**Shambi v Rodgers & another (Election Petition Appeal 1 of 2023)**
**[2023] KEHC 21931 (KLR) (13 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 21931 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**ELECTION PETITION APPEAL 1 OF 2023**

**DKN MAGARE, J**

**FEBRUARY 13, 2023**

**BETWEEN**

**JOSEPHAT PETER SHAMBI ..... APPELLANT**

**AND**

**DOREEN TAABU RODGERS ..... 1ST RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT**

**High Court declares section 7 of the County Governments Act unconstitutional for referring to elected special members of the County Assembly as nominated members instead of special seat members.**

Reported by John Ribia, Valentine Wanjiru, and Martha Jepkemei

***Electoral Law*** *- electoral systems – electoral systems in Kenya - special seat members vis-a-vis - nominated members - what was the differentiation between Kenya's electoral systems, being the first-past-the-post electoral system and proportional representation – Constitution of Kenya, articles 87(2), 88(4)(e), 90, 97, 98, and 165; 177(1)(c); 197(2); Elections Act (cap 7), sections 34(6), 74(1), 75(1), and 88(4); Elections (Parliamentary and County) Petition Rules, 2017 (cap 7 Sub Leg), rule 35; Political Parties Act (cap 7D), sections 39, and 40; County Governments Act (cap 265), sections 7 and 197.*

***Jurisdiction*** *– jurisdiction of the Independent Electoral and Boundaries Commission Dispute Resolution Committee vis-a-vis the Magistrates' Court - jurisdiction over election disputes by members elected through proportional representation as special seat members - what was the role of the IEBC in resolving disputes arising out of nomination - whether a dispute on members elected through proportional representation as special seat members was an election dispute - Constitution articles 87(2), 88(4)(e), 90, 97, 98, and 165; 177(1) (c); 197 (2); Elections Act (cap 7), sections 34(6), 74(1), 75(1), and 88(4); Elections (Parliamentary and County) Petition Rules, 2017 (cap 7 Sub Leg), rule 35; Political Parties Act (cap 7D), sections 39 and 40; County Governments Act (cap 265), sections 7 and 197.*

***Jurisdiction*** *– jurisdiction of the High Court – jurisdiction in election disputes - jurisdiction to entertain interlocutory appeals in election disputes - whether the High Court had jurisdiction to entertain interlocutory appeals arising from time-bound election disputes.*

***Statutes*** *– constitutionality of statutory provisions – constitutionality of section 7 of the County Government Act - whether the classification of members elected through proportional representation as "special seat members" rather than "nominated members" in section 7 of the County Governments Act was unconstitutional - County Governments Act (cap 265), section 7.*

**Brief facts**

The interlocutory appeal arose from the trial court's decision to dismiss the preliminary objection regarding the court's jurisdiction to consider the election petition. The preliminary objection at the trial court was based on the fact that the court lacked jurisdiction to hear and determine the matter in light of the provisions of article 88(4)(e) of the Constitution, section 74(1) of the Elections Act and sections 39 and 40(1) of the Political Parties Tribunal Act. The 1st respondent challenged the election by nomination of the appellant vide Gazette Notice 10712 Vol CXXIV dated September 9, 2022, which was 30 days after the general election on August 9, 2022. The appellant's case was that it was a nomination dispute, which needed to be dealt with under the IEBC Dispute Resolution Mechanism.

The trial court, in a ruling, found that the dispute was an election dispute but not a nomination dispute. Aggrieved, the appellant filed the instant interlocutory appeal to overturn the position of the trial court on matters of jurisdiction.

**Issues**

i. What was the differentiation between Kenya's electoral systems, being the first-past-the-post electoral system and proportional representation?
ii. Whether the classification of members elected through proportional representation as special seat members rather than nominated members in section 7 of the County Governments Act was unconstitutional.
iii. Whether a dispute over members elected through proportional representation as special seat members was an election dispute.
iv. What was the role of the IEBC in resolving disputes arising out of the nomination?
v. Whether High Court had the jurisdiction to entertain interlocutory appeals arising from time-bound election disputes.

**Held**

1. The question about which candidates were to represent which minority in the qualifying list was determined by the Independent Electoral and Boundaries Commission (IEBC). It was the IEBC that made a conscious decision on election balancing. There was a difference between the pre-election nominations that resulted in candidates and the post-election selection that resulted in nominated members of the county assembly.
2. The issue about when the 1st respondent knew of the qualifying list was irrelevant for the determination of the matters. That was because many people on that qualifying list were not elected by nomination and had not complained.
3. Parties were proceeding as if Kenya had a one-mode electoral system with only the first-past-the-post (FPTP) election system. Kenya had dual election modes. There was FPTP, which was concluded at the general election under article 101 of the Constitution. The members elected via that system were usually referred to as elected members. They included the President and governors, as there were no nominated governors or presidents. The second mode was a proportional representation (PR) under articles 97, 98, and 177 of the Constitution. The PR system was used in the Senate for the purposes of attaining the two-thirds gender rule, as well as in the county assembly for the same and related purposes. The National Assembly, county assemblies, and the Senate also had a similar method for the election of

people with disabilities, the youth, and the marginalized. The members elected through those elections were usually referred to as nominated or special seat members. They were elected under special seats or a marginalized category.

4. The confusion in the minds of parties arose from the common usage of nomination and election to differentiate the FPTP elected members from those elected through universal suffrage and election by nomination through parties. The use of the word nominated in section 7 of the County Governments Act was the source of the confusion. Referring to the special seat members as nominated was incorrect. Instead, the Act should refer to them as special seat members or proportional representative special seats, which was the constitutional term used in article 177 of the Constitution.
5. The reference of section 7 of the County Governments Act to the members elected under article 177 of the Constitution, as nominated, was unconstitutional in view of article 90 of theConstitution, which provided that they were elected.
6. The process undertaken by political parties ended once the qualifying lists were submitted to the IEBC and accepted. The remainder of the process was done by IEBC, up to gazettement. Upon publishing the names of persons elected under articles 97, 98, and 177 in the Kenya Gazette, the mandate of the IEBC ended.
7. The elections were tied such that one could not separate them without committing an atrocity against the constitutional order. The general elections were held on the second Tuesday of August. The results produced parliamentary parties and their equivalent in the county assembly. That formed the electoral base for selecting from the qualifying list. However, IEBC made decisions in balancing the lists for the purpose of balancing ethnicity and gender.
8. All processes related to elections were terminated once elections were held. After elections, the remainder of the matters were specifically designated to be within the realm of the elections court.
9. Section 39 of the Political Parties Act was irrelevant as far as the instant appeal was concerned. It dealt with the composition of the Political Parties Disputes Tribunal, which was not in issue in the instant election petition. The dispute in the lower court related to the election of a candidate from a non-minority ethnic group to represent the minority. It was not a party dispute, even if it was between members of the same party. The decision that was impugned was and ought to have been made by the IEBC. There was no dispute with the party list itself or its generation.
10. Article 88(4)(e) of the Constitution provided for the powers of the IEBC, which included the settlement of disputes arising from nominations. Any dispute after the election, other than a presidential dispute, should be taken to the Magistrates' Court if it involvedd members of the county assembly from both the PR and FPTP election systems. Section 75 of the Election Act equally provided for the jurisdiction of the Magistrates' Court to hear petitions determining the validity of the election of members of the county assembly. The membership was not limited to ward representatives but included all members of the county assembly, other than the speaker, who was *ex officio*. The dispute resolution mechanism ended at the election; the trial court had jurisdiction to consider the election petition.
11. The IEBC could not be a judge in its cause since it had already made its final pronouncement. It could only defend its decisions under the current legal dispensation. It was not an arbiter. In the instant case, IEBC had already taken sides, defending the results of their action. *Nemo iudex in causa sua* (no one should be a judge in their cause). To safeguard the independence of the IEBC, the framers of the Constitution did not give it the power to solve post-election disputes because of the perceived conflict of interest.
12. The IEBC, as a commission, did only two jobs—conducting elections and referenda on one side and boundary delimitation on the other. The instant dispute was an election dispute. Challenging the gazettement of a nominated member was an election dispute.

