REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

ELECTION PETITION APPEAL NO. 3 OF 2018

MWATHETHE ADAMSON KADENGE.....APPELLANT

VERSUS

TWAHER ABDULKARIM MOHAMED.....1st RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION (IEBC).....2nd RESPONDENT

MASHA SUDI.....3rd RESPONDENT

JUDGMENT

(Being an Appeal against the judgment of Hon. CO Nyawiri (SRM) in CMCC Election Petition No. 7 of 2017, Malindi delivered on 6th March, 2018 between Mohamed Twaher Abdulkarin (Petitioner) vs Independent Electoral and Boundaries Commission, Masha Sudi and Kadenge Mwathethe Adamson)

1. On 8.8.17, the second general elections after the promulgation of the Constitution of Kenya 2010 were held in Kenya. The position of Member of County Assembly, Shella Ward in Kilifi County attracted 9 candidates including Twaher Abdulkarim Mohamed the 1st Respondent herein and Mwathethe Adamson Kadenge**,** the Appellant. The Appellant was declared as having been duly elected as the Member of County Assembly, Shella Ward in Malindi, Kilifi County with 6,234 votes. The 1st Respondent came second with 3,784 votes while Kazungu Wanje Baya was 3rd having garnered 2,711 votes. The remaining candidates got less than 300 votes each.

2. The 1st Respondent being dissatisfied with the outcome of the results filed Petition No. 7 of 2017 (the Petition) in the Chief Magistrates' Court at Malindi on 9.9.17, challenging the election of the Appellant. In his Petition, the 1st Respondent alleged that for various reasons stated therein, the 2nd and 3rd Respondents did not conduct the election of Member of County Assembly, Shella Ward in Malindi, Kilifi County in accordance with the Constitution and the law relating to elections and further that the Appellant was not validly elected as the Member of County Assembly, Shella Ward in Malindi, Kilifi County.

3. In his Judgment delivered on 6.3.18, Hon. C.O. Nyawiri Senior Resident Magistrate found that the Appellant had not been validly elected as Member of County Assembly of Shella ward. He allowed the Petition and nullified the said election. The learned Magistrate further directed the Independent Electoral and Boundaries Commission (IEBC) the 2nd Respondent to conduct a fresh election in conformity with the Constitution and the Election Act 2011 and other laws governing elections in Kenya. He awarded costs to the 1st Respondent which he capped at Kshs. 2,000,000/= to be paid to the 1st Respondent by the 2nd and 3rd Respondents.

4. The Appellant was aggrieved by the said judgment and filed the appeal herein. The grounds of the appeal are:

> ***1) The Honourable Magistrate erred in law and in fact by finding that the elections held on 18/8/2017 for the member of the County Assembly for Sheila Ward, Malindi constituency, Kilifi were not so held in accordance with the constitution, the Election Laws and reputations.***
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> ***2) The Honourable Magistrate erred both in law and in fact by finding that the petitioner in the petition proved electoral malpractices and irregularities and that the proved electoral malpractices and irregularities affected the outcome of the election of the 3rd Respondent therein (the appellant).***
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> ***3) The Honourable trial Magistrate erred in law and in fact by making a finding that the 3rd Respondent therein (the appellant) was not validly elected as a member of the County Assembly for Sheila Ward, Malindi Constituency, Kilifi County.***

4) The Honourable trial Magistrate erred both in fact and law in framing the issues from determination based on the evidence placed before him.

5) The Honourable trial Magistrate erred both in fact and in law by making a finding that the Petitioner (1st Respondent) discharged his burden of proof on the questions of illeterate voters.

6) The Honourable trial Magistrate erred both in fact and in law by finding that the Petitioner (1st respondent) discharged the burden of proof on issues surrounding counting, verification and tallying of voters.

7) The Honourable trial Court erred in Law and in fact by making a finding that the 3rd Respondent therein (appellant) was to pay costs of the petition.

8) The Honourable Court erred both in fact and in law by coming to the conclusion that the elections of 8/8/2017 had to be nullified, nullified them and directed a fresh election.

5. The Appellant urged the Court to vacate, vary and set aside the said judgment and substitute it with an order dismissing the petition with costs to the Appellant. He also prayed for costs of the Appeal.

6. The 2nd and 3rd Respondents filed a notice of cross-appeal dated 21.3.18. They stated that they support the Appeal and then proceeded to list their own grounds as follows:

1) The Learned Trial Magistrate erred in law and fact by considering matters of fact and evidence that were extraneous in arriving at his decision.

2) The Learned Trial Magistrate did not have jurisdiction to hear and determine the Election Petition before him as the same had been filed out of time and contrary to Article 87 of the Constitution and he failed to appreciate that the results for the impugned election herein was declared on 10th August, 2017 and the winner was issued with the Form 36C on the said date.

3) The Learned Trial Magistrate erred in law and fact when he determined the Petition on the basis of a disputed second declaration of results, as though it was a common ground.

4) The Learned Magistrate erred in law and fact by failing to manage the Trial in accordance with Rule 17 of the Election (County and Parliamentary) Petition Rules.

5) The Learned Trial Magistrate erred in law and in fact and misdirected himself by completely going outside the allegations raised by the Election Petition and other filed pleadings and arrived at the wrong conclusion.

