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**KENYA HUMAN RIGHTS
COMMISSION**

From the Ballot Box to the Courts



A Case Digest on Post-2013 Election Petitions in Kenya

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ACRONYMS

DPP Director of Public Prosecutions

ECK Electoral Commission of Kenya

EACC Ethics and Anti-Corruption Commission

IEBC Independent Electoral and Boundaries Commission

IREC Independent Review Committee

KHRC Kenya Human Rights Commission

KNDR Kenya National Dialogue and Reconciliation

MCA Member of the County Assembly

PEV Post-Election Violence

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INTRODUCTION

The 2007 general elections marked a pivotal turning point in Kenya's history. The announcement of the presidential election results saw unprecedented violence and displacement occur around the country as a result of allegations that the then Electoral Commission of Kenya (ECK) had presided over a mismanaged and manipulated election. As a way out of the political crisis, the Kenya National Dialogue and Reconciliation (KNDR) was constituted as a mediation process presided over by an Eminent Panel of African Personalities chaired by H.E. Kofi Annan.

The KNDR yielded four agenda items for mediation and they entailed the following:

1. Immediate action to stop the Post-Election Violence (PEV) and restore fundamental right and freedoms;
2. Immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration;
3. How to overcome the political crisis; and
4. Address long-term issues and solutions.

The Independent Review Committee (IREC) commonly known as the Kriegler Commission, was constituted within agenda item 3 to conduct a forensic audit of the 2007 elections and with making recommendations towards improving the normative and institutional frameworks of Kenya's electoral system. The Kriegler Commission in its final report called for the entire overhaul of Kenya's electoral system with a raft of recommendations in relation to constitutional, legislative, institutional and procedural reforms. These recommendations would subsequently be effected in the constitutional reform process that yielded our current Constitution promulgated on August 27, 2010. The establishment of the Independent Electoral and Boundaries Commission (IEBC) and a series of laws enacted to reflect further reforms were also recommended. These measures were to be supplemented by a similar overhaul to the judiciary that had been equally indicted as being incapable of being an impartial arbiter of electoral disputes.

Reforms in the judiciary have been ushered in through constitutional reform that among other things establishes the Supreme Court of Kenya and provides for the vetting of Judges and Magistrates. The Supreme Court also now possesses exclusive jurisdiction over petitions challenging the validity of a Presidential election.

While a series of by-elections and the referendum for the enactment of the current Constitution had taken place post-2008, the extent and efficacy of Kenya's electoral reforms would only be truly tested by the 2013 general elections. The 2013 elections while being reputed by most observers to be peaceful and credible was characterized by disputes at various stages and most notably at the highest level when a petition was filed at the Supreme Court challenging the results of the Presidential elections. As a positive indicator of progress since 2008, the post-2013 environment was not characterized by a similar scale of violence in the midst of disputed electoral outcomes. Instead, the Kenyan judiciary was confronted with an unprecedented number of election petitions. Reflections on the outcome of these petitions has however been varied; some have hailed the courts as fair and impartial while others have decried failures in justice occasioned by a reluctant bench and inhibitive procedures.

This digest seeks to ascertain the true extent of the progress made in Kenya's electoral reforms in as far as electoral dispute resolution is concerned. While it does not devote itself to extensively analyzing the organizational structure of the IEBC and Judiciary, it considers how electoral dispute resolution has been undertaken under the new legal and institutional order. It does so by considering various aspects of the dispute resolution process and highlighting jurisprudence emerging from the interpretation of the legal framework on electoral dispute resolution.

It is expected that this analysis will be valuable to various stakeholders in improving the electoral system further and thereby enhancing the constitutionally safeguarded right to free fair and regular elections.

EXECUTIVE SUMMARY

This case digest discusses Kenya framework on electoral dispute resolution through the prism of jurisprudence as it relates to the interpretation of applicable legislation and the actions of the institutions entrusted with this mandate. It contains a review of relevant constitutional provisions and laws along with a collection of election petitions and other cases of significance that were filed following the March 2013 elections. It is divided into four main parts as follows:

1. Constitutional framework
2. Legislative framework
3. Thematic Consideration of Jurisprudence (Restated and emerging)
4. Case summary: Significant decisions.

The section on the constitutional framework outlines the operating environment for electoral dispute resolution prior to and after the promulgation of the 2010 Constitution. It discusses the content, scope and limitations of political rights as defined by Article 38 of the Constitution. It focuses on the normative and institutional guidelines provided for with regard to election dispute resolution. From this section, it becomes clear that the current constitution has introduced major advancements to the realization of free and fair elections along with the resolution of electoral disputes. This framework is however not self-enforcing; sound legislation that mechanizes constitutional standards and ideals must go hand in hand with institutional effectiveness if the electoral system is to truly succeed.

The section on the legislative framework reviews legislation related to the electoral process with a particular emphasis on electoral dispute resolution. The laws discussed in detail include the Political Parties Act, of 2011, the Elections Act of 2011 and the Supreme Court Act of 2011. It highlights the roles of institutions in electoral dispute resolution. Some of the institutions discussed include the IEBC, political parties, the Political Parties Tribunal and the Judiciary. Jurisdiction and procedures for electoral dispute resolution as outlined in various pieces of legislation are discussed with highlights of instances where judicial interpretation has

been called upon to clarify the application of the law. In this regard, the section relies on jurisprudence to discuss aspects such as: the resolution of nomination disputes; the delineation between the jurisdiction of the IEBC and the courts; the delineation of jurisdiction within the courts' hierarchy; the security for costs and apportionment of costs in an election petition; and the invalidation of electoral results. These issues call for a deeper reflection on the extent to which institutions such as the IEBC and the Political Parties Tribunal have utilized or exercised their mandate with regard to electoral dispute resolution; and whether their capacities can be enhanced to deflate the pressure currently placed on the courts to resolve these disputes.

The section on thematic consideration of jurisprudence reflects on the centrality of the Supreme Court in charting the jurisprudence of election petitions. It outlines how the court's decisions have set the standards on the following thematic issues: timelines with regard to filing a petition and the introduction of evidence; the jurisdictional limits of election courts; the evidentiary threshold for the nullification of an election outcome; what constitutes a voters' register; and the distinction between spoilt votes, rejected votes and votes cast along with their impact on the vote tally calculation for an election. It is however noted that the decisions of the Supreme Court has occasioned a significant dissonance with a section of lawyers, scholars, civil society and even between the Supreme Court and the Court of Appeal. There is need for sustained multi-stakeholder dialogues to establish whether some of the issues that remain contested can be resolved through institutional and/or legislative reforms and that such a process is inclusive and participatory if it is to yield lasting consensus.

The digest concludes with a case summary section consisting of significant decisions from election petitions. These cases are discussed from the perspective of the issues up for determination, the facts of the case, the law as applied (*ratio decidendi*) and additional opinions of the court (*obiter dicta*).

PART I

CONSTITUTIONAL FRAMEWORK

I.1. Pre-2010 position

Prior to 2010, the Constitution did not provide for an elaborate elections management process and system. Courts under it also lacked institutional and individual independence that could position them to address grievances arising from the electoral system. The system further suffered from the inadequacies emanating from the absence of standards on enforcement of the already deficient framework. For instance, the right to vote was not presented explicitly as a single standing right and the related State obligations were also not clearly spelt out. The right to form a political party or to participate in its activities was also not recognized as a single standing right as is the case in the 2010 Constitution. Rather, it was exercised as part of the right to the freedom of association. This freedom was mentioned under *section 70* but specifically recognized under *section 80*. *Section 70* was the preamble section to the bill of rights and basically qualified rights in that it provided that rights, including the freedom of association, were to be exercised subject to respect of the rights of others and to public interest.

In term of institutions, the repealed constitution did not provide for an elaborate electoral system. There was also no elaborate dispute resolution mechanism. The general framework for elections and dispute resolution had been set out in the *National Assembly and Presidential Elections Act*,¹ which provided for both registration of electors, holding of elections and the conduct of the then Electoral Commission. The ECK had been established under section 41 but its functions prescribed under section 42 A in the following manner:

- (a) the registration of voters and the maintenance and revision of the register of voters;
- (b) directing and supervising the Presidential, National Assembly and local government elections;
- (c) promoting free and fair elections;

¹ Cap 7.

- (d) promoting voter education throughout Kenya; and
- (e) such other functions as may be prescribed by law.

A reading of section 42 A does not elaborate on how the electoral body was to facilitate dispute resolution. Many elections related disputes would arise in the context of nominations but would not be resolved.²

Resolution of electoral disputes, whether relating to election of the President or Members of the National Assembly was a preserve of the High Court which was vested with the jurisdiction to hear and determine election disputes.³ With respect to presidential elections, no timeline was set as to when the dispute would be heard and determined. Such a petition would follow the appellate system if a party to the High Court case was dissatisfied with the outcome of the Court. As a result, an appeal could take as long as two years.

It is against this backdrop that a new Constitution was enacted. It attempted to address the maladies in the erstwhile regime and as is evident, many disputes were referred to court for their resolution in 2013, than at any other time in Kenyan history.

1.2. Constitution of Kenya, 2010

Given the history of Kenya that depicts a suppression of political rights, it was expected that the 2010 Constitution would create an ornate electoral system and in so doing also provide a structure for electoral dispute resolution. The 2010 Constitution did however go beyond this expectation. First, it introduced a justiciable ‘...right to make political choices.’⁴ As mentioned, this right had not been set out as a single standing right in the repealed constitution.

1.2.1 The right to make political choices

² See Justice Kimondo, *Stephen Kariuki v George Mike Wanjohi*, Petition No. 2 of 2013.

³ Sections 10 and 44, Constitution of Kenya (repealed).

⁴ Constitution of Kenya 2010, article 38. The term political rights are often associated with the ‘International Covenant on Civil and Political Rights, 1966.’ Article 25 which evinces political rights akin to the contents of article 38 right provides as follows:

‘Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c)’

In its preamble, the 2010 Constitution recognises democracy as an “essential value” and asserts that Kenyans have a right to determine the form of governance of the country.⁵ Certainly, representative democracy can have no meaning if citizens do not participate in the processes that are the hall-marks of democracy: elections and plebiscites.. The Constitution, in recognising the essence of citizen participation in governance, sought to entrench, in the Bill of Rights, a class of rights titled ‘political rights’.

1.2.2 Content of “political rights”

The freedom to make political choices has been provided for in the Constitution to include the right to form, or participate in the formation of a political party, to participate in the activities of a political party, to participate in recruiting members into it, to campaign for that particular political party.⁶ The right to make political choices also includes the right to free and fair regular elections based on universal suffrage and the free expression of the will of the electors.⁷ Further in this respect, every citizen has the right without unreasonable restrictions to register as a voter and to vote either in an election or a referendum or to be a candidate in a political party or as an independent candidate.⁸

Most important also is that article 38 (1) right is couched in an inclusive rather than exclusive manner. The words used are “..., which includes the right...” This implies that the list provided under sub-articles (a), (b) and (c) is not an exhaustive list of the forms in which the freedom to make political choices can be exercised. This is consistent with article 19 (3) (b) of the Constitution which prohibits the exclusion of rights and fundamental freedoms not articulated within the Bill of Rights but are recognized or conferred by law. What this implies is that there can be other aspects of the right to make political choices that may not necessarily be manifest in article 38 of the Constitution.

1.2.3 Beneficiaries

⁵ *Constitution of Kenya*, 2010, preamble.

⁶ *Constitution of Kenya*, article 38.

⁷ *Ibid.*

⁸ *Ibid.*

Political rights can only be exercised by citizens.⁹ It has however been broadened. Under the erstwhile regime, prisoners were for instance not permitted to vote.¹⁰ This position now stands abolished.¹¹ The state has however grappled with the question of whether citizens in the diaspora are entitled to exercise this right.¹² A reading of the Constitution does not reveal any prohibition upon citizens on the exercise of this right. What emerges from this hesitation on the part of the state to facilitate the exercise of this right for Kenyan's in diaspora is that political rights are not mere negative rights. The state cites inability due to the heavy financial outlay that fulfilling political rights for Kenyan's in diaspora would require. For Kenyan's in diaspora thus, the political rights have been subjected to progressive realisation.

1.2.4 The right to vote

In Kenya just like in South Africa, it is the 'right to vote' aspect of 'political rights' that has however received judicial promotion than any other aspect. Ultimately, it is the end of political rights and through it, political choices are expressed. In the South African case of *Richter v Minister for Home Affairs & 2 Others*,¹³ the Constitutional Court of South Africa underscores the essence of this right thus:

“...the right to vote, and the exercise of it, is a crucial working part of our democracy. Without voters who want to vote, who will take the trouble to register, and to stand in queues...democracy itself will be imperiled. Each vote strengthens and invigorates our democracy...The moment of voting reminds us that both electors and elected bear civil responsibility arising out of our democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.”¹⁴

⁹ In the United States of America, the right of non-citizens has been a subject of contention. Certain states permit non-citizens to vote, others do not. At some point, the Supreme Court of the United States in the case of *Minor v Happersett* 88 US 162, (1874) did point out that “*citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote...*”

¹⁰ See Constitution of Kenya (repealed) section 43 (2) (b).

¹¹ *Kituo cha Sheria v Independent Electoral and Boundaries Commission & another* [2013] eKLR [Petition 574 of 2012](#).

¹² *New Vision Kenya (NVK Mageuzi) & 3 Others v Independent Electoral and Boundaries Commission & 8 Others* [2012] eKLR, Petition 331 of 2012.

¹³ (2009) ZACC 3, cited also by Justice Githua in the *Sarah Mwangudza Kai Case*.

¹⁴ (2009) ZACC 3 above.

This emphasis on the right to vote is not peculiar to South Africa, in the Kenyan case of *Stephen Kariuki v George Mike Wanjohi*,¹⁵ the court emphasized that political rights are underpinned by the franchise of the voter in regular elections. It then noted that the Constitution had provided the fundamental aspects of a free, fair and transparent and credible poll. This can also be inferred from the decision of Githua J, who notes concerning political rights that:

the importance of the right to vote in a democratic form of government like the one we have in Kenya cannot be gainsaid. It is the bedrock of democratic governance and unless there are exceptional circumstances that do not permit the exercise of that right, it is a right that must be safeguarded and jealously protected by the Courts.¹⁶

The fact that judges have made specific pronouncements on this aspect of the right does not however mean that the right to vote is more important than any other aspect of the right to make political choices. They are interrelated and where one is fettered, all are fettered.

1.2.5 Limitations on the right to make political choices

The right to make political choices is undoubtedly not an absolute right. One of its limitations is that it only be exercised by citizens.¹⁷ It is subject to limitations which must be strictly in accordance with article 24 of the Constitution. In particular, the right can be limited only by law and to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom taking into account all factors which may include the nature of the right, the importance of the limitation, the nature and extent of the limitation, the need to ensure that the enjoyment of rights and freedoms does not prejudice the rights and freedoms of others, the relation between the purpose of the limitation and whether there is a least restrictive mean of achieving the sought.

Indeed, under article 83, the right to register as a voter has been limited in that only persons of sound mind and those who have not been convicted of an election offence are eligible to register as voters. In the *Stephen Kariuki case*, Kimondo J did note also concerning this right

¹⁵ Election Case No. 2 of 2013.

¹⁶ *Sarah Mwangudza Kai v Mustafa Idd & 2 others*, Election Petition No. 8 of 2013 [2013] eKLR

¹⁷ See *Kituo cha Sheria v John Ndirangu*, Election Petition No. 8 of 2013.

that “although in ideal circumstances all registered voters should be able to cast their vote for their preferred candidates without any impediments truth of the matter is that in reality, it is impossible to attain 100% voter turnout in any election and that is why democracy is predicated upon the will of the majority...”¹⁸ Granted, the Judge argued, that while some voters may have been prevented from voting by concerns for their safety, the truth is that there may have been others who for personal and other reasons purely unrelated to the insecurity chose not to cast their vote.

1.3 Free and fair elections

Most of the petitions filed impugned the elections for not being ‘free and fair.’ This is a constitutional requirement on the threshold of elections. Kenyan Courts in most of their decisions cite the Ugandan case of *Rtd. Col. Kizza Besidge v Electoral Commission, Yoweri Kaguta Museveni*¹⁹ in which the Ugandan Supreme Court in addressing free and fair elections held that:

To ensure that elections are free and fair there should be sufficient time given for all the stages of the elections, nomination campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials. There must be a leveling of the grounds so that the incumbent or Government Ministers and officials do not have an unfair advantage. The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people. The election law and guidelines for those participating in elections should be made and published in good time. Fairness and transparency must be adhered to in all stages of electoral process. Those who commit electoral offences or otherwise subvert the electoral process should be subjected to severe sanctions. The Electoral Commission must consider and determine election disputes speedily and fairly.²⁰

¹⁸ *Stephen Kariuki v George Mike Wanjohi*, Petition No. 2 of 2013.

¹⁹ Election Petition No. 1 of 2006, [2007] UGSC 24.

²⁰ *Rtd. Co. Kizza Besidge Case*, above.

This rendition has been echoed in a number of Kenyan cases. In *Mwaudgza v Mustafa Idd & 2 Others*,²¹ Githua J mentioned that a free and fair election is one which is conducted in accordance with the constitutional principles enumerated under Article 81 of the Constitution. The judge then noted that the election must comply with the principle of universal suffrage based on the aspiration for fair representation and equality of vote. The casting of votes must, in Justice Githua's view, be by secret ballot, free from violence, intimidation, improper influence or corruption and must be conducted in a transparent, impartial, efficient and accountable manner by an independent body.

I.4 Representation of the people

Political rights are exemplified by a full chapter on representations of the people, Chapter 7. It sets out the electoral system and process.²² It also defines the principles that must be complied with by the electoral system. In particular it demands that the electoral process and system must at the very least:²³

- a. Recognise the freedom of citizens to exercise their right to make political choices as set out under article 38 of the Constitution.
- b. There is gender equity. In particular, it prescribes that the electorate process must ensure that not more than two thirds of members of elective bodies are of the same gender.
- c. There is a fair representation of persons with disability.
- d. There is universal suffrage based on fair representation and equality of vote.
- e. Free and fair elections that are by secret ballot, free from intimidation violence and improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral efficient, accurate and accountable manner.

Parliament is tasked with enactment of legislation that would provide amongst others for the delineation of electoral units, nomination of candidates, and continuous registration of citizens as voters, conduct of elections and referenda and progressive of registration of citizens living

²¹ Malindi, Election Petition No. 3 of 2013.

²² See *Constitution of Kenya*, articles 81 to 87.

²³ *Constitution of Kenya*, article 81.

outside Kenya.²⁴ Under the Constitution, the legislation to be enacted by Parliament is required to ensure that voting at every election is simple, transparent and that it takes into account the special needs of persons with disability and other persons or groups with special needs.²⁵

Article 38 is further amplified by article 83 that sets out the qualifications for registration as a voter. First the person must be an adult citizen.²⁶ Second, the person must not have been declared to be of an unsound mind.²⁷ It is worth noting that the Constitution does not specify the body vested with the competence of making the declaration of sanity/suitability. Third, the person must not have been convicted of an election offence within five years.²⁸ Further, the constitution stipulates that a citizen who is qualified as a voter can only register at one registration station. In this regard, the Constitution forbids denying an eligible voter of the right to vote or to stand for elections through administrative arrangements for registration of voters which are instead envisaged to facilitate the right to vote and stand for elections.²⁹ The IEBC has also been tasked with coming up with a code of conduct.³⁰ Under the Constitution, candidates including political parties are obligated to code of conduct prescribed by the electoral body.

Eligibility to stand as independent candidates is further explained by article 85 of the Constitution. Under that article, one qualifies to become an independent candidate if, first, he is not a member of a political party and has not been a member of the party for at least three months after elections, and further if he or she satisfies the requirements of article 99 [if he intends to contest for election in the National Assembly] and in the Senate or second, if he or she satisfies the requirements of 193 (1) (c) of the Constitution with regard to County Assemblies.³¹ Under section 99 (1) (c) of the Constitution, one could become eligible to contest as an independent candidate.

²⁴ *Constitution of Kenya*, article 82.

²⁵ *Constitution of Kenya*, article 82 (2).

²⁶ *Ibid*, art. 83 (1) (a).

²⁷ *Ibid*, art. 83 (1) (b).

²⁸ *Ibid*, art. 83 (1) (c).

²⁹ *Ibid*, art. 83 (2) & (3).

³⁰ *Ibid*, art. 84.

³¹ Generally, article 193 generally governs qualifications for elections as a member of county assembly.

Parliament was also tasked with passing of legislation regulating elections.³² It did this through the enactment of the Elections Act, 2011. This legislation sought to among other things; prescribe how voters would be registered, how nominations and elections are to be conducted, how an elected member would be recalled, what would constitute election offences and most importantly how disputes emanating from elections are to be resolved.³³ Justice Kimondo in the *Stephen Kariuki* case described the Elections Act as the ‘brainchild’ of article 82 (d) of the Constitution.³⁴ The Elections Act, 2011 is not the only instrument that regulates the conduct of elections and the resolution of attendant disputes. The Constitution vested exclusive jurisdictions on the Supreme Court to decide disputes concerning presidential elections. As such the Supreme Court Act as well as the regulations constitutes an integral part of Kenya’s electoral dispute resolution structure. They will be a subject of subsequent analysis.

I.5 Electoral Dispute Resolution

Various provisions set a framework for dispute resolution under the Constitution. Article 87 of the Constitution is titled, “*Elections disputes.*” It provides:³⁵

- (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
- (2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.
- (3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

The 2010 Constitution envisages that there can be disputes and has demanded that Parliament enacts a legislation providing for resolution of disputes.³⁶ The Constitution sets a standard for the legislation with regard to timely settlement of the disputes and thus requires that election

³² Constitution of Kenya, art. 82.

³³ See Elections Act, 2011 (preamble).

³⁴ Election Case No. 2 of 2013.

³⁵ Constitution of Kenya, art. 87.

³⁶ *Ibid*, art. 87 (1).

petitions be filed within a prescribed time.³⁷ It also provides specifically on the mode of service of elections. The constitutional requirement is that petitions may be served directly or through an advertisement in a newspaper with national circulation.

An electoral dispute resolution mechanism is meant to give effect to the right to make political choices. Justice Majanja noted in that regard that

‘[t]he principle bedrock principle of election dispute resolution is to ascertain the intention of the voter and give effect to it whenever possible.’³⁸

This essence of the electoral dispute resolution mechanism in giving effect to the right to make political choices was emphasized in the case of *Richard Nyagaka Tong’i v Independent Electoral & Boundaries Commission & 2 Others*, where the court noted:

In making its determination under article 105 of the Constitution, the election Court is enjoined to give effect to the will of the electors under article 38 of the Constitution. I consider that the corporate will of the people of Nyaribari Chache would understand that the constitution enjoins the electoral court, where the will is not verifiable because of the absence of vital documents of record, to take the safest way of re-establishing their will by repeat election. It is the lesser of the two evils, if the absence of the re-election is the continued representation without their consent by a member of National Assembly so declared in an unaccountable process as their ‘elected’ representative.

