



**Akaran v Mbele & 2 others (Election Petition Appeal E001 of 2022)
[2023] KEHC 19290 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ELECTION PETITION APPEAL E001 OF 2022**

DKN MAGARE, J

JUNE 22, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

**IN THE MATTER OF ELECTION OF THE MEMBER OF
COUNTY ASSEMBLY BAMBURI WARD, MOMBASA**

COUNTY

BETWEEN

ETORE JOHN AKARAN APPELLANT

AND

PATRICK MWAMVULA MBELE 1ST RESPONDENT

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2ND
RESPONDENT**

WARIO IBRAHIM ALI 3RD RESPONDENT

JUDGMENT

Introduction and background

1. The Appellant filed Memorandum of Appeal dated 29/12/2022 praying that the appeal be allowed and the entire judgment of the Chief Magistrate Hon Martha Mutuku, given on 16/12/2022 be set aside and the petition be allowed. I gave directions for the parties to file submissions. The submissions have been filed and I have considered them. If for any reason I do not refer them specifically, is not out of disrespect but due to economy of space.
2. Under rule 35. (1) of The Elections (Parliamentary and County Elections) Petition Rules, 2017, the Appellant was under duty to file a concise Memorandum of Appeal. The said rule posits as follows: -



- (1) 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.
 - (6) The Appellant shall, within twenty-one days, upon filing of memorandum of appeal, file a record of appeal which shall contain the following documents—
 - i. Memorandum of Appeal;
 - ii. Pleadings;
 - iii. Typed and certified copies of the proceedings;
 - iv. All affidavits, evidence and documents put in evidence before the magistrate; and
 - v. Signed and certified copy of the judgment appealed from and a certified copy of the decree.
3. The Appellant appeared to be green about these provisions. He filed the record of appeal 5 months and 1 day later, leaving the court and the Respondent less than a month to deal with the case. To make matters worse the memorandum of appeal was so prolixious and repetitive that it was not humanly possible to understand what the Appellant was thinking in that respect. It is simply bad draftsmanship. I have painstakingly read the entire Memorandum of Appeal. It is a study of what not to do in an appeal.
4. The Court of Appeal was confronted with a better but convoluted Memorandum of Appeal in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR, where the learned judges of the court of Appeal posited as doth: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned.

What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.”



5. I have also seen another memorandum of appeal included in the record of Appeal filed on 30/5/2023. Though it is the same in all material particulars, the operative memorandum of appeal is the one filed within time on 29/12/2022. Rule 35 requires that the Memorandum of Appeal be filed within 14 days of judgment. The rule provides as doth: -
 - “(3) The memorandum of appeal shall be filed at the nearest High Court registry within fourteen days from the date of the judgment.”
6. The Original Memorandum of Appeal suffices. I am tempted to strike out the Appeal in limine for infractions to Rule 35. The Appeal has monumental issues that are more worrisome than infraction of Rule 35. The worry about rule 35 will be for another day, another place, another occasion.
7. The first Memorandum of Appeal was correctly filed on 29/12/2022. Second Memorandum was placed in the record of Appeal without filing and without any basis in law and in fact. The document dated 30/5/2023 is not a memorandum of Appeal and as such it is expunged from record.
8. There is a second issue that the Record of Appeal was filed outside 21 days as required under Elections (Parliamentary and County Elections) Petition Rules, 2017. To compound the problem, the record of Appeal has more than three quarters of documents that are not supposed to be in it. These documents include spent Applications, authorities, submissions on applications, affidavits that were not admitted in evidence or were already expunged from the record of proceedings in the court below.
9. This makes the record bulky and untidy to fathom. However, I have read all the three records as filed. They raise issues that are fairly straight forward. The entire petition is clearly about St. Elizabeth primary school polling station.
10. The court has endeavoured and summarized the 17 long-winded grounds of appeal into three, I understand them, that is: -
 - a. The court erred in disregarding and blocking the Appellant’s ‘unchallenged’ evidence and submissions.
 - b. The court erred in not awarding ‘special damages’ and proper costs.
 - c. The court erred in failing to order scrutiny and recount.
 - d. There is also appeal on issues like recusal, violation of Article 50 of *the constitution* and bias; these are not real issues before this court.
11. The issues raised in paragraph (d) above cannot be dealt with in this case. This is because the Appellant did not appeal when the impugned decisions were made. Even if an appeal was to be filed, it was for summary rejection. Failing to allow an application is not a ground for making an application for recusal.

Results

12. The Petitioner filed a Petition dated 8/9/2022 without results in the Petition. Rule 7 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provide as follows: -
 7.
 - (1) A petition shall be in Form EP 1 and shall state —
 - (a) the name and address of the petitioner;
 - (b) the date when the election in dispute was conducted;



- (c) the results of the election, if any, and however declared;
- (d) the date of the declaration of the results of the election;
- (e) the grounds on which the petition is presented; and
- (f) the name and address of the advocate, if any, for the petitioner which shall be the address for service.

13. The Results are an integral part of the election petition, without results, the election petition without results, the petition is fatally defective and untenable in law. I need to deal with other aspects of the case before disposing off the Appeal is for another occasion another time. In the case of Mwamlole Tchappu Mbwana v Independent Electoral & Boundaries Commission & 4 others [2017] eKLR. This could dispose the appeal. That however, in that case, Justice M Thande, stated as doth: -

“ 43. In the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR one of the grounds of appeal was that the learned Judge unilaterally framed new issues for determination that were not pleaded or responded to by the parties. The Court of Appeal in allowing this ground of appeal stated:

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

By proceeding with a Petition in which the date of declaration of the results and the results have not been pleaded, this Court will run the risk of abandoning its role as an independent and impartial arbiter and descend into the arena of conflict. In the circumstances, I find that the Petition is incompetent for not having stated the date of declaration of the election results. Though the failure to state the results was not one of the issues raised in the preliminary objection, the Court cannot shut its eye to the omission.

Extension of time

14. The court below was right in all aspects in declining to extend time within which to adduce additional evidence. That decision was not challenged at the time it was made.
15. The law as it is set out in Article 87 of *the Constitution* is as doth: -
1. Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
 2. Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.



