election Appeal Rules. Section 78 (3) provides as follows:

> *(3) Where a Petitioner does not deposit security as required by this section, or if an objection is allowed and not removed, no further proceedings shall be heard on the petition and the Respondent may apply to the election court for an order to dismiss the petition and for the payment of the Respondent's costs.*

The provisions of section 78 are elaborated upon in Rule 13 of the Election Petition Rules where the procedure is set out. A reading of the counterpart provision in relation to election appeals, Rule 27 of the Election Appeal Rules, indicates that there is no discretion where there is failure to furnish security at the time of the lodging of the appeal. However, Rule 5 of the same rules grants the Court the power to determine the effect of non-compliance with the Rules in the following terms:

> *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 timelines set by the Constitution or any other electoral law.*

Therefore, while Rule 27 may appear to be worded in mandatory terms, a holistic reading of the Rules leads to a conclusion that the CoA may extend time for lodging security for costs under Rule 5. This being the first EDR cycle where the 2017 Rules were applicable, there was no jurisprudence on the question of whether the Court can extend time for furnishing security in respect of an appeal.

In respect of petitions in the election court, in the last EDR cycle, there was mixed opinion as to whether failure to furnish security for costs within 10 days of filing as stipulated by section 78 (1) was fatal to the petition. The use of the words 'no further proceedings shall be heard on the petition' appeared to imply, in the view of some election courts, that proceedings could be temporarily stayed to facilitate compliance with this provision and it was only when directions to comply were not obeyed by a Petitioner that a petition could be struck out.

Muriithi J, in the case of ***Fatuma Zainabu Mohamed v Ghati Dennitah & 10 Others*** **[2013]**

375 Milimani High Court Election Petition 18 of 2017.

376 For this reasoning, see dicta of Majanja J in *Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & 2 Others* Machakos High Court Election Petition 8 of 2013.

eKLR interpreted section 78 of the Elections Act to mean that the Court had discretion to enlarge time within which a Petitioner could furnish security for costs, particularly where the delay was not inordinate.

> *I consider that if section 78(3) of the Elections Act were construed as not allowing for any good cause an extension of time to deposit security for costs, it would unreasonably restrict the right to approach the Court for a determination whether one has been elected to hold office, inconsistently with the constitutional right under Article 38(3)(c) of the Constitution for "every adult citizen has the right without unreasonable restrictions to be a candidate for public office or office within a political party of which the citizen is a member and if elected to hold office". Accordingly, I find that the time prescribed for deposit of security for costs is a matter of procedure rather than substance of the right to petition the Court on election dispute, which is granted by the Constitution itself.*

Some election courts extended time for the Petitioner to furnish this security.[377] Majanja J argued for the discretion of the Court to extend time for furnishing of costs in ***Patrick Ngeta Kimanzi v Marcus Mutua Muluvi & Others,***[378] by looking at the pre-2010 jurisprudence since section 78 was retained from the previous electoral regime. While the jurisprudence pointed to the peremptory nature of the requirement, the learned judge asserted that the jurisprudence failed to consider the import of the words 'or if an objection is allowed and not removed…the Respondent may apply to the election court for an order to dismiss the petition…' used in section 78 (3) of the Elections Act. He opined that considered together, these words led to the conclusion that the election court had discretion to consider whether to allow the Respondent's objection where no security is deposited. An objection could therefore be removed if a Petitioner gave reasons why the deposit was not made on time. Since section 78 did not contain an express requirement to dismiss the petition,[379] and the wording of section 78 (3) was to the effect that the Respondent may apply to dismiss the petition, it was, in the view of the Court, implied that there was room for the exercise of judicial discretion. All in all, the exercise of discretion would depend on the particular circumstances of the case and whether the Petitioner had demonstrated that he/she was worthy of the exercise of discretion in their favour.[380]

On the contrary, other courts considered the failure to furnish security for costs on time a matter that went to the root of the petition and declined to extend time for furnishing the same. Such was the case in ***Mohamed Odha Maro v County Returning Officer, Tana River & 3 Others***[381] and ***Evans Nyambaso Zedekiah & Another v Independent Electoral And Boundaries Commission & 2 Others.***[382]

In the 2017 EDR cycle, this dichotomy continued to be exhibited, with some courts finding the omission fatal to the petition, while other courts exercised discretion to enlarge time. However, it would appear that the majority of the courts are now leaning towards treating this omission as going to the root of the jurisdiction of the Court, making it a substantive rather than a procedural requirement.

377 See *John Lokitare Lodinyo v Mark Lomunokol and 2 Others* [2013] eKLR; *Charles Maywa Chedotum & Another v IEBC & 2 Others* Kitale High Court Election Petition 11 of 2013 [2013] eKLR.
378 Machakos High Court Election Petition 8 of 2013.
379 Contrast this with Rule 27 of the Election Appeal Rules.
380 For similar reasoning, see also *Noah Makhalanganga Wekesa v Albert Adome, Returning Officer IEBC & 2 Others* Kitale Election Petition 6 of 2013.
381 Malindi Election Petition 15 of 2013.
382 Kisii Election Petition No 10 of 2013.

In ***Samwel Kazungu Kambi v Nelly Ilongo & 2 Others***[383] the Court ruled that the failure to deposit the security within the stipulated timeframe was not fatal to the petition and the Court could extend time to enable the Petitioner to comply with the requirement for the deposit of security for costs. Similarly, in ***Yaite Philip Okoronon v Jakaa Gardy Odara & Another***,[384] the Court ruled that a reading of section 78 requires the Petitioner to be given an opportunity to show cause why the petition should not be dismissed for failure to furnish security for costs on time. The Court declined to strike out the petition but ruled that the hearing of the petition would not proceed until the Petitioner had complied. While declining to strike out the petition in ***Samson Kinyua Magambo v IEBC & 3 Others,***[385] the Court ruled that the requirement to furnish security for costs was a procedural one.

Similarly, it would appear that in ***Kiplagat Richard Sigei & 2 Others v IEBC & Another,***[386] the Court was willing to exercise discretion to allow the Petitioner to furnish security for costs outside the statutory timeline. However, since no attempt was made to pay the security and the Respondents conceded as much, and no effort was made to seek an extension of time to comply with the requirement, failure to pay costs was ruled fatal to the petition.

Nonetheless, in the majority of the cases reviewed, the failure to deposit security for costs was determined to be an issue of substance rather than procedure, making it fatal to the petition. Where security for costs was not deposited, it was considered an indication that the Petitioner was not keen on prosecuting the petition. In ***Morris Muindi Mutiso v Naomi Namsi Shaban & 2 Others***,[387] the Court declined to exercise discretion in favour of the Petitioner as in the view of the Court, he demonstrated ambivalence as to whether he intended to proceed with the prosecution of the petition. Similarly, in ***Milton Kimani Waitinga v IEBC & 2 Others,***[388] Ngugi J, drawing from the decision of Sitati J in ***Evans Nyambaso Zedekiah & Another v IEBC & 2 Others,***[389] asserted that the requirement that a Petitioner pay security for costs was not a technical requirement, but a substantive question which went to the root of the Court's jurisdiction. He further asserted that the aim of this requirement was to discourage frivolous or vexatious litigants from challenging the results of elections and ensure that Respondent recovered some of their costs from defending unsuccessful election petitions.[390] The Court also asserted that the payment of security for costs was a pre-requisite for the hearing of the election petition. Since no attempt was made either to pay the security or to seek an extension of time within which to comply with section 78 of the Elections Act, the Court ruled that the non-compliance went to the root of the jurisdiction of the Court and the Court therefore had no jurisdiction to take any further action in the petition. The petition was therefore struck out with costs to the Respondents.

In ***Robert Mwangi Kariuki v IEBC and 2 Others,***[391] the Petitioner challenged the election of Member of the National Assembly for Tetu Constituency. The 1st and 2nd Respondents filed two applications subsequent to filing their response. The first application sought to extend time for filing additional witness statements while the second sought to strike out the petition for failure to deposit security for costs as mandated by section 78 (3) of the Elections. The 3rd Respondents also filed an application

383 Malindi High Court Election Petition 4 of 2017
384 [2017] eKLR.
385 Githongo MCEP No. 2 of 2017.
386 Kericho High Court Election Petition 1 of 2017.
387 [2017] eKLR.
388 Kiambu Election Petition 2 of 2017.
389 [2013] eKLR.
390 At para 13.
391 Nyeri High Court Election Petition 1 of 2017.

to strike out the petition for want of service within 7 days and for failure to deposit security for costs. Neither the Petitioner nor their counsel was present on the day set down for hearing of the applications. The Court noted that it was clear from the record and the Petitioner's conduct that he had not intended to prosecute the petition and could have been a busy body. The Court also took cognisance of the clarity of Parliament's intention in section 78 of the Elections Act and of the consequences of non-compliance; that failure to make the deposit would render the petition dead on arrival. The Court ruled that there could only be one outcome of failure to deposit the costs: it was fatal to the petition. While the Petitioner had not served the Respondents, he published it in print and electronic media, the Petitioner could not escape the burden of costs. The costs of hearing and determining an application under section 78 (3) of the Elections Act was either that they be paid as ordered by the election court or that they form part of the general costs of the petition where no order was made. The petition was struck out with costs to each respondent.

In ***Tom Onyango Agimba vs IEBC and Another***,[392] the Petitioner filed an application, citing among other provisions Rule 19 of the Election Petition Rules, seeking extension of time to deposit security for costs outside the 10-day limit prescribed by ninety-six hours. The Court had noted that there was no evidence on record that the security for costs had been deposited and postponed the pre-trial conference to allow the Petitioner to furnish proof of the same. The Petitioner averred that the deposit was to be deposited but instead of availing the proof of payment sought an extension of time, averring that the monies had not been deposited by his client as he had been made to believe. The Petitioner contended that he stood to suffer irreparable harm if the application was not determined in his favour. The application was opposed on among other grounds that there had been inordinate delay on the part of the Petitioner in making the said deposit and misleading the Court and other parties that the deposit had been made. It was also argued that Rule 19 could not override the provisions of section 78 and the Petitioner was not entitled to the Court's discretion on account of his inequitable conduct.

On the question of whether the Court had discretion to extend time, the Court took the view that Rule 19 of the Election Petition Rules confers discretion on the Court to extend time to deposit the security since the effect of Rule 13 is to subject the 10-day timeline to the provisions of Rule 19, making the timeline amenable to extension by the Court.[393] In so doing, it diverged from the decision of Sitati J in ***Evans Nyambaso Zedekiah & Another v IEBC & 2 Others,***[394] to the effect that failure to deposit security on time was a substantive issue going to the root of the petition. As to whether the Petitioner merited the exercise of discretion in their favour, the Court was not convinced that a plausible explanation for non-compliance had been proffered. While it was true that he had instructed a client to deposit the said funds, he was under an obligation to not only ensure that the deposit was made but to also present the deposit slip and obtain a deposit slip from the Registrar in accordance with Rule 13 of the Election Petition Rules. The Petitioner could therefore not escape censure for having sat back without ensuring full compliance with section 78 and Rule 13. Moreover, no satisfactory explanation was offered for why the deposit was not paid by the said client, if at all he had been in a position to pay. It was also unclear why he waited until the 24th of October to seek confirmation of the payment, particularly since as a lawyer, he knew all along that a deposit was required by law upon the filing of the petition and it had to be made no later than 10 days after filing the petition.

392 Nairobi High Court Election Petition 18 of 2017.
393 See the similar reasoning of Karanja J in *Joshua Mutoto Werunga v Joyce Namunyak & 2 Others* Kitale Election Petition 10 of 2013.
394 [2013] eKLR.

Moreover, in the authorities relied on by the Petitioner where the Court had granted extension of time, the Petitioners had not only shown due diligence but had already deposited the security at the time the applications were being argued. In this case, the Petitioner sought an extension of time for a further 96 hours, which in the view of the Court not only showed disdain for the whole concept of timelines but was also in effect an admission that he had no funds, which was the very mischief that section 78 sought to cure. Article 159 (2) (d) could therefore not come to his aid since that provision, as explained by Karanja J in ***Charles Maywa Chedotum & Another v IEBC & 2 Others***[395] was not meant to be a panacea for indolence or lack of diligence by advocates in the preparation of cases. The application was therefore dismissed and petition struck out with costs to the Respondents.

In ***Ibrahim Ahmed vs IEBC and 2 Others***[396] the Court found that section 78 was set in mandatory terms and the Petitioner was not at liberty to determine when to deposit the security for costs. The Petitioner sought an extension of time alleging that he had deposited a cheque into the Judiciary account which unbeknownst to him had not cleared because of lack of funds. He prayed for an extension of time to deposit the same.

The Court considered his explanation unpersuasive, since it was the Petitioner's duty to ensure that the account had sufficient funds to cater for the cheque. Moreover, his explanation was implausible as the cheque was to be deposited with the Registrar of the Court who was required to issue a receipt to the Petitioner. The explanation that he made a direct deposit to the Judiciary account did not hold water, especially since the Judiciary no longer accepted personal cheques for any payments to the courts. Since it was clear that the Petitioner had not made the deposit as alleged, the petition was rendered fatally defective as the deposit of security was a substantive requirement and the petition was therefore struck out with costs to the Respondents.

Likewise the cases of ***Sila Samuel Mulwa v IEBC & 3 Others,***[397] ***Jane Naicar Eshuchi v Maurice Sakwa & 2 Others,***[398] ***Salim Abdallah Salim v IEBC & 2 Others,***[399] and ***David Mutua Malii v Tobias Otieno Samba & 2 Others***[400] were struck out on among other grounds, failure to deposit security for costs.

While initially it may have appeared that there was still divergence on this issue, with conflicting decisions having been rendered by courts of concurrent jurisdiction, the scale now seems to tilt in favour of treating the deposit security for costs as a substantive rather than a procedural issue, failure to comply with which renders a petition fatally defective. Where the courts have struck out petitions for this omission, the majority have argued that section 78 leaves no room for judicial discretion.

6.4. Failure to Serve Pleadings within Stipulated Timelines

In the case of ***Clement Kungu Waibara v Annie Wanjiku Kibeh & Anor,***[401] the Petitioner filed 10 witness affidavits but contrary to Rule 12 of the Election Petition Rules, opted not to serve them upon the Respondents until the hearing, ostensibly because the information relied on was too sensitive

395 [2013] eKLR.
396 Nairobi High Court Election Petition 21 of 2017.
397 Malindi High Court Election Petition11 of 2017.
398 Mumias CMCC EP No. 1 of 2017.
399 Mombasa MCEP No. 2 of 2017.
400 Mombasa MCEP No. 1 of 2017.
401 Kiambu High Court Election Petition 1 of 2017.

and therefore it was a strategic move on the part of the Petitioners not to serve the Respondents too well in advance. These affidavits were filed after the petition and without the leave of the Court. The Court allowed the Respondents' application to strike out the affidavits and to preclude the Petitioner from relying on them or the evidence contained therein during the hearing.

The approach taken by the Petitioner is akin to the process that held sway pre-2010 under the repealed National Assembly and Presidential Election Rules.[402] In order to reduce instances of evidence tampering and manipulation of witnesses, affidavits would be filed 48 hours before trial and would remain sealed until their deponents took the stand to testify.[403] This was overhauled by the 2013 election petition rules, and retained in the 2017 rules. Ngugi J deprecated the Petitioner for attempting to conduct a 'trial by stealth' as the aim of pleadings is to allow the Respondents to know the case they are required to meet. Introducing evidence on the day the hearing was scheduled to commence would not only deprive the Respondents of an opportunity to adequately prepare but it would also wreak havoc on the timelines agreed upon by the parties during the pre-trial conference. Similarly the High Court in Malindi struck out a petition where the Petitioner unprocedurally replaced the original petition with another, without the leave of the Court in ***William Kahindi Mganga v IEBC & 4 Others.***[404]

Similarly, in ***Kiplagat Richard Sigei & 2 Others v IEBC & Another,***[405] the 2nd Respondent filed a Notice of Motion seeking to have the petition struck out for want of service within 2 days of filing, contrary to section 77 of the Elections Act and Rule 13 of the Election Petition Rules. It was the Applicant's case that she had never been served personally, neither had an affidavit of service been filed. The Court was guided by the decision of the Court of Appeal in ***Rozaah Akinyi Buyu v IEBC & 2 Others Kisumu Civil Appeal No 40 of 2013*** where it had been held that service was so fundamental to the petition that failure to serve went to the root of the petition and the petition could not stand. It was satisfied that there was no service and service on the liaison office in Bomet did not count as personal service. The petition was therefore struck out for, *inter alia,* want of service. A similar fate befell the petition in ***Aluodo Florence Akinyi v IEBC & Others***[406] where the petition was neither served directly nor through substituted service.[407]

Kitavi Sammy v IEBC & 2 Others,[408] the Court was called upon to determine whether it had jurisdiction to hear an appeal where the Appellant served the Notice of Appeal was filed on time but the Memorandum of Appeal was served on the 1st and 2nd Respondents outside the 7 days stipulated by Rule 34 (5) of the Election Petition Rules. Since the Memorandum had been served upon the 3rd Respondent on time, the Appellant argued that failure to serve the 1st and 2nd Respondents on time was a mere technicality and did not provide sufficient basis for striking out of the appeal. It was also urged that the Court had discretion to extend time under Rule 5 (1) of the Election Petition Rules.
The Court, in determining whether to exercise its discretion in favour of the appellant, considered the justification provided by counsel for their laxity in serving. Since the overriding objective of the rules

402 Enacted pursuant to section 27 of the National Assembly and Presidential Elections Act (cap 7) (repealed by the Elections Act 24 of 2011).
403 Rule 18, National Assembly and Presidential Election Rules (repealed).
404 Malindi High Court Election Petition 5 of 2017.
405 Kericho High Court Election Petition 1 of 2017.
406 Siaya High Court Election Petition 4 of 2017.
407 See also *Jacob Thoya Iha v IEBC & 3 others* Malindi Election Petition 6 of 2017; *Saad Yusuf Saad vs IEBC & 2 others* Mombasa Election Petition 8 of 2017; *Aziz Mohamed Karisa vs IEBC & 3 others* Malindi Election Petition 7 of 2017; *Jane Wambui Mwaura vs IEBC & 2 others* Muranga Election Petition 1 of 2017 which were also struck out for want of service.
408 Kitui Election Petition Appeal 3 of 2017.

required a just, expeditious, proportionate and affordable resolution of disputes, the Court opined that facilitating a just resolution of an election petition would call for the Court to ensure that justice is done even if technicalities were disregarded. This would mean that the intent and purpose of the substantive law is upheld.

Nevertheless, in the circumstances, the Court had to interpret the law strictly and found that the failure to serve the appeal within time was detrimental to the Appellant. This was because counsel for the Appellant, while seeking a discretionary order, indicated that he had been handling several election petitions upcountry. Counsel for the Appellant maintained that he had exercised due diligence and served the Applicant when he touched base in Nairobi. However, counsel failed to establish the allegation that he had other cases in other courts, for example by attaching cause lists or any other evidence to suggest that he was indeed representing other parties before other courts. Moreover, nothing was stated to suggest why a process server was not retained by the Appellant to discharge the responsibility of serving the Memorandum upon the 1st and 2nd Respondents. The Court therefore found that the explanation given by counsel for the Appellant did not fall within the criterion of plausibility acceptable to the Court and was dismissed. Since the Memorandum of Appeal was served on the 3rd Respondent in time but not the 1st and 2nd Respondents, it was not properly served and it was therefore rendered incompetent.

7. Costs in an Election Petition

Section 84 of the Elections Act grants the election court the power to award costs of and incidental to an election petition and the costs ordinarily follow the cause. The Election Petition Rules then flesh out the parameters of this power, which include setting out the person by whom costs are payable, the total costs payable and allowing the Court to disallow costs incurred because of vexatious conduct, unfounded allegations or unfounded objections by a party.[409]

In 2013, some election courts also considered the power of the Court to award costs to extend to persons who were used as proxies to file petitions by unsuccessful candidates which were eventually dismissed. It was considered within the powers of an election court to make an order for costs against a 'proxy Petitioner' and/or his principal.[410] According to Makau J:[411]

> *The Petitioner who agrees to bring a petition on behalf of an unsuccessful candidate should be ready to meet the consequences of a failed petition and cannot hide behind the fact of being a sponsored [P]etitioner. He should make arrangements with the principal in advance. The Petitioner in my view should not be left unpunished for his actions as by failing to do so would encourage the unsuccessful candidates to use men of no means to file petitions with the hope of getting away without paying costs in case the Petitioner does not succeed.*

409 Rule 30, Election Petition Rules 2017. A literal reading of Rule 30 leads to the conclusion that it is *ultra vires* section 84 of the Elections Act. The parent statute directs that costs shall follow the cause. The Rule on the other hand gives the election court room to determine who shall pay the costs, and how much. Taken together with jurisprudence from the 2013 petitions, it has been said that that discretion extends to even persons not party to the petition but who orchestrated the filing of a petition by proxy.

410 See dicta of Tuiyott J in *John Okello Nagafwa v Independent Electoral and Boundaries Commission & 2 Others* Busia Election Petition No. 3 of 2013; & Makau J in *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others* Meru Election Petition No. 1 of 2013.

411 *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others* Meru Election Petition No. 1 of 2013

In ***John Okello Nagafwa v IEBC & 2 Others,***[412] the Court considered the use of the term 'persons' rather than party instructive:

> *…The use of the word "persons" and not "party" [in that Rule] is, in my view, deliberate. In appropriate circumstances, persons other than the Petitioner/s or the Respondents may be subjected to costs. There is no reason why the actual owner of a failed petition should be left unpunished.*

The practice of capping costs in an election petition began with the introduction of rule 36 in the 2013 Election Petition Rules, which gave the election court the power to set the maximum costs payable before the matter went on taxation to the Deputy Registrar. Rule 36 read as follows:

Costs

36. (1) The Court shall, at the conclusion of an election petition, make an order specifying—
(a) the total amount of costs payable; and
(b) the persons by and to whom the costs shall be paid.

(2) When making an order under subrule (1), the Court may —
(a) disallow any costs which may, in the opinion of the Court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and
(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

(3) The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.

The effect of the provision was to curb the discretion granted to the taxing master under paragraph 16 of the Advocates Remuneration Order 2009.

The rationale for the practice was captured in the case of ***Esposito Franco v Amason Kingi Jeffah & 2 Others***[413] in the following terms:

> *Although this observation is obiter, the new electoral dispute regime has introduced a mechanism for capping of costs in Election Petitions. This was certainly intended to keep costs at a manageable level so as not to limit access to justice by litigants of moderate incomes. In many petitions filed after the 2013 General Elections that went into full hearing, costs were capped by Courts at between shs.1.5 to shs.2m.*

On one hand, the Rule was intended to address the mischief created by election courts awarding runaway costs to successful parties, with the result that unsuccessful litigants were burdened with hefty costs and persons with legitimate complaints shied away from presenting them to court for fear of being slapped with exorbitant costs. Advocates on the other hand justify the high fees on the basis that the law has restricted the timeframes for hearing and determining petitions and this therefore compels them to focus almost exclusively on the petition during its tenure.[414]

412 Busia High Court EP 3 of 2013.
413 [2014] eKLR.
414 Ibid.

The said rule was amended in 2017 to include the power of the Court to specify the person who shall pay the costs and the person to whom the costs shall be paid. Further, Rule 30 modifies the previous provision by expanding the discretion of the election court to include the power to specify the maximum costs payable. It reads:

> *30. Costs*
> *(1) The election court may, at the conclusion of a petition, make an order specifying—*
> *(a) the total amount of costs payable;*
> *(b) the maximum amount of costs payable;*
> *(c) the person who shall pay the costs under paragraph (a) or (b); and*
> *(d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.*
> *(2) When making an order under sub-rule (1), the election court may—*
> *(a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and*
> *(b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.*
> *(3) The abatement of a petition shall not affect the liability of the Petitioner or of any other person to the payment of previously incurred costs.*

While acknowledging that there is a legitimate and fair argument in capping costs, without clear parameters for the exercise of this discretion, the COA considers the decision of the election court, at best, arbitrary.[415] The COA has also expressed concern that this provision in the rules is weakened by the fact that the parties are not required to address the Court before the decision on costs is made and called for a review on this provision.[416]

It is not apparent that the practice of capping costs by the election court has succeeded in ensuring that the losing party is not unduly burdened and prospective litigants dissuaded from taking up election petition litigation.[417]

While in some cases, the election court explains the rationale for arriving at the order of costs that it does, there are many more instances when it was not clear why costs were awarded in the manner that they were. In ***Clement Kung'u Waibara v Annie Kibeh***,[418] the Court noted that the style of litigation adopted by the Petitioner involved unnecessary delay and was characterized by wild allegations. Therefore, even though the petition succeeded, the costs were capped at KES 1.5 million in line with Rule 30 (2) of the Election Petition Rules. In ***Ibrahim Ahmed vs IEBC and 2 Others,***[419] the petition was struck out after the pre-trial conference for failure to deposit security for costs. The Respondents were awarded costs capped at KES 2 million since they had already started preparing for the hearing of the petition.

415 *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 others* [2014] eKLR, para 76. It is noteworthy that the Supreme Court has now proffered guidelines on the question of costs in the case of *Cyprian Awiti & Another v IEBC & 3 Others* SC Petition 17 of 2018, as will be discussed below.

416 Ibid.

417 See 'LSK seeks to lower cost of election petitions' available on https://www.nation.co.ke/news/politics/LSK-seeks-to-lower-high-cost-of-election-petitions-/1064-4308312-13gf7jcz/index.html (accessed 14 November 2018);

418 Kiambu Election Petition 1 of 2017.

419 Nairobi High Court Election Petition 21 of 2017.

On the other hand, no rationale was given by Muchelule J in the ***Wavinya Ndeti*** petition for setting the cap at KES 10 million nor by Karanja J in ***Joseph Oyugi Magwanga & Another v IEBC & 3 Others***[420] in capping costs at KES 12 million. In ***Stephen Kolimuk v IEBC & 2 Others,***[421] the Court, while dismissing the petition at the preliminary stage for having been filed out of the 28 day timeline allowed by the Constitution, awarded costs of KES 2 million to the Respondents. In ***Sila Samuel Mulwa v IEBC & 3 Others,***[422] costs of KES 1 million were awarded in similar circumstances. No explanation was proffered in either case, making it difficult to discern a pattern in the reasoning that would form the basis for the exercise of discretion in similar cases in the future. Similarly, it was unclear why Gitari J capped the costs in the ***Martha Karua*** petition at KES 10 million yet the petition was struck out before hearing commenced following a preliminary objection.

When the ***Martha Karua*** petition went on appeal, the Court considered the amount of 10 million capped by the Trial Court against the fact that the matter had not proceeded to full hearing and the parties had only attended court 8 times. In light of the jurisprudence from the 2013 elections, which sought to stem the practice of awarding large sums in costs which were punitive and an impediment to the right to access justice, the Court considered the sum of 10 million excessive, especially since it was unclear how this figure was arrived at. The Trial Court did not state its basis for the award. It noted with concern that there was a reversal of the trend to the era of inordinately high costs, which had the result of being punitive on unsuccessful litigants. In the Court's assessment,

> *…the capping of costs provided under Rule 30 of the Petition Rules, 2017 was to ensure that parties approach courts without fear of being subjected to excessive costs. Despite this rule, the current trend in the capping of costs at inordinately high amounts shows that we are going back to the era where costs in election petitions were very high. Capping of costs was intended to curb the practice of awarding large sums in costs. High costs are an impediment to the right of access to justice and are not meant to be punitive. In our view, this petition and the applications thereunder were not particularly complex or protracted. To our collective minds, the amount of Kshs.10 million, even where this amount is to be shared amongst all the respondents, was excessive.*

The Court asserted that costs were intended to compensate a successful litigant and not punish or serve as a deterrent measure scaring away litigants from the doors of justice. In the interests of not discouraging citizens from filing petitions, the Court ruled that having found that the trial judge had erred in striking out the petition, the award of costs could not stand. The costs were awarded to the appellant and capped at KES 2 million.

Similarly, in the case of ***Timamy Issa Abdalla v IEBC & 3 Others***,[423] the High Court awarded a total of KES 12 million in costs, with each set of Respondents getting KES 6 million each. The Court, while noting that the issues in the petition were not complex, asserted that there were many witnesses called to testify, causing the hearings to last for 21 days and running beyond working hours on each day. The parties also had to work late into the night over one weekend. This figure was also guided by the costs of legal representation and the strain experienced in the preparation and perusal of the pleadings, submissions and research. When the matter went on appeal, it was argued that the costs were punitive and a violation of Article 48 of the Constitution.

420 Homa Bay High Court Election Petition 1 of 2017.
421 Kapenguria High Court Election Petition 2 of 2017.
422 Malindi High Court Election Petition 11 of 2017.
423 Malindi High Court Election Petition 3 of 2017.

Although the substantive appeal was dismissed, the Court interfered with the exercise of the Trial Court's discretion on the question of costs. The COA was guided by its dicta in the ***Martha Karua*** appeal as well as ***Dennis Magare Makori & Another v The Independent Electoral and Boundaries Commission & 3 Others***[424] to the effect that the Court was to be guided by the principles of fairness, justice and access to justice and costs should not seek to punish an unsuccessful litigant. The Court also considered costs awarded both in election courts and appellate courts in comparable disputes, and found that the award of KES 12 million was excessive, even bearing in mind the number of witnesses who testified, the complexity of the matter and the time involved in the preparation for the petition. The COA ruled that the trial judge's discretion was not exercised properly and the costs of KES 12,000,000 were capped at KES 3,000,000 to be paid equally between the 1st and 2nd Respondents on one part and the 3rd and 4th Respondents on the other.

In the same way, in the case of ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 5 Others,***[425] the award of the election court of KES 10 million in costs to the Respondents was contested. The decision in the ***Martha Karua*** appeal was cited by the appellant in support of the argument that the award was exorbitant and the prayer to have the award set aside or capped at KES 1 million. The Court referred to the COA decision in ***Philip Kyalo Kaloki v IEBC & 2 Others,*** [426] where its dicta in the ***Martha Karua*** appeal that an award of costs be guided by fairness, justice and access to justice was relied on. Applying those principles, the Court considered the award of KES 10 million excessive as it did not appear fair, just or aimed at promoting access to justice. It ruled that reducing it in half would be reasonable. Consequently, the award of costs was varied with the appellant directed to pay 2.5 million to the 1st Respondent and 2.5 million to the 2nd and 3rd Respondents, subject to taxation.

The approach taken by the election court in the ***Martha Karua*** case can be contrasted with that of Gikonyo J in ***Peter Gatirau Munya vs Independent Electoral and Boundaries Commission, Meru County Returning Officer & Kiraitu Murungi.***[427] In the latter case, the Court, noting that the matter was withdrawn at an early stage and that there was nothing to show bad faith in bringing the petition, limited the costs to the expenses incurred during the re-sealing of ballot boxes by the Court and the 1st and 2nd Respondents. The costs were either to be taxed or agreed on by the parties and were to be paid out of the security deposited by the Petitioner and any balance released to him.

While the election court is also at liberty to set the total amount payable, it was only in few cases that the Court fixed the total amount payable and directed that the matter not go for taxation. Such was the case in the ***Kazungu Kambi*** case as well as the ***Clement Kung'u Waibara*** case.

There were also instances where the Court granted costs but did not set an upper limit of the costs. Such was the case in ***Kitavi Sammy v IEBC & 2 Others***[428] where the Court granted costs to the Respondents but did not cap them. Costs were also not capped when the matter went on appeal.

Some appeals on costs were allowed on the basis that they were capped too low and did not align with the trends gleaned from awards of costs in similar petitions. In ***Kennedy Moki v Rachel Kaki Nyamai & 2 Others,***[429] the Cross Appeal on costs to the 1st Respondent was allowed and costs capped

424 Kisumu Election Petition Appeal No. 22 of 2018.
425 Nyeri Election Petition Appeal 3 & 4 of 2017 (consolidated).
426 [2018] eKLR.
427 Meru Election Petition 6 of 2017; [2017] eKLR.
428 Kitui Magistrates' Court Election Petition No. 2 of 2017.
429 Election Appeal 2 of 2018.

at KES 1 million by the election court were enhanced to KES 2.5 million. The CoA, having compared the award of costs in similar petitions, considered the award inordinately low.