In the same breadth, the Court noted in the *Stephen Kariuki Case* that ‘the Court has to determine whether the poll and the declaration of the results was free and fair, transparent and administered in a neutral and accountable manner.’

What the 2010 Constitution does is to establish the broad framework for resolution of electoral disputes. It also gives the normative content for how such disputes are to be resolved. It specifically mentions the role of the Supreme Court as well as that of the High Court and the

³⁷ Ibid, art. 87 (1) & (3).

³⁸ See, the *Kalembe Ndile Case*, High Court at Machakos, Petition No. 1 consolidated with petition No 7 of 2013.

IEBC in dispute resolution. The jurisdiction of the Supreme Court to hear election disputes is set out under as follows:

163. (3) The Supreme Court shall have—

(a) Exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140;

What this means for electoral disputes is that it augments the need that presidential election disputes be resolved expeditiously. It is not required that a case should be filed in the High Court as had been the procedure in the erstwhile regime.³⁹ In fact, the Constitution suspends the swearing of the president pending the hearing and determination of the petition challenging a presidential election. Article 140 of the Constitution which concerns itself with the question as to the validity of presidential elections provides as follows:

140. (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

On the face of it, article 140 of the Constitution vests in every person the right to challenge the validity of a presidential election. There are however serious constraining factors towards realization of this provision. As shall be discussed the requirement for security for costs impedes to such a great extent, the ability of some category of persons to challenge a presidential election.

³⁹ The Court of Appeal was the court at the apex. It did not have original jurisdiction in respect of election disputes and an election petition would have to be filed in the High Court first. If a person was aggrieved with the High Court decision he or she had then to appeal against that decision. This certainly implicated on the duration that court would take to resolve electoral disputes.

The Constitution is keen on expediency. It requires election petitions to be determined within a short period of time.⁴⁰ For that reason, it requires that a petition on the validity of a presidential election be filed within no more than seven days and its determination within fourteen days.⁴¹ Article 105 (1) of the Constitution vests in the High Court the jurisdiction to hear electoral disputes in the following way:

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

There is no jurisdictional departure from the previous arrangements given that in both cases, the High Court is still vested with the authority to determine the question as to the validity of an election for members of parliament. The only difference is that in the former, no time frame had been fixed within which the dispute was to be resolved. In the past, there was no six months limitation period as is the case in the present regime. Unlike presidential elections disputes, one would still be sworn as a member of parliament before the petition can be determined.

1.6 The Independent Electoral and Boundaries Commission (IEBC)

Article 88 of the Constitution establishes the IEBC. It is one of the institutions that have been established by the Constitution to midwife representative democracy. The Commission is, as would be deduced from its name, expected to be independent and impartial.

The IEBC's role in dispute resolution is set out under section 88 (4) as follows:

- (4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

⁴⁰ Constitution of Kenya, art. 140 (2).

⁴¹ *Ibid.*

(a)

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

The Constitution thus vests in the IEBC the authority to settle some electoral disputes. The particular disputes are those that arise before election results are declared. This is an expansive jurisdiction. In support of this authority, courts have been hesitant to assume jurisdiction on matters that fall under the IEBC's dispute resolution ambit. Such hesitation when exercised out of context may however lead to some level of injustice. What happens where a question relating to a violation of article 38 rights arises? Is the electoral body competent to give any of the reliefs available at article 22 of the Bill of Rights? If not, should there be a bar to concurrent proceedings before the High Court seeking to enforce an article 38 right even if it is under the purview of the electoral body?

1.7 Conclusion

The constitutional framework meant to ensure free and fair elections and resolution of electoral disputes is fairly elaborate. The standards that these frameworks set are however not self-enforcing. The mere fact also that institutions have been established does not mean that the standards will be enforced. Institutional effectiveness is dictated by a number of factors including the legislative framework that is intended at mechanizing these constitutional standards and ideals. The next segment of the digest thus considers the legislative framework on the electoral process with a bias on electoral dispute resolution.

PART II

LEGISLATIVE FRAMEWORK

2.1. Introduction

The 2010 Constitution required parliament to ‘enact legislation to establish mechanisms for timely settling of electoral disputes.’⁴² There is no specific legislation that singularly devotes itself to electoral dispute resolution. Dispute resolution has been weaved in some legislation that guides institutions in dispute resolution. The prominent of these legislations are:

- (a) *Political Parties Act, 2011*.
- (b) *Elections Act, 2011*; and
- (c) *Supreme Court Act*;

⁴² Constitution, Article 87

This list is not exhaustive. There are other laws that have a bearing on elections. These include the, *Independent Electoral and Boundaries Commission Act*,⁴³ *County Government Act, 2012*⁴⁴ and the *National Cohesion and Integration Act*.⁴⁵ Some of these legislations are discussed hereunder.

2.1.1 Political Parties Act, 2011

According to the Constitution, the right to make political choices is to be exercised in relation to political parties.⁴⁶ This is because the freedom to make political choices entails the right to form, or participate in the formation of a political party, to participate in the activities of a political party and in recruitment of members and to campaign for a political cause.⁴⁷ In the case of *Political parties Forum Coalition & Others v Office of the Registrar of Political Parties & Others* the court observed this concerning political parties:

‘In view of the importance attached to political parties, article 91 of the Constitution provides for the Organization and essential elements of political parties...’⁴⁸

Given the centrality political parties and their position as vehicles through which political rights are exercised, a framework has been set within the Political Parties Act to facilitate dispute resolution. This framework is respected and courts have declined to assume jurisdiction over cases that fall within the purview of the dispute resolution organs in the Political Parties Act or the IEBC.⁴⁹ Ongudi J. noted in this regard that:

The Political Parties Act and the Elections Act provide for an elaborate procedure of dealing with disputes arising from the Nomination Process. That procedure ought to have been followed and exhausted especially where the Petitioners had already presented their grievance to The Independent Electoral and Boundaries Commission Tribunal.⁵⁰

⁴³ Act 9 of 2011.

⁴⁴ Act 17 of 2012.

⁴⁵ Act No. 12 of 2008

⁴⁶ Constitution, art. 38 (1)

⁴⁷ Ibid.

⁴⁸ Petition No. 436 of 2013, eKLR

⁴⁹ In the case of *Thomas Mulinda Musau & Others v Independent Electoral & Boundaries Commission & 2 Others*, Petition No.3 of 2013 for instance, an allegation was made that the register was in the presidential ballot boxes. The court mentioned in this regard that, ‘...Due to lack of jurisdiction on the part of this court, it could not be assessed...’

⁵⁰ *Wachira Martin Ngiri & 3 others v Independent Electoral and Boundaries Commission & 5 others* [2013] eKLR.

The Act therefore has ‘internal’ remedies that should be exhausted before recourse is made to the courts for disputes that fall under them. This framework is provided for under Part V of the Political Parties Act. This Act vests in two institutions, the responsibility of determining electoral disputes and they are: The Political Parties Tribunal and the Office of the Registrar. Under section 34 the Registrar has the powers to investigate complaints. Section 40 on the other hand describes the authority of the Political Parties Tribunal. Under that section, the tribunal is mandated to determine disputes between members of a political party, a member of a political party and a political party, political parties, coalition partners and appeals from the registrar.

The Act does contemplate that political parties have some internal dispute resolution mechanisms through which disputes regarding membership to political party can be resolved. If a dispute therefore arose regarding membership then it would have to be resolved either by the political party or by the tribunal.

If a member of a political party is aggrieved by actions within the political party, he or she could apply to the Registrar for Investigations or to the Tribunal. The High Court has appellate jurisdictions over such disputes such that if one is aggrieved by a decision of the Tribunal, he or she could appeal to the High Court on matters facts and the law and further, an appeal could lie from such a decision on matters of law to the Court of Appeal and ultimately to the Supreme Court.⁵¹ However, not every dispute on matters of law is appealable to the Supreme Court. An appeal can only be made to the Supreme Court under Article 163(4) of the Constitution where questions of constitutional interpretation arise or where an electoral dispute is certified as raising issues of general public importance.⁵² The Act requires that such disputes before the tribunal be resolved expeditiously and its orders are to be treated as though they were orders of a magistrate court. Certainly there is no logic for the lower status that is given to the

⁵¹ *Political Parties Act*, section 41 (2).

⁵² *Fredrick Otieno Outa v Jared Odoyo Okello & 3 Others*, Civil Application No. 10 of 2014 para 34.

political party's tribunal considering that the chair of the tribunal is qualified as a judge of the High Court.⁵³

2.1.2 Elections Act, 2011

This is the main legislation that governs the electoral process including dispute resolution. Its preamble sums up its core position not only in directing the conduct of the electoral process but also resolution of election disputes in the following manner:

AN ACT of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purpose.

The Act essentially sets out the substantive rules for resolution of disputes as well as the procedure. Part II of the Act provides the framework for registration of voters and determination of disputes relating to registration. A person who has been registered as a voter can submit a claim to a magistrate on questions of fact and to the High Court on questions of law if his name is not in the register.⁵⁴ What that part fails to do however is to say what an individual is to do in the event such registration is refused. What the part envisages as a claim is what arises as a result of a name not being in the register.

Though impeachment is envisaged under the constitution, it is Part IV of the Elections Act that makes provision for recall of a Member of Parliament. It sets out the substantive grounds for such a recall but most importantly, vests in the High Court the jurisdiction to consider the grounds for removal. It is the High Court that is to make an assessment of whether the requirements set out in section 45 (2) have been met or not. That provision sets out the requirements which are whether the member has violated the provisions of Chapter Six of the Constitution, mismanaged public resources or is convicted of an offence. This process must not however have been initiated by a person who unsuccessfully contested for the seat in

⁵³ See *Political Parties Act*, section 37 (4).

⁵⁴ Elections Act, section 5.

contention. The mischief here is that collateral attacks can be made by an unsuccessful challenger beyond filing a petition challenging the elections.

2.1.2.1 Election offenses

The most relevant part of the Elections Act in so far as electoral dispute resolution is concerned is part VI of the Act. It is the section that sets out election offenses. Most, if not all, petitions that were filed challenging the validity elections cited election offences. The Act classifies offences relating to voters and voters cards,⁵⁵ those relating to multiple registration,⁵⁶ those relating to voting, relating to the conduct of members and staff of the IEBC in the conduct of the elections, personation, treating, undue influence, voter bribery, offences relating to the conduct of elections, what are referred to as 'illegal practices', use of force or violence during the election period and on the use of national security organs.

2.1.2.2 Election Disputes resolution

The part that is of most relevance to election disputes is part VII of the Elections Act. It is specifically titled 'Election Disputes Resolution'. Under this section, a seemingly elaborate structure has been put in place for resolution of electoral disputes which includes a procedure for resolution of disputes arising from referendums and elections. It is section 74 (1) that particularly vests in the IEBC the authority to settle disputes relating to nominations. It also caps the timelines for determination of such disputes to be seven days and requires that it should be resolved before elections.

This is a new legislative development. Prior to 2010, a person aggrieved by the nominations process had no elaborate reliefs from any institution. He or she had to wait and file a petition after the elections. Salient to illustrate this pre-2010 position is the case of *Daniel Arap Moi v John Harun Mwau*.⁵⁷ Justice Kimondo noted in the case of *Stephen Kariuki v George Mike Wanjohi* that 'a lot of water has since flowed under the bridge' in that the Commission now has the power to resolve certain disputes such as nomination of candidates. The judge observed that the Commission (in view of article 88 (4)(e) of the Constitution) has the power to settle

⁵⁵ Elections Act, 2011, section 55.

⁵⁶ Ibid 57.

⁵⁷ Nairobi, Court of Appeal, Civil Appeal 131 of 1994

electoral disputes excluding election petitions and disputes subsequent to the declaration of election results. The term, dispute has not been defined in the Elections Act.⁵⁸

The impression created by this section is that once a matter concerns nominations, it is not to be determined by the High Court. The Court considered this position in the *Kituo cha Sheria v John Ndirangu Kariuki & Another*⁵⁹ case which concerned a challenge to and subsequent election of the respondent. The Court in that case emphasized that there are various independent state actors and institutions with jurisdiction to settle nomination disputes. It listed the IEBC and the Ethics and Anti-Corruption Commission (EACC) as the ones that are mandated to address nomination disputes. That is not however to suggest that the High Court has no role in resolution of nomination disputes. In the *Kituo Cha Sheria case*, the court noted that where for instance, by negligence or otherwise, a non-citizen was nominated for elections and elected, the court would intervene to 'right the wrong.' In yet another case of *Luka Lubwayo & Another v Gerald Otieno Kajwang & Another*, the court also noted that where the IEBC had failed to exercise its mandate under the statute, the High Court could intervene.⁶⁰

An interesting question was posed for the Court's determination in the case of *Karanja Kabage v Joseph Kiambegu Nganga & 2 others*⁶¹ regarding the role of the IEBC in dispute resolution. In the event of a malpractice or potential breach of the electoral law and the complaint is not addressed by the electoral body, such that primary elections are held without the complaint having been adequately addressed, could a candidate's remedy lie with the election court? The Court, in answering this question highlighted the role of the IEBC noting:

...in a case where there was a 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 had to consider these proceedings in determining the validity of election of the candidate...

⁵⁸ A number of disputes have been filed challenging IEBC nomination dispute decisions. These include, *Republic v IEBC Nomination Dispute Resolution Committee & another Ex-Parte Jane Ochieng' Mkholi* [2013] eKLR; *Beatrice Nyaboke Oisebe v Independent Electoral and Boundaries Commission 2 others* [2013] eKLR

⁵⁹ Election Petition No. 8 of 2003

⁶⁰ Petition 120 of 2013 [2013]

⁶¹ High Court at Nakuru, Election Petition No. 12 of 2013 [2013]eKLR.

It however cautioned that in so doing, the court should not usurp the powers of the Returning Officer and the IEBC.”⁶² Citing the case of *Republic v The Independent Electoral & Boundaries Commission Ex Parte Charles Odari Chebet*⁶³ the Court further noted that where a matter is raised in an election petition filed after the declaration of the results and the matter is one which should, properly have been raised earlier for the determination by another body, then the court lacks jurisdiction to determine the matter in the course of an Election Petition. The only exception to that rule, the court explained, 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 Commission, the Court would interfere with the wrong on grounds of illegality. In the case of *Charles Odari Chebet*, cited in the *Karanja Kabaje Case*, the Court had rendered itself that:

...my understanding of Article 88 (4) of the Constitution and Section 74 of the Elections Act (in its entirety) is that any dispute relating to nominations to any electoral post are required to be determined within a prescribed time and those relating to nominations of candidates should be determined before the date of the nomination or elections whichever is applicable. Clearly because of the limited time spans for the determination of nomination disputes, political party nominations needed to be done well before the nomination dates to the Returning Officer/Electoral Bodies. As this did not happen the aggrieved candidate must live with the choices of the Electoral mandarins...⁶⁴

The Court in the *Kabaje Case* then proceeded to hold that where there is a clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes, the court’s jurisdiction is precluded. The Court’s jurisdiction would only arise after due exercise by the mandated bodies, the Returning Officer and the Commission.

But when does the court assume jurisdiction over a matter? The Supreme Court in *Hassan Ali Joho and Another v Suleiman Said Shabal and 2 others*⁶⁵ held that the declaration of the electoral results marks the end of the electoral process. The court stated that ‘by affirming and declaring the election results which could not be altered or disturbed by any authority.’ Thus upon the

⁶² Stephen Kariuki case.
⁶³ JR App. No. 3 of 2013.
⁶⁴ *Stephen Kariuki Case*.
⁶⁵ Petition No. 10 of 2013

issuance of Forms 35 to 38 which constitute the final declaration of results by the returning officer, the IEBC becomes *functus officio* and any dispute can only be resolved by the election court.⁶⁶

The power that magistrates have to determine questions of validity of elections at the county level arises from section 75 of the Act. A question as to validity of an election of a county governor is, according to this section to be determined by the High Court station within the county or nearest to the county. A resident magistrate has been given the jurisdiction to consider disputes challenging the validity of election of a Member of the County Assembly (MCA). The question that poses a concern however is the availability of High Court stations in certain areas particularly in Northern Kenya. High Court stations in the region are at Garissa, Kitale and now Turkana. They are intended to serve a vast area and considering accessibility problems associated with poor roads in Northern Kenya, it is almost impracticable for people to make use of the provided mechanisms. In terms of that section also, such questions must be heard and determined within six months from the date of lodging the petition.⁶⁷

The Act sets different dates that the petitions are to be presented. A petition which either seeks to question the validity of an election or which seeks to declare a seat in parliament or county assembly vacant should be presented within twenty eight (28) days either after the date of the publication of the results or after the date of notification of the vacancy as the case may be.⁶⁸ A petition questioning a return or an election on the ground of a corrupt practice, and specifically one that claims a payment of money must be filed twenty eight days. In terms of the *Elections Act* also, a petition that seeks to question a return or an election upon a claim of an illegal practice and alleging a payment of money must also be filed at any time within twenty-eight days after the publication of the election results in the Gazette. Under the Act also, a petition that is filed in time could also be amended with the leave of court and a supplementary petition could also be introduced.

A petition that questions the validity of elections must be served within fifteen days of presentation. However, a petition that seeks to declare that a seat in parliament has become

⁶⁶ *Steven Kariuki v George Mike Wanjohi and 2 others*, Civil Appeal No. 272 of 2013.

⁶⁷ Elections Act, Section 75

⁶⁸ *Ibid*, section 76.

vacant could be presented at any time. The court expounded on this requirement in the case of *Caroline Mwelu Mwandiku v Patrick Mweu Musimba & 2 others* where it held that:

... Parliament must have intended that the twenty-eight day period must begin to run from the time the results are published in the Gazette of the 13th March 2013 as opposed to the 'announcement' by the returning officer. A contrary reading would imply and inject contradiction in the sections of the Act specifically section 76 and other provisions such as the section 77 of the Act.⁶⁹

This judgment explains section 77 of the Act which provides that a petition challenging an election (other than that of the president) should be filed within 28 days from the date when the commission announces the results. One of the issues that many petitions raised concerned service. Service had a decisive impact in the former regime. Petitions would be struck out for want of proper service even when it was impracticable to effect service. It is for that reason that the Constitution sought to specifically address the issue by noting that service could be effected not only through personal service. Previously, where a document had not been properly served as envisaged, the petition would be dismissed. In the case of *Chelaite v Njuki & Others* Justice Pall had held:

Once an election court is satisfied that due to failure to serve the petition within the time prescribed by the law, the petition has become a nullity, it surely has the power to strike it down without any more ado.⁷⁰

Despite this seemingly clear new position, there have still been disputes on the issue of service. In the case of *Rozaah Akinyi Buyu v Independent Electoral and Bounderies Commission & 2 Others*⁷¹ one of the respondents had observed that they received the pleadings from the head office while another respondent argued that the petition had just been dumped in his law firm which he had apparently not visited for many months. As noted, the initial position as is demonstrate from the case of *Kibaki v Moi* case is that service of the petition had to be effected only through direct service. Section 77(2) of the Elections Act did however envisage a situation where the

⁶⁹ [2013] eKLR
⁷⁰ (1999-2009) IEAGR 34.
⁷¹ Petition No. 40 of 2013 [2014] e KLR.

petition could be served in two major ways; through direct service or through a newspaper of national circulation.

Even though service can be through a newspaper, courts have reasoned that a notification of the petition cannot be service. In the *Rozaah Akinyi Case*, the court observed:

[o]n perusal of the newspaper advertisement by the Petitioner the same in my considered opinion is not an advertisement as envisaged by the above quoted rules. What is exhibited is a notification to the parties that the petition was served upon them and the documents are in their respective offices.⁷²

2.1.2.3 Security for costs

The Act also requires payment of security for costs as a prerequisite for the hearing of petitions. When challenging a presidential election, one could deposit as much as one million Kenya shillings, while when challenging an election of a Member of Parliament or a governor, one could pay five hundred thousand Kenya shillings and when challenging an election of a county one could pay one hundred thousand Kenya shillings.⁷³ No proceedings may go on or the respondent can even apply and have the petition dismissed in the event security for costs is not paid. Such security can also be released just after the hearing of all the parties.

It is arguable that the requirement for security for costs has a secluding effect on some members of the society in that those without money are effectively restrained from prosecuting petitions. Indeed elections concern the public; costs must be minimal to encourage such litigation. Despite this seemingly desirable position, there are numerous examples where petitions were dismissed for failure to deposit security for costs. In the case of *Said Buya Hiribae v Hassan Dukicha Abdi & 2 Others*⁷⁴ for instance, the petition was dismissed partly because the petition was not served and the security for costs had not been deposited as required under section 78. In *Simon Kiprono Sang v Zakayo K. Cheruyot & 2 Others*⁷⁵ a respondent contended that the Petitioner should not be given audience partly because he had not deposited security. Justice Wendoh explained the rationale for depositing security for costs noting that

⁷² Ibid.

⁷³ Elections Act, section 93.

⁷⁴ Mombasa, Election Petition 7 of 2013.

⁷⁵ Election Petition 1 of 2013.

Depositing the security was to ensure that access to justice is regulated and that the Courts are insulated against abuse of court process by all manner of petitioners and vexatious litigants since every voter has a right to come to court. It also helps to protect the respondent's right to costs in the event the petition is not successful⁷⁶

This rationale obtains from common law. In the case of *Hon. Johnson Muthama v Minister of Justice and Constitutional Affairs & Others*,⁷⁷ the court had noted concerning security for costs that:

Provision of payment of costs by a party coming before the Court does not in my view, violate any provision of the constitution. It is a common practice in civil proceedings intended to safeguard the interest of the party against who a claim is brought and to prevent abuse of the court process. Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.⁷⁸

Justice Wendoh in the case of *Simon Kiprono v Zakayo K. Cheruyoit & 2 Others*⁷⁹ cited section 78 (3) noting that failure to comply with the requirement for security for costs bars the court from proceeding with the petition.

2.1.2.4 Preliminary assessment of petitions

The Election Court has been granted powers under section 77 to consider petitions before hearing them. If the Election Court is of the opinion that there are no sufficient grounds to justify the grant of the reliefs sought, it can summarily dismiss the petition. In order to perform their functions effectually, the election court has been given immense powers which include the power to:

- (i) Summon and swear witnesses the same way a court exercising civil or criminal jurisdiction would and impose penalties for false evidence;
- (ii) Compel the attendance of a witness;

⁷⁶

Ibid.

⁷⁷

Petition No. 198 of 2011

⁷⁸

[Petition Nos 198, 166 & 172 of 2011 \(Consolidated\)](#)

⁷⁹

Petition No. 1 of 2013, High Court of Nakuru

- (iii) Examine a witness who has been compelled to attend;
- (iv) Decide cases without undue regard to procedural technicalities; and
- (v) Punish, for contempt, those who refuse to attend when summoned.⁸⁰

All the interlocutory matters are determined by the Elections Court. After hearing the petition, the elections court has the powers to order that the Commission issues a certificate to the President, MCA or Member of Parliament if it establishes that either upon recount of the ballot cast the winner is apparent or the winner is found not to have committed an election offence. Under such circumstances, the Commission is required to notify the speaker of such a decision.