13. The dispute in the trial court was an election dispute. A nomination dispute occurred and was concluded before the election. They were concluded before August 9, 2022. Any dispute after that, other than a presidential dispute, should have been taken to the trial court if it involved members of the county assembly, both from the PR and FPTP election systems, and to the High Court in case of parliamentary and other county elections.
14. The candidates for election for special seats were selected through a nomination process using a qualifying list. That process led to only one outcome—an election for the special seats. Those members of the county assembly became candidates for election with only one distinction: they were elected through nomination using qualifying party lists. The elections of the members by registered voters provided statistics upon which elections envisaged under article 90, as read with 97, 98, and 177 of the Constitution, were to be conducted. Those elections were as valid as those held by the registered voters. The challenge of the election process of the elections should be the same. The only procedure available was a petition to an election court through a petition.
15. Jurisdiction was circumscribed by statute. It could not be ousted by the Rules. However, noting the strict timelines set under the Constitution, the court must only take up jurisdiction under special circumstances; otherwise, defer the matter until after the final determination of the case. The jurisdiction of the court was sequential and not concurrent. Unless the same involved striking out, which was successful, or a jurisdictional issue that could dispose of the matter, the court should put down its tools to give the court below a chance to conclude the matter before it.
16. The position on whether to lock out interlocutory appeals had not been fully settled by statute. It was not advisable to file, and for good measure. However, the courts could never lock them out completely, as it could create tyranny in lower courts. The court could decline to take up jurisdiction for procedural matters, as those would of necessity involve the determination of fact, which was not within the domain of the appellate elections court, like improper admission of evidence. It was doubtful, however, that when the issue was about jurisdiction only and not other directions, the court could fold its arms.
17. Where a decision was a nullity, it need not be set aside, although for good order it was important to do so. A court would ignore issues of jurisdiction that would dispose of the entire petition. However, there was no jurisdiction in election matters to handle interlocutory matters of procedure or fact, or even admission of evidence. The only reason why an issue of jurisdiction could be challenged was to avoid the court proceeding on a nullity and wasting judicial time.
18. Given very punishing timelines, the law did not anticipate interlocutory appeals, hence the need to be restrictive. The issues to be raised could be raised as part of the main appeal. That was why the rules referred to judgment and not rulings.
19. It was advisable for courts to hear matters together with the main petition. Given that the refusal to hear the preliminary objection was not appealable, the matter could be disposed of expeditiously.
20. Where an issue of jurisdiction succeeded, it would dispose of the appeal, and it would thus be unnecessary to determine whether the appeal ought to have been filed in the first place.
21. In exceptional circumstances, an appellate court could dispose of an appeal that arose from an interlocutory application filed and determined by the trial court while the substantive matter was ongoing at the trial court. In doing so, the timeframe question must always be borne in mind. The issue in both courts was jurisdiction and timelines, and it could be handled in the interlocutory appeal. Hence, the court had the jurisdiction to hear and determine the interlocutory appeal.
22. The trial court had jurisdiction to hear and determine the dispute. Noting that the gazettement was done on September 9, 2022, the appeal was properly before the trial court.
23. ***[Obiter]*** "Maybe it is a high time IEBC was treated as a repository of evidence and election materials and not a proper party. That is for legislative reform, for which this court cannot direct. It can only muse and posit. Nothing more."

*Appeal dismissed.*

***Orders***

i. *The appeal was unmeritorious and was dismissed in limine.*

ii. *Section 7 of the County Governments Act was unconstitutional only to the extent that it referred to members elected under article 90 of the Constitution as nominated members instead of special seats members.*

iii. *The costs of the appeal of Kshs 165,000 were awarded to the 1st respondent, payable within 30 days, failing which execution do issue.*

iv. *The 2nd respondent was to bear their own costs.*

v. *The trial court was to proceed with the petition uninterrupted.*

vi. *The file was closed save only for execution for costs, if need be.*

**Citations**

**Cases**

***Kenya***

1. *Abdullahi, Bashir Haji v Adan Mohamed Nooru & 3 others* Civil Appeal 300 of 2013; [2014] KECA 621 (KLR) - (Explained)
2. *Andama, Benjamin Ogunyo v Benjamin Andola Andayi & 2 others* Election Petition 8 of 2013; [2013] KEHC 2530 (KLR) - (Explained)
3. *Aramat, Lemanken v Harun Meitamei Lempaka & 2 others* Petition 5 of 2014; [2014] eKLR - (Explained)
4. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] 1 KLR 111 - (Explained)
5. *Kambi, Samwel Kazungu & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 others* Election Petition 4 & 5 of 2017; [2017] KEHC 2818 (KLR) - (Explained)
6. *Karua, Martha Wangariv Independent Electoral and Boundaries Commission & 3 others* Petition 3 of 2019; [2019] KESC 26 (KLR) - (Followed)
7. *King'ara, Peter Gichuki v Independent Electoral and Boundaries Commission & 2 others* Civil Appeal 23 of 2013; [2013] KECA 278 (KLR) - (Explained)
8. *Kones v Republic ex parte Kimani Wanyoike* Civil Appeal 94 of 2005; [2006] eKLR; [2006] 2 EA 158; [2006] 2 KLR 226 - (Explained)
9. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] 3 KLR 199 - (Explained)
10. *Mathia, Lydia v Naisula Lesuuda & another* Election Petition 13 of 2013; [2013] KEHC 2194 (KLR) - (Explained)
11. *Mathia, Lydia v Naisula Lesuuda & another* Civil Appeal (Application) 287 of 2013; [2013] KECA 63 (KLR) - (Explained)
12. *Muthuri, Jacob Mwirigi v John Mbaabu Murithi & 2 others* Election Petition 2 of 2013; [2013] KEHC 2639 (KLR) - (Explained)
13. *Mwanthi, Stephen Nzue v Philip Muia* Election Appeal 1 of 2017; [2017] KEHC 1706 (KLR) - (Explained)
14. *Mwicigi, Moses & 14 others v Independent Electoral and Boundaries Commission & 5 others* Petition 1 of 2015; [2016] KESC 2 (KLR) - (Explained)
15. *National Gender and Equality Commission v Independent Electoral and Boundaries Commission & another* Petition 147 of 2013; [2013] KEHC 4687 (KLR) - (Explained)
16. *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Applied)
17. *Popat, Alnashir & 7 others v Capital Markets Authority* Petition 29 of 2019; [2020] KESC 3 (KLR) - (Explained)

18. *Shabhal, Suleiman Said v Independent Electotal & Boundaries Commission & 3 others* Civil Appeal 42 of 2013; [2014] KECA 658 (KLR) - (Explained)
19. *Sheikh, Mohamed Mohamud v Independent Electoral and Boundaries Commission & 2 others* Election Petition 1 of 2017; [2018] KEHC 8480 (KLR) - (Explained)
20. *Waititu, Ferndinand Ndung'u v Independent Electoral & Boundaries Commission & 8 others* Civil Application 137 of 2013; [2013] KECA 460 (KLR) - (Explained)
21. *Waititu, Sammy Ndung'u v Independent Electoral & Boundaries Commission & 3 others* Election Petition 33 of 2018; [2019] KESC 54 (KLR) - (Explained)