6) The Learned Trial Magistrate erred in law and in fact, by deviating from principles of the incidence of burden and standard of proof in election petitions, in departure from the binding decision of the Supreme Court in the case of Raila Odinga & Others vs Independent Electoral and Boundaries Commission & Others, Supreme Court Petition No. 5 of 2013; Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission, Petition No. 1 of 2017, in breach of the provisions of Article 163 (7) of the Constitution and the Learned Trial Magistrate thus erred in law in shifting the burden of proof to the 1st and 2nd Respondents at the Trial Court

7) The Learned Trial Magistrate erred in law and fact in concluding that delayed opening and early closing of certain Polling Stations amounted to an illegality and a contravention of the rights under Article 38 of the Constitution as no such evidence was tendered or no such alleged registered voters gave evidence or complained about being denied the right to exercise their rights under Article 38 of the Constitution.

8) The Learned Trial Magistrate erred in law and fact by wrongfully concluding that the result of the election was affected as a result of late opening and early closing of certain Polling Stations and yet not such evidence was placed before the Trial Court and hence there was no basis for such a finding.

9) The Learned Trial Magistrate erred in fact and law in concluding that there was an irregular; un-procedural and illegal assistance of voters.

10) The Learned Trial Magistrate erred in fact and law by failing to appreciate that the failure of stamping statutory Forms is not a legal requirement and that the failure by agents to sign statutory Forms would not affect the authenticity of the results as indicated in Form 36A.

11) The Learned Trial Magistrate erred in law and fact in failing to appreciate the plethora of authorities which the 1st and 2nd Respondents relied upon in demonstrating that elections are human endeavours and that human errors are inevitable.

12) The Trial Magistrate erred in law and fact by failing to appreciate that the results as tabulated in Form 36A, which were not disputed, were final and thereby failing to appreciate the precedence set by the Court of Appeal in the Maina Kiai Case and the Supreme Court Case in Raila Amolo Odinga and Another vs Independent Electoral and Boundaries Commission and Others, 2017.

13) The Learned Trial Magistrate erred in fact and law in ordering the 1st Respondent to pay the costs of the Petition of Kshs. 2,000,000/= which are not only unreasonable but harsh, punitive and a hindrance to access to justice as guaranteed under Article 48 of the Constitution and furthermore outside the know norms and precedents.

14) The Learned Trial Magistrate erred in law and fact by failing to appreciate the incorporation of technology in the electoral system and the resultant effects of the use of KIEMS Kits in voter identification.

15) The Learned Trial Magistrate erred in fact and law by failing to appreciate and address his mind to the provisions of Section 72 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya which is to the effect that a deviation in a statutory Form shall not render that particular Form void so long as it does not affect the substance of the instrument or not calculated to mislead.

16) The Learned Trial Magistrate totally ignored the evidence tendered by the 1st and 2nd Respondents witnesses in respect of the statutory Forms for the declaration of the results, the tallying and the subsequent declaration of the winner.

17) The Learned Trial Magistrate erred in fact and law by considering matters not pleaded in the Petition and taking into consideration extraneous facts and issues and hence arriving at an erroneous conclusion.

18) The Learned Trial Magistrate erred in fact and law in reaching the conclusions and orders he made while disregarding the scrutiny that was conducted which confirmed the victory of the Appellant as the rightfully elected person and the verifiability of the results and contents as contained in the 36A series Forms which were subsequently transferred to the Form 36B.

19) The Learned Trial Magistrate misdirected himself in law, when he went on a tangential frolic while evaluating the totality of the evidence on record. The Learned Magistrate thus ignored bare and inherent inconsistencies in the Petitioner's case.

20) The Learned Trial Magistrate misdirected himself in law, and hence arrived at the wrong conclusion, when he admitted the Petitioner's mere allegations as though they were proven undisputed facts.

21) The Learned Trial Magistrate misdirected himself in law when he impeached the credibility of the Returning Officer without any justification.

22) The Learned Trial Magistrate misdirected and misguided himself in holding that the results contained in the Forms 36A series were not verifiable.

23) The Learned Trial Magistrate erred in failing to correctly contextualize the mandate of the 1st and 2nd Respondents in the overall conduct of elections and thereby arrived at the erroneous decision that officers of the 1st Respondent had failed and/or omitted to comply with the law and the Constitution.

24) The Learned Trial Magistrate erred in law when he determined the authenticity of the Form 36B prepared by the 1st and 2nd Respondents on the 10th of August, 2017.

25) The Learned Trial Magistrate erred in law and fact by picking and choosing only those facts that would lead him to making findings in favour of the Petitioner while ignoring all the facts that would lead to the dismissal of the Petition and thereby violating the Appellants' right to be heard as enshrined under Article 50 of the Constitution.

26) The Learned Trial Magistrate erred in law and fact by filing the gaps left out by the Petitioner without any basis in law and evidence.

27) The Learned Trial Magistrate erred in law and fact by selectively reading and applying the scrutiny report and using the same as a basis in arriving at his conclusions and decision.

28) The Learned Trial Magistrate erred in fact and law by failing to appreciate the principles of interpretation of the Constitution moreover on the principles of elections and electoral disputes, and the purposive interpretation of the Constitution.

29) The Learned Trial Magistrate erred in law and fact by misdirecting himself on the interpretation of Section 83 of the Elections Act.

30) The Learned Trial Magistrate erred in fact and law by failing to appreciate the management of elections, set-up and gazettement of the Polling Stations and also failed to appreciate that the said Polling Stations were used for the other elective positions for President, Senator, Governor, Member of Parliament etc.

31) The Learned Trial Magistrate erred in law and fact in placing reliance on some of the evidence adduced by the Petitioners which he relied on in reaching most of his conclusions and ultimate decision and hence misapplied his mind to Rule 15 (8) of the Elections (Parliamentary and County) Petition Rules, 2017.