The Election Court has been granted quasi investigatory roles by the Act with regard to ordering a scrutiny of the votes. This can be done by the court either on its own motion or at the instance of application by a party to the proceedings.⁸¹ Section 82(3) provides that a vote cannot be struck off merely because the voter is or was not qualified to be registered. A vote can however be struck off if the voter has been convicted of an election offence or disqualified by reason of a report of an election court.

2.1.2.5 Declaration that an election is invalid

Section 83 of the Act is one of the most cited sections of the Elections Act. It states that if an election is to be invalidated, the irregularities must have affected the results of the elections. This means that even where the law has been contravened, the court will not nullify the election merely because of the contravention- if the outcome would not be affected. This is not a constitutional principle yet it appears that courts would give effect to it even where a provision of the constitution has been contravened. These principles had been used by the

⁸⁰ The Act prohibits disclosure of vote by providing under section 81 that a voter is not to be compelled to disclose the person they voted for in an election petition. This provision aims to safeguard the constitutional right to vote in a secret ballot.

⁸¹ Election Act, 2011, s 82. In so doing, section 82(2) of the Act limits the power of the court to strike off only the following votes (i) The vote of person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorised to vote at that station (ii) the vote of a person whose vote was procured by bribery, treating or undue influence (iii) the vote of a person who committed or procured the commission of personating at the election (iv) the vote of a person proved to have voted in more than one constituency (vi) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or (v) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

court in Kenya.⁸² It is however drawn from the English case *Morgan & Others v Simpson & Another*⁸³ a case in which the following principles were expounded:

- i. An Election Court is required to declare an election invalid; (a) if the irregularities in the conduct of the election had been such that it could not be said that the election had been conducted as to be substantially in accordance with law as to elections. (b) If the irregularities had affected the results. Accordingly, where breaches of the election rules although trivial, had affected the result that by itself was enough to compel the Court to declare the election void, even though it had been conducted substantially in accordance with the law as elections.
- ii. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated-irrespective of whether or not the result of the election had been affected.

The Supreme Court reiterated this principle in the case of *Raila Odinga v Uhuru Kenyatta & 3 others* in the following manner:

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 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 departure from the prescriptions of the law.⁸⁴

⁸² See e.g. the cases of *Munyao v Munene & Others* [2008] eKLR (EP) and *Ole Lempaka vs. Komen & Others* [2008] 2 KLR.

⁸³ [1974] 3 ALL ER, 722

⁸⁴ Election Petition No. 5 of 2013

The High Court explained the reason behind this provision in the case of *Stephen Kariuki v George Mike Wanjohi & Others*.⁸⁵ The court explained that this section has been couched in negative language to emphasize the caveat placed on the election court. The Court noted that there is a rebuttable presumption in favour of respondents that the elections are conducted properly and in accordance the law. The Court further noted that it is implied by that provision that elections are not always perfect. For that reason, this principle requires a petitioner to prove to the court not only the allegations of irregularities but also that the irregularities tainted the polls.⁸⁶

Noteworthy, the phrase ‘substantial manner’ is not contained in Kenya’s Election Act, which the Ugandan legislation uses. The Court in the case of *Rishad Hamid Ahmed Amana v Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR noted in this regard that:

Our section 83 of the Elections Act does not contain the words “substantial manner” unlike the Ugandan Act. However, this fact does not lessen the significance of what the Learned Supreme Court judge stated in the above decision. A petitioner is not only required to establish that there were irregularities which were committed during the elections; he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred to as the material test.

The Court in that case also noted that the Petitioner is required to establish that the errors and irregularities were occasioned by outright negligence or deliberate action on the part of the guilty party. Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court is mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty-six (hours) and therefore simple arithmetical mistakes are bound to happen.

⁸⁵ Election Case No. 2 of 2013

⁸⁶ See *Stephen Kariuki v George Mike Wanjohi & Others*, Election Case No. 2 of 2013.

The case of *Mbowe v Eliufoo*⁸⁷ is cited as the authority for the meaning of the phrase “affected the results”. The phrase is broader than merely bridging the gap between the leading candidates. The Court will invalidate an election if it leads to a change in the result unless the margin of differences is so big that despite a substantial reduction of the gap leaves the winning candidate still with a higher majority.

2.1.2.6 Costs in petitions

Section 84 addresses the issue of costs. Costs are a usual consequence in litigation. Whenever a defendant or respondent is dragged into costly litigation and the plaintiff or petitioner who instigates the litigation fails to establish a case, that person is often condemned to pay costs. Elections are to greater extent ‘public interest litigation’ and one would have expected that costs be minimal. Section 84 of the Elections Act provides, as is always the position in ordinary suits that costs are to follow the events. This means that the one who ‘wins’ is entitled to costs. Rule 36 (1) of the *Elections (Parliamentary and County Elections) Petition Rules 2013* does however grants the court powers to determine the costs to be paid and by whom. In particular, it provides that at the conclusion of an election petition, the Court is to make an order specifying the total amount of costs payable and the persons by whom and to whom the costs are to be paid.

The law therefore gives the courts the discretion to fix the amount of costs and there have been instances when the court orders payment of costs to one respondent and not the other (if they are more than two). In so doing, the Court sometimes considers factors such as the conduct of a party. In the *Stephen Kariuki Case* for instance, Kimondo J stated as follows in regard to costs:

The 2nd and 3rd respondents are not entitled to costs. They are largely the authors of the misfortune that befell the petitioner. I expressed displeasure with IEBC at paragraph 64, 68 and 84 of this judgment. The third respondent announced the petitioner as winner of the poll on premature and erroneous tallies. She granted him a certificate in form 38. She and the 2nd respondent cancelled it and issued a fresh certificate to the 1st respondent. The petition has

⁸⁷ [1967] EA 240

been lost but it does not wipe out the element of incompetence and inefficiency displayed by the returning officer in the execution of her core functions. Sadly, it did not end there. The 2nd and 3rd respondents filed and served responses to this petition and their witness statements out of time. The petitioner was magnanimous enough and by consent, the response and witness statement were attached to the record outside the prescribed time. I would have thought that once bitten twice shy. It was not to be. The learned counsel for the second and third respondents did not file or serve the written submissions within the time ordered by the Court. It was all very tardy. A pattern emerges of serious lapses and poor diligence. Granted all those circumstances, I would be unjust to condemn to pay the petitioner for costs for the second respondent. I order that the second respondent shall not get any costs.⁸⁸

In yet another case of *Sarah Mwangudza Kai*, the court noted concerning costs that:

Taking into account the input, level of research and effort made by each of the parties in the course of the hearing as well as the number of days taken to conclude the hearing, the costs are capped at maximum of Kshs. 2.5 million. Kshs. 1.5 million will be shared by the 2nd and 3rd respondents while the 1st respondent's costs will not exceed Kshs. 1 million.⁸⁹

The practice has therefore been to fix a maximum amount but then to remit the issue of costs for taxation before a registrar. Sometimes a court would decline to award costs. In the *Rozaah Akinyi Buyu v Independent Electoral & Boundaries Commission & 2 others*,⁹⁰ the court observed for instance that “the costs shall be assessed by the Deputy Registrar of the Court and the same should not exceed Kshs. 1.5 million.” In the *Said Buya Hiribae v Hassan Dukicha Abdi*, the court despite having dismissed the petition did not award costs. Justice Odunga reasoned, ‘As Mr Osoro does not insist on costs, there will be no order as to costs to the petition.’⁹¹

2.1.2.7 Completion and reporting

⁸⁸ Paragraph 88. The court capped the 1st respondents cost to Kshs 2, 000, 000.00. It explained that the amount that was to be taxed was not to exceed 2,000,000.00.

⁸⁹ Petition No. 40 of 2013 [2014] e KLR.

⁹⁰ Kisumu, High Court, Petition 2 of 2013.

⁹¹ Paragraph 2.

Upon completion of the hearing and determination of the petition, the court is obligated to determine the validity of all questions raised and certify its determination to the Commission which is then to notify the relevant speaker of the applicable legislative assembly.⁹² Having done so, the speaker is required to issue directions either confirming or altering the return.⁹³ The court is also required to prepare a report and forward the report to the Director of Public Prosecutions (DPP), the Commission and the relevant speaker of the legislative assembly whose member the election concerned.⁹⁴ The report should ideally not be sent to the DPP at the tail end of the process; the DPP should instead be involved at the starting stage and should participate in the proceedings especially where election offenses are cited as the grounds for challenging the petition in question. The Act requires that the report be presented in writing indicating whether an offense has been committed by any person in connection with the election. This should also specify the names and description of persons that have been proved at the hearing to have been guilty of election offences. If a person other than a party implicated in an election petition is reported in an election court, that person is required to be given an opportunity to be heard and to give evidence so that he or she can show why he or she should not be reported.⁹⁵ Sub-section 3 obligates the relevant speaker to publish the report that is forwarded to him in the Gazette and the commission is meant to consider the report and delete from the register of voters the name of a person that is disqualified from the register of voters. This then leads to the second legislation of relevance to dispute resolution.

2.1.3 Supreme Court Act, 2011

The Supreme Court is the court at the apex of the court systems in Kenya. Previously, the highest court in Kenya which had the final say was the Court of Appeal. The Supreme Court was given both original jurisdiction and appellate jurisdiction. Original jurisdiction is donated by article 163 of the Constitution. Article 140 grants every person (citizen) a right to challenge the validity of a presidential election in the Supreme Court. The Constitutional threshold is that such disputes be resolved within 14 days from the date of the filing of the challenge. This is

⁹² In line with section 85 of the Act

⁹³ In terms of section 86 (2) upon receipt of the certificate the relevant speaker is obligated to then

⁹⁴ Section 87.

⁹⁵ Section 87.

mechanized through the Supreme Court Act, 2011 and the rules. Section 12 of the Supreme Court Act provides that

An application to the Supreme Court in respect of a dispute to which Article 163(3) (a) of the Constitution applies shall be submitted by petition and shall further comply with the procedures prescribed by the rules

In that regard, the Supreme Court has made the *Supreme Court (Presidential Petitions) Rules of 2013 (the rules)*. These are the rules that prescribe how the election petitions are to be heard and determined.⁹⁶ The purpose of the rules is to enable the Supreme Court to exercise jurisdiction as contemplated under the Constitution. A petition should be filed in Court within seven days from the date of the declaration of the presidential elections.⁹⁷ Once filed, it should be served either to the respondent (s), either through personal service of or through a newspaper of wide national circulation.⁹⁸ That is however a print copy. The soft copy should be served within two hours from the time of the filing of the petition (assumes that the petitioners will readily have email addresses of the respondents).⁹⁹ A respondent who has been served with the petition is given three days to lodge a reply to it.¹⁰⁰ This may not be adequate time considering the gravity of such a petition but in the quest to determine the dispute expeditiously, perhaps this is defensible.

After the filing of the petition, a pre-trial conference is conducted after 9 days.¹⁰¹ This is to clarify preliminary issues and to identify the real question in controversy. This is important because much time can be easily lost at the hearing while concentrating on these preliminary issues. The Deputy Registrar is required to notify the parties of the pre-trial conference, and particularly, the date and the place of the conference.¹⁰² This is done through a standard form provided. As observed, the pre-trial conference is meant to among others, identify the contested and uncontested issues, consider the consolidation of petitions, give directions with regard to preliminary matters, give directions on expeditious disposal of the matter or

⁹⁶ Through legal notice, No. 14 of 2013, the rules came into operation on 28 February 2013.

⁹⁷ *Supreme Court (Presidential Petitions) Rules of 2013*, Rule 6.

⁹⁸ *Ibid*, rule 7.

⁹⁹ *Ibid*, rule 7.

¹⁰⁰ *Ibid*, rule 8.

¹⁰¹ *Ibid*, rule 9.

¹⁰² *Ibid*.

outstanding issues, give directions specifying the place and time for hearing of the petition, give directions with regard to filing and service of further affidavits or giving of additional evidence, specifying the volume and number of pages of any additional document that may be required, enabling notice to the Commission to furnish it with all necessary documents and make any other orders that is necessary to ensure a fair disposal of the suit.¹⁰³ The Court is also required to give directions as to the manner in which evidence is to be taken.¹⁰⁴

A person can file a petition either challenging the validity of the election of a president-elect or a declaration made by the Commission under article 138 (5).¹⁰⁵ Five grounds that may be included which may form the basis for a petition. The grounds must not however be frivolous, scandalous or vexatious.¹⁰⁶

In terms of the rules, a court is properly constituted with five judges or more.¹⁰⁷ A petitioner having filed the petition is required to deposit with the Court a sum of Kshs. 1,000,000.00. The Supreme Court can dismiss a petition if security for costs is not paid. This could be done by the court either at its own motion or at the instance of the application by a respondent. This area has been a subject of criticism, in that while the Constitution, arguably, grants authority to every person to challenge presidential elections, the requirement that a security for costs must be deposited takes away from some individuals the ability and therefore the right to challenge the validity of a presidential election.

The Registrar of the Supreme Court is required to notify the Commission of the petition after three days of the filing of the petition. After the Commission has been notified, it is required to deposit with the Registrar, copies of Form 36 of the *Elections (General) Regulations, 2012* in respect of the presidential election from every county. The Registrar is further required by rule 16 of the rules to publish in the Gazette and in a newspaper of national circulation a notification of filing of the petition.

¹⁰³ *Ibid*, rule 10.

¹⁰⁴ *Ibid*, rule 9 (2).

¹⁰⁵ *Ibid*, rule 12.

¹⁰⁶ *Ibid* 12 (1) (e).

¹⁰⁷ Supreme Court Presidential Election Petition Rules, rule 13.

A person not originally in the petition could be enjoined as a party.¹⁰⁸ This provision affords an opportunity to individuals that could be affected by the outcome to make representations.. It would however be unreasonable to allow all Kenyans to be party to the petition merely because the outcome would affect them. It is perhaps for this reason also that the petitioner is allowed to apply to strike out a co-petitioner or all the petitioners. Respondents could also be replaced.¹⁰⁹ Pursuant to that rule, an applicant must file a notice of motion and support it with an affidavit. Under sub rule 3, the petition is to be heard and determined notwithstanding that any person has subsequent to the filing of the petition applied to be enjoined as a respondent.

Petitions could also be withdrawn once filed.¹¹⁰ Rule 19 permits a withdrawal of the petition at the instance of an application by the applicant. This can however be done only with the leave of the court. It is not known how the hearing of a petition would proceed where such an application has been made [for withdrawal] and the court insists on hearing it. In terms of rule 19 (2), one is required to file an application by way of Notice of Motion and support it with an affidavit. In allowing such an application, the court has been given the mandate to impose such terms and conditions that it may deem fit. This could certainly be costs. Also, the rule permits for the substitution of petitioners in favour of persons who are entitled to be petitioners. If this substitution is done, the registrar is required to publish the substitution in a newspaper of wide national circulation.

As noted also, the Supreme Court also exercises appellate jurisdiction over election disputes. Those are filed pursuant to Part IV of the Supreme Court Act. Appeals can lie from the Court of Appeal to the Supreme Court. Such appeals are to be upon certification by either the Court of Appeal or the Supreme Court that the appeal raises issues of general public importance. This certification requirement is however excluded in respect of matters that relate to constitutional interpretation. Two points to be noted: First, the Supreme Court and the Court of Appeal have emphasized that the process is certification and not granting of leave.¹¹¹ Second, the High Court has declared the provisions of the Supreme Court Act that introduced the requirement of a consideration of interests of justice or substantial miscarriage of justice

¹⁰⁸ Rule 17.

¹⁰⁹ Rule 18.

¹¹⁰ Rule 19.

¹¹¹ See e.g. *Koinange Investment & Development Ltd v Robert Nelson Ngethe* [2013] eKLR Civil Application 15 of 2012.

unconstitutional in a *Commission on Administrative Justice v Attorney General*¹¹² and the Supreme Court has affirmed this finding by the High court in *Malcolm Bell v Daniel Toroitich Arap Moi & another*.¹¹³ In certifying a matter as raising issues of general public importance, the Court could impose some conditions.

2.2 Conclusion

While this section has paid particular attention to the Political Parties Act, the Elections Act and the Supreme Court Act, there are other legislations that contribute to the framework for electoral dispute resolution or which impact on it. These include: the Independence Electoral and Boundaries Commission Act, 2011 and the County Governments Act. Electoral dispute resolution should be viewed as beginning from the internal mechanisms of political parties before proceeding to external mechanisms such as the IEBC and the Political Parties Tribunal before culminating in seeking recourse at the Judiciary. The relationship between these mechanisms should be complementary and cognizant of their respective jurisdictions and when they should apply. Given the elaborate and technical nature of election petitions, it would be ideal for the courts to be considered as a measure of last resort rather than recourse of first instance. Given the nature of some of the issues that still made their way to the courts, it is essential to reflect on enhancing the capacities of the electoral dispute mechanisms that are quasi-judicial or non-judicial in nature as a way of deflating the pressure currently placed on the courts.

PART III: THEMATIC CONSIDERATION OF JURISPRUDENCE IN ELECTORAL DISPUTES: NEW AND RESTATED

3.1 Centrality of the Supreme Court

¹¹² *Petition No 284 of 2012*.

¹¹³ [2013] eKLR.

As in other common law jurisdictions, the Supreme Court of Kenya occupies a pivotal role in shaping the development of jurisprudence. This is because the Supreme Court is the highest court in the land. As such, the decisions of the Supreme Court – its legal thinking – are binding upon all other courts in Kenya. What this means is that the Court of Appeal, the High Court and all the other subordinate courts established under the laws of Kenya must decide cases in line with the legal thinking set by the Supreme Court. Where such courts depart from the logic as set by the Supreme Court, the Supreme Court would (as it often has), overrule the lower courts. This is why in reviewing the jurisprudence that has emerged from Election Courts, this part pays primary attention to the reasoning of the Supreme Court on some of the issues that it has been moved to decide upon. Of course, the lower courts have also played a role in developing jurisprudence which has either subsequently been confirmed by the Supreme Court, or, at least, not controverted. Such instances are also highlighted below.

In the same vein, it is useful to note an interesting pattern that has emerged with regard to decisions on election petitions, which have proceeded by appeal from the High Court through to the Court of Appeal and ultimately to the Supreme Court. This pattern is that the Supreme Court has overruled the Court of Appeal on all election petitions that have proceeded from the Court of Appeal to the Supreme Court. There thus appears to be a ‘jurisprudential conflict’ between the Court of Appeal and the Supreme Court. The statistical representation below indicates the decisions by the Supreme Court and is indicative of the stated jurisprudential conflict:

Table I: Representation of the cases heard by the Supreme Court

| Item No. | Case Number and name | Nature of suit | Jurisdiction the Court was exercising | Outcome of the Case |
|-----------------|--|---|--|-----------------------------|
| 1. | <i>Raila Odinga & 5 Others v Independent</i> | Petition was challenging the validity of the presidential | Original jurisdiction | The case was dismissed. The |

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|----|--|---|--|---|
| | <i>Electoral and Boundaries Commission & 3 Others, Petition No. 5, 3 & 4 (Consolidated) of 2013</i> | elections | | election results were not annulled. |
| 2. | <i>Isaac Aluoch Polo Aluochier v Independent Electoral and Boundaries Commission & 19 Others, Petition no. 2 of 2013</i> | The petition was contesting the validity of the nominations and approvals made by the Independent Electoral and Boundaries Commission (IEBC) in respect of candidature for the office of President. | Original jurisdiction | Petition dismissed the court holding in a ruling that it had no jurisdiction. |
| 3. | <i>John Mbugua & Another v Attorney General & 16 Others, Petition 3 of 2013.</i> | The petition sought an order permitting them to file a petition challenging the swearing in of the president-elect on the grounds that they had no means to do so. | Original jurisdiction (Case determined by the registrar) | Petition dismissed. |
| 4. | <i>Mary Wambui Munene v Peter Gichuki Kingara & 2 Others, petition No. 7 of 2014.</i> | An appeal against the decision of the Court of Appeal invalidating the election of the Appellant as the duly elected member of parliament of Othaya. | Appellate jurisdiction | Petition allowed (in effect, reinstating the decision of the High Court dismissing the petition). |
| 5. | <i>Gitirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, Petition No. 2B of 2014</i> | An appeal against the decision of the Court of Appeal invalidating the election of the Appellant as the Governor for Meru. | Appellate jurisdiction. | Petition allowed (In effect, reinstating the decision of the High Court dismissing the petition). |
| 6. | <i>Hassan Ali Joho &</i> | An appeal from the Ruling of the | Appellate | Appeal allowed (in |

| | | | | |
|----|--|--|------------------------|--|
| | Another v Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013. | Court of Appeal which dismissed the Appellants Appeal and allowed the 1st Respondent's Cross-Appeal dated 25th July, 2013 in Malindi, Civ. Appeal No. 12 of 2013 | jurisdiction. | effect affirming the election of the Appellant as the governor-elect. |
| 7. | Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] | An appeal against the Judgment of the Court of Appeal sitting at Kisumu, dated 28 th March, 2014 in Civil Appeal No. 39 of 2013, which overruled the decision of the High Court sitting at Homa Bay in Election Petition No. 3 of 2013. The outcome of that decision was the invalidation of the election of the appellant, as the duly-elected Governor of Migori County. | Appellate jurisdiction | Appeal allowed (in effect affirming the election of the Appellant as the elect governor. |
| 8. | Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] | An appeal against the judgment of the Court of Appeal sitting in Nyeri, delivered on 12 th March, 2014 in Nyeri <i>Civil Appeal No. 38 of 2013</i> , overruling the decision of the High Court sitting at Meru in <i>Election Petition No.1 of 2013</i> . The Court of Appeal decision invalidated the election of the appellant as the duly-elected Governor of Meru County. | Appellate jurisdiction | Appeal allowed (in effect affirming the election of the Appellant as the elect governor. |

| | | | | |
|-----|---|--|------------------------|---|
| 9. | Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR | <i>An appeal from the Ruling of the Court of Appeal sitting at Malindi which dismissed the Appellants Appeal and allowed the 1st Respondent's Cross-Appeal dated 25th July, 2013 in Malindi, Civ. Appeal No. 12 of 2013)</i> | Appellate jurisdiction | The Appeal allowed, with the holding that Section 76(1)(a) of the Elections Act, 2011 is inconsistent with Article 87(2) of the Constitution of Kenya, 2010 and, to that extent, a nullity. The cross-appeal to the extent of the grounds raised in respect of costs awarded by the Court of Appeal, is dismissed. |
| 10. | Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 others [2014] eKLR | <i>An application for stay of execution of the Judgment and order of the Court of Appeal; at Nairobi in Civil Appeal No. 293 of 2013 dated 23rd April, 2014)</i> | Original Jurisdiction | The Applicant's Notice of Motion filed Court allowed and Execution of the whole judgment and/or orders of the Court of Appeal dated 23 rd April, 2014 hereby stayed pending hearing and determination of the appeal. |

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|-----|---|--|------------------------|---|
| 11. | George Mike Wanjohi v Steven Kariuki & 2 others [2014] eKLR | <i>An appeal against the Judgment of the Court of Appeal sitting in Nairobi, overruling the decision of the High Court sitting at Nairobi in Election Petition No.2 of 2013, delivered on 13th September, 2013. The decision of the Court of Appeal invalidating the election of the appellant as the duly-elected member of the National Assembly for Mathare Constituency.</i> | Appellate jurisdiction | Appeal disallowed and the court of appeal determination upheld thereby annulling the results of the Applicants election. |
| 12. | Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] | <i>An appeal against the Judgment of the Court of Appeal sitting in Nairobi, delivered on 13th May, 2014 in Civil Appeal No. 324 of 2013, overruling the decision of the High Court in Election Petition No.1 of 2013. The Court of Appeal decision invalidated the election of the 1st and 2nd appellants as the duly-elected Governor and Deputy Governor of Nairobi County</i> | Appellate jurisdiction | Appeal allowed thereby reversing the decision of the court of appeal and reinstating the decision of the high court therein reaffirming the status of the 1 st appellant herein as the duly-elected Governor of Nairobi County |

The Supreme Court has had a far reaching influence on the other courts. Many of the petitions that were filed in the High Court were dismissed arguably following the Supreme Court legacy in the *Raila Odinga case*.