***United Kingdom***

*Edington v Fitzmaurice* (1885) 29 ChD 459 - (Explained)

***Regional Court***

*Karua, Martha Wangari v Attorney General of Kenya & 2 others* EACJ Reference 20 of 2019 - (Explained)

**Statutes**

***Kenya***

1. Constitution of Kenya articles 87(2); 88(4)(e); 90; 97; 98; 165; 177(1) (c); 197(2) - (Interpreted)
2. Constitution of Kenya (Repealed) In general - (Cited)
3. County Governments Act (cap 265) section 7 - (Unconstitutional)
4. County Governments Act (cap 265) sections 7, 197 - (Interpreted)
5. Elections (Parliamentary and County) Petition Rules, 2017 (cap Sub Leg) rule 35 - (Interpreted)
6. Elections Act (cap 7) sections 34(6); 74 (1); 75 (1); 88 (4) - (Interpreted)
7. Political Parties Act (cap 7D) sections 39, 40; part VII - (Interpreted)

**Advocates**

*Miss Nyange* for the appellant
*Odunga* for 1st the respondent
*Mwazighe h/b for Mr Munyithia* for the 2nd respondent

## JUDGMENT

### Introduction

1. This matter was referred to me on 27 January 2023 by the principal Judge to handle pursuant to directions that had hitherto been given. I took up the matter immediately and gave directions that the matter be listed for directions and case conference on 7 February 2023. Parties duly attended and I gave directions to proceed by way of written submissions. The timetable for submissions was to end by 9 February 2023. Parties duly complied with very succinct and comprehensive submissions.

2. For the proper handling of the appeal, in line with active case management strategies, I issued further directions that the matter be listed for directions on Friday 10 February 2023 at 12 noon to confirm filing of submissions. Parties' advocates confirmed having filed submissions in time. I also asked them to highlight on the issue of costs, which they duly did albeit coyly. I slated this matter for judgment today, 13 February 2023 at 0900 hours. The same is now ready for delivery after burning midnight oil over the weekend to have wheels of justice move.

3. I have considered the submissions filed to the fullest extent possible. Submissions are not binding on the court but give an indication on how the parties perceive their cases. If for any reason I have not regurgitated the same here is not out of disrespect or paucity of ideas but due to economy of space.

4. I have read all the humongous authorities which were annexed. Some were extremely useful. However, some of the decisions were selectively quoted by advocates. It is of course part of this game called litigation tactics. Unfortunately, I have read each of the decisions including footnotes and the litigation history, for those cases that were litigated up to the Court of Appeal and Supreme Court.

5. I take this early opportunity before making the ultimate decision, to thank advocates for the parties for industry exhibited in working within very short timelines.

**Background**

6. This is an interlocutory appeal that arose from the decision of the learned principal Magistrate, Hon Mr DM Ndungi sitting as an election court in Voi MCEP No E001 of 2022. He had dismissed in a preliminary objection that had been raised by the appellant herein on jurisdiction of that court.

7. The said preliminary objection against the entire election petition on was raised on the grounds that: -

   a. The court lacks jurisdiction to hear and determine this entire election petition in view the provisions of article 88(4)e of the *Constitution*, section 74(1) of the *Elections Act, 2011*, section 39 and 40 of the *Political parties Act*.

   b. The entire election petition is bad in law, incompetent, frivolous and legally untenable in view of the provisions of article 88(4), section 74(1) of the *Elections Act* which vests the 2nd respondent with powers to settle nomination disputes.

8. The lower court found as follows while relying on the case of *Sammy ndung'u Waity v IEBC* [2019] eKLR, I am of the view that:-

> " The dispute herein is an election dispute and not a nomination dispute. The petitioner herein is not challenging the party list by Wiper Democratic Movement to the (IEBC) which was published on 4.7.2022. what the petitioner is challenging is the eventual gazettement of the 1st respondent by the (IEBC) on 9 September 2022..."

9. The trial court dismissed the same as totally unfounded in a well-reasoned but short ruling. The court below states as doth: -

> " I find and hold that the petition is properly before the (election) court by way of an election petition to challenge the election by nomination of the 1st respondent to represent ethnic minority. The results of that election were gazetted on 9 September 2022 vide gazette notice no (omitted for clarity).

10. The said findings aggrieved the appellant herein, who was the 1st respondent and the elected member on a special seat representing ethnic minority, which is the gravamen of the petition, in the County Assembly of Taita Taveta. When the appellant filed this appeal, he also filed an application dated 23 January 2023 seeking stay of proceedings. My sister, Hon Lady Justice Njoki, rightly, did not find the application being urgent and directed the matter be placed before the Principal Judge forthwith for appointment of a judge to hear the appeal. This then resulted in my appointment.

11. When the matter came for directions, the appellant wanted directions on the application for stay. I informed him that due to the constitutional timelines, I was minded to dismiss the same *proprio motu*. I was aware of the limited timelines the trial magistrate was faced with. The advocate for the appellant was kind enough to withdraw the same with costs being in the cause and it was so ordered.

12. The parties then agreed to proceed with the appeal forthwith. I was made aware that the main petition is due for hearing on 14 February 2023 and as such I fixed the judgment a day before then. I know how precious judicial time is both in this court and the court below and did not want to constrain the trial court in the eventuality that the petition survived.

13. I did not want these proceedings to hang on the court system like the sword that Emperor Dionysius I of Syracuse placed on the poor soul of his courtier Domacles, otherwise now known as Domacles sword as narrated most ably in the discussions by Marcus Tullius Cicero's celebrated Tusculanae disputationes, Book V to denote the precariousness and vanity of certain engagements.

14. We identified the issues that were arising in the appeal and requested that parties address the court on the same. These can be summarized as:-

    a. Whether the lower court had jurisdiction to hear the petition before it.

    b. Whether this court has jurisdiction to hear an interlocutory appeal.

    c. Who is to bear costs, and to what extent.

**Appellant's Submissions**

15. The appellant submitted that the law does not restrict appeals to final decisions but the court can hear an interlocutory appeal. He submitted as doth:-

> " ...a close look at section 75(4) of the *Elections Act* and rules 34 does not restrict the appeals to the high court to be restricted from the final judgment of the lower court as contrasted to the appels to the court of appeal under rules 35 of rules. A further look at rule 34 of the rules one notices that there is no mention of an appeal being one from a judgment or a decree as mentioned under rule 35, it is erroneous to construe and impose a limitation on the high court jurisdiction to hear appeal arising from interlocutory applications in the High Court, actually the only qualification to the jurisdiction of the High Court in section 75(4)(a) is to hear and determine the appeal within six months where again there is conflict on time lines with rule 34(11).

16. The above argument, according to the appellant is based on article 165 of the *Constitution*. Her submissions were as follows: -

> " Article 165 of the *Constitution* establishes the High Court jurisdiction is succinctly spelt out in article 165(6) and its jurisdiction is to exercise its supervisory jurisdiction over the subordinate courts over any person's body or authority exercising a judicial function and under article 165(7) where this court is given the authority to make any order or give any directions it considers appropriate to ensure the fair administration of Justice."