16. These legislation is the *elections Act*. It provides for filing within 28 days. The court of Appeal in the case of Joh clarified the law as it relates to 28 days. In any case, the application for adduction of additional evidence was made outside 28 days required for filing the petition. In the case of Justus Mongumbu Omiti v Independent Electoral and Boundaries Commission (I.E.B.C.) & another [2017] eKLR, the court, Justice Makau stated as follows: -

“36. It is from the above, a constitutional requirement that a petition and all affidavits of the persons intended to be called as witnesses be filed at the time of the filing of the Petition. The Election dispute timelines prescribed under *the constitution* and Election Act No. 24 of 2011, especially related to filing documents set out, cannot be extended after expiry of the 28 days from the time of declaration of the results. An Election Court has no power to extend time for filing such documents. Rule 19 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, empowers election court to extend the time prescribed in these Rules or its own timelines but election court has no jurisdiction to extend timelines set in *the Constitution* or the Election Act No. 24 of 2011.

37. In view of the above, I find that this court has powers to extend the period within which the present application was filed and served. I accordingly extend the period of service and declare the application properly on record. I, however, decline to extend the time to file supplementary affidavit/report and/or to file further affidavit of Dr. Noah Akala Oduwo, for the reasons that it is an attempt to file further evidence or introduce new evidence to the Petition, after time allowed for filing witness statements has since lapsed, as the petition was filed on 7.9.2017 challenging declaration made on 10th August, 2017. The last date for filing the petition could have in this case, have been on 7.9.2017. That after 7th September 2017, no valid documents or amendment of the petition could be entertained. I find that the attempt to introduce new evidence through the affidavit of Dr. Noah Akala Oduwo untenable. Further affidavit in support of the petition is only required to be sworn by the Petitioner and within time.”

17. The court cannot extend time outside the 28-day period. The prayer for adduction of extra evidence as such was properly excluded.

Gubernatorial elections postponement and agents lock out.

18. The Appellant was complaining that the postponement of Gubernatorial election affected the results.

19. Before I depart, I need to address the issue of voter suppression, purported from the postponement of elections for the gubernatorial seat. This issue was dealt with in rem by the supreme court in the case of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022) (Judgment). In that case, the supreme court addressed the very issue of voter suppression though postponement of gubernatorial elections as doth: -

“On the other hand, in rebuttal to these claims, IEBC illustrated, with examples, to our satisfaction that there was no nexus between the postponement of elections and voter turnout in the affected units; and that voter turnout in the neighbouring Counties was no



different from the two Counties in question. For instance, the voter turnout for Kakamega, Vihiga and Bungoma Counties was 60.29%, 60.13% and 63.51% respectively. Similarly, the voter turnout in Mombasa County compared to Kilifi County was shown to be 43.76% against 49.03%. Far from the fact that this claim was undoubtedly just another red herring, it has nothing to do with the question under review, and accordingly we reject it and hold that there is no proof that the postponement resulted in voter suppression to the detriment of the 1st petitioner.”

20. Though the Appellant did not tender any evidence of this, such evidence will have been of no use in view of the factual findings by the supreme court.
21. First, there are no results pleaded contrary to Rule 7. There is an indication that the 1st Respondent was a winner with 2,798. It is not clear how many registered voters are in the ward, how the candidates scored, Spoilt votes, rejected votes, disputed votes and total votes cast.
22. The Appellant testified that he had strong and loyal voters that registered at St. Elizabeth Primary School. He lamented that his agents were locked out of polling station for having not official logo of the IEBC. He further stated that intimidation of voters and blocking of the voters coupled with blocking of voters and or agents led to irregularities. He also stated that some of his agents were blocked from polling station. Some of his agents were also compromised. Finally, he stated that forms 36B were not accurate and verifiable.
23. He also lamented on the voting material was diverted to the 1st Respondent’s premises. He made other lamentations that I shall delve into at the analysis level. The petition was supported by the affidavit of the Appellant herein all issues on policy were in relation to St. Elizabeth Primary school.
24. Despite having the so-called loyal voters, none of the voters turned up to swear any affidavit to any of the ills, irregularities or infractions in the elections process. According to the petitioner, there was an error in form 36B. I cannot fathom how errors in form 36 B, will render an election invalid. The -A series of forms are what constitutes the election. Elections are held at the polling station and not the tallying Centre. There is real no basis for the lamentation. He has not impugned any single form 36A.
25. Regarding the A series of forms, Article 86 of *the constitution*, which deals with elections and voting: -
 - “Voting At every election, the Independent Electoral and Boundaries Commission shall ensure that: -
 - a. whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
 - b. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
 - c. the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
 - d. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.
26. In effect, elections are carried out at the polling stations and not at the tallying centre. No single Form 36A were annexed to show any anomaly or irregular or breach of statutory duties vis a vis the result without such evidence, the Appellant’s was simply crying foul.



27. In the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, the court of Appeal stated as doth regarding finality of election at the polling station. Without a challenge to Form 36A, the claim fall flat on its face.

‘we reiterate the words of the learned Judges of the Supreme Court in George Mike Wanjohi v. Stephen Kariuki & 2 Others [2014] eKLR that;

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

Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of any electoral contest. Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.”

28. Earlier, during the 2013 elections, Justice Chemitei stated as follows in the case oof Ernest Ogesi Kivai v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR: -

“ 46. From the above decision it is evident that it is not the results that matter but the trail left behind by the paper work. Form 35 were well filed and where there were alterations the same were countersigned.

47. The only errors seemed to have been transfer figures to form 36. I do not think that such errors which were admitted by the 1st and 2nd respondents interfered with the election results or were of such significance that fundamentally affected the results.”

29. The issue of loyalty of voters can never be guaranteed by anyone. It is a non-issue that I need not dwell on.

Burden of proof

30. In the Raila Odinga -VS- I.E.B.C & Others Petition No. 5 of 2013, the supreme court on the same point of burden of proof had this to say:

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies “Omnia praesumuntur vite et soleminter esse acta”. Acts are presumed to have been done rightly and regularly. So, the petitioner must



set out by raising firm and credible evidence of the public authorities departures from the prescription of the law”.

31. The agent’s forms and oaths of secrecy are of no use. The agents have not sworn that any of them were excluded illegally. What is required is or the Agents to be authorized within the requisite period before the date of voting under Regulation 94 of the (Elections) General Regulations, 2012. Clearly, the Petitioner’s agents had not been accredited at all.
32. It is an election offence to try to enter a polling station, purporting to be an agent without authorization. The need not say more.
33. This was outlined in the case of Apungu Arthur Kibira v Independent Electoral & Boundaries Commision & 2 others [2018] eKLR, the court noted as follows; -

“79. Denial of petitioner’s Agents to polling Stations and Tallying Centre.

