REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 10 OF 2017

IN THE MATTER OF: THE ELECTION FOR THE MEMBER OF NATIONAL

ASSEMBLY FOR GANZE

AND

IN THE MATTER OF: THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

BETWEEN

MBARAKA ISSA KOMBE.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....1ST RESPONDENT

WAFULA CHEBUKATI.....2ND RESPONDENT

D. KOMBE HILLARY.....3RD RESPONDENT

TEDDY NGUMBAO MWAMBIRE.....4TH RESPONDENT

RULING

1. The subject of this ruling are two similar applications filed by the 1st and 3rd Respondents on the one hand, and the 4th Respondent on the other hand. Both applications are dated 18th June, 2018 and are brought under Articles 87 and 105 of the Constitution, Section 85 of the Elections Act and Rule 19 (1) and (2) of the Elections (Parliamentary and County Elections) Petition Rules, 2017 (hereinafter to be referred to as the Election Petition Rules). In both applications, the applicants seek to have the entire petition struck out.

2. The Applicants allege that the Petition was filed on 6th September, 2017 and ought to have been determined within six months from the date it was filed as provided by the law. The Applicants claim that the life line for the Petition ended on 5th April, 2018 when the six months period lapsed.

3. The Applicants claim that despite the ruling by the Court of Appeal on 10th May, 2018 ordering that the matter be returned for hearing and determination by the High Court, the High Court did not have the jurisdiction to entertain the matter as the timeframe for the determination of the petition had already lapsed.

4. It is the Applicants' case that the timeframe for determination of election petitions is mandatory and inelastic. Therefore the Petition ought to be struck out.

The Response

5. The Petitioner responded to the Applications by way of Grounds of Opposition dated 27th June, 2018.

6. The Petitioner/Respondent (hereinafter referred to as the Petitioner), contends that the Petition was filed on 6th September, 2017 and was to be determined within six months, meaning that the Petition should have been completed by 7th march, 2018. However, the Petitioner states that the Petition was struck out at the interlocutory stage on 2nd November, 2017 before the six months had lapsed.

7. The Petitioner avers that he filed an appeal before the Court of Appeal against the ruling dated 2nd November, 2017 and the execution of the ruling was stayed pending the determination of the appeal. The Petitioner alleges that vide judgment delivered on 10th May, 2018 by the Court of Appeal, the appeal was successful and the Court of Appeal ordered that the petition be heard and determined on its merits by the High Court.

8. The Petitioner contends that at the time when the Petition was struck out on 2nd November, 2017 only 1 month and 25 days had lapsed hence by 10th May, 2018 when the Court of Appeal directed that the Petition be retried, there were 4 months and 5 days remaining which would end on 16th September, 2018.

The Hearing

9. Both applications came up for heating on 6th July, 2018. Mr. Olekina appeared for the 1st and 3rd Respondents, Mr. Owour appeared for the 4th Respondent, while Mr. Aboubakar appeared for the Petitioner.

10. Mr. Olekina submitted that under Article 105 (1) (2) and (3) of the Constitution, a Petition is required to be heard and determined within six months from the date of filing. To reinforce this assertion, Counsel added that Section 85 of the Elections Act makes similar provisions to those of Article 105 of the Constitution.

11. Mr. Olekina submitted that Rule 19 (2) of the Election Petition Rules provides for the extension of time but the time provided for under Article 105 of the Constitution cannot be extended. Counsel pointed out that the time for the Petition started running on 7th September, 2017 and the six months were tabulated from that date. Counsel asserted that once the six months period ended this court had no jurisdiction to continue entertaining the Petition. Counsel argued that even if the Court of Appeal had ordered this court to hear and determine the Petition, this court had, by virtue of Article 105, no jurisdiction to hear the same.

12. As to the computation of time, Mr. Olekina submitted that Article 259 of the Constitution provides guidelines for the interpretation of the Constitution. According to Counsel, time should be computed chronologically and not cumulatively. This interpretation, Counsel contended, would show that the timeframe for this Petition was from 6th September, 2017 to 6th March, 2018.

13. Mr. Owour, Counsel for the 4th Respondent in support of the applications submitted that Articles 87(2) and 105 of the Constitution are clear on the time frames for election petitions. Counsel contended that the Court of Appeal can neither purport to extend the timelines provided by the Constitution nor freeze the same. Accordingly, Counsel affirmed that there was no petition to be heard and determined by this court.