17. The appellant's views are that the rules cannot limit the jurisdiction of the high court. Further, they are of the view that the authorities referred to are from the Court of Appeal in relation to the high court. He argues that the high court has powers to supervise the magistrates court, the court of appeal does not have corresponding powers over the high court. The submissions were to the effect that:

> " A subsidiary legislation cannot expand, add to or reduce the jurisdiction of any court as spelt out in the *Constitution* or by statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the *Constitution* or Statute. A rule cannot limit the jurisdiction of a court of law. Of importance to note is that most of the authorities

in respect of interlocutory Appeals are those based on appeals from the High court to the Court of Appeal under rule 36 of the rules a case in point Ferdinand Ndungu Waititu...

18. They further relied on the Supreme Court decision of *Hassan Ali Joho & another v Suleiman SaidShahbal &2 others* [2014] eKLR, where the supreme court held as doth:

> " The High Court ruled that section 76(1)(a) was inconsistent with the provisions of article 87(2) of the *Constitution* and recommended the amendment of either article 87(2) of the *Constitution* or section 76 of the *Elections Act*. The court however declined to strike down the petition for the reason that the 1st respondent was not to blame as section 76(1)(a) of the *Elections Act* was lawful until the court's declaration of its invalidity"

19. The Appellant relied on paragraph 27 of the Court of Appeal decision in *Peter Gichuki King'ara v IEBC* [2014] eKLR, where the Court of Appeal (Hon Justices A Visram, M Koome and J Otieno-Odek JJA, indicated as follows:-

> It is our considered view that subsidiary legislation or rules of procedure or a rule made by the Rules Committee cannot confer, create, establish, limit or subtract the Jurisdiction of any court of law or tribunal as established by the *Constitution*. Or statute. Rule 35 of the Elections Petition Rules is a subsidiary legislation which is contained within the rules of procedure for conduct and trial of election petition. We hold that rule 35 of the election petition rules, being subsidiary legislation within procedural rules, it is not a jurisdictional rule and cannot confer or limit jurisdiction of the court...

20. The decisive part is a different portion of the same judgment of *Peter Gichuki King'ara* (*supra*), where the law Lords stated with authority that:-

> " However, the jurisdiction of this court is only exercisable after a final judgment and decree of the High Court has been made. The points of law raised in the memorandum of appeal dated August 12, 2013 and the prayers sought therein are interlocutory in nature. The main election petition is still pending before the High Court and there is no judgment or decree from an election court that is before this court. We hold that the issues raised in this appeal are premature and must await the final judgment and decree of the High Court in the Election Petition. We concur and paraphrase in italics the dicta by this court differently constituted in the case of *Kakuta Maimai Hamisi v Peris Tobiko & 2 others* Civil Appeal No 154 of 2013 where it is stated:-
>
> > "We are on our part perfectly satisfied that the delay or deferment of interlocutory matters is an exemplary of that sense of balance, proportionality and appreciation of the practical realities of just, expeditious, time-bound and substantive determination of election petitions on merit untrammeled by the delays and confusion that can be sown by appeals to this court on interlocutory rulings. The law on electoral dispute resolution as currently formulated was meant to facilitate a speedy and seamless process of adjudication of the petitions proper, hence the deferment of disruptive distractions such as interlocutory appeals that serve only to unnecessarily prolong the process with the attendant peril of piercing the statutory timelines."

21. The appellant's view was that the nomination under article 177(1)c is not an election and as such the petition should have challenged the same at the relevant time. They urged me to strike out the petition in the court below.

**Second Respondent's Submissions**

22. The second respondent relied on the decision of *Jacob Mwirigi Murithi v John Mbaabu Muriithi & 2 others* [2013] eKLR , Where Justice Lesiit, as then she was held that:-

> " The rule provides that the High Court will have the same powers and perform the same duties conferred on the court exercising original jurisdiction...
>
> .. Order 42 rule 6 of the Civil Procedure Rules provides for stay. The Appeal was brought within time was brought without undue delay."

23. They also relied on paragraph 55 of the Supreme Court decision of *Martha Wangari Karua v IEBC & 3 others* [2019] eKLR, which stated as follows: -

d. Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial court.

e. In exceptional circumstances, an appellate court may dispose of an appeal arising from an interlocutory application filed and determined by the trial court while the substantive matter is still ongoing at the trial court. In doing so, the timeframe question as explained above must always be borne in mind.

24. They further beseeched the court to have regard to certain precedents where they submitted as follows: -

> " At this juncture, we urge the court's mind to the holding in the case of The *National Gender and Equality Commission Vs the Independent Electoral and Boundaries Commission and Another* [2013] eKLR (where) it was held that:
>
> > "Section 34(6) of the *Elections Act, 2011* specifically provides that "The party lists submitted to the Commission under this section shall be in accordance with the *Constitution* or the nomination rules of the political party concerned." This role does not extend to directing the manner in which the lists are prepared as these are matters within the jurisdiction of the parties but in considering the lists, the IEBC must nevertheless be satisfied that the lists meet constitutional and statutory criteria... in the event there is a dispute in the manner in which the parties conduct themselves in conducting their internal elections then recourse may be had by the aggrieved party members, inter alia, to the Political Parties Disputes Tribunal established under section 39, Part VI of the *Political Parties Act, 2011* or to the High Court in appropriate circumstances...
> >
> > The *Constitution* imposes the primary obligation to ensure that the lists are compliant with the *Constitution* on the IEBC. The IEBC is required to scrutinize the lists forwarded to it to ensure that the lists comply with the *Constitution*, laws and regulations and in each case to ensure that the special interests are represented in the said lists." (Emphasis added)"

25. The second respondent concluded as follows:-

> " From the above quoted precedents, it is further evident that the trial magistrate misdirected himself and did not allow himself to be guided by the decisions of superior courts, which decisions are binding and arrive at a finding that 1st respondent being a member of Wiper Political Party was aggrieved by the political party's preparation and submission of party list nominations and was thus under a mandatory obligation to file a complaint with the IEBC or PPDT."

**First Respondent's Submissions**

26. The first respondent was the first to throw salvo. She submitted that:

> " ...the High Court can only be seized of an appeal on the decision of the Magistrate Court, and not until then this court cannot and is by law barred from presiding over a dispute as to validity or otherwise, of an election of a member of County Assembly. See section 75(4) of the *Elections Act*.
>
> As regards appeals from interlocutory decisions of elections court, rule 35 of the *Elections (Parliamentary and County) Petition Rules, 2017* (hereinafter the "Rules") is so deliberate that an appeal from the election court to the High Court can only lie from judgment or decree but not on interlocutory orders as is the case herein.

27. To back up their submissions they relied extensively on the decisions of the Court of Appeal in *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission, IEBC & 8 others* [2013] eKLR and *Benjamin Ogunyo Andama v Benjamin Andola Andayi & 2 others* [2013] eKLR for authority that this court should decline invitation to take up jurisdiction.

28. They further invited me to appreciate the predicament of the 1st respondent. In a graphic way they ask me to muse on what they were to do in the circumstances. Do they fold up arms and wait for their fate. This is a dated form of saying were they to involve themselves in fist fights or go to the court below.

29. They urged me to dismiss the appeal and award them costs.

**Analysis**

30. The petition in the subordinate court dated 29/9/2022 challenged election/nomination of the appellant to represent the minority in Taita Taveta county. According to the 1st respondent, who was the petitioner in the subordinate court, it is the Pare who are minority. The 1st respondent contends that the appellant is a Taita by ethnicity. Further that Taita is not a minority within Taita Taveta county within the meaning of article 177(1)(c) of the *Constitution*. This nomination was done 30 days after the General Election of 9/8/2022.

31. The 1st respondent challenged the election by nomination of the appellant vide Gazette Notice 10712 VOL CXXIV dated 9/9/2022, which was 30 days after the general election of 9/8/2022. The appellant's case is this is a selection when article 177(1)(c) is a nomination which needs to be dealt with under the IEBC Dispute Resolution Mechanism.

