REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAROK

ELECTION PETITION APPEAL NO. 2 OF 2018

ANN POTISHO KAPASAR..APPELLANT/APPLICANT

VERSUS

SIALO NATANYA TASUR...1ST RESPONDENT

CHRISTINE TIYIANA KOSHAN...2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION......3RD RESPONDENT

THE COUNTY ASSEMBLY OF NAROK...4TH RESPONDENT

THE CLERK COUNTY ASSEMBLY OF NAROK

AND

MAENDELEO CHAP CHAP & 5 OTHERS.....................................INTERESTED PARTIES.

RULING

The case for the applicant

1. The applicant through her notice of motion date 21st May 2019 has pursuant to the provisions of section 80 of the Civil Procedure Act (Cap 21) Laws of Kenya and Order 42 rule 6 and Order 45 of the Civil Procedure Rules, applied to this court under certificate of urgency, seeking the following major orders.

> 1. …*spent*.
>
> 2. An order of stay of execution of the judgement and decree of this court delivered on 14th August 2018 issued against the respondents pending the hearing of this application.
>
> 3. An order to nullify the order directing that the appellant’s nomination as a member of the County Assembly be declared as void.

2. The application is supported by ten (10) grounds that are set out on the face of the notice of motion. The following are the major grounds. There is an error apparent on the face of the record. The applicant had preferred an appeal against the said judgement and had filed a memorandum of appeal on 12th September 2019 at the Court of Appeal registry at Nyeri, being Election Petition Appeal No. 14 of 2018 (formerly Election Petition Appeal No. 7 at the Nakuru registry). On 21st May 2019 the applicant withdrew her appeal in the Court of Appeal, hence the application is timeous and well in order. The applicant is currently sitting as a Member of the County Assembly of Narok County nominated as such through Kenya African National Union (KANU) and unless an order of stay is granted in respect of the impugned judgement that was delivered on 14th August 2018, the applicant is likely to lose her seat and this will render the application nugatory.

3. Furthermore, the applicant states that in the alternative, it is paramount that the judgement that was delivered on 14th August 2018 be interpreted. None of the political parties took part in the proceedings and it was therefore not possible for Jubilee Party to get orders that were never pleaded nor prayed for. The Court of Appeal has pronounced itself on its jurisdiction to entertain second appeals arising from magisterial courts. Finally, the respondent will suffer no prejudice if the orders sought are granted.

4. In her supporting 11 paragraphs affidavit the applicant has deponed to the following matters. The applicant has replicated the matters set out on the face of the notice of motion as grounds in support of the application in the affidavit. It is therefore not necessary to set them out again.

5. Additionally, the applicant has filed a supplementary affidavit in response to the replying affidavit of Sialo Natanya Tasur. In response to paragraph 4 of the respondents, all the parties who participated in the judgement that was delivered on 14th August 2018 preferred appeals to the Court of Appeal due to strict time lines. This is based on advice of her counsel. The applicant preferred an appeal in the Court of Appeal, being Election Petition No. 14 of 2018; the 1st and 2nd respondents preferred an appeal to the Court of Appeal, being Election Petition No. 15 of 2018 and the 3rd respondent filed a cross appeal and all appeals were withdrawn on 21st May 2019. That following advice of her counsel, the applicant believes being aggrieved by the judgement that was delivered on 14th August 2018, the law allows her to apply for review, since she has not preferred an appeal. She has denied the contents of paragraphs 5, 6, 7, 8, and 9 of the replying affidavit and that the apparent error identified is in regard to the formula.

6. Furthermore, the applicant has deponed that Maendeleo Chap Chap did not submit the party list for gender top up within the stipulated timelines, the total number of seats in regard to the Gender Top Up for Narok County Assembly were 25 seats calculated as hereunder: -

Party	**seats won from the wards**
Jubilee	13
Chama cha Mashinani	6
ODM	4
KANU	1
National Vision Party	1
Total	25

7. The applicant has annexed a true copy of the Kenya gazette notice dated 28th August 2017 marked “APK 2”, which contains the declaration of results under the ‘GENDER-TOP UP LIST’ in which Narok County Assembly is allocated 13 seats as follows.

Name of party	**number of seats allocated**
Jubilee	7
Chama cha Mashinani	3
ODM	2
KANU	1
Total	13

8. Based on the 25 seats won by all the parties (which excludes Maendeleo Chap Chap), IEBC allocated the 25 seats to the political parties as follows.