The petitioner alleged that 46 of his agents were denied entry to various polling stations. He failed to produce a list of his agents or their letters of accreditation by IEBC authorizing them to access a Polling Station and the Tallying Centre. Persons so authorized are stated under Regulation 85 of the Elections (General) Regulations, 2012 as follows:

- i. The Presiding Officers and other election officials on duty,
- ii. A candidate a person nominated as a Deputy to the candidate where applicable
- iii. A member of the Commission,
- iv. Authorized Agents,
- v. Police Officers on duty,
- vi. Duly accredited election observers and duly accredited media persons.

80. Section 13(h) of the *Election Offences Act* 2016, creates an offence for a person who enters or remains in an Election Centre or area designated by IEBC for electoral purposes without authority.

Thus for an agent to be allowed into a polling centre, he ought to have a letter of accreditation from IEBC and the letter of appointment by the candidate or party and to have taken the oath of secrecy -Regulation 94 (5).

81. The petitioner did not name any of his accredited agents who may have been locked out of any named polling station.” (emphasis mine).

Special damages

34. The issue of special damages though raised in the memorandum of appeal does not seem to be material for this appeal. It is a matter within the domain of civil law and negligence. It is purely carelessness in



preparing pleadings. A leading decision in that area is DAVID BAGINE Vs MARTIN BUNDI [1997] eKLR, where the court of Appeal posited as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: “...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177”

35. In the circumstances I do not see how the issue of special damages arises in election petition. It is thus an issue of draftsmanship. It creates an unnecessary points to write about and waste judicial time.

Costs

36. The court below awarded Ksh 3000,000/= as costs. This is after considering the circumstances if the case. If I was doing the case, I may have arrived at a different figure. Nevertheless, that cannot be basis for setting aside the costs awarded. It has been settled that costs are discretionally. Therefore, unless there is clear and manifest evidence that the court did not exercise its discretion, judiciously, the appellate court cannot interfere with such discretion.

37. It is not enough that the costs are high. They must be inordinately high and out of range having regard to the amount of work done. I have noted that the Appellant adopted scotched earth policy. He filed a myriad of applications which resulted in several attendances. The costs were justified in the circumstances.

38. The court is guided by the court of appeal decision of M/s Otieno, Ragot & Company Advocates v Kenya Airports Authority [2021] eKLR the court stated as follows: -

“More particularly, in the case of Kipkorir, Tito & Kiara Advocates vs Deposit Protection Fund Board [2005] eKLR this Court observed;

“On reference to a Judge from the Taxation by the Taxing Officer, the Judge will not normally interfere with the exercise of discretion by the Taxing Officer unless the Taxing Officer, erred in principle in assessing the costs.”

With these principles in mind, the issues for determination are whether, the taxing officer rightly exercised her discretion to determine the Appellant’s instruction fees in the Advocate and client bill notwithstanding the existence of a taxed party and party bill of costs; whether in determining the Appellant’s instruction fees, the taxing officer’s decision as upheld by the High Court took into account the right considerations in arriving at the Advocate and client costs and whether interest on the Advocate and client bill was payable from the date of demand or from the date the Bill of Costs was taxed.

The beginning point is whether the taxing officer properly exercised her discretion to determine the Advocate and client bill of costs.”

39. The Appeal obliquely deals with costs. Costs are by their nature discretionally. It is a strong thing for this court to differ with the lower court simply because this court could have awarded different costs, had it been sitting in the case. It is surprising since all parties had agreed that the Appeal ought to attract costs of 400,000/=. The aspect of discretion was settled in Mbogo & Another vs. Shah [1968] E.A.



93 at page 96, where the legendary Sir Charles Newbold P elucidated the point in the most succinct way as hereunder: -

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

Right to be heard.

40. The right to be heard does not include a right to be heard while making noise. It does also not give you room to blast peoples' ears. While it is a beautiful right, it does not override Article 87 of *the constitution* requiring hearing within 6 months of filing. This by itself means that some noises have to be muted for the true voice of the voters to be heard.

41. It means that to be heard one must be there to talk and at the time they have a chance. One must also speak the language of the occasion. During election petition time, the judicial review language is muted. You must speak the election language.

42. This is informed by the fact that elections petitions are sui generis proceedings. The Supreme Court, Moses Mwiciigi & 14 Others –vs- IEBC & 5 others {2016} eKLR had this to say: -

“119. To allow an electoral dispute to be transmuted into a petition for the vindication of fundamental rights under Article 165(3) of *the Constitution*, or through judicial review proceedings, in our respectful opinion, carries the risk of opening up a parallel electoral dispute-resolution regime. Such an event would serve not only to complicate, but ultimately, to defeat the sui generis character of electoral dispute-resolution mechanisms, and notwithstanding the vital role of electoral dispute-settlement in the progressive governance set-up of the current Constitution.”

43. Further, in the case of David Aoko Were v Independent Electoral & Boundaries Commission & 2 others [2021] eKLR, the court, Justice W. Musyoka, stated as doth: -

25. Of course, the argument in Japhet Muroko & another vs. Independent Electoral and Boundaries Commission (IEBC) & 3 others [2017] eKLR (Mbogholi-Msagha J), and other cases in that league, is persuasive: If legislation is enacted, intended to govern some particular area of the law, and it appears to be exhaustive enough, as to exclude application of the *Civil Procedure Act* and the Civil Procedure Rules, then anything that is not provided for in the special legislation remains excluded, even if it is covered under the *Civil Procedure Act* and the Civil Procedure Rules, on the basis that the special legislation is sui generis or self-contained. What is not contained in it, is deemed excluded, and there ought to be no recourse to the *Civil Procedure Act* and the Civil Procedure Rules. That is the position that the petitioner is taking here, that the *Elections Act* and the Elections (Parliamentary and County Elections) Petition Rules, 2017, are self-contained or sui generis...”