32) The Learned Trial Magistrate erred in fact and law by misdirecting himself on matters of both law and fact as to occasion a miscarriage of justice against the Appellants' herein.

33) The Learned Trial Magistrate exhibited a high level of incompetence by determining the Petition on the basis of personal opinions which undermine the independence of the Judiciary and the Rule of Law.

7. The 2nd and 3rd Respondents urged the Court to allow the Appeal and Cross-Appeal. They further prayed that the Judgment, Order and Decree of 6.3.18 be set aside and substituted with an order allowing the cross-appeal and an order dismissing the Petition in the trial Court with costs.

8. On his part, the 1st Respondent filed a Notice of Preliminary Objection dated 21.5.18 on the grounds that:

1. This Honorable Court has no jurisdiction to hear this appeal as the Record of Appeal does not contain a signed copy of the judgment appealed from as is required by Rule 34 (6) (e) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 and therefore there is no competent appeal before court hence it should be struck out with costs.

2. This Honorable Court has no jurisdiction to hear the 2nd and 3rd Respondents alleged cross-appeal as there is no provision allowing for parties in an appeal to file a cross-appeal hence the cross-appeal should be struck out with costs.

3. The said cross-appeal has not been served on the 1st respondent herein

9. Parties filed written submissions as directed by the Court which were highlighted before me. The Court directed that the Preliminary Objection and the Appeal be argued concurrently. The 1st Respondent abandoned the Objection on service of the cross appeal after proof of service was produced and argued the first 2 Objections. The 1st Respondent challenges the jurisdiction of the Court on 2 grounds. First, he argues that the Appeal is incompetent in that the record of appeal does not contain a signed judgment as required by Rule 34(6)(e) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 (the Election Petition Rules). As such the Court has no jurisdiction to hear the Appeal and the same should be struck out with costs. Secondly the 1st Respondent argues that there is no legal provision allowing the filing of a cross-appeal, not in the Constitution, Election Act or Rules thereunder. As such the Court has no jurisdiction to hear the 2nd and 3rd Respondents' Cross-Appeal and the same should be struck out with costs. I will consider the latter objection first.

10. The 1st Respondent takes issue with the Cross-Appeal filed by the 2nd and 3rd Respondents and argued that they ought to have filed their own independent appeal. The 1st Respondent relied on the case of Twaher Abdulkarim Mohamed v Independent Electoral & Boundaries Commission (IEBC) & 2 others [2014] eKLR to buttress his contention. It was further submitted that for the Court to exercise jurisdiction over the Cross-Appeal the same must be given by the Constitution Act or rules. The Court was urged to strike out the cross appeal.

11. The 2nd and 3rd Respondents oppose the objection raised regarding the Cross-Appeal. They argue that the Court has powers to do substantive justice in accordance with Article 159(2) of the Constitution and consider the Cross-Appeal on merit. It was argued that cross-appeals were common in Court of Appeal practice. The Twaher Abdulkarim Mohamed case (supra) is a decision of a court of concurrent jurisdiction and is not binding on this Court. The Court was urged to apply its own mind in the interpretation of Rule 34 and find that the cross appeal has merit and grant the prayers sought.

12. It is trite law that without jurisdiction, a Court cannot to deal with a matter before it. Halsbury's Laws of England 4th Edition, Vol. 10, paragraph 314, defines jurisdiction:

By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

13. The jurisdiction of any Court is conferred upon it by the Constitution or statute or both. This was the holding of the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law… Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation"

14. In the cited case of Twaher Abdulkarim Mohamed case (supra), Muriithi, J while rejecting a cross-appeal held:

Rule 34 of the Election (Parliamentary and County Assembly Elections) Petition Rules, 2013 is a comprehensive provision for appeals from the Resident Magistrate's Court as an election court and it cannot justify reliance on the provisions of the Civil Procedure Act and Rules. The Rule does not contain provisions for the filing of cross-appeals or cross-objections. In the circumstances, any objection or issue proposed to be canvassed against a finding of the election court on appeal to the High Court must be filed as an appeal. In the circumstances of this case, the respondents ought to have filed their independent respective appeals on the matter.

15. Prior to making his findings, the learned Judge sought to give his own view as to why provisions for a cross appeal may have been omitted in Rule 34:

The failure by the Rules Committee to provide in Rule 34 of the Election Petition Rules for cross appeal or grounds of affirmation may have been informed by the need to facilitate an expeditious disposal of electoral disputes in accordance with the requirement of Article 87 of the Constitution. The design and nature of Rule 34 of the Election Petition Rules as one rule

containing provisions for appeals from the resident magistrate's election court, contrasts with rule 35 which legislates by incorporation the entire body of the Court of Appeals Rules through the reference of the rules as the procedure for appeals from the High Court to the Court of Appeal. It connotes that the rule 34 on appeals to the High Court on election petition decisions from the resident Magistrate's court as election court is the comprehensive provision on appeals and there is no justification for calling into aid the provisions of the Civil Procedure Rules which are applicable to the court's ordinary civil jurisdiction..."

16. While I agree that there is no justification for calling into aid the provisions of the Civil Procedure Rules which are applicable to the court's ordinary civil jurisdiction, I with respect, disagree that the omission of cross-appeal in the said Rules was informed by the need to facilitate an expeditious disposal of electoral disputes. On the contrary, a cross-appeal is more facilitative of the overriding objective of the just, expeditious, proportionate and affordable resolution of election disputes as opposed to filing 2 separate appeals. In any event the decision is not binding on this Court being of a Court of concurrent jurisdiction.