32. The three issues that linger in my head and which had the parties considered it carefully, then we could not be here. The decision regarding which candidates are to represent which minority in the zebra list, which the law calls the "qualifying list", are determined by the IEBC. It is IEBC that makes a conscious decision on election balancing. How then can they be the ones hearing disputes arising thereafter.

33. The second issue that parties seem to ignore is a difference between the pre-election nominations that results into candidates and the post-election, selection that results in nominated Members of the county Assembly.

34. I only wish to point out that part of the 1st respondent's submissions are factually wrong. The issue when they knew of the qualifying list is irrelevant for the determination of these matters. This is because there are many people on that qualifying list who were not elected by nomination and have not complained.

35. The dispute is only in respect of one thing, that is, was the appellant herein entitled to be elected to represent the minority by virtue of the Taita and whether the Taita are or are not the minority in Taita Taveta county or it is the Pare who are minority. The less I say about this the better as the matter is alive before the trial court.

36. The other point I note is that parties are proceeding as if Kenya has one mode electoral system with only First-past-the-post (FPTP) election system. In truth, Kenya has dual election modes. There is first-past-the-post election, which is concluded at the general election under article 101 of the *Constitution*. The members elected this this system are usually referred to as elected members. These include the president and governors.

37. There are no nominated governors or president. The Supreme Court in *Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others* [2016] eKLR noted as follows:-

> " 117. It is clear to us that the *Constitution* provides for two modes of 'election'. The first is election in the conventional sense, of universal suffrage; the second is 'election' by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of 'election petition'."

38. We also have a proportional representation(PR) under articles 177, 97 and 98 of the *Constitution*. This system is used in the senate for purposes of attaining 2/3 gender rule well as in the county assembly for the same purpose and connected purposes.

39. The National Assembly, County Assembly and Senate also have a similar method for election of people with disabilities, the youth and the marginalized. The members elected with those elections are usually referred to as nominated or special seats. The correct position is that they are elected under special seats or marginalized.

40. The confusion in the mind of parties arise from the common usage of nomination and election to differentiate the first-past the post elected members, that through universal suffrage and elections by nomination through parties. Article 177(1) provides as follows: -

> " a county assembly consists of
>
> a. Members elected by registered voters of the wards, each ward consisting a single member constituency, on the same day as a general election of members of Parliament, being the second Tuesday in August, in every 5th year,
>
> b. The number of special seat members necessary to ensure nor more than two-thirds of the membership of the Assembly are of the same gender.
>
> c. The number of members of marginalized groups including persons with disabilities and the youth prescribed by an act of parliament.

d. The speaker..."

41. It should be recalled that article 177(3) of the *Constitution* gives away the position of these members-

> " the filling of special seats under clause 1(b) shall be determined after declaration of elected members of each ward.

42. There is a similar provision for Senate in respect of gender representation where article 98(b) of the *Constitution* which states as follows: -

> " The senate consists of –
>
> a. Forty seven members each elected by the registered voters of the counties, each county constituting a single member constituency
>
> b. sixteen women members who shall be nominated by political parties according to their proportion of members of the senate elected under clause (a) in accordance with article 90
>
> c. two members, being one man and one woman, representing the youth;
>
> d. two members, being one man and one woman, representing persons with disabilities; and
>
> e. the Speaker, who shall be an *ex officio* member 2. The members referred to in clause (1)(c) and (d) shall be elected in accordance with article 90."

43. The National Assembly also has similar provision where article 97(1)(b),(c) and (d) of the *Constitution* which provides as: -

> " The National Assembly consists of
>
> a. two hundred and ninety members, each elected by the registered voters of single member constituencies.
>
> b. forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;
>
> c. twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with article 90, to represent special interests including the youth, persons with disabilities and workers;
>
> d. the Speaker, who is an *ex officio* member."

44. Finally on the constitutional imperative, about election is set out in article 90 provides as follows:-

> " Allocation of party list seats
>
> 1. Elections for the seats in Parliament provided for under articles 97(1)(c) and 98(1)(b), (c) and (d), and for the members of county assemblies under article 177(1)(b) and (c), shall be on the basis of proportional representation by use of party lists.

2. The Independent Electoral and Boundaries Commission shall be responsible for the conduct and supervision of elections for seats provided for under clause (1) and shall ensure that-

   a. each political party participating in a general election nominates and submits a list of all the persons who would stand elected if the party were to be entitled to all the seats provided for under clause (1), within the time prescribed by national legislation;

   b. except in the case of the seats provided for under article 98(1)(b), each party list comprises the appropriate number of qualified candidates and alternates between male and female candidates in the priority in which they are listed; and

   c. except in the case of county assembly seats, each party list reflects the regional and ethnic diversity of the people of Kenya.

45. Article 90(2) then declares whether or not the exercise is a nomination or an election. It provides," the independent election and boundaries commission shall be responsible for the conduct and supervision of election for sections provided for in clause 1 and ensure –

   a. Except in the case of the county assembly seat, each party list reflects the regional and ethnic diversity of the people of Kenya.

46. The latter is not a carte blanche to the County Assembly to have diversity. article 197(2) of the *Constitution* provides as follows:

   "(1) parliament shall enact legislation to-

      a. Ensure that the community and cultural diversity of a county is reflected in its county assembly and county committee; and

      b. Prescribe mechanisms to protect minorities within counties.

47. The Legislation referred to in article 197 is the *County Governments Act, 2012*. Section 7 of the said Act provides as follows: -

   7. Membership of the county assembly

      (1) In addition to the members who are elected under article 177(a), or nominated under article 177(b) of the *Constitution*, a county assembly shall comprise—

         (a) six nominated members as contemplated in article 177(c) of the *Constitution*; and (b) the speaker, who is an ex officio member elected in accordance with article 178 of the *Constitution*. (2) The political party nominating persons under subsection (1) shall ensure that—

         (a) community and cultural diversity of the county is reflected in the county assembly; and

         (b) there is adequate representation to protect minorities within the county in accordance with article 197 of the *Constitution*.

(3) The number of members nominated under subsection (1)(a) shall be reviewed to accord with the number of Wards determined by the Independent Electoral and Boundaries Commission under section 27(3)(a)

48. The use of the word nominated in section 7 of the *County Governments Act* may have been the source of all these confusions. To that extent referring the special seat members as nominated is a misnomer and incorrect. The same should be special seat members or proportional representative special seats, which is the constitutional term used in article 177.

49. The reference to the members elected under article 177 of the *Constitution* and to nominated is thus unconstitutional in view of article 90 of the *Constitution* which provides that they are elected. I so declare.

50. All these matters are all provided under the *Constitution*. The clarity with which article 90 declares the election by nomination using qualifying party list as an election, could have stopped parties from litigating on a non-issue, unless there were other motives, probably to delay the main petition. We will never know since the words of Lord Brown LJ in *Edington v Fitzmaurice*(1885)29 Ch D 459, ring true in this case,

> " the state of a man's mind is as much a fact as the state of his digestion."

51. Another salient feature of this case is that the question whether election by nomination is an election or not is not a novel one. It is a well-travelled terrain only unknown to a visitor in Jerusalem, travelling to Emmaus.