While capping costs does not mean that those will be the amounts eventually awarded to successful parties, it is more likely than not that the taxed costs will be within the range of the capped costs. Some guidelines as to the exercise of the discretion of capping costs are therefore necessary to allow the striking of a balance between recovery of costs by the successful party and ensuring that access to justice is not hampered.

The SC in ***Cyprian Awiti & Another v IEBC & 3 Others***[430] taking cognisance of the notoriety of the award of costs in election petitions, which in its view was worthy of judicial notice, proffered the following guidelines for the award of costs in election petitions:[431]

*(a) the general rule that **"costs follow the event"** is applicable in election matters in which no special circumstances are apparent;*
(b) however, an election Court holds discretion in reserve, for awarding costs as merited by the occasion;
(c) a discretion vests in the Election Court to prescribe a ceiling for the award of costs;
(d) in setting a ceiling to the award of costs, the Election Court stands to be guided by certain considerations, namely:
  (i) costs are not to be prohibitive, debarring legitimate litigants from moving the judicial process;
  (ii) inordinately high costs are likely to compromise the constitutional right of access to processes of justice;
  (iii) costs are not to bear a punitive profile;
  (iv) Courts, in awarding costs, are to be guided by principles of fairness, and ready access to motions of justice;
  (v) costs are intended for decent and realistic compensation for the initiatives of the successful litigant;
  (vi) costs are not an avenue to wealth, and are not for enriching the successful litigants;
  (vii) the award of costs shall not defer to any makings of opulence or profligacy in the mode of conduct of the successful party's cause.

In light of the foregoing, it would appear that section 84 of the Elections Act, which gives the election court power to grant costs, ought to be widened in scope to allow the Court to take into account the circumstances of the case as listed above and in Rule 30 of the Election Petition Rules. These would include the conduct of the parties which results in undue expense or vexatious conduct in determining who should pay costs.[432] At present, the section directs that costs shall follow the cause, which limits the discretion of the election court.

430 Supreme Court Petition 17 of 2018.
431 At para 105 (F).
432 See for example *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 others* Mombasa Election Petition Appeal 7 of 2018 where the Court of Appeal rule that the conduct of the 1st and 2nd Respondents necessitated filing of the petition giving rise to the appeal, ad thererefore they did not deserve to be awarded costs of any amount.

8. Election Offences

According to Huefner,[433] when an election outcome is disputed, the contention can be attributed to either one of two causes: an unfair manipulation of the system by candidates or polling officials i.e. fraud or an unintentional interference of the electoral process by those tasked with administering the election i.e. mistake. The first category constitutes election offences, while the latter are described as irregularities,[434] and will be discussed below. Prof Otieno-Odek proffers a third category: petitions alleging that the electoral process did not comply with the constitutional principles of the electoral system and proposes that these categories sometimes overlap.[435]

Both election offences and irregularities are considered egregious because they have the effect of negating the will of the people. In addition to other penalties prescribed by the Election Offences Act, where a person is convicted for an election offence, they are not eligible for election or nomination in an election for a period of five years following the date of the conviction.[436]

There are various categories of election offences, including offences relating to voting, offences by members and staff of the IEBC, offences relating to the register of voters and voters' cards, offences relating to multiple registration as a voter, offences relating to the use of technology in elections, offences relating to campaign expenditure, offences relating to unlawful use of public resources and breach of the Electoral Code of Conduct.

The mandate of investigation and prosecution of election offences was previously vested in the IEBC by Part VI of the Elections Act of 2011. This required that persons mandated to carry out prosecution on behalf of the IEBC be appointed as prosecutors by the DPP under section 85 of the Criminal Procedure Code. However, the Elections Act was amended with the effect that Part VI of the Act was repealed,[437] and replaced by the Election Offences Act.[438] The mandate of investigation and prosecution under the Act now vests with the Director of Public Prosecutions. Complaints of violations of the Electoral Code of Conduct remain the preserve of the IEBC, and the Commission may, if need be, institute proceedings at the High Court where there is intimidation, violation or a gross violation of rights by a party or by party leader/office-bearer or by a member or supporter.[439]

8.1. Powers of Election Court Pre-2016

In the context of an election petition, prior to amendment in 2016,[440] section 87 of the Elections Act provided for the making of a report, by the election court, on the commission of election offences uncovered in the process of hearing of the petition. In addition to any other findings made, the election court was empowered to make a report to the DPP and relevant Speaker indicating whether an election offence had been proved at the hearing to have been committed by any person. The section provided:

433 SF Huefner 'Remedying election wrongs' 44 Harvard Journal on Legislation (2007) 265 271.
434 As above.
435 Prof James Otieno-Odek 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?"' 5.
436 Sec 24 (3) Election Offences Act.
437 Sec 25, Election Offences Act 37 of 2016.
438 Act 37 of 2016.
439 Para 9, Electoral Code of Conduct.
440 Election Laws (Amendment) Act 36 of 2016.

> ***87.*** *(1) An election court shall, at the conclusion of the hearing of a petition, in addition to any other orders, send to the Director of Public Prosecutions, the Commission and the relevant Speaker a report in writing indicating whether an election offence has been committed by any person in connection with the election, and the names and descriptions of the persons, if any, who have been proved at the hearing to have been guilty of an election offence.*
> *(2) Before a person, not being a party to an election petition or a candidate on whose behalf the seat is claimed by an election petition, is reported by an election court, the elections court shall give that person an opportunity to be heard and to give and call evidence to show why he should not be reported.*
> *(3) The relevant Speaker shall publish a report made under this section in the Gazette, and the Commission shall consider the report and delete from the register of voters, the name of a person who is disqualified from being registered in that register of voters.*

In giving effect to the provisions of this section, the High Court in two instances ordered the arrest and investigation of persons who admitted to the commission of election offences during their testimony. In ***George Aladwa Omwera v Benson Mutura Kang'ara & 2 Others,***[441] the Court ordered arrest of a witness who testified to having voted twice, an offence which was under section 58 (m) of the Elections Act then (now section 5 (n) of the Election Offences Act 2016) punishable by fine not exceeding one million shilling and/or imprisonment not exceeding 6 years. The Court also ordered further investigation by the police. A similar fate befell a witness in ***Abdinasir Yasin Ahmed & 2 Others v Ahmed Ibrahim Abass & 2 Others***[442] who admitted to treating voters during his testimony.

The provision as drafted then posed several challenges to the prosecution of election offences and had some undesired consequences. The first was a characterisation issue. Electoral disputes are *sui generis*: neither civil nor criminal in nature. Section 87 as it then was seemed to imply the presence of a criminal trial within the trial of a petition. An election court would be making a finding of a criminal matter outside a criminal proceeding. Questions arose as to whether an election court can simultaneously be constituted as a civil and criminal court. It was thought that section 87 (2) provided some fair trial guarantees. Section 87 (2) required that a person be heard before a report was made against them.

In ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 Others,***[443] the High Court decision to order the arrest and prosecution of two witnesses for breach of the Public Officer Ethics Act and the Elections (General) Regulations 2012 was overturned on the basis that the witnesses were not on trial. The Court of Appeal found, *inter alia*, that section 87 (2) had not been complied with and ruled that the Trial Court ought to have recommended investigation into the matter by the DPP if he had been satisfied that an election offence had been committed. The CoA recommended further investigation into the matter in the place of the High Court order for arrest and prosecution of the witnesses. However, it was arguable that section 87 (2) did not provide sufficient guarantees available in a criminal proceeding, such as the right to remain silent.[444] This was because once allegations are made in an election petition, the Respondent is under an obligation to rebut these allegations to justify a finding in his favour.

441 Nairobi High Court Petition 4 of 2013.
442 Garissa High Court Petition 9 of 2013.
443 Meru Election Petition 1 of 2013.
444 See the dicta of Gikonyo J in *Moses Wanjala Lukoye v Benard Alfred Sambu 3 others* Bungoma Election Petition No. 2 of 2013, para 43.

Moreover, since the report contemplated was a finding of guilt as in a criminal trial, the report to the DPP appeared to be misplaced in law. For the person against whom such a finding was made, it was argued that a subsequent criminal prosecution by the DPP would also entitle them to raise the defence of double jeopardy.

For some the characterisation argument was settled by asserting that the High Court was vested with unlimited original civil and criminal jurisdiction; however, the same could not be said of Magistrates' Courts gazetted under section 75 (1A) of the Elections Act. This argument also left unresolved the question of what an election court should do if at the time of making its finding, criminal proceedings were ongoing in a Magistrates' Court, as had occurred in ***Kimilili PMCCRC No 365 of 2013 R v Patrick Wanjala Siketi*** or what the role of the Magistrates' Court would be in proceedings following investigation by the DPP. This was because the section 87 report was made in respect of persons 'proved at the hearing to have been guilty of an election offence'. Was the Magistrate's court to find that the matter had been proved at the High Court? Was a section 87 finding a decision that the offence had been proved beyond reasonable doubt?

These questions were answered by the CoA and the Supreme Court. In ***Moses Wetangula v Musikari Kombo,***[445] the Court of Appeal found that the allegation of election offences in an election petition was sufficient notice to a respondent that the Petitioner intended to prove criminal charges against him. In the words of the Court:

> *Such respondent is put on notice that upon sufficient evidence being adduced against him of commission of an election offence, he is obliged, without assuming the burden of proving himself innocent, to rebut such evidence. All that the petition court is required to do is to afford such respondent a reasonable opportunity to defend himself. So when, after considering all the evidence on record including any evidence adduced by the Respondent, an election court finds that an election offence has been proved to the required standard against a respondent who has been afforded an opportunity to defend himself or herself, the Trial Court does not have to wait until such a respondent is proved guilty in a separate criminal trial. The reporting requirement was not put in the Elections Act as a mere ornamental or lofty aspirational provision. It is supposed to be enforced and implemented. It is supposed to and should bite. The petition court should therefore boldly go ahead and report such respondent and upon receipt of such report, the IEBC is, under* ***Section 72(3) (b)*** *of the* ***Elections Act,*** *obliged to disqualify such candidate from contesting the next election. That is the only way we can tame such vices in our electoral system…*

In ***Wetangula v Kombo***,[446] the Supreme Court settled the characterisation issue and held that election petition proceedings, being *sui generis*, were not part of the normal criminal process. In the words of the Court:

> *The description of election petitions as causes sui generis, is in every respect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on*

445 Civil Appeal No. 43 of 2014; [2014] eKLR.
446 [2015] eKLR.

> *private political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.*

This meant that the strict substantive and procedural safeguards for the rights of the accused, including the right to silence, did not apply to election petition proceeding, since the Respondent was under a duty to rebut allegations made in order for the election court to dispose of the matter comprehensively.

Since an election offence had the trappings of a crime and stood to be prosecuted within the realm of general criminal law, a report to the DPP was necessary. This reference could not be compromised by the principle of double jeopardy, since it was a principle of criminal law, while election petitions were the subject of detailed statute law.[447] This meant that double jeopardy could not be raised as a shield in criminal charges brought subsequently in the ordinary sense. For double jeopardy to attach within the meaning of section 138 of the Criminal Procedure Code, proceedings would have to have been characterised as a 'trial for an offence' and result in ether an acquittal or a conviction.

The importance of a report as to whether an election offence had been committed was reiterated in the following terms:[448]

> *Section 83 of the Elections Act empowers the Election Court to declare an election to be valid or invalid, following an election petition, on the basis of certain conditions. The Court cannot appear to condone illegality in the election process, and would therefore investigate any alleged breaches of the law, even where these were not in the pleadings but arose in the course of the trial. The office of Director of Public Prosecutions becomes relevant, insofar as evidence of general offence may emerge in election petition proceedings; and the Court then has the duty to forward this for further investigations, and possible criminal charges. The election Court, thus, affords the criminal-prosecution office a special opportunity to take up the relevant matter for possible criminal trial. The election Court's contribution in that regard is that it is a source of relevant information for a possible criminal trial; but whether or not such trial takes place, falls to the prosecutorial discretion of the Director of Public Prosecutions.*

It was clear to the apex court that the finding under section 87 was to provide relevant information for a criminal trial, which trial was not mandatory but subject to the DPP's prosecutorial discretion. This then meant that the election court did not turn into a criminal court, further undergirding its finding that a person made subject to such a report would not be exposed to double jeopardy.[449]

The decision of the Supreme Court was followed by a proceeding at the IEBC Dispute Resolution Committee to determine whether Hon. Wetangula should be struck off the Register of Voters for having committed the offence of bribery. The Supreme Court had found that he had been involved in the offences in question and could not escape liability simply because his co-accused was not party to the proceedings. Noting the ambiguity of the law as highlighted by Gikonyo J in the High Court and reiterated by the Supreme Court, the IEBC declined to disqualify Hon Wetangula from participation in future elections. It was determined that disqualification should follow a conviction in a criminal trial with the appropriate constitutional guarantees and since Wetangula had neither been

447 At para 136 of the judgment.
448 At paras 137-138.
449 Paras 138-139.

subjected to a separate criminal trial nor convicted by the Supreme Court, he could not be struck off the Register of Voters.[450]

8.2. Role of Election Court Post-2016

Following the decision of the Supreme Court, particularly the concurring opinion of Rawal DCJ & V-P (as she then was) in the ***Wetangula Case*** and that of the Special Committee of the IEBC, legislative reform was proposed to clarify the ambiguity created by section 87. The section was amended in 2016[451] to read as follows:

> **87. Report of court on electoral malpractices**
> *(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.*
> *(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the Court shall direct that the order be transmitted to the Director of Public Prosecutions.*
> *(3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall—*
> *(a) direct an investigation to be carried out by such State agency as it considers appropriate; and*
> *(b) based on the outcome of the investigations, commence prosecution or close the matter.*

Unlike the old section 87, the making of a report on election offences is no longer mandatory. Section 87 (1) invites the election court to proffer an opinion as to whether an election offence may have occurred, rather than a finding that an election offence was proved to have occurred and the persons who were involved. This then leaves the discretion of investigation to the DPP without labouring under an already formed determination of the commission of any alleged offences. Such a report is then transmitted to the DPP. The election court therefore has no power to find a person guilty of an election offence.

In line with the recommendations of Gikonyo J and of Rawal DCJ & V-P (as she then was) in the Concurring Opinion in the ***Wetangula Case*** that the law be amended to stipulate the procedure to be followed when a section 87 report was handed over to the DPP, both section 87 (3) of the Elections Act and section 22 of the Election Offences Act 2016 offer some guidelines. Section 87 (3) enshrines prosecutorial discretion in such instances, which was not previously clearly articulated, and allows the DPP to form their own opinion as to whether the matter is worth prosecutorial time and resources. Where the DPP does decide to commence proceedings, section 22 (2) of the Election Offences Act requires that proceedings be commenced within twelve months of the date of the final judgment.

The new provision also omits the previous directive to the IEBC to delete from the Voter's Register the name of a person who is disqualified following a finding that they have committed election offences. It is noteworthy, however, that section 24 (3) of the Election Offences Act retains the penalty of disqualification of a candidate from election or nomination following a conviction under the Act. Nevertheless, this penalty does not extend to persons who commit offences and who are not candidates in an election.

450 *In the Matter of Moses Masika Wetangula*, decision of a Special Committee of the IEBC delivered on 19 January 2016, paras 147 & 162.

451 Section 21 Election Laws (Amendment) Act 36 of 2016.

In the 2017 EDR cycle, the courts had occasion to deal with allegations of commission of election offences when handling election petitions. With the 2017 amendment to section 87, the manner in which findings in this regard were made was altered. The limited scope of the election court's power under section 87 was acknowledged in ***Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others.***[452] Citing the decision of Majanja J in ***Arthur Papa v Oku Edward Kaunya & 2 Others,***[453] the Court, in determining the Petitioner's application to summon the OCPD Kitui to testify on a criminal matter against a polling clerk for issuing multiple ballot papers, noted that the powers of an election court in investigation whether an election offence had been committed were limited under the new section 87. Therefore, in making its determination as to the validity of the election, an election court had to exercise caution and circumspection to safeguard the further process that is contemplated in order to determine whether a person is guilty of an election offence.[454]

A finding that election offences may have been committed is factored in the determination by the election court of the validity of the election, without including a finding of guilt on the persons whose conduct is impugned.

It was established in the case of ***Fredrick Otieno Outa v Jared Odoyo Okello*** **[2014] eKLR** that proof of the commission of an election offence by a successful candidate was enough to result in nullification of the result. However, the Petitioner ought to produce more than partisan witnesses to succeed. The courts give greater weight to non-partisan witnesses where election offences are alleged. The Supreme Court pronounced itself thus:

> *…the offence of bribery ought to have been pleaded clearly with specificity. The 3rd respondent ought to have adduced sufficient evidence to prove that the purpose for distributing the CDF cheques was to influence voters to vote for the appellant, directly or indirectly. As evidence of the appellant's presence during the distribution was controverted, the 3rd respondents ought to have provided evidence, not emanating from his own agents or even the supporters. The record reveals that most of those who testified were politically inclined to support either of the candidates.*

Of all the election offences set out in the Election Offences Act, bribery appears to carry greater weight in the context of an election petition. In the ***Wetangula Case***, it was established that a single act of bribery was sufficient to nullify an election result. According to Halsbury's Laws of England, bribery is inexcusable and once an act of bribery is proved, the election court is not at liberty to weigh its impact on the election result.[455] It is therefore imperative that allegations of bribery be proved by clear and unequivocal evidence.[456] Such was the position taken in ***Twaher Abdulkarim Mohamed v Mwathethe Adamson Kadenge & 2 Others,***[457] where the Court stated:

> *Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by its agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the*

452 Machakos Election Petition 4 of 2017.
453 Busia Election No. 2 of 2017.
454 See also *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC* Eldoret High Court Election Petition 1 of 2017.
455 4th Edition, vol. 15; cited in *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others*, Supreme Court Petition No. 12 of 2014, para 124.
456 *Wilson Mbithi Munguti Kabuti & 5 Others v Patrick Makau King'ola & Another* Machakos Election Petition No. 9 of 2013.
457 Malindi High Court Election Petition Appeal No. 1 of 2014.

> *circumstances may be such, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the Court is not bound by the strict practice applicable to criminal cases, but may act on the uncorroborated testimony of an accomplice…The Court has always refused to give any exhaustive definition on the subject, and has always looked to the exact facts of each case to discover the character of the transaction. A corrupt motive must in all cases be strictly proved. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bribing him. Where the evidence as to bribery consists merely of offers or proposals to bribe, stronger evidence will be required….A general conversation as to a candidate's wealth and liberality is not evidence of an offer to bribe. General evidence may, however, be given to show that what the character of particular acts has presumably been.*

For a finding that an election offence occurred, the standard of proof required is beyond reasonable doubt. In the 2017 ***Raila Odinga Case***, the Supreme Court declined the Petitioner's invitation to alter the standard of proof. At para 152 of its decision, the Court asserted:

> ***[152]*** *We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the Petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities. (Emphasis added)*

This standard of proof was applied in ***Joel Makori Onsando & 2 Others v IEBC & 3 Others.***[458] In this case, the Petitioner contended that the 3rd and 4th Respondents had appointed the 5th Respondent, an employee of the Kisii County Health Department as their chief agent, contrary to sections 12 of the Political Parties Act, 16 and 23 of the Leadership and Integrity Act and 15 (1) (a) of the Election Offences Act which require neutrality of public officers in political matters and bar them from engaging in political activities. The Petitioner also alleged that the 3rd Respondent had contravened section 15 of the Election Offences Act by participating in the elections as a public officer, rendering the 3rd Respondent ineligible to participate in the elections. The Petitioner also asked the Court to draw an adverse inference, based on the 'empty chair doctrine' from the fact that key witnesses such as the 3rd and 4th Respondents, whose integrity had been called into question, had not testified. The doctrine provides that the failure by a litigant to produce an available witness expected to testify in support of their case permits the drawing of an inference that had the witness chair been occupied, the witness would have testified adversely to the litigant.

The Court evaluated the evidence adduced by the Petitioner and noted that the appointment letter that the Petitioner had relied on dated 7 August 2017 had questionable features on it which were not explained by the Petitioner. On the letter, the identity card and telephone numbers of the 5th Respondent had been blotted out by a dark ink and there was an image of a hand on it, suggesting that another document had been superimposed on the letter. The Court also observed that the 5th

458 Kisii High Court Election Petition 3 of 2017.

Respondent's details were not known to the person who made the alterations and therefore inserting them on the deleted portion did not create a convincing image. The Petitioner also did not adduce any statutory form signed by the 5th Respondent. The Court was therefore not persuaded by the Petitioner's allegations. On the 'empty chair doctrine', the Court found that the burden remained with the Petitioner to establish the allegations before the Respondents could be expected to attend court for cross-examination and the Respondents were under no obligation to bring in witnesses to fill in the loopholes left by the Petitioner or satisfy his curiosity. The allegations were therefore dismissed.

In ***Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others***,[459] whereas the Petitioner had also alleged that some IEBC clerks had issued multiple ballot papers to voters, the Trial Court failed to find in favour of the Petitioner for several reasons. While the Petitioner had attached copies of charge sheets showing that two polling clerks had been charged with issuance of multiple ballot papers and a voter charged with voting more than once, at the time the parties were submitting, the charges of issuance of multiple ballot papers and voting more than once had not been proved and the cases were still ongoing at the Magistrates' courts. The Court therefore found that the allegations had not been proved to the required standard. Moreover, the Court found that PW23, who testified in this regard, could not tell whether the extra ballot papers were for the presidential or parliamentary seat. The Court therefore found that it was difficult for the Petitioner to establish a direct link between that occurrence and the validity of the specific election of Member of National Assembly for Changamwe constituency. This finding was upheld on appeal. [460]

In compliance with section 87 (2), several courts generated a report to the DPP recommending investigation of election offences. In ***Clement Kungu Waibara v Annie Wanjiku Kibeh & Another,***[461] the Court acknowledged the change in the law as of January 2017 which precluded the election court from making a finding, in the course of hearing the petition, as to whether a person was guilty of an election offence. However, certain irregularities and illegalities were noted to have taken place and the Court recommended that the Director of Public Prosecutions carry out investigations and take possible action in respect of the electoral malpractices identified. At paragraphs 140-141 of the judgment, the Court identified the persons recommended for investigations alongside the reasons for the recommendation. The persons listed included the Petitioner.

> *140. It is fairly obvious from the evidence that has emerged on the missing votes and how they found their way to the Petition, that aside from the moral culpability of the agents and employees of the 2nd Respondent in conducting an election marred by irregularities, a serious election crime was committed. A person or a group of people were able, in blatant and criminal disregard of the law, to break open ballot boxes for at least two Polling Stations in Gatundu North and stole at least 332 votes therefrom. There is no question that this is a serious election offence. The perpetrator(s) need(s) to be found, prosecuted and punished in accordance with the law.*
> *141. Unfortunately, the evidence that emerged before me did not point with precision to a specific perpetrator. It would appear that there are at least seven people who should be investigated: one or more of these seven individuals is responsible for this electoral offence. From the chain of custody of the ballot materials, the alleged appearance of the materials in public places and their eventual appearance in the Petition, it is clear that one or more of these seven people is*

459 Mombasa High Court Election Petition No.7 of 2017.
460 See *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 others* Mombasa Election Petition Appeal 7 of 2018; [2018] eKLR, at para 34.
461 Kiambu Election Petition 1 of 2017.

> *responsible for the theft or at least conspired to steal the votes. These seven individuals are:*
> *i. The Presiding Officers of Mutuma Primary School (Stream 2 of 3); Ndekei Primary School (Stream 1 of 3); and Mungai Primary School (Stream 2 of 2): These are the three people who counted the votes, tallied them, put them in the Ballot Boxes and sealed the Ballot Boxes. They were expected to deliver the Ballot Boxes untampered to the County Returning Officer. They would be the first persons of interest to the extent that counted votes did not make their way to the County Returning Officer.*
> *ii. The Constituency Returning Officer, Mr. Patrick Muthee: This is the person who received the Ballot Boxes, certified himself that they were sealed and un-tampered and reportedly handed them to the Constituency Logistics Officer for temporary safe-keeping at the Tallying Centre. Since the Returning Officer satisfied himself that he had received sealed Ballot Boxes, to the extent that the theft happened after he received the Ballot Boxes, he might be responsible for it.*
> *iii. The Constituency Logistics Officer, Mr. Patrick Ndung'u: This is the person who had custody of the Ballot Boxes for seven days before they were taken to the Warehouse for safe-keeping.*
> *iv The County Logistics Officer, Mr. Thomas Waweru: This is the person who took custody of the Ballot Boxes from the Constituency Logistics Officer and kept them until their production in Court.*
> *v. The Petitioner, Mr. Clement Kung'u Waibara: This is the person who exhibited the stolen votes in his Election Petition before this Court. He needs to explain how he came to be in contact with election materials and whether the circumstances under which he came into contact with those materials suggest the commission of an election offence.*

This finding was upheld by the Court of Appeal.[462]

Similarly, in ***Timamy Issa Abdalla v IEBC & 3 Others***,[463] the Court deprecated the Presiding Officer in charge of Mapenya Primary School polling station who swore an affidavit in support of the Petitioner's case to the effect that pre-marked ballot papers had been used during the gubernatorial elections in Lamu County. It emerged at the trial that the marks on the ballot papers were a result of printing errors rather than pre-marking in favour of any candidate and after consultation with the Lamu West Returning Officer, it had been agreed to make note of the marks and accept the ballot papers notwithstanding the marks. The Court also observed that no remark in this regard had been made in the polling station diary, which was strange for a violation of this magnitude. The Court noted that the said officer had taken an oath of office while performing their duties at the polling station as a Presiding Officer and therefore by swearing an affidavit on a fact that she knew was not correct, she had committed perjury. The Court therefore recommended that the matter be investigated by the County Director of Criminal Investigations in Lamu, and where any culpability was established, that it be referred to the Director of Public Prosecution for appropriate action or guidance. The Court asserted that it was important for officers of the IEBC to be warned against turning against the very institutions they swore to serve and the consequences of sabotaging the process they were supposed to be managing. In addition, such action was intended to protect the future integrity of the electoral system.

462 *Annie Kibeh v Clement Kungu Waibara & Another* Nairobi Election Appeal 20 of 2018.
463 Malindi High Court Election Petition 3 of 2017.

In ***Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others***,[464] the Court was invited to make a recommendation to the DPP that the Changamwe Constituency Returning Officer be investigated for an election offence for making alterations to Form 37B touching on the Mombasa gubernatorial election. The Returning Officer admitted to the alteration in the course of cross-examination by counsel for the Petitioner. The Court was also asked to make recommendations in respect of 3 IEBC polling clerks attached to Chaani Primary School polling station 3 who had signed Form 35A purporting to be political party agents.

In respect of the alterations to Form 37B, the Court declined to make the recommendation since it did not have conduct of the Mombasa gubernatorial election petition; neither did it have full facts or particulars upon which to make recommendation for the investigation of the said Returning Officer. However, in respect of the polling clerks, the Court noted that it was clear in the course of the proceedings that the 3 polling clerks had signed Form 35A purporting to be ODM and Jubilee Party agents. They attributed the said action to fatigue. Since there was no justification for signing Form 35A under the guise of being political party agents, the Court recommended to the DPP to institute investigations and determine whether the said polling clerks should be charged with an electoral offence. There was no evaluation by the Court of the impact of the alleged offences on the validity of the election, although the petition was dismissed on the ground that that the irregularities occasioned by the 1st and 2nd Respondents are not of such a magnitude that would justify the annulment of the election results for Changamwe constituency.[465]

In ***Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC***,[466] the approach taken in making a finding on the commission of an election offence was akin to what took place before the amendment to section 87 of the Elections Act. In this case, several allegations were made of commission of election offences, including stealing of KIEMS equipment, manipulation of results, use of manual verification of results at the Wajir East tallying centre contrary to section 44 of the Elections Act, failure to secure ballot papers and boxes, opening of ballot boxes which had been sealed and that Presiding Officers were unduly influencing assisted voters to cast their vote for the 1st Respondent.

While this latter allegation was refuted, the Court found that the Presiding Officers had not complied with the procedure for assisting voters, which required that a note be made in the Voter Register next to the names of the persons assisted indicating the fact of the assistance and reasons thereof. This would in the view of the Court make the process verifiable. Since out of the 16,170 voters who took part evidence was supplied of only 4 voters being assisted, in a region with a high illiteracy rate, the Court found that by failing to mark the register as required under Regulation 72 (6), the Presiding Officers were committing an offence under section 6 (j) of the Election Offences Act.

On the opening of the ballot boxes after sealing, the Court found that opening sealed boxes was contrary to Regulations 81, 83, 86, and 93 of the Elections (General) Regulations where it was done without an order of the Court. However, despite noting that the opening of the ballot boxes was accompanied by alterations to Form 37A resulting in the votes of the 1st Respondent being adjusted,

464 Mombasa High Court Election Petition No.7 of 2017.

465 It is noteworthy that in separate criminal proceedings not arising from this election petition, the 3rd Respondent, Hon. Omar Hassan Mwinyi was convicted by the Chief Magistrates' Court in Mombasa for assaulting two police officers and destroying ballot boxes during the ODM party nominations in April 2017. See https://www.nation.co.ke/news/Court-finds-MP-Omar-Mwinyi-guilty-of-poll-violence/1056-4693924-rcg6qaz/index.html (accessed 2 January 2019).

466 Nairobi Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017).

the Court simply termed the actions irregular and as having affected the credibility of the election. No specific finding or recommendation was made in respect of alleged offences nor was there an evaluation of whether the commission of offences was proved to the required standard.

Contrary to the requirement under the revised section 87 that a recommendation be made in such instances to the DPP to investigate and consider whether to prosecute, the Court made a finding as to the commission of an offence and left it at that. Without a recommendation to the DPP as required, it was unclear what action was to be taken against the Presiding Officers who were indicted.

In the instances when bribery was alleged, the courts upheld the position in the ***Wetangula Case***[467] that bribery had to be established through unequivocal evidence. In ***Peter Odima Khasamule v Independent Electoral and Boundaries Commission (IEBC) & 2 Others,***[468] the Petitioner sought a nullification of the election of the 3rd Respondent on the basis that the 3rd Respondent had bribed members of the Abamenya clan and that his campaigner Patrick Olasa had been seen distributing beef, sugar and money to voters at Poa Petrol station. The Court found this evidence unconvincing on the basis that the Petitioner did not give an approximate number of members of the clan that had been bribed, nor was there any witness called to support the claim. There was also no evidence of a police report of an alleged bribery incident by the 3rd Respondent. Moreover, while the Petitioner alleged that the 3rd Respondent had been involved in treating voters at Butula Polytechnic, there was no proof of the slaughtering of bulls or distribution of money to attendees. The Court also found incredible the allegation of voter bribery during voting on the basis that the Petitioner's testimony was inconsistent — he had averred that voter bribery had occurred in his polling station, Lwanya Primary School, but in his testimony he indicated that the incident was at Lwanyange Primary School — and because the incident was not reported. The Petitioner's evidence was also considered incredible since his testimony was that he was inside the polling station when these incidents occurred, and it was therefore unclear how he could have witnessed events occurring outside. The allegations that these incidents were witnessed by Presiding Officers who did nothing to stop them were also considered unlikely to be true.

In ***Samwel Kazungu Kambi v Nelly Ilongo and 2 Others,***[469] the Petitioner impugned the election of the 3rd Respondent on the basis of alleged bribery of teachers by the 3rd Respondent at a teachers' meeting held at the Coast Palace Hotel, Mariakani about 3 weeks to the election. The Petitioner contended that the 3rd Respondent handed teachers KES 1,000 each for lunch and promised them jobs as officials of the 2nd Respondent during the elections. It was his case that indeed some teachers were offered jobs as presiding and deputy Presiding Officers and clerks of the 2nd Respondent. PW3, who was a Presiding Officer, testified to having received KES 1000 but denied having received it from the 3rd Respondent. He also denied having been promised a job with the 2nd Respondent by the 3rd Respondent. The Court was urged by the 1st and 2nd Respondents to find that the witness had recanted his statement, and the 3rd Respondent maintained that the KES 1000 given to attendees of the meeting was in lieu of lunch since no lunch had been provided by the organisers.