Jubilee party

7 seats made up thus 13 seats won x 13 allocated seats divide by 25 seats won under IEBC= 6.76 (rounded off to 7 seats)

Chama cha Mashinani

6 seats made up thus 6 seats won x 13 allocated seats divide by 25 seats won under IEBC= 3. 12 (rounded off to 3 seats)

Orange Democratic Party

4 seats won made up thus 4 seats won x 13 allocated seats divide by 25 seats won under IEBC= 2.08 (rounded off to 2 seats)

Kenya African National Union

1 seat won made up thus 1 seat won x 13 allocated seats divide by 25 seats won under IEBC= 0.52 (rounded off to 1 seat)

National Vision Party

1 seat won made up thus 1 seat won x 13 allocated seats divide by 25 seats won under IEBC= 0.52 (rounded off to 1 seat)

9. Finally, the applicant has deponed that KANU did not get half seat as stated in the court's judgement, but it got 0.52, which when rounded off comes to 1 seat; following advice of her counsel, which she believed.

The submissions of the applicant.

10. Based on the provisions of section 80 of the Civil Procedure Act (Cap 21) Laws of Kenya and Order 45 of the 2010 Civil Procedure Rules and the affidavit evidence of the applicant, Mr. P. Sang has submitted that there is an error apparent on the face judgement that warrants review with a view of it being set aside. The said section 80 gives the court the power of review and Order 45 sets out the rules. Additionally, he has cited the following authorities. ***National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR,*** in which the Court of Appeal stated that: *"a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."*

11. Counsel also submitted that in the General Elections of 8th August 2018 the political parties secured the following elective posts.

Party	**seats**
Jubilee	13
Chama cha Mashinani	6
Orange Democratic Movement	4
Maendeleo Chap Chap	2
KANU	1
National Vision party	**1**
Total	**27**

12. The court used the elective 27 posts instead of 25 posts. Applying that formula of allocation of seats using the 27 elective posts KANU under the judgement of the court obtained 1 seat divide by 27 x 13 seats for allocation = 0.481 (rounded off to zero seat).

13. However, the IEBC used the formula of 25 seats as shown in the Kenya Gazette which yielded 1 seat won divide by 25 seats for allocation x 13 seats= 0.52 (rounded off to 1 seat which was allocated to KANU).

14. Furthermore, counsel submitted that only five (5) parties were considered in the computation by IEBC and the total number of seats won from the wards were 25, which are the available seats for allocation. In table form they are as follows.

Party	**seats won**
Jubilee	13
Chama cha Mashinani	6
Orange Democratic Movement	4
KANU	1
National Vision party	1
Total	**25**

15. Counsel further submitted that Maendeleo Chap Chap's two seats did not form part of the available seats for distribution. Counsel also submitted that the formula and the evidence on the formula that was actually used by IEBC only came to the knowledge of the applicant after the court had given its orders. According to counsel "*The calculation and allocation in the said Gazette Notice is a new and important evidence which was not within the knowledge of the applicant when the judgement and decree of this Honourable court was passed."*

16. Counsel also ***cited Khalif Sheikh Adan v Attorney General, Environment and Land Court Case No. 20 of 2018 (2019) eKLR***, in which the court allowed the application for review for the sole reason that a new and important document which formed evidence was discovered after the court had made the decision.

17. In addition to the foregoing, counsel has urged the court to review its judgement, which was issued when the court was not aware of the fact that IEBC used 25 seats won and not 27 in applying the formula for allocating seats to the parties. He finally, urged the court to allow

the application and allow KANU to retain the one seat it was allocated by IEBC.

The case for the 1st respondent

18. The 1st respondent has deponed to a 10 paragraphs replying affidavit in opposition to the application. She has deposed to the following major matters. She has deposed that the applicant's application dated 21st May 2019 has been explained to her and she has understood it. She has deposed that the application is an abuse of the court process. She also has deposed that the appellant was dissatisfied with the judgement of the court that was delivered on 14th August 2018. As a result, she preferred an appeal being appeal No. 14 of 2018, which is a clear demonstration that the judgement did not have an error apparent on the face of it and only faulted it in both law and fact. Therefore, the application for review and the alternative prayer for interpretation is an attempt to appeal through the back door.

19. None of the political parties has lodged an appeal in this court and have not complained in this court. The application and affidavit in support of the application have not disclosed what component of the decision that is ambiguous or unclear for it to require interpretation. Finally, she has deposed that the aim of the application is to seek the assistance of the court in earning salary from the public money.

The submissions of the 1st respondent.