17. The appellate jurisdiction of this Court is stipulated in the Constitution of Kenya, 2010, the Elections Act 2011 and the Election (Parliamentary and County Elections) Petitions Rules (the Election Petition Rules). Article 165(3)(e) of the Constitution provides:

(3) Subject to clause (5), the High Court shall have—

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

The Elections Act 2011 at Section 75(4) confers jurisdiction on this Court to ear election petition appeals from the Magistrate's Courts:

(4) An appeal under Subsection (1A) shall lie to the High Court on matters of law only and shall be-

a) filed within thirty days of the decision of the Magistrate's Court; and

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

Rule 34 of the Election Petition Rules specifies the manner in which an appeal from the Magistrate's Court shall be filed in the High Court.

18. This Court notes that there is indeed no reference to a cross-appeal in the foregoing provisions. What should then happen to a cross-appeal by which a party invokes the appellate jurisdiction of this Court? Should such party be driven away from the judgment seat of justice? The High Court is clothed with inherent jurisdiction to ensure that the ends of justice are met. This inherent jurisdiction is innate in the Court. The filing of a cross appeal by the 2nd and 3rd Respondents instead of an independent appeal is in my view a deviation from form and procedure. It does not go to the jurisdiction of the Court, or to the root of the dispute and does not at all occasion prejudice or miscarriage of justice to the 1st Respondent. The Court must therefore rise to its highest calling to do justice by sparing the parties the draconian approach of striking out the cross appeal on this basis. See Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR

19. In dealing with matters that are not specifically provided in the law, the holding of the Court of Appeal in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR, is instructive. The High Court in that case had dismissed an election petition for *inter alia* non-attendance by the petitioner, whereupon the petitioner filed an application to set aside the order and for reinstatement of the petition. In dismissing the application, the High Court held *inter alia "That there is no provision under the Elections Act which allows for setting aside, review and or reinstatement of a dismissed Petition."* In its decision, the Court of Appeal recognised that it is not possible for statutory provisions to cover every perceivable scenario and observed:

In our own appreciation of this appeal, the Judge held that the court had no jurisdiction and in the same breath accepted and rightly so, that the inherent jurisdiction vested in the court was meant to ensure the ends of justice are achieved. Circumstances vary and although the courts are governed by the statutory underpinnings, statutes cannot cover every perceivable situation and make provisions. That is what is described in the Taylor case (supra) as implied jurisdiction. For example the Elections Act or the regulations made thereunder do not make any express provisions that, once a petition is fixed for hearing and the petitioner fails to attend court on the day of hearing, the petition will be dismissed for non–attendance. This is a general power given to a court to control its own procedure so as to prevent its being used to achieve injustice and also it is a power given to the court in order to maintain its character as a court of justice.

20. To strike out the Cross-Appeal simply because electoral laws do not make provision for cross-appeals would be to sacrifice substantive justice at the altar of strict adherence to provisions of procedural law which would create hardship and unfairness. This would go against the spirit of Article 159(2)(d) which enjoins this Court and indeed all other Courts and tribunals to administer justice without undue regard to procedural technicalities. The tenor of Section 80(1)(d) of the Elections Act is similar:

(1) An election court may, in exercise of its jurisdiction-

(d) decide all matters that come before it without undue regard to technicalities.

21. The right to appeal is the right of a party to approach a superior court to invoke its aid and interposition to redress the error of the court below. This right can only be restricted by an express statutory provision. The Court of Appeal in DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited [2017] eKLR the stated as follows:

As we have illustrated hereinabove the right to appeal to this Court from a decision of the High Court can only be restricted by express statutory terms. Hence, the interpretation of the aforementioned sections ought to be made in the right context and in

conformity with the Constitution. See the Supreme Court's decision in Hassan Ali Joho & Another vs. Suleiman Said Shahbal [2014] eKLR and this Court's decision in Narok County Government & Another vs. Richard Bwogo Birir & Another [2015] eKLR.

In our view, the fact that section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal.

22. There is no provision in the Constitution, the Act and the Rules that expressly restricts or prohibits the right of a party to approach this Court by way of cross-appeal. Duly guided by the foregoing holding of the Court of Appeal my finding is that the fact that the Constitution, Act and Rules are silent on the filing a cross-appeal does not in itself bar a party to invoke the appellate jurisdiction of this court by way of cross-appeal. Having found so found, it follows that therefore that the preliminary objection lacks merit regarding the cross appeal and the same is dismissed.

23. The second limb of the Preliminary Objection is that the judgment in the record of appeal is not signed. It was submitted for the 1st Respondent that in the absence of a signed judgment, the Appeal is incompetent, the Court has no jurisdiction to hear the Appeal and the same should be struck out. It was submitted that there was an attempt to certify the judgment as a true copy of the original however, an unsigned judgment cannot be certified. For the Appellant, it was conceded that the judgment was not signed but contended that the trial Magistrate certified the same at the bottom of the judgment. Further, that no evidence was adduced that the Magistrate who certified the judgment is not the trial Magistrate. It was further contended that the decree was signed by the same Magistrate. No prejudice will be suffered and the appeal should not suffer because of an oversight by the Court.