The Court, noting the criminal nature of the allegation, found that the Petitioner had not discharged the burden of proof by demonstrating that the money had been given by the 3rd Respondent to influence voters to vote for him or manipulate anyone to vote in his favour. The allegation therefore failed.

467 Supreme Court Petition 12 of 2014.
468 Busia High Court Election Petition 4 of 2017.
469 Malindi EP 4 of 2017.

The Court also found that allegations of bribery were not established to the required standard in ***Joseph Oyugi Magwanga & Another v IEBC & 3 Others***[470] ***Peter Odima Khasamule v IEBC & 2 Others***[471] and in ***Kennedy Moki v Rachel Kaki Nyamai & 2 Others.***[472] In the ***Joseph Oyugi*** case, the Petitioner had relied on video clips of a county government executive giving money to alleged voters in July 2017, and attributed these acts to the 3rd Respondent. The Court ruled that the videos did not establish beyond any reasonable doubt any criminal or improper conduct on the part of the Respondents or any other person and since the video was not taken on voting day, its relationship to the voting process could not be explained. In any case, the Court opined, the validity of the videos to the credibility of the impugned election and the reason for taking the videos was not established, which cast suspicion that the videos were intended to create a situation that had not occurred.

In the case of ***Robert Kibet Kemei v Alfred Kiptoo Keter & IEBC,***[473] the Court noted that allegations of bribery and treating of voters; that voters were given money, bar soap, sugar and other household goods to voters were not proved since the Petitioner did not witness these acts and his testimony was therefore hearsay and proof had to be beyond reasonable doubt. However, the election court allowed the election petition on the basis that it was established that the 1st Respondent had campaigned outside of the timelines prescribed by the IEBC. This, the Court found, tainted the fairness and integrity of the election for Member of the National Assembly for Nandi Hills constituency and therefore the 1st Respondent was not validly elected. The Court also found that an election offence may have occurred and directed that the DPP conduct investigations as directed by section 87 (2) and (3) of the Elections Act. The Court also faulted the Returning Officer for not taking action when the Petitioner made an informal complaint about the unlawful campaigns and ruled that failure to act on the report rendered the IEBC (the 2nd Respondent) liable for failing to conduct the elections in accordance with the Constitution. Consequently, the election was nullified and the IEBC directed to conduct a fresh election.

The Court of Appeal[474] overturned the decision, having found no evidence of the illegal or irregular campaigns. In the Supreme Court,[475] the apex court ruled that there was indeed sufficient evidence of unlawful campaigns but this was not substantial enough to nullify the election. The decision of the CoA was therefore upheld.

Curiously, in ***Cyprian Awiti & Anor v IEBC & Others***,[476] the CoA declined to make a finding as to the commission on an election offence. The appellate court ruled that since the jurisdiction of an election court was limited to determining whether an electoral malpractice may have been committed, it had no jurisdiction to determine whether in fact an offence had been committed. By extension, the COA concluded that the appellate court had no jurisdiction to determine that an election offence had been committed as prayed by the 1st and 2nd Respondents. It therefore did not interrogate the provisions of the new section 87 and whether this was a ripe case for recommending to the DPP investigation into a possible election offence.

470 Homa Bay High Court Election Petition 1 of 2017.
471 Busia High Court Election Petition 4 of 2017.
472 Kitui Election Petition 2 of 2017.
473 Eldoret High Court Election Petition 1 of 2017.
474 *Alfred Kiptoo Keter v Bernard Kibor Kitur & Independent Electoral & Boundaries Commission* Election Appeal 21 of 2017.
475 *Bernard Kibor Kitur v Alfred Keter & IEBC* Supreme Court Petition 27 of 2018.
476 Kisumu Election Appeal 5 of 2013.

9. Use of Technology in Elections

The 2010 Constitution, the Elections Act and the Elections (Technology) Regulations now mandate the use of technology in elections. The undergirding principle for the adoption of technology in election management is the idea that appropriate technology can reduce the risk of electoral malpractice, as required by Article 86 (d) of the Constitution, and increase efficiency in the management of elections.[477]

In the 2013 ***Raila Odinga Case,*** the Court analogised the use of technology in elections with its use in refereeing football matches. At para 233, the Court pointed out:

> *Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complemented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and lineswomen to notice.*

At its best, technology provides an additional layer of efficiency and integrity in the electoral process,[478] thereby boosting public confidence in the electoral system,[479] increases the number of people able to exercise their franchise where virtual ballot boxes/e-voting are involved, reduces human error in counting and facilitates faster tallying and announcement of results.[480] The Court of Appeal in the ***Maina Kiai Case*** succinctly set out the rationale for electronic transmission of election results as provided for in the Elections Act as follows:[481]

> *The electronic transmission of results was intended to cure the mischief that all returning officers from each of the 290 constituencies and 47 county returning officers troop to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced result.*

However, because technology is prone to failure[482] and manipulation (or at least the suspicion of manipulation), as was evidenced both in the 2013 and the 2017 elections, it is not entirely dependable, and the use of technology cannot be the sole determinant of the validity of an election.[483] Where it is misused, it negatively impacts on the right to participate in the political process by rendering elections more opaque and vulnerable to manipulation.[484] This in turn lowers public confidence in the electoral process,[485] and the lack of trust among political parties and players and suspicions of

477 Judiciary Bench Book, 121.
478 *John Lokitare Lodinyo v Mark Lomunokol & 2 others* [2013] eKLR, at page 10.
479 Nic Cheeseman, Gabrielle Lynch & Justin Willis 'Digital dilemmas: the unintended consequences of election technology' (2018) 25 Democratization, 1397-1418, 1402.
480 Arthur Gwagwa 'Understanding the Legal and Technological Challenges in Kenya's 2017 Elections' Working Paper for the 'Elections and Technology' Panel Discussion at the CIPESA-APC Forum for Internet Freedom in Africa, 27-29 September, 2017, Johannesburg, South Africa, 1.
481 See page 32 of the decision.
482 The Supreme Court took judicial notice of this fact in the 2013 Raila Odinga case, at para 233.
483 See 2013 Raila Odinga case, para 237.
484 Gwagwa, as above.
485 National Academies of Sciences, Engineering, and Medicine Securing the Vote: Protecting American Democracy (2018), Washington, DC: The National Academies Press, 92. It is available on https://www.nap.edu/catalog/25120/securing-the-vote-protecting-american-democracy (accessed 4 January 2019).

electoral fraud cause the political process to lose credibility,[486] catalyse polarisation and increase the potential for violent conflict.

Nonetheless, challenges in the use of technology in elections are not unique to Kenya. More established democracies such as the US have recently been beleaguered by claims of manipulation of their 2016 elections by Russia.[487] The concern about the security of elections technology and the "digital arms race" which have made elections prone to corporate and foreign manipulation have also plagued the European Union in the run-up to the 2019 parliamentary elections, and led to calls for stricter surveillance and legislative measures if need be.[488] What is clear from the foregoing concerns about integrity of electoral systems is that technology cannot be a substitute for the requirement that electoral officials operate these systems using the highest standards of integrity. Without a commitment to free and fair elections, no technology can facilitate free and fair elections.

Indeed, it is conceded by experts that 'there is no realistic mechanism to fully secure vote casting and tabulation computer systems'[489] without including a level of complexity that renders such systems unusable.[490] It is therefore recommended to use methods of assessing the accuracy of the election without relying on the hardware and software used to conduct the election.[491] Gwagwa further proposes that rather than focusing on embedding more technology or re-writing software, focus should shift to 'finding the right balance between software security and usability, administration and simultaneous production of paper trail for verifiability'.[492]

The use of technology in elections in Kenya was triggered by the persistent failure to deliver credible elections in successive electoral cycles since independence. Despite being party to various international and regional instruments which set the yardstick for transparent and accurate electoral administration, electoral management in Kenya continued to be plagued by the fear of manipulation with election results and interference with the integrity of the electoral process. The discontent with the management of elections prior to the 2010 Constitution was captured in the Kriegler Report. At page 138 of its report, the Commission noted the following about the integrity of the process of counting, tallying and announcement of results:

> *IREC's analysis of nineteen sample constituencies – which we have no hesitation in using for drawing conclusions about the entire operation – has led it to the irrefutable conclusion that the ECK was not able to manage the counting, tallying and results announcement processes in such a way that it secured the integrity of the electoral process at either the presidential or the parliamentary level… It did not live up to the basic international standards of transparent, free and fair elections which the ECK Chairman had forcefully stated was what the ECK aimed for.*

The Kriegler Commission therefore recommended that the EMB integrate the various descriptions of the entire counting and tallying procedure into one document; that there be developed an integrated

486 Kriegler Report, 137, para 6.9.
487 https://www.businessinsider.com/evidence-russia-meddled-in-us-election-2017-6 (accessed 5 January 2019).
488 The Guardian 'European elections 'face growing threat of manipulation' https://www.theguardian.com/technology/2018/oct/23/risk-of-interference-in-mep-elections-growing-eu-commission-facebook-scandal-monitoring (accessed 5 January 2019).
489 National Academy of Sciences, Securing the vote (as above) 91.
490 Ronald L Rivest & Phillip B Stark, 'When is an Election Verifiable?' IEEE Security and Privacy, Vol.15, No.3, (2017) 48-49, cited in Gwagwa, as above, 1.
491 National Academy of Sciences, Securing the vote, 91.
492 Gwagwa, 'Understanding the Legal and Technological Challenges in Kenya's 2017 Elections' 1.

and secure tallying and data transmission system to allow computerised data entry and tallying at constituencies, secure simultaneous transmission of poll station data to the national tallying centre, and integration of the results-handling system in a progressive election result announcement system; that the media have access to this new system to allow access to reliable results and that there be ample time provided for verification of provisional results to reduce the risk of errors and allow non-frivolous objections to be raised.[493]

9.1. Legal Framework for the Use of Technology in Elections

The 2010 Constitution captured the aspiration for verifiability of election results by requiring that whatever electoral system is used is 'simple, accurate, verifiable, secure, accountable and transparent.'[494] In addition to the constitutional principles on elections set out in the Constitution, sections 6A, 39 (1) (C) and 44 (4), (5) and (7) of the Elections Act provides for the use of technology in elections.

Section 6A requires the IEBC to open the Register of Voters for the verification of biometric data by voters and to publish the Register online once the process of verification is completed. The publication of the Register online facilitates the EDR process, particularly where the petition alleges that the recorded votes cast exceeded the total number of registered voters. A Petitioner may also apply to the IEBC for a copy of the Register.[495]

In order to safeguard the accuracy of the presidential election results, section 39 (1) (C) of the Elections Act requires the IEBC to electronically transmit, in the prescribed form, results of the presidential election from polling stations to the constituency tallying centre and to the national tallying centre, to tally and verify the results at the NTC and to publish the polling result forms on an online public portal. The Court of Appeal in the ***Maina Kiai Case*** expressed the opinion that electronic transmission was crucial to safeguarding the integrity of the election. It stated:[496]

> *We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections…*

Section 44 of the Elections Act establishes an integrated electronic electoral system which enables biometric voter registration, electronic voter identification and electronic transmission of results. Over and above the current use of technology, which limits the use of electronic transmission of results to the presidential elections, the IEBC is mandated to develop a policy for the progressive use of technology in elections.[497]

The technology used, which must accord with Article 86 (a) of the Constitution, must be in place at least 120 days before an election and be tested at least 60 days before the D-day.[498]

493 p 138.
494 Art 86 (a).
495 See dictum of the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* Petition 2B of 2014.
496 At p 33.
497 Sec 44 (2).
498 Sec 44 (4).

Section 44(A), introduced in 2017,[499] provides for a complementary mechanism for identification of voters. It requires the IEBC to put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent in compliance with the provisions of Article 38 of the Constitution.

From a reading of the above-cited provisions of the Elections Act, Otieno-Odek sees election technology in Kenya as six-fold: Biometric Voter Registration (BVR); Electronic Voter Identification (EVI); Electronic Transmission of Results (ETR); Kenya Integrated Elections Management System (KIEMS); On-line publication of the Register of Voters and the publication of polling result forms of presidential elections on an online public portal maintained by the Commission.[500]

The provisions of the Elections Act are supplemented by the Elections (Technology) Regulations, 2017, which were developed by the IEBC in consultation with relevant stakeholders in accordance with section 44 (5) of the Elections Act.

The impact of technology in an election must constantly be evaluated as the outcome of elections determines the political course of a nation for years, and even decades.[501]

9.2. The 2013 Raila Odinga Case

While technology was intended to increase the credibility of electoral outcomes, few issues have triggered as much litigation since 2010 as the use of technology. In the ***2013 Raila Odinga Case***, the Supreme Court delved into the question of electronic support for the electoral process and the role of technology in the presidential election. The Petitioners' case was that the technology put in place by the IEBC for results transmission failed, and the resort to a manual system was in contravention of the law. This was because both section 39 of the Elections Act and Regulation 82 of the Elections (General) Regulations mandated electronic transmission of results. Moreover, without electronic transmission there could be no verification, which meant that the process as conducted was prone to manipulation and corruption by design.

The apex court was also asked to determine whether the voter register affected the validity of the presidential election. The Petitioners took issue with the IEBC's assertion that discrepancies in the number of registered voters could be explained in part by the 31, 318 persons registered in the non-biometric special register, a register which had not been made public as required by law before elections and which was not anchored in any electoral law. It was therefore their case that the use of that special register was a violation of the Constitution and related laws, and infringed upon the validity of the presidential election. The Petitioners also asserted that the failure of the vote identification systems made it impossible to automatically track the total votes cast since there was more than one register in use. On the other hand, the Respondents maintained that contrary to the Petitioners' assertions, voting, counting, tallying and transmitting of results were manual processes by design of the law. They urged that contrary to the Petitioners' allegations, technology was never intended to be the only way of registering and identifying voters, tallying results and transmitting them; rather, it was meant to provide checks and controls in the electoral process to ensure that the 1st Respondent fulfilled its mandate under Article 81 of the Constitution. They maintained that the IEBC had a wide latitude

499 Election Laws (Amendment) Act No. 1 of 2017, sec 19.
500 Otieno-Odek 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?",13-14.
501 Gwagwa, as above.

to determine whether to use electronic systems and that the IEBC had held consultations with all political parties notifying them that should electronic voter identification fail, the paper register would be used as a fall-back plan.

On the question of whether electronic facilitation was mandatory or discretionary, the apex court ruled that an objective reading of the Regulations led to the conclusion that elections were not intended to be conducted solely be electronic means, since the Elections (General) Regulations stipulated that where this was the case, guidelines were to be availed to the public. Moreover, a reading of section 39 and Regulation 82 revealed that the transmitted results were only provisional. While the Court was urged to find that the failure to transmit provisional results was a basis for invalidation the outcome, the Court took judicial notice that most polling stations were in the rural areas which did not have access to electricity. The Court also took judicial notice that electoral technology, as with all technologies, is rarely perfect, and invited those applying it to be open to the coming of new and improved technologies.[502] The Court acknowledged the evidence that the voter identification and results transmission systems had failed, but ruled that the IEBC had no other lawful recourse than to revert to the manual system as they did.

Since technology had not achieved the level of reliability envisaged, it could not be considered a permanent or irreversible foundation for the conduct of the elections. The Court rejected the Petitioners' assertion that injustice would result where elections technology was not applied consistently by the IEBC in the conduct of the election. Consequently, the Court declined to nullify the presidential election on the grounds of failed technological devices.

Failure of the electronic voter identification and results transmission systems and concerns about manipulation of the system in 2013 were captured by the Report of the Joint Parliamentary Select Committee on the Matters Relating to the IEBC, which provided in part:[503]

> *There were challenges experienced with the electronic transmission of the results including that only 17,000 of the 33,000 polling stations managed to transmit results before it was overwhelmed by some technical hitches. This alternative method of getting results had to be discontinued when it became too slow and although the problem was identified and fixed, a number of officials had abandoned the transmission as they took hard copies of the same to tallying centres. There were also network failures and suspicions of system hacking which necessitated a reversion to physical submission of the results.*

What was clear from the 2013 Supreme Court decision was that technology could not be the sole or decisive determinant of the validity of an election.

9.3. The 2017 Raila Case

The use of technology in the run up to the 2017 elections was the subject of extensive litigation.[504] One of the issues that were revived is the question of whether election management was to be exclusively electronic, or whether it remained partly electronic and partly manual as had been found by the SC in 2013. A 5-judge bench of the High Court was urged to declare that the 2017 general elections were to

502 At para 233.
503 The Report of the Joint House Select Committee on Electoral Reforms (Kiraitu/Orengo Report), 16th August, 2016, para 452.
504 See section titled 'Conduct of Elections' above.

be exclusively electronic in respect of voter identification and transmission of results in ***National Super Alliance (NASA) Kenya v The Independent Electoral & Boundaries Commission & 2 Others.***[505] The Petitioners expressed concern that the IEBC had not complied with the timelines established by the Elections Act, not having procured and tested the technology 40 days before the general election.

In a decision which was upheld on appeal,[506] the High Court acknowledged that the legal regime obtaining in the country presently requires an integrated electronic system that enables biometric voter registration, electronic voter identification and electronic transmission of results. The Court however observed that there is also provision for a complementary mechanism envisaged in section 44A of the Elections Act, which only sets in when the integrated electronic system fails. In rejecting the prayer that identification of voters and transmission of results be exclusively electronic, the Court held:

> *To our mind, what was required of the Respondent was to put in place a mechanism that would complement the one set out in section 44 of the Act. The particulars of the mechanism, whether electronic, manual, or any other mode was not expressly provided in section 44A. If that were the intention of Parliament, nothing would have been easier than to specify so.*

Moreover, from a reading of section 39 (1) (C), it is only in presidential elections that results are required to be electronically transmitted to the NTC. This was confirmed in ***Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others,***[507]

> *180. Section 39(1C) of the Elections Act is clear that electronic transmission and publication of poll results in a public portal is only a statutory requirement for the Presidential election. Further, except for voter registration and voter identification; voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual.*

In the first presidential petition, the Petitioners impugned the delay in the transmission of results which, contrary to section 39 (1) (C) of the Elections Act, did not include a simultaneous electronic transmission of results from the polling stations to the national tallying centre. Moreover, it was their contention having the primary and secondary disaster recovery sites hosted by an external contractor, OP Morpho SAS, rather than the Communications Authority of Kenya (CAK) as proposed, opened up the system to unlawful interference and manipulation by outsiders. Taken together with the delay in the procurement and testing of the technology used in the election, it was the Petitioners' case that the conduct of the election was not simple, accurate, verifiable, secure, accountable and transparent, contrary to Article 81 (e) (iv) and (v) of the Constitution.

The Court ruled that failing to ensure that all Forms 34A were electronically transmitted to the national tallying centre as is required by section 39 (1) (C) of the Elections Act could not be explained by failure of technology, since the Respondents had indicated, prior to the elections, that alternative arrangements would be made where technology failed. Moreover, no plausible explanation was offered for the discrepancy in the results as contained in the scanned Forms 34A and those transmitted electronically to NTC. In the words of the Court:

505 Nairobi High Court Petition No. 328 of 2017.
506 *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 258 of 2017.
507 Mombasa Election Petition 7 of 2017.

> *Our understanding of this process is that the figures keyed into the KIEMS corresponded with those on the scanned image of Form 34A. In the circumstances, we do understand why those figures which learned counsel referred to as mere "statistics" that did not go into the determination of the outcome of the results, differed. In these circumstances, bearing in mind that the IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden.*

The 1st Respondent also failed to allow the Petitioners access to the system to confirm the authenticity of the transmissions to CTCs and NTCs. 1st Respondent failed to discharge its burden by demonstrating that it had conducted the elections in accordance with the Constitution and other written law.

9.4. John Harun Mwau & Others v IEBC & Others[508] *& Katiba Institute & 3 Others v Attorney General & 2 Others*[509]

The constitutionality of the Elections Law (Amendment) Act, which sought to amend among other provisions, section 39 of the Elections Act, was challenged both at the Supreme Court in the ***John Harun Mwau*** petition as well as in the High Court in the ***Katiba Case***. At the Supreme Court, the 2nd and 3rd Petitioners asserted, *inter alia*, that the passing of the Elections Law (Amendment) Act 34 of 2017 was intended to diminish the role of technology in the conduct of elections, to open the election results to manipulation and signal to voters the impossibility of successfully challenging the results of the fresh presidential elections even if the same were to be at variance with the Constitution, unlawful or irregular as determined in the ***2017 Raila Case***. The applicability of the said law to the fresh elections and subsequent EDR process was also in question, given that the statute came into force on 2 November 2017, while the fresh election had been held on 26 October 2017.

The Supreme Court ruled that the applicable law for the fresh election could therefore only have been the 2011 Elections Act, when assessed against the rule of construction that statutes should not be given retrospective operation, in the absence of a special legislative indication to the contrary. However, the Court noted that a similar matter, ***Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others*** **Nairobi High Court Petition No. 548 of 2017,** was pending at the High Court. In keeping with its practice of not taking away the jurisdiction vested in other superior courts, and particularly because this was not a matter in respect of which the Constitution had reserved for the jurisdiction of the Supreme Court, the Court deferred the question of constitutionality of the new law to the jurisdiction of the High Court for determination.

At the High Court, the Court evaluated each of the proposed amendments to section 39 of the Elections Act, which deals with determination and declaration of results, to assess their consistency with the Constitution, and particularly the principles contained in Articles 81 and 86 of the Constitution.
One of the impugned provisions was section 39 (1) (C) of the Elections Act, which, *inter alia*, removed the requirement for results to be transmitted in a prescribed form and asserted that where there was a discrepancy between physically transmitted results and electronically transmitted results, the Commission would determine the result which is an accurate reflection of what was tallied and declared at the polling station as the result which would prevail. The Court agreed with the

508 Petitions 2 and 4 of 2017.
509 [2018] eKLR.

Petitioners that the said provision did not accord with the Constitution and in particular the principles of verifiability, transparency and accountability of election results.

> *82. The problem in so far as I can see, is with regard to transmission of results from the polling stations to the constituency and national tallying centres as required by the new section 39(1C)(a). First, there is no requirement for the results to be transmitted in any prescribed form which was an essential requirement in the deleted subsection. This was an essential safeguard that guaranteed verifiability, transparency and accountability of the election results transmitted from polling centres to the constituency and national tallying centres. This is made even more troubling by the fact that results will also be physically delivered to the constituency and national tallying centres but in no particular prescribed form. This not only opens the results to possible adulteration and manipulation but also mischief. The amendment obviously reverses the gains the country had made in electoral reforms including results transmitted in a particular form.*

At paragraph 85 of its decision, the Court restated the importance of electronic transmission of results to the integrity of the electoral process. It reiterated the Court of Appeal dicta on the rationale in the ***Maina Kiai Case*** for the finality of the declaration at the constituency level by highlighting the potential for mischief that is opened up when results are manually transmitted to the national tallying centre. What the new section 39 (1) (C) (a) sought to do was to elevate manual result transmission over electronic transmission and undermine the verifiability of the results, which is the spirit of Articles 81 and 86 of the Constitution. Such a reversal to the pre-2010 era was in the view of the Court undesirable and could not be allowed to stand. In the words of the Court:

> *…a law allowing election officials once again to troop to the Constituency and national tallying centres with hard copies of election results in no particular forms, is to take several steps backward from the progress the country had made to guarantee free, fair and transparent elections in conformity with the Constitution. This amendment is clearly against the spirit of Articles 10, 81 and 86 of the Constitution and cannot pass the constitutionality test of validity.*

The Court also took issue with section 39 (1) D as read with section 39 (1) E of the Elections Act. While the former, which required tallying, verification and declaration of results at the polling station, appeared on the face of it to be in consonance with Article 138 (3) (c)of the Constitution, when read together with section 39 (1) E, it opened up the potential for mischief. Section 39 (1) E provided:

> *Where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the results and the result which is an accurate record of the results tallied, verified and declared at the respective polling station shall prevail.*

The challenge with this provision as crafted was to create a situation where there was potential for conflict between manual and electronically transmitted results, yet the two sets of results were meant to flow from the same process of tallying, verification and declaration. This, in the view of the Court, opened up room for tinkering with the results, thereby was ambiguous. In the words of the Court:

> *91. The Constitution is very clear on the accuracy, verifiability and reliability of elections. Accuracy guarantees democratic elections as the foundation of a democratic state. Section 39(1D) as read with 39(1)(F) are vague and ambiguous on which results are the accurate record of the election as tallied verified and announced by the presiding officers since there can be only one result from an election. In this regard, these subsections downgrade the significance of*

> *accuracy and transparency of an election thus open room for speculation and manipulation of election results. The Commission has the enviable role of not only guaranteeing the accuracy of elections and results therefrom, but also ensuring that they are in conformity with constitutional principles in Articles 10, 81 and 86. There should never be room again in our election laws for the possibility of manipulating elections or results as this would undermine free and fair elections which are the hallmark of a democratic society. I therefore find fault with sections 39 (1D) and 39(1E) of the Act.*

The impugned statute had also sought to amend the requirements on live streaming and transmission of results. Section 39 (1) F provided that the failure by the Presiding Officer to electronically transmit results would not invalidate the results as declared by the presiding or returning officer. Section 39 (1) (G) further provided that the results that appeared on the public portal maintained by the IEBC were 'for public information only' and would not form the basis for the declaration of results by the IEBC. The Court impugned these provisions since the former absolved officers of the IEBC who failed to transmit results without justification, and further, that the latter section made nonsense of the heavy investment in technology provided for in section 44 of the Act if the intention of the legislature was that the results transmitted from the primary source should not matter. In the view of the Court, live streaming was introduced into the law to allow citizens to compare transmitted results with the declared results, thereby confirming their accuracy. All these provisions taken together had the effect of making a mockery of free, fair and credible elections and undermining, rather than strengthening the electoral process. To the extent that they were inconsistent with constitutional principles, they were declared unconstitutional.

The Court, however, declined to find that the complementary mechanism envisaged by section 44A of the Elections Act was unconstitutional since as the terms suggests, it was only complementary. It was therefore not intended to replace the electronic voter identification system but was to be resorted to when if the principal voter identification system failed due to technology failure. For that reason therefore, the Court failed to see how section 44A violated Articles 10, 38, 81 and 86 of the Constitution as it was intended to aid the main voter identification process and ensure continuity of the electoral process.

The intention to make the use of technology central in elections management in Kenya was acknowledged by the High Court of Nairobi in ***Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC*** **Nairobi Election Petition 14 of 2017:**

> *143. The Petitioners complained that while the 3rd respondent was required to transmit the results electronically, the system failed. That the transmission of results from polling stations to the Constituency and County Tallying Centres failed. That the results being streamed to both the Constituency and County Tallying Centres were not credible. …as correctly submitted by Mr. Macharia and Ms. Okimaru, the High Court held in the case of **National Super Alliance (NASA) Kenya v IEBC & 2 Others [2017] eKLR** that notwithstanding the provisions of sections 39 and 44 of the Elections Act, the elections of 8th August 2017 were not to be exclusively electronic.*
>
> *145. The evidence on record shows that majority of voters were identified biometrically. They had been registered biometrically. The only complaint is on the transmission of the results from the polling stations to the Constituency and County Tallying Centres. While I am in agreement with the Petitioners that technology was meant to be central in the elections of 8th August 2017, nevertheless it was not the only mode of transmission of results. Indeed, a reading of Regulations*

> *5 (1A) (d) and 82 of the Regulations, will show that the Presiding Officer is only mandated to electronically transmit presidential results. The results he transmits under Regulation 82 are only provisional. The results that count under Regulation 76 are those in the physical Form 37A. However, this does not mean that the 3rd respondent should not endevour in future to fully operationalize section 44 of the Elections Act. Electronic transmission of results was meant to make the results declared at the polling station accountable, credible and verifiable.*
> *146. In this regard, in order to meet the constitutional standards of accountability, credibility, transparency and verifiability in Articles 81 and 86 of the Constitution, the 3rd respondent should embrace technology in all elections as it has in Presidential elections in section 39 (c) of the Elections Act. That will call for an amendment to Regulations 5 (1A) and 82 of the Regulations.*
> *147. In my view therefore, there was no evidence to show that failure to properly transmit the results electronically to both the Constituency and County Tallying Centres affected the results of the elections. That allegation fails.*

What therefore emerges from the 2017 jurisprudence is that while technology is an important component of elections management in Kenya, for the foreseeable future, electronic management of elections will run alongside a complementary (read manual) system in the event of technology failure. However, section 44 (2) of the Elections Act requires the IEBC to 'develop a policy on the progressive use of technology in the electoral process'.

In order to ensure that the use of technology meets the constitutional safeguards set out in Articles 81 and 86 of the Constitution, the High Court noted in the case of ***Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC,***[510] that while there was no obligation to electronically transmit results in all elections (only presidential election results had to be electronically transmitted under section 39 (1) (C) of the Elections Act), there is nothing that should stop the IEBC from making arrangements for electronic transmission of all results, in order to fully operationalise section 44 of the Elections Act. Electronic transmission of results would, in the view of the Court, make the results declared at the polling station accountable, credible and verifiable. The Court therefore recommended an amendment to Regulations 5 (1A) and 82 of the Elections (General) Regulations to facilitate this progressive use of technology.

It is also recommended that there be greater involvement by civil society, lawyers and human rights organisations in pre-election processes. This would give them a better grasp of the electoral legal framework, policies and procedures, including an understanding of the working of the technology used in elections. With the extensive jurisprudence surrounding the question of technology under the current legal regime, it is important for various actors to be familiar with the standards to which the electoral management body ought to be held to account in so far as the use of technology is concerned and where necessary documenting instances of non-compliance. This would be useful in case of an election petition since existing timelines for preparation of a petition do not allow sufficient time for all evidence gathering.[511]

510 Nairobi Election Petition 14 of 2017.
511 Gwagwa (as above) 6.

10. Impact of Irregularities and Illegalities on the Outcome of the Election

Since elections determine the governance of a country, it is crucial that election results reflect the will of the people. To ensure the credibility and verifiability of election results, the Elections Act and Elections (General) Regulations set out certain procedural requirements to be complied with in the process of voting, counting, tallying and declaration of election results. These include the use of transparent or translucent ballot boxes, the serialisation of election material, the presence of agents and observers to monitor the process of voting, counting, tallying and declaration, the use of statutory forms to declare results, the signing of statutory forms by candidates and/or their agents, the signing and stamping of statutory forms by IEBC officials, the sealing of ballot boxes using official seals, the transmission of results using prescribed forms to the tallying centres and the availing of copies of result forms both to agents and by pinning at the polling stations. For the presidential election results, there is an additional requirement under section 39 (1) (C) of the Elections Act for electronic transmission of results from polling stations to the constituency and national tallying centre.

Administratively, the IEBC has also adopted certain security measures to safeguard the integrity of the election. These include colour-coding of ballot papers and statutory forms, the use of impenetrable security features such as generic watermarks which are a pattern or text incorporated in results declaration forms and which can only be seen at an angle or when viewed against normal light; guilloche patterns which are non–reproducible geometric patterns generated by a special security software and which cannot be scanned and reproduced; anti-copy feature where hidden texts appear on the copy produced thus distinguishing the original from the reproduced copy; micro-text where text on declaration forms is printed in very small font, appearing like a line to the naked eye and only verifiable under a magnifying glass; embossment, invisible UV printing where each result declaration form has an invisible logo which may only be seen under a UV light; polling station data personalisation where details of the polling station's name and code, ward name and code, constituency name and code and the county name and code are personalised to avoid misuse of forms; self-carbonating element of forms which restricts manual entry of data on the form 34A to only once; barcodes where Forms 34B and 34C are printed with barcodes which identify the tallying centre by showing the county codes and constituency codes for quick identification; tapered serialisation where each form has a unique serial number which cannot be produced by a regular mechanical impact device; and tapered UV serialisation.[512] Over and above these security features, the IEBC required its officials to stamp both the ballot papers and result declaration forms.