This influence can be inferred from the fact that no other decision has been cited by the Superior Courts in Kenya like the *Odinga case*. The High Court did receive a myriad of petitions

however more than 60% of the filed petitions were dismissed. It has been argued that this rate of dismissals is the legacy of the Supreme Court decision in the *Odinga* case. In the *Martin Sarakwe Wechuli v IEBC & 2 others* case for instance, a petition to withdraw a case was partly founded on the premise that the petitioner had considered the Supreme Court decision.¹¹⁴ The jurisprudence that the Supreme Court established, and which has significantly influenced the other courts, is what the next segment considers in further detail. It does so from thematic areas of focus, so as to explain whether the jurisprudence was a restatement of previous positions or ‘new’ jurisprudence.

3.2 Thematic Considerations on Jurisprudence

3.2.1 Who can institute an Election Petition?

This is in other words referred to as *locus standi*. With regard to the rules of *locus standi*, there has been no major shift in the jurisprudence of Election Courts. An election petition can be filed by a candidate in the elections. It can also be filed by any person who has grounds to challenge the validity of the electoral process and the outcome. This was the case even during the pre-2010 Constitution period. Thus, while the Constitution of 2010 is noted for making expansive provisions on *locus standi*, these provisions, at least in respect of election petitions, have only reinforced pre-existing jurisprudence – that any aggrieved individual, whether or not the individual was a candidate in the elections, can file a petition challenging the validity of an election. A cursory perusal of election petitions filed following the March 4, 2013 elections will in fact show that many of the election petitions were often filed by individuals who participated in the elections as ordinary voters and not as candidates.¹¹⁵

¹¹⁴ [2013] eKLR

¹¹⁵ *Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 other*, Petition 13 of 2014 [2014] eKLR.

3.2.2 When Can an Election Petition be filed?

The Constitution and other electoral laws set timelines on when election petitions can be filed and determined. The Election Courts have held that these timelines are inflexible and must be adhered to. A number of election petitions have been struck out for not adhering to these timelines. This strict interpretation of, and adherence to, the timelines stipulated in the Constitution and other electoral laws is one of the notable jurisprudential legacies of the Supreme Court.

In the presidential petition of *Raila Odinga and others v IEBC and others* (the *Raila Odinga* case), the Supreme Court made an interlocutory Ruling on these timelines. This Ruling remains the guide to other Election Courts on the strictness of the timeframes. In the *Raila Odinga* case, the Supreme Court refused to admit in evidence a further affidavit filed by the petitioner outside the timelines stipulated (for filing a presidential petition). The Supreme Court held that the effect of the further affidavit would be to change the character of the petition before the court by introducing new material and issues. This, the Supreme Court held, would offend the constitutional requirement on time as it would be tantamount to filing a petition outside the stipulated timelines. The Constitution and the Supreme Court (Presidential Election 2013) Rules require that a presidential election petition be filed within seven days after the date of the declaration of the presidential election results. The Supreme Court would then have fourteen days within which to deliver its ruling on the petition.

The Election Courts have also had to determine when the timelines for filing election petitions for other posts other than the presidency begin to run. This is of course clear for presidential election petitions (as explained above). However, there was some uncertainty regarding other positions, principally due to a conflict between the provisions of different laws. Article 87(2) of the Constitution provides that election petitions in respect of other offices other than the presidency be filed within 28 days after the declaration of the election results by the IEBC. Section 76 of the Elections Act, on the other hand, provided that an election petition in respect of other offices other than the presidency be filed within 28 days after the date of *publication of the results of the election in the Gazette*. Thus, section 76 of the Elections Act introduced a new requirement that is not spelt out in Article 87(2) of the Constitution. The consequence of this

is that some petitions had been filed within timeframes that met the timelines set under section 76 of the Elections Act, but which were outside the timelines stipulated by Article 87(2) of the Constitution. There had been various decisions from the High Court and the Court of Appeal. For example, some decisions acknowledged the existence of the inconsistency, but stated that the petitioners were not to blame as such inconsistency was occasioned by the legislature. Other decisions were to the effect that section 76 of the Elections Act was the applicable provision as it expounded on Article 87(2) of the Constitution.

However, in the case of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (the Joho case)*, the Supreme Court determined the issue as to when the time-limit envisaged under Article 87(2) of the Constitution is set in motion, and declared Section 76(1)(a) of the Elections Act *ultra vires* the Constitution. Therefore, election petitions challenging the election of other office holder except the presidency should be filed within 28 days after the declaration of the results by the IEBC.

An advantage that has come with the use of defined timelines in election dispute resolution is that election petitions are resolved promptly and with certainty as to timelines. In the past, election petitions would be pending in court for as long as five years, with the obvious ramification that some elected leaders would serve their full term before petitions against them are determined. Some dissenting views emerging from the *Raila Odinga Case* have however suggested that the strict application or interpretation on timelines has emphasized the procedural over the substantive in manner that could undermine justice. .

3.2.3 Jurisdictional Limits of Election Courts

As explained in earlier portions of this work, the Constitution spells out the jurisdiction of each Election Court. There are courts that deal with election petitions at each electoral level. The Supreme Court has exclusive original jurisdiction over presidential election petitions. The High Court hears election petitions for Members of the National Assembly, Senators and Governors. The Magistrates Courts have original jurisdiction for petitions concerning the election of members of the County Assemblies. Appeals from the Magistrates Courts are heard in the High Court. Appeals from the High Court are heard in the Court of Appeal, and can be appealed

further to the Supreme Court. There has emerged notable jurisprudence on the foregoing issues of jurisdiction.

For instance, the Supreme Court has been keen to demarcate the extent of the Court of Appeal's appellate jurisdiction. The Court of Appeal, the Supreme Court has said, can only entertain appeals on *matters of law*. Matters of fact are deemed to have been appropriately disposed of by the High Court. In a number of cases, the Supreme Court has overturned decisions of the Court of Appeal on the grounds that the Court of Appeal decided on issues of fact, and therefore acted *ultra vires* (beyond its powers). This is an aspect of the apparent jurisprudential conflict between the Supreme Court and the Court of Appeal, referred to above. A notable example is to be found in cases where the Court of Appeal has annulled elections on the basis of discrepancies in the vote tally, only for the Supreme Court to find that issues of vote tally are matters of fact over which the Court of Appeal has no jurisdiction. In the *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 Others* (the *Okoth Obado* case), the Court of Appeal, in nullifying the election, stated as thus:

...the election of Governor, Migori County was so badly conducted that it failed to meet the constitutional and legal requirements of a free and fair election; and that the irregularities affected the results.

This verdict was appealed to the Supreme Court which stated that the Court of Appeal had exceeded its jurisdiction by making conclusions as to matters of fact. The Supreme Court in its finding on this matter pronounced itself in the following manner:

In making these observations, as we find, the appellate Court exceeded its mandate, by its conclusions of fact, thus contravening Section 85A of the Elections Act. The Court of Appeal accorded no deference to the High Court's findings on facts; and the claims made by the petitioner were on the accuracy of the tallying of the results, rather than on what occurred at the polling station, with the exception of two polling stations, namely, Kengariso Primary School, and Ombo Primary School.

It was in the *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* (the *Peter Munya* case) that the Supreme Court clearly demarcated the jurisdiction of the Court of Appeal. The Supreme Court, explaining what constitutes matters of law, explained that a matter of law will be one 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 Supreme Court has also spelt out its jurisdiction in presidential election petitions – that its exercise of that jurisdiction must not infringe into the jurisdiction of other Election Courts. In simple terms, the Supreme Court’s position is that when determining presidential election petitions, it will only give rulings that limit themselves to the presidential election. It cannot, for instance, give a determination that indicts the election of other office-holders such as governors, senators, members of parliament and county assembly members. The logic is that there are other Election Courts that have jurisdiction to decide on election petitions affecting the aforementioned office holders. The Supreme Court cannot intrude into that jurisdiction. In

the *Raila Odinga* case, the Supreme Court stated, for instance, that it would only inquire into any allegations of voter-registration malpractices to the extent that the alleged malpractices affected the validity of a presidential election.

3.2.4 Evidentiary Threshold and Burden of Proof

This portion essentially seeks to answer two questions. The first one is what amount of evidence does the Election Court require in order to nullify an election? The second question is: who bears the duty of proving that an election qualifies for nullification? These questions have generated considerable debate. This debate should not be entirely surprising if one is to consider what is at stake on either side of the debate. If the evidentiary threshold is set too high, the result will be that it would be extremely difficult to prove that an election qualifies for nullification. In other words, individuals would easily get away with irregularities for as long as the irregularities do not meet the high threshold set. On the other hand, if the evidentiary threshold is set too low, elections would be prone to nullification on the basis of minor or otherwise negligible irregularities. An ideal system, arguably, would be one which balances between these two extremes. The evidentiary threshold should not be too high as to enable perpetrators of major irregularities get away with their misdeeds. The threshold must also not be too low as to lead to frequent nullifications of elections on the basis of minor and negligible irregularities that did not affect the outcome of the election. What is the current jurisprudence on evidentiary threshold in Kenya?

The position of the Supreme Court on the evidentiary threshold is that an election should only be nullified if it is shown that the alleged irregularities affected the outcome of the election. In other words, where the impact of the irregularities on the outcome of the elections is negligible, then the election should not be nullified. This position was explained by the Supreme Court in the *Raila Odinga* case. In other words, non-compliance with electoral law will not necessarily lead to the invalidation of an election. The Supreme Court in this regard has been said to have set the bar very high. In fact, a review of the election petitions filed subsequent to the Court's decision in the *Raila Odinga* case indicates that majority of the petitions were dismissed, largely because they did not meet the high evidentiary threshold set by the Supreme Court.

The jurisprudence on the degree of proof in election petitions is different from the standards used in civil and criminal matters. In civil matters, the degree of proof is on a balance of probabilities. In criminal matters, the degree of proof is beyond reasonable doubt. In election petitions, the Supreme Court directed (at para 203) that ‘the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.’ The standard of proof in election petitions therefore is between the civil balance of probabilities test and the criminal beyond reasonable doubt test. Where the election petition involves criminal charges, however, the degree of proof used in respect of such charges would be beyond reasonable doubt.

Who discharges the burden proof? In criminal cases, it is upon the prosecution to prove its case beyond reasonable doubt. In civil cases, the claimant also has to discharge the burden of proof on a balance of probabilities. In election petitions however, the burden of proof may devolve upon both the petitioner and the respondents. Importantly though, the initial burden of proof falls upon the petitioner, after which the respondents would be invited to bear the evidential burden in response.

3.2.5 The Voters’ Register and the Electronic System of Tallying and Transmission of Results

The *Raila Odinga* case was grounded, among others, on the allegation that no proper voters’ register had been maintained by the IEBC and hence no valid election had been held; and that the electronic system for transmission of results had crashed thereby removing the basis for verifying the tally from the polling centers.

On the issue of the voters’ register, the Supreme Court was of the view that the IEBC had used the Principal Register. The Principal Register was explained as being a combination of several parts prepared to cater for diverse groups of electors. However, the Principal Register of voters has three components namely; the Biometric Voter Register, Special register and the Green book, otherwise known as the Primary Reference Book, which is done by hand. In

essence, the IEBC is within the law to maintain several registers which are regarded as components of the Principal Register.

At the same time, the Supreme Court stated that it was guided by jurisdictional considerations for election petitions; it had to be careful not to make orders that would bring a conflict between its jurisdiction and that of other Election Courts – such as the High Court and the magistrate’s courts which had the jurisdiction to hear electoral disputes for other positions other than the presidency, all of which used the same voter register. Consequently, the Supreme Court would therefore only inquire into any allegations of voter-registration malpractices to the extent that the alleged malpractices affected the validity of a presidential election.

On the issue of tallying and transmission of election results, the Supreme Court stated that the IEBC enjoys discretion under the Constitution and electoral laws to either work with a full electronic system or a manual system. If the electronic system failed, the IEBC was within its discretion to resort to the manual system, as that was indeed the only option left.

3.2.6 Spoilt Votes, Rejected Votes and Votes Cast

This is one of the crucial issues that the Supreme Court had to determine in the *Raila Odinga* case. The issue was crucial because it was necessary to ascertain what category of votes would be included in the vote tally in the calculation of the 50 + 1 requirement. The Supreme Court, interpreting the Elections Act and Rules and the Constitution, also drew from the practice in other jurisdictions to give its verdict on this issue.

What is a spoilt vote and how does it differ from a rejected vote? It is worth noting that none of the relevant electoral laws and regulations defines the term ‘rejected vote.’ Making reference to Regulation 71 of the Elections (General) Regulations, 2012, the Supreme Court explained that a spoilt vote would be one which has been dealt with by a voter in a way that it cannot be conveniently used as a ballot paper. Such a ballot paper is to be surrendered to the presiding officer and a replacement ballot paper issued to the voter. In other words, a spoilt vote does not find its way into the ballot box and therefore does not count.

Using the foregoing premise (that spoilt votes do not find their way into a ballot box), the Supreme Court proceeded to explain the difference between a spoilt vote and a rejected vote as being that although the rejected vote finds its way into the ballot box, it does not count as a vote because it is found to be invalid for reasons such as fraud and duplicity of marking. The Supreme Court reasoned that as a vote that counts in favour of a candidate is a valid vote, one that does not count in favour of any candidate is invalid, and consequently, a rejected vote. Such a vote, according to the Supreme Court, does not confer any electoral advantage upon any of the candidates, and is void.

The Court then held that the phrase ‘votes cast’ as used in the Constitution means only valid votes cast and does not include rejected votes. Consequently, rejected votes are not to be used in calculating the vote tally to determine if a candidate has met the 50 + 1 requirement to be an outright winner of a presidential election. This reasoning, the Supreme Court explained, was reached in consideration of the following:

- (a) The mandate of the Judiciary to interpret the Constitution in a manner that ‘contributes to good governance’ [Article 259(1)(d)];
- (b) The duty to interpret the Constitution in a manner promotes its purposes and principles, advances the rule of law and the Bill of Rights and permits the development of the law [Article 259]; and
- (c) The progressive character of the Constitution.

It is useful here to note the examples from other jurisdictions that the Supreme Court relied upon. For instance, in Ghana, Cyprus and Portugal, the law makes reference to ‘valid votes cast.’ This is more restrictive than the broad phrase of ‘votes cast’ that is used in the Constitution of Kenya, and which is also used by the Constitution of Seychelles. In Croatia, the Constitution requires that the winner of a presidential election be elected by a majority of all ‘electors who voted’; the meaning being that both valid and invalid votes are included in the vote count.

3.2.7 Consequences of a Successful Election Petition

Once an election has been nullified, a by-election will be organized. This is usually the case with the positions of members of the county assembly, members of parliament and governors. In the event that a presidential election is nullified, the Constitution directs that a fresh election shall be conducted. The key jurisprudential development, however, lies in what the Supreme Court has stated on who can qualify for an election following nullification.

For all other positions except that of president, the by-election that ensues after a nullification is open to any person who wishes to contest – this includes the candidates who participated in the nullified election, and other new candidates who didn't partake in the nullified election but who decide to contest in the by-election. In case a presidential election is nullified, the situation will be different.

The case in which the Supreme Court directed itself on the matter was the *Raila Odinga* case. In that case, the Supreme Court stated that if a presidential election is nullified, the candidates in the fresh election that would follow would be determined in the following ways. First, if the petition that led to the nullification of the presidential election was filed by only one of the candidates who participated in the nullified presidential election and came second to the declared winner in the vote-tally, only that candidate would be permitted to contest the fresh election against the initially declared winner. Thus, for instance, had the Raila Odinga petition been successful, only Odinga would have qualified to stand in the fresh election against Uhuru Kenyatta, the declared winner. All the other candidates would be deemed to have accepted the election results by virtue of the fact that they never contested the results in the Supreme Court.

Secondly, if the petition leading to the nullification was filed by more than one of the candidates who participated in the original election, then the fresh election that would ensue following the nullification of the original election would involve only those candidates that filed the petition and the initially declared winner of the original election. The third scenario would be where the petition leading to the nullification of the presidential election was filed by a member of the public who was never a presidential candidate. In such a scenario, the ensuing fresh election would involve all the candidates who participated in the nullified election.

The contrast between a fresh presidential election following a successful presidential election petition on the one hand, and a by-election following a successful election petition on the other, is therefore clear. While the latter would be open to both all the candidates in the initial election and new candidates, the former is restricted only to the candidates in the original election who filed the petition, or where the petition was filed by a member of the public, only the candidates who participated in the original election. There is thus no scope for new presidential candidates. The only situation where a new candidate would be allowed to enter into the fresh election would be where one of the candidates eligible to participate in the fresh election as explained above, either dies or withdraws from the election. In that case, a nomination process would be necessary to select a new candidate as a replacement to partake in the fresh election.

3.3 Conclusion

As expected, the decisions by the Supreme Court have proved pivotal in determining the future electoral dispute resolution in Kenya and improvements to the electoral system generally. Its decision in the *Raila Odinga case* has seen the resolution of previously ambiguous issues such as: timelines for filing petitions and the introduction of evidence; the evidentiary threshold for the nullification of an election outcome; the constitution of a voters' register; and the distinction between spoilt votes, rejected votes and votes cast along with their impact on the vote tally calculation. The Supreme Court also subsequently pronounced itself on the jurisdictional limits of election courts.

While all these decisions should have ideally brought finality to these questions, the reality is that significant dissonance has emerged from them as expressed by various actors. A section of lawyers, civil society and the political class have described the *Raila Odinga Case* decision as setting the threshold for the nullification of an election to an unassailable level that negates justice. The extent to which the Supreme Court has overturned the decisions of the Court of Appeal on election petitions points to a palpable conflict within the judiciary that suggests discomfort with the prevailing jurisprudence. There is need for sustained, multi-stakeholder dialogues to establish whether some of the issues that remain contested can be resolved

through institutional and/or legislative reforms and that such a process is inclusive and participatory if it is to yield lasting consensus.

PART IV: SUMMARY OF SIGNIFICANT CASES

Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others, Petition No. 5, 3 & 4 (Consolidated) of 2013

Coram: W.M. Mutunga, Chief Justice and President of the Supreme Court; P.K. Tunoi; M.K. Ibrahim; J.B. Ojwang; S.C. Wanjala; N.S. Ndungu, SCJJ

Facts

Subsequent to the announcement that Uhuru Kenyatta had been elected as president three petitions challenging the results of the Presidential elections were filed at the Supreme Court. Both petitions had allegations of impropriety and breach of both the Constitution and electoral laws. The first petition by Moses Kiarie Kuria, Denis Njue Itumbi and Flowrence Jematiah Sergon filed the first petition against the IEBC as the 1st respondent, and Mr. Isaack Hassan was instituted on the basis that *'the respondents' decision to include rejected votes in the final tally had a prejudicial effect on the percentage votes won by Mr. Kenyatta.'* The second Petition by Gladwell Wathoni Otieno and Zahid Rajan contended that the election was not conducted substantially in accordance with the Constitution, or the Elections Act and the governing Regulations. In particular, the Petitioners averred that the IEBC failed to establish and maintain an accurate Voter Register that was publicly available, verifiable and credible as required by Articles 38(3), 81(d), 83(2), 86 and 88(4) of the Constitution, sections 3, 4, 5, 6, 7 and 8 of the Elections Act, 2011 and the Elections (Registration of Voters) Regulations, 2012. The third Petition was filed by Mr. Raila Odinga on 16th March, 2013 against the IEBC as the 1st Respondent, Mr. Isaack Hassan as the 2nd Respondent, Mr. Uhuru Kenyatta as the 3rd Respondent and Mr. William Ruto as the 4th Respondent. Odinga's case was that *'the electoral process was so fundamentally flawed that it precluded the possibility of discerning whether the presidential results declared were lawful.'*

Issues

- (i) *Whether the 3rd and 4th Respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the Presidential elections held on the 4th of March, 2013.*
- (ii) *Whether the Presidential election held on March 4th, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.*
- (iii) *Whether the rejected votes ought to have been included in determining the final tally of votes in favour of each of the Presidential-election candidates by the 2nd Respondent.*
- (iv) *What consequential declarations, orders and reliefs this Court should grant, based on the determination of the Petition.*

Held

- 1 The 3rd and 4th Respondents were validly elected and declared as President-elect and Deputy President-elect respectively, in the Presidential elections held on the 4th of March, 2013. The respective petitions are disallowed and the Presidential- election results as declared by IEBC on 9th March, 2013 upheld.
- 2 The Presidential election held on March 4th, 2013 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.
- 3 The rejected votes ought not to have been included in determining the final tally of votes in favour of each of the Presidential-election candidates by the 2nd Respondent though the Petition No. 3 of 2013 in the Consolidated Petitions, and with regard to the prayer for Orders for the re-computation of vote-tally percentages by the 2nd Respondent, was declined, for want of jurisdiction.
- 4 Each party was to bear their own costs.

Ratio Decedendi

- (i) An alleged breach of an electoral law, which leads to a perceived loss by a candidate, as in the Presidential election which led to the Petition, takes different considerations from the standard of proof required in criminal and civil case. The office of President being the focal point of political leadership, and therefore, a critical constitutional office is one of the main offices which, in a democratic system constituted strictly on the basis of majoritarian expression. The whole national population has a clear interest in the occupancy of this office which, indeed, they themselves renew from time to time, through the popular vote
- (ii) As a basic principle, it is not for the Court to determine who comes to occupy the Presidential office; save that as the ultimate judicial forum, entrusted under the Supreme Court Act, 2011 (Act No. 7 of 2011) with the obligation to “assert the supremacy of the Constitution and the sovereignty of the people of Kenya” [s.3(a)], must safeguard the electoral process and ensure that individuals accede to power in the Presidential office, only in compliance with the law regarding elections.