24. Rule 34(6)(e) of the Election Petition Rules provides:

> 6. ***The appellant shall within twenty-one days of the filing of the memorandum of appeal in accordance to sub-rule (3), file a record of appeal which shall contain the following documents:***
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> ***a) The memorandum of appeal,***
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> ***b) Pleadings of the petition,***
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> ***c) Typed and certified copies of proceedings***
>
> ***d) All affidavits, evidence and documents entered in evidence before the magistrate and***
>
> ***e) A signed and certified copy of the judgement appealed from and a certified copy of the decree.***

25. The foregoing Rule provides that the record of appeal shall contain *inter alia* a signed and certified copy of the judgment. That a judgment forms the basis of any appeal cannot be gainsaid. The requirement by Rule 34(6)(e) of a signed judgment is thus not an idle prerequisite. The purpose of a signed judgment is for the appellate Court to satisfy itself as to the finding of the Court below. The appellate Court must be aware of what the trial Court decided before it can begin to go into the merits of the Appeal. This is the spirit behind the Rule 34(6)(e). It is not disputed that the judgment in the record of appeal is not signed. The Court however notes that the same is certified.

26. The Rules further require the trial Court to forward to this Court the proceedings and all relevant documents relating to the Petition. Rule 34(8) provides:

> ***The election court from which an appeal is preferred shall, upon receiving a notice under sub-rule (7), send the proceedings and all relevant documents relating to the petition to the High Court to which the appeal is preferred.***

27. There is on record the entire record of the lower Court. I note that the original signed judgment of the lower Court is contained therein. From the original judgment the Court is able to ascertain the finding of the lower Court. The omission by the Appellant to provide a signed copy of the judgment in the record of appeal does not in my view go to the jurisdiction of the Court or the root of the dispute. It is a deviation and lapse in form which will not occasion prejudice or miscarriage of justice to the 1st Respondent. This was the holding of Ouko, JA. in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR:

> ***Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.***

28. The minor procedural infraction committed by the Appellant will not cause injustice or injurious prejudice to the 1st Respondent. In line with the exigency in Article 159(2)(d) of the Constitution of Kenya 2010 therefore, this Court will rise to its highest calling to administer substantive justice without undue regard to procedural technicalities. In the circumstances, this limb of the Preliminary Objection that the judgment in the record of appeal is not signed also fails.

29. I now turn to the Appeal itself. For the Appellant, 3 points were highlighted. The first was the competency of the petition. The second

point was on burden of proof and the last was based on the result of scrutiny.

30. On the first point, it was submitted that there was no competent petition before the lower Court and the same ought to have been struck out. Without a valid petition before him, the learned Magistrate erred in finding that the Appellant was not validly elected as the Member of County Assembly (MCA) of Shella Ward. It was submitted that the Petition was filed out of time. According to the Appellant, the declaration of the election results was done on 10.8.17 and the Petition was filed on 9.9.17. The 28 days stipulated Article 87(2) of the Constitution and by Section 76(1) of the Elections Act (the Act) expired on 8.9.17.

31. It was further submitted for the Appellant that the Respondents admitted that form 36C was dated 10.8.17. The lower Court did not therefore have jurisdiction to extend time. Other than the 3rd Respondent, no other organ has the mandate to issue Form 36C. It was argued that a petition filed outside 28 days after declaration of results is a nullity. Given that there was no competent petition before the lower Court, the same out to have been struck out. To buttress the foregoing submission, the Appellant relied on the cases of Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR (the Joho case) and Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 others [2017] eKLR (the Toboso Case).

32. On burden of proof it was argued that the learned Magistrate erred by agreeing that there were many affidavits but not all deponents were called to testify. He went on to classify the affidavits of those who did not testify to be of less probative value. However in his judgment he treated all affidavits as evidence of the 1st Respondent in proving their case. From the judgment, one cannot distinguish between what was said by the witnesses who testified and those who did not. Relying on the cases of Josiah Taraiya Kipelian Ole Kores v Dr. David Ole Nkedienye & 3 others [2013] eKLR (the Taraiya Case) and Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others [2013] eKLR (Raila 2013) and Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 others [2013] eKLR it was submitted that the learned Magistrate ought to have considered the affidavits of deponents who did not testify to be of no probative value. Those affidavits should never have been considered.

33. On the result of scrutiny, it was submitted for the Appellant that there was not enough evidence before the lower Court to order scrutiny. To the Appellant, the learned Magistrate embarked on a fact finding mission on behalf of the 1st Respondent. The result of the scrutiny showed that the Appellant emerged the winner.

34. For the 2nd and 3rd Respondents it was submitted that it was brought to the attention of the lower Court that the election results were declared on 10.8.17 and the Petition was filed on 9.9.17. This was 3 days after the 28 days stipulated in the Constitution. Results were declared by issuance of Form 36C to the Appellant on 10.8.17. The learned Magistrate should not have allowed the Petition to proceed as he had no jurisdiction. Without jurisdiction, he ought to have downed his tools. It was further submitted that the 1st Respondent purported to introduce 14.8.17 as the date of declaration which is a date different from that in Form 36C. Once the Returning Officer demonstrated that results were declared openly on 10.8.17, the Court ought not to have accepted that results were declared on 14.8.18. The statutory form for declaration of results is Form 36C. However, there was no Form 36C with that date.

35. It was further submitted that results at the polling stations were announced in Form 36A. The same were then collated and a winner announced on 10.8.17. It matters not that Form 36B was in A4 or A3 size. What matters is the content. Citing Section 72 of the Interpretation and General Provisions Act, it was argued that problems with statutory forms should not render the contents thereof void. As long as Form 36A at the polling stations were not disputed than the shape and size of Form 36B cannot be disputed. The case of Josiah Tarayia Kipelian Kores & another; v Joseph Jama Ole Lenku & 4 others [2018] eKLR was cited to buttress the argument. Relying on the case of Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR, it was argued that it was not the duty of the Court to fill in gaps for any party.