44. Further, *the constitution* must be interpreted as an indivisible whole. In Katiba Institute & 3 others v Attorney General & 2 others [2018] eKLR, justice E C Mwita, Fifth, the Court must also consider the cause- effect in interpreting *the Constitution*. The purpose of enacting a statute and the effect of



implementing the statute will also determine the constitutionality of a statute. In the case of *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, the Supreme Court of Canada observed;

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.” (See *Olum and another v Attorney General* [2002] 2 EA 508).

50. And In *Ng Ka Ling & Another v The Director of Immigration* (1999) 1 HKLRD 315, the Court stated;

“It is generally accepted that in the interpretation of a Constitution such as the Basic Law, a purposive approach is to be applied. The adoption of a purposive approach is necessary because *the Constitution* states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, *the Constitution* and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”

45. The *Elections Act* is a normative derivative of *the constitution*, though not at the same status as *the constitution*, it is not of the same ilk as the *civil procedure act*. Its imperatives are thus given primacy over the normal understanding of what constitutes of being heard.

46. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the supreme court stated as doth: -

“(77) While we agree with Mr. Muthomi, regarding his contention that Section 87 of the *Elections Act* cannot be equated to a constitutional provision, we must hasten to add that the *Elections Act*, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of *the Constitution*, and that in interpreting them, a Court of law cannot disengage from *the Constitution*].

47. The Election Act is a normative derivative of Article 87. The supreme court in the case of *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, expounded what it meant in *Munya 1* as the *elections act* being a normative derivative of Article 87 of *the constitution*.

“(46) At this juncture, we would like to state that the *Munya 1* case did not in any way open a carte blanche window so that any appeal can be brought to this Court on allegation that the judgment of the Court of Appeal took a



constitutional trajectory. Neither should the phrase “the *Elections Act*, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of *the Constitution*” be construed as providing a blanket right of appeal to the Supreme Court in all election petition matters to the Supreme Court from the Court of Appeal. It is thus not enough for a party in an election dispute to simply cite the Munya 1 decision and allege that in determining his matter, the Court of Appeal in its reasoning took a constitutional trajectory. A party is under a duty to squarely bring his case within the four corners of Munya 1 case. In *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR, this Court disabused an abstract interpretation of the Munya 1 decision when Counsel in the matter argued that the Munya 1 decision had opened up the Court to hear all types of appeals from the Court of Appeal and urged the Supreme Court to depart from it. This Court in dismissing Counsel’s invitation to depart from that case emphasized the need to understand the Munya 1 case in its context, thus:

“[134] Learned counsel, Mr. Abdullahi’s argument that, “all laws are normative derivatives of *the Constitution*”, while by no means illogical, had in our view taken an abstract point out of the context of the real dispute being redressed within the judicial system. If *the Constitution* is equated to Kelsen’s grundnorm in the hierarchy of norms, then it follows that all laws are “normative derivatives” of *the Constitution*, as they derive their validity therefrom. And since *the Constitution* vests the legislative authority in Parliament, then all laws that the latter enacts “derive from *the Constitution*”.

(135) However, *the Constitution* itself, for its meaningful implementation, and with definite socio-political goods accruing to the people, has duly empowered the judicial system and this Supreme Court to establish operational beacons. Such is the role this Court has played in settling disputes, a typical example in this regard being, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012, in which the Court, considering the Attorney-General’s reference on the proper effect of Article 81 (b) of *the Constitution*, thus expounded the critical questions of principle which learned counsel in the instant case should take into account (paragraph 54):

“Certain provisions of *the Constitution* of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach



with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favor of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.”

(136) The Court’s statement in *Munya 1* is to be perceived in the context of the foregoing passage, which sought to unlock the frontiers of Article 81(b) of *the Constitution*, as read with other provisions of *the Constitution*. The Court was advancing and applying the interpretative schema of *the Constitution*, in the light of its transformative character. In this regard, plain abstract theory founded upon the Kelsenian grundnorm, rested upon a secondary pedestal.”

48. Therefore, there can be no conflict between Article 87 and Article 50. These Articles are not opposed to each other but must be read in a manner that is harmonious. In *Katiba Institute & 3 others v Attorney General & 2 others* [2018] eKLR, the court, Hon Justice E C Mwita stated as doth: -

“44. This principle was emaciated in the case of *Njoya & 6 Others vs Attorney General & another* [2004] eKLR where the Court stated;

“Constitutional provisions ought to be interpreted broadly or liberally. Constitutional provisions must be read to give values and aspirations of the people. The Court must appreciate throughout that *the constitution*, of necessity, has principles and values embodied in it, that a constitution is a living piece of legislation. It is a living document.”

45. Third, a Constitution has various provisions which should be given a holistic interpretation. It should be read as one document and not as several and or separate provisions. Each provision should be read as supporting the other and not one provision destroying the other. They should be given a harmonious reading as one document. In the case of *Tinyefuze v Attorney*



General of Uganda Constitutional Petition No 1 of 1997 [1997]3 UGCC the Constitutional Court put it thus;

“The entire Constitution has to be read together as an integrated whole, not one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness. And exhaustiveness.”

49. The case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [Supra] eKLR, decided on the issue of normative derivative as doth; -

“The operative principles in question, in our view, were the provisions of Articles 81 (e) and 86 of *the Constitution*. Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of irregularity, scrutiny and recount of the vote, the central theme of the application of Articles 81 and 86 to the dispute, was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of this particular election, the Court of Appeal was applying the provisions of Articles 81 and 86 of *the Constitution*. This is illustrated by the Court’s own conclusion at paragraph 220 (quoted above) of its judgment.

(77) While we agree with Mr. Muthomi, regarding his contention that Section 87 of the *Elections Act* cannot be equated to a constitutional provision, we must hasten to add that the *Elections Act*, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of *the Constitution*, and that in interpreting them, a Court of law cannot disengage from *the Constitution*.”

50. Consequently, the court cannot give primacy to Article 50 over Article 87, when it comes to matters election. in the circumstances the postulations about Article 50 are irrelevant and I don’t want to waste more Judicial time in dealing with moot points.
51. The parties filed submissions and also highlighted the case before me. I was then able to know where the major contentions were.

1ST RESPONDENT’S SUBMISSIONS

52. The 1st Respondent relied on the decision of Alfred Nganga Mutua & 2 others v Wavinya Ndeti & another [2018] eKLR, where the court held as doth: -

“ 53 From these rival submissions on this point, the issues for our determination at this stage is whether or not the omission is immaterial and whether or not Regulation 87(2)(b)(iii) of the Elections (General) Regulations, 2012 is ultra vires Section 39(1B) of the *Elections Act*.