14. Mr. Aboubakar, Counsel for the Petitioner in opposition to the applications, submitted that the Petition was filed on 6th September, 2017 and by virtue of Article 105 (2) of the Constitution and Section 85 of the Elections Act, the Petition was to be concluded by 7th March, 2018. Counsel, however, submitted that the Petition was struck out not dismissed on 2nd November, 2017 at the interlocutory stage when the six months had not lapsed. Counsel pointed out that an appeal was lodged against the ruling dated 2nd November, 2017 striking out the Petition. According to Counsel, when the appeal was lodged time stopped running as the execution of the ruling dated 2nd November, 2017 was stayed pending the determination of the appeal.

15. The appeal having been successful, Mr. Aboubakar submitted that time remaining which was 4 months 5 days resumed running on 11th May, 2018 after the decision of the Court of Appeal.

16. Mr. Aboubakar sought to distinguish the facts of **Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR**, a decision of the Supreme Court of Kenya, which was cited by the applicants. Counsel stated that in the cited case the election petition had been heard, concluded and the petition dismissed on merit while in this case the petition had not been heard on merit, but was instead struck out on technicalities. Further, Counsel contended that in the cited case the apex court found that the Court of Appeal had no jurisdiction to entertain the appeal since the petition before the High Court had been filed out of time.

17. Mr. Aboubakar submitted that the Elections Act was enacted to give purpose to Article 105 of the Constitution. Counsel stated that Section 85 (a) of the Elections Act provides that a Petitioner has the right to appeal against the decision of the Election Court. Counsel argued that if an appellant succeeds, he or she must enjoy the fruits of the success and this can only happen if this Petition is heard to its finality. Counsel submitted that the right to appeal was not abrogated by Article 105 of the Constitution.

18. Mr. Aboubakar submitted that the Constitution must be interpreted in the spirit and tenure Constitutionalism. Counsel submitted that the Constitution ought to be given a purposive interpretation that is broad and flexible. Counsel argued that Article 105 of the Constitution has to be read in line with Articles 50, 48 and 259 of the Constitution.

19. In rebuttal, Mr. Olekina submitted that this court was gazetted on 16th May, 2018 to hear this petition. However, Counsel contended that the said gazette notice cannot extend time limited by the Constitution.

20. On the issue of the right to appeal brought up by Mr. Aboubakar, Mr. Olekina submitted that the filing of the appeal was not an automatic stay of the order striking out the petition. Counsel argued that a stay order must be specifically given and since the same was not given, time continued to run.

21. Mr. Owour on his part submitted in rebuttal that the applicants were not asking the court to make a restrictive interpretation of the Constitution, but rather to apply the clear provisions of the Constitution. In interpretation of the Constitution, Counsel opined that the court will find that time once set out by the Constitution cannot be varied by statute or judicial pronouncement.

22. As to Articles 48, 38 and 50 of the Constitution referred to by the Petitioner, Counsel contended that the rights envisaged there under were realized during the hearing of the petition and its appeal. Mr. Owour submitted that expeditious disposition of elections does not go against these Articles of the Constitution. Counsel urged the court to find that the time for hearing and determination of this petition lapsed on 6th March, 2018.

The Determination

23. I have carefully considered the applications. The only issue that arises for determination by this court is whether this Petition should be struck out for want of jurisdiction.

24. The Applicants contend that the Petition herein was filed on 6th September, 2017 and had a life line of six months. Therefore, the Petition had to be concluded by 6th March, 2018. The Applicants claim that the Election Court as provided by Article 105 has jurisdiction of six months to hear and determine election disputes. This jurisdiction they claim cannot be extended as it is cast in stone. The consequence of which is that an election court cannot entertain an election petition past the six months provided in law.