36. For the 1st Respondent, it was submitted that the grounds of appeal are predicated on facts thus rendering the appeal incompetent. The grounds do not involve the interpretation of Constitutional or statutory provisions. The Supreme Court defined matters of law in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR (Gatirau Peter Munya case). Should the Court however find the appeal to be competent than the same is without merit.

37. It was submitted that there although there were 15, 21 and 3 assisted voters at polling station 1 Ukweyuni, polling station 2 at Malindi High School and polling station 1 at Sir Ali bin Salim respectively, no declaration in Form 32 was made as thus breaching Regulation 72(6) of the Elections (General) Regulations, 2012. The net effect of this violation of the Regulations is that the results of these polling stations are null and void. It was further submitted that upon scrutiny, it was found that the Regulations 79, 81 and 83 as well as Section 39 of the Act and Article 86 of the Constitution were violated in that Form 36A was not in any of the ballot boxes as required. If the results of the said polling station are nullified that would mean 3,151 nullified votes which exceeds the margin between the winner and the runner up. This therefore affected the results.

38. It was further submitted that the burden of proof was discharged in a manner way above the required standard. The lower Court analyzed the issue of date of declaration of results very well. Further, the 2nd and 3rd Respondents failed to eliminate election malpractices and to ensure that results from polling stations were openly and accurately collated. Section 39 of the Act and Regulation 83 were violated. The 2nd Respondent used paper and not the prescribed form 36B. The explanation given that the printer failed and that parties agreed to have the results on A4 paper was not accepted and indeed all candidates including the Appellant and their agents declined to sign the form. It was further submitted that Form 36C could not be issued without Form 36B. It was contended that the 2nd Respondent called the candidates on 14.8.17 to sign Form 36B and to issue them with declaration of results as such the Petition was filed within 28 days of 14.8.17. The forms filed in the lower Court were Form 36C dated 10.8.17 and Form 36B dated 14.8.17. There was no form 36B dated 10.8.17. The case of Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR (Raila 2017) and that of Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others [2018] eKLR were cited to buttress the submission that using non statutory forms goes to integrity of the election and is adequate to nullify the election.

39. According to the 1st Respondent, the learned Magistrate restated the interpretation of Section 83 of the Election Act that once a party proves that the election was not conducted as per the constitution it is sufficient to nullify the same. The Court was urged to preserve the

judgment of the lower Court.

40. I have given due consideration to the appeal and the rival submissions and authorities cited. Flowing from the foregoing submissions, the following issues fall for determination:

i) Whether the Appeal is incompetent being predicated on facts and not matters of law.

ii) Whether there was a competent petition before the Magistrate's Court.

iii) Whether the 1st Respondent discharged the burden of proof in respect of the allegations in the Petition.

iv) Whether the order for scrutiny was justified.

Whether the Appeal is incompetent being predicated on facts and not matters of law

41. The 1st Respondent finds fault with the Appeal on the basis that the same is predicated on facts and not matters of law. Section 75 of the Elections Act provides the jurisdiction of this Court to hear election petition appeals from the Magistrate's Court as follows:

> ***(1A) A question as to the validity of the election of a member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.***
>
> ***(4) An appeal under subsection (1A) shall lie to the High Court on matters of law only and shall be—***
>
> ***(a) filed within thirty days of the decision of the Magistrate's Court; and***
>
> ***(b) heard and determined within six months from the date of filing of the appeal.***

42. It is clear from the foregoing that a contest of a decision in a Magistrate's Court to this Court in an election petition can only be on matters of law and not fact. The Supreme Court in the Gatirau Peter Munya case had this to say in respect of what constitutes "matters of law":

> ***[81] Now with specific reference to Section 85A of the Elections Act, it emerges that the phrase "matters of law only", means a question or an issue involving:***
>
> > ***a. the interpretation, or construction of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor;***
> >
> > ***b. the application of a provision of the Constitution, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor;***
> >
> > ***c. the conclusions arrived at by the trial Judge in an election petition in the High Court concerning membership of the National Assembly, the Senate, or the office of County Governor, where the appellant claims that such conclusions were based on "no evidence", or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were "so perverse", or so illegal, that no reasonable tribunal would arrive at the same; it is not enough for the appellant to contend that the trial Judge would probably have arrived at a different conclusion on the basis of the evidence.***

43. An election petition appeal from the lower Court to this Court must relate to the interpretation, or construction of a provision of the Constitution, an Act of Parliament, statutes or rules and regulations made thereunder or any legal doctrine, or the application thereof to a set of facts or evidence on record. Matters of law could also relate to determination of whether the conclusions of the trial Court are not based on the evidence on record or are so perverse or illegal that no reasonable tribunal would have arrived at them.

44. The Court notes that both the Appeal the Cross-Appeal contains the standard phrase that the learned Magistrate "erred in law and in fact…" notwithstanding the fact that the law only allows appeals on matters of law only. This practice was condemned by the Court of Appeal in Pius Yattani Wario v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR. The Court observed:

> ***As we have already noted, many of the grounds of appeal and of the cross-appeal are prefixed by the assertion that the learned judge "erred in law and in fact" in arriving at various determinations. Of late, we have encountered two strands of response from appellants when we query why they have framed their grounds appeal in an election petition to include invitations to the Court to determine issues of fact. The first is denial that the appeal indeed raises issues of fact, notwithstanding how the grounds of appeal are framed. In this response, the matter is reduced to an issue of semantics, raising the question why a party who seeks determination of issues of law only is not able to say so in a straightforward manner. The second, a more honest, if lazy approach, is to admit that the appeal indeed raises issues of fact and throw back the problem to the Court to sort out matters of fact from matters of law, before making its determination. We think both approaches are to be deprecated. It is not the business of the Court in each and every appeal to jump into the haystack to look for the needle. It is for the appellant to frame the issues that aggrieve him or her with precision and clarity. Encouraging that kind of practice will ultimately make nonsense of the rules***

of pleadings and encourage parties to present to the Court a potpourri of myths, rumours, allegations, facts, and so on, in the mistaken belief that it is the business of the Court to sort out the relevant from the irrelevant, as it strives to sustain all and sundry claims, however presented.