20. Mr. E. K. Mutua, counsel for the 1st and 2nd respondents, has submitted that the Civil Procedure Act and the rules made thereunder are inapplicable. Furthermore, counsel submitted that the election courts are not clothed with powers of review. He cited ***Apungu Arthur Kibira v IEBC & Others (2018) eKLR***, in which the court pronounced itself as follows "*I predicate my analysis by making the categorical statement that matters election, election petitions and election petition appeals in particular are sui generis. They cannot be placed on the same plane with ordinary civil appeals …….in the case of* ***Rozaah Akinyi Buyu v IEBC & 2 Others [2014] eKLR,*** *which held that courts in Kenya and elsewhere have interpreted electoral law strictly within the corners and confines of the same as electoral law is a special jurisdiction created by the constitution and statutes, and the civil process is not applicable to the same. "*

21. Furthermore, counsel cited ***Patrick Ngeta Kimanzi v Marcus Mutua Muturi (sic) & 2 others, being Machakos High Court EP NO. 8 OF 2013 para 23*** in which the court stated that: "*Similarly the petitioner cannot call in aid the provisions of Civil Procedure Rules. The Election Act 2011 and Rules and the Regulations made thereunder is comprehensive code of substantive and procedural election hence the Civil Procedure Act Cap 21 Laws and Rules made thereunder do not apply to Election Act 2011 except where expressly provided for in the Act or the rules.*

22. With the above legal principle in mind a reading of the Election Act, Rules and Regulations made thereunder clearly shows that there is no express or implied provision for the review, setting aside or reinstatement of a dismissed petition."

23. In addition to the foregoing, counsel has submitted that this application cannot be entertained because it is filed outside the 6 months' limitation period. He cited the provisions of section 75 1 (A) and section 75 (4) of the Election Act which provide as follows.

> "*75 (1A) A question as to the validity of the election of a member of a county assembly, shall be heard and determined by the Resident Magistrate's court designated by the Chief Justice.*
>
> *75 (4) An appeal under subsection (1A) shall lie to the High Court on matter of law only and shall be:*
>
> *(a) Filed and heard within thirty days of the decision of the magistrate court; and*
>
> *(b) Heard and determined within six months from the date of filing of the appeal."*

24. Counsel has submitted that the instant application cannot be entertained because the application is time barred, because in terms of timeline set by the electoral law an appeal to the High Court from a magistrate's court must be determined within six months. It was his further submission that the court having determined the appeal within six months the High Court became *functus officio. Counsel then cited* ***Mauray Aseme Ouko v IEBC, Siaya County People with Disability Network & Another (Interested Party) [2009] eKLR***,*in which the High Court held as follows: "44. In my humble view, the above timelines are amenable for enlargement under section 80 and Rule 21(1) of the Rules and not timelines given for the filing of the appeal and hearing and determination of the appeal.*

25. As was stated by the Supreme Court in the Samuel Kamau Macharia (supra) a court's jurisdiction flows either from the constitution or from legislation or both and a court can only exercise jurisdiction as conferred by the constitution or other written law."

26. The applicant's counsel further submitted that the question of non-participation of the political parties in the petition cannot amount to an error apparent on the face of the record. He further submitted that the issue of the applicable formula for the allocation of seats to the political parties is a question of the interpretation of the law. In its interpretation the court concluded that KANU was not entitled to the allocation of a seat. The application by the applicant to have the court review its decision amounts to asking the court to sit on appeal in its judgement.

27. Finally, counsel cited ***Zablon Mokua v Solomon M. Choti & 3 others [2016] Eklr*** in which the High Court stated that: *"The Court of Appeal had the following to say in an application for review in the case of* ***National Bank of Kenya Ltd vs Ndungu Njau.***

> *'a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground review that*

the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provision of law cannot be a ground for review."

28. Counsel has therefore urged the court not to review the judgement 12 months after the judgement was handed down as this will amount to a breach of the law.

The case for the 3rd respondent.

29. The 3rd respondent through Salome Oyugi, has deposed to the following major matters. She is the manager of political parties and campaign financing at the IEBC. She deposed that IEBC is the 3rd respondent in the Election Petition Appeal No. 2 of 2018 and the appellant in Election Petition Appeal No. 4 of 2018. IEBC is mandated to, inter alia, conduct elections, or supervise elections to any elective body or office established by law in accordance with the Constitution, the Elections Act and any other relevant laws. IEBC is duty bound to remain impartial at all times.