- (iii) The Court must hold in reserve the authority, legitimacy and readiness to pronounce on the validity of the occupancy of that office, if there is any major breach of the electoral law, as provided in the Constitution and the governing law.
- (iv) By no means can the conduct of the election of 2013 be said to have been perfect, even though, quite clearly, the election had been of the greatest interest to the Kenyan people, and they had voluntarily come out into the polling stations, for the purpose of electing the occupant of the Presidential office.
- (v) The evidence did not disclose any profound irregularity in the management of the electoral process, nor did 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. It was also not evident, on the facts of the case, that the candidate declared as the President-elect had not obtained the basic vote-threshold justifying his being declared as such.
- (vi) In principle a ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, does not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate.
- (vii) A rejected vote is void. The question to ask is why should such a vote, or ballot paper which is incapable of conferring upon any candidate a numerical advantage, be made the basis of computing percentage accumulations of votes, so as to ascertain that one or the other candidate attained the threshold of 50% + 1 .

Obiter dictum

- (i) The manual voting system, though it serves as a vital fallback position, has itself a major weakness which the IEBC has a public duty to set right. The ultimate safeguard for the voter registration process, namely “the Green Book”, has data that is not backed-up, just in case of a fire, or other similar calamity. The Court signaled this as an urgent item of the agenda of the IEBC, and recommended appropriate corrective action.

Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 others Civil Appeal No. 43 of 2013

Coram: Maraga, Azangalala, Mohammed JJ.A

Facts

The Appellant, Moses Wetang'ula was declared winner of the Bungoma Senatorial seat having garnered 154,469 votes. His closest rival, Musikari Nazi Kombo, who allegedly garnered 125,853 votes, successfully petitioned the High Court which nullified his election. The High Court had held that the Petitioner had proved to the required standard that the election for Moses Wetang'ula was not conducted in accordance with the Constitution and the Elections Act. Citing article 81(e) of the Constitution, the Superior Court had held that the election had not been conducted in an accurate, accountable and verifiable manner and that it had not been free of improper influence or corruption; it had not been transparent; it had tincture with bribery and treating of voters; and the results had not been verified or verifiable. It had also held that there had been multiple malpractices and irregularities that substantially affected the validity of the results for the election in dispute.

Issues:

- 1 *whether or not he was guilty of the election offences of bribery contrary to Section 64 of the Elections Act and treating contrary to Section 62 of the same Act;*
- 2 *Whether or not the Bungoma County Senatorial Election (the election) was conducted substantially in accordance with the principles laid down in the Constitution and with the written law of that election.*
- 3 *Whether or not the irregularities allegedly committed in the conduct of the election affected the result of the election.*

Held:

- 1 There was only one incident of corruption proved against the appellant.
- 2 It would limit the invalidation of an election on proof of commission of only one act of corruption to the act of a candidate himself because such an act impeaches the integrity of that candidate.

- 3 Both the qualitative and quantitative irregularities committed by the IEBC's officials in the conduct of the Bungoma Senatorial election did not affect the integrity or result of the elections.

Ratio decedendi

- (i) Any election that is not conducted substantially in accordance with the electoral law of that election is null and void. However, it observed that an election was a human activity and no human activity can be perfect. For an election be valid there had to be substantial compliance with the law governing that election is mandatory.

- (ii) No election can be valid if it is not based on the principle of universal suffrage; if it is not by secret ballot; if it is not transparent and free from violence, intimidation, improper influence or corruption; and if it is not conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner.

- (iii) No election can be valid if, whatever method of voting is employed, it is not "simple, accurate, verifiable, secure, accountable and transparent"; as well as if "appropriate structures and mechanisms to eliminate electoral malpractice are [not] put in place"; and the counting and collation of votes and announcement of the results are not open and accurate.

- (iv) What Section 83 of the Elections Act excuses are minor infractions of these principles or requirements that arise from inadvertent, not deliberate or negligent, human activities in the effectuation of these principles but do not affect the result of the election.

- (v) Where commission of any election offence is alleged against any respondent in an election petition, that is sufficient notice to such respondent that the petitioner intends to prove criminal charges against him. 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.

- (vi) 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.
- (vii) The reporting requirement was not put in the Elections Act as a mere ornamental or lofty aspiration 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.
- (viii) By the time the criminal case is mounted and proved against a respondent, the election court would have closed shop and become *functus officio* and Section 87(1), with the consequences spelt out in Section 72(3) (b), will have been rendered otiose thus encouraging impunity leading to the disaffection among the voters with catastrophic consequences as happened in our country after the 2007 general election.

Obiter dictum

The court also reasoned in passing that:

- (i) Irregularities which prevent an election from being “a true election” cast doubt on the integrity of such an election.

Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others [Kisii Petition 4 of 2014; [2014]

Coram: Mutunga, CJ & P; Rawal, DCJ ; Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ

Facts

The High Court had, upon hearing the petition and considering the evidence presented, including the Deputy Registrar's report, dismissed the petition holding that the declaration of the appellant as the Governor for Migori County was valid. The trial Court ordered the 2nd respondent, IEBC, to pay costs of Ksh. 1 million. The Court of Appeal allowed the appeal. It set aside the Judgment of the High Court, stating that the election of Governor, Migori County was so badly conducted that it failed to meet the constitutional and legal requirements of a free and fair election and that the irregularities affected the results. The appellate Court further ordered that the Independent Electoral and Boundaries Commission (IEBC) be notified to proceed and conduct a fresh election under Section 86(2) of the Elections Act.

Issues

- 1 *Whether the Court of Appeal acted in excess of its jurisdiction as conferred by Section 85A of the Elections Act, as read with Article 87(1) of the Constitution, by delving into issues of fact*
- 2 *Whether the appellate Court disregarded the doctrine of stare decisis, by failing to apply a binding decision of the Supreme Court – thereby contravening Article 163(7) of the Constitution;*
- 3 *Whether the Migori County gubernatorial elections were conducted in compliance with the principles in Articles 81(e) and 86 of the Constitution, as read together with the provisions of Section 83 of the Elections Act;*
- 4 *Whether the Court of Appeal properly applied the doctrine of supremacy of the Constitution, enshrined in Article 2 of the Constitution;*
- 5 *Whether the appellate Court misapplied Article 180(4) of the Constitution, by considering the margin of error, as a basis for nullifying the election;*
- 6 *Whether the Court of Appeal considered unpleaded facts in arriving at its determination, hence denying the appellant his right to a fair hearing, enshrined in Article 50(1) read together with Article 25 of the Constitution.*

Held

- 1 The appellate Court exceeded its mandate, by its conclusions of fact, thus contravening Section 85A of the Elections Act.
- 2 The Court of Appeal misapplied Article 163(7), by failing to take guidance in a binding decision of this Court, and consequently arriving at a wrong determination.

- 3 The election, though tainted with irregularities, was essentially free and fair.
- 4 The Court of Appeal misdirected itself by paying regard to the margin of votes between the winning candidate and the runner-up.
- 5 The appellate Court, in stating that the trial Court ought to have annulled the election, made inapposite observations, to the effect that the irregularities that occurred vitiated the election, in view of the margin of votes as between the two leading candidates
- 6 It is not in the interest of justice to allow for new affidavit-evidence to be filed when time is of essence.

Ratio decidendi

- (i) The Court of Appeal overlooked vital observations of the trial Court, and *made findings of fact* regarding the Kosodo, Siala and Marera Primary School polling stations, as well as Nyamaharaga ACK Nursery School which *had not been pleaded as an item of dispute*.
- (ii) The Court of Appeal ought not to have overstepped the evidentiary bounds marked out by the trial Court, whether on the basis of pleaded or unpleaded issues.
- (iii) By making findings regarding *irregularities* in those polling stations, which the trial Judge discounted on the ground that the petitioner had not pleaded them – and thus denying the respondents the right of reply – the Court of Appeal made *plain findings of fact*, and in this way misdirected itself.
- (iv) Parties, as is well recognized, are bound by their pleadings. The Court of Appeal also erred by failing to restrict its observations to the limit of the findings of fact by the High Court; the appellate Court extended the scope of such observations – avowing that the irregularities appeared to have been widespread, and of a greater magnitude than was observed by the High Court
- (v) The Court of Appeal accorded no deference to the High Court's *findings on facts*; and *the claims made by the petitioner were on the accuracy of the tallying of the results, rather than on what occurred at the polling station, with the exception of some polling stations*.
- (vi) The Court affirmed the observations in the *Peter Munya case*, that the doctrine of *stare decisis* is a critical element of our legal system, providing certainty and predictability in the law.

- (vii) While Article 163(7), by no means ousts other constitutional provisions (such as Article 2 on the supremacy of the Constitution), it does not countenance disregard for binding precedent, in the course of application of constitutional provisions. The Constitution should be interpreted holistically, and in a manner that fuses with the rational and progressive common law principles governing the judicial process.
- (viii) The re-tally showed that the declared Governor-elect for Migori County had retained his lead – indeed, with an enhanced vote. Therefore *the irregularities complained of did not affect the outcome of the election*. The appellate Court, by not applying the binding precedent, had contravened Article 163(7) of the Constitution

Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 other, Petition 13 of 2014
[2014] eKLR

Coram: *Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ*

Facts

The appellant, Mr. Nathif Jama Adam had garnered 37,910 votes and declared a winner while his closest contender, Mr. Ali Bunow Korane, garnered 35,098 votes. Two registered voters Abdikhaim Osman Mohamed and Sahael Nuno Abdi filed a Petition in the High Court at Garissa, seeking a nullification of the election. In a Judgment delivered on 24th September, 2013, the High Court (*Mabeya, J.*) dismissed the petition, finding that *although several irregularities had been proven, they were not so substantial as to have affected the results of the election*. In the Court of Appeal, the appeal was allowed. The Court of Appeal held that that the judge had glossed over and completely misdirected himself on the effect of the massive irregularities committed in the conduct of the election which we find not only dented the integrity of the election but also affected its result. Dissatisfied with the Judgment of the Court of Appeal, the appellant, on 29th April, 2014 filed a petition and a Notice of Motion, under certificate of urgency at the Supreme Court.

Issues

- 1 *Whether the Court of Appeal exceeded its jurisdiction, contrary to Article 164(3) of the Constitution, and Section 85A of the Elections Act;*

- 2 Whether the Court of Appeal failed to make a finding as to whether or not the 1st and 2nd respondents had discharged the burden of proof, and the standard of proof required in election petitions;
- 3 Whether the Court of Appeal erred in finding that the voting process carried out on 5th March, 2013 at the Saka Primary School polling station was invalid, and so the votes cast from there should have been disregarded in the final tally;
- 4 Whether the Court of Appeal erred in invalidating the election on the basis of the denial of an interlocutory application for scrutiny, against which the aggrieved party did not prefer an appeal; and
- 5 Whether the Court of Appeal misinterpreted Articles 38, 81(a),(d),(e), 86 and 87 of the Constitution, which lay the normative foundation for public elections in Kenya.

Held

- 1 The Court of Appeal erred when it established new facts, extraneous to the findings of the trial Court – thus exceeded its mandate provided for under Section 85A of the Elections Act.
- 2 The issue addressed was not whether the analysis regarding the burden of proof was correct, but whether the appellate Court attempted any analysis of the discharge of this burden. The appellate Court undertook an analysis, prior to reaching a divergent opinion from that of the High Court Judge.
- 3 The learned appellate Judges erred, by proceeding on the basis of Regulation 66, rather than of Regulation 64.
- 4 The learned Judges of Appeal misapprehended the *factual position*, thereby coming to a *wrong conclusion in law*. This erroneous finding of fact was that *the irregular closing of the polling station caused violence to erupt*.
- 5 The learned trial Judges were in error in holding that an order for scrutiny cannot be granted *where it is not pleaded*.
- 6 The irregularities did not affect the election-outcome, and that the election conformed substantially to the terms of Articles 38; 81(a), (d) and (e); 86, and 87 of the Constitution.

Ratio decedendi

- (i) Evidence is the basic building block of valid judicial inferences; and Courts of law ought to appreciate the probative value of evidence presented before them; they should avoid all inclination towards conjecture.
- (ii) A petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. 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. It is on that basis that the respondents bear the burden of proving the contrary.
- (iii) Regulation 64 protects the citizen's right to vote in situations (eg) where the security of the polling station and the voters is compromised. Once security is reinstated, it would be contrary to the Constitution to limit voting for those who risk their safety to exercise their democratic right.
- (iv) The Supreme Court Judges reading of the Court of Appeal's Judgment did not reveal the anomaly that had complained about.

Obiter dictum

- (i) Only when provisions for discretion are abused, for purposes of allowing unqualified persons to vote, or to disenfranchise qualified voters, can the electoral process at the affected polling station be nullified.

George Mike Wanjohi v Steven Kariuki & 2 others [2014] eKLR

Coram: *Mutunga, CJ; Rawal, DCJ; Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ*

Facts

After counting and tallying of votes, the Returning Officer had announced Steven Kariuki (1st respondent) the duly-elected Member for Mathare Constituency, and issued him with a Certificate of Results (Form 38). The appellant lodged at the Constitutional Division of the High Court in Nairobi a petition, *George Mike Wanjohi v. Steven Kariuki & Others, High Court Petition No. 150 of 2013 (Petition No. 150 of 2013)*, seeking to be declared the lawfully elected Member

of the National Assembly for Mathare Constituency and to be issued with a certificate to that effect. Further he sought to have the Court declare that the 1st respondent had been wrongly certified as the winner. On 8th March, 2013 the appellant withdrew his petition and the 2nd and 3rd respondents wrote a letter to the 1st respondent cancelling his Certificate of Results (Form 38), on the basis that it had been issued in error. The letter also stated that the *appellant* was the rightful winner of the election and, as such, a new certificate had been issued to him. The appellant was consequently gazetted as the duly elected Member of the National Assembly for Mathare Constituency on 13th March, 2013. The 1st respondent filed a petition in the High Court, *Steven Kariuki v. George Mike Wanjohi, Election Petition No. 2 of 2013*. He contended, *inter alia*, that the 2nd and 3rd respondents became *functus officio* after declaring him the winner and issuing Form 38 to him. Thus, they could not purport to cancel the certificate in his favour and issue it instead, to the applicant. He also sought, in the alternative, an order of scrutiny and recount of the votes cast, and a determination *that the election was null and void, and that a fresh election be held*.

In his judgment dated 13th September, 2013 the trial Judge based his decision on Regulation 87(9) of the Elections (General) Regulations 2012 [Elections Regulations], and determined that the initial results announced by the Returning Officer, and the Form 38 issued to the 1st respondent, were *merely provisional*. He held that the 2nd and 3rd respondents were not *functus officio* and could, therefore, *correct the error they had made*. The net effect of this was that the cancellation of the certificate issued to the 1st respondent was validated by the Election Court. Aggrieved by this determination, the 1st respondent appealed to the Court of Appeal, seeking to set aside the trial Court's Judgment. In overturning the decision of the High Court, the Court of Appeal observed that it could not ascertain the winner of the subject election. The appellate Court ordered that *fresh elections* be held for Member of the National Assembly for Mathare Constituency. Aggrieved by the said Judgment, the appellant filed the case at the Supreme Court.

Issues

- 1 Whether the Court of Appeal had exceeded its jurisdiction as specified under Article 164(3) of the Constitution;

- 2 Whether the Court of Appeal had upheld the principles of stare decisis enshrined in Article 163(7) of the Constitution, in applying the *Joho* decision;
- 3 Whether IEBC exceeded its mandate under Article 88(4)(e) of the Constitution;
- 4 Whether the Court of Appeal misinterpreted or misapplied Article 105 of the Constitution;
- 5 Whether the Court of Appeal contravened Article 27 of the Constitution, in awarding costs to the 1st respondent only.

Held

- 1 The Court of Appeal had not exceeded its jurisdiction.
- 2 The application of the *Joho* case was essential. The doctrine holds that decisions of a higher Court, unless distinguished or overruled, bear the quality of law, and bind all lower Courts in similar or like cases. Court of Appeal upheld the principle.
- 3 IEBC exceeded its mandate under Article 88(4) of the Constitution. [however] The lack of transparency, attended with breaches of the law, on the part of the 2nd and 3rd respondents harmed both the appellant and the 1st respondent.
- 4 There was no contravention of Article 27.

Ratio decidendi

- (i) The Court of Appeal had not made its determination on unpleaded facts, nor had it granted reliefs not specifically sought.
- (ii) The matters that were before the court were 'live' (sic) when the 1st respondent submitted his further bundle of authorities to the Court of Appeal, and when the Court subsequently heard arguments on the points of law raised from the two further case-authorities.
- (iii) Where the facts are different, the *ratio decidendi* of the precedent-setting case should not injudiciously be applied to a later decision. The earlier decision should be distinguished, on a case-by-case basis, through a circumspect process of judicial reasoning that gives a basis for a different *ratio*, even when the outcome is similar to that in the earlier case.

- (iv) By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 the Constitution, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid, until the contrary is shown, through a *recognized legal mechanism founded in law or the Constitution*.
- (v) Any contests as to the credibility, fairness or integrity of elections, belongs to no other forum than *the Courts*. The charge of commission of administrative error, fraud, deliberate misconduct, or some element of corrupt practice in elections, are questions that go to the *root of the validity of elections* and which, if apparent subsequent to the declaration of results, are expressly *excluded from the scope of the dispute-resolution powers of the IEBC under Article 88(4)(e)*.
- (vi) Returning Officer could not have, after issuing the Certificate of Results in favour of the 1st respondent, subsequently cancelled it and issued a fresh Form 38 to the appellant. The Returning Officer having declared the 1st respondent as the winning candidate, and duly issued the Form 38, became *functus officio*.
- (vii) There is neither scope for the Returning Officer to withdraw a declaration of the election result once made, and to cancel the certificate issued in favour of the winning candidate, nor is there a mandate to rectify the Form 38. Once the votes are polled, counted and results declared, it would be perilous to allow the Returning Officer to nullify the result, purportedly in rectification of some error. This would not only affect the very sanctity of the election process, but also encroach on the powers of the *Election Court*.
- (viii) The Returning Officer does not have the power unilaterally to “correct” any decisional errors after the declaration of the election result. The alternative would amount to conferring a power which is not recognized under the Constitution, the Elections Act, and the Rules and Regulations framed thereunder, as well as the IEBC Act.
- (ix) in light of Article 88(4)(e) of the Constitution, section 74(1) of the Elections Act and the decision in the *Joho* case, the jurisdiction of the 3rd respondent (IEBC) ended at the time the Returning Officer issued the certificate in Form 38, on 6th March, 2013; and no alteration could be made by its officers. Any disputes arising from the declaration could only be determined by the *Election Court*.

- (x) In election petition matters, Courts should in principle, award costs *following the event*. In instances where there is a vexatious claim brought by the petitioner or the respondents, the Court will determine whether a party is to be disallowed costs, or the burden of paying costs will fall on such a party.
- (xi) A firm statutory framework for the award of costs in electoral dispute-settlement is established by the wording of Section 84 of the Elections Act, and of Rule 36 of the Election Petition Rules. The scope for discretion in this regard, it is clear, is more limited than is the case in normal civil procedure. The purpose is to compensate the successful litigant for expenses incurred in prosecuting the case.

Obiter dicta

- (i) Decisions of the Supreme Court, as a matter of constitutional imperative, are binding on all other Courts, and are to be adhered to so that certainty, predictability and consistency in the law is institutionalized within the legal system. However, due to society's constant social mobility and re-ordering, the attendant dynamics may necessitate either a *departure* from, or a *distinguishing* of legal norms laid down by the Supreme Court.
- (ii) Different sets of facts present themselves in the adjudication of disputes before the Courts. These varying facts fall for evaluation, interpretation and analysis, outcomes of which are then weighed, in a process of judicial reasoning, against some defined principles of law, so as to determine the *respective rights of parties*. Indubitably, the differing fact-situations make every given case peculiar, and quite apart from the other. Bearing in mind that ascertained legal principles of binding precedent are applied to ascertained factual situations, regard should be had, in the course of identifying an applicable rule, to the principle that similar fact-situations should be treated in a similar fashion.
- (iii) Where facts are materially dissimilar, or the case is not analogous to the previous decision, this Court will always distinguish the rule and may, in the interest of justice, choose not to apply its previous decision.

Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014]

Coram: Mutunga, CJ & P, Rawal, DCJ & V-P, Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ.

Facts

Dr Kidero was declared the duly-elected Governor of Nairobi County following the gubernatorial elections held on 4th March, 2013. The 1st respondent, Mr Waititu who came second with a total of 617, subsequently filed *Election Petition No. 1 of 2013* at the High Court at Nairobi challenging the election of the 1st appellant. In a Judgment dated 10th September, 2013, the trial Court dismissed the petition and confirmed the 1st appellant as the duly-elected Governor of Nairobi County. Aggrieved by the decision of the High Court, the 1st respondent filed an appeal at the Court of Appeal. In its Judgment dated 13th May, 2014 the Court of Appeal, in its Judgment dated 13th May, 2014 the Court of Appeal, in a majority decision (G.B.M. Kariuki & Kiage, JJ.A, with Warsame, J.A dissenting), set aside the High Court decision and annulled the election of the 1st and 2nd appellants. The Court of Appeal in its majority decision held *inter alia*, that the 1st respondent had filed his appeal *within time*; and that the trial Judge improperly exercised his discretion when he curtailed the cross-examination of the Returning Officer for Nairobi County and upheld the election, despite contrary evidence from the Court-ordered scrutiny-reports. In his dissenting opinion, Warsame, J.A held that election petitions are causes *sui generis*, and Rule 82 of the Court of Appeal Rules was not applicable in electoral matters. Therefore, the Court of Appeals holding was that the appeal was filed *out of time* and was incompetent. Warsame, J.A had also found that, based on the scrutiny-report, there was no evidence to invalidate the election of the 1st appellant herein.

Issues

- 1 Whether the Supreme Court has the jurisdiction to hear and determine the appeal under Article 163(4)(a) of the Constitution;
- 2 Whether the Judges of the Court of Appeal heard and determined an incompetent appeal, contrary to Article 87(1) of the Constitution and Section 85A of the Elections Act;
- 3 Whether the Judges of the Court of Appeal, in their majority decision, erred in law in considering matters of fact and evidence contrary to Article 87(1) of the Constitution and Section 85A of the Elections Act;

- 4 *Whether the Judges of the Court of Appeal, in their majority decision, disregarded the doctrine of stare decisis, by failing to apply binding decisions of the Supreme Court in contravention of Article 163(7) of the Constitution;*
- 5 *Whether the Judges of the Court of Appeal, in their majority decision, erred in holding that the 1st respondent's right to a fair trial under Articles 25(c) and 50 of the Constitution had been denied, when the High Court curtailed the cross-examination of the 5th appellant;*
- 6 *Whether the Judges of the Court of Appeal, in their majority decision, acted contrary to Articles 81(e) and 86 of the Constitution by nullifying the 1st and 2nd appellants election on the ground that the 1st respondent was not accorded the right to fair hearing;*
- 7 *Whether the Court of Appeal misinterpreted and misapplied Section 82(1) of Elections Act, vis-à-vis Rule 33(2) and (4) of the Elections Petition Rules, regarding scrutiny and recount of votes;*
- 8 *Whether the Judges of the Court of Appeal in their majority decision, erred with regard to the burden and standard of proof applied at the High Court; and*
- 9 *Whether the election Court and the Court of Appeal misinterpreted Section 84 of the Elections Act and Rule 36 of the Elections Petition Rules, in imposing an upper limit to costs.*

Held

- 1 The Supreme Court had jurisdiction to hear and determine the appeal under article 163 of the constitution.
- 2 The learned Judges of Appeal fundamentally erred in law.
- 3 The majority decision of the appellate court was admitted an appeal that had been filed out of time in spite of clear and unambiguous enunciations of legal principle, by *both* the Court of Appeal and the Supreme Court, regarding the legal effect of Section 85A(a) of the Elections Act.
- 4 The Court of Appeal had annulled a petition on the basis of an appeal that had been filed out of time.
- 5 The learned Judges had overlooked the *law of precedent*, expressly declared in Article 163 (7) of the Constitution.
- 6 The petition of appeal before the Court of Appeal was filed well outside the mandatory time prescribed by Section 85A of the Elections Act.