The inclusion of legal and administrative requirements to safeguard the integrity of our elections is anchored in our history of electoral injustice, and they are aimed at ensuring that we progressively move towards making our elections credible, transparent, accountable and verifiable. It therefore calls for holding IEBC to the constitutional standards on elections. As pointed out by Ngugi J:[513]

> *This conclusion that the failure by the IEBC to strictly comply with the Constitution and statutory law is consequential is not just a product of formalist deontological analysis. It is informed by our history of electoral (in)justice as a people and its consequences on our nation as well as our aspirations to build a new Kenya using the structural foundations of the 2010*

512 See para 214-219 of the SC judgment in the *2017 Raila Odinga case*.
513 *Clement Kungu Waibara v Annie Wanjiku Kibeh & another [2018] eKLR.*

> *Constitution which include, among other pillars, a call for a strict adherence to electoral justice principles. It is informed by a consuming belief that as a country, we can rise above a culture of electoral lawlessness and non-adherence to rules and laws as long as we get by. It is, finally, informed by faith that our institutions can do better and that they must be held to the high standards of excellence and integrity that is demanded in our Constitution. IEBC, like this Court, is one such institution.*

Conversely, the imperfect nature of elections and human beings involved in the electoral process cannot be overlooked and it is acknowledged that no election then can be flawless. It is therefore important that the law sets out a threshold for assessing valid elections which admits the reality of the flawed people that conduct elections, without allowing it to degenerate in a 'culture of electoral lawlessness and non-adherence to rules and laws as long as we get by'[514] by requiring adherence to certain agreed on principles and standards.

Indeed section 83 of the Elections Act, described by the Supreme Court as the 'fulcrum' of the presidential election petition, is phrased in such a way as to make it clear that not every irregularity will be sufficient to invalidate an election result so long as it does not affect the outcome of the election or overturn the democratic will of the people. The Supreme Court affirmed this position in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others:***[515]

> *[216] It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.*
> *[217] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on ground of irregularities.*
> *[218] Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.*

This position was restated in several cases, including the ***2017 Raila Odinga Case*** where the Court ruled:

> *373 …At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.*
> *374…even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good*

514 Per Ngugi J in *Clement Kung'u Waibara v Annie Kibeh & Anor* Kiambu Election Petition 1 of 2017.
515 Supreme Court Petition No. 2B of 2014.

> *judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.*

Muchelule J opined in ***Wavinya Ndeti & Another v IEBC & 2 Others***:[516]

> ***Section 83** of the **Elections Act** recognizes the sanctity of the right of the people to choose their political leaders, and forbids the Court from trivialising that right by nullifying an election merely because errors and irregularities have been shown to have been committed, or that a provision of the law relating to elections has not been complied with. The errors and irregularities, or the non-compliance with election law, must be of such gravity that the integrity of the election is materially compromised.*

Odek JA, in his text 'Election Technology Law and the Concept of Did the Irregularity Affect the Result?' asserts:[517]

> *For an election irregularity to vitiate the result, the result must be affected. Which result must be affected" There is only one result that must be affected - the result that "A" is the winner of the election. "Result" means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate.er of the election. "Result" means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate. For an election petition to succeed, evidence must be led to prove that the result and conclusion that "A" is the winner of the election is affected by the irregularities or non-compliance with the constitutional principles and electoral law. The evidence led must demonstrate that the irregularities or non-compliance raise doubt as to whether "A" is the winner and better still that the irregularities or non-compliance prove that "A" is not the winner.*

Errors in electronic transmission do not have an impact on the outcome, if it cannot be demonstrated that the result forms at the polling station are impugned. Since, as the Court stated in ***Maina Kiai***, the polling station is the true locus of the expression of the will of the voters, any errors in transmission cannot be said to affect the will of the people if the original declaration form cannot be shown to have been affected by the said errors. In ***Jackton Nyanungo Ranguma vs IEBC & 2 Others,***[518] Majanja J held that:

> *Even accepting the errors, omissions and inconsistencies highlighted by PW4 and the other witnesses, the legal position remains that the votes as recorded in form 37A are final. Unless forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus the primacy and finality of form 37A.*

To successfully impugn an election therefore, one must demonstrate that the result forms 'As' were affected by the irregularities. A similar finding was made in ***Hassan Jimal Abdi v Ibrahim Noor***

516 Machakos Election Petition 1 of 2017.
517 pp 81-82.
518 Kisumu Election Petition 3 of 2017

Hussein & Others.[519] In this case, the Court considered two issues to be of concern: the irregular opening of ballot boxes in Basineja and Batalu polling stations after declaration of results and the alterations made in Form 36 A in favour of the 1st Respondent. The Court found that both irregularities affected the integrity of the election. The Court noted that the alterations were made to favour the 1st Respondent and occurred in polling stations in his strongholds. The two impugned polling stations accounted for ¾ of his winning votes. The effect of the irregularities could therefore not be gainsaid.

The Court therefore found that the elections at Batalu ward could not be said to accord with the constitutional dictates of a simple, accurate, verifiable, secure, accountable or transparent election. Since it was not credible, free and fair, the petition was found to be merited an allowed. The 3rd Respondent was directed to conduct a fresh election for Member of County Assembly for Batalu Ward pursuant to the Constitution and the electoral laws.

In ***Baridi Felix Mbevo v Musee Mati & 2 Others***,[520] overturned the decision of the Trial Court, asserting that the results from the portal, being only provisional, ought not to have been relied on in making a determination, since they could lead to the wrong conclusion. The Court ruled that the trial judge erred in admitting the IEBC portal printouts as they lacked accuracy and could not be verified.[521]

While not every irregularity suffices to invalidate an election result, it is crucial that the electoral management body bears responsibility for maintaining the highest standards of electoral integrity as dictated by Articles 81 and 86 of the Constitution, rather than excuse non-compliance under the guise of human error. Such was the reasoning in ***Mohamed Ali Mursal v Saadia Mohamed & 2 Others***[522] where the Respondents attributed all the anomalies to human error and the Court found that argument to be akin to an insult to the voters. It stated:

> *It is the view of this court that some errors cannot be excused. For instance it cannot be explained how figures from Forms 35 could not be transmitted correctly to Forms 36 or why all forms do not have statutory declarations. Returning Officers had the responsibility of correctly transmitting all the data from all Forms 35 to the Constituency Form 36 without errors or with minimal errors. Kenya is coming from the history of lack of confidence by the citizens in some of the organs of the Government including the 2nd Respondent and especially its predecessor, the ECK. I think it was time for this institution to rise above board in order to give the electorate confidence that their political rights will be protected.*

Ngugi J expressed a similar view in ***Clement Kung'u Waibara v Annie Wanjiku Kibeh***[523] in justifying the decision to annul the declaration of the 1st Respondent as the winner of the election.[524] At para 134, the Court stated:

519 Wajir Magistrates' Election Petition No 3 of 2017.

520 Kitui Election Petition Appeal 1 of 2018.

521 It is curious that in this appeal the High Court did not evaluate the failure by the IEBC to adduce Forms 36A as directed by the Trial Court during the hearing and the impact that had on the determination of the petition. While the IEBC maintained that the Petitioner had not discharged their burden in so far as the results were concerned, they ought not to have been allowed to benefit from their own wrongdoing, i.e. failure to comply with a court order. As was the case in the Supreme Court with the ***2017 Raila Odinga case***, where an adverse inference was drawn in light of the failure by the IEBC to allow access to servers and access logs, it was open to the High Court in this case to drawn an adverse inference in so far as the results were concerned. It is worth noting, as the Trial Court had stated, that despite alleging that the results on the portal were wrong, the IEBC never supplied any documents to show the actual results.

522 [2013] eKLR.

523 [2018] eKLR.

524 It is noteworthy that this decision was overturned on appeal, and the Court of Appeal finding was upheld by the Supreme Court.

> *This conclusion that the failure by the IEBC to strictly comply with the Constitution and statutory law is consequential is not just a product of formalist deontological analysis. It is informed by our history of electoral (in)justice as a people and its consequences on our nation as well as our aspirations to build a new Kenya using the structural foundations of the 2010 Constitution which include, among other pillars, a call for a strict adherence to electoral justice principles. It is informed by a consuming belief that as a country, we can rise above a culture of electoral lawlessness and non-adherence to rules and laws as long as we get by. It is, finally, informed by faith that our institutions can do better and that they must be held to the high standards of excellence and integrity that is demanded in our Constitution. IEBC, like this Court, is one such institution.*

The terms 'irregularities' and 'illegalities' were defined by the SC in the ***2017 Raila Odinga Case.*** Illegalities referred to 'breach of the substance of specific law' while irregularities were 'violations of specific regulations and administrative arrangements'. The Court was asked to vitiate the election on the basis of irregularities and illegalities, irrespective of whether they affected the result. This would be a departure from the ***2013 Raila decision*** where the petition was dismissed because the Petitioner did not demonstrate the effect of irregularities on the outcome. The apex court had, in that decision, set out the test for non-compliance in the following terms:[525]

> *Did the Petitioner clearly and decisively show the conduct of the election to have been so devoid of merits, and so distorted, as not to reflect the expression of the people's electoral intent? It is this broad test that should guide…in deciding whether we should disturb the outcome of an election. Does the evidence disclose any profound irregularity in the management of the electoral process, or does it gravely impeach the mode of participation in the electoral process by any of the candidates who offered himself or herself before the voting public?*

In the 2017 ***Raila Odinga Case,*** alongside non-compliance with electoral law, the Petitioners' case was that the election was so marred with irregularities as to have fundamentally and cumulatively negatively impacted the election. Some of the irregularities alleged included Forms 34A, 34B and 34C not having security features; forms having different layouts and formats; some forms missing serial numbers, bar codes, official stamps, water marks and anti-copying features; lack of handover notes; Forms 34A and 34B being signed by unauthorised persons; forms being signed by the same presiding and returning officers and others originating from ungazetted polling stations. The Petitioners also impugned the process of declaration on the basis that results had been announced using Form 34B without having received all the Forms 34A, particularly since there variances between the results on the Forms 34B and those on the public portal.

> *Following scrutiny as ordered by the Court, the report of the Registrar noted that:*
> *(a) Certain forms 34As appeared to have been duplicated;*
> *(b) Certain forms 34As and 34Bs appeared to be carbon copies;*
> *(c) Certain forms 34As and 34Bs appeared to be photocopies;*
> *(d) Some of the forms had no evidence of being stamped or signed.*
> *(e) Out of the 291 Forms 34B scrutinized:*
> - *56 forms bore no watermark,*

525 Paras 304-305.

- *5 forms had not been signed by the returning officer,*
- *31 forms had no serial numbers,*
- *32 forms had not been signed by the respective party agents, the "hand over" section of 189 forms had not been filled and*
- *the "take over" section of 287 forms had not been filled.*

In response, the Respondents contended that Regulations 79 (2) (a) and 83 (a) only required that they sign the Forms and there was no requirement for security features. The inclusion of security features was therefore out of 'abundance of caution' on the part of the 1st Respondent.

In making its findings, the Supreme Court observed that Form 34 C which was used to declare presidential election result was not the original but appeared to be a copy. The original form never availed despite court directive. Since the form did not have security features, the results could not be authenticated. No explanation given by the IEBC as to the failure to avail original form 34C as directed by the Court. There was also no plausible explanation for the discrepancy in the forms, with some having security features while others did not; more so, when it was deponed that all forms had those features. Moreover, failure to fill in the takeover section by the Chairperson of the Commission cast doubt as to the verification process required to be done by Article 138 of the Constitution.

In addition, since polling station is the 'true locus of the free expression of the will of the voters', declaring results on the basis of Forms 34B without reference to Forms 34A was unjustifiable. The apex court was emphatic that the CoA in ***Maina Kiai*** did not take away obligation to supply Forms 34A to NTC. At paragraph 286 of its decision, the Court reiterated the role of the Commission under Article 138 (5) of the Constitution as that of tallying and verifying the results and not to vary, change or alter them under the guise of verification. Where any discrepancies were noted, they were to be forwarded to the Supreme Court as the sole body with the jurisdiction to determine presidential election disputes.

It was the view of the Court that the election had not been conducted in accordance with constitutional principles. Nevertheless, it was still necessary to assess the impact of the irregularities on the integrity of the election. The Court set out the rationale for this at para 374:

> *…even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.*

The Court then reached a conclusion on the impact of the above-mentioned irregularities on the outcome of the election:[526]

> *In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of*

526 At para 379.

> *the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.*

Various election courts were also asked to nullify election results on the basis of irregularities and illegalities. It was therefore necessary to determine whether they provided sufficient ground for nullifying the declared result.

10.1. Failure to Stamp Statutory Forms

Failure to stamp result forms was one of the irregularities noted in the ***2017 Raila Odinga Case.*** The question was whether the law requires result forms to be stamped and whether failure to stamp statutory forms could, by itself, invalidate an election result.

A review of regulations 76 and 79 of the Elections (General) Regulations, which provide the procedure for counting and declaring results, indicates that whereas signing the declaration forms is mandatory, there is no legal obligation to stamp the forms. The obligation to sign the result forms is extended to the Presiding Officer and candidates/their agents. In ***Mohamed Mahamud Ali v IEBC & 2 Others,***[527] the Court ruled that it was clear that the Regulations do not contain a provision on stamping Forms 35A. The Court placed reliance on the CoA decision in ***IEBC v Stephen Mutinda Mule***[528] where the Court had stated:

> *There is no stamping requirement in the case of Form 35. All that is required with regard to Form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates. We agree with the submission on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such Forms were stamped, it was gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of Forms 35 that did not contain the stamp…….*

The Court also considered stamping discretionary in ***John Munuve Mati v RO Mwingi North & Others***[529] and therefore failure to stamp could not invalidate the election.

The CoA in ***Cyprian Awiti & Anor v IEBC & Others***[530] overturned the Trial Court's finding on the effect of failure to stamp result forms. While the Trial Court had ruled it an irregularity sufficient to nullify the election, the CoA considered persuasive the decisions in ***Kalla Jackson Musyoka v Independent Electoral & Boundaries Commission (IEBC) & Another***[531] that the lack of stamp on the statutory forms did not affect the results of the elections; ***Mark Nkonana Supeyo & Another v Independent Electoral and Boundaries Commission & 2 Others Kajiado Election Petition 1 of 2017*** that in the absence of proof of any prejudice suffered by failure to stamp the requisite form, the omission cannot *per se* stand on the way of the electorate to frustrate the will of the people especially

527 Mombasa EP 7 of 2017
528 [2014] eKLR.
529 Kitui Election Petition 3 of 2017.
530 Kisumu Election Appeal 5 of 2013.
531 [2018] eKLR.

when the result in the specific polling station including the votes garnered by each candidate is not in question and ***IEBC v Stephen Mutinda Mule & 3 Others [2014] eKLR*** where it was held that there was no statutory requirement for stamping of Forms. Further, the appellate court endorsed the finding of Kimondo J in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko and Others Nairobi High Court E.P. 5 of 2013 [2013] eKLR*** on the absence of a stamp on a signed form:

> *I am not trivializing the matter. Obviously, the stamp creates the aura of an official document. But it would be a fallacy to throw out a form for want of a stamp when the maker (the Presiding Officer or Deputy) have signed it." See generally Regulation 79; See also IEBC & another -v- Stephen Mutinda Mule & 3 others, Nairobi, Court of Appeal, Civil Appeal 219 of 2013[2013] eKLR.*

The appellate court concluded that the Trial Court erred in failing to determine the specific number of Forms 37A that were not stamped and further in failing to determine how failure to stamp Forms 37A affected the result.

10.2. Failure to Sign Statutory Forms

As set out above, the Elections (General) Regulations require that result declaration forms are signed by the Presiding Officer and the candidates or their agents. Signing authenticates results and indicates to voters and candidates that election officials stand by the results declared. Signing is therefore not merely a procedural requirement, but a solemn act going to the root of the validity of an election result. In the ***2017 Raila Odinga Case,*** the Court found that the unexplained irregularities in the result forms, including failure to sign by returning and Presiding Officers, made it such that the forms were not free from doubts as to their authenticity. The Court pondered:

> *[377] Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form?*
> *[378] Where do all these inexplicable irregularities that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free will and sovereign will of the people, but of the many unanswered questions with which we are faced?...*

As a result, the Court ruled the illegalities and irregularities so substantial that no court, properly applying its mind to the evidence and the law and the IEBC's administrative arrangements could in good conscience declare that they did not matter and that the will of the people was still expressed.

In the case of ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others***[532] guided by the dicta of the Supreme Court in the ***2017 Raila Odinga Case,*** Mabeya J set out two consequences of failure to sign statutory forms as required by law. Firstly, unlike the failure to sign by an agent, which is excusable under Regulation 79 (6) of the Elections (General) Regulations, the Court made it clear that failure to sign by a presiding or returning officer was not a mere error but a criminal offence under section 6 (j) of the Election Offences Act. Moreover, even the failure to sign by an agent would not be excusable until the Presiding Officer recorded the reasons for that failure as required by Regulation 79 (4) for purposes of accountability, credibility and verifiability. Where the forms were not signed by agents and the presiding officers did not take note of that fact, a question of credibility would arise. This position was endorsed in ***Mohamed Mahamud Ali v IEBC & 2 Others,***[533] where the Court allowed scrutiny in respect of 9 polling stations listed in Annex V in the application for scrutiny on the basis of missing signatures and details of the Presiding and Deputy Presiding Officer, whereas the same are required by law to be included in Forms 35A.

Secondly, as to the effect on the result, the Court ruled such forms 'worthless pieces of paper whose contents would not count in the final tally of results'.[534] This was because signing of the forms gives credence and makes the results accountable and verifiable; therefore unsigned result forms lacked credibility and authenticity. The credibility of the results was further undermined by the fact that the agents did not sign many of the result forms, some of the forms had alterations which were not countersigned and the reasons for this omission were not given by the presiding officer. The Court therefore found that results of the 5 polling stations in respect of which the Form 37A were not signed ought to have been excluded from the final tally.

The Court noted with concern that the County Returning Officer and Constituency Returning Officers who testified were less than candid about the signing and stamping of the forms as required by law. Whereas in their affidavits they swore that all forms were signed, dated and stamped, the Court noted from the bundle of documents supplied that some of the documents filed originally had no signatures or stamps. However, copies of the same documents that were later introduced had signatures of both presiding officers and agents and were stamped, leading to the inference that they were forged.

In ***Samwel Kazungu Kambi v Nelly Ilongo and 2 Others 2017 eKLR,*** the Court noted that there was an admission by the Returning Officer that he did not sign Form 37 B in respect of Kilifi North constituency. Korir J asserted that this was a mishandling of the results and in the circumstances, the law required that the unsigned Form 37B be ignored. However, since there was evidence that the 1st Respondent had verified each of the 988 Forms 37A, there was no reason to exclude the votes cast in respect of the gubernatorial election in Kilifi North Constituency. The unsigned form was therefore not a basis for invalidating the election. The decision of Korir J accords with the established position of the COA in the ***Maina Kiai Case*** that the polling station is the true locus of the expression of the will of the voter, and therefore if the results as contained in Form 37A were not contested, there was no reason to invalidate the election.[535]

532 [2018] eKLR.
533 Mombasa Election Petition 7 of 2017.
534 At para 88.
535 See also the dicta of Majanja J in *Jackton Nyanungo Ranguma v IEBC & 2 Others* Kisumu Election Petition 3 of 2017 and *Joseph Oyugi Magwanga & another v Independent Electoral and Boundaries Commission & 3 others* Homa Bay Election Petition 1 of 2017.

The circumstances were different in ***Cyprian Awiti & Another v IEBC& 3 Others.***[536] In that case, the appellate court had to evaluate the impact of failure to sign 67 Forms 37 A by either the presiding or deputy Presiding Officer. The Court noted that the omission had been identified by both the Trial Court and the Deputy Registrar during scrutiny.

> *180. The Trial Court at paragraph 150 of its judgment made a finding of fact that some Form 37As produced by the IEBC did not have signatures of presiding officers. Is this finding supported by evidence" YES. What is the evidence on record? The observations made by the Petitioners' agents on the Report on Access Orders dated 7th and 15th November 2017 revealed that 67 original Form 37As were not signed by either the presiding officer or deputy presiding officer…*

The Court also took cognisance of the fact that the requirement to sign statutory forms was couched in mandatory terms. Nevertheless, the CoA, quite apart from the finding of the Supreme Court in the ***2017 Raila Odinga*** case, held that even where the forms were not signed by either the presiding or deputy presiding officer, the Trial Court was still under an obligation to evaluate the impact of the failure to sign the result forms on the result of the election. It stated:

> *182. The burden to successfully challenge non-existence of a signature in form 37A and its authenticity if any, purely lies on the person alleging such omission. Regarding Deputy returning officers' signature, the same is not mandatory as long as the Presiding officer has signed. There is no law requiring both of them to sign concurrently. A deputy can sign in the absence of a presiding officer for good reason or both can sign if present hence no harm. In the instant case, other than the 3rd and 4th respondents Observation Report on Access Orders, it is not manifestly clear how the failure to sign the Forms would quantitatively affect the result of the election. Whereas there is evidence on record that some Form 37As did not have signatures of presiding officers, how absence of such signatures affect the results of the election must be demonstrated. The Trial Court did not consider this aspect and there is no specific finding how absence of some presiding officer's signature affected the result of the election. Prima facie, a statutory Form that is neither signed by the presiding officer nor deputy presiding officer cannot authenticate results of the election at the specific polling station.*

This finding was upheld by the Supreme Court.[537]

10.3. Use of Unofficial Forms/ Failure to Use Prescribed Form

What becomes of instances where results are declared using forms outside of the prescribed format set out in the rules? Does that irregularity justify nullification of an election result? In ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others,***[538]some of the Forms 37A, 37 B and 37C were not original; some did not have security watermarks while others had no serial numbers. The absence of the original forms, as was the case in the ***2017 Raila Odinga*** petition, was not explained. As to the absence of security features on the forms, the IEBC attributed the same to inability to print the correct forms due to defective printers. The Court considered the explanations rendered by the IEBC on the omissions unsatisfactory, as the results on those forms could not be said to be credible, accurate and verifiable.

536 Kisumu Election Petition Appeal 5 of 2018.
537 See Supreme Court Petition 7 of 2018.
538 [2018] eKLR.

…Forms 37B for Wajir East, Wajir West and Eldas Constituencies were original, they had serial numbers and had the security water mark. However, Form 37 B for Wajir North had no water mark, it had no serial number and was not an original but a print out. The one for Wajir South had no watermark, no serial number and was also a print out. While that of Tarbaj had no watermark, had a serial number and was a scanned copy.

96**. Ms. Okimaru submitted that the respective Returning Officers and R2W1 had explained the inability to print the correct Al-Ghurair Forms due to defective printers. Mr. Macharia submitted that the defect in those forms are curable under **section 26 (2) of the Statutory Instruments Act, 2013.

***97**. As regards Form 37B for Tarbaj Constituency, there was no explanation why only a scanned copy was availed to the Deputy Registrar during scrutiny. The whereabouts of the original was not explained. It did not bear a watermark although it had the serial number and agents signed.*
***98**. Regarding Form 37B for Wajir South, the same had no security bar code, no serial number and no agent signed. R2W4, Anthony Kirori Kimani the Returning Officer who prepared that form explained that he printed the results in an A4 paper because the printer he was provided with did not have capacity to print all that was required. That he captured this in the incident report. However, the Court notes that he did not produce that incident report. Neither did he tender any evidence to show that the entries he made in that form were from the Forms 37A submitted to him by the various Presiding Officers.*

***99**. To my mind, for the results in that Form to be said to be accountable, credible and verifiable, it was imperative for the said Returning Officer to produce Forms 37A from all the 119 polling stations so as to verify that what was in that an unofficial form, was what had been transferred from acceptable verifiable statutory Forms 37A. He produced none. I have seen the copies of Forms 37A produced by the 1st respondent in his Replying Affidavit to scrutiny application. They are for only 80 polling stations out of the 119 polling stations in the Wajir South Constituency. A total of 29 Forms 37A were not produced. The results in that Form 37B cannot therefore be said to be verifiable. I should point out here that the 2nd and 3rd respondent did not produce in court Forms 37A for all the polling stations.*

***100**. As regards Form 37B for Wajir North, it neither had the serial number nor the security bar code. In addition, the signing page was that for the presidential election. It showed the handing and taking over of Forms 34A instead of Forms 37B. It did not even have the logo of the 3rd respondent. It was also not original but a print-out. Although this Form was said to be generic like Forms 37B for Wajir South and Tarbaj, it was completely different from those others.*
***101**. Unlike all the other Forms 37B, including the ones for Wajir South and Tarbaj, in which the page for signing by the agents and the Returning Officer is a continuation of the pages containing the results, the one for Wajir North is completely separate and distinct. There was no explanation why a page for Presidential Form 34B was used to declare the results for the election of Governor. R2W1 stated that that was a typo error. This cannot be the case. During the scrutiny ordered, there was no original of that form. Only a print out that was produced.*
***102**. In addition, one cannot vouch for the results therein since the Returning Officer did not produce all the Forms 37A for the particular Constituency to support the entries therein. For example, polling station No. 0080330163025 Rabsu Centre had more votes cast (390) than registered voters (389).*

> ***103**. As regards Form 37C, it was also not without its own challenges. Whilst an original standard Form with serial number and security bar code was provided during scrutiny, its entries had issues. There were 17 polling stations from Wajir South Constituency whose results were entered but names not indicated. This is clear from Form 37C produced by R2W1 at pages 41 to 42 of the Response to the Petition. While in all other constituencies the names of each polling station is given, there are blanks totaling 17 in which results are entered but the names of polling stations are not disclosed.*
>
> ***104**. It is the view of this court that this is in breach of **Regulation 87 (2) (b) (i)**. That Regulation makes it mandatory for each polling station to be named and the results in each entered. Anyone looking at the said Form 37C cannot be able to discern for which polling stations those results are. There was no explanation that was given for this anomaly. This is the Form which was used to declare the results for governor in Wajir County. This anomaly in my view makes those results unaccountable and unverifiable.*
>
> ***105**. This then was the unsatisfactory nature of the declaration forms which the 2nd and 3rd respondent relied on to declare the results in the Wajir Gubernatorial election.*
> ***106**. The explanation given by the 2nd and 3rd Respondent for the irregularities were shocking. It was explained that the Presiding Officers were tired, that the printers "ate" the official Form 37B for Wajir North (to use the words of R2W5 Noor Gedi, the Returning Officer for Wajir North) or that the printers supplied could not print all the required information for Wajir South.*
> ***107.** As regards the Presiding Officers, R2W4 admitted that the training given to them was is inadequate. That it is a four (4) day marathon "training" whose content include the applicable law, processes, technology and the operational rules. There is also the aspect of simulation. He admitted that there is barely time to get feedback or confirm that the Presiding Officers are clear on what they are tasked to do because of lack of time.*
>
> ***108**. The view the Court takes is that, it is due to of lack of proper and adequate training that the actions of some Presiding Officers in this case exhibited sheer incompetence. Some failed to sign statutory forms contrary to law, others failed to countersign alterations while others decided to seal all the results from the polling stations in the ballot boxes. Clearly a marathon training of such crucial officers of only 4 days for such an important exercise is completely inadequate.*
> ***109**. On the alleged **"paper eating printers"** or faulty and ineffective printers, that is the least that would be expected of the 3rd respondent. An institution which gobbled over KShs.49 billion for the said election would not be expected to supply its officers with faulty equipment for use in such an important exercise. For the 3rd respondent therefore to have supplied its officers with such equipment which affected the accuracy and efficiency of the election, is a tragedy. This allegation was therefore proved.*

However, where it was shown that irregularities on the forms did not affect the results, the courts did not give undue regard to the omissions by election officials.

In ***Timamy Issa Abdalla v IEBC & 3 Others,***[539] the Petitioner took issue with the use of Form 36B to collate results for the gubernatorial election in Lamu East Constituency. The said form was intended to be used for declaration of results for Member of the National Assembly. In the Petitioner's view,

539 Malindi High Court Election Petition 3 of 2017.

the use of the wrong form rendered the results null and void. The explanation rendered by the 1st and 2nd Respondents for the use of the said form was that Forms 37B had been destroyed in the printer. On its own motion, the Court ordered a scrutiny of the Forms 37A in Lamu East constituency.

In all 40 polling stations in that constituency, it was established that the presiding officers, agents and parties signed the forms without noting any negative comments while others affirmed that the election was free and fair. The numbers tallied during scrutiny were the same ones reflected in the said form 36B. The Court concluded that the scrutiny report revealed very minor errors in very few aspects which in fact did not affect the outcome of the election as recorded on Form 37As in the polling stations where the scrutiny was conducted. This allegation was therefore not proved and the Court dismissed it. This finding was upheld on appeal,[540] where the COA declined to interfere with this finding of fact and was quick to add that section 26 of the Statutory Instruments Act was clear that deviation from a prescribed form did not render it void so long as the deviation did not affect the substance thereof or was not calculated to mislead. This ground of appeal was therefore also dismissed.

In ***Wavinya Ndeti & Another v IEBC & 2 Others,***[541] the Appellant contended that the use of the prescribed form 37C containing results of all polling stations was mandatory and failure to make reference to Forms 37A in preparing the said Form 37C made the results unverifiable and unconstitutional. The appellant faulted the decision of the election court for holding that this issue had not been pleaded and therefore no submissions could be made on it. The Respondents maintained that the issue had not been pleaded before the Trial Court and in any case, there was substantial compliance in the declaration of results since Form 37C was in an Excel spreadsheet, even though it omitted the column with results from all polling stations within the county. In their view, the failure to use the prescribed format was a matter of form and therefore insufficient to invalidate an election as it was excusable under section 72 of the Interpretation and General Provisions Act.

The Trial Court found that the issue of Form 37C was not pleaded and in any case the results had been acknowledged by the Appellants' sponsoring party and the results as contained in Form 37A, being the primary results, could not be altered by the returning officer. Having reviewed the averments in the petition, the Court of Appeal found that the complaints regarding the validity of Form 37C and the declaration of results were anchored in the petition and the Respondents had due notice of the grievances; further the judgment itself acknowledged that the Appellants' grievance was with the results as declared in Form 37C. The issue was therefore sufficiently pleaded.

As to whether the results as declared by the 2nd Respondent met the constitutional threshold of verifiability and whether the declaration ought to have been in the prescribed form, the Court evaluated the provisions of Article 86(c) of the Constitution, which requires the Returning Officer to openly and accurately collate and tally results from every polling station, section 39 (1) (B) of the Elections Act which requires the county returning officer to collate, tally and declare results from constituencies in the county using the prescribed form and Regulation 87 (1) of the Elections (General) Regulations which require the county returning officer to, *inter alia*, declare in Form 37C the votes cast for each candidate in each polling station.

540 Malindi Election Petition Appeal 4 of 2018.
541 Nairobi Election Petition Appeal 8 of 2018.

The Court therefore agreed with the Appellants that the verification role included the task of verifying that the results delivered by the CRO in Form 37B were an accurate record of the results tallied, verified and declared at the respective polling stations and therefore the county returning officer had to be concerned with Forms 37A as the primary documents that capture the results at the polling station. Therefore, this requirement to declare results from each polling station was mandatory and failure to reflect the results from polling stations, as asserted by Mabeya J in ***Ahmed Abdullahi Mohamad & Another v Mohamad Abdi Mohamed & 2 Others*** **[2018] eKLR**, made the results unaccountable and unverifiable.

The Court disagreed with the Respondents' assertion that the complaint in respect of Form 37C was simply a matter of form. It found that had the form used by the returning officer contained all the requisite information, section 72 of the Interpretation and General Provisions Act would have come to the aid of the Respondents, as the substance would have been unaffected. Since the excel spreadsheet did not contain all the requisite information and no explanation was rendered for the failure to use the prescribed form, the election results failed the constitutional test of verifiability and the declaration that the 3rd Respondent was duly elected had no legal basis. Consequently, the appellate court ruled that the trial judge had erred in holding that the election was conducted in accordance with the constitutional principles under Articles 81 and 86 of the Constitution.

At the Supreme Court,[542] the Court had to determine whether there was non-compliance of the impugned Form 37 C with the prescribed form and the effect of its use in the declaration of results. The Appellants conceded that the form was not in the prescribed format but argued that the omission was immaterial as Regulation 87 (2) (b) (iii) of the Elections (General) Regulations was *ultra vires* section 39 (1) (B) of the Elections Act. They maintained that it was only in presidential elections that the national returning officer was required to tally and aggregate on Form 34 C results on Form 34A from the polling stations; the County Returning Officers were not required to concern themselves with the results on the "A" forms.