25. The Petitioner on the other hand admits that the Petition was filed on 6th September, 2017. The Petitioner also agrees that the election court had jurisdiction over the matter for a period of six months, within which period, the petition ought to have been heard and determined. However, the Petitioner claims that the Petition was struck out on 2nd November, 2017 at the interlocutory stage and an appeal was lodged in the Court of Appeal. According to the Petitioner, the timeline for the petition stopped running on 2nd November, 2017 when the appeal was lodged, and resumed running on 10th March, 2018 when the decision of the Court of Appeal ordering the rehearing of the petition was delivered. To support this assertion, the Petitioner argues that the appeal against the ruling striking out the petition dated 2nd November, 2017 was an automatic stay of execution of the ruling. Hence, the Petitioner contends that at the time of striking out the Petition only 1 month and 25 days had lapsed out of the six months period and 4 months 5 days were remaining. The Petitioner claims that the 4 months 5 days started running from the date when the Court of Appeal delivered its judgment. That being so, the Petitioner's case is that this court has the jurisdiction to entertain this matter for a period of 4 months 5 days from the date of the Court of Appeal's decision. In the alternative, the Petitioner contends that in filing the appeal against the ruling dated 2nd November, 2017, he exercised his right of appeal as enshrined under the law. Therefore, the Respondent should enjoy the fruits of his success at the Court of Appeal by having this petition heard and determined on its merits as directed by the Court of Appeal.

26. Article 105 of the Constitution reads as follows:

> **105. (1) The High Court shall hear and determine any question whether—**
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> **(a) a person has been validly elected as a member of Parliament; or**
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> **(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. (emphasis added)**

The above provision mandates the High Court to hear and determine electoral disputes regarding election of members of Parliament within six months from the date of filing of the Petition.

27. The Applicants' arguments are anchored on this provision. The Applicants have urged this court to consider the provisions of Article 105 (2) of the Constitution as having being coined in mandatory terms. According to the Applicants the timelines set under this provision are cast in stone and not subject to extension. Consequently, the Applicants contend that this Petition ought to have been heard and determined between 6th September, 2017 and 6th March, 2018.

28. The issue of electoral disputes timelines has been addressed by various superior courts in Kenya including the Supreme Court. These decisions include **Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR**; **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others [2014] eKLR**; **Mary Wambui Munene v. Peter Gichuki King'ara [2014]eKLR**; and **Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 others [2014] eKLR**. A common restatement in these decisions is the importance of and purpose of timelines. Timelines are intended to create efficiency and effectiveness in handling electoral disputes. Election disputes cannot be litigated indefinitely as this will create confusion and unease among electorates, who ultimately deserve to know who their leaders are, in the shortest time possible.

29. In the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others [2014] eKLR**, the Supreme Court discussed the significance of timelines. The Court observed as follows:

> **"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. The Constitutional sensitivity about 'timelines and timeliness', was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation."**

30. Further in the case of **Lemanken Aramat v. Harun Meitamei Lempaka & 2 others [2014] eKLR**, the Supreme Court reiterated the relevance of timelines by reflecting on the historical commercialization of electoral disputes. The Court stated:

> **"[72] The chain of ideas and principles that underlie this Court's prioritization of timelines in electoral dispute-settlement is clearly depicted in Chief Justice Mutunga's concurring opinion in the Munya case (paragraph 246):**
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> **"Kenya's political history has been characterized by large-scale electoral injustice. Through acts of political zoning, privatization of political parties, manipulation of electoral returns, perpetration of political violence, commercialization of electoral processes, gerrymandering of electoral zones, highly compromised and incompetent electoral officials, and a host of other retrogressive scenarios, the country's electoral experience has subjected our democracy to unbearable pain, and has scarred our body politic. As a result, free choice and fair competition, the holy grail of electoral politics, have been abrogated, and our democratic evolution, so long desired, has staggered and stumbled, indelibly stained by this unhygienic environment in which our politics is played. This is the history that our Constitution seeks to correct, through elaborate provisions, and the adoption of exemplary standards in our electoral system".**
>
> **[73] Timeliness is a manifest example of such exemplary standards; and quite appropriately, it is a precondition in the prosecution of electoral causes. This is a constitutional requirement that goes to the root of democratic governance…**
>
> **[76] The Court, as a device of sanctification of the people's electoral determination, is not an unregulated forum, where so critical a dispute can linger for indeterminate periods of time. Thus, the Supreme Court, in asserting the authority of the Constitution, underlines the element of the immanent time-constraint, in the resolution of electoral disputes, throughout the judicial system. The ultimate principle is: while citizens are at liberty to contest electoral outcomes, they will proceed within prescribed timelines, and in this way help to sustain the due functioning of other constitutional processes".**

31. I am in perfect agreement with the position stipulated in the above case. It is not in dispute that timelines are integral in the efficient disposal of electoral disputes. However, there is a contention as to the application of timelines in this matter. For better understanding, I will first give a brief history of this matter.