52. In *Mohammed Abbas sheikh v IEBC* [2018] eKLR, Justice Alfred Mabeya while considering a similar issue arising from the Meru county assembly, pronounced himself in his usual clarity as follows: -

> " 30. having established various entities, forums and nature of disputes they are mandated to determine, at what stage does the court's jurisdiction commence in determination of disputes relating to members of the county assembly.
>
> 31 This arose in the case of *Mwicigi & 14 others v IEBC & 5 others* [2016] eKLR , where the supreme court delivered itself as follows ;
>
> > "It is clear from the foregoing provisions that allocation or nomination of seats by the IEBC is a time bound process that starts with proportional determination of the number of seats due to each political party. On the basis, IEBC then designates or draws from the allocated list the number or nominees required to join the county assembly. To designate or draw from entails an act of selecting from the list provided by the political party. It is plain to us that Constitution and the electoral law envisages the entire process of nomination for the special seats, including the act of gazettement of nominees' names by the IEBC, as an integral part of the election process."
>
> The gazette notice in this case signifies the completion of election through nomination and finalizes the process of Constitution of the assembly in question. On the other hand, election by registered voters, as was held in the John's case, is in principle completed by issuance of form 38, which terminates

the Returning officer's mandate and shifts any issue of validity of the results from IEBC to an election court."

53. *Ipso facto*, the process undertaken by political parties end once the qualifying lists are submitted to IEBC and accepted. The remainder of the process is done by IEBC, up to gazettement. Upon publishing the names of persons elected under articles 97, 98 and 177, in the Kenya Gazette, the mandate of IEBC ends. That also marks the end of the General elections for that particular election cycle. Any election after that is a by-election.

54. The elections are so tied together like Siamese twins that one cannot separate them without committing an atrocity to our Constitutional order. The general elections are held I the second Tuesday of August. The results produce parliamentary parties and its equivalent in the county assembly. That then forms the electoral base for selecting form the qualifying list.

55. However, IEBC makes decisions in balancing the lists for purposes of balancing ethnicity and gender. For example, when selecting youth where two vacancies are available, they pick a man and man from either ortwo qualified parliamentary parties, a decision as whether to pick a man from party A or B is part of the discretion of the 2nd respondent, the Independent Electoral and Boundaries Commission. It is not a party decision.

56. Is this a matter to be dealt under the *Political Parties Act* or by the Independent Electoral and Boundaries Commission. My position is that all processes related to elections are terminated once elections are held. After elections, the remainder of the matters are specifically designated to be within the realm of the elections court.

57. It is my position that section 39 of the *Political Parties Act* is irrelevant as far as this appeal is concerned. It deals with the composition of the Political Parties Disputes Tribunal, which is not in issue in this election petition.

58. Further, section 40(1) of the *Political Parties Act* provides for determination of various disputes.

> "Jurisdiction of Tribunal (1)
>
> The Tribunal shall determine—
>
> (a) disputes between the members of a political party; (
>
> b) disputes between a member of a political party and a political party;
>
> (c) disputes between political parties;
>
> (d) disputes between an independent candidate and a political party;
>
> (e) disputes between coalition partners; and
>
> (f) appeals from decisions of the Registrar under this Act;
>
> (fa) disputes arising out of party primaries.
>
> (2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms."

59. The dispute here does not fall under any of the foregoing parameters. The dispute in the lower court relates to election of a candidate from a non-minority ethnic group to represent the minority. It is

not a party dispute, even if it is between members of the same party. This is because the decision that is impugned was and ought to have been made by the Independent Electoral and Boundaries Commission. There is no dispute with the party list itself or its generation.

60. Lastly, can the Independent Electoral and Boundaries Commission internal mechanisms be invoked to resolve this dispute. The answer lies in the very article counsel for the appellant was relying on, that is, article 88(4)(e), which provides for the powers of the IEBC. In regard to settlement of disputes, article 88(4)(e) is germane. It provides as doth-

> " The commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an act of parliament and, in particular-
>
> a ....
>
> b .....
>
> c ....
>
> d. The settlement of electoral disputes, including disputes arising from nomination but excluding petitions and disputed subsequent to the declaration of results (emphasis mine)."

61. Section 74(1) the *Elections Act* is even more succinct. It provides as doth: -

> "74. (1) Pursuant to article 88(4)(e) of the *Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
>
> (2) An electoral dispute under subsection (1) shall be determined within seven days of the lodging of the dispute with the Commission.
>
> (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable.

62. Let's assume for arguments sake that nominations are not elections. It follows that the only elections will be the general elections held on 9 August 2022. This dispute will be subsequent to the election, the same having arisen from 9 September 2022. The events after general election, other than by-election, will still remain outside dispute resolution mechanism IEBC. If that happens, where do parties with "nomination disputes take them?

63. The *Constitution* under article 105, provides for resolution of the membership of parliament while section 75 of the *Elections Act*, equally provides for the jurisdiction of the magistrate to hear petition determining the validity of election of member of the County Assembly. The membership is not limited to ward representatives but all members of the Assembly, other than the speaker, who is *ex officio*.

64. It is my considered view that the dispute resolution mechanism ends at the elections. After the elections, IEBC is a party to the dispute to answer to all manner of sins committed during elections both real and imagined. Maybe it is high time IEBC was treated as a repository of evidence and election

materials and not a proper party. That is for legislative reform for which, this court cannot direct. It can only muse and posit. Nothing more.

65. The Independent Electoral and Boundaries Commission cannot be a judge in its own cause since it has already made final pronouncement. It can only defend their decisions under the current legal dispensation. It stands accused by all and sundry and it is therefore not an arbiter. In this case it has taken sides already, defending the results of their action. The old adage '*nemo iudex in causa sua*' comes to mind.

66. In the Supreme Court pronounced itself clearly in paragraphs 65 and 66 in the case of *Alnashir Popat & 7 others v Capital Markets Authority* [2020] eKLR, where they stated as doth:-

> " 65] We also agree with the petitioners that enforcement proceedings are not necessarily administrative merely because the enforcement body is an administrative one. In the words of the Constitutional Court of South Africa in *President of the Republic of South Africa and others v South African Rugby Football Union and others* (CCT 16/98) [1999] ZACC 11:
>
> > "The focus of the enquiry as to whether conduct is 'administrative action' is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising." In *Cojuangco v PCGG*, 190 SCRA, the Supreme Court of Philippines, whilst prohibiting a law enforcer from investigating his own complaint, held that a preliminary investigation, though not a trial, amounted to a judicial proceeding on account of the nature of the function. In that characterization, it said "An act becomes judicial when there is opportunity to be heard and for, the production and weighing of evidence, and a decision is rendered."
>
> (66) So, upon the characterization of the functions of the agency that are in question as judicial or quasi-judicial, the agency becomes a "tribunal" and must, in exercising those functions, comply with the requirements of impartiality and independence."

67. To safeguard the independence of the Independent Electoral and Boundaries Commission, the framers of the *Constitution* did not give them powers to solve post-election Disputed because of the perceived conflict of interest. I was thus surprised by the submissions of IEBC in this matter to the contrary.

68. A similar dispute was handled by the high court and Court of Appeal as an election dispute. This case the case of *Lydia Mathia v Naisula Lesuuda & another* [2013] eKLR, where the court noted that the election by nomination is done by the decision made by IEBC. The Court stated:-

> " It is incumbent upon (IEBC) to look at the list and 'designate' nominees in line with article 90.

69. The Independent Electoral and Boundaries Commission does only two jobs, conducting election &referenda on one side and boundary delimitation on the other. This dispute was not on boundary delimitation. It is definitely an election dispute. The Court of Appeal in an appeal from the foregoing case, in *Lydia Mathia v Naisula Lesuuda & another* [2013] eKLR, the Court of Appeal held that challenging a gazettement of a nominated member is an election dispute.