The Respondents countered this by asserting that Regulation 87 (2) (b) (iii) was not *ultra vires* section 39 (1) (B) but an amplification. Since it was couched in mandatory terms failure to tabulate on Form 37C results from all polling stations must have resulted from not having Forms 37A from various polling stations accounting for 55,000-100,000 votes and therefore the omission was a deliberate cover up intended to mislead. They argued that the omission not only rendered data on results unverifiable but also affected the substance of the entire election.

The Court evaluated whether this omission was material and whether Regulation 87 (2) (b) (iii) was *ultra vires* section 39 (1) (B). Citing the Indian Supreme Court decision in ***Jyoti Basu & Others v Debi Ghosal & Others*** **(1982) AIR 983** to the effect that electoral law is a special jurisdiction and interpretation is confined within the parameters of the Constitution and relevant electoral statutes, the Court reiterated that electoral statutes had to be given their ordinary meaning and strictly interpreted to define the rights of parties. The Court noted that it was not in dispute that Form 37C did not comply with Regulation 87 (2) (b) (iii). The only issue was whether it was *ultra vires* section 39 (1) (B) of the Elections Act.

542 *Alfred Nganga Mutua & Others v Wavinya Ndeti & Anor* Supreme Court Petition 11 of 2018 as consolidated with Petition 14 of 2018.

The apex court disagreed with the COA that the provisions of section 39 of the Elections Act with regard to the handling of results in presidential elections applied *mutatis mutandis* to other elections. Read as a whole, the section made a distinction between presidential elections and other elections. Section 39 (1) (B), which provided for the declaration of the results from gubernatorial, senate and woman representative to the National Assembly elections made no reference to polling stations but only mandated the declaration of final results from constituencies in the county. Therefore, the Court ruled that the CRO did not have to review the figures in the "A" forms but tally and collate figures in the "B" forms to the "C" forms. The COA thus erred in finding that the CRO must be concerned with Forms 37A since the requirement of results from polling stations in Regulation 87 (2) (b) (iii) was not contained in the parent statute. Given that legislation which conflicts with the parent statute is *ultra vires* (***Kenya Country Bus Owners' Association (through Paul G Muthumbi, Samuel Njuguna and Joseph Kimiri) v Cabinet Secretary for Transport and Infrastructure and 5 Others JR Petition No 2 of 2014 as consolidated with R v The Chairman National Transport & Safety Authority & 3 Others Miscellaneous Application 464 of 2013),*** Regulation 87 (2) (b) (iii) was *ultra vires* section 39 (1) (B) and was therefore null and void *ab initio.*

The Court therefore assumed it never existed and therefore the 3rd Appellant was right in ignoring it and omitting from the impugned Form 37C the column with results from polling stations. The Court evaluated the provisions of section 72 of the Interpretation and General Provisions Act and section 26 of the Statutory Instruments Act which stipulate that an instrument or document is not void by reason only of deviation from the prescribed form where the deviation has no effect on the substance of the instrument or document nor was it calculated to mislead. In light of section 72 of the Interpretation and General Provisions Act and Section 26 of the Statutory Instruments Act, even if the Regulation was not *ultra vires*, the Court agreed with the appellants that the variation on Form 37C in this case was minor and the omission was inconsequential.

10.4. Failure to Follow Procedure for Assisted Voting

Not all voters are equally placed during the ballot process. Whether arising from disability, old age or illiteracy, it could be that a voter is unable to cast their vote unaided because they are unable to read the voting material. Section 109 (1) (o) of the Elections Act empowers the IEBC to make regulations to, 'provide for the manner in which a voter with special needs including a person with disability may vote or be assisted in voting'. It is noteworthy that the section is inclusive, and there is no closed list of people eligible for voting assistance. The procedure for assisted voting is set out in Regulation 72 of the Elections (General) Regulations. Regulation 72 entitles any person who, by reason of disability or being unable to read or write to assisted voting on application to the Presiding Officer.

To safeguard the process from abuse, the right to be assisted in voting will not be granted as a matter of course. The Regulations empower the Presiding Officer to make any respectful inquiries necessary to establish that the voter and the person chosen to assist have met the requirements of the Regulations. Regulation 72 sets out three parameters for the exercise of this right: that while a voter may be assisted by a person of their choice, that person may not be a candidate or an agent;[543] that a person who assists under the Regulation can only assist or support one voter at that election[544] and while there is no requirement that the person assisting be a registered voter, they must have attained the age of majority.[545]

543 Reg 72 (1).
544 Reg 72 (5) (c).
545 Reg 72 (4).

Where a person applies to be assisted but is not accompanied to the polling station, the Regulations provide that they are to be assisted by the Presiding Officer in the presence of agents.[546] It is difficult to reconcile this procedure with the right to vote by secret ballot as set out in Article 38 (3) (b) and principles of the electoral system at Article 81 (e) of the Constitution.

Once the application for assisted voting is granted, the person assisting is required to make a declaration of secrecy before the Presiding Officer using Form 32 in the Schedule,[547] and receive a mark as proof of assistance.[548]

For accountability, the Presiding Officer is required to record in the polling station register against the name of the voter the fact that they were assisted and the reason for the assistance.[549] The Regulation makes it an offence for an unauthorised person to be present during assisted voting and for a person assisting to breach the provisions of the declaration.[550]

Where the procedure for assisted voting is not followed, it raises concerns about the integrity of the process. Several election courts therefore had to determine the impact of the failure to comply with the guidelines on assisted voting. In ***Mohamed Mahamud Ali v IEBC & 2 Others,***[551] the Court noted a discrepancy in the procedure for assisted voting. One of the Petitioner's witnesses asserted that IEBC officials had marked the ballot paper in favour of the 3rd Respondent, who was not her choice. While the Presiding Officer maintained that voters were assisted in accordance with the law, the polling station diary indicated that he did not record the number of Forms 32 he had filled as proof of compliance with the requisite procedure for assisted voting. The Court therefore found the witness' testimony as to undue influence credible, despite the fact that the specific persons alleged to have influenced the voting were unidentified.

In ***Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC***,[552]the Court also deprecated the Presiding Officers for failure to comply with the procedure for assisted voting, which in addition to filling a Form 32 required that a note be made in the Voter Register next to the names of the persons assisted indicating the fact of the assistance and reasons thereof. This would in the view of the Court make the process verifiable. Since out of the 16,170 voters who took part evidence was supplied of only 4 voters being assisted, in a region with a high illiteracy rate, the Court found that by failing to mark the register as required under Regulation 72 (6), the Presiding Officers were committing an offence under section 6 (j) of the Election Offences Act. The petition was eventually allowed.

On the contrary, in ***John Munuve Mati v RO Mwingi North & Others***[553] the Court found the allegations of undue influence by the Petitioner's witness to be unproved on the basis that the persons alleged to have influenced voters were not identified. Further, there was no proof that the Presiding Officers in the impugned polling station were recruited for purposes of influencing people to vote for the 3rd Respondent.

546 Reg 72 (2).
547 Reg 72 (5) (b).
548 Reg 72 (5) (c).
549 Reg 72 (6).
550 Regs 72 (5) (b) and 72 (7).
551 Mombasa Election Petition 7 of 2017.
552 Nairobi Election Petition 14 of 2017.
553 Kitui Election Petition 3 of 2017.

10.5. Discrepancies between Results of Different Elective Posts

Should an election court be concerned with disparities between results of different elective posts given that each voter is issued with 6 ballot papers on Election Day? Could there be any valid reasons for huge disparities between the results recorded for the various seats? In ***Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others,***[554] the Court declined to consider this a basis for impugning the result without evidence of electoral malpractice. In the words of the Court:

> *183. On the issue of the difference in the number of votes cast for the President, the Governor, Member of the National Assembly, Senator, Woman Representative and the Member of the County Assembly at Changamwe Constituency, this court notes that valid votes cast for all positions need not necessarily be uniform. There could be various reasons which would account for any difference that may be realized. Therefore, unless cogent evidence is adduced, a difference of numbers in the votes cast in various positions is not from the face of it evidence of electoral malpractice. However, where the variance is huge and no tangible explanation is proffered, that would call for the Court to make a decision in one way or the other on the same.*

The CoA in ***Jackton Nyanungo Ranguma v IEBC & 2 Others***[555] while considering the difference in votes informative, ruled each election a stand-alone one and found that the results of one election could not be used to challenge another:

> *Whereas comparison of votes cast in one election with another is informative, such comparison per se cannot be a ground to nullify the results of one election as against the other. Each election result must be challenged on its own ground. Each election petition is a stand-alone petition and any allegation contained therein must be proved. It is the result of a specific election that is being challenged and not the results of all other elections. It is impermissible to use the results of one elective position to challenge or prove that the result of another elective post is vitiated. If one were allowed to do so, this would be speculative and extrapolation of evidence which is impermissible. We find that it is inappropriate without cogent evidence to draw an inference that mere difference in votes cast between the various electoral seats is proof of electoral malpractice or irregularity. Accordingly, we find that the Trial Court did not err in its finding that the appellant had not laid out a factual basis for the alleged malpractices or irregularities in each polling station which led to the difference or variation in the number of votes cast in the Presidential, Senatorial and the gubernatorial elections. This ground of appeal fails.*

Similarly, in ***Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others,***[556] the CoA declined to overturn the finding of the Trial Court on the impact of these discrepancies on the electoral result. The Petitioner had contended that the discrepancies in the total vote tally for the various elective positions i.e. presidential, senatorial, gubernatorial and women representative in Lamu County were occasioned by some voters being given more or less ballot papers which caused the disparity in the number of voters who cast their votes for each elective post. The Court considered the Petitioner's evidence in this regard to have been unsubstantiated.

554 Mombasa High Court Election Petition 7 of 2017, para 183.
555 Kisumu Election Appeal 1 of 2017.
556 Mombasa Election Appeal No. 4 of 2018.

I have considered the allegations by the Petitioner and his witnesses and the explanation by the Respondents with regard to the alleged variances or discrepancies in the vote tally for different elective posts, and I am convinced by the Respondents explanation that this can be caused by stray ballots, rejected votes, or even errors in the recording of votes cast in the statutory forms. I also wish to note that the number of said votes has not been specified for this court to determine whether it was so huge or small so as to make a difference in the result. Again, the Petitioner's evidence in this regard has not been substantiated effectively. In fact, the voters, who according to Pw 107 were not issued with ballot papers should have been called to testify to confirm this allegation if at all they were there because his amounts to depriving them a right to vote.

11. Scrutiny, Recount and Re-tallying

When challenging an election outcome through a petition, one of the remedies open to a Petitioner is that of scrutiny and recounting of ballots cast at the disputed election.[557] Scrutiny and recount are two of the tools available to an election to assess the accuracy and verifiability of election results.[558] Scrutiny is a court supervised forensic investigation of the validity of votes cast[559] and may be carried out either at the instance of a party or by the Court on its own motion.[560] Scrutiny and recount are especially important where cognisance is taken of the fact that elections are conducted by human beings and are therefore not free from error in the counting and tabulation of results. According to the Court of Appeal in ***Cyprian Awiti & Another v IEBC & 3 Others***,[561] there are three primary situations where scrutiny is crucial: where it is the only prayer in the petition; if upon recount the winner is apparent and where the margin of victory is narrow. On the other hand, recount assists both in the expeditious disposal of election petitions but also helps with enhancing transparency and public confidence in EDR.[562]

The Petitioner is at liberty to seek either recount or scrutiny or both reliefs. While sufficient basis is required to be laid before an order of scrutiny can be granted, it appears that where the only issue in the petition is the tally, a recount will be ordered as a matter of course.[563]

According to Korir J, '*[i]t is not a farfetched statement to assert that the law on scrutiny and recount is now settled.*'[564] In its ruling on scrutiny in the ***2017 Raila Odinga Case***, the Supreme Court did not establish any new principles, but recounted the development of the law of scrutiny under the current electoral law framework as pronounced by the High Court, Court of Appeal and the Supreme Court in previous decisions. The following principles on scrutiny can be distilled from the jurisprudence so far.

Firstly, the purpose of scrutiny was articulated in the ***2013 Raila Odinga Case*** as 'to better understand the vital details of the electoral process, and to gain impressions of the integrity thereof.'[565] Omondi J

557 Rule 8 (3) (d) of the Election Petition Rules 2017.
558 Otieno-Odek 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?" 96.
559 Halsbury's Laws of England (1990) 4th Ed.12.45, cited in Otieno-Odek, as above, 97.
560 Sec 82 (1), Elections Act 2011. See also *Raila Odinga & Others v IEBC & Others* SCEP 5 of 2013; *Michael Gichuru v Hon. Rigathi Gachagua & 2 Others* Nyeri High Court Election Petition 2 of 2017.
561 Kisumu Election Petition Appeal 5 of 2018, at para 94.
562 As above.
563 See Rule 28, Election Petition Rules.
564 *Rishad Hamid Ahmed Amana v IEBC* & 2 others Malindi Election Petition 1 of 2017; [2018] eKLR; *Samwel Kazungu Kambi v Nelly Ilongo and 2 Others* Malindi Election Petition 4 of 2017.
565 At para 169.

in ***Philip Mukwe Wasike v James Lusweti Mukwe & 2 Others,***[566] elaborated on the Supreme Court dicta and set out the purpose of scrutiny as three-fold: assisting the Court to investigate the validity of allegations of irregularities and breaches of the law complained of; assisting the Court to determine the valid votes cast in favour of each candidate: and assisting the Court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process. The SC in ***Munya***[567] set out what it considered the emerging jurisprudence on the purpose of scrutiny as follows:

> *(i) it enables the Court to ascertain whether the allegations, irregularities or breaches of the law complained of, are valid;*
> *(ii) it enables the Court to ascertain the valid votes cast in favour of each candidate;*
> *(iii) it is not meant to unearth new evidence to sustain a petition; its purpose is to enable the Court to verify the allegations made by the parties — allegations which must be founded on formal pleadings;*
> *(iv) it is one of the devices for enabling the Court to ascertain whether an election has been conducted in accordance with constitutional principles, and to establish that, indeed, the declared result was a reflection of the electorate's will at the time of voting;*
> *(v) it is a mechanism of proportionate design, for rectifying election results, and declaring the valid outcome — a process which obviates the necessity to annul the entire election outcome, or, alternatively, the validation of an erroneous electoral outcome.*

In the 2017 decision in ***Mohamed Mahamud Ali v IEBC & 2 Others,***[568] the Court allowed scrutiny of *inter alia*, 21 polling stations wherein the serial numbers on the ballot boxes and on the seals affixed to apertures of ballot boxes were at variance with serial numbers captured in polling station diaries and the report filed by the Deputy Registrar at the time she took custody of the election materials in question.

Secondly, it has been gainsaid that scrutiny will not be granted as a matter of course; a basis must be laid for the grant of the order. Onyancha J (as he then was) declined to grant an order of scrutiny in respect of 15 polling stations in the case of ***Hassan Mohamed Hassan & Another v IEBC & 2 Others,***[569] asserting as follows:

> *... a party has liberty to apply for scrutiny and recount at any stage of the proceedings for the purposes of establishing the validity of the votes cast. However, the Court has to be satisfied that there is sufficient reason for it to order for scrutiny or recount of votes. In my view and understanding, for a party to provide sufficient reason upon which the Court can decide to grant the order, the party shall provide sufficient evidence to that end. If the request for scrutiny is made before the trial starts and therefore before the relevant evidence upon which such decision is adduced, then clearly and logically such relevant evidence must be based on the affidavits, if any, supporting the application....*
> *On the other hand where an application for scrutiny or recount is made after adequate relevant evidence has been adduced during the trial, it will be such evidence that will provide, if at all, sufficient reason upon which the Court will make relevant orders. It is my view however that whether the application for scrutiny or recount is made before, during or at the end of the*

566 Bungoma High Court Petition No. 5 of 2013; [2013] eKLR.
567 SC Petition 2B of 2014.
568 Mombasa High Court Election Petition 7 of 2017, at para 3 of the ruling on scrutiny, delivered on 12 January 2018.
569 Garissa High Court Election Petition 6 of 2013; [2013] eKLR.

> *trial of a petition, the Court must be satisfied generally, that there are sufficient grounds to order a scrutiny or recount on the basis that such scrutiny or recount will be in the interest of fairness and justice in settling the issues raised in the petition. The decision to grant scrutiny or recount is clearly, not only discretionary but is also judicious. That is to say that the Court's reason to grant such order must be good, must be logical and must be necessary for the purpose of arriving at an expeditious, fair, just, proportionate and affordable resolution of the issues raised in the Petition.*

The SC in the ***Munya Case*** cited this decision with approval and asserted:

> *The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an Election Petition is to establish the basis for such a requests [sic] to the satisfaction of the trial judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.*

Odunga J reached a similar conclusion in ***Gideon Mwangangi Wambua & Another v IEBC & 2 Others,***[570]

> *The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the Court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words, a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the Court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the Petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the Petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.*

In 2017, this position was upheld in various decisions including the High Court in ***Michael Gichuru v Hon. Rigathi Gachagua & 2 Others,***[571] and in ***Mark Nkonana Supeyo & Another v IEBC & 2 Others***[572] and ***George M. O. Ayacko v IEBC & 3 Others***[573] where the Court declined to grant an order of scrutiny in respect of the where this prayer was not made in the petition and no basis had been laid for a grant of scrutiny in the entire constituency.[574] The Court of Appeal endorsed this approach in ***Annie Wanjiku Kibeh v Clement Kungu Waibara & Another***[575] where the CoA overturned the decision of the Trial Court granting scrutiny in respect of 10 polling stations for the reason that no basis had been laid. It is therefore not open to a Petitioner to use scrutiny to gather information to

570 Mombasa Election Petition No. 4 of 2013 (consolidated with Election Petition Cause No. 9 of 2013) [2013] eKLR.
571 Nyeri High Court Election Petition 2 of 2017.
572 Kajiado Election Petition 1 of 2017.
573 Kisii Election Petition 13 of 2017.
574 See also *Chris N Munga Bichage v. IEBC & 2 others* Kisii Election Petition 12 of 2017 where the Court declined to grant scrutiny, ruling that it would be extravagant and an affront to constitutional policy; *John Munuve Mati v RO Mwingi North & Others Kitui Election Petition 3 of 2017* where the Court deferred the prayer for scrutiny until a basis had been laid & *Abdirahman Adan Abdikadir v IEBC & 2 Others* Nairobi Election Petition 13 & 16 of 2017 where the Petitioner did not specify the stations alleged to be affected in their prayer for scrutiny.
575 Nairobi Civil Appeal 20 of 2018.

bolster their case. In other words, as reasserted by the Supreme Court in the ***2017 Raila Odinga Case,***[576] election courts will not countenance Petitioners using scrutiny as a 'fishing expedition' for evidence.[577]

Thirdly, there is no limit as to the timing of an application for scrutiny; it can be made at any time.[578] The SC in ***Munya*** stated:

> *The right to scrutiny and recount of votes in an Election Petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. Consequently, any party to an Election Petition is entitled to make a request for a recount and /or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.*

However, it is best made when filing the petition since the Rules require parties to file affidavits with all the evidence they would be relying on.[579] Indeed the Election Petition Rules require that where this remedy is sought, it be articulated in the petition.[580]

In the 2017 EDR process, the Court took cognisance of the practice of combining a request for information with a prayer for scrutiny and/or recount in the case of ***Samwel Kazungu Kambi v Nelly Ilongo and 2 Others.***[581] It was urged that such applications be lodged simultaneously with applications for scrutiny and/or recount. However, where what is sought is only an application for information and/or preservation of evidence, the same should be dispensed with before the pre-trial conference.

> *48. Recently a new development has emerged in election petitions wherein a Petitioner will ask for information and at the same time apply for scrutiny and or recount. Ideally the prayers should be made in one application as an application for information is a precursor to an application for scrutiny or recount as was noted by the Supreme Court in Presidential Petition No. 1 of 2017 in its ruling of 28th August, 2017 that "implicit in scrutiny is also the fact that the information sought is first granted before any scrutiny can be initiated."*
>
> *49. An application like the one made by the Petitioner in Application No. 1 is not only an application for information but also an application for preservation of evidence. In my view, such an application should be dispensed with at the pre-trial stage of an election petition. The outcome of such an application should not in any way affect the application for scrutiny which should come after the evidence and which is ordinarily filed at the interlocutory stage.*

Fourthly, as to when it can be granted, there appears to be consensus that the grant of an order for scrutiny is best deferred until after witnesses of both the Petitioners and respondents have testified, so

576 Ruling on scrutiny, at para 62.

577 See also *Philip Osore Ogutu v Michael Aringo & 2 Others* Busia High Court Election Petition 1 of 2013. See also *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* Election Petition No. 3 of 2013, *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR, *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr*, Civil Appeal Nos. 5710-5711 of 2012; [2014] 2 S.C.R the Supreme Court of India.

578 *Hassan Mohamed Hassan & Another v IEBC & 2 Others* Garissa High Court Election Petition 6 of 2013.

579 *Philip Osore Ogutu v Michael Aringo & 2 Others* Busia EP 1 of 2013.

580 Rule 8 (3) (d). This was the finding of the Court in *Mark Nkonana Supeyo & another v Independent Electoral and Boundaries Commission & 2 others* Kajiado Election Petition 1 of 2017.

581 Malindi Election Petition 4 of 2017. See *Jackton Nyanungo Ranguma v IEBC & 2 Others* Kisumu Election Petition 3 of 2017 and *Edward Tale Nabangi v. James Lusweti Mukwe & 2 others* Bungoma Election Petition 1 of 2017 where access to information was granted simultaneously. However, Mwongo J cautioned in *Abdirahman Adan Abdikadir v IEBC & 2 Others* Nairobi Election Petition 13 & 16 of 2017 that the Access to Information Act does not give an unfettered right to instant public information on demand.

that the Court has a chance to weigh the evidence before it.[582] The reasons for the grant of the order must also be recorded.[583] The SC in ***Munya*** pointed out:

> *(b) The Trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.*

Lesiit J in ***Jacob Mwirigi Muthuri v John Mbaabu Murithi & 2 Others,***[584] concurred:

> *[28]… Unless an order for scrutiny and recount is the only prayer sought in the Petition, it cannot be ordered at the pre-trial stage. This is because the prayer should not be granted on the basis of untested evidence, which would be the case if the prayer is simply granted at the pre-trial stage on the basis of the allegations in the Petition and the witness affidavits of the Petitioner.*
>
> *[29] It is clear from the foregoing that where an application for scrutiny is made, the Court must be satisfied that an order for scrutiny and recount has been justified by the party applying and secondly, that the order is necessary for the just resolution of the election Petition. Scrutiny is one of the tools that the Court uses to investigate whether an election was conducted in accordance with constitutional principles and to establish that indeed the result as declared was a reflection of the will of the electorate that took part in that election. The only way the Court can test whether an order for scrutiny and recount is deserved and justified is first by considering the Petition and the Affidavit in support to find out whether they disclose the Petitioner's cause of action and whether they contain concise statements of the material facts relied upon in support of the allegations of impropriety or illegality and secondly by calling of evidence and testing of that evidence through cross examination and re examination process to test the veracity of the same. There can be no need to call evidence for examination through the trial process if none has been advanced in the Petition and the Petitioner's pleadings and in particular the affidavits of potential witnesses.*

This decision was endorsed in the 2017 EDR cycle in various petitions, including in ***Mohamed Mahamud Ali v IEBC & 2 Others,***[585] ***Apungu Arthur Kibira v IEBC & 2 Others***[586] and ***Michael Gichuru v Hon. Rigathi Gachagua & 2 Others.***[587] Karanja J in ***Joseph Oyugi Magwanga and Another v IEBC and 3 Others***[588] affirmed his support for this approach in the following terms:

> *… an election court would order scrutiny or recount or re-tallying of votes if this would serve the purpose of establishing the sovereign will of the people and only after it is satisfied that the petition contains adequate statement of material facts on which the Petitioner relies on in support of his case. Where there is ground for believing that there were irregularities in*

582 *Rishad Hamid Ahmed Amana v IEBC & Others* Malindi EP 6 of 2013.
583 *Aziz Mohamed Karisa vs IEBC & 3 others* Malindi Election Petition 7 of 2017
584 *Jacob Mwirigi Muthuri v John Mbaabu Murithi & 2 Others* Meru Election Appeal 2 of 2013.
585 Mombasa High Court Election Petition 7 of 2017, at para 3 of the ruling on scrutiny, delivered on 12 January 2018.
586 Kakamega High Court Election Petition 6 of 2017.
587 Nyeri High Court Election Petition 2 of 2017.
588 Homa Bay Election Petition 1 of 2017; [2017] eKLR.

> *the election process or if there is a mistake or mistakes on the part of election officials, an order of scrutiny may issue.*

Fifthly, a prayer for scrutiny must be specific. It is not open to the Petitioner to make a generalised prayer for scrutiny. They must specify the polling stations in respect of which scrutiny is needed and lay the foundation for the grant of scrutiny for each polling station.[589] In ***Ledama ole Kina v Samuel Kuntai Tunai & 10 Others,***[590] Wendoh J ruled:

> *An application for scrutiny of all of Narok South Constituency lacks specificity, is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done [in]. If he wanted scrutiny in all the polling stations, then a basis should have been laid for each polling station. The rationale is clear, the process of scrutiny is laborious, time-consuming, and the applicants cannot be let at liberty to seek ambiguous prayers and waste precious court's time and incur unnecessary costs. They must be specific. For the above reason, the Court cannot give a blanket order for scrutiny of Narok South Constituency because such order will be prejudicial to the Respondent now that the evidence of witnesses has already been taken. The Respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny.*

The SC concurred. In the ***Munya Case***, the apex court stated:

> *Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question…*

The SC also disagreed with the holding of the Court of Appeal that if a Petitioner seeks scrutiny and recount of votes in a constituency, the purposive approach is that he is seeking scrutiny and recount of votes in all the polling stations in the constituency. At paras 157 & 159, the Court asserted:

> *This gives the impression that where a Petitioner makes a claim for a recount or scrutiny in a constituency, it should be granted as a matter of course. If such a position were to be sustained, it would stand as a contradictory precedent, with the potential to disrupt the stability of decision making already evolving, in the practice of scrutiny and recount. It would mean that once an application for recount or scrutiny refers to a constituency, then the trial Court must automatically order scrutiny in all the polling stations in the constituency…On the contrary, judicial opinion distinctly favours a view that commends itself to us: that, an application for scrutiny and recount, must be couched in specific terms, and clothed with particularity, as to which polling stations within a constituency are to attract such scrutiny. If a party lays a clear basis for scrutiny in each and all the polling stations within a constituency, then the order ought to be granted. Otherwise, a prayer pointing to a constituency but lacking in specificity is not to be entertained.*

This approach was adopted by Ongeri J in ***Albeity Hassan Abdalla vs IEBC and 2 Others,***[591] where the Court declined to grant an order for scrutiny where the polling stations whose results were

589 See also Rule 29 (4) Election Petition Rules 2017.
590 Nakuru High Court, Election Petition No. 3 of 2013.
591 Malindi High Court Election Petition 8 of 2017.

contested were not specified and where the application was made before the hearing of the evidence; the Court considered the application premature. In ***Annie Wanjiku Kibeh v Clement Kungu Waibara & Another,***[592] the CoA deprecated the Trial Court's grant of scrutiny where no polling stations were specified in the pleadings in relation to the allegations of ballot stuffing and use of counterfeit ballot papers. In the words of the Court:

> *None of these allegations even remotely identified polling stations where fake ballots were found or ballot stuffing occurred, and it is no wonder that the learned judge opted to consult with the parties before selecting polling stations where scrutiny was to be carried out. There is no doubt that the allegations were random, arbitrary and unspecific, and when this is compounded by the fact that no polling stations where the alleged illegalities occurred could be ascertained from the petition or the supporting affidavits, then it is plain to see that scrutiny ought not to have been ordered as no basis was laid for the same. Scrutiny for undefined reasons, or for its own sake, particularly where no polling stations are indicated, had, in our view all the hallmarks of a grand fishing expedition, and an incredible journey into the unknown.*

This finding was upheld by the Supreme Court, which concurred that the exercise of the Court's discretion did not meet the guidelines in the 2014 ***Munya*** case.[593]

Sixthly, according to the Court of Appeal in ***Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others***[594] an appellate court will not ordinarily interfere with the grant of an order of scrutiny by the election court unless it can be shown that it was granted without basis. Citing the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others***[595] the COA stated that when an order is made granting or denying scrutiny, it will not easily be overturned, unless it can be demonstrated that it resulted in an injustice or was exercised without basis. In ***Annie Wanjiku Kibeh v Clement Kungu Waibara & Another,***[596] the Court of Appeal considered that the Trial Court's exercise of the discretion to order scrutiny where the Petitioner had not specified the polling stations in respect of which allegations of ballot stuffing and use of counterfeit ballots were made was an injudicious one and made in disregard of the laid down principles, and it was necessary to interfere with the exercise of that discretion. The Supreme Court agreed that it was not open to the Trial Court to grant scrutiny in respect of polling stations not either set out in the petition or revealed in the evidence.[597]

Seventh, on the impact of scrutiny on an election result, judicial opinion has now settled the fact that a scrutiny report must be considered in making a determination on the petition.[598] However, a scrutiny report will not lead to an election court nullifying the result unless it can be shown that there is a reversal of the candidate who had been declared a winner. In the SC decision in the ***Munya Case,*** the Court opined:

> *[219] By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that*

592 Nairobi Civil Appeal 20 of 2018.
593 *Clement Kung'u Waibara v Annie Wanjiku Kibeh & Anor* SC Petition 24 of 2018.
594 Election Petition Appeal 6 of 2018.
595 [2014] eKLR.
596 Nairobi Civil Appeal 20 of 2018.
597 *Clement Kung'u Waibara v Annie Wanjiku Kibeh & Anor* SC Petition 24 of 2018, at para 45.
598 *Cyprian Awiti & Another v IEBC & 3 Others* Kisumu Election Petition Appeal 5 of 2018.

> *reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election....*

This finding was upheld in ***Cyprian Awiti & Another v IEBC & 3 Others,***[599] where the Court of Appeal held that the Trial Court ought to have evaluated the impact of the various irregularities revealed during the scrutiny before making its finding. The irregularities revealed include failure to stamp result forms, production of photocopies rather than original Forms 37A, and failure to sign Forms 37A. The appellate court therefore found that the Trial Court erred in overlooking the said report. However, the CoA declined to make a finding on the impact of the scrutiny report, terming it an issue of fact over which it had no jurisdiction.

It therefore upheld the finding of the Trial Court nullifying the election on the basis of the indeterminate nature of the result. At the Supreme Court,[600] the Court agreed with the CoA that the impact of the scrutiny report ought to have been considered by the Trial Court. However, it disagreed with the CoA as to its jurisdiction and found that the CoA erred in law in holding that it did not have jurisdiction to evaluate the impact of the scrutiny report. Failure to consider the scrutiny report was considered a grave error of law, resulting in the SC overturning the findings of the CoA and the Trial Court.

In ***Clement Kungu Waibara v Hon. Annie Wanjiku Kibeh & 2 Others,***[601] the Supreme Court agreed with the Court of Appeal's finding that the impact of the scrutiny exercise on an election result was a material consideration in the determination of the petition and without this assessment, the decision to nullify the election could not be upheld. It asserted at para 52:

> *In view of such considerations, we are in agreement with the Appellate Court's standpoint that the trial Court ought to have ascertained whether the irregularities revealed by the process of scrutiny, did affect the outcome of the election. It was clearly inapposite to settle the dispute on the basis of any conjecture, however logical.*

12. Standard of Proof in Election Petitions

Before determining the substantive issues, the Court evaluated the question of standard of proof afresh in the 2017 ***Raila Odinga Case***. The Petitioner had asked the Court to alter the legal principle that the standard of proof in election petitions is an intermediate standard: below beyond reasonable doubt but above a balance of probabilities. The Petitioner asked the Court to find that the standard of proof in election petitions is on a balance of probabilities.