32. This Petition was filed on 6th September, 2017. In the course of the proceedings, and importantly at the preliminary stage, the 3rd Respondent raised a preliminary objection arguing that the Petition as filed offended Rules 8 (1) and 12 of the Election Petition Rules. The 3rd Respondent sought to have the Petition struck out for being fatally defective thus incompetent. Vide a ruling dated 2nd November, 2017, the court ruled in favour of the 3rd Respondent and the Petition was struck out. The Petitioner filed an appeal against the ruling in the Court of Appeal being **Mbaraka Issa Kombe v. IEBC & 2 others, Election Petition Appeal No. 3 of 2017**. The Appeal was heard and allowed. The Superior Court found that the Petition ought not to have been struck out as non-compliance with Rules 8(1) and 12 of the Election Petition Rules did not go to the root of the Petition. Subsequently, the Court of Appeal made the following orders:

> **i. The learned Judge's ruling dated 2nd November, 2017 is hereby set aside in its entirety.**
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> **ii. The costs of the application striking out the petition be in the petition.**
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> **iii. <u>Election Petition No. 10 of 2017 be heard and determined on merit in Malindi before any Judge with jurisdiction other than P.J. Otieno J</u>.**
>
> **iv. We award the appellant costs of this appeal which we cap at Ksh.500,000.00, as against the 3rd respondent.**

In furtherance of order (iii) above, this Court was gazeetted on 16th May, 2018 to hear and determine this Petition.

33. The Applicants contend that by dint of Article 105(2) of the Constitution, the life span of this Petition ended on 6th March, 2018. Therefore, this court does not have the jurisdiction to entertain this matter even after the orders issued by the Court of Appeal. According to the applicants, the Court of Appeal cannot purport to extend timelines set by the Constitution. On the other hand, the Petitioner claims that the appeal lodged before the Court of Appeal stayed the execution of the ruling dated 2nd November, 2017 and as a result time stopped running when the appeal was lodged.

34. In my view the contention herein revolves around the interpretation of Article 105 (2) of the Constitution. Is the timeline set under Article 105(2) of the Constitution cast in stone? The provisions of Article 105(2) of the Constitution are also echoed in Section 85 of the Elections Act which provides that an election petition under the Act shall be heard and determined within the period specified in the Constitution.

Article 105 (2) utilizes the term "shall", the implication being that the provision is worded in mandatory terms. This would suggest that a dispute involving the election of a Member of Parliament must be heard and determined within six months. An election court would not have the jurisdiction to entertain an election dispute past the six months provided under the law. This was the position taken by the Supreme Court in the case of **Lemanken Aramat (supra)** where the apex court opined that:

> **"[139] The burden of the argument, founded upon the Constitution and the law as these stand; upon the lines of conviction in counsel submissions; and upon the relevant comparative judicial experience, in our perception, does not stand in favour of the 1st respondent. We would not agree with the opinion of counsel for the 1st respondent that the Appellate Jurisdiction Act (Cap. 9, Laws of Kenya) confers jurisdiction upon the Court of Appeal to remit an electoral-dispute matter back to the High Court after the six-month limit set out in Article 105(1) and (2) of the Constitution has lapsed. The Constitution and the Elections Act, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes within six months; and the appellate Court cannot confer upon itself powers to resurrect the jurisdiction of Election Courts, after such jurisdiction is exhausted under the law."**
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> **[140] It is a commonplace that the Constitution is the supreme law of the land, in the terms of its Article 2(1), which binds all persons and State organs. It follows that the Constitution is sovereign, and holds a place of superiority over any orders and decrees of a Court. Accordingly, the Court of Appeal could not confer jurisdiction upon the High Court to conduct a recount, as the jurisdiction of the High Court under Article 105(1) and (2) of the Constitution, was in the first place contestable on the ground of expired timelines, and would in any case have been already exhausted.**

The court concluded that:

> **[154] Upon an extensive consideration of the factor of timelines in the processing of electoral disputes, under the Constitution and the statute law, this Court has come to the conclusion that the jurisdiction of the Election Court is linked to timelines. Consequently, the trial Court lacked jurisdiction to entertain the electoral question remitted by the Court of Appeal, once its six-month mandate had lapsed.**

35. In the above case, the Court of Appeal had remitted the matter back to the High Court for recount of all votes cast in all polling stations within the Constituency in question. The apex court found that the High Court had no jurisdiction to entertain the electoral dispute as the timeline of six months had already lapsed.