7 The proceedings at the High Court were ready for collection on 9th of October 2013. A certificate of delay was issued on 30th October 2013 notwithstanding the fact that the proceedings had been ready for collection on 9th of October. The petition of appeal ought to have been filed on or before the close of day on 10th October 2013. Instead, the appeal was not filed until the 22nd of November 2013.

Ratio decidendi

- (i) Article 163(4) (a) of the Constitution confers upon the Supreme Court a role of constitutional *interpretation* and *application*, which cannot be performed through a bare apportionment of judicial tasks.
- (ii) Court of Appeal's majority position, even if founded upon notions of "justice and fairness", had overlooked clear imperatives of the law that are overriding.
- (iii) It is not feasible in electoral disputes, in respect of which the Constitution dedicates a whole chapter to "general principles" of the electoral system *principles* that's tand alongside *prescriptive norms*.
- (iv) Where disputes arise with regard to the interpretation and application of such principles and norms in election petitions, the Supreme Court, Kenya's apex Court, cannot gaze helplessly when moved by a litigant.
- (v) Upon unspecified grounds, the Court of Appeal judges chose to depart from the legal principles established by the Appellate Court itself, and affirmed by the Supreme Court, regarding timelines, and without specifically distinguishing the earlier cases in accordance with normal judicial practice.
- (vi) The Court of Appeal judges did not recognize that Section 85A of the Elections Act is directly born of Article 87 of the Constitution.
- (vii) Judges of the Court of Appeal did not take into account the fact that ideals of justice are by no means the preserve of the intending appellant, and that they must enure to the electorate as a whole.
- (viii) The learned Judges perhaps failed to recognize that the overall integrity of the democratic system of governance is sealed on a platform of orderly process, of which the

Judiciary is the chief steward, and in which the course of justice already charted by the superior Courts is to be methodically nurtured.

Obiter dicta

- (i) To ask the Court, so nonchalantly in the course of submissions, to depart from a statement of principle formally taken in a judicial setting, amounts, with respect, to an abuse of the process of Court.
- (ii) If the Constitution is equated to Kelsen's grundnorm in the hierarchy of norms, then it follows that all laws are "normative derivatives" of the Constitution, as they derive their validity therefrom. And since the Constitution vests the legislative authority in Parliament, then all laws that the latter enacts "derive from the Constitution".
- (iii) The operative words are "interpretation or application". Do these words have the same meaning? In our perception, these terms do not mean one and the same thing. Otherwise, the drafters would have simply opted to use either of them. As it is, the Supreme Court will not infrequently be called upon either to interpret or to apply the Constitution. It emerges from the comparative lesson that judicial approaches in different jurisdictions, do not accord the expressions "constitutional interpretation", and "constitutional application" the same meaning.
- (iv) Interpretation of the Constitution involves revealing or clarifying the legal content, or meaning of constitutional provisions, for purposes of resolving the dispute at hand (call it the hermeneutic aspect). The basic reference-point in constitutional interpretation is the text. Application of the Constitution is a more dynamic notion. It comes into play when the provision of the Constitution remains in some vital respects (even after the jural process of content-ascertainment) indeterminate, or ambiguous, or vague, or contradictory. In other instances, a constitutional text may be quite clear on paper, but when applied to a dispute, it leads to absurd consequences. In such a situation constitutional application ceases to be a

simple exercise in interpretative syllogism. It takes on the character of “creative interpretation”

- (v) Constitutional application, therefore, entails creatively interpreting the constitution to eliminate ambiguities, vagueness and contradictions, in furtherance of good governance. Quite often, this exercise involves interpreting the Constitution in such a manner as to adapt it to changing circumstances in the community, with the care not to usurp the role of the legislature. This is what is meant when the Constitution is said to be “a living document”. A Constitution is, thus, to be interpreted both according to its text, and creatively as well, to breathe life into it.
- (vi) Courts of law should not be the ones to stand in the way of the expeditious disposal of electoral disputes, in a manner that gives fulfillment to the terms of the Constitution and the law.

Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, Petition 2b of 2014 [2014]

Coram: *Mutunga, CJ & P, Rawal, DCJ & V-P, Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ*

Facts

The appellant had been declared as Governor of Meru County after the Meru gubernatorial elections held on 4th March, 2013. He won the election by 3,436 votes. The 1st respondent, a registered voter in North Imenti Constituency in Meru County, filed a petition in the High Court at Meru on 26th March, 2013 seeking a nullification of the election results. The petitioner (the 1st respondent herein) alleged that the election was marred by voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence, discrepancy in the results announced, and contraventions of the regulations governing elections.

The Court, on 23rd September, 2013 dismissed the petition, and confirmed the appellant as Governor of Meru County. Aggrieved by this decision, the 1st respondent appealed to the Court of Appeal. The Court of Appeal held that: *the declared results of the Meru gubernatorial elections were not accurate, verifiable and accountable; the tallying process was not efficient and accurate; the trial judge erred and misdirected himself in finding that a margin of 0.819% could be*

described as wide; quantitatively, the errors and irregularities disclosed materially affected the results of the elections, given the narrow margin between the winner and the runner-up; the trial judge had erred, in denying the 1st respondent the right to cross-examine one of the defence witnesses.

The Court of Appeal set aside the High Court's judgment, and declared that the Meru gubernatorial election *did not meet the threshold of Article 81(e) (iv) and (v) and Article 86 of the Constitution*. The appeal was allowed, and the election of Mr. Munya as Governor of Meru County declared null and void. Aggrieved by the said judgment, the appellant, on 20th March, 2014 filed an appeal and a Notice of Motion under certificate of urgency at the Supreme Court.

Issues

- 1 *Whether the Judges of Appeal acted in excess of their jurisdiction by delving into matters of fact, contrary to the provisions of Section 85A of the Elections Act as read with Article 87(1) of the Constitution;*
- 2 *Whether the Judges of Appeal erred in law, in their interpretation of Section 82(1) of the Elections Act vis-à-vis Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 regarding the recount and scrutiny of votes;*
- 3 *Whether the Judges of Appeal erred in shifting the “burden of proof” in electoral disputes contrary to the applicable law and the binding precedent, as decreed by the doctrine of stare decisis (Article 163(7) of the Constitution);*
- 4 *Whether the Judges of Appeal erred in placing reliance on the percentage “margin of victory” as opposed to the numerical accretion of votes, in annulling the election of the appellant, contrary to Article 180 (4) of the Constitution;*
- 5 *Whether the Judges of Appeal erred in their appreciation of the “legal effect” of errors and irregularities upon an election, in the context of Article 86 of the Constitution.*

Held

- 1 The Judges of Appeal acted in excess of their jurisdiction by delving into matters of fact, contrary to the provisions of Section 85A of the Elections Act as read with Article 87(1) of the Constitution;
- 2 The Judges of Appeal erred in law, in their interpretation of Section 82(1) of the Elections Act vis-à-vis Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013 regarding the recount and scrutiny of votes;
- 3 The Judges of Appeal erred in shifting the “burden of proof” in electoral disputes contrary to the applicable law and the binding precedent, as decreed by the doctrine of stare decisis (Article 163(7) of the Constitution);
- 4 The Judges of Appeal erred in placing reliance on the percentage “margin of victory” as opposed to the numerical accretion of votes, in annulling the election of the appellant, contrary to Article 180 (4) of the Constitution
- 5 The Judges of Appeal erred in their appreciation of the “legal effect” of errors and irregularities upon an election, in the context of Article 86 of the Constitution.

Ratio decidendi

- (i) The three elements of the phrase “matters of law” are 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.*
 - d. *by elevating the analysis of the appellant/petitioner to a pedestal of “proven evidence”, and drawing their own conclusions of fact there from, the learned Judges of Appeal cannot be said to have been considering “matters of law” within the meaning of Section 85A.*
- (ii) The following are the guiding principles on scrutiny and recount of votes in an election petition:

- a. *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.*
 - 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.*
 - c. *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 request, 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.*
 - d. *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 in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.*
- (iii) A petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt.
 - (iv) 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. It is on that basis that the respondents bear the burden of proving the contrary.

- (v) Having found that the election was *conducted substantially in accordance with the constitutional principles*, the learned Judges had *no basis* for invalidating such an election, unless such errors and irregularities had *demonstrably reversed the result* against the appellant.
- (vi) By annulling the Meru gubernatorial election, the Court of Appeal had shown scant reference to the recorded findings of the trial Judge, substituting the conclusions of the trial Judge with its own, though without *evidentiary justification*.
- (vii) The appellate Court had misinterpreted and misapplied the electoral law, and overlooked the doctrine of precedent, contrary to *Article 163(7) of the Constitution*. There is no basis for sustaining the said judgment.

Obiter dicta

- (i) 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 experiment.
- (ii) The Constitutional sensitivity about “timelines and timeliness”, was intended to redress this aberration in the democratic process.
- (iii) The country’s electoral cycle is five years. It is a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are.
- (iv) The people’s will, in name of which elections are decreed and conducted, should not be held captive to endless litigation.

Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others, Petition No. 10 of 2014, [2014] eKLR

Coram: Rawal, DCJ, Tunoi, Ibrahim, Ojwang, Ndungu, SCJJ

Facts

The 1st respondent filed a petition in the High Court at Mombasa on 10th April 2013, challenging the validity of the election of the 1st appellant as the Governor of Mombasa County and consequently, that of the 2nd appellant as the Deputy Governor. In response to the petition the appellants (respondents in the petition) averred that the 1st respondent had filed his petition outside the timelines prescribed by the Constitution. Accordingly, the appellants filed an application dated 29th April, 2013 seeking that the petition be struck out or dismissed on the ground that it had been filed 34 days after the declaration of the election results - outside the 28 days mandated by Article 87(2) of the Constitution.

The application was anchored on the ground that the provisions of Section 76(1)(a) of the Elections Act, No. 24 of 2011 (hereinafter, the Elections Act) were inconsistent with Article 87(2) of the Constitution and hence the High Court lacked jurisdiction to entertain the matter. The High Court ruled that Section 76(1)(a) was inconsistent with the provisions of Article 87(2) of the Constitution and recommended the amendment of either Article 87 (2) of the Constitution or Section 76 of the Elections Act. The appellants, being aggrieved by the decision of the High Court, appealed to the Court of Appeal on grounds, *inter alia*, that the trial judge erred in law in finding that Section 76(1)(a) of the Elections Act was *prima facie* lawful at the time of filing the petition. The Court of Appeal, however, dismissed the appeal and nullified the High Court's ruling to the effect that Section 76(1)(a) of the Elections Act is inconsistent with Article 87(2) of the Constitution. Aggrieved by the Court of Appeal judgment, the appellants further appealed to the Supreme Court as of right, pursuant to Article 163(4)(a) of the Constitution, seeking a determination of the question whether Section 76(1)(a) of the Elections Act, 2011 is inconsistent with the provisions of Article 87(2) of the Constitution.

Issue

1. *Whether the Court had jurisdiction to entertain the appeal.*
2. *Whether Section 76 (1)(a) of the Elections Act is ultra-vires Article 87 (2) of the Constitution.*

Held

- 1 Court had jurisdiction to determine appeal.

- 2 Section 76(1) (a) of the *Elections Act, 2011* was inconsistent with Article 87(2) of the Constitution of Kenya, 2010 and, to that extent, a nullity.
- 3 *Appeal allowed.*

Ratio decedendi

- i. While the principle of *timely disposal of election petitions* affirmed by the Court must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount.
- ii. Tallying and public announcement are designed by the Constitution [Article 86 (b) & (c)] and the Elections Act [Section 39] to take place *immediately after the close of polling*. T
- iii. The Constitution specifically emphasizes the *promptness* with which the collated and tabulated results ought to be announced. This is important because it signifies the urgency with which the public should be notified of the outcome of the election.
- iv. The subsequent stage of *declaration* must take place *immediately after the tallying and announcement of the election results*.
- v. The jurisdiction to handle disputes relating to the electoral process shifts from the Commission to the Judiciary upon the execution of the required mandate by the returning officer.
- vi. Once the returning officer makes a decision regarding the validity of a ballot or a vote, this decision becomes final, and only challengeable in an election petition. The mandate of the returning officer, according to Regulation 83(3), terminates upon the return of names of the persons-elected to the Commission.
- vii. The issuance of the certificate in Form 38 to the persons-elected indicates the termination of the returning officer's mandate, thus shifting any issue as to validity, to the election Court.
- viii. Based on the principle of efficiency and expediency, the time within which a party can challenge the outcome of the election starts to run upon this final discharge of duty by the returning officer.

Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 others, Petition 2 of 2013 (Bungoma) [2013] eKLR

Per: Gikonyo J

Facts

The Petitioner filed a case contesting the validity of the election of the second appellant as the Member of the National Assembly for Webuye-East Constituency during the general elections held on 4th March, 2013. The Petitioner had made a number of allegations made the following broad allegations including bribery, transportation of voters, dual party membership, use of violence and irregular malpractices (on the part of the IEBC).

Issues

- 1 *Whether there were election malpractices committed by the 1st, 2nd and 4th Respondents and whether those malpractices affected the results of the election.*
- 2 *Whether the 1st, 2nd and 4th Respondents committed electoral offences during the election held on 4th March, 2013.*
- 3 *Whether the 1st Respondent was validly elected as the Member of the National Assembly for Webuye-East Constituency in the election held on 4th March, 2013.*
- 4 *What orders does the court make on costs?*

Held:

- 1 Petitioner had not established irregularities or non-compliance with the electoral laws of Kenya to the required standard of proof which would entitle the court to nullify the election of the 1st Respondent as the Member of National Assembly for Webuye East Constituency.
- 2 The Petitioner established some irregularities in some Form 35 and Form 36 on the results in dispute. Those irregularities were not widespread, multiple, fundamental in a sense to

make them of the kind of non-compliance that would affect the results or put the victory of the 1st Respondent in doubt. Such errors are expected in any process which is being handled by human beings.

- 3 The evidence tendered in support of the claim for issuance of two sets of ballot boxes remained general and without much and specific details required in law.
- 4 The advantage accruing from failure to record statutory comments would only be of value where there is evidence adduced in support of the insidious irregularities in the election or ineptitude or improprieties on the part of the IEBC Officials.
- 5 Costs follow the event. Costs to the 1st Respondent are not to exceed Kshs 1,500,000. Costs to the 2nd and 3rd Respondents are also not to exceed Kshs 1,500,000 while those to the 4th Respondent shall not exceed Kshs 1,000,00.

Ratio decedendi:

- i. The court cannot interfere with that expression of the will of the people unless there grounds proven in accordance with the law.
- ii. The offence of treating of voters contrary to section 62 of the Elections Act requires that the Petitioner should prove that the candidate corruptly, for purposes of influencing a voter to vote or refrain from voting for a particular candidate or for any political party at an election, gave or undertook or promised to reward, or provided any food, drinks refreshment or provision of any money, etc. to any person for the purpose of corruptly influencing that person or any other person to vote or refrain from voting for a particular candidate at the election or to refrain from voting, for a particular candidate, at the election.
- iii. Corrupt intention to induce and influence voters to vote for a particular candidate or political party or to refrain from voting for a particular candidate or political party was visibly missing in the petitioner's evidence.

- iv. The Petitioner's evidence was also of a general nature on that matter. In fact the witness said that he did not consider the party at Sambu's [respondent] home to be a bribe.
- v. Comments by the Presiding Officer embodies a statutory requirement. The comments serve the following purposes:
 - (a) to give information on the general conduct of elections in the particular Polling Station
 - (b) helps IEBC, the court and the public to observe from the recorded comments what transpired in that election in the particular Polling Station;
 - (c) enables the court, IEBC and the public to assess the impact of any impropriety recorded therein, especially when questions on the integrity of the electoral process are raised. Some may argue that where there are no adverse happenings worth recording, the Presiding Officer need not record any comment.
- vi. Scarcely will lack of Statutory Comments, by itself, invalidate an election per se. Nevertheless, failure to make the statutory comments in Form 35 would, in a properly argued case, derive some factual benefit to the Petitioner.
- vii. First, the court will take judicial notice of the fact that the comments were absent in Form 35. Secondly, it is not untrue that the absence of statutory comments on the Form does not necessarily mean there were no irregularities or malpractices in the election. That advantage is ephemeral unless it is coupled with concrete evidence of malpractices or irregularities.
- viii. The court is empowered under rule 36(1) (a) of the Elections Rules to specify the total amount of costs payable; and the persons by and to whom the costs shall be paid.

Obiter dicta

- i. Under section 68 of the Elections Act, a candidate who uses public resources for purposes of campaign in an election commits an election offence. It is a grave matter with criminal

connotation and one that should be reported for criminal prosecution under section 87(1) of the Elections Act. It should, therefore, be proved beyond reasonable doubt.

- ii. In any judicial proceeding, the question of burden of proof and standard of proof must be squared out first which is the legal scale of measure for evidence tendered. Then, a decision is made.
- iii. The two terminologies, the burden of proof and standard of proof are closely related subjects, albeit distinct, they have been wrongly used interchangeably. More trouble is found in understanding that burden of proof entails legal burden of proof and evidential burden.
- iv. 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.
- v. 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
- vi. 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.
- vii. The Petitioner cannot, 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 of the Petitioner.
- viii. 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.

Martin Sarakwe Wechuli v IEBC & 2 others [2013] eKLR

Coram: H.A. OMONDI J

Facts

The Petitioner- Martin Sarakwe Wechuli- filed the petition challenging the election of Bonface Okhiya Otsiula as the member of the National Assembly for Bumula Constituency in the General Election held on March 2013. He alleged certain discrepancies and breaches of the Electoral laws at various polling stations, resulting in elections which were neither free nor fair. The Respondents filed responses contesting the allegations pleading that the elections were free, fair and credible. On 22/04/2013, the petitioner filed a notice of withdrawal of the Election Petition and applied to withdraw the petition on grounds that:

- a) He had held serious consultations and sought legal advice from his counsel, which had resulted in him concluding that the best decision for him was to withdraw the petition.
- b) He had also examined carefully, the decision by the Supreme Court – Election Petition No.5 of 2013 (Raila Odinga v IEBC and 3 others) as consolidated with Petition No.3 of 2013, (Moses Kiarie Kuria and 2 others V Ahmed Isaack Hassan and IEBC), and Petition No.4 of 2013 (Gladwel Wathoni Otieno and Another V Ahmed Isaack Hassan and 3 others where the petitioners challenged the election of His Excellency President Uhuru Kenyatta and the petition was dismissed. He stated that in light of that decision and having continuously followed the mood of his constituents, he had resolved not to pursue the petition further.

Issue

- 1 *Whether to allow the application for withdrawal*
- 2 *Who was to bear the costs*

Held

- 1 The petition was marked as withdrawn.

2 Costs were to be borne by the petitioner.

Ratio decedendi

- i. The reasons given for the withdrawal was as a result of not only personal interest of the petitioner, but [also] the interest of the people of Bumula, [the petitioners family], and the fact that the petitioner recognized that most of the issues he raised especially with regard to 1st and 2nd respondents had been addressed by the Supreme Court in its ruling in Election Petition No.5 of 2013, and appropriate directions had been given especially as concern the electoral body and the conduct of future elections.

John Murumba Chikati v Returning Officer Tongaren Constituency & 2 others [2013] **eKLR**

Coram: F Gikonyo J

Facts

The Petitioner and the 3rd Respondent together with other candidates, contested for the seat of Member of National Assembly for Tongaren Constituency in the General Elections held on 4th March, 2013. On conclusion of the elections, the 3rd Respondent was declared by IEBC as the winner. The Petitioner was aggrieved by the declaration of the results and in exercise of his constitutional right, filed this petition on 8.4.2013 to challenge those results. The Petitioner's case was that the election was marred by massive irregularities and malpractices. He pleaded that the way the elections in dispute were conducted completely violated the provisions of the Constitution, the Elections Act and the Independent Electoral and Boundaries Commission Act. The Petitioner alleged that flawed recruitment of polling clerks, interference with election materials, pre-marking of register, excess voting, illegal polling streams, inaccuracies, duplication, non-entry of results, use of violence on voters and closing the polling station before time fundamentally interfered with the results.

Issues

- 1 *Whether the elections were conducted in accordance with the law by the 1st and 2nd Respondent*

- 2 *Whether the 3rd Respondent was validly elected*
- 3 *Whether the 1st Respondent engaged in acts of violence*
- 4 *Whether there should be a scrutiny and recount of votes.*
- 5 *Who was to bear the costs of the suit?*

Held

- 1 The allegations that the election had not been conducted in accordance with the Constitution and the Elections Act were not proved.
- 2 The 3rd Respondent was validly elected.
- 3 There was no sufficient reason to warrant scrutiny and recount of votes.
- 4 The costs were to be awarded to the respondents

Ratio decedendi

- i. The irregularities cited including errors, duplication of results, lack of statutory comments, lack of official rubber stamp and only some agents signing the statutory Form 35, did not affect the result of the election in dispute.
- ii. An order for scrutiny can be made when it is prayed for in the petition itself and when reason for it exists. It is made when there is ground for believing that there are irregularities in the election process or if there was a mistake on the part of Returning Officer or other election official.
- iii. Commission of an election offence is one thing whilst the effect of the offence to the integrity of the election is another thing altogether. Invalidation of election results on the ground of electoral offences will depend on a number of legal considerations. The major ones would be who committed the offence and the nature of the offence.
- iv. If a candidate commits act of bribery, the election is void even on a single incident; whereas, if the bribery is by the agents, it is permissible to allow the candidate to claim exoneration from the acts of the agents. It is also the view of the law that where the bribery was by another person, it would invalidate a candidate's election if it was so extensive that it affected the results

- v. 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 shifts to the party who would fail without further evidence.
- vi. As was established in the *Raila Odinga* case, in election petitions, the standard of proof in allegations other than those of commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases although it does not assume the standard of beyond-reasonable-doubt. However, where the Petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt.