70. The foregoing leads the court to only one conclusion, the dispute in court below was an election dispute. A nomination dispute occurs and is concluded before election. They were concluded before 9 August 2022. Any dispute after that, other than presidential dispute should be taken to the magistrate's court, if it involves members of the county assembly both from PR and FPTP election system and to the high court in case of Parliamentary and other County elections.

71. How then do you justify that a nominated member is elected while elected members were nominated before general elections? The answer is fairly simple. The candidates for election for special' seats are selected though a nomination process using a qualifying list. This process leads to only one outcome- an election for the special seats. These members of the County Assembly, become candidates for election with only one distinction, they are elected though nomination using qualifying party lists.

72. Upon elections of the members through registered voters provide statistics upon which to carry out elections envisaged under article 90 as read with 97, 98 and 177. These elections are as valid as those done by the Registered voters. Challenge of the process is and should be the same.

73. The disputes regarding whether nominated members are elected have been with us for years. The Court of Appeal pronounced itself quite clearly and in a sound manner in the pre-2010 period, under the retired *Constitution*. I recall that the court of Appeal in *Kipkalya Kiprono Kones v Republic ex parte Kimani Wanyoike* [2006] eKLR pronounced itself when it stated as follows, in a precedent setting decision that saved the appellant from the jaws of tyranny:

> " We have said enough, we think to show that the procedure of Judicial Review, like that of a plaint, is and was not available to the parties aggrieved by the acts or omissions of the commission. We re-assert as we previously did, that the way of challenging the electoral process, and for that purpose nominating members to the national Assembly is part of the electoral process, is through an election petition as set in the *Constitution* and the (Act).

74. In the above case the appellant had been nominated by Ford People under the retired *Constitution*. The Party chairman Kimani Wanyoike sought to challenge the outcome though Judicial Review. He was not successful as the court held that nominations are elections hence only the election petition filed in the election court was valid.

75. Having found that this was an election within the meaning of article 177(1) as read with articles 97, 98 and 90 of the *Constitution* the only procedure available is a petition to an election court through a petition.

76. Having found that this is an election dispute, the next question is whether this court has jurisdiction to handle the matter that is as an interlocutory appeal. To answer this question begs another. Ordinarily jurisdiction is the first issue you deal with. However, the jurisdictional question was based on a question of fact. If this was not an election dispute, then election law does not apply hence interlocutory appeals may be filed. Thus, I had to satisfy myself that this was an election dispute before applying election law to it.

77. As far as the law on jurisdiction is concerned, the law is well settled. The Court of Appeal in the *Owners of Motor Vehicle Vessel "Lilians v Caltex Oil (Kenya) Ltd* [1989] eKLR , as per Nyarangi JA as then he was, held as follows:

> " Jurisdiction is everything without it, a court has no powe4r 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 down tools in respect of the matter before it, the moment it holds, the opinion that it is without jurisdiction."

78. In *SK Macharia & another v KCB & 2 others* the court stated as follows:

> "A court's jurisdiction flows from either the *Constitution* or Legislation or both. Thus a court 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. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction or a court of law or tribunal, the legislature will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

79. The jurisdiction to hear and determine interlocutory appeals has had contestations in various courts during an election cycle. Most courts hold that unless the appeal is on an application disposing off the entire suit or an issue of Jurisdiction that is likely to dispose of the entire suit, there is no jurisdiction. They hasten to add that this is not to say that all interlocutory appeals will be shut out unless they are not disposing the entire suit.

80. My considered view is that the jurisdiction is circumscribed by statute. It cannot be ousted by rules. However, noting the strict timelines set under the *Constitution*, the court should, nay must, only take up jurisdiction under special circumstances, otherwise, defer the matter till after the final determination of the case. From a series of decisions, it can be seen that the jurisdiction of the court is sequential and not concurrent. Unless the same involves striking out which was successful or jurisdiction only, the court should down its tools to give the court below a chance to conclude the matter before it.

81. In *Stephen Nzue Mwathi v Philip Muia & 4 others*, [2017] eKLR, where justice DK Kemei had this to say.

> "It is worth noting that the court in *Ferdinand Waititu and Judicial Service Commission v Kalpa H Rawal* cases (*supra*) were not dealing with interlocutory appeals that will dispense the petition or rather lead to conclusion of a particular case. However, from the latter case, it is apparent that appeal can be allowed in the event the application to strike out is allowed."

82. The position on whether to lock out interlocutory appeals has not been fully settled by statute. The case law indicates it is not advisable to file and for good measure. However, the courts may never lock them out completely as we may create tyranny in lower courts.

83. The court can, as it is bound to do, refuse or decline to take up jurisdiction for procedural matters as those will of necessity involve determination of fact, which are not within the domain of the appellate elections court, like, improper admission of evidence. It is doubtful however, on basis of the *Joho*'s case above, that when the issue is jurisdiction, only and not other directions, that the court can fold its arms.

84. The Court of Appeal (Maraga, M'inoti & Murgor, JJA) while considering the effect of a nullity stated as follows in the case of *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR

> " In *Macfoy v United Africa Co Ltd* (*supra*) Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void, but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect after it is declared void; it is not void *ab initio*. What has been done or accomplished before, pursuant to that act, is not affected by the declaration. On the other hand, a nullity is really something that is void, a nothing right from the beginning. In the words of Lord Denning:
>
> > "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it."

85. What the court was saying is that, where a decision is a nullity, it need not be set aside, although for good order it is important to do so. That is what was done in the case of *Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others* [*supra*]. There is doubt that a court will ignore issues of jurisdiction that will dispose of the entire petition. However, there is no Jurisdiction in election matters to handle interlocutory matters of procedure and or fact or even admission of evidence. The only reason issue of jurisdiction may be challenged is to avoid the court proceeding on a nullity and wasting judicial time.

86. In other words, if the preliminary objection is allowed or refused or an application to strike out is allowed, an interlocutory appeal may be filed. Given very punishing timelines, the law does not anticipate interlocutory Appeals, hence the need to be restrictive. My view is that the issues could be raised as part of the main appeal. That is why the rules refer to judgment and not rulings.

87. Arising from the Supreme Court decisions of *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others* [2019] eKLR and the *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR, it is advisable for courts to hear matters together with the main petition. Given that the refusal to hear the preliminary objection is not appealable, the matters could disposed of expeditiously.

88. The East Africa Court of Justice recently held as follows in the case of *Martha Wangari Karua v The Attorney General of Kenya and 2 others*, Reference No 20 of 2019 at paragraph 54:-

> " 54. Unfortunately, the trial court was unable to determine the matter within the time fixed by statute. The applicant's quest for justice saw her return to the appellate court to challenge a decision on merits, albeit one that was delivered beyond the prescribed tine line. On this occasion she was unsuccessful inter

alia on the premise of time- limitation, a decision that was upheld by the apex court

89. In *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014], the Supreme Court stated as doth: -

> "(161) In drafting article 87 of the *Constitution*, the drafters were informed by the dark election petition history in our country where petitions could drag on into the next electoral cycle. This was captured by this court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji*, Petition No 2B of 2014 (*Munya* case) at paragraph 62 thus:
>
> > (62) 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 name of which elections are decreed and conducted, should not be held captive to endless litigation."

90. I note that had the issue of jurisdiction succeeded, it will have disposed of the appeal it is thus unnecessary to determine whether the appeal ought to have been filed in the first place. This has been dealt with comprehensively by the Court of Appeal and supreme court.