36. I do agree with the Supreme Court. However, I do note that the circumstances or facts presented in the said case are different from those facing this court. In the **Lemanken Aramat case**, the election petition had been heard and determined by the High Court on its merits. It is on the basis of the judgment delivered by the High Court that an appeal was lodged before the Court of Appeal. On appeal, the Court of Appeal remitted the matter back to the High Court for recount of votes. In the instant case, the petition was struck out by the Court at the interlocutory stage. The matter herein had not been heard on its merits. These proceedings are as a result of the Court of Appeal's decision which found that the petition herein ought not to have been struck out and remitted the same to the High Court for hearing and determination on its merits.

37. While Article 105 (2) of the Constitution puts a time limit on the jurisdiction of the High Court in dealing with election petitions, does this imply that the provision is so restrictive that even matters that were struck out and not heard on their merits cannot be remitted back to the courts for determination? The Court of Appeal while handling the appeal that emanated from this petition i.e **Mbaraka Issa Kombe v. Independent Electoral and Boundaries Commission (IEBC) & 2 others [2018] Eklr** opined that in order to discern the intention of drafters, interpretation of legal provisions must take into account not only the text used but also the context. The court observed as follows:

> **"16. We believe that discerning the intention of the Rules Committee in making the Rule in question cannot be solely based on the language employed thereunder. Regard has to be given to the parent statute, that is, the Elections Act as well as the context within which both the parent statute and the Election Petition Rules were formulated. Our position is fortified by the often quoted sentiments of the Supreme Court of India in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. And others {1987} 1 SCC 424:-**
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> **"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."**

38. Article 259 of the Constitution enjoins this court to interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. Further, in interpreting the Constitution a court must have due regard to the purpose of the provision so as to discern the intention of the drafters. In doing so, the provisions of the Constitution must be given a purposive and liberal interpretation. In the case of **Mugambi Imanyara & another v Attorney General & 5 others [2017] eKLR**, Mativo J discussed the need for courts to be innovative and take into account the contemporary situation of each age in interpretation of the constitutional and statutory provisions. The learned Judge made reference to the case of **Hamdarddawa Khana vs Union of India Air [1960] 554** where the Supreme Court of India observed as follows:

> **"In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the needs of the people and the laws it enacts are directed to problems which are made manifest by experience. The elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."**

Further the learned Judge observed that in interpretation of the Constitution the court should attach such meaning and interpretation that

meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

39. Article 105(2) of the Constitution should be read holistically together with other provisions of the Constitution. The provision should be seen as complimenting other provisions. No provision of the Constitution should be interpreted as limiting other provisions of the same Constitution. Rather, each provision should sustain the other. Therefore, no one provision of the Constitution should be viewed as superior to another. The reason I say this is that while Article 105(2) limits the jurisdiction of the court in handling election petition, this provision also denies justice to some litigants. Article 48 guarantees access to justice for all persons while Article 5o guarantees every person the right to a fair hearing. In my view the right to a fair hearing includes the right to have an election petition determined on its merits. Can this right be limited by Article 105 (2) of the Constitution? Under Article 25 of the Constitution the right to a fair trial is among the fundamental rights and freedoms that cannot be limited. I do not believe that the drafters of the Constitution in coming up with timelines for election petitions intended to lock out legitimate or deserving litigants from the seat of justice. Article 105 (2) brings about certainty, efficiency and effectiveness in resolving electoral disputes. In doing so, justice cannot be denied to litigants especially those who find themselves at the mercy of the provisions of Article 105 (2) through faults not of their own making.

40. Article 105 (2) of the Constitution should be given an expansive view. Its interpretation should not be simplistic or one based on the plain language or words used. While in its literal sense the provision gives no room for election courts to go past the six months period provided, it is imperative to question the intention of the drafters of the Constitution. As explained above, I do not think the provision intended to deny justice to litigants whose petitions were dismissed at the interlocutory stage and succeeded on appeal. Justice would not only be denied to such litigants but also to electorates who have the right to know who their leaders are.