It noted that whereas in the Kenyan jurisprudence the intermediate standard had always been applied,[602] in England no such distinction was made and the ordinary civil litigation standard of proof 'on a balance of probabilities' applied.

> *[147] In England, however, no such distinction is made. Whether or not allegations of a criminal or quasi-criminal nature are made in a petition, the ordinary civil litigation standard of proof*

599 Kisumu Election Appeal 5 of 2018.
600 *Cyprian Awiti & Another v IEBC & 3 Others* SC Petition 17 of 2018.
601 SC Petition 24 of 2018.
602 *Raila Odinga v IEBC & 5 Others* [2013] eKLR, *M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 Others*, Civil Appeal No. 47 of 2013; [2014] eKLR; *Sarah Mwangudza Kai v Mustafa Idd & 2 Others* Election Petition. No. 8 of 2013; [2013] eKLR.

> *on a 'balance of probabilities' applies. This came out clearly in the decision of the Judicial Committee of the Privy Council in Jugnauth v Ringadoo and 69 Others where there was an allegation of bribery. Affirming the decision of the Supreme Court of Mauritius, the Privy Council stated that:*
>
> *"[17]…there is no question of the Court applying any kind of intermediate standard…*
>
> *[19] It follows that the issue for the Election Court is whether the Petitioner had established, on the balance of probabilities, that the election was affected by bribery in the manner specified in the petition."…*

The Court found, having reviewed decisions from various jurisdictions that three main categories of standard of proof emerge: a criminal standard of proof beyond reasonable doubt applicable when allegations of commission of criminal or quasi-criminal acts are made in a petition; a civil standard of balance of probabilities applicable in jurisdictions like England irrespective of the allegations made; and an intermediate standard of proof above the balance of probability but not as high as beyond reasonable doubt, such as was applied in our jurisdiction in the ***2013 Raila Odinga Case***. While acknowledging that it could indeed overrule its position in the ***2013 Raila Odinga Case***, the Court was persuaded that due to the great public importance attached and public interest nature of election petitions, the legal principle remains that the standard of proof is higher than a balance of probabilities but lower than beyond reasonable doubt and where allegations of a criminal or quasi-criminal nature are made, they must be established beyond reasonable doubt.

> ***[152]*** *We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the Petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.*
>
> ***[153]*** *We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.*

This standard is binding on all election courts in accordance with the principle of *stare decisis* as encapsulated by Article 163 (7) of the Constitution.

13. Burden of Proof

Underlying the issue of burden of proof in an election petition is the presumption of validity of election results and the presumption of the validity of all official acts.[603]

603 Otieno-Odek, 'Election Technology Law and the Concept of "Did the Irregularity Affect the Result of the Elections?"' 45.

> *The presumption of validity of election results is well elaborated in the Indian Supreme Court and Court of Appeal decisions in* ***Jeet Mohinder Singh v Harminder Singh Jassi***[604] *and* ***Ponnala Lakshmaiah v Kommuri Pratap Reddy & Ors***[605] *respectively. In the former case, the Supreme Court of India asserted that this was a well-settled principle in election law. It stated:*[606]
>
> *The success of a candidate who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the Court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration.*

Justice Thakur, of the Indian Court of Appeal, observed as follows in ***Ponnala Lakshmaiah v Kommuri Pratap Reddy & Ors***:[607]

> *There is no denying the fact that the election of a successful candidate is not lightly to be interfered with by the Courts. The Courts generally lean in favour of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be unduly stretched beyond a limit. We say so because while it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process. An election which is vitiated by reason of corrupt practices, illegalities and irregularities……cannot obviously be recognized and respected as the decision of the majority of the electorate. The Courts are, therefore, duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach & without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute.*

It is also a well-established rule of evidence that he who alleges must prove.[608] In the context of an election petition, a Petitioner would be triumphant if they succeeded to prove either that the conduct of the election substantially violated the principles laid down in the Constitution and other written laws on elections or that the election was marred by irregularities and illegalities that affected the result of the election, even though it was conducted substantially in accordance with the principles laid down in the Constitution and other written laws on elections.

The apex court articulated this burden in both the ***2013*** and the ***2017 Raila Odinga*** cases. In the former, the Court stated:

604 Civil Appeal 154 of 1999; AIR 2000 SC 256.
605 Civil Appeal No. 4993 of 2012.
606 At page 16 of the decision.
607 Civil Appeal No. 4993 of 2012 arising out of S.L.P. (C) No. 20013 of 2010, at para 22.
608 Sec 107 (1) of the Evidence Act.

> *[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the Petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.*
> *[196] …. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been noncompliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to have been done rightly and regularly. So, the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."*

In the ***2017 Raila Odinga Case***, the Court the distinction drawn between the legal burden and the evidentiary burden was affirmed, but unlike 2013, the Petitioner was under no obligation to prove both non-compliance with the law on elections and the impact of the non-compliance on the validity of the election. The finding that the test of invalidity was a disjunctive one altered the obligation of the Petitioner to prove both limbs of section 83 as had previously been asserted. It was sufficient to prove non-compliance with the law on elections.

> *"[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."*
> *[133] It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law."*

In ***Cyprian Awiti & Another v IEBC & 3 Others***[609] the SC overturned the decisions of the CoA and the Trial Court nullifying the Homa Bay gubernatorial election on the basis that neither court gave deference to the *prima facie* legitimacy of the official records emanating from the IEBC and the relevant law on proof in election petitions.[610]

Whereas the legal and evidential burden rests with the Petitioner at the onset of the trial, depending on the manner he discharges it, the evidential burden keeps shifting and its position at any time would be determined by ascertaining who would stand to lose if no further evidence were introduced. This

609 Supreme Court Petition 17 of 2018.
610 At para 103.

was well articulated by Gikonyo J in ***Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 Others***:[611]

> *…More trouble is found in understanding that burden of proof entails legal burden of proof and evidential burden. The legal burden of proof in an election petition rests with the Petitioner; for he is the party desiring the Court to take action on the allegations in the petition. The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY"S Law of England, 4th Edition, vol. 17. Therefore, where the Petitioner has laid prima facie evidence against the Respondent including the electoral body which as matter of law must be a respondent in an election petition, the law says that evidential burden has been created on the shoulders of the Respondent who would fail if he does not adduce evidence in rebuttal.*
>
> *It is, thus, not in doubt that at the point where the Respondent would fail without further evidence, the Respondent should discharge the evidential burden through offering evidence in rebuttal. If the Respondent offers no evidence in rebuttal, judgment may be entered against him on the basis of the preponderant evidence adduced by the Petitioner. The Petitioner will not, however, succeed because the Respondent has not offered evidence in rebuttal but because the Petitioner has proved his case to the required standard of proof, and the absence of evidence in rebuttal by the Respondent only sanctifies the confidence of the Court to enter judgment in favour or the Petitioner. Of the essence is that the evidential burden is the obligation of the Respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the Respondent with the result that he fails and the Petitioner succeeds.*

In ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,***[612] the Court of Appeal upheld the finding of the Trial Court that the evidentiary burden shifted when the appellant failed to appear in court to be cross-examined on the contents of his affidavit. The CoA stated:

> *The cavalier attitude evinced by the appellant in the face of serious questions about his eligibility to vie for the seat of governor was compounded and rendered tragic by his choice to stay away from the proceedings and therefore not only fail to present his side of the story, but also keep himself from being cross-examined on his replying affidavit thereby robbing it of any probative value. The learned Judge in his analysis of the evidence and the appellant's failure to present himself in court expressed himself thus at paragraph 192:*
>
> *"I have taken note of the fact that although the 1st respondent had the opportunity to either deny or challenge all these facts, he did not do so in his replying affidavit. He also failed to appear in court and shed light on this issue. The Petitioners' evidence therefore remained uncontroverted. The Petitioners had therefore succeeded in shifting the evidentiary burden of proof to the 1st respondent. The moment they produced the graduation list and the alleged admission made before the Committee of the House of not having had a degree by 2014, the burden shifted to the 1st respondent to prove that the Bachelor's degree dated 1st March 2012, had been genuinely issued to him by Kampala University. This he failed to.*
>
> *With respect … the learned Judge's reasoning cannot be faulted. Nor can he be blamed for stating*

611 Bungoma Election Petition 2 of 2013, at paras 34-35.
612 Nairobi Election Petition Appeal 2 of 2018.

> *that what was placed before him by the Petitioners did establish a prima facie case about the invalidity of the degree dated 1st March 2012, which therefore shifted the evidential burden of proof to the appellant to discharge. The learned Judge remained faithful to the law on burden of proof in that the legal burden remained with the 1st and 2nd respondents but a basis had been established for the evidentiary burden to shift to the appellant.*

It therefore behoves the Petitioner to go beyond generalised claims and provide clear and cogent evidence for the onus of proof to shift. In ***John Harun Mwau & 2 Others v IEBC & 2 Others,***[613] the Supreme Court restated this requirement as follows:

> *As stated in both the RAILA 2013 and 2017 decisions, the burden of proof, at all times, lies on a Petitioner and generalized claims, without evidence that meets clear threshold, are of no value.*

The Petitioner must supply evidence in support of their claims and this proof must be supplied to the required standard. The SC in ***Alfred Nganga Mutua & Others v Wavinya Ndeti & Anor***[614] addressed the question of whether the recruitment of public officers as agents of the appellant had been proved. It stated:

> *[45] As we have stated, this allegation amounted to commission of an election offence proof of which the law requires to be beyond reasonable doubt. With profound respect, the Court of Appeal erred in finding that the said Urbanus Wambua Musyoka was one and the same person as the Chief Officer of the Machakos County Government. Other than making that allegation in their petition and in the evidence of the 1st respondent in her supporting affidavit at Par. 85 (Volume 3) wherein she made reference to annexture WN 27, the respondents never provided any proof of the allegation that the said Urbanus Wambua Musyoka was one and the same person as the Chief Officer of the Machakos County Government. A mere allegation cannot be proof, leave alone proof to the required standard of beyond reasonable doubt. The respondents definitely needed to do more than that. In our respectful view therefore, the learned trial Judge was quite right in finding that the respondents had not discharged their burden of proof on that allegation to the required standard. We also find no anomaly in the trial Judge's suggestion that, to discharge their burden of proof on that allegation, the respondents should have invoked Article 35 of the Constitution and obtained records from the Machakos County Government to verify that allegation. In the circumstances, we find that the Court of Appeal erred in basing its nullification of the 1st appellant's election partly on that ground.*

The evidentiary burden will not shift where the Petitioner relies on hearsay evidence. In ***Bernard Kibor Kitur v Alfred Keter & IEBC,***[615] the Court ruled that having found that the evidence relied on by the Trial Court to determine that the Petitioner had met the evidentiary burden and that it had shifted amounted to hearsay, the CoA was right to find that the Petitioner's evidentiary burden of proof did not shift to the Respondents.

613 Supreme Court Presidential Election Petitions 2 & 4 of 2017.
614 Supreme Court Petition 11 of 2018.
615 Supreme Court Petition 27 of 2018.

14. Withdrawal of a Petition and Substitution of a Petitioner

An election court may grant an application for substitution of a Petitioner where an application for withdrawal is lodged.[616] The application is considered during the hearing of the application for withdrawal. The practice of allowing substitution of a Petitioner in an election petition is anchored in the public interest nature of election petitions: that election petitions are not just between the parties but are actions *in rem,* concerning the entire electorate,[617] and therefore cannot be withdrawn on a whim; the leave of the Court is required.[618] In ***Bijayawanda Patwak v Satrug-Hna Saha***,[619] the Supreme Court of India pronounced itself as follows on the curtailment of a Petitioner's right to withdraw a petition:

> *The Petitioner in an Election Petition has not (sic) an absolute right to withdraw it, nor has the Respondent the absolute right to withdraw from opposing the petition in certain circumstances. The basis for this special provisions as to withdrawal of election petitions is to be found in the well-established principle that an election petition is not a matter in which the only persons interested are candidates who strove against each other at the election. The Public of the constituency also is substantially interested in it, as election is an essential part of the democratic process. That is why provision is made in election law circumscribing the right of the parties thereto to withdraw. Another reason for such provision is that the citizens at large have an interest in seeing and they are justified in insisting that all elections are fair and free not vitiated by corrupt or illegal practices. That is why provision is made for substituting any elector who might have filed the petition in order to preserve the party of election.*

14.1. Criteria for Grant of Application for Withdrawal &/ or Substitution

Firstly, it must be clear that the application is not actuated by undue influence, political backroom dealing or malice, thereby compromising the public interest. Kimondo J had in 2013 highlighted the need for caution in considering an application for withdrawal, noting the need for the Court to avoid entanglement in political deals or malice on the part of a Petitioner, in ***Ahmed Abullahi Amin & Another v Abass Sheikh Mohamed & 2 Others,***[620] as follows:

> *The underlying rationale is self-evident: the Court may unwittingly become the anvil upon which political deals are hammered. Petitioners in election disputes at times act in bad faith. Those mala fides were recently brought to the fore in the High Court at Malindi in election petition number 16 of 2013 Dobson Chiro Mwahunga Vs Independent Electoral and Boundaries Commission and others [2013] e KLR. In that petition, a disinterested Petitioner acting through a brief-case lawyer filed a petition using the law firm of a third party. The scheme that unruffled in court was aimed at extracting costs and other benefits from the Respondent. Christine Meoli, J, struck out the petition on that ground among others.*

616 Rule 24, Election Petition Rules.
617 *Abdikhaim Osman Mohammed & another v IEBC & 2 others* [2014] eKLR.
618 Rule 21 (1), Election Petition Rules.
619 AIR 1963 S.C. 1566, 1569.
620 Garissa Election Petition 8 of 2013; [2013] eKLR, para 6.

This was restated in 2017 in, *inter alia*, ***Peter Gatirau Munya v IEBC, Meru County Returning Officer & Kiraitu Murungi,***[621] to the effect that election petitions are litigation *sui generis* and brought inherently in the public interest and therefore could not be withdrawn at the behest of the Petitioner, or even with the consent of the parties. Leave will ordinarily not be granted unless the Court is satisfied that there is no bad faith in making the application to withdraw,[622] that there is no collusion by the parties to the detriment of the electorate[623] and that no agreement or undertaking has been entered into in relation to the withdrawal of the petition.[624] If there be a lawful agreement on the basis of which the application for withdrawal is made, the terms of such an agreement must be disclosed to the Court in the affidavit supporting the application for withdrawal.[625]

In ***David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others,*** [626] the Court ruled that it was not sufficient to allege that a Petitioner had been compromised to withdraw the petition; proof of this fact must be supplied to successfully oppose a withdrawal application. In this case, it was alleged that the original Petitioner had been compromised and had defected to Jubilee Party and this was the reason for withdrawal. Photographs of the Petitioner at State House were adduced as evidence of this allegation. In reviewing the alleged proof that the Petitioner had been compromised upon defecting to Jubilee Party, the Court ruled that the attached photographs had not met the standards of production as set out in section 106 (B) (4) of the Evidence Act to confirm their authenticity and they were therefore inadmissible. The Court found that the allegation that the Petitioner had been compromised was unsubstantiated since change of a political party alone was insufficient to infer a compromise. The Respondent adduced no proof that the Petitioner had entered into any kind of undertaking to withdraw the petition.

The Court restated the right of the Petitioner under Article 36 of the Constitution to freedom of association and the right to political participation under Article 38 which entitled him to form, join or take part in the formation, activities of and recruitment for a political party. Therefore, neither going to State House nor joining another political party was unconstitutional. In any event, the Court asserted that a Petitioner who was no longer willing to prosecute a petition that he had filed could not be compelled to continue so long as the conditions for withdrawal were met. The application for withdrawal was therefore merited.

The importance of this disclosure in Rule 21 (6) in the parties' affidavits was considered in ***Peter Gatirau Munya vs Independent Electoral and Boundaries Commission, Meru County Returning Officer & Kiraitu Murungi,***[627] against Rule 21 (5) which grants the Court discretion to dispense with a party's affidavit in relation to the application for withdrawal. In that case, only one affidavit was filed as required by Rule 21 (4) by counsel for the Petitioner and the averment was contained not in the affidavit but in the application for withdrawal. None of the Respondents filed a Rule 21 (4) affidavit, but they indicated that they did not oppose the application. Gikonyo J opined:

621 Meru Election Petition 6 of 2017; [2017] eKLR. See also *Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 7 others* Election Petition Appeal 4 of 2018; *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 others* Kerugoya Election Petition 3 of 2017.

622 *Ahmed Abullahi Amin & another v Abass Sheikh Mohamed & 2 others* Garissa Election Petition 8 of 2013 [2013] eKLR, para 6.

623 *Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 7 others* Election Petition Appeal 4 of 2018, para 18.

624 Rule 21 (6), Election Petition Rules.

625 Rule 21 (7), Election Petition Rules.

626 Kajiado High Court Election Petition 2 of 2017.

627 Meru Election Petition 6 of 2017; [2017] eKLR. See also *Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 7 others* Election Petition Appeal 4 of 2018; *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 others* Kerugoya Election Petition 3 of 2017.

> *The words: "…to the best of the deponent's knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition." should relate to the Petitioner too, for those words constitute an undertaking on oath. And the Petitioner must also give the undertaking under oath- something I do not think could be achieved by merely stating in the application…that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition. I could be wrong on this, and if my proposition is wrong, therefore the purpose the averment was meant to serve is lost. Worse still, therefore, the averment or existence of unlawful agreement or undertaking in relation to withdrawal of a petition becomes mere embellishment of law without much importance. Nonetheless, the Court may dispense with filing of affidavits by any party in the proceedings…in exercise of the powers conferred in rule 21(5) the Court dispensed with the filing of affidavits by the Respondents who stated that they do not oppose the withdrawal and that they wish not to file any affidavit thereto. Therefore, there is wide discretion in this rule. But in my view; (1) the nature of election petitions, i.e. sui generis proceedings with public interest element; and (2) the fact that such proceedings cannot be withdrawn except in accordance with the elaborate procedure provided in PART V of the Elections Petitions Rules, 2017; gives the averment in rule 21(6) of the Election Petitions Rules, 2017 such a fundamental vitality to act as a safeguard valve against collusion by parties to withdraw a petition at unlawful gain and to the detriment of the residents of the locality to which the petition relates. Needless to state also that election petitions also serves as mechanisms to test the integrity of the electoral process. I see a kind of dilemma in that rules which may need clarification by the makers of the rules in the future.*

Secondly, the grant of the application for withdrawal and substitution is discretionary.[628] Mshila J in ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others***,[629] citing with approval the Indian decision of ***Jagal Kshoie S/o Lalchard v Dr. Balder Prakash,*** asserted that there was no automatic right to joinder and opined that leave would become redundant if courts were not allowed to exercise judicial discretion; each case had to be dealt with according to its peculiar circumstances.[630]

Thirdly, while the rules prescribe that an application to withdraw takes the prescribed format and be published,[631] no particular mode of application is stipulated where substitution is sought. In respect of the application for substitution, Kimondo J in ***Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC***[632] opined that no specific format for the application for substitution is prescribed. The Rules only require that the applicant be qualified to be a Petitioner, that he/she serve their intention on the Deputy Registrar and that the application be made during the hearing of the application for withdrawal. This means that the application can even be made orally.[633]

Fourthly, while it is not mandatory that substitution be allowed, Ong'udi J in ***Mohammed Ibrahim Abdi vs IEBC and 2 Others***[634] asserted that it was the duty of the election court to ensure that the

628 Rules 21 (2) & 24 (2), Election Petition Rules.
629 Kerugoya Election Petition 4 of 2017; [2018] eKLR.
630 At para 63 of the ruling dated 31 January 2018.
631 See for example *Justine Chemtai & another v. Winnie Atieno Nyabok & 2 others* Kimilili MCEP No. 2 of 2017 where an oral application to withdraw was denied and the Petitioner directed to file a formal application.
632 Eldoret High Court Election Petition 1 of 2017.
633 Eldoret High Court Election Petition 1 of 2017, at para 15 of the ruling
634 Nairobi Election Petition No.7 of 2017.

withdrawal of an election petition did not terminate it if there was a suitable substitute.[635] Nevertheless, it is important that the intending Petitioner (s) be suitable, i.e. it must be shown that they have locus. This could be done by demonstrating that the intended Petitioners were resident and voters in the electoral area in question by giving their ID numbers, polling stations and wards.[636]

In ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others***,[637] the Court allowed an application for withdrawal but declined to allow two separate applications for substitution on the basis that they had not met the threshold for substitution as Petitioners. The first set of applicants were considered unsuitable Petitioners for several reasons: they had nothing to demonstrate that they were from the concerned electoral area, having averred that they were registered in Nairobi, Mombasa and Kisii counties, in contravention of the law, and therefore disqualifying themselves from any favourable exercise of the Court's discretion; they laid no basis for how they would be prejudiced by the withdrawal of the petition, having come at the tail end of the process; and the intended Petitioners had not demonstrated their ability to pay costs of the election petition in the event of it being dismissed. This led to the inference that they were not acting *bona fide* and their applications were a crafty manoeuvre to defeat the course of justice by delaying the speedy determination of the election petition.

The 3rd applicant, James Karimi Karubiu, was also ruled an unqualified Petitioner on the basis of his past conduct, having previously filed two petitions challenging the same election (Petition 1 and 3). The first petition was withdrawn without stating the reasons and the second struck out for want of compliance with the Election Petition Rules. He had also failed to take up the proposal by the Court to have the 2nd petition consolidated with the one he sought to be enjoined in and he did not defend the application to strike out the petition. It was therefore peculiar that he sought to be admitted to a similar petition. The Court declined to allow his application as it would be condoning an abuse of process.

While cognisant of its obligation to ensure that a withdrawn petition was not terminated if there were qualified persons to take it over,[638] the Court was satisfied that there were no qualified persons to take over the matter. In the view of the Court, a Petitioner who intends to withdraw ought not to be held against his will and should be allowed to walk away with his head held up high.[639] The application for withdrawal was allowed, with costs to the Respondents.

Onyiego J took a different view of the question of *locus standi* in the case of ***David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others***.[640] In that case, the application for substitution was opposed on the basis that the applicants had not demonstrated that they had *locus*, by showing that they were registered voters in Kajiado, and that it was not demonstrated what prejudice they would suffer if the petition was withdrawn. The Court evaluated the qualifications of the intended Petitioner under Rule 24 and found nothing that required the intended Petitioner to be a registered voter or to have voted in the particular election in order to qualify as a Petitioner. The Court cited Articles 22 and 258 of the Constitution which allow a person to file a public interest litigation on behalf of themselves and others. Since no such restrictions were included in the law, the Court found that nothing barred the

635 At para 31, ruling dated 30 November 2017.
636 See *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 others* Mombasa Election Petition 7 of 2017.
637 Kerugoya Election Petition 4 of 2017; [2018] eKLR.
638 Per Ong'udi J in *Mohammed Ibrahim Abdi v IEBC and 2 Others* Nairobi Election Petition 7 of 2017.
639 For similar reasoning, see the decision of Kasango J in *Sammy Ndung'u Waitty & another v. IEBC & 3 others* Nanyuki Election Petition 2 of 2017.
640 Kajiado High Court Election Petition 2 of 2017.

applicants from being substituted in the petition. Given that the Petitioners had indicated that they were adults of sound mind and that they were registered voters and indeed voted in the August 8 elections, it was incumbent upon the 3rd Respondent (the IEBC) who are the custodians of the voter's register to rebut this assertion with evidence to the contrary. No such evidence was availed.

The Court further found that the applicants had locus to be enjoined in the petition as they demonstrated a *bona fide* claim that the elections in Kajiado County were not conducted in accordance with the law. Given the public interest in the petition and the fact that the Court had no reason not to exercise its unfettered discretion in their favour, the application was granted.

Fifthly, a petition must also be capable of being taken over and heard to its logical conclusion before the application for substitution is granted. In ***Bariu M'Limunyi v IEBC & 2 Others,***[641] Gikonyo J ruled that a petition which had not been served and in respect of which security for costs had not been deposited was incapable of being taken over by another Petitioner

Overall, in considering an application for substitution, the Court of Appeal has ruled that the paramount guiding principle ought to be whether it will aid in the effectual determination of the petition. In ***Mwamlole Tchappu Mbwana v IEBC & 7 Others,***[642] the COA stated:

> *1…The paramount rationale for substitution of parties is to enable the Court to reach an effectual and complete determination of the questions or issues arising in the proceedings. A court's power to allow substitution, if any, is regulated by rules of procedure.*

14.2. Timing of Application

The proper timing of an application for an application for withdrawal and consequent substitution was the subject of the Court's deliberation in ***Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others***,[643] where the two applications were filed after the hearing of the petition and at a time when the petition was coming up for submissions. The Petitioner averred that he had of his own volition chosen to withdraw the petition as he had become disillusioned with the electoral justice system and sought to disengage from it. He stated that while he had anticipated securing justice expeditiously and be confirmed as the true winner of the Kirinyaga Senatorial elections, it had become obvious that he would not receive justice without a long drawn out and costly appeal process. He averred that since he was concerned about the impact of a long drawn out process on the unity, public interest, cohesion and developmental vision of the people of Kirinyaga, he had opted to lay aside his political ambitions and withdrawing the petition would serve the greater interest and public good. He further averred that no agreement or terms of any kind had been made or undertaking entered into in relation to the withdrawal of the petition. Two separate applications were lodged by three applicants expressed their intention to be substituted for the Petitioner.

The Respondents contested the applications for withdrawal and substitution, urging that the timing was suspect, given that it came at the tail end of the process, and that a notice of intention to take over the petition had been lodged; the intended withdrawal would therefore neither serve the expeditious disposal of the petition nor bring about the desired harmony in the county. It was urged that the

641 Meru Election Petition 4 of 2017.
642 Mombasa Election Petition Appeal 4 of 2018, at para 1.
643 Kerugoya Election Petition 4 of 2017; [2018] eKLR.

interests of justice would best be served by disallowing the application, allowing parties to highlight submissions and rendering a judgment. It was further urged that the petition was not a personal dispute but touched on the residents of Kirinyaga County who were entitled to know the outcome of the election petition. Therefore, a withdrawal of the petition at the tail end would, in their view amount to a miscarriage of justice.

The applications for substitution were also opposed by the 2nd and 3rd Respondents on the basis that the applicants had not demonstrated that they had *locus standi* nor had they shown that they would be prejudiced by the withdrawal of the petition.

While the Court was not convinced about the true reason for the application to withdraw at the tail end of the process, it found that the Petitioner ought not to be held against his will and should be allowed to walk away with his head held up high.[644] Since there were no qualified persons to take up the petition, the application for withdrawal was allowed, with costs to the Respondents.
A question also arose in ***Nathif Jama Adan v Ali Bunow Korane & 2 Others,***[645] as to whether an election court can consider an application for substitution where the original Petitioner had failed to prosecute the withdrawal application or to comply with the procedure under Rule 21 of the Election Petition Rules on publication. The Court found that since the application for substitution could only be ordered where the application to withdraw by the Petitioner had crystallised, the substitution of the Petitioner remained unripe, as the withdrawal had not lawfully been done to completion. The request for substitution was therefore premature and could not be granted.

The Court distinguished the authority in ***Onchieku v IEBC & Others,***[646] which allowed application for substitution to proceed on merit before publication on the basis that the publication was done before the application for substitution was canvassed. In the present case, the notice for withdrawal was never published, neither was the application prosecuted. The application could therefore neither be sustained nor prosecuted by the Court. Consequently, since it was clear that the Petitioner had no intention of prosecuting the petition, the Court, guided by the decision in ***Japhet Muroko and Another v IEBC & Others***[647] to the effect that where a Petitioner discloses disinterest in prosecuting his petition, the Court is entitled to strike it out, struck out both the application to withdraw and the petition for want of prosecution.

Similarly, in ***Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others,***[648] two applications for substitution filed by 15 intending Petitioners were struck out for being premature, having been filed before publication of the Notice of intention to withdraw.

14.3. Effect of Substitution

Where substitution occurs, the substituted Petitioner stands in the same position as the original Petitioner, to the extent possible, and is subject to the same liabilities as the original Petitioner. This would include payment of costs where the petition is unsuccessful, unless the Court otherwise directs.

644 See also the dictum of Onyiego J in *David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others* Kajiado High Court Election Petition 2 of 2017 that a Petitioner who was no longer interested in prosecuting a petition could not be compelled to do so, so long as the conditions for withdrawal were met.
645 Garissa Election Petition 2 of 2017.
646 Kisii Election Petition 10 of 2013.
647 Nairobi Election Petition 23 of 2017.
648 Mombasa Election Petition 7 of 2017.

The Court may impose certain conditions in granting prayer for substitution. Firstly, the Election Petition Rules require that the election court give direction as to security for costs. Two avenues are open to the Court: to direct that the security for costs deposited by the original Petitioner remain in place for the duration of the trial, meaning that the original Petitioner may become liable for the costs of the petition, at least to the extent of the sum deposited; or to require that the substituted Petitioner pay, within three days of the order of substitution, security for costs before proceeding with the petition.[649] In ***Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC,***[650] the election court took the former approach, upon revelation that the security for costs for the original petition had actually been paid by the substituted Petitioner.[651] In ***David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others***,[652] the Court took the latter approach, allowing the prayer for substitution subject to deposit of security for costs within 3 days.[653]

The use of the words 'the substituted Petitioner shall pay…the security before proceeding with the petition' implies that where the latter avenue is taken by the Court, a failure to deposit security for costs by the substituted Petitioner will mean that no further step may be taken in the proceedings, as is the case with an original deposit of security for costs under section 78 (3) of the Elections Act.

Secondly, where substitution is allowed, it is not uncommon for the substituted Petitioner to pray for leave to file supplementary affidavits. Depending on the stage in the hearing of the petition at which the application for substitution is considered, the election court ought in such cases to balance the interests of the substituted Petitioner, who seeks justice but did not have the benefit of drafting the original pleadings, with those of the Respondents, who have crafted their responses and evidence to counter the allegations and evidence in the original petition. In ***Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC,***[654] the Trial Court attempted to strike this balance by allowing the substituted petition to file a supplementary affidavit without any additional facts or evidence. Kimondo J gave the rationale in the following terms:

> *In the interests of justice however, the Court granted leave to the substituted Petitioner to file a supplementary affidavit on terms: Save for his name and particulars, the affidavit was to the greatest extent possible to be word for word, without any additional facts or evidence, as the affidavit of the original Petitioner sworn on 5th September 2017. The rationale was to ring-fence the fresh deposition; and, to ensure that it did not permeate the borders of the original petition or alter its character to the prejudice of the respondents.*

The same approach was taken by Ong'udi J in ***Mohammed Ibrahim Abdi vs IEBC and 2 Others***,[655] and by Onyiego J in ***David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others***.[656]

However, when the CoA reviewed this practice in ***Alfred Kiptoo Keter v Bernard Kibor Kitur & IEBC,***[657] it questioned the probative value of the supplementary affidavit of the substituted Petitioner, filed months after the petition was filed, and whether it could be placed on the same level as the

649 Rules 24 (3) & (4).
650 Eldoret High Court Election Petition 1 of 2017.
651 At para 11 & 17 of the Ruling on withdrawal, delivered 23 November 2017.
652 Kajiado High Court Election Petition 2 of 2017.
653 See also *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 others* Mombasa Election Petition 7 of 2017 for a similar finding.
654 Eldoret High Court Election Petition 1 of 2017, at para 4 of the judgment.
655 Nairobi Election Petition No.7 of 2017
656 Kajiado High Court Election Petition 2 of 2017.
657 Election Appeal 21 of 2017.

Petitioner's affidavit in support of the petition. While agreeing with the High Court that after withdrawal the petition and supporting affidavit remained intact, the Court, citing the decision of Gikonyo J in ***Moses Wanjala Lukonye v Bernard Alfred Wekesa Sambu & 3 Others [2013] eKLR*** found that where the original Petitioner failed to appear for examination in chief and cross-examination without being excused by the Court, their evidence was of no probative value and the Court ought not consider it. Further, the Court found that the Trial Court misdirected itself in law by requiring the substituted Petitioner to adopt, word for word, the original Petitioner's supporting affidavit in preparing their supplementary affidavit. According to the CoA, this resulted in the substituted Petitioner adopting facts which he was not able of his own knowledge to prove, contrary to the law on affidavits, making such evidence hearsay and of no probative value.