91. This is on the basis of the decision in *Joho* case, where the Supreme Court pronounced itself and has been beautifully captured by the Court of Appeal (Githinji, Ouko & Murgor, JJA, as then they were) *Bashir Haji Abdullahi v Adan Mohamed Nooru & 3 others* [2014] eKLR:-

> "The decision of the Supreme Court in *Joho* case is by virtue of article 163(7) of the *Constitution* a binding precedent on this court and binds third parties including the appellant in all election petitions including appeals which have not reached finality where the issue has been properly raised and in future prospective election petitions."

92. I will quote beautifully worded injunction by Hon Justice W Korir as then he was, in *Samwel Kazungu Kambi & another v Nelly Ilongo County Returning Officer, Kilifi County & 3 others* [2017] eKLR

> "26. That time is of essence in election petitions cannot be gainsaid. The Supreme Court stressed the importance of complying with the timelines in election disputes in the case of *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR. In order to

convey the message of the Supreme Court, I only need to reproduce a few paragraphs of that judgement in this ruling.

"[69] We have to note that the electoral process, and the electoral dispute-resolution mechanism in Kenya, are marked by certain special features. A condition set in respect of electoral disputes, is the strict adherence to the timelines prescribed by the *Constitution* and the electoral law. The jurisdiction of the court to hear and determine electoral disputes is inherently tied to the issue of time, and a breach of this strict scheme of time removes the dispute from the jurisdiction of the court. This recognition is already well recorded in this court's decisions in the Joho case and the Mary Wambui case.

[70] As urged by counsel for the 1st respondent, we recognize that there are instances in general litigation, when jurisdiction is not affected by a party's failure to meet the set filing requirements. For example, a court may in certain instances exercise its discretion to admit a matter for hearing when an argument regarding proper form is pending before it. The court's authority under article 159 of the *Constitution* remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice. However, there are instances when the *Constitution* links certain vital conditions to the power of the court to adjudicate a matter. This is particularly true in the context of Kenya's special electoral dispute-resolution mechanism. By linking the settlement of electoral disputes to time, the *Constitution* emphasizes the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed electoral justice, that has plagued this country in the past."

93. I was not surprised that parties used similar authorities but gave them a different interpretation. I have also carried out extensive research in order to align all these positions to the law and decisions of the superior courts.

94. Premium has been made of the *Elections (Parliamentary and County) Petition Rules, 2017*. I note that rules 35 and 36 of provide as follows: -

35. An appeal from a Magistrate's Court under section 75 of the Act shall be in the form of a memorandum of appeal and shall be signed in the same manner as a petition.

(2) The memorandum of appeal shall concisely set out under distinct head, the grounds of appeal, without any argument or narrative, from the judgment appealed from and the grounds shall be numbered consecutively.

36(3) Rule 35 of the (Parliamentary and County) Petition Rules, 2017 provides that provides that: -

Only one appeal may be entertained in relation to a petition.

95. These rules have been interpreted by the Supreme Court and as such I cannot re- invent the wheel. In *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others* [2019] eKLR, the Supreme Court gave directions on what ought to be done in the following terms: -

55] We take the view that all the suggested propositions must be considered within the context of the strict timelines provided for the settlement of electoral disputes. We understand that these proposals seek to remedy the likelihood of denial of substantive justice due to impeding court processes or where a wrong cannot be corrected at the appellate stage due to lapse of time. Hence, a proper consideration of this issue requires a balancing of rights such as the right of appeal, access to court, the right to have a matter adjudicated within the

specified timeframes and the right to substantive justice. Consequently, learning from the experience of the emerging jurisprudence in our courts, we propose the following: -

(a) All applications by a respondent in an election petition, save in exceptional circumstances, should form part of the response to the petition. Similarly, a petitioner should as much as possible file any application arising from his petition eg for scrutiny or recount at the same time as the petition.

(b) Unless for want of jurisdiction or in any other deserving circumstance, a trial court should exercise restraint in striking out a Petition or a response, where such an action is likely to summarily dispose of the matter.

(c) All applications for striking out an election petition for want of jurisdiction, or for any other reason, must be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In this regard, it is for the trial court, to make and enforce such case management orders, so as to meet this objective.

(d) Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial court.

(e) In exceptional circumstances, an appellate court may dispose of an appeal arising from an interlocutory application filed and determined by the trial court while the substantive matter is still ongoing at the trial court. In doing so, the timeframe question as explained above must always be borne in mind.

**Special Circumstances**

96. Ordinarily, this court should refrain from exercising jurisdiction in interlocutory matters., except those covered under clause (e) of *Martha Karua* case (*supra*). Notwithstanding differences in interpretation of rule 35 of the *Elections (Parliamentary and County) Petition Rules, 2017*, article 163(7) directs, nay commands, that we defer to the decision made by the supreme court as that represents the jurisprudential guidance. This means that interlocutory appeals can only be heard in exceptional circumstances.

97. The court notes that the issue in both courts was jurisdiction and timelines were still viable to handle the interlocutory appeal in terms of direction (e) in *Martha Karua* case (*supra*) bearing in mind timelines. I therefore decided to hear and conclude this appeal before the date set for hearing.

**Conclusion**

98. Having found that all courts from the high court to supreme court have properly found this kind of dispute to be an election dispute, I declare that the court below was right in relying on binding precedent and finding that he had jurisdiction to hear and determine the dispute before him.

99. Noting that the gazettement was done on 9 September 2022, the appeal was properly before the subordinate court.

100. In my final analysis, the court below was correct in all aspects. The appeal lacks merit and is hereby dismissed with costs to the 1st respondent.

**Costs**

101. The appeal filed was ill advised and the preliminary objection filed in the lower court was completely a waste of precious judicial time. It was an abuse of the court process as every precedent was against the appellant. To use the appellant's own words in the second objection, the appeal is legally untenable, frivolous and vexatious in view of the clear provisions of article 88(4)e of the *Constitution*. It is clear that the appellant was not nominated but elected through proportional representation.

102. In order to return the parties where they are in readiness for hearing of the petition in the subordinate court tomorrow, an order of costs will assuage the 1st respondent. She has been inundated by a scotched earth strategy where she has to be fighting this dispute both in this court and the court below.

103. The costs involved perusing a voluminous 418-page record, a huge application for stay, humongous authorities and submissions while preparing her submissions and the hearing of the petition. This is coupled with the level and intensity of interest and timelines given for disposal of an appeal of this nature.

104. After taking into consideration the comments and submissions by parties I am of a considered view that costs of Kshs 165,000 are adequate. As such, while dismissing the appeal for lack of merit, I award the 1st respondent a sum of Kshs 165,000 as costs payable in the next 30 days. In default execution do issue.

105. The 2nd respondent supported the appeal and as such have lost with the appellant. They shall thus bear their own costs.

**Disposition**

106. In conclusion therefore the court makes the following orders: -

    a. The appeal herein is unmeritorious and is dismissed *in limine*

    b. Section 7 of the *County Governments Act* is unconstitutional only to the extent is refers to members elected under article 90 of the *Constitution* as nominated members instead of Special Seats Members.

    c. The costs of the appeal of kshs 165,000 are awarded to the 1st respondent, payable within 30 days, failing which execution do issue.

    d. The 2nd respondent, having supported this unmeritorious appeal, shall bear their own costs.

    e. The trial magistrate to proceed with the petition uninterrupted.

    f. The file is closed safe only for execution for costs, if need be.

    It is so ordered.

**DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 13TH DAY OF FEBRUARY THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**KIZITO MAGARE**

**JUDGE**

In The Presence Of;

Miss Nyange for the Appellant

Odunga for the 1st Respondent

Mwazighe holding brief for Mr. Munyithia for the 2nd Respondent

Andrew Mwambanga - Court Assistant.