54 As the Court of Appeal, citing with approval the Indian Supreme Court decision in Jyoti Basu & Others vs Debi Ghosal & Others [1982] AIR 983; [1982] SCR (3) 318, stated in Mbaraka Issa Kombe vs. Independent Electoral and Boundaries Commission & 2 others- Election Petition Appeal No. 3 of 2017 (unreported), “... electoral law is a special jurisdiction whose



interpretation is strictly confined within the parameters of *the Constitution* and relevant electoral statutes” In that Indian case, the Supreme Court stated:

“An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, [the] Court is put in a straightjacket. Thus, the entire election process is [a] self-contained code within which must be found any rights claimed in relation to an election or an election dispute.”

It is clear from this authority, which we endorse, that in electoral disputes, save where the contrary so demands, the words of a statutory provision should be given their ordinary meaning and strictly interpreted in defining the rights of the parties to the dispute.”

53. In *Ismail Suleman & 9 Others V Returning Officer Isiolo County Independent Electoral and Boundaries Commission & 4 Others* [2013] eKLR, the court was of the view that: -

“An election court faced with a similar situation in the case of *Gakenia V Kimani & Others* Case No. 1 Of 1992 at Nyeri stated as follows: -

“This court is of the view that the desired amendments were mistakes in naming specific places- the constituency and some polling stations. It is always of great importance that respondents know exactly where an irregularity or misdeed took place. This is not a trivial; matter and a petitioner is who is not careful drafting his petition, itself not an impossible task should not demand the importance or the errors he makes. Once the respondent gets a petition, he embarks on putting together what material he desires in his defence. He should not be confused and thrown in disarray by the unfortunate errors of the petitioner. If this petition remains for hearing as it is, the pleadings will allude to Changamwe while evidence is likely to come from Ol Kalou. This cannot be. It is trite law that pleadings accord with evidence. Nothing less. So this petition must go out. Even had the amendment gone through paragraph 7 would have differed from the original on Total Registered votes: 541 or 48 589? A sign of further errors?

“Further in the case of *John Michael Njenga Mututho And Jane Njeri Wanjiku Kihara & Others* (2008) 1 KLR 10 court of Appeal stated:-

“Election petitions are special proceedings. They have a detailed procedure and by law they must be determined expeditiously. The legality of a person’s election as a people’s representative is in issue. Each minute counts. Particulars furnished count if the petition itself is competent, not otherwise. Particulars are furnished to clarify issues not to regularize an otherwise defective pleading. Consequently, if



a petition does not contain all the essentials of a petition, furnishing of particulars will not validate it. Section 20 of the Act is clear that any amendment of a petition can only be legally done within 28 days. No supplemental petition was filed in terms of S.20(3). Besides, the petitioner does not have results even now. Her advocate stated as much. If she does not have the results, what is she challenging?. The issues she raises are meant to nullify a particular result. But if she has not given the results, any findings on the issues raised will serve no useful purpose. Any evidence adduced or to be adduced is intended to show that certain irregularities affected the outcome of the election, but without the result it might not be possible to relate the irregularities to the result.”

54. It is their submission therefore that, having been filed outside 28 days the documents sought to be added were doomed ab initial. In any case the Appellant should have filed the appeal when that decision was made and cannot appeal outside 14 days of the date of refusal to include further evidence.

2ND AND 3RD RESPONDENT’S SUBMISSIONS.

55. IEBC and the returning officer submitted that instant Appeal was not proper as filed is proper having abated for failure to adhere to the rule 35 (6) of the Election Petition Rules 2017 on the filing of the record of appeal.
56. They argue that the appeal is to be filed within 21 days but was filed 4 months later. According to them, the Elections (Parliamentary and County Rules Elections) Petitions Rules, 2017, rules 3 and 4.
57. They submitted that failure to file further evidence as fatal to the Appellant' case. They stated that the Petitioner, should file affidavits of everyone they intended to call as witnesses at the hearing within 28 days. Having failed to do so, they drove themselves from the seat of justice (paraphrase mine).
58. They submit that failure to comply with such requirement was fatal to the Appellant’s case. They cited Article 87 of *the Constitution* in their defence
59. The 28-day period starts running from the date of declaration of the election results, that is the day the returning officer issues a certificate of election to the successful candidate. This was so held in the case of Mary Wambui Munene v Peter Gichuki King’ara & 2 Others, Supreme Court Petition No. 7 of 2014, where the supreme court stated as doth: -

“(76) To give effect to the foregoing principle, Article 87(1) of *the Constitution* directed Parliament to establish mechanisms for the timely settlement of electoral disputes; hence the *Elections Act*. Further, Article 87(2) made the provision requiring that election petitions for elections other than Presidential elections, be filed within 28 days after the declaration of the election results by the Commission.

(77) Unfortunately, Parliament had enacted a contradictory provision, in the form of Section 76(1)(a) of the *Elections Act*. In considering the effect of this provision, this Court in Joho, declared Section 76(1)(a) of the *Elections Act* inconsistent with Article 87(2) of *the Constitution*.



60. It is Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013) the supreme court stated as doth: -

“(77) Bearing in mind the nature of election petitions, the declared election results, enumerated in the Forms provided, are quantitative, and involve a numerical composition. It would be safe to assume, therefore, that where a candidate was challenging the declared results of an election, a quantitative breakdown would be a key component in the cause. It must also be ascertainable who the winner, and the loser (s) in an election, are. The certificate in Form 38 declares the winner of the election and terminates the mandate of the returning officer, who acts on behalf of the Commission, shifting the jurisdiction in respect of the electoral process to challenge the results of the election to the election Court. We hold that the certificate in Form 38 comprises the declaration of election results. This declaration sets in motion the time-frame within which to lodge an election petition, and it is hereby so held. Consequently, the provision of Section 76 (1) (a) of the *Elections Act* is inconsistent with the provisions of Article 87 (2) of *the Constitution*, as elaborated hereinbefore, and is hereby declared unconstitutional to that extent.

61. In respect to Further Affidavits and Additional Evidence, the law provides that an election court has discretion to allow the filing of further affidavits and admit new or additional evidence as per (Rule 15(1)(h) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. However, this must be done within 28 days.