41. In order to better understand the purpose of Article 105(2) of the Constitution, this court must question the place of the Court of Appeal in this matter. Section 85A of the Elections Act makes provision for appeals from the High Court to the Court of Appeal on matters of election petitions. It states as follows:

> **(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be—**
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> **(a) filed within thirty days of the decision of the High Court; and**
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> **(b) heard and determined within six months of the filing of the appeal.**
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> **(2) An appeal under subsection (1) shall act as a stay of the certificate of the election court certifying the results of an election until the appeal is heard and determined.**

42. Section 85A makes it clear that the Court of Appeal is a necessary intervention in election petitions. Therefore parties to an election petition have the right to appeal against the decision of an election court. This Section neither restricts the lodging of appeals emanating from decisions such as the present case nor does it state that appeals may only be filed against petitions that were heard on their merits. In hearing an appeal, the Court of Appeal is not estopped from issuing an order remitting a petition back to the High Court for hearing and determination on its merits. Rule 25 of the Court of Appeal (Election Petition) Rules, 2017 lists the orders that the Court of Appeal may issue on conclusion of the hearing. It states:

> **25. (1) At the conclusion of the hearing of an election appeal, the Court may make an order—**
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> **(a) dismissing the appeal;**
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> **(b) declaring the election to be—**
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> **(i) valid; or**
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> **(ii) invalid.**
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> **(c) invalidating the declaration made by the Commission;**
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> **(d) on payment of costs; or**
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> **(e) <u>as it may deem fit and just in the circumstances</u>.**

Order (e) above may include an order remitting an election petition back to the High Court for hearing.

> 43. A restrictive interpretation of Article 105(2) of the Constitution would mean that upon hearing an appeal and allowing it, such as is the case in this matter, the Court of Appeal's hands are tied. It can do nothing to enforce the rights of a successful appellant. Such an appellant will have succeeded at the court but his or her victory would be pyrrhic, and amount to nothing. The remedy provided in law would be useless, and the question as to whether there was a fair hearing guaranteed under the Constitution would be in doubt. I do not think that our laws intended to disenfranchise successful litigants.

44. The Petitioner argued that once they lodged the appeal it served as a stay of the ruling dated 2nd November, 2017. Consequently, the Petitioner contended that time as envisioned by Article 105(2) of the Constitution stopped running when the appeal was filed. Accordingly,

the Petitioner stated that time resumed running on 10th May, 2018 when the Court of Appeal issued its judgment. On their part, the Applicants opined that time should be calculated chronologically and not cumulatively as suggested by the Petitioner.

45. I do not agree with the Petitioner's submissions on this issue. In my view, time in the context of Article 105(2) of the Constitution is calculated chronologically as suggested by the Applicants. There is no provision of the law, either in the Constitution or the Elections Act, to suggest that the six months period provided can be suspended by a certain action or inaction and later reinstated.

46. In the view of this court, the decision of the Court of Appeal gave a new lease to the Petition herein meaning that the six months period provided by the law would run a fresh in this matter. The Court of Appeal faulted the entire process before the High Court suggesting that the petition herein should start afresh. Subsequently, a gazette notice was issued-Gazette Notice No. 6026 dated 16th May, 2018- gazetting this court to hear this matter. When then does the six months period begin to run? In my view the six months should be calculated from the date of the gazette notice i.e 16th May, 2018. This is because it is the said gazette notice that gave this court the jurisdiction to hear and determine this matter. Election Petitions are conducted by specific Judges gazetted to do the same. In essence, the earlier proceedings before the earlier Judge are totally impugned, and the gazettment of a new Judge connotes a fresh process entitled to a fresh six months period. In my considered opinion there has been no violation of Article 105 (2) of the Constitution. In keeping in tandem the constitutional principles of fair hearing; and the need to do substantive justice as opposed to determination of issues on technicality; and in keeping in tandem the fundamental freedoms established in the Constitution, this court finds that hearing this petition afresh on its merits upon the constitutional intervention by the Court of Appeal is in tandem, and not inconsistent, with the provisions of Article 105 (2) of the Constitution. The said Article 105 (2) must be purposively interpreted to accommodate the constitutional principles of fair hearing and the lawful and constitutional intervention of the Court of Appeal in situations where the Court of Appeal faults or impugns the entire process of the High Court, and orders a fresh start before a freshly constituted and gazetted High Court. Therefore, the jurisdiction of this court runs from the 16th May, 2018 to 16th November, 2018.

47. In conclusion, this court finds that it has the jurisdiction to hear and determine this election petition. For this reason the applications dated 18th June, 2018 by the Applicants are hereby dismissed. Costs shall be in the cause.

Dated, Signed and Delivered in open court in Malindi .

this 27th day of September, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Aboubakar for the Petitioner

Mr. Ole Kina for 1st and 3rd Respondents

Mr. Owour for the 4th Respondent

Mr. Kaunda Court Assistant