45. Given the framing of the grounds of appeal, this Court has to engage in the arduous task of sorting out matters of fact from matters of law and as it were, jump into the haystack to look for the needle! To do so, it shall be necessary to look at each of the issues for determination individually.

Whether there was a competent petition before the Magistrate's Court

46. It is trite law that jurisdiction is the authority of a Court to decide matters litigated before it. Without this authority, a Court has no basis to proceed with any matter before it. This was stated by Nyarangi, JA. in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1:

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

47. The question whether there was a competent Petition in the lower Court is an issue that that goes to the jurisdiction of the Court to entertain the matter. The question of jurisdiction is matter of law as envisaged in Section 75(4) of the Election Act. In the circumstances, this Court has jurisdiction to entertain this ground of appeal being predicated on a matter of law.

48. The Appellant and the 2nd and 3rd Respondents challenge the competency of the Petition before the lower Court on the basis that the same was filed after the constitutional 28 days of declaration of the election results. Article 87(2) of the Constitution provides:

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.

49. The election the subject matter of the Petition before the lower Court and of this Appeal is that of the member of County Assembly of Shella Ward in Malindi, Kilifi County. The time for filing the Petition challenging the outcome of the election was 28 days of declaration of the election results by the 3rd Respondent. The date of declaration of the election results was disputed. The Appellant and the 2nd and 3rd Respoindents maintain that it was 10.8.17 and Form 36C was issued on the said date. The Petition was however filed on 9.9.17 3 days after the lapse of the 28 days. The 1st Respondent on the other hand insists that the results were declared on 14.8.17 and thus the filing of the petition on 9.9.17 was within the stipulated time.

50. In the joint Replying Affidavit of the 2nd and 3rd Respondents, the 3rd Respondent averred that results were declared to all the candidates on 10.8.17 after receiving all Form 36As from the presiding officers and Form 36Bs being the declaration of results was issued to all candidates on 14.8.17. On 10.8 17, the 3rd Respondent declared the Appellant as the winner and issued him with Form 36C. In his evidence, the 3rd Respondent stated that he was the returning officer and that he declared the results on 10.8.17. He conceded that Form 36B which he issued on 10.8.17 did not have security features. He further conceded that he issued Form 36B to the candidates on 14.8.17.

51. **Regulation 83** of the **Elections (General) Regulations, 2012** prescribes the duties of a Retuning Officer upon receipt of the poll from all polling stations in the constituency. Regulation 83(i) states in part:

(i) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present—

(e) complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate or referendum side in each polling station;

(iv) number of rejected votes in each polling station;

(v) aggregate number of votes cast in the respective electoral area; and

(vi) aggregate number of rejected votes;

(f) sign and date the relevant forms and publicly declare the results for the position of –

(i) member of County Assembly

(ii) member of the National Assembly.

(g) issue certificates to persons elected in the county assembly and National Assembly elections in forms 36C and 35C respectively set out in the schedule.

52. The duty of the 3rd Respondent as the returning officer is clearly set out in the foregoing provisions. It would appear that the 3rd Respondent did not fully comply with the Regulations particularly Regulation 83(1)(e). He used ordinary A4 paper to print out the tallied and collated results which even the candidates/agents declined to sign. He did not complete Form 36B as *set out in the Schedule*. The 3rd Respondent attributes this challenge to problems with the printer. This excuse did not go down well with the learned Magistrate who stated in his judgment that the 3rd Respoindent failed the test in Article 38 and 86 of the Constitution.

53. The question this Court has to determine is the date the election results were declared in order make a determination as to the competency of the Petition before the lower Court. The question of the date of declaration of results is not a new one. The Supreme Court of Kenya while addressing itself to the issue of "declaration" in the case of In Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR had this to say:

[72] "Declaration" takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County returning centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.

[92] … We discern from the above regulations that one of the specific mandates of the returning officers is to declare the election results. As we have depicted in the analysis, these officers declare the election results at various stages in the election. For the purposes of computation of time in respect to the filing of the election petition, we hold that the final declaration presents the instrument of declaration in accordance with Article 87 (2) of the Constitution

[100] After considering the relevant provisions of the law, as well as the submissions made before us, and after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared at the county level by the County Returning Officer who issues the presumptive winner with a certificate in Form 38.

54. **The foregoing decision settled the thorny issue of date of declaration of election results. Declaration takes place at every stage from the polling station, the** *tallying centre* and the *County returning centre. In the case of ward* **elections, the stages are the polling centre where results are contained in Form 36A and the constituency tallying centre where the results are collated and printed and declared in Form 36B. Thereafter a certificate in Form 36C declaring the winner is issued to the winner.** The Supreme Court stated that *finality of the set of stages of declaration* is depicted in the *issuance of the certificate in Form 38 to the winner of the election. For the position of ward representative the declaration would culminate in the issuance of the certificate in Form 36C to the winner representing the final declaration. The Supreme Court went on to state that f*or the purposes of computation of time with respect to the filing of an election petition, the *final declaration* presents the *instrument of declaration* in accordance with Article 87 (2) of the Constitution. Duly guided by the aforesaid decision the ultimate outcome of the election of the position of Member of County Assembly of Shella ward is the one declared at the tallying centre by the 3rd Respondent who was the returning officer, by the issuance to the Appellant, the winner, with the certificate in Form 36C. This was done on 10.8.17.