Anami Silverse Lisamula v Independent Electoral & Boundaries Commission, David Lenarum, Returning Officer Shinyalu Constituency & Justus Gesito Mugali M'mbaya [2014] eKLR

Coram: *Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala, Njoki, SCJJ*

Facts

The appellant, Anami Silverse Lisamula, the 3rd respondent and five others were candidates for Member of National Assembly in Shinyalu constituency. The 2nd respondent declared the appellant as the winner garnering 125,563 votes out of the total 260,481 votes cast. The results were gazetted on 13th March, 2013 and the appellant was sworn in on 28th March, 2013 as the Member of the National Assembly for Shinyalu Constituency. The 3rd respondent challenged the declared results, vide *Election Petition No. 6 of 2013*, in the High Court at Kakamega. The petition was grounded on allegations that:

- i. *The election was not conducted in accordance with Articles 81 and 86 of the Constitution;*
- ii. *The 1st respondent failed to conduct an election that met the requirements of Articles 81, 83 and 88 of the Constitution as a result of which the appellant herein was not validly elected Member of the National Assembly for Shinyalu constituency;*

- iii. *The 1st and 2nd respondents were bound to adhere to Article 10 of the Constitution, and were bound by the Bill of Rights; they were bound to respect, uphold and defend the political rights of the 3rd respondent herein and of his supporters enshrined in Article 38 of the Constitution;*
- iv. *The 1st and 2nd respondents failed to properly count, tally and verify the results of the election, hence breaching Article 38 of the Constitution;*
- v. *The election was vitiated by gross and widespread irregularities and malpractices which fundamentally impugned the validity of the declared results;*
- vi. *The 1st respondent, with calculated precision and by design, adopted a procedure, policy and an attitude that would ensure that the electronic voter-registration, identification and results-transmission during the election, would fail; hence, it could not hold a free and fair election.*

The trial court (E.K. Ogola J) delivered judgment on 4th October, 2013, holding that it would not be proper to nullify the election due to minor electoral errors and anomalies and in the light of the evidence adduced before it. The Court held that the appellant was validly elected as Member of the National Assembly for Shinyalu Constituency, in a free and fair election.

The 3rd respondent being dissatisfied with the Judgment of the High Court filed an appeal at the Court of Appeal at Kisumu, on 4th November, 2013. The Court of Appeal addressed the following three issues as the central ones in the petition:

- i. *The violence witnessed in Shinyalu Constituency, its extent and legal effect;*
- ii. *The errors, irregularities, malpractices alleged, and whether they affected the result; and*
- iii. *The legal correctness of reliance on a unilateral reconciliation of votes during the hearing, in lieu of the requested scrutiny and recount.*

It held that the election in question did not conform to the high standards of probity and integrity set out in the Constitution. That non- conformity and non-compliance with the law doubtless affected the result of the election. The co-existence of non-compliance effect on the result would inevitably lead to such an election being declared void.

The judgment of the High Court dated and delivered on 4th October 2013 was set aside in its entirety. It was substituted by an order that the 3rd Respondent was not validly elected as the member of the National Assembly for Shinyalu Constituency in the election held on 4th day of March 2013.

The appellant being dissatisfied with the decision of the Court of Appeal, filed a further appeal before us on 16th April, 2014, together with a Notice of Motion application under certificate of urgency.

Issue(s)

- I. *Whether the petition at the High Court was filed out of time, and whether the proceedings at the High Court and the Court of Appeal were a nullity **ab initio** for being in contravention of Article 87(1) of the Constitution.*

Held

- I. The petition in the High Court, which was filed 35 days after the date of final declaration of results by the Returning Officer, fell outside the 28 days prescribed by the Constitution; and thus, all the proceedings ensuing from such declaration of results, at the High Court and the Court of Appeal, were a nullity.

Ratio Decedendi

- (i) Article 87(1) of the Constitution [decrees] that Parliament was to enact legislation to ensure timely settlement of election disputes. On this basis, the Elections Act, 2011 was passed, bearing Section 76(1) (a), which provided that such a contest should be lodged within 28 days of the gazettment of the results.
- (ii) The Supreme Court had pronounced itself on the meaning of “declaration of results”, in the case of *Hassan Ali Joho & Another v. Suleiman Said Shahbal & Two Others*, *Supreme Court Petition No. 10 of 2013*; [2014] eKLR. In that case, the sole issue for determination was *whether Section 76(1)(a) of the Elections Act was unconstitutional, for being inconsistent with Article 87(2) of the Constitution*. It was Determined that the declaration

of results is done by the officials of the electoral body, through the various Forms prescribed by the Elections Act, and that Section 76(1)(a) was a nullity.

Dr. Thuo Mathenge & another v Nderitu Gachagua & 2 others, Civil Appeal, No. 29 of 2013 [2013]eKLR

Coram: Visram, Koome & Odek JJA

The appeal was a consolidated appeal against the decision of the High Court (Wakiaga, J.) dated 9th September, 2013 in which a petition had been dismissed. The High Court had dismissed the petition. The decision was impugned on several grounds including that the High Court had rendered an erroneous interpretation of the provisions of Section 22 of the Elections Act, 2011 and Regulation 47(2) of the Election (General) Regulations, 2012 (the Regulations), that the judge had entertained an issue of eligibility of the 1st appellant when the question before the superior court was the validity of the elections of the county Governor under Section 75 read together with Section 86(1) of the Elections Act, that the judge had directed the Director of Public Prosecutions to order investigations in respect of violations of the provisions of Article 157(4) and 157 (10) of the Constitution, that the judge had failed to appreciate that for an election to be valid in law, it must comply with the Constitutional principles as to what constitutes a free and fair election as prescribed by Article 81(e) of the Constitution, that the judge had failed to find that the provisions of Section 83 of the Elections Act could not be used to protect, sustain, defend or otherwise shield from invalidation or nullification of an election not conducted in accordance with all the principles laid down in the Constitution and in the written electoral law; that the contents of the ballot paper, however erroneous do not affect the legal validity of the ballot paper as long as the form, the pattern or the outline of the ballot paper complies with Form 29 prescribed by Regulation 68 (1)(c) of the Regulations. It was also claimed that the judge had misconstrued and misinterpreted the provisions of Article 180(6) of the Constitution in so far as the joint election of the Governor and Deputy Governor is concerned; that he had erred in law by evaluating the evidence before him in an impartial and unfair manner thereby rendering the appellants' constitutional rights to a fair hearing under Article 50(1) of the Constitution illusory and that the learned Judge had erred in law by

allowing his religious beliefs to influence and colour his judgment in violation of the judicial oath of office prescribed by the 3rd schedule to the Constitution.

Issues

- 1 *What are the applicable principles in interpreting both constitutional and statutory provisions regarding electoral matters?*
- 2 *What is the threshold of free and fair elections?*
- 3 *What was the nature of the error on the ballot paper?*
- 4 *What was the effect of the error on the gubernatorial elections?*
- 5 *Did the trial court have jurisdiction to entertain the issue of a candidate's eligibility in respect of academic qualifications in the Petition?*
- 6 *Was the learned Judge biased against the appellants?*
- 7 *Did the learned Judge rely on his personal religious beliefs to make his decision?; if so was it proper?*
- 8 *Who should bear the costs both of the Petition and this appeal?*

Held:

- 1 Interpretation of the *Constitution* is distinct from interpretation of provisions of statutes. An act of Parliament ought to be construed according to the intent of Parliament; if the words of the statute are in themselves precise and unambiguous the words should be given their natural and ordinary meaning as the words best portray the intention of Parliament.
- 2 The threshold of a fair and free election is one which complies with the electoral law and/or which despite non-compliance does not affect the results which reflect the will of the electorate.
- 3 The appellant failed to discharge the obligation of pointing out errors associated with clearing of candidates.
- 4 The evidence adduced by the 1st appellant that he believed his supporters voted against him because of the error on the ballot paper were based on opinions and speculations
- 5 The subject elections were substantially in conformity with the law and that the error on the ballot papers did not affect the gubernatorial election results of Nyeri County.

- 6 The High Court has the jurisdiction to determine whether an individual is eligible to contest for an electoral seat or to be elected to an electoral office.
- 7 The appeal had no merit and is hereby dismissed with costs to the respondents.

Ratio decedendi

- (i) The Supreme Court and the Court of Appeal have on numerous occasions set out the applicable principles in interpretation of constitutional provisions. These are:
 - a. Firstly, it ought to be interpreted in a manner that promotes *Article 259* of the *Constitution*.
 - b. Secondly, the spirit and tenor of the *Constitution* which embodies the ideals, aspirations and values of the Kenyan citizens must preside and permeate the process of interpretation.
 - c. In determining and understanding the spirit of the *Constitution* the language of the various provisions of the *Constitution* ought to be taken into account.
- (ii) By virtue of *Section 83* of the *Elections Act* it is not in all circumstances that non-compliance with the above principles leads to unfair elections.
- (iii) The IEBC is required to publish the names of cleared candidates. Upon such publication in the Kenya Gazette, the obligation to point out any error is upon any member of the public but more particularly on an aggrieved person. However, the obligation of the IEBC to ensure the accuracy of the contents of the ballot paper cannot be diminished by an allegation that the 1st appellant [an individual] was to inform them of any error.
- (iv) There was no basis for speculations and opinions in the evidence adduced. This was because:
 - a. It is only the Governor who is directly elected by the voters. The appellant's witnesses did admit that they were aware that it was only the Governor who was being directly elected by the voters and that the successful candidate's nominee would be the Deputy Governor. Therefore, the contention by the appellants' witnesses that they had supported the 1st appellant on account of Dr. Geoffrey Kamau Kibui being his running mate and that the error on the ballot papers influenced them to vote against the 1st appellant was unreasonable. It is quite clear that the witnesses understood that it was only

the Governor who would be directly elected; his running mate would be the Deputy Governor. Therefore, at no instance were the appellants' witnesses voting for the Deputy Governor. The contention was thus, unreasonable.

- b. It was clear from the evidence of the appellant's witnesses that they knew that the 1st appellant had nominated Dr. Geoffrey Kamau Kibui to be his running mate and both the 1st appellant and his nominee were from the same party.
 - c. Thirdly, the appellants did not prove that the error on the ballot papers resulted in the voters changing their preferred choice. The evidence adduced by the appellants on this issue was based on opinion and speculation.
- (v) The fact that the 3rd respondent clears candidates to run for elective posts does not oust the jurisdiction of the High Court in determining electoral eligibility.

Obiter dictum

- (i) A free and fair election is not determined per se by the ballot paper. The electoral process has several components which start with the clearance of candidates by political parties to casting of votes and ultimately declaration of a winner. In all these processes there was no error in the electoral process in respect of the gubernatorial elections.

Amina Hassan Ahmed v Returning Officer Mandera County & 2 Others, Petition 4 of 2013 [2013] eKLR

Coram: Onyancha J

Facts

The election petition was filed by the Petitioner, Amina Hassan Ahmed, through her Advocates on the 5th April, 2013. The petition sought to challenge the election of Fathia Mahbub who was the declared and gazetted winner of the Women Representative seat for Mandera County. The Petition was accompanied by a supporting affidavit of the Petitioner sworn on the 24th March,

2013. It was also accompanied by several affidavits of evidence, sworn by those intended to be called as witnesses. As soon as the petition was served an application was filed by Fathia Mahbub seeking to strike out the petition as it failed to disclose material facts, namely:

- a) *Actual election results declared by the 1st and 2nd Respondents.*
- b) *The names of all candidates participating in the contested Mandera County Women Representative seat elections.*
- c) *The dates and manner of declaration of the contested results.*

Issue

- 1 *Whether the Petitioner would be allowed to amend the petition to include mandatory material information*

Held

- 1 The Petitioner's application seeking amendment and other prayers, dated the 11th day of May, 2013 and filed in court on 13th May, 2013 refused and dismissed with costs to the Respondents.
- 2 The 3rd Respondent's application dated 3rd May, 2013 and filed in court on the 7th May, 2013, seeking the striking out of the Petitioner's petition dated the 24th March, 2013 and filed in court on the 5th of April, 2013, granted.
- 3 Petition struck out, with costs to the Respondents.

Ratio decidendi

- (i) Neither the *Elections Act* nor the *Rules* donates any provision for amendment of an election petition except for the limited window found in *Section 76(4)* of the *Elections Act, 2011*.
- (ii) The *Elections Act, 2011* does not generally allow amendment of an election petition except where the following terms are complied with:

(i) The petition to be amended questions a return or an election result upon an allegation of an election offence and;

(ii) *The amendment is sought from the election court within the 28 days prescribed by the Act for filing an election petition and;*

(iii) *The election court is willing to exercise its original discretion in favour of granting the amendment sought.*

Obiter dictum

- (i) An election petition is a creature of special legislations the *Elections Act, 2011*. It is not an ordinary civil suit and ordinary civil procedure principles arising from the interpretation of the *Civil Procedure Act and Rules* may not be applicable.

Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 others, Civil Appeal No. 300 of 2013 [2014] eKLR

Coram: Githiji, Ouko & Murgor JJA

Facts

The appellant *Bashir Haji Abdullahi*, the 1st Respondent *Adan Mohamed Nooru*, the 2nd respondent and one *Mohamed Dube* vied for election as a member of National Assembly for Mandera North constituency in the general elections held on 4th March, 2013. After the elections the 1st respondent garnered a total of 19,055 votes, against the appellant's 14,156 votes. The 3rd candidate *Mohamed Dube* garnered 5 votes. Thereafter the 3rd respondent, the Returning Officer declared the 1st respondent as duly elected member of the National Assembly. On 8th April, 2013 the appellant filed an Election Petition No. 7 of 2013 in the High Court at Garissa challenging the validity of the election of the 1st respondent on the grounds of various electoral malpractices. According to the petition the 2nd respondent was joined in the petition because he was directly or intimately involved in the perpetuation of electoral offences during the election process either on his behalf or for the benefit of the 1st respondent. On 9th May 2013, the 1st respondent filed a notice of motion seeking an order to strike out the petition essentially on the ground that the petition was filed 34 days after the declaration of results in contravention of *Article 87(2)* of the *Constitution*. That application was fully heard by the High Court and on 31st May 2013 *Onyancha, J* dismissed the application with costs. On 1st November

2013 the appeal was filed. Subsequently on 13th March 2014, the 1st and 2nd respondents filed a notice of cross-appeal against the decision of the High Court dated 2nd October 2013. By the cross-appeal they sought an order that the decision be varied or reversed to the extent and in the manner that the petition was filed out of time and therefore incompetent *ab initio*. The cross appeal had to be dispensed off first as it raised issues touching the validity of the petition.

Issues

- 1 *Whether the learned Judge erred in law in failing to find that there was conflict between the provisions of Article 87(2) of the Constitution and section 77 of the Elections Act on one hand and section 76(1) (a) of the Elections Act.*
- 2 *Whether the learned Judge erred in law in equating the phraseology “declaration of the election results’ used in the Constitution with the phraseology “publication of results in the election Gazette” used in section 76(1)(a) of the Elections Act.*
- 3 *Whether the learned Judge erred in law in finding that the petition was filed within the time prescribed by Article 87(2) of the Constitution.*

Held

- 1 The election petition on which the appeal was based was filed outside the constitutional limitation period stipulated in *Article 87(2)*. Upon the expiry of the 28 days constitutional limitation, the appellant’s right to file an election petition was extinguished.
- 2 The election petition was incompetent and the High Court lacked jurisdiction to entertain it.

Ratio decidendi

- i. Except in cases where the interlocutory decision finally disposes of the election petition, the Court has no jurisdiction to entertain an interlocutory appeal and a party aggrieved by an interlocutory decision should raise the issue as a ground of appeal on a matter of law in the resulting appeal.
- ii. Neither the *Elections Act* nor *Rule 35* of the *Elections Petition Rules* expressly confers on the Court jurisdiction to entertain interlocutory appeals.

- iii. *Section 3(1) of the Appellate Jurisdiction Act* only empowers the Court to hear appeals in cases in which an appeal lies to the Court of Appeal under any Law. It does not itself donate a right of appeal of whatever nature.
- iv. The appeal against the dismissal of the election petition was filed on 2nd November, 2013. The 1st and 2nd respondents' application to strike out the petition on the ground that it was filed outside the period stipulated by *Article 87(2)* was dismissed on 9th May 2013. The notice of cross-appeal against the final decision dated 2nd October 2013 was filed on 13th March, 2014. During the pendency of the appeal the Supreme Court on 4th February 2014 delivered its decision in Joho's case in which it declared *section 76(1) (a) of the Elections Act* inconsistent with *Article 87(2)*:

“The appeal is allowed with the holding that section 76(1)(a) of the Elections Act 2011 is inconsistent with Article 87(2) of the Constitution of Kenya and to that extent, a nullity.”

M'nkiria Petkay Shen Miriti v Ragwa Samuel Mbae & 2 others Civil Appeal No. 47 of 2013 [2014] eKLR

Coram: Visram, Koome & Odek, JJ.A

Facts

The appellant had vied for Governorship in Tharaka-Nithi County. The other contestants for the governorship were the 1st respondent and Mutegi Francis. After the conclusion of the elections the 3rd respondent, being the County Returning Officer announced the 1st respondent as the winner. The results in respect of the gubernatorial elections as announced by the 3rd respondent were as follows: Ragwa Samuel Mbae 70,088 votes, M'Nkiria Petkay Shen Miriti (Appellant) 54,813 votes, Mutegi Francis 10,741 votes. Aggrieved with the manner in which the elections were conducted, the appellant filed an Election Petition in the High Court on 10th April, 2013 challenging the election of the 1st respondent as the Governor for Tharaka-Nithi County. After considering the evidence adduced, the trial court found that the appellant had not proved any election offence or malpractice that had been committed by the respondents in the 4th March, 2013 general elections. The trial court also found that the arithmetical errors in

the results, if any, were due to human error and did not affect the outcome of the results; the 1st respondent was rightly declared as the elected Governor for Tharaka-Nithi. The learned Judge (Lesiit, J.) vide a judgment dated 27th September, 2013 dismissed the appellant's Petition with costs. It is that decision that has provoked this appeal.

Issues

- 1 *Can the competency of the appeal be raised at the hearing of the appeal?*
- 2 *What is the Court's jurisdiction in respect of the appeal?*
- 3 *Who bears the burden of proof in election petitions?*
- 4 *Did the appellant prove his case to the requisite standard?*
- 5 *Did the learned Judge contravene the provisions of Rule 21 of the Elections Rules by directing the 2nd respondent no to avail ballot boxes in respect of challenged elections before the election court?*
- 6 *Did the learned Judge misdirect herself in declining to issue an order for scrutiny and recount of the votes?*
- 7 *Did the learned Judge consider the results contained in Forms 35 & 36?*
- 8 *Was the learned Judge biased against the appellant?*
- 9 *Who is required to filling Form 35?*
- 10 *Did the errors and irregularities exposed (if any) affect the election results?*
- 11 *Did the learned Judge properly exercise her discretion in respect of costs?*

Held

- 1 Competence of an appeal determines whether or not a court can go into the merits of the appeal.
- 2 The appeal was filed within the requisite time and was competent before the court.
- 3 From the practice and history of Kenya, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question.
- 4 There was no proof of bias on the part of the learned Judge as against the appellant.
- 5 There was no fault in the learned Judge declining to grant the order for scrutiny and recount because the appellant had not laid any basis for the same.

- 6 However, we are of the considered view that the learned Judge misdirected herself on the cap she placed on the total costs payable by the appellant.
- 7 Costs in the High Court were not to exceed Ksh. 2.5 million while costs of this appeal were not exceeding Ksh. 1 million.
- 8 Appeal lacked merit and dismissed with costs to the respondents.

Ratio decidendi

- (i) The evidence that had been adduced did not prove to the required standard the alleged irregularities and malpractices.
- (ii) Rule 35 of the Elections Rules provides that an appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules. Pursuant to the Rules, a party can only raise an issue on the competency of an appeal before this Court either under Rule 84 or 104(b).
- (iii) Under the rule (84) a party is required to raise an issue on the competency of the appeal before the appeal is set down for hearing.
- (iv) The standard and burden of proof in election petitions was aptly stated in the case of *Raila Odinga v IEBC & Others*
- (v) *Regulation 79* of the *Elections Regulations* requires the Presiding Officer to announce and forward the results to the Returning Officer vide a declaration which shall be in Form 35; Form 35 is required to be signed by party agents present at the polling centre. The *Elections Regulations* do not require the Presiding Officer to forward the tallying sheet to the Constituencies Returning Officer. All that is required to be forwarded is Form 35, the ballot boxes and the tamper proof envelopes. The party agents are not required to append their signatures on Form 33.
- (vi) The appellant had failed to adduce exact, accurate and cogent evidence which demonstrated that the Presiding Officers refused/neglected to fill in Form 33 and this affected the results of the election.
- (vii) The learned Judge had been justified by declining to grant the order for scrutiny and recount because the appellant had not laid any basis for the same. Evidence that was adduced did not also prove to the required standard the alleged irregularities and malpractices.

- (viii) The appellant had not proved that the affected votes were substantial as to cast doubt as to who the winner in the said elections was. Even if the affected votes were to be taken into account the margin between the appellant and the respondent which was 15,275 would still be huge.
- (ix) The cap of Kshs. 5 million is excessive and contrary to the average cap placed by the Election Court in similar Election Petitions.

Charles Kamuren v Grace Jelagat Kipchoim & 2 others Civil Appeal No. 159 of 2013 [2013] eKLR

Per Nambuye, Musinga & M’Inoti JJA

Facts

Achode J delivered a ruling on the 17th day of June, 2013 striking out a petition from the petitioner for being served out of time. In the ruling the court determined four applications that had, by consent, been consolidated and heard together. The applications were:

- a. *Application dated 10th May, 2013 filed by the 1st respondent seeking an order to strike out the petition for late service.*
- b. *Application dated 14th May, 2013 filed by the 2nd and 3rd respondents to strike out the petition for non-compliance with rule 10 (1) (c) and (d) of the Elections (Parliamentary and County Elections) Petition Rules, 2013 (hereinafter referred to as “the Petition Rules”).*
- c. *Application dated 21st May, 2013 filed by the petitioner seeking extension of time to effect service of the petition.*
- d. *Application dated 14th May, 2013 by the petitioner seeking leave to amend the petition.*

In respect of the application challenging the petition for non-compliance with *rule 10 (1) (c) and (d)*, the election court held that it was not correct that the petitioner had not particularized the results he was contesting. The petitioner had stated the results, whether or not they were the correct ones was a different matter altogether. In any event, the trial judge added, the question as to whether the results cited by the petitioner were the exact ones that had been declared was a matter of fact that could only be ascertained by way of evidence. Further, the court observed, although the petitioner did not indicate the date when the results were declared by

the 2nd respondent but had only stated the date they were gazetted that did not render the petition fatally defective and therefore dismissed that application. Regarding the petitioner's application to amend the petition, the court had held that it had no jurisdiction to do so since the application had been brought outside the twenty eight days' period that is allowed for presenting an election petition. Consequently, the court dismissed the application.

As to whether the court had power to extend time within which an election petition can be served, the court held the petition was served out of time and the court lacked jurisdiction to extend the period of service, the election court struck out the entire petition with costs to the respondent.

Being aggrieved by that decision, the appellant preferred an appeal to the court of Appeal.