The Supreme Court endorsed this finding in the subsequent appeal wherein it stated:[658]

> *...We must also keep in mind that with election timelines being **strict as set under Articles 87 (2) and 105 of the Constitution** on filing of election petitions and swift disposal respectively, the law does not contemplate filing of a **new** petition but the replacement of one suitable Petitioner with another.*
>
> ***[74]** However, we are convinced that it was not the intention of the Rules Committee to treat a new Petitioner differently from the original one. He is to have the same rights as the old one and these rights, include the right to adduce and challenge evidence a tenant of Fair hearing under **Article 50 (k)** of the Constitution.*
>
> ***[75]** In this matter, the Election Court granted the Original Petitioner, Mr. Kimei's application, to withdraw from the Petition, allowing Mr. Benard Kibor Kitui to be substituted as a Petitioner. In doing so, the Court directed that the substituted Petitioner stands in the same position, to the extent possible and subject to the same liabilities as the original Petitioner. The Learned Judge also directed that the Petitioner ought to adopt the Affidavit of the Original Petitioner. It is the latter direction that is subject of contention.*
>
> ***[76]** With this in mind, we take a look at the obligations of a Petitioner in matters of evidence, which is found under **Rule 12(1)(b)** stipulating that in the matter of an affidavit, a Petitioner **shall** file an affidavit personally. The use of the word **shall** depicts that the Petitioner must swear his own evidence in support of a petition. As affidavit evidence is evidence that is personal to the deponent, it cannot stand that a Petitioner relied on evidence that he was not privy to.*
>
> ***[77]** We find that in limiting the Substituted Petitioner to adopting word for word the averments of the Original Petitioner, the learned trial judge erred as it was tantamount to relying on facts not within his knowledge violating rules of Evidence and admitting hearsay evidence.*
> ***[78]** We are therefore in agreement with the Appellate Court in their finding that an Affidavit must state the substance of the evidence and must be confined to facts that the deponent is able of his own knowledge to prove.*

658 *Bernard Kibor Kitur v Alfred Keter & IEBC* Supreme Court Petition 27 of 2018.

The Court was however careful to state that the substituted Petitioner was not at liberty to introduce new issues, as this would advance a new case which would be different from the original Petitioner's case.[659]

14.4. Effect of Publication of Intention to Withdraw

Where the original Petitioner has complied with the procedure for withdrawal under Rule 21 (3), and there is no expression of interest to take over the petition, the application to withdraw will ordinarily be allowed.[660]

Once the procedure set out in Rule 21 has crystallised, is it open to a Petitioner to change his mind and have the petition proceed, especially where no person applies to be substituted? This was the gist of the Court's decision in ***Ombati Richard v Independent Electoral and Boundaries Commission & 2 Others.***[661] An application to withdraw the petition together with the accompanying notice in Form 5 were published prior to the pre-trial conference only for the Petitioner to later disown them and apply to have them expunged from the Court record, claiming that they were the work of an imposter. The Court found it curious that neither the Petitioner nor his counsel attended the pre-trial conference (which occurred after the publication) to contest the said application or took any steps to immediately bring to the attention of the Court the filing of the application to withdraw by an impostor. The Petitioner also adduced no evidence to show that he reported the alleged incident to the police as claimed. Moreover, the signing of the application, by thumbprint, yet the Petitioner confessed he was literate, was considered by the Court a mischievous way of creating the impression that the application had been lodged by someone else.

Since all evidence pointed to the fact that the Petitioner had lodged the application, and the Petitioner was clearly not keen on prosecuting the petition, the Court ruled that the application for withdrawal had technically crystallised, in view of the fact that no intending Petitioner applied to be substituted to the petition. The application to expunge the notice and application to withdraw were denied and petition marked withdrawn. Due to his conduct, however, the Petitioner was condemned to pay costs.

14.5. Substitution in an Election Appeal

In ***Mwamlole Tchappu Mbwana v IEBC & 7 Others,***[662] the COA contended with whether it had jurisdiction to allow substitution of an appellant in an election appeal. The application for substitution followed the appellant's notice to the Deputy Registrar under Rule 96 of the Court of Appeal Rules. The appellant also published a notice of intention to withdraw. Thereafter, the parties to the appeal filed a consent letter to mark the appeal as withdrawn. The applicants sought to join the appeal following the notice of intention to withdrawn by the appellant, arguing that it was in the public interest that they are permitted to take up the appeal.

The Respondents objected to the substitution arguing that there was nothing in the Court of Appeal Rules or the Election Petition Appeal Rules that allowed for such a substitution, and in any case, the

659 As above, para 80.

660 *James Kingangir Naikola v IEBC & Another* Narok HCEP No. 5 of 2017; *Adow Mohamed Abakar v Hon Mohamed Abdi Mohamed & 2 Others* Nairobi Election Petition 3 of 2017; *Jimale Mohamed Abdullahi v IEBC & 2 Others* Garissa HCEP No. 8 of 2017; *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 others* Mombasa Election Petition 7 of 2017.

661 Kisii Election Petition 9 of 2017.

662 Mombasa Election Petition Appeal 4 of 2018, at para 1.

parties to the appeal had entered a consent to withdraw the appeal. It was their case that the applicants had not taken up the opportunity to be party to the petition at the election court and that the COA had no jurisdiction to entertain such an application as the petition had been struck out by the election court, thereby necessitating the appeal.

Having reviewed the Election Appeal Rules and the Court of Appeal Rules, the COA found that they made no provision in respect of substitution of an appellant who wished to withdraw an appeal. Substitution was only envisaged in Rule 99 of the Court of Appeal Rules upon the demise of a party. The Court declined the invitation by the applicants to import the provisions of Rule 24 of the Election Petition Rules because those rules were only applicable to petitions in the election court, and the omission of a provision on substitution both in the Election Appeal Rules and in the Court of Appeal Rules must have been deliberate. The Court also opined that it could not have been the intention of the Rules Committee, contrary to the argument by the applicants, that the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 be applicable. As it stood, the Court found that there was no rule which sustained or justified the application for substitution.

Further, the Court opined that even if it had jurisdiction to entertain the application, where the appellant had complied with the procedure for withdrawal of an appeal under Rule 96, the leave of the Court was not required to withdraw the appeal, unless the withdrawal was objected to by a party to the appeal, which was not the case. The effect of the filing of the consent with the Deputy Registrar was to strike the appeal from the list of pending appeals. The appeal had therefore ceased to exist at the time the application for substitution was made.

> *40. Ultimately, we find that the application lacks merit and is hereby dismissed with costs to the appellant and respondents. We hereby strike out his appeal from the list of pending appeals in this Court and direct that the security for costs be refunded to the appellant.*

15. Scope of an Election Appeal

15.1. Appeals from an Election Court

The right of appeal from the Resident Magistrates' Court to the High Court[663] and from the High Court to the Court of Appeal[664] on election matters were previously omitted from the Elections Act 2011. Both sections 75 (4) and 85A of the Elections Act were introduced by amendment in 2012[665] to provide for appeals from decisions of the Magistrates' Court to the High Court concerning membership of the County Assembly and from the High Court to the Court of Appeal in election petitions concerning membership of the National Assembly, Senate or the office of county governor. These appeals are stated to be limited to matters of law and are to be filed within 30 days of the decision of the election court and heard and determined within 6 months.

Since there is no legislative prescription as to what amounts to matters of law for the purposes of sections 75 (4) and 85A of the Elections Act, the Supreme Court in ***Gatirau Peter Munya v Dickson***

663 Sec 75 (4) Elections Act.
664 Sec 85A Elections Act.
665 Act No. 47 of 2012.

Mwenda Kithinji & 2 Others[666] delved into great detail in determining what amounts to a point of law under ***Section 85A***. In that case, the Court delineated matters of law in the following terms:[667]

> *[80] From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:*
> *a. the technical element: involving the interpretation of a constitutional or statutory provision;*
> *b. the practical element: involving the application of the Constitution and the law to a set of facts or evidence on record;*
> *c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record.*
>
> *[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:*
> *a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;*
> *b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;*
> *c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence."*

The Court went on to state:

> *A petition which requires the appellate court to examine the probative value of the evidence tendered at the Trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate court to proceed from a position of deference to the trial Judge and the trial record, on the one hand, and the trial Judge's commitment to the highest standards of knowledge, technical competence and probity in electoral dispute adjudication, on the other hand.*[668]

The Supreme Court has therefore settled the question of what amounts to a point of law and as the Court of Appeal in Kisumu held in ***Cyprian Awiti & Another v IEBC & 3 Others***,[669] what amounts to a point of law is not the appellation given by the party raising it. In ***Alfred Kiptoo Keter v Bernard***

666 [2014] eKLR.
667 At para 81.
668 At para 82.
669 Election Petition Appeal No. 5 of 2018.

Kibor Kitur & Independent Electoral & Boundaries Commission,[670] the CoA ruled on the probative value of the original Petitioner who had been allowed to withdraw from the petition but who was not cross-examined on the contents of his affidavit which remained on the record. The Court, citing the case of ***Moses Wanjala Lukoye v Benard Wekesa Sambu & 3 Others,***[671] ruled that it was of no probative value as a result. At the Supreme Court, [672] it was contended that the CoA had exceeded its mandate under section 85A of the Elections Act by making a determination of fact. The Supreme Court drew a distinction between interrogating the veracity of the averments in the affidavit and making a determination as to the place of law of the affidavit in view of the substitution of parties, the latter of which is what the CoA did. It drew the conclusion that in making its determination, the CoA did not delve into matters of fact.

In ***John Munuve Mati v Returning Officer Mwingi North Constituency & 2 Others,***[673] the Court of Appeal had to determine whether the Trial Court had erred in evaluating the evidence on record and therefore arriving at the wrong conclusion. The appellant contended that the election court ought to have believed the testimony of PW13 who testified that the Presiding Officer discouraged voters from casting their ballots for the Petitioner and that he had refused to sign Form 35A for this reason. The Court found that this was an issue of credibility of witnesses, which according to the Supreme Court decision in ***Gatirau Peter Munya v Dickson Mwenda Kithinji &2 Others,***[674] was an issue within the competence and jurisdiction of the Trial Court. Therefore, the COA could not overturn its finding unless it could be shown that the determination was so perverse that no reasonable tribunal would have come to that decision.

According to Maraga CJ & P in his dissenting opinion in the ***Mohamed Abdi Mahamud case***,[675] the term 'matters of law only' as used in section 85A should be given broad interpretation to include constitutional issues that come into play in any electoral matter under consideration. Since there are often legal, constitutional, statutory and common law issues which should guide the determination of a case, the phrase 'matters of law' not only encompasses matters of statute and common law but extends to the constitutional provisions which come into play in any given matter.[676]

What becomes of cases where the appellant files grounds of appeal of mixed facts and law or where they assert that the trial judge erred in law and in fact? Does this divest the COA of jurisdiction in the appeal? This conundrum stems from the dicta of the COA that the Notice of Appeal is the primary jurisdictional document in an appeal;[677] by extension therefore, any defect in the Notice of Appeal would appear to divest the COA of jurisdiction to determine the substantive appeal.

The Court of Appeal deprecated the practice of filing appeals which invite the appellate court to determine issues of fact in ***Pius Yattani Wario v IEBC & Another,***[678] where the Court stated:

670 Election Appeal 21 of 2017.
671 [2013] eKLR.
672 *Bernard Kibor Kitur v Alfred Keter & IEBC* Supreme Court Petition 27 of 2018.
673 Nairobi Election Petition Appeal 5 of 2018; [2018] eKLR.
674 [2014] eKLR.
675 SC Petition 7 of 2018.
676 At para 167.
677 *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others* [2014] eKLR*; Boy Juma Boy & 2 Others v Mwamlole Tchappu Mbwana & Another* [2014] eKLR.
678 Election Petition No. 10 of 2018.

> *As we have already noted, many of the grounds of appeal and of the cross-appeal are prefixed by the assertion that the learned judge "erred in law and in fact" in arriving at various determinations. Of late, we have encountered two strands of response from appellants when we query why they have framed their grounds of appeal in an election petition to include invitations to the Court to determine issues of fact. The first is denial that the appeal indeed raises issues of fact, notwithstanding how the grounds of appeal are framed. In this response, the matter is reduced to an issue of semantics, raising the question why a party who seeks determination of issues of law only is not able to say so in a straightforward manner. The second, a more honest, if lazy approach, is to admit that the appeal indeed raises issues of fact and throw back the problem to the Court to sort out matters of fact from matters of law, before making its determination. We think both approaches are to be deprecated. It is not the business of the Court in each and every appeal to jump into the haystack to look for the needle. It is for the appellant to frame the issues that aggrieve him or her with precision and clarity. Encouraging that kind of practice will ultimately make nonsense of the rules of pleadings and encourage parties to present to the Court a potpourri of myths, rumours, allegations, facts, and so on, in the mistaken belief that it is the business of the Court to sort out the relevant from the irrelevant, as it strives to sustain all and sundry claims, however presented.*

As to how courts should treat such appeals, the COA in the case of ***Timamy Issa Abdalla v IEBC & 3 Others,***[679] opined that two schools of thought had emerged on this issue. The first school of thought holds that where an appeal is purportedly anchored on mixed grounds of law and facts, it is unsustainable. This school was best exemplified in the following decisions. In ***Apungu Arthur Kibira v IEBC & 2 Others,***[680] the majority of the bench ruled to strike out the appeal which challenged the whole decision of the Trial Court. They stated:

> *Quite plainly, it [the Notice of Appeal] answers to none of the prerequisites set out in Rule 6 and it cannot therefore be a 'Notice of Appeal'. It even refers to appealing 'against the whole decision' including factual matters which do not lie in this Court. The applicant and his counsel admit as much and that is why they seek time for filing a fresh Notice of Appeal. Their plea that the Rules were in transition and were hence easily overlooked cannot be a serious assertion as the Rules had been in existence for more than eight months before the election petition was decided. [T]he document filed was a nullity as it purports to be a Notice of Appeal filed under the rules. It follows that no Notice of Appeal was filed in this matter and there is no jurisdiction granted to the Court to consider the extension of time sought. 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….*

In ***Lesirma Simeon Saimanga v IEBC & 2 Others,***[681] the Court faulted the Notice of Appeal on various fronts. In addition to being filed at the High Court Registry instead of the Court of Appeal one and failing to enumerate the grounds of appeal as required by Rule 6(5) of the Election Appeal Rules,the Appellant was described to be against the whole decision/judgment of the Trial Court. Since the Court's jurisdiction was limited to appeals arising from election petitions on matters of law only, the Court ruled the notice wanting to the extent that it sought to challenge the whole of the judgment, which judgment was based on facts and the law. The Notice of Appeal, without which there could not be a valid appeal, was struck out.

679 Mombasa Election Appeal No. 4 of 2018.
680 Kisumu Election Petition Appeal No. 11 of 2018.
681 Nakuru Election Petition Appeal (Application No. 7 of 2018).

The second school, also referred to as a liberal approach, while acknowledging that appeals are limited to points of law, holds that the COA should take a liberal approach and look beyond the manner in which the grounds of appeal are crafted to determine whether there are points of law raised and to address its mind on those points. This school, exemplified by the decisions in the ***Wavinya Ndeti*** appeal, ***Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 Others,***[682] ***Joel Makori Onsando & Another v IEBC & 5 Others,***[683] & ***Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others,***[684] appears from the 2017 jurisprudence, to hold more sway at the COA.

In the ***Stanley Muiruri appeal***, the Court, having evaluated the grounds of appeal and concluded that both issues of law and fact were raised, declined to strike out the appeal, asserting that it would be pedantic to summarily reject an entire appeal that raises clear issues of law simply because counsel for the appellant did not craft the grounds of appeal as elegantly as required. In the ***Babu Owino*** appeal, the CoA invoked the provisions of Article 159 (2) (d) of the Constitution, sections 3A and 3 B of the Appellate Jurisdiction Act and Rule 5 of the Election Petition Rules to deem the appeal as properly filed.

These decisions resonated with the approach taken in the ***Wavinya Ndeti*** appeal,[685] where it was held that section 85A should not be used as a blanket 'no entry zone' to keep the Court from considering grounds of appeal simply because the memorandum of appeal referred to errors of facts and law. The Court agreed that it would be imprudent to shut out a litigant purely because of inelegance in drafting since justice must prevail at all times; it therefore behoves the Court to undertake a delicate examination to ensure that appeals are not rejected outrightly and without proper examination. The Court also noted that there are times when points of law are difficult to separate from factual determination and since the line is opaque, circumspection is necessary.

In ***Hassan Aden Osman v The IEBC & 2 Others,***[686] the COA was emphatic that the manner in which the Notice of Appeal is crafted cannot divest the COA of jurisdiction. Their position, which was cited with approval in the ***Timamy Issa Abdalla*** appeal, was set out as follows:

> *Having so said, it bears repeating that elegance in a pleading is not a precondition to its legitimacy; that jurisdiction can only be conferred by the Constitution, or any written law, or both; and that no one, not even the Court itself can, through judicial craft or innovation, arrogate to itself jurisdiction exceeding that which is conferred as aforesaid. Conversely, the jurisdiction of a court cannot be taken away merely by poor drafting of pleadings or even by the parties.*

In ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others***[687] the CoA reiterated that a Memorandum of Appeal must comply with section 85A in that it raises only questions of law which must be distinctly, concisely and precisely set out; anything short of this was deserving only of dismissal. The bench stated:

> *... in electoral matters, there is no such thing as 'questions of mixed law and fact and grounds of appeal that are a composite of both are clearly inappropriate and probably incompetent.*

682 Mombasa Election Petition Appeal No. 1 of 2018 as consolidated with Election Petition Appeal No. 3 of 2018.
683 Kisumu Election Petition Appeal No. 17 of 2018.
684 Nairobi Election Appeal 18 of 2018.
685 *Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 others* Nairobi Election Appeal 8 of 2018.
686 Election Petition Appeal No. 11 of 2018.
687 Nairobi Election Appeal 2 of 2018.

However, after expressing concurrence with the Supreme Court decision in ***Munya*** that it was not open to the Court to examine questions of fact, and despite finding that it could, with justification strike out all save one of the grounds of appeal presented by the appellant, the Court proceeded to determine the appeal on merit. It found that the appeal hinged on two legal issues: whether the appellant met the constitutional and statutory qualifications to vie for the position of governor and whether the High Court had jurisdiction to inquire into the appellant's nomination to vie and determined the matter along these two issues.

In ***Mawathe Julius Musili v IEBC & Another,***[688] the Supreme Court was asked to rule on whether the CoA had improperly declined to reject the Memorandum of Appeal which raised mixed issues of fact and law. The apex court, upon perusal of the record, affirmed that 18 of the 19 grounds of appeal had indeed raised issues of both fact and law. However, it noted that while the Court of Appeal was cognisant of this, it limited its analysis to issues of law. By reference to its decision in the ***Munya*** case, the apex court set out the questions that guided its consideration of the propriety of the Appellate Court's decision as follows:

> *Was the Court cautious enough to limit itself to issues regarding the interpretation and application of the law by the trial Judge, in relation to the petition at the High Court? Did the Judges of Appeal limit themselves to evaluating the conclusions of the trial Judge on the basis of the evidence on record; and to determining whether such conclusions were not supported by the evidence; or to ascertaining that the conclusions were not so perverse that no reasonable tribunal could arrive at the same?*

Since the issues for determination were all limited to questions of law, and where evidence was analysed, the Supreme Court noted that the Appellate Court only sought to establish whether the conclusions of the trial judge were supported by evidence, the apex court concluded that the Judges of Appeal had not descended into the arena of examining the probative value of the evidence presented in the petition, or engaging in the calibration of evidence, with a view to determining the veracity or otherwise of evidence tendered by witnesses. This ground of appeal was therefore dismissed.

It would therefore appear that even where an appellant has appealed against the whole judgment of the Trial Court or where they allege both errors of law and fact in their Notice of Appeal, the COA will not automatically dismiss the appeal for want of jurisdiction. The public interest nature of election petitions, as well as ensuring that justice is not fettered by procedural technicalities; appear to underlie the jurisprudence of the COA on this issue.

The High Court, sitting on appeal in ***Kitavi Sammy v IEBC & 2 Others***[689] had to determine the competency of an appeal under section 75 (4) of the Elections Act which stipulates that appeals to the High Court shall be on matters of law only. An application seeking to strike out the appeal was filed on amongst other grounds that the Memorandum of Appeal sought to challenge the decision of the lower court on the basis of both law and fact contrary to the provisions of section 75 (4). Counsel for the Appellant did not submit on this issue. The Court noted that it was undisputed that the appeal challenged the decision of the lower court on factual issues. There was however, a ground which referred to actual rules and would have been considered to determine how the facts were considered

688 SC Petition 16 of 2018.
689 Kitui Election Petition Appeal 3 of 2017.

by the Court which was a point of law. That ground would have been salvaged by Rule 5 (1) of the Election Petition Rules. However, since the Appellant failed to serve the Memorandum of Appeal within the 7 days stipulated under the Election Petition Rules, the appeal was rendered incompetent and struck out.

Just as the Court of Appeal found in the ***Wavinya Ndeti*** appeal,[690] the Court took a liberal approach to the question of raising questions of mixed law and fact in an appeal. The Court looked beyond the manner in which the grounds of appeal were crafted to determine whether there were points of law raised and address its mind on those points. It found that there was one point of law and it would have been proceeded to determine that issue, had the appeal not been otherwise defective for want of service.

15.2. Appeals to the Supreme Court

The jurisdiction of the Supreme Court in relation to election appeals has caused controversy in the recent past. On one hand, it is argued that electoral disputes were to be clothed with a sense of finality, hence the provision in sections 75 (4) and 85A of the Elections Act for appeals to be on matters of law only. The Elections Act did not provide for further appeals to the Supreme Court. In addition to limiting the material scope of appeals to matters of law, the Elections Act limits the temporal scope of appeals, stipulating that they be filed within 30 days and heard and determined within 6 months. This allows for a conclusive determination of the will of the electorate and precludes upheaval in the leadership of an electoral area halfway through an electoral cycle.

According to the Supreme Court in the ***Munya*** case, limiting the scope of appeals to the Court of Appeal to matters of law restricts the number, length and cost of petitions, thereby meeting the constitutional imperative of timely resolution of electoral disputes.[691] However, it is also arguable that allowing appeals to go to the Supreme Court, where there is no limitation of the time for hearing and determining the appeals, renders illusory the question of timely resolution of electoral disputes and the need to settle electoral matters in a timely fashion for the benefit of the electorate.[692]

On the other hand, as set out in ***Lemanken Aramat v Harun Meitamei Lempaka & 2 Others***,[693] the SC has an overall constitutional responsibility and binding authority on questions of law over all other courts. This responsibility includes the obligation to interpret the Constitution with finality and to provide guidance on all matters of law for other courts.

The right of a party to make a further appeal to the Supreme Court is stated to be enshrined in Article 163 (4) (a) of the Constitution.[694] The said provision allows for appeals from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution.[695]

690 *Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 others* Nairobi Election Appeal 8 of 2018.

691 At para 63

692 Take for example the Supreme Court decision in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* SC Petition 7 of 2018 where the appeal was filed on 7 May 2018 and the decision of the Supreme Court rendered on 15 February 2019.

693 Supreme Petition No. 5 of 2014.

694 In 2013, several election petitions went all the way to the Supreme Court under this jurisdiction, including *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others*, S.C. Pet. No. 2B of 2014; [2014] eKLR; *Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others*, S.C. Pet. No. 10 of 2013; [2014] eKLR; *Raila Odinga & Another v. IEBC & 2 Others,* S.C. Pet. No. 1 of 2017; *Zacharia Okoth Obado v. Edward Akong'o Oyugi & 2 Others* [2014] eKLR; *Nathif Jama Adam v. Abidkhaim Osman Mohamed & 3 Others* [2014] eKLR).

695 See *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & Another* SC Petition 3 of 2012 [2012] eKLR; *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others* [2014] eKLR; *Gatirau Peter Munya v Dickson Mwenda Kithinji* SC Pet 2B of 2014.

The jurisdiction of the Supreme Court in election appeals was articulated in ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others*** SC Petition 2B of 2014 ***(Munya 2)***, ***Peter Oduor Ngoge v Francis Ole Kaparo & 5 Others,*** SC Petition 2 of 2012 and reiterated in ***Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung'u Waititu & 4 Others***[696] where the Court upheld the competence of the superior courts to handle disputes before them and asserted that access to the Supreme Court was limited to cardinal issues:

> *the chain of Courts in ... [our] constitutional set-up, have the professional competency to adjudicate upon issues ... [placed] before them; and only cardinal issues of law or of jurisprudential moment deserve the further input of the Supreme Court.*

Where a matter was properly before the Court, the role of interpretation was stated to involve 'revealing or clarifying the legal content or meaning of constitutional provisions, for purposes of resolving the dispute at hand' and application to entail 'creatively interpreting the Constitution to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance'. In ***Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others,***[697] the Court ruled that it had jurisdiction to determine whether the election court had properly found that it had jurisdiction to determine the appellant's eligibility to hold office in light of Article 88 (4) (e) of the Constitution.

In 2018, the SC, noting the clamour by candidates in elections to have their appeals heard by the apex court further elaborated on its mandate in relation to election appeals in the case of ***Zebedeo John Opore v IEBC and 2 Others,***[698] where a preliminary objection was raised to the Court's jurisdiction to entertain the appeal lodged under Article 163 (4) of the Constitution. The Court acknowledged the broader context of the electoral process, being that elections generally draw legitimacy from the broad lines of the Constitution and electoral laws. However, the Court clarified that not every election petition merits the Supreme Court's intervention but only those conclusions reached by the Trial Court which clearly emerge as requiring constitutional interpretation or application.[699] For the apex court's jurisdiction to be activated, the generality of the Constitution and electoral laws had to be crystallised into clearly defined normative prescriptions by virtue of Article 163 (4) (a) of the Constitution. The Court proceeded to distil the categories of election cases that could proceed to the Supreme Court on appeal in the following terms:[700]

> *(a) In election petitions before this Court, a party may not invoke the Court's jurisdiction under Article 163 (4) (a), where the trial Court had found that alleged irregularities and malpractices were not proved, as a basis then does not lie for an application or interpretation of the Constitution.*
> *(b) The Articles of the Constitution cited by a party as requiring interpretation or application by this Court, must have required interpretation or application at the trial Court, and must have been a subject of appeal at the Court of Appeal; in other words, the Article in question must have remained a central theme of constitutional controversy, in the life of the cause.*
> *(c) A party seeking this Court's intervention has to indicate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question. Thus, the said constitutional provision must have been a subject of determination at the trial Court.*

696 SC Petitions 18 & 20 of 2014.
697 SC Petition 7 of 2018.
698 SC Election Petition 32 of 2018.
699 See also *Clement Kung'u Waibara v Annie Kibeh & Anor* SC Petition 24 of 2018, at para 43.
700 At para 57.

> *(d) As a logical consequence of the foregoing, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the Constitution, and must signal the perceived difficulty or impropriety with the Appellate Court's decision.*

Applying these principles to the matter, the Supreme Court was satisfied that the appeal did not raise any issues of constitutional interpretation or application and therefore the Court's jurisdiction had not been properly engaged. The Preliminary Objection was therefore upheld and the appeal struck out. On the contrary, in ***Alfred Nganga Mutua & 2 Others v. Wavinya Ndeti & Another,***[701] the Court ruled that an appeal based upon the question of verifiability of an election, and upon the terms of Article 86 (a) of the Constitution fell within the jurisdictional ambit of the Supreme Court as set out in Article 163 (4) (a) of the Constitution.

Where the appeal includes both matters of constitutional interpretation and application and those falling outside the scope of Article 163 (4) of the Constitution, the Supreme Court considers itself at liberty to exercise jurisdiction over those falling within its mandate and excluding the rest. In ***Clement Kung'u Waibara v Annie Kibeh & Anor,***[702] the Court, guided by the principles set out in the ***Zebedeo Opore*** appeal, stated:[703]

> *On the foregoing principles, we consider that a limited number of the issues raised in the petition do indeed involve constitutional interpretation or application: for instance, the issue of the application of Section 83 of the Elections Act, 2011 and the conduct of election in relation to the terms of Articles 81 and 86 of the Constitution. We recognise, however, that some of the issues raised in the petition of appeal and in the cross-petition fall outside this Court's mandate, and accordingly, we will omit them from the ambit of our determination.*

Where an appeal properly lodged from the Court of Appeal to the Supreme Court challenges the exercise of the Court of Appeal's discretion, the Supreme Court will be hesitant to interfere with the exercise of the Appellate Court's discretion unless the Appellant can demonstrate that: the Court of Appeal acted on a whim, the decision of the Court of Appeal was unreasonable; the decision of the Court of Appeal was made in violation of any law or the Constitution or that the decision was plainly wrong and caused undue prejudice to a party.[704]

As to the nature of the hearing of the appeal, the Court pointed out in ***Cyprian Awiti & Another v IEBC & 3 Others***[705] that it is empowered by section 20 of the Supreme Court Act of 2011 to proceed, where it considers it necessary, by way of a fresh hearing and to grant any order or relief that could have been granted by the Court or tribunal appealed from.

701 SC Petition 11 of 2018.
702 SC Petition 24 of 2018.
703 At para 44.
704 See SC decision in *Musa Cherutich Sirma v IEBC & 2 Others* Supreme Court Petition 13 of 2018, at para 58.
705 Supreme Court Petition 17 of 2018.

Recommendations for Law Reform

In the course of the pre-election EDR processes and the post-election EDR process in the courts, certain provisions of the law were identified as problematic and recommended for review. This section reviews some of the shortcomings in the legislative framework which have been identified and makes proposals for review of the relevant legislative framework by the appropriate agency.
For ease of reference, the proposals are summarised in a tabular form at the end of the text.

1. Elections (Amendment) Act 34 of 2017

In ***Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others,***[706] the High Court found that some of the amendments to the IEBC Act and the Elections Act introduced by Act No. 34 of 2017 are unconstitutional. Still pending are legislative amendments following declarations of unconstitutionality.

2. Clarity as to the Meaning of Fresh Election as contained in Article 138 (5) and as contained in Article 140 (3)

Though the term 'fresh election' is used in both provisions, it connotes different formats of presidential elections and this may need legislative elaboration. This is especially so because the candidates in the two elections are different and therefore different procedural requirements are implied

3. Party Primary Disputes

Amendment to section 40 (2) of PPA-to clarify that party primary disputes should be subjected to IDRM. Amendment to section 40 (1) to include party primary disputes was not followed by an amendment to section 40 (2) subjecting party primary disputes to IDRM. As the Court of Appeal stated in ***Dr. Lilian Gogo v Joseph Mboya Nyamuthe & 4 Others*** **Civil Appeal 135 of 2017,** there may be need to distinguish matters relating to party primaries and which are subjected to IDRM and those that do not involve party primaries, in which case IDRM will not be necessary.

4. Removal of Deputy Governor from Office

Provisions relating to the removal of a deputy county governor in the event of nullification of the election of the governor require specificity. Whereas it was argued by Achode J[707] and Muchelule J[708] that once the governor is removed from office under Article 182 of the Constitution, the deputy governor cannot remain in office, there is nothing in the Constitution or the County Governments Act that makes this explicit. Thande J was emphatic that there is need to plug the gaps that exist in relation to the effect of a nullification of the election of a governor on the election of the deputy governor and the procedure for the appointment of another deputy governor in the event of assumption by the deputy governor to the office of the governor under Article 182.[709]

706 Nairobi High Court Petition No. 548 of 2017.
707 *Hassan Omar Hassan & another v Independent Electoral & Boundaries Commission & 2 others* [2017] eKLR.
708 *Wavinya Ndeti & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others* [2017] eKLR.
709 *Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 4 others* [2017] eKLR, para 70.

5. Costs

It is proposed to amend section 84 of the Elections Act to expand the jurisdiction of the election court to award costs by allowing the Court to take into account factors such as the conduct of the parties which causes undue expense or where costs are incurred due to vexatious conduct or unfounded allegations by a party, as set out in Rule 30 (2) of the Election Petition Rules. At present, section 84 stipulates that costs shall follow the cause, which then renders Rule 30 (2) *ultra vires.* However, it is prudent that the factors listed therein are factored in the award of costs, hence the proposal to amend the parent statute.