62. The Supreme Court in the case of Evans Odhiambo Kidero & 4 Others v Ferdinand Ndung’u Waititu & 4 Others, Supreme Court Petition No. 18 of 2014 the court stated as doth: -

“(268) I am of the view that the decision whether to admit additional evidence in the course of a trial is a discretionary power that the Court enjoys. A Court must however exercise this discretion judiciously taking into account the particular facts at hand. This is the view that this Court expressed in Raila Odinga where we held that:

“The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

63. Additional evidence is to be admitted within 28 days of the declaration of the results of the election. This is the period for filing the petition. This is for a good cause. The petition is to be heard within 60 months. 2 of which may be utilized by the court in making the decision. One month or thereabout



usually goes to preliminaries. The petition cannot be allowed to challenge the seat of a sitting member with a moving target, when the time for hearing and response is a moving target.

64. There is a direct injunction that an election court will not grant an application for the filing of new or additional evidence where the grant of such an application will prejudice the other parties to the dispute or undermine the constitutional imperative of timely resolution of electoral disputes.
65. This was reminisced over by justice Maraga CJ, in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (20 September 2017) (Judgment)*, when he stated as doth: -

“It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to *the Constitution* and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by *the Constitution*.

395. And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law is the heritage of all mankind and a salutary reminder that wherever law ends, tyranny begins.[122] Cast the rule of law to the dogs, Lutison Salevao once observed and government becomes a euphemistic government of men... He adds: History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.[123] The moment we ignore our Constitution the Kenyans fought for decades, we lose it.

66. In this Case the Appellant filed only one affidavit- his own. He saw the light and sought to file several additional affidavits which will have changed the petition both in character and tenor. This will have not only prejudiced the respondents but also compromised the timelines for defending the case. The chief magistrate considered the application and in exercise of its judicial discretion, dismissed the Application for adducing additional evidence, in limine. Admission of additional evidence is not an automatic right. Here the Appellant sought to introduce massive evidence which would, in effect, change the nature of the petition.
67. In the case of *Michael Gichuru v Rigathi Gachagua & 2 others [2017] eKLR*, the court was of the view that addition evidence cannot be for expanding the petition of fishing expedition.

“(67) For the same reasons I have given in granting some of the prayers sought in prayer 4, I opine that prayers 5 (b) and (c) are merited. Prayer 5(a) is spent with the 3rd respondent having filed Form 35B that contains all the polling stations in Mathira Constituency.

Prayer 6 appeals to me as a classic case of a fishing expedition. In my view the petitioner here is simply seeking for evidence upon which he can mount his petition should such evidence spring up. Suffice it to say, the door to fresh evidence being introduced was slammed shut at the expiry of 28 days after the declaration of the results.

I will also reject the prayer 7 partly because it is seeking to introduce fresh evidence out of time and also because no sufficient reason has been given why



the intended affidavit of Bildad Namawa Urandu was not filed together with petition.

(68) As for prayer 8 all I can say is that the affidavit in support of the petitioner’s motion is restricted to the motion only; it cannot serve the dual purpose of supporting the motion and at the same time be treated as a further affidavit in support of the petition. Indeed, if this prayer was to be granted the petitioner will have succeeded in getting what he could not get in prayer 7 which is introducing new evidence to the petition.”

68. Finally, further affidavits may not be filed without leave of court or after hearing has closed, irrespective of their relevance (Joseph Obiero Ndiege v Orange Democratic Party & Another, Nairobi High Court Election Petition Appeal No. 19 of 2017). 4.7.4 Withdrawal of Election Petitions and Substitution of Petitioner.

69. The *raison d’être* for the strict timelines is to afford parties electoral justice. In the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, the Chief Justice Mutunga, as then he was stated as follows: -

“(245) Democracy is predicated upon notions of free choice, and fair competition. The freedom to choose, is cardinal to democratic processes, to such an extent that it constitutes the heart and soul of any democracy. It is only when ideas are allowed, in pacific conditions, to contend in the political market place, that citizens will be able to make the right political purchases.

(246) 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.

The golden thread running through *the Constitution* is one of sovereignty of the people of Kenya articulated in Article 1 of *the Constitution*. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information.

70. In the case of Gideon Mwangangi Wambua & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR, the court, G.V. ODUNGA, J, as then he was stated as doth: -

“In my view, in determining whether or not the result of an election is a reflection of the will of the electorates, the Court must consider the cumulative effect of all the circumstances.



As was held by the High Court of Tanzania in Ng'weshemi vs. Attorney General Mwanza HCMCC No. 5 of 1970:

“The question whether non-compliance with the provisions of the Act relating to elections affected the result of the election would depend on the nature of the particular complaint or irregularity and the margin of victory ...

Where, however, the complaint goes to the root of free election such as a case of organized campaign or undue influence, and it appears that a substantial number of votes were obtained thereby, then the full extent of such wrong practice may never be known the Court may be inclined to hold that it affected the result of the election without proof of actual reversal of the result.”

71. In this case there were no numbers quoted. The results have not been pleaded. No irregularities were shown to exist. All allegations revolve around St. Elizabeth primary school polling station where the petitioner is said to have voted. No scintilla of evidence, none, no iota of the same was tendered. I don't know how the Appellant wanted to prove his case. I have gone through his testimony and I am unable to pick out one single thing he said or proved was wrong with the elections. Counsel conceded that without the further Affidavits being adduced, his goose is cooked. I dare add that it is not only cooked. It is actually a duck which has been cooked served, eaten and digested. Processes remaining are biological in nature and of no interest to this court.

72. In the case of Michael Gichuru v Rigathi Gachagua & 2 others [2018] eKLR), the court stated that it will not allow filing of additional evidence where it will only act as a fishing expedition and serve to expand the petition. The court stated: -

“In the final analysis, I am not persuaded that the petitioner has discharged the burden of proof to the required standard which, as noted, is the intermediate standard, that the election of the 1st respondent as the Member of National Assembly for Mathira constituency was not in accordance with *the Constitution*, the *Elections Act* or the Regulations made there under. As I noted earlier, I am of the humble view that the irregularities that have been pointed out are isolated and are not of such substantial nature as to have any impact on the election result or its integrity. In this regard I echo the words of the Supreme Court in Election Petition No. 1 of 2017 that:

“...not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny.”