Issue

- 1 *Whether the Appellate Court had jurisdiction to hear and determine the appeal.*
- 2 *Whether the learned judge erred in law in holding that the High Court had no power to extend the time for serving an election petition and proceeding to strike out the petition for late service.*

Held

- 1 The Court has jurisdiction to hear and determine the appeal
- 2 The learned trial judge cannot be faulted for allowing the 1st respondent's application to strike out the petition for late service. The petition was struck out in accordance with the law.

Ratio decedendi

- (i) [Citing *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1*] where the issue of jurisdiction is raised, the same must be determined first since jurisdiction is everything and without it the court cannot take any further step.
- (ii) Canons of interpretation of statute dictate that where there is a conflict between the provisions of an Act of Parliament and subsidiary legislation, the provisions of the Act must prevail. In addition, under *Section 31 (b) of the Interpretation and General Provisions Act, Cap 2*, no subsidiary legislation shall be inconsistent with the provisions of an Act.

- (iii) The provisions of *Section 76 (1) (a)* of the *Elections Act* as relate to the time for service of an election petition override the provisions of *rule 13 (1)* of the *Petition Rules*.
- (iv) *Article 87 (3)* of the *Constitution* stipulates that service of a petition may be direct or by an advertisement in a newspaper with national circulation. That mode of service is further stipulated under *Section 77 (2)* of the *Elections Act* and *rule 13 (2)* of the *Petition Rules*. The petitioner did not have to waste time looking for 1st respondent to effect personal service upon her.

Henry Okello Nadimo v Independent Electoral and Boundary Commission & 2 others
Petition 2 of 2013 [2013] eKLR

Per Tuiyott J

Facts

At the close of the Polls on 4th March 2013 elections in Budalangi Constituency the 2nd Respondent announced the 3rd Respondent as the winner for the Member of National Assembly contest and subsequently the 3rd Respondent was duly declared as the person elected in a special issue of The Kenya Gazette published by the 1st Respondent on 13th March 2013. The Petitioner, a voter in that Constituency, aggrieved by the return and declaration challenged the election by filing a Petition. According to the Petitioners, the 1st Respondent violated the provisions of *Articles 81 and 86* of *The Constitution* and *Electoral Law* and failed to conduct a valid, legal and credible election. He also claimed that the Respondents perpetrated various electoral irregularities and malpractices and in some instances committed electoral offences. Party agents were harassed, voters were threatened and intimidated, and others bribed and treated by the 3rd Respondent. It was also averred that the 3rd Respondent employed the use of violence and force. There were further claims of pre-polls breaches. It being alleged that, with the complicity collusion or connivance of the commission, the 3rd Respondent imported voters from neighboring Constituencies. The Petitioner stated that the 3rd Respondent also breached the Law by conducting night campaigns and campaigns after the close of the Official Campaign Period.

Issues

- 1 *Whether the 3rd Respondent was validly elected and declared as member of The National Assembly for Budalangi Constituency during the elections held on 4th march 2013.*
- 2 *Whether the said election was conducted in a free, fair, transparent and credible manner and in compliance with the provisions of the Constitution and all relevant laws and regulations.*
- 3 *Whether there was fundamental breach of the election process or commission of malpractices or irregularities that compromised the outcome or validity of that election and also whether such breaches or malpractices or irregularities, if any, are sufficient ground for nullification of the result of the said election.*
- 4 *Whether the Respondents, jointly or severally, were involved in any electoral malpractices or election offences.*
- 5 *Whether there are consequential declarations and reliefs including costs that this Court should grant on the determination of the petition.*
- 6 *Whether a fresh election for the member of the National Assembly for Budalangi Constituency ought to be held.*

Held

- 1 The elections in Budalangi constituency were conducted and managed very substantially in accordance with the Constitution and the Electoral Law.
- 2 The allegations of Electoral malpractice made against the Respondents were not proved.
- 3 Where the Commission transgressed the irregularities were insubstantial and did not compromise or affect the result or outcome of the election.
- 4 The result returned in favour of the 3rd Respondent was valid and reflected the will of the people of Budalangi Constituency. The big margin between the victor and the runners up reflected the clarity of that will.

Ratio decidendi

- (i) The role of an Election Court is to examine, within the context of the Petition before it, whether a disputed Election meets those Constitutional expectations and the Electoral Laws and to determine the implications of any non-compliance.
- (ii) Both the giver and the taker of a bribe deserve censure. An allegation of the offence must be proved with cogent, credible and firm evidence.

- (iii) There was no reason for upsetting the will of the people of Budalangi Constituency which they empathically expressed at the Ballot.

***Milliah Nanyokia Masungo v Robert Mwembe & 2 others* Petition 56 of 2013, [2014] e KLR**

Per Mabeya J

Facts

The Appellant Miliyah Nanyokia Masungo was among five (5) contestants for the office of Member of County Representative for Misikhu Ward, Webuye Constituency, Bungoma County during the general elections on 4th March, 2013. The 1st Respondent was announced as the duly elected candidate. The Appellant filed Election Petition No.2 of 2013 at the Chief Magistrate's Court at Bungoma challenging the election of the 1st Respondent. By a Judgment delivered on 25th September, 2013, Hon. Margaret Wambani, SPM dismissed the Petition and certified the 1st Respondent to have been duly elected. The Appellant had alleged that there were massive irregularities, voter bribery and violence that affected the election process; that there was manipulation of results in forms 34, 35 and 36 in favour of a certain candidate; that there were breach of electoral rules and regulations that prevented the election from being a transparent process; that the total votes cast and total number of vote obtained by all the candidates did not match; that the negligence of polling clerks led to double voting; that the 1st Respondent was involved in election malpractices including voter bribery and voter transportation and finally that the officers of the 2nd Respondent were biased and incompetent. The respondents filed their responses wherein they denied all the allegations in the Petition.

Issues

- 1 *Whether the Court properly applied the principle of burden of proof and if so, whether the Petitioner had discharged the same;*
- 2 *Whether the Court disregarded the evidence on record;*
- 3 *Whether the judgment of the court was based on or took into consideration extraneous matters and evidence; and*
- 4 *Whether in the circumstances, the 1st Respondent was validly elected as County Representative for Misikhu Ward.*

Held

- 1 The Court properly appreciated the principle of burden of proof though the Petitioner had failed to discharge the burden and standard of proof.
- 2 The Petitioner had proved to the required standard, that there was irregularities regarding how entries were made in Forms 35 and 36 which shifted the burden to the 2nd and 3rd Respondent who failed to discharge the same as they failed to call the makers of the alterations to those Forms 35 to explain the basis of the alterations and cancellation.
- 3 The election of the 1st Respondent as the Ward Representative for Misikhu Ward nullified

Ratio decidendi

- (i) The burden of proof in election petitions at all times rests with the Petitioner. It is the Petitioner who makes allegations and it is he/she who will fail if he/she does not call evidence to prove the allegations in the Petition.
- (ii) The burden is always higher than in civil cases that is balance of probability. it is said to be higher than the balance of probability and slightly lower than beyond reasonable doubt.
- (iii) Allegations in the Petition of commission of election offences, since they attract criminal sanctions, should be proved to the standard of proof in criminal cases i.e. beyond reasonable doubt.
- (iv) If the Court finds that principles and the election rules and regulations were flouted so much so as to make a mockery of the democratic process, the Court will disregard the quantitative aspect and nullify the election.

Philip Osore Ogutu v Michael Onyura Aringo & 2 others, Civil Appeal No. 38 of 2013
[2014] eKLR

Per Onyango Otieno, Azangalala & Kantai, JJA

Facts

The Appellant Philip Osore Ogutu a registered voter at Butula constituency filed the appeal seeking to nullify the election of Michael Onyura Aringo who is the 1st respondent as the Member of National Assembly for Butula Constituency. The High Court (Tuiyot, J.) in a judgment delivered on 9th September, 2013 dismissed, with costs, the election petition which had been lodged by the Appellant. The 1st respondent had been declared the winner of the National Assembly election for the said Constituency after garnering 12,325 votes and was gazetted as the winner. In the Election Court at Busia the Appellant alleged that the 1st respondent had, by himself and through known persons, engaged in acts that contravened the provisions of the law such as meting violence against supporters of his rivals; engaging in bribery and treating of voters; engaging in campaigns after the official campaign period; employing services of known public servants in his campaigns and dissuading voters inclined to vote for his rivals not to vote. The appellant alleged, as against I.E.B.C., that it failed to adhere to basic standards and procedures allowed by law and allowed the Returning Officer to act illegally by allowing unauthorized persons and non – employees of I. E. B. C. to collect ballot papers from one polling station to another and without the consent and authority of approved party agents of various candidates; failing to secure ballot boxes at the close of polling and while transporting ballot boxes to the tallying centre; allowing unmarked ballot papers to be cast in favour of the 1st respondent; counting and or allowing counting of spoilt ballot papers in favour of the 1st respondent; allowing, permitting and or conniving with the 1st respondent to continue with election campaigns at known polling stations on election day; declaring results of candidates before the requisite forms were signed by all party agents and stuffing and or allowing invalid ballot papers to be staffed in ballot boxes in favour of the 1st respondent.

The trial court dismissed the appeal with costs after recount and scrutiny of Bujumba polling station revealed that the 1st respondent lead with the same margin.

Issues

- 1 *Whether the Judge of the election court erred in law and in fact in not finding that there had been ballot stuffing after polling;*
- 2 *Whether the learned judge erred in not finding that results were announced before statutory forms 35 and 36 were signed by the candidates or their agents;*
- 3 *Whether the learned judge erred in disregarding the findings of the Document Examiner;*
- 4 *Whether the learned judge erred in not finding that forms 35 had alterations, erasures, cancellations to the disadvantage of the petitioner's preferred candidate, Joseph Maero Oyula;*
- 5 *Whether the learned judge had erred in not finding that the appellant's averments were supported;*
- 6 *Whether the learned judge erred in not finding that the Returning Officer was not candid; in ignoring the testimonies of the agents of the petitioner's preferred candidate;*
- 7 *Whether the learned judge erred in relying on a tallying sheet which was not produced;*
- 8 *Whether the learned judge erred in failing to find that violence, voter bribery and treating, use of public officers were proved;*
- 9 *Whether the learned judge erred in not finding that the 1st respondent was guilty of unlawful campaigns;*
- 10 *Whether the learned judge erred in ignoring that the Returning Officer allowed the 1st respondent to use unauthorized persons to take part as agents; in not appreciating the results of the scrutiny and in not ordering the respondents to pay the appellant's costs.*

Held

- 1 The decision of the judges on many of the issues on trial could not be faulted.
- 2 The evidence of bribery and treating of voters, stuffing ballot boxes, use of violence and Civil servants to support the Respondent had not been proved
- 3 The election of the 1st respondent as Member of National Assembly for Butula Constituency was conducted, managed and supervised substantially in compliance with the principles enshrined in the Constitution, in the Act and the Regulations made thereunder and that the anomalies found were not so pervasive or so serious as to affect the election.
- 4 Appeal dismissed decision of the learned Judge of the High Court upheld.

5 The appellant was to bear the costs of the suit.

Ratio decidendi

- (i) It is not merely enough for the petitioner to allege election offences, he or she must go further and prove the same.
- (ii) The appellant had to prove the allegations of voter bribery and treating, which are of a criminal nature, beyond reasonable doubt. However, the evidence which the appellant adduced before the High Court fell far short of even the balance of probabilities, test, let alone above the balance of probability test which is the standard for all allegations in election matters save those alleging criminal violations.
- (iii) There is good reason for the requirement that allegations of commission of election offences be proved beyond reasonable doubt. They are criminal offences. In the criminal justice system for anyone to be held criminally liable, Article 50 (2) (a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt.
- (iv) In election petitions, the law requires the election court to report such person to the I.E.B.C., which may bar such person from contesting in that or future elections. That is besides the sentence which may be meted out to such person if criminal charges are brought against him. Those consequences inform the requirement for proof of election offences beyond reasonable doubt.

Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others Application 16 of 2014, [2014] e KLR

Per Ibrahim, SCJ & Wanjala, SCJ

Facts

The applicant and the 2nd respondent, Wilfred Rotich Lesan, were among the contestants in the General Elections held on the 4th March, 2013, for Bomet County Senatorial seat. On the 6th March, 2013, the 2nd respondent was declared the duly elected Senator for Bomet County by the Independent Electoral and Boundaries Commission.

Being dissatisfied with the conduct of elections and declaration of the 2nd respondent as the winner, the applicant filed an *Election Petition No. 1 of 2013* in the High Court at Kericho. He sought, among other prayers, a declaration that the 2nd respondent had not been validly elected. He blamed the respondents, in the petition, for electoral malpractices, irregularities, fraud, intimidation, bribery and coercion.

The High Court, Muchelule, J in a decision delivered on 19th August 2013, dismissed the petition on grounds that the petitioner did not prove that any errors committed were such as would materially influence the results in his favour. Aggrieved by that decision, the applicant appealed to the Court of Appeal in *Nairobi Civil Appeal No. 228 of 2013*. In a majority decision (M'Inoti & Gatembu, JJA with Kiage, JA dissenting) delivered on 28th February 2014, the Court of Appeal upheld the High Court decision and dismissed the appeal with costs to the respondents.

This decision by the Court of Appeal further aggrieved the applicant herein. He decided to seek further redress by filing an application: *Civil Application Sup No. 5 of 2014 (UR 2014)* in the Court of Appeal seeking certification that his case constitutes matters of general public importance and that he be granted leave to appeal to the Supreme Court.

On 9th April, 2014, the day set for hearing of the application, one member of the Court of Appeal Bench, Karanja, J, recused herself. The court made an order giving the Applicant The liberty to make the application at the Supreme court or to have it listed on priority basis with Karanja J not being at the bench.

Subsequent to the order, the applicant moved to the Supreme Court on 24th April 2014 and filed an application by way of a Notice of Motion seeking an extension of time to file the appeal outside the 30 days period. The applicant also filed an appeal to this Court: *Petition No. 10 of 2014*. On 30th April, 2014, the applicant filed another Notice of Motion Application under certificate of urgency seeking that this Application to be certified urgent. The certificate of urgency was heard before Ojwang, SCJ and he declined to certify the matter as urgent.

Issues

- 1 *Whether the intended appeal raised any constitutional matters to warrant appeal as of right without certification.*

- 2 Whether the Court had jurisdiction to extent time to file an election petition appeal out of time: Has a basis been satisfactorily laid to warrant this Court to extent time to file the appeal?
- 3 What is the position of the Court of Appeal Application No Civil Application Sup No. 5 of 2014 (UR 2014) seeking certification? Is a letter to the Registrar sufficient to withdraw an application before the Court of Appeal?

Held

- 1 The applicant had established a *prima facie* case to approach the Supreme Court as of right.
- 2 Petition No. 10 of 2014 was to be struck out and expunged from the Court's record.
- 3 The applicant was granted leave to file an appeal within 14 days.
- 4 The applicant was to bear the respondents' costs.

Ratio decedendi

- (i) Having filed the Notice of Appeal, a party is supposed to file an appeal within thirty (30) days pursuant to rule 33(1) of the Supreme Court's Rules.
- (ii) The applicant timely filed his Notice of Appeal, but did not file an appeal within the thirty days. He filed an Application in the Court of Appeal seeking certification that his intended appeal as one that involves matters of general public importance. On the day set for hearing of that application, a Honorable judge on the bench recused herself and the court opined that the applicant may consider filing his application directly to the Supreme Court or re-listing the same before a bench not composed of the recused Justice.
- (iii) Filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality.
- (iv) Rule 53 of the Supreme Court Rules has discretionary powers to extend time within which certain acts can be undertaken. This can be perceived by the use of the word "may" in crafting of the rule. This discretion is a very powerful tool which should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in the Constitution are realised

Obiter dictum

(i) Section 3 of the Supreme Court Act, 2011 provides that the Supreme Court is to:

...

(b) Provide authoritative and impartial interpretation of the Constitution

(c) Develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.

In developing this rich jurisprudence, the Court will not shun from correcting glaring errors of law when presented by litigants and/or counsel.

Noah Makhlanganga Wekesa v Albert Adome & 2 others Petition 6 of 2013 [2013] e KLR
Per J R Karanja J

Facts

The Petitioner and the 3rd Respondent contested for the Governorship of Trans Nzoia County in the elections held on 4th March 2013. The 3rd Respondent was declared the winner. The petitioner seeks an order that leave be granted and that there be an extension of time within which to deposit a sum of Ksh. 400,000/= being further security for costs. The main reason for his application was that when the petitioner filed the petition on 8th April, 2013 he was ready and prepared to pay the sum of Ksh. 500,000/= as security for costs but the court registry assessed the amount payable as Ksh. 100,000/= and received the amount accordingly.

The petitioner contended that his failure to deposit the required amount of Ksh. 500,000/= was on account of the mistake made by the court registry and if the mistake was extended to him it would prejudice him.

Issues

- 1 *Whether the court has the jurisdiction to extend time within which security for costs may be deposited and if it has,)*
- 2 *Whether the petitioner is entitled to exercise of discretion in his favour and be granted extension of time within which to deposit security or further security.*

Held

- 1 *The court has the jurisdiction to extend time within which security for costs may be deposited.*
- 2 *The petitioner is entitled to extension of time within which to deposit security or further security.*

Ratio decedendi

- (i) Failure to deposit the security was not as a result of the Petitioner's fault.
- (ii) The Elections (Parliamentary and County elections) Petition Rules, 2013 are for purposes of regulating the practice and procedure of the High Court with respect to elections disputes.
- (iii) The overriding objective of the rules is to facilitate the just, expeditious, proportionate and affordable resolution of elections under the Constitution and the Act.
- (iv) The Act and the Rules form a complete legal regime with its elaborate procedure concerning the filing, serving, hearing and determination of the Elections Petitions.
- (v) The Constitution confers jurisdiction to the High court to hear and determine election petitions. This is a special jurisdiction for which the provisions of the Civil Procedure Act and Rules made there under do not apply save where expressly incorporated as was held in the case of *David W. Murathe vs. Samuel Kamau Macharia Civil Appeal No. 171 of 1998*.

***Eunice Wanjiru Kamau Karanja v Independent Electoral and Boundaries Commission & 2 others* Petition 12 of 2013 [2013] e KLR**

Per A Mshila J

Facts

The Petitioner filed a petition to question the validity of the election of the Janet Nangabo Wanyama (3rd Respondent), as the Woman Member of the National Assembly for Trans Nzoia County following the general election held on 4/3/2013 The Petitioner further filed a Notice of Motion dated 30/4/2013 under a Certificate of Urgency seeking the following orders;

- a. *That the Petitioner be granted leave to file the Petition dated 10th April 2013 out of time.*
- b. *That the petition filed in Court Registry on the 11th April 2013 be deemed to have been properly filed and served.*

Issues

- 1 *Whether Petitioner should have sought leave of the court before filing of the Petition*
- 2 *Whether filing of a Petition is a technical or substantive procedure;*

- 3 Whether delay is inordinate or inexcusable;
- 4 Whether this court has the power to enlarge timelines for the filing of Petitions;
- 5 Whether prejudice shall be occasioned to the Respondents.

Held

- 1 The Petition was filed outside the statutory timelines. The Petition was also filed prior and without leave of the court first being had and obtained. The rules of procedure require a party to seek leave of the court, first, before filing any pleading which is statute barred.
- 2 The Petitioner had sufficient time and the same and equal amount of time like all other Petitioners countrywide to gather her evidence, her documentation and her witnesses.
- 3 There was indolence on the part of the Petitioner in that she failed to treat the filing process with the urgency it deserves. No reasons are given as to why the Petitioner failed to file her Petition as the first order of business in the morning of the 11th April, 2013 instead of at 2.00pm.
- 4 The respondent was entitled to costs.

Ratio decedendi

- (i) There were no sufficient reasons given for the delay
- (ii) Petitions are public electoral disputes which can be categorized as actions '*sui generis*' as they are unique, special and peculiar in nature. In that, the entitlement or the interest at stake is not limited to the litigants but involves the interest of the voters and the public at large. The '*Locus standi*' is also not limited to the contestants as litigants and such actions are open to any member of the public who feels aggrieved by the election outcome. Lastly Common law is not applicable to these electoral disputes.
- (iii) The petition had already been filed and the application seeking to validate it by enlarging of the time-line was before this court. The procedure adopted by the Petitioner could aptly be described as putting the cart before the horse. The court could have chosen to adopt the easy way out, known as the escapist route and could have struck out the Petition for failure to obtain leave as a pre-requisite.
- (iv) The court as a state organ is only authorized to do that which is prescribed by the Constitution. If there is no provision to extend the time for filing of a Petition in the

Constitution it therefore, clearly, follows that the court has no authority nor the inherent jurisdiction or power to enlarge the time line for the filing of an election petition.

Rozaah Akinyi Buyu v Independent Electoral and Boundaries Commission & 2 others
Petition No. 40 of 2013 [2014] e KLR

Per Musinga, Azangalala & Kantai, JJ A

Facts

The appellant contested the Judgment of H. K. Chemitei, J, delivered on 4th September, 2013 in the matter of the election for the member of National Assembly for Kisumu West Constituency. The 3rd respondent, John Olago Aluoch, was declared by the 1st respondent, as the elected member of the National Assembly for the said constituency but that declaration was challenged by the appellant, Rozaah Akinyi Buyu, in the said election petition which the learned Judge found without merit and dismissed. The Respondents raised a cross appeal.

Issues

- 1 *Whether the judge erred in finding that the 3rd respondent had used undue influence through threats and intimidation upon the supporters of the appellant;*
- 2 *Whether the learned judge erred in holding the 1st and 2nd respondents liable for such undue influence;*
- 3 *Whether the learned judge erred in holding that deposit on security for costs had been made on time or at all;*
- 4 *Whether the judge erred in awarding a quantum of costs without hearing the parties and that the judge erred not only in capping costs but also in taking away the mandate of the Registrar as the Taxing Master on matters of costs.*

Held

- 1 The appeal lacked merit and was dismissed with costs to the Respondents.

- 2 The cross -appeal succeeded to the extent that it set aside the findings of the learned judge on undue influence against the respondents, the order on costs was also varied.

Ratio decedendi

- (i) The overriding objective of the Elections (Parliamentary and County Elections) Petition Rules, 2013 is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Elections Act. The Court, in exercise of its powers should seek to give effect to the overriding objective so created.
- (ii) The *Constitution of Kenya, 2010* has provided the two modes of service of an election petition – it may be direct service or substituted service through advertisement. The Elections Act has a similar provision.
- (iii) The relevant Rule in the Elections (Parliamentary and County Elections) Petition Rules, 2013 is well set out in full in the judgment appealed from. The law on service of election petitions has developed, shifting from the position where only personal service was permitted to the new position where a petitioner who can show that he has been unable to serve a petition on a respondent has an opportunity to use substituted service through advertisement. The relevant Rule has an elaborate procedure on how substituted service is to be affected including the form, the size of the petition, the font, the language and the details to be set out in the notice.
- (iv) The election court was within its mandate to cap costs as it did as the relevant rule gave it authority to do so.



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