55. The settling of the date of declaration of election results in the Joho case erased any doubt as to when the period set in Article 87(2) of the Constitution within which an election petition must be filed, begins to run. Courts must emphasize the need for adherence to the time-limits provided by the Constitution as this ensures predictability, certainty, uniformity and stability in the application of the law.

56. As regards who has the mandate to determine the date of declaration of elections, the Supreme Court in the Joho case stated:

The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results which could not be altered or disturbed by any authority.

57. Form 36C being the certificate declaring the Appellant as the winner in the election herein marked the end of the electoral process by affirming and declaring the election results. The issuance of Form 36C falls within the mandate of the returning officer set out in Regulation 83(1), in this case the 3rd Respondent.

58. In his judgment the learned Magistrate came to the following conclusion:

"…the Petitioner, in my view acted within his legal statutory rights to file the petition within the timing he filed it, it cannot be rightfully be (sic) argued that the Petitioner filed the petition out of time. It is on the basis of the foresaid Form 35B and the entire contents of the form, including the date herein as written, signed and stamped by the 2nd Respondent then the Petitioner filed this petition on 9th September 2017. This Petition is accordingly not time barred. Form 35B shows that the purported declaration of results was made on 14th August 2017."

59. With respect, the foregoing conclusion by the learned Magistrate goes against the principle set out in the Joho case. As per the holding of the Supreme Court, Form 36C marked the end of the electoral process by affirming and declaring the election results. Form 36C being

the final declaration of results presents the instrument of declaration in accordance with Article 87(2) of the Constitution. For the Court to find that the date of declaration of results was 14.8.17 as indicated in Form 36B is to arrogate to itself a jurisdiction it does not have. The date of declaration of results of the election is that in Form 36C and the same cannot not be altered or disturbed by any authority.

60. **In view of the foregoing, this Court finds that the date of declaration of election results of the Member of County Assembly of Shella Ward, Malindi was 10.8.17 and not 14.8.17. The last date for filing the Petition in the lower Court was 7.9.17. The Petition which was filed on 9.9.17 was therefore instituted** outside of the time limit set out under Article 87(2) of the Constitution of Kenya, 2010. The Petition was incurably defective and incompetent and the lower Court had no jurisdiction whatsoever to entertain the same. I am guided by the decision in the case of Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR, the Supreme Court observed:

> ***We take judicial notice that the principle in the Joho case has been relied upon by the Court of Appeal in the case of Paul Posh Aborwa v Independent Electoral and Boundaries Commission and 2 Others, Civil Appeal No. 52 of 2013, in a judgement dated 2nd May 2013 in which the Court held:***
>
> ***"The result of the foregoing is that we uphold the preliminary objection and determine that we have no jurisdiction to hear and determine the appeal emanating as it does from the proceedings that are a nullity by reason of having been instituted outside of the time limit set out under Article 87(2) of the Constitution of Kenya, 2010."***

61. The lower Court at the tail end of the judgment observed in part as follows:

> ***"In the case before me the Petitioner has proved that the election of the Member of County Assembly (MCA), Shella Ward was not conducted in accordance with the Constitution and other law governing elections in our country, the irregularities, which are grave have also been proved as clearly seen when it comes to assisted voters, lack of or failure to make a declaration of results in Form 36B…"***

62. In coming to his conclusion, the learned Magistrate relied on the case of Raila 2017 which nullified the presidential election due to irregularities. The Supreme Court stated:

> ***[377]…Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the "numbers" on that form?***
>
> ***[378] Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn't quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables? It is to the Kenyan voter, that man or woman who wakes up at 3 a.m on voting day, carrying with him or her the promise of the Constitution, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.***

63. With respect, Raila 2017 is distinguishable for the reason that there was a competent petition before the Supreme Court. In the present case however, as demonstrated above, the Petition before the lower Court was incompetent for having been filed outside the time stipulated in Article 87(2) of the Constitution. The lower Court was devoid of jurisdiction to hear it and ought to have adopted the dictum of Nyarangi JA in the Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 and downed its tools.

64. Having found that the Petition before the lower Court was incompetent it follows that the entire proceedings in the lower Court were a nullity and void *ab initio.* In the premises, it is not necessary to consider and delve into the other issues for determination. I now make the following orders:

i) The Appeal dated 15.3.18 and the Cross-Appeal dated 21.3.18 are both hereby allowed with costs.

ii) The proceedings, Judgment and consequential Orders of the Hon. C. O. Nyawiri (SRM) in Election Petition No. 7 of 2017, Malindi are hereby declared null and void.

iii) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of the seat for Member of the County Assembly of Shella Ward in Kilifi County is hereby restored.

iv) For the Petition, the 1st Respondent shall pay costs which I cap at Kshs. 1,000,000/= to be divided equally between the Appellant on the one hand and the 2nd and 3rd Respondents on the other hand.

v) For this Appeal, 1st Respondent shall pay costs which I cap at Kshs. 1,000,000/= to be divided equally between the Appellant on the one hand and the 2nd and 3rd Respondents on the other hand.

DATED, SIGNED and DELIVERED in MALINDI this 10th day of August 2018

_____

M. THANDE

JUDGE

In the presence of: -

…… for the Appellant

…… for the 1st Respondent

…… for the 2nd & 3rd Respondents

……..……Court Assistant