73. This position was the same as that of Justice Mwongo, in Ferdinard Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR, in which he expressed himself inter alia as follows:

“71. I think that to constitute a void election on account of non-compliance with the law, the evidence of irregularities and discrepancies in the election must be of such nature as to disclose through clear and weighty evidence, any one or more of the following:

a. An attempt to establish a winner otherwise than in compliance with *the Constitution*; and or



- b. An attempt to suppress, alter or undermine the will of the voters exercising their rights under Article 38 in such a manner as to affect the overall outcome of an election; and or
- c. A failure by or of the electoral system, or in the processes used therein, such as to constitute non-compliance with the general principles of the electoral system under Article 81 of *the Constitution*; and or
- d. Such clear and glaring flaws in the conduct of the elections as substantially render any of the aspirations of Article 86 (a), (b), (c) or (d) to be meaningless; and or
- e. That the non-compliance with the electoral law or regulations was substantial enough to, and did in fact, affect the result of the election.”

74. Section 83 of the *elections act* as amended reads as doth: -

“ 83. Non-compliance with the law

No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in *the Constitution* and in that written law or that the non-compliance did not affect the result of the election.”

75. The implication of section 83, it has been determined, is that unless the irregularities or malpractices proved by the petitioner are such that they actually interfere with the free choice of the voters, the court will not be willing to interfere with the existing elections. There is absolutely no evidence to go on to even consider whether the irregularities affected the elections. There are simply no irregularities. The issue whether they affected the election is therefore moot.

76. The section was interpreted as disjunctive by the highest court in the land. In the case of Gatirau Peter Munya Vs Dickson Mwenda Githinji & 2 Others (2014) eKLR, the supreme court, interpreted section 83 of the *Elections Act* as to be interpreted and applied in a disjunctive manner in determining the validity or otherwise of an election. The Supreme Court of Kenya stated as doth: -

“It is clear to us that an election should be conducted substantially in accordance with the principles of *the constitution* as set out in article 81(e). Voting should be conducted in accordance with the principles set out in Article 86. The *Elections Act* and the Regulations therefore, constitute the substantive and procedural law for the conduct of elections. If it should be shown that an election was conducted substantially in accordance with the principles of *the constitution* and the *Elections Act*, then such an election is not to be invalidated only on grounds of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise procedural or administrative errors occasioned by human imperfection are not enough, by and themselves to vitiate an election.....where an election is conducted in such a manner as demonstrably violates the principles of *the constitution* and the law, such an election stands to be invalidated.”



77. In *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017)* [supra], the court, in setting aside the presidential election by a majority stated as doth: -

“(211) In our respectful view, the two limbs of Section 83 of the *Elections Act* should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”

78. Looking at the evidence on record, it came only from the petitioner. There were no electoral malpractices proved in that affidavit. The evidence does not meet the threshold for grant of the orders sought.

79. There was no single allegation that was proven to impeach the election of the 1st Respondent. The Appellant cannot predicate his appeal on the application that was not allowed. The timelines for filing the matters in the court have long gone. There is nothing the court, can do after the lapse of statutory timelines. Parties should endeavour to put their best foot forward at the time of drafting the petition. The court cannot deal with what ought to be but only what is.

Scrutiny and time lines.

80. Article 87 has imperative timelines, 6 months to hear and determine election disputes. The *elections act* provides for timelines of the appeals while the *appellate jurisdiction act* provides for elections petition appeals to that court. There are no timelines for appeals to the Supreme Court And for a good reason. There is no right of appeal to the supreme court. Appeals proceed only as constitutional interpretation to that court.

81. The remedies the appellate court gives are distinct from those of the trial court. The trial court can order scrutiny and recount. The Appellate court cannot do so. This is because it will be hearing an appeal outside the 6 months. The dilemma was seen in the decisions of Aramat and Martha Karua.

82. In *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR, the supreme court stated as followed: -

“(143) There is no standard mode of delineating a Court’s jurisdiction. In this instance, *the Constitution* is clear in its wording in Articles 105(1) and (2), that the High Court has the power to hear and determine electoral disputes relating to membership of Parliament, and this power must be exercised within a six-month period. The clear import of the prescribed timelines, within which to determine electoral disputes, is that they inherently and compellingly subsume jurisdiction.



- (144) It is thus clear to us that the Court of Appeal had disregarded the constitutionally-set, six-month timeline for determining a parliamentary-membership electoral dispute; and it had attempted to confer upon the High Court extended jurisdiction for carrying out a vote-recount.
- (145) Did the Court of Appeal misinterpret the provisions of Article 87(1) of *the Constitution* and Section 85A of the *Elections Act*, when it “delegated the duty of determining the appeal” to the High Court which, as we have found, would have been *functus officio* – if it had jurisdiction in the first place? Counsel for the Appellant and for the 2nd and 3rd respondents urged that the Judges of Appeal had erred in law, when they failed to hear and determine the appeal before them, and instead issued an order delegating to the High Court the task of determining an appellate question. According to the Black’s Law Dictionary, 9th ed. (page 514), “determination” means:

“A final decision by a Court or an administrative agency – ‘the Court’s determination on the issue.’” From a reading of the Judgment of the Court of Appeal, it is clear that the Court heard the submissions of the parties in relation to five grounds of appeal, and issued orders – without regard to the question of jurisdiction as it applied in relation to the High Court.

83. The court, in that case, *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* [supra] proceeded further as follows, as regard the 6 months’ timelines:-

“(148) The factor of time and timelines, at the very beginning in the High Court, when the 1st respondent filed his petition on 10th April, 2013 – 36 days rather than 28 after final declaration of results on 4th March 2013 – goes to jurisdiction.

(149) By the principles considered in this Judgment, and by the settled authorities of the Court, the High Court lacked jurisdiction to entertain the 1st respondent’s petition. Similarly, the Court of Appeal lacked jurisdiction – in several respects, as already noted. Consequently, the determinations made in both superior Courts were null. We would dispose of this cause on the basis of the law of jurisdiction.

84. In essence, it is not possible to have the issue of scrutiny dealt with at this level even, where there was merit. In the circumstances, it will be an academic exercise to deal with the same.