In addition, it is proposed to amend Rule 30 Election Petition Rules -to set clear parameters for the exercise of the Court's discretion in awarding costs, particularly because the Court has the power to set out the total costs payable. Without such parameters, the discretion of the Court is exercised arbitrarily, and especially because there is no stipulation that the parties be heard before the decision on costs is made. In light of the fact that the role of the DR is now limited, or done away with entirely as was the case in the ***Kazungu Kambi* case,** the rights of the parties to be heard before a determination on this issue is paramount. It is noteworthy that the Supreme Court has recently provided such guidelines in ***Cyprian Awiti & Another v IEBC & 3 Others.***[710]

6. Electronic Transmission of Results in all Elections

The High Court noted in the case of ***Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC,***[711] that there was no obligation to electronically transmit results in all elections; only presidential election results had to be electronically transmitted under section 39 (1) (C) of the Elections Act. That notwithstanding, the Court found nothing that should stop the IEBC from making arrangements for electronic transmission of all results, in order to fully operationalise section 44 of the Elections Act. Electronic transmission of results would, in the view of the Court, make the results declared at the polling station accountable, credible and verifiable. The Court therefore recommended an amendment to Regulations 5 (1A) and 82 of the Elections (General) Regulations.

7. Election Appeals

On the question of election appeals, several reforms are proposed. Firstly, while sections 75 (4) of the Elections Act, dealing with appeals to the High Court and section 85A which relates to appeals to the Court of Appeal were introduced by the same amendment and are almost identical in provision on appeals, an appeal under section 85A operates as an automatic stay of the decision of the High Court until the appeal is heard and determined.[712] This obviates the need for an appellant to make a separate application for stay at the Court of Appeal. It is unclear why only section 85A was amended to this effect and it is recommended that section 75 also be amended to include an identical provision.

Secondly, Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules 2017 provides that appeals from petitions concerning membership of the National Assembly, Senate or County Governor shall be heard and determined under the Court of Appeal Rules, 2010. This is inconsistent

710 Supreme Court Petition 17 of 2018.
711 Nairobi Election Petition 14 of 2017.
712 Section 85 A (2). This amendment was introduced by Election Laws (Amendment) Act No 36 of 2016.

with the enactment of the Court of Appeal (Election Petition) Rules 2017. It is therefore proposed to amend Rule 35 to provide that election appeals from the High Court shall be heard and determined under the Court of Appeal (Election Petition) Rules 2017.

Thirdly, Rule 34 (11) Elections (Parliamentary and County Elections) Petition Rules is inconsistent with section 75 (4) of the Elections Act. The latter provides that an appeal from the Resident Magistrate's Court is to be heard and determined within 6 months, while the Rule stipulates that such appeals are to be heard and determined within 3 months. It is therefore recommended to amend the Rule to provide consonance between the Act and the Rules on the timeframe within which appeals arising from county election petitions are to be heard and determined.

8. Declaration and Transmission of Results

With respect to the transmission of results for elections for county governor, senator and woman representative to the National Assembly, section 39 (1) (B) of the Elections Act requires county returning officers to tally, announce and declare, in the prescribed form, final results from constituencies in the county. Regulation 87 (2) (b) of the Elections (General) Regulations specifies the manner of declaration: the filling in of Forms 37C, 38 C and 39 C set out in the Schedule. These forms are to contain the name of the respective electoral area, the total number of registered voters, the votes cast for each candidate in each polling station, the number of rejected votes for each constituency, the aggregate number of votes cast in the respective electoral area and the aggregate number of rejected votes. In the ***Wavinya Ndeti*** appeal,[713] the CoA had faulted the IEBC for failure to use the prescribed Form 37C setting out the votes cast for each candidate in each polling station, in violation of Regulation 87 (2) (b) (iii). This was because the requirements in that provision were set in mandatory terms.

However, the Supreme Court disagreed.[714] It noted that the requirement to provide the results garnered by each candidate in each polling station went beyond the requirement of section 39 (1) (B) to tally, announce and declare the results from each constituency. Therefore, the said regulation was *ultra vires* section 39 (1) (B) of the Elections Act and was null and void *ab initio.* The Regulation and Forms 37 C, 38 C and 39 C ought to be amended to only require declaration of results from constituencies, in accordance with section 39 (1) (B) of the Elections Act.

9. Scrutiny, Recount and Re-tallying

The importance of scrutiny in EDR, particularly in the determination of a presidential election petition cannot be gainsaid, particularly in light of the 14-day timeline for resolving presidential election disputes. It is a crucial tool for assisting the Court to verify the allegations made by the parties to the petition. It is therefore curious that the Supreme Court (Presidential Election Petition) Rules 2017 are silent on scrutiny. This was pointed out in the ***2017 Raila Odinga case***. The Elections (Parliamentary and County Elections) Petition Rules set out guidelines for scrutiny in Rule 29. This means that at present, the only provision applicable to scrutiny at the Supreme Court is section 82 of the Elections Act. It is therefore proposed to amend the Rules to make provision for scrutiny, which will provide clear parameters for the application for and the effective implementation of orders of scrutiny, taking into account the 14 day timeline for hearing presidential election petitions. This would ensure that a balance is struck between efficient and expeditious dispute resolution and according justice to the parties.

713 *Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 others* Nairobi Election Appeal 8 of 2018.
714 *Alfred Nganga Mutua & Anor v Wavinya Ndeti & Anor* Supreme Court Petition 11 of 2018 as consolidated with Petition 14 of 2018.

10. Withdrawal of an Election Petition

While Rule 21 (6) Elections (Parliamentary and County Elections) Petition Rules requires that parties to a petition swear an affidavit in relation to the application to withdraw a petition with the averment that "to the best of the deponent's knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition", this requirement does not extend to affidavits sworn by persons authorised by the Petitioner, such as an advocate. The effect is to circumvent the mischief of the rule: to prevent collusion or agreements to withdraw a petition to the detriment of the electorate. It is therefore proposed to amend Rule 21 (4) & (5) to include the words 'or persons authorised by them' immediately after the words 'the parties to a petition'. This would extend the application of Rule 6 to affidavits deponed to by persons authorised by the Petitioner.

Summary of Law Reform Proposals

Relevant law	Shortcoming	Recommendation
Section 40 (2) of Political Parties Act	With the amendment of section 40 (1) to include party primary disputes, this section was not amended to require that such disputes also be submitted to IDRM before going to the Political Parties Disputes Tribunal	To amend section 40 (2) to expressly require that party primary disputes be subject to IDRM before lodging a complaint at the Tribunal
The Elections Act 24 of 2011	Lack of clarity as to the meaning of the term 'fresh election'. Whereas the term is used both in Article 138 (5) and 140 (3) of the Constitution, two different scenarios are contemplated. Though the term 'fresh election' is used in both provisions, it connotes different formats of presidential elections, with different procedures and this may need legislative elaboration.	Legislative amendment to define the term and provide clear distinction as to the requirements for fresh election under Article 138 (5) and under Article 140.
The Elections (Amendment Act 34 of 2017)	Section 39 (1) (C) sought to elevate manual results over electronically transmitted results, which the High Court ruled inconsistent with Articles 81 and 86 of the Constitution	Repeal of the new section 39 (1) (C) to accord with Articles 81 and 86 of the Constitution.
The Elections (Amendment Act 34 of 2017)	Section 9 sought to amend section 83 by making the test of invalidity of an election a conjunctive one rather than a disjunctive one. The removal of the disjunctive word 'or' and the introduction of the conjunctive word 'and' together with the introduction of the word 'substantially' a departure from the constitutional requirements for free, fair and transparent elections.	Repeal the said section to revert to the old section 83 so that one only needs to prove non-compliance with the Constitution and related election laws or the effect of irregularities upon the election result.

Relevant law	Shortcoming	Recommendation
Section 39 (1) F of the Elections Act	In relation to live streaming and transmission of results, this section provided that the failure by the Presiding Officer to electronically transmit results would not invalidate the results as declared by the presiding or returning officer. This would absolve officers of the IEBC who failed to transmit results without justification. Since live streaming was introduced into the law to allow citizens to compare transmitted results with the declared results, thereby confirming their accuracy, the provision undermined free, fair and credible elections.	Repeal of the offensive section since it was declared unconstitutional by the High Court in the ***Katiba*** case.
Section 39 (1) (G) of the Elections Act	Provided that the results that appeared on the public portal maintained by the IEBC were 'for public information only' and would not form the basis for the declaration of results by the IEBC. This is inconsistent with the heavy investment in technology provided for in section 44 of the Act if the intention of the legislature was that the results transmitted from the primary source should not matter. Also undermined free, fair and credible elections rather than strengthening the electoral process.	Repeal of the said section which was declared unconstitutional in the ***Katiba*** case.
Section 75 (4) of the Elections Act	Does not include a provision to the effect that an appeal acts as a stay of the certificate of the election results issued by the election court until the appeal is heard and determined. Its counterpart provision, section 85A, contains this provision.	To include a provision identical to section 85A (2) providing that an appeal shall operate as a stay of the decision of the election court until the appeal is heard and determined.

Relevant law	Shortcoming	Recommendation
Section 84 of the Elections Act	Stipulate that costs shall follow the cause. Does not allow an election court discretion to award costs in a manner that takes into account the circumstances of the case including conduct of the parties which causes undue expense or where costs are incurred due to vexatious conduct or unfounded allegations by a party, as set out in Rule 30 (2) of the Election Petition Rules. The Rules therefore appear to be *ultra vires* the Act.	To amend section 84 of the Elections Act to grant an election court discretion in the award of costs to take into account circumstances of the case such as those listed in Rule 30 (2) of the Election Petition Rules.
Regulations 5 (1A) and 82 of the Elections (General) Regulations	No mandatory requirement for electronic transmission of all results-IEBC only obligated to work progressively towards ensuring use of technology in all elections.	To enhance credibility in result transmission for all elections, it is recommended that the Regulations be amended to allow for electronic transmission of results of all elections.
Rule 30 Elections (Parliamentary and County Elections) Petition Rules 2017	No clear parameters in law to guide the exercise of the Court's discretion in awarding costs.	Since the election court has the power to set the maximum costs payable and direct that the matter shall not be subject to taxation, clear parameters for the exercise of this discretion are necessary to prevent arbitrariness, which undermines Article 48 rights.
Rule 34 (11) Elections (Parliamentary and County Elections) Petition Rules	The provision is inconsistent with section 75 (4) of the Elections Act. The latter provides that an appeal from the Resident Magistrate's Court is to be heard and determined within 6 months, while the Rule stipulates that such appeals are to be heard and determined within 3 months.	To amend the Rule to provide consonance between the Act and the Rules on the timeframe within which appeals arising from county election petitions are to be heard and determined.

Relevant law	Shortcoming	Recommendation
The Supreme Court (Presidential Election Petition) Rules 2017	Are silent on scrutiny, where the Elections (Parliamentary and County Elections) Petition Rules set out guidelines for scrutiny in Rule 29. Only applicable provision at present is section 82 of the Elections Act.	Amend to make provision for scrutiny, which will provide clear parameters for the application for and the effective implementation of orders of scrutiny, taking into account the 14 day timeline for hearing presidential election petitions. This would ensure that a balance is struck between efficient and expeditious dispute resolution and according justice to the parties.
Rule 21 (6) Elections (Parliamentary and County Elections) Petition Rules as read with Rules 21 (4) & (5)	While the Rule requires that parties to a petition swear an affidavit in relation to the application to withdraw a petition with the averment that "to the best of the deponent's knowledge and belief, that no agreement or terms of any kind has been made, and that no undertaking has been entered into, in relation to the withdrawal of the petition", this requirement does not extend to affidavits sworn by persons authorised by the Petitioner, such as an advocate. The effect is to circumvent the mischief of the rule: to prevent collusion or agreements to withdraw a petition to the detriment of the electorate.	To amend Rule 21 (4) & (5) to include the words 'or persons authorised by them' immediately after the words 'the parties to a petition'. This would extend the application of Rule 6 to affidavits deponed to by persons authorised by the Petitioner.
Regulation 87(2)(b) (iii) of the Elections (General) Regulations	Requires the county returning officer to tally, announce and declare results garnered by each candidate in each polling station, contrary to Section 39 (1) (B) which only requires declaration of results from constituencies.	Supreme Court in ***Alfred Mutua & Others v Wavinya Ndeti & Another [2018] eKLR*** declared Regulation 87 (2) (b) (iii) *ultra vires* section 39 (1) (B) of the Elections Act. Regulation and Forms 37 C, 38 C and 39 C ought to be amended to only require declaration of results from constituencies, in accordance with section 39 (1) (B) of the Elections Act.

Relevant law	Shortcoming	Recommendation
Rule 27 (1), Court of Appeal (Election Appeal) Rules	While requiring the appellant to deposit security for costs upon filing an appeal, it does not stipulate the timeframe within which the Appellant must comply. The counterpart provisions in section 78 (1) of the Elections Act as read with Rule 13 (1) of the Election Petition Rules give a Petitioner 10 days from the time of filing a petition to deposit their security. Timelines are important because the Rule gives the CoA the power the power to strike out the appeal where there is non-compliance.	To amend Rule 27 to specify the timelines within which the Appellant is required to deposit their security for costs.
Rule 6 Court of Appeal (Election Petition) Rules 2017	Requires a Notice of Appeal against a decision of the High Court to be lodged at the Court of Appeal. This is contrary to the practice in other appeals as set out in the Court of Appeal Rules of lodging the Notice in the registry of the Court whose decision is appealed from.	To amend Rule 6 to harmonise the practise of filing appeals and have Notice of Appeal lodged with the High Court. This would serve to create appropriate notice to the parties in the original petition that an appeal is anticipated to be lodged to the Court of Appeal, which is the thus achieving the legislative intent of the practice of giving notice.
Rule 35 of the Elections (Parliamentary and County Elections) Petition Rules 2017	Provides that appeals from petitions concerning membership of the National Assembly, Senate or County Governor shall be heard and determined under the Court of Appeal Rules, 2010. This is inconsistent with the enactment of the Court of Appeal (Election Petition) Rules 2017.	To amend Rule 35 to provide that election appeals from the High Court shall be heard and determined under the Court of Appeal (Election Petition) Rules 2017

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- *Stephen Kolimuk v IEBC & 2 Others Kapenguria High Court Election Petition 2 of 2017*
- *Sumra Irshadali v IEBC & Another Nairobi Election Appeal 22 of 2018*

2. Failure to File Appeal on Time

- *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC Supreme Court Petition Application 27 of 2018*
- *John Munuve Mati v RO Mwingi North & Others Election Petition Appeal 5 of 2018*
- *Mawathe Julius Musili v IEBC & Another SC Petition 16 of 2018*
- *Peter Odima Khasamule v Independent Electoral and Boundaries Commission (IEBC) &*

2 Others Civil Appeal Election Petition No. 4 of 2018
- *Sumra Irshadali v IEBC & Another Nairobi Election Appeal 22 of 2018*

3. Failure to Furnish Security for Costs within 10 Days of Filing Petition

- *David Mutua Malii v Tobias Otieno Samba & 2 Others Mombasa MCEP No. 1 of 2017*
- *Ibrahim Ahmed v IEBC and 2 Others Nairobi High Court Election Petition 21 of 2017*
- *Jane Naicar Eshuchi v Maurice Sakwa & 2 Others Mumias CMCC EP No. 1 of 2017*
- *Milton Kimani Waitinga v Independent Electoral and Boundaries Commission & 2 Others Kiambu Election Petition 2 of 2017*
- *Morris Muindi Mutiso v Naomi Namsi Shaban & 2 Others Voi High Court Election Petition 2 of 2017*
- *Robert Mwangi Kariuki v Independent Electoral and Boundaries Commission & 2 Others Nyeri High Court Election Petition 1 of 2017*
- *Salim Abdallah Salim v IEBC & 2 Others Mombasa MCEP No. 2 of 2017*
- *Samson Kinyua Magambo v IEBC & 3 Others Githongo MCEP No. 2 of 2017*
- *Samwel Kazungu Kambi & Another v IEBC and Others Malindi High Court Election Petition 4 of 2017*
- *Tom Onyango Agimba v Independent Electoral and Boundaries Commission & 2 Others Milimani High Court Election Petition 18 of 2017*
- *Yaite Philip Okoronon v Jakaa Gardy Odara & Another Busia Magistrates' Court Election Petition 8 of 2017*

4. Failure to Serve Pleadings within Stipulated Timelines

- *Aluodo Florence Akinyi v. IEBC & Others Siaya High Court Election Petition 4 of 2017*
- *Aziz Mohamed Karisa vs IEBC & 3 Others Malindi Election Petition 7 of 2017*
- *Clement Kung'u Waibara v Annie Kibeh Kiambu Election Petition 1 of 2017*
- *Jacob Thoya Iha v IEBC & 3 Others Malindi Election Petition 6 of 2017*
- *Jane Wambui Mwaura vs IEBC & 2 Others Muranga Election Petition 1 of 2017*
- *John Munuve Mati v RO Mwingi North & Others Nairobi Election Petition Appeal 5 of 2018*
- *Kiplagat Richard Sigei & 2 Others v IEBC & Another Kericho High Court Election Petition 1 of 2017*
- *Kitavi Sammy v IEBC & 2 Others Kitui Election Petition Appeal 3 of 2017*
- *Saad Yusuf Saad vs IEBC & 2 Others Mombasa Election Petition 8 of 2017*
- *William Kahindi Mganga v IEBC & 4 Others Malindi High Court Election Petition 5 of 2017*

G. Costs in an Election petition

- *Clement Kung'u Waibara v Annie Kibeh Kiambu Election Petition 1 of 2017*
- *Dennis Magare Makori & Another v The Independent Electoral and Boundaries Commission & 3 Others Kisumu Election Petition Appeal No. 22 of 2018*
- *Martha Wangari Karua & Another v IEBC & 3 Others Kerugoya High Court Election Petition 2 of 2017*
- *Martha Wangari Karua v IEBC & 3 Others Nyeri Election Appeal 1 of 2017*
- *Samwel Kazungu Kambi & Another v IEBC and Others Malindi High Court Election Petition 4 of 2017*

- *Sila Samuel Mulwa v IEBC & 3 Others Malindi High Court Election Petition 11 of 2017*
- *Stephen Kolimuk v IEBC & 2 Others Kapenguria High Court Election Petition 2 of 2017*
- *Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 Others Machakos Election Petition 1 of 2017*

H. Election Offences

- *Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC Nairobi Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017)*
- *Alfred Kiptoo Keter v Bernard Kibor Kitur & IEBC Election Appeal 21 of 2017*
- *Arthur Papa v Oku Edward Kaunya & 2 Others Busia Election 2 of 2017*
- *Bernard Kibor Kitur v Alfred Keter & IEBC Supreme Court Petition 27 of 2018*
- *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC Eldoret High Court Election Petition 1 of 2017*
- *Clement Kung'u Waibara v Annie Kibeh Kiambu Election Petition 1 of 2017*
- *Cyprian Awiti & Another v IEBC & 3 Others Kisumu Election Petition Appeal No. 5 of 2018*
- *Joel Makori Onsando & 2 Others v IEBC & 3 Others Kisii High Court Election Petition 3 of 2017*
- *Joseph Oyugi Magwanga & Another v IEBC & 3 Others Homa Bay High Court Election Petition 1 of 2017*
- *Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others Machakos Election Petition 4 of 2017*
- *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others Mombasa High Court Election Petition No.7 of 2017*
- *Peter Odima Khasamule v Independent Electoral and Boundaries Commission (IEBC) & 2 Others Busia High Court Election Petition 4 of 2017*
- *Timamy Issa Abdalla v IEBC & 3 Others Malindi High Court Election Petition 3 of 2017*
- *Wavinya Ndeti & Another v IEBC & 2 Others Machakos Election Petition 1 of 2017*
- *Wavinya Ndeti & Another v IEBC & 2 Others Nairobi Election Appeal 8 of 2018*

I. Use of Technology in Elections

- *Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others Nairobi Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017)*
- *John Harun Mwau & Others v IEBC & Others Presidential Election Petition 2 & 4 of 2017*
- *Katiba Institute & Africa Centre for Open Governance v Hon. Attorney General & 2 Others Nairobi High Court Petition No. 548 of 2017*
- *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others, Mombasa Election Petition 7 of 2017*
- *Raila Odinga & Anor v IEBC & 2 Others Presidential Election Petition 1 of 2017*

J. Irregularities and Illegalities

1. Failure to Stamp Statutory Forms

- *Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others Nairobi Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017)*
- *Kalla Jackson Musyoka v Independent Electoral & Boundaries; Commission (I.E.B.C) & Another Machakos Election Petition 4 of 2017*
- *Mark Nkonana Supeyo & Another v Independent Electoral and Boundaries Commission & 2 Others Kajiado Election Petition 1 of 2017*
- *Raila Odinga & Anor v IEBC & 2 Others Presidential Election Petition 1 of 2017*
- *Samwel Kazungu Kambi & Another v IEBC and Others Malindi High Court Election Petition 4 of 2017*

2. Failure to Sign Statutory Forms

- *Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & 2 Others Nairobi Election Petition 14 of 2017(Consolidated with Garissa HCEP No. 3 of 2017)*
- *Raila Odinga & Anor v IEBC & 2 Others Presidential Election Petition 1 of 2017*
- *Samwel Kazungu Kambi & Another v IEBC and Others Malindi High Court Election Petition 4 of 2017*

3. Use of Unofficial Forms

- *Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC Nairobi Election Petition 14 of 2017(Consolidated with Garissa HCEP No. 3 of 2017)*
- *Alfred Nganga Mutua & Anor v Wavinya Ndeti & Anor Supreme Court Petition 11 of 2018 as consolidated with Petition 14 of 2018*
- *Timamy Issa Abdalla v IEBC & 3 Others Malindi High Court Election Petition 3 of 2017*
- *Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 Others Nairobi Election Appeal 8 of 2018*
- *Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission (IEBC) & 2 Others Machakos Election Petition 1 of 2017*

4. Failure to follow Procedure for Assisted Voting

- *Ahmed Abdullahi Mohammed & Ahmed Muhumid Abdi v Mohamed Abdi Mahamed, Patrick Gichohi & IEBC Nairobi Election Petition 14 of 2017 (Consolidated with Garissa HCEP No. 3 of 2017)*
- *John Munuve Mati v RO Mwingi North & Others Kitui Election Petition 3 of 2017*
- *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others SC Petition 7 of 2018*
- *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others Mombasa High Court Election Petition 7 of 2017*

5. Discrepancies between Results of Different Elective Posts

- *Jackton Nyanungo Ranguma v IEBC & 2 Others Kisumu Election Appeal 1 of 2017*
- *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others Mombasa High Court Election Petition 7 of 2017*
- *Timamy Issa Abdalla v IEBC & 3 Others Malindi High Court Election Petition 3 of 2017*
- *Timamy Issa Abdalla v Independent Electoral and Boundaries Commission & 3 Others Mombasa Election Appeal No. 4 of 2018*

K. Scrutiny, Recount and Re-tallying

- *Abdirahman Adan Abdikadir v IEBC & 2 Others Nairobi Election Petition 13 & 16 of 2017*
- *Albeity Hassan Abdalla vs IEBC and 2 Others Malindi High Court Election Petition 8 of 2017*
- *Annie Wanjiku Kibeh v Clement Kungu Waibara & Another Nairobi Election Petition Appeal 20 of 2018*
- *Apungu Arthur Kibira v IEBC & 2 Others Kakamega High Court Election Petition 6 of 2017*
- *Aziz Mohamed Karisa vs IEBC & 3 Others Malindi Election Petition 7 of 2017*
- *Chris N Munga Bichage v. IEBC & 2 Others Kisii Election Petition 12 of 2017*
- *Clement Kung'u Waibara v Annie Wanjiku Kibeh & Anor SC Petition 24 of 2018*
- *Clement Kung'u Waibara v Annie Wanjiku Kibeh & Another Kiambu Election Petition 1 of 2017*
- *Cyprian Awiti & Another v IEBC & 3 Others Kisumu Election Petition Appeal 5 of 2018*
- *Cyprian Awiti & Another v IEBC & 3 Others Supreme Court Petition 17 of 2018*
- *Edward Tale Nabangi v. James Lusweti Mukwe & 2 Others Bungoma Election Petition 1 of 2017*
- *George M. O. Ayacko v IEBC & 3 Others Kisii Election Petition 13 of 2017*
- *Jackton Nyanungo Ranguma v IEBC & 2 Others Kisumu Election Petition 3 of 2017*
- *John Harun Mwau & Others v IEBC & Others Presidential Election Petition 2 & 4 of 2017*
- *John Munuve Mati v RO Mwingi North & Others Kitui Election Petition 3 of 2017*
- *Joseph Oyugi Magwanga & Another v IEBC & 3 Others Homa Bay High Court Election Petition 1 of 2017*
- *Mark Nkonana Supeyo & Another v Independent Electoral and Boundaries Commission & 2 Others Kajiado Election Petition 1 of 2017*
- *Martin Nyaga Wambora v Lenny Maxwell Kivuti & 3 Others Election Petition Appeal 6 of 2018*
- *Michael Gichuru v Hon. Rigathi Gachagua & 2 Others Nyeri High Court Election Petition 2 of 2017*
- *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others, Mombasa Election Petition 7 of 2017*
- *Raila Odinga & Anor v IEBC & 2 Others Presidential Election Petition 1 of 2017*
- *Rishad Hamid Ahmed Amana v Independent Electoral & Boundaries Commission & 2 Others Malindi Election Petition 1 of 2017*
- *Samwel Kazungu Kambi & Another v IEBC and Others Malindi High Court Election Petition 4 of 2017*

L. Standard of Proof in Election Petitions

- *Raila Odinga & Anor v IEBC & 2 Others Presidential Election Petition 1 of 2017*

M. Burden of Proof

- *Alfred Nganga Mutua & Anor v Wavinya Ndeti & Anor Supreme Court Petition 11 of 2018 as consolidated with Petition 14 of 2018*
- *Bernard Kibor Kitur v Alfred Keter & IEBC Supreme Court Petition 27 of 2018*
- *Cyprian Awiti & Another v IEBC & 3 Others Supreme Court Petition 17 of 2018*
- *John Harun Mwau & Others v IEBC & Others Presidential Election Petitions 2 & 4 of 2017*
- *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others Nairobi Election Appeal 2 of 2018*
- *Raila Odinga & Anor v IEBC & 2 Others Presidential Election Petition 1 of 2017*

N. Withdrawal of a Petition and Substitution of a Petitioner

- *Adow Mohamed Abakar v Hon Mohamed Abdi Mohamed & 2 Others Nairobi Election Petition 3 of 2017*
- *Alfred Kiptoo Keter v Bernard Kibor Kitur & Independent Electoral & Boundaries Commission Election Appeal 21 of 2017*
- *Bariu M'Limunyi v IEBC & 2 Others Meru Election Petition 4 of 2017*
- *Bernard Kibor Kitur v Alfred Keter & IEBC Supreme Court Petition 27 of 2018*
- *Bernard Kibor Kitur v Alfred Kiptoo Keter & IEBC Eldoret High Court Election Petition 1 of 2017*
- *David K. Ole Nkedianye v Joseph Jama Ole Lenku & 4 Others Kajiado High Court Election Petition 2 of 2017*
- *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 Others Kerugoya Election Petition 4 of 2017*
- *James Karimi Karubiu v Kibiru Charles Reubenson & 2 Others Kerugoya Election Petition 3 of 2017*
- *James Kingangir Naikola v IEBC & Another Narok High Court Election Petition 5 of 2017*
- *Japhet Muroko and Another v IEBC & Others Nairobi Election Petition 23 of 2017*
- *Jimale Mohamed Abdullahi v IEBC & 2 Others Garissa Election Petition 8 of 2017*
- *Justine Chemtai & Another v. Winnie Atieno Nyabok & 2 Others Kimilili MCEP No. 2 of 2017*
- *Mohammed Ibrahim Abdi v IEBC and 2 Others Nairobi Election Petition No.7 of 2017*
- *Mohamed Mahamud Ali v Independent Electoral and Boundaries Commission & 2 Others Mombasa Election Petition 7 of 2017*
- *Mwamlole Tchappu Mbwana v Independent Electoral and Boundaries Commission & 7 Others Election Petition Appeal 4 of 2018*
- *Nathif Jama Adan v Ali Bunow Korane & 2 Others Garissa Election Petition 2 of 2017*
- *Ombati Richard v IEBC & 2 Others Kisii Election Petition 9 of 2017*
- *Peter Gatirau Munya v Independent Electoral and Boundaries Commission, Meru County Returning Officer & Kiraitu Murungi Meru Election Petition 6 of 2017*
- *Sammy Ndung'u Waitty & Another v. IEBC & 3 Others Nanyuki Election Petition 2 of 2017*

O. Scope of an Election Appeal

- *Alfred Kiptoo Keter v Bernard Kibor Kitur & Independent Electoral & Boundaries Commission Eldoret Election Appeal 21 of 2017*
- *Alfred Nganga Mutua & Anor v Wavinya Ndeti & Anor Supreme Court Petition 11 of 2018 as consolidated with Petition 14 of 2018*
- *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 Others Kisumu Election Petition Appeal 11 of 2018*
- *Bernard Kibor Kitur v Alfred Keter & IEBC Supreme Court Petition 27 of 2018*
- *Clement Kung'u Waibara v Annie Kibeh & Anor Supreme Court Petition 24 of 2018*
- *Cyprian Awiti & Another v IEBC & 3 Others Election Petition Appeal 5 of 2018*
- *Cyprian Awiti & Another v IEBC & 3 Others Supreme Court Petition 17 of 2018*
- *Hassan Aden Osman v The IEBC & 2 Others Election Petition Appeal No. 11 of 2018*
- *Joel Makori Onsando & 2 Others v IEBC & 3 Others Kisumu Election Petition Appeal 17 of 2018*
- *John Munuve Mati v RO Mwingi North & Others Nairobi Election Petition Appeal 5 of 2018*
- *Kitavi Sammy v IEBC & 2 Others Kitui Election Petition Appeal 3 of 2017*
- *Lesirma Simeon Saimanga v Independent Electoral and Boundaries Commission & 2 Others Nakuru Election Appeal (Application No 7 of 2018)*
- *Mawathe Julius Musili v IEBC & Another Supreme Court Petition 16 of 2018*
- *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others Nairobi Election Appeal 2 of 2018*
- *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others SC Petition 7 of 2018*
- *Musa Cherutich Sirma v IEBC & 2 Others Supreme Court Petition 13 of 2018*
- *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others Nairobi Election Appeal 18 of 2018*
- *Pius Yattani Wario v IEBC & Another Nairobi Election Petition Appeal No. 10 of 2018*
- *Stanley Muiruri Muthama v Rishad Hamid Ahmed & 2 Others Mombasa Election Petition Appeal No. 1 of 2018 as consolidated with Election Petition Appeal No. 3 of 2018*
- *Sumra Irshadali v IEBC & Another Nairobi Election Appeal 22 of 2018*
- *Timamy Issa Abdalla v IEBC & 3 Others Mombasa Election Appeal No. 4 of 2018*
- *Wavinya Ndeti & Another v Independent Electoral and Boundaries Commission & 2 Others Nairobi Election Appeal 8 of 2018*
- *Zebedeo John Opore v IEBC and 2 Others Supreme Court Election Petition 32 of 2018*

The cover depicts Kenyans of Maasai origin lining up at a poll station awaiting biometric registration in the run up to the 2017 elections. The 2017 elections marked a milestone in the Kenyan election jurisprudence. Despite inclusion of new interventions including a biometric voting system to ensure fair and transparent elections, the elections were characterised by social and political tensions and election disputes. Following the disputed presidential election results and consquent petition by the opposition, a decision by the Supreme Court of Kenya nullified the results for the first time in the Kenyan electoral history. Kenya became the fourth country in the world and first in Africa to annul a Presidential election through a Court process. Subsequently, a fresh presidential election was held, setting the country firmly on unchartered jurisprudential waters.

Picture by Winnie Kimani retreived from http://theelectionnetwork.com

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Kenya's National Civic Education Programme

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ISBN: 9966-958-55-x