85. In the case of *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others* [2019] eKLR, the supreme court stated as doth: -

“(42) On our part, we are aware that there have been conflicting decisions emanating from the superior Courts with regard to consequences of determining an election petition after the specified timeframes. This being the first time this issue is before us, we must settle the law in this Judgment. In that context, we note that timelines in resolving electoral disputes were first introduced by the 2010 Constitution. In the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others* SC Petition No. 2B of 2014; [2014] eKLR while



considering the rationale of Article 87(1) which requires Parliament to create a mechanism for timely resolution of electoral disputes, we held that [paragraph 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 the name of which elections are decreed and conducted, should not be held captive to endless litigation.”

86. The court continued as doth in *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others* [supra] as follows in analysing the adherence to constitutional timelines for election petitions: -

“(45) The need to adhere to the constitutional timeframes was also emphasised in the cases of *Hassan Ali Joho & Another v. Suleiman Said Shahbal and Others*, SC Petition No 10 of 2013; [2013] eKLR and *Evans Odhiambo Kidero & 4 others v. Ferdinard Ndungu Waititu & 4 others*, S.C Pet. No. 20 of 2014; [2014] eKLR. In that regard, we still hold the position that the period provided for the settlement of electoral disputes cannot be extended by any Court and we see no reason to depart from that position in this or any other case. It is indeed unfortunate that in remitting the matter back to the High Court after the determination of the prior appeal, the Court of Appeal appeared to have disregarded this Court’s decision in *Lemanken Aramat v. Harun Maitamei Lempaka & 2 Others*. Had the Appellate Court applied the precedent in that case, it would not have made an open ended order of remission as it did. The Court should have made a limited order with the requirement that the High Court determines the petition strictly within the timeline of six months. In the alternative, the Appellate Court should have decided to end the matter at that stage, well aware that any substantive determination of the petition by the High Court, would be an exercise in futility, in view of the precedent in *Lemanken*. The reverse happened and after remitting the matter, the same Court differently constituted in the present appeal correctly held but too late in the day, that the timelines had been breached and jurisdiction could not be properly exercised by the High Court.



(46) In addition to the above holdings and with regard to elections of a Governor, the relevant provision is Section 75 of the *Elections Act* as read with Article 87(1) of *the Constitution*. Article 87(1) provides that:

“Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.”

87. In *Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others* [supra], the supreme court concluded as doth: -

“(56) The above proposals as premised in (e) above do not in any way provide an exception to the requirement of settling disputes within the specified timeframe. As already stated, all election petitions must be resolved within the provided timeframes without qualification. In this case, we have noted that the High Court determined the petition before it after the lapse of 6 months from the date of filing. That was an affront to *the Constitution* and the enabling electoral laws. As such, we agree with the Court of Appeal that the said High Court proceedings were a nullity.

(57) Having found that the proceedings before the High Court were a nullity, we would have no jurisdiction to determine the remaining issues. On the issue of the appropriate remedy, we restate that, upon lapse of time, the High Court had no jurisdiction to determine the petition. As such, no decision, strictly speaking emanated from the High Court and no remedy was/is available to any party.”

88. This is to say, that after the 6 months lapsed for hearing the case in the lower court, there can be no scrutiny. The Appellant had time to prove his case, litigate within 6 months and place evidence to be dealt with but he failed to do so. At appellate level we are constrained by the evidence on record. No evidence of malpractices is on record at all.

89. Even on merit, there has to be sufficient reasons for scrutiny and recount. This is established through irregularities pleaded and shown to exist. There was no attack on the results from any polling station. If I was to believe the issue of voter suppression, that will not be in the ballot. It should come from the summing of evidence, which evidence is outside the ballot. It is not a fishing expedition. We cannot open the ballot boxes to see, if they comply. Evidence must be led to lay basis for the scrutiny.

90. In *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* Supreme Court Petition No. [supra] eKLR the Supreme Court stated:

“158. It appears to us that the learned Judges of Appeal did not avail themselves of the number of weighty decisions of the High Court, such as the ones we have reviewed hereinabove. From the eminent rational of these decisions, it is clear to us that an order for a recount or scrutiny must be grounded on sufficient reasons. The words of Wedo J, in *Ledama Ole Kina v. Samuel Kuntai Tunai & 10 Others* (cited above) are, in this respect, instructive:

“An application for scrutiny of all of Narok South Constituency lacks specificity, and is a blanket prayer that, in my view, cannot be granted. The applicant needed to be specific on which polling stations he wanted a scrutiny done in. If he wanted scrutiny in all



the polling stations, then a basis should have been laid for each polling station. The rationale is clear: the process of scrutiny is laborious, time-consuming, and the applicants cannot be left at liberty to seek ambiguous prayers and waste previous Court time and incur unnecessary costs. They must be specific. For the above reason, the Court cannot give a blanket order for scrutiny in Narok South Constituency, because such order will be prejudicial to the respondent, now that the evidence of witnesses has already been taken. The respondent would not have an opportunity to respond to any new issues that may be unraveled during scrutiny.”

Conclusion

91. I find no fault in the decision of the court below. The 1st Respondent was duly elected as a member Member of the County Assembly, Bamburi Ward in Mombasa County in a free, fair and credible elections. The appeal herein is bereft of merit and as such it is dismissed in limine with costs to the Respondents.
92. The Appeal itself was fickle and dead on arrival. If it was not dismissed, it could have been struck out for being incompetent. Such an appeal cannot attract costs 400,000/= as costs prayed for. In the circumstances the 1st Respondent shall have costs of Ksh 250,000/= for this appeal and the 3rd and 4th Respondents shall have a sum of Ksh. 250,000/=.

Determination

93. The upshot of the foregoing, is that, I make the following orders: -
 - a. The Appeal is bereft of merit and it is consequently dismissed with costs to the Respondents.
 - b. The 1st Respondent shall have costs of Ksh 250,000/= for the Appeal
 - c. The 3rd and 4th Respondents shall have costs of Ksh. 250,000/= for the Appeal.
 - d. The Appellant shall bear costs in the subordinate court as ordered by that court.
 - e. The costs are payable within 30 days, in default execution to issue.
 - f. 14 days Right of appeal on points of law only

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF JUNE, 2023.
JUDGMENT DELIVERED THROUGH A MIX OF MICROSOFT TEAMS ONLINE PLATFORM
AND IN OPEN COURT.**

KIZITO MAGARE

JUDGE

In the presence of:

Yose for the Appellant

Chengo for the 1st Respondent

Mutugi for the 1st Respondent

Court Assistant - Brian

Page 16 of 16 M.D. KIZITO, J.