30. She has deposed that she has read and understood the contents of the notice of motion dated 21st May 2019 together with the annexed supporting affidavit of the applicant of the same date to which she hereby responds as herein below. The court *vide* its judgement of 14th August 2018, declared, inter alia, the nomination of Ann Potisho Kapasar as invalid. She has deposed that the court rightly found that IEBC used the correct formula in allocating seats to the political parties but fell in error in finding that "*the formula used did not produce a single seat for KANU*."; which conclusion was not supported by that finding. KANU was the political party to which the applicant belonged. According to her the court fell in error, which is apparent on the face of the record.

31. Furthermore, she has deposed that: "*if correctly applied, the formula used by the IEBC to come up with the allocation of gender top-up seats for the Narok County will result in KANU getting a seat among the nominated members*." She also has deposed that: "*Narok County has a total of 30 wards wherein the elected members comprise 29 male persons and 1 female*." "And that out of the 30 elected members, 27 belonged to a political party, while 3 were independent candidates. The distribution of elected members was as follows:

1. Jubilee party (JP) 13 (13 men)
2. Chama cha Mashinani (CCM) 6 (6 men)
3. Orange Democratic Party (ODM) 4 (4 men)
4. Maendeleo Chap Chap 2 (2 men)
5. KANU 1 (1 woman)
6. National Vision Party (NVP) 1 (1 man).

32. She has further deposed that IEBC allocated 13 special gender seats for Narok County Assembly in accordance with Regulation 56 (2) of the Elections (General) Regulations. Based on this regulation, IEBC then allocated the 13 seats as follows:

Party	**seats won**	**formula**	**total number of seats allocated**
JP	**13**	**13: 25X13**	
		= 6.76	**rounded off to 7**
CCM	**6**	**6:25X13**	
		=3.12	**rounded off to 3**
ODM	**4**	**4:25X13**	
		=2.08	**rounded off to 2**
KANU	**1**	**1:25X13**	
		=0.52	**rounded off to 1**
NVP	**1**	**1:25X13**	
		=0.52	**rounded off to 1**
Total	**25**		**13**

33. It is to be noted that the number 25 is used in the allocation since Maendeleo Chap Chap (MCC) did not submit any party lists for the gender top-up within the specified timelines, which is captured in paragraph 25 of the judgement as follows: "I find that Maendeleo Chap Chap was all along aware of the time frames and that is why it submitted the candidature of Charles Rorinke Ole Kantai within the permitted time, but failed to do so in respect of Gender top up category**."**

34. It is clear from the above list that both KANU and NVP were both entitled to an extra seat each due to the fact that they equally tied in priority. "***That, the breaker would ordinarily be the total number of votes garnered by the individual party in accordance with article 177 (1) (a). However, in this case, there would be no need to resort to that metric as National Vision Party only submitted the name of one male nominee under the gender special seats category for Narok County."***

35. Furthermore, she has deposed: "*That, having established that the National Vision Party had not submitted a name under the gender top up category, the party was thus not considered in the allocation of gender top-up seats as it did not have a qualifying nominee. The seat was therefore allocated to KANU."* She has therefore urged the court to review its judgement and find that IEBC used the correct formula in nominating the applicant as a nominee and therefore validly elected to the county assembly of Narok.

36. **The submissions of the 3rd respondent**

37. Ms Ng'etich, counsel for the 3rd respondent has submitted that the thrust of her submission is that there is an error of the face of the record that warrants review. It is premised on the grounds that the applicant succeeded in her appeal before this court; and yet proceeded to nullify her nomination. She has further submitted that the applicant has withdrawn her appeal in the Court of Appeal with the result that the matter is properly before this court as a review application.

38. Counsel has noted that the main grounds of opposition are that this court lacks jurisdiction as the application seeks to appeal the court's judgement to itself. Secondly, she also has noted that it is opposed on the basis that this court lacks jurisdiction to review its own judgement; since the Elections Act and its rules do not provide for review. Thirdly, she has also noted that the opposition to the application is that the grounds raised in the application do not qualify as sufficient grounds for review of a judgement.

39. The 3rd respondent submits the review application from a slightly different line of argument, which appears in the replying affidavit of Salome Oyugi dated 9th July 2018. She has submitted that: "***The gist of the 3rd respondent's reply is that while this Honourable Court properly reasoned that it used the correct formula in allocating the gender top-up seats, it proceeded to erroneously conclude that that Jubilee Party was entitled to one more seat yet IEBC'S formula did not yield a seat of Jubilee***." Counsel has further submitted that if the court properly concluded that the formula used by IEBC was right, then there is an error apparent on the face of the record owing to the erroneous conclusion. She therefore submits that the only way is to correct the error in the decision; which nullified the nomination of the applicant, despite the formula used by IEBC produced a seat for her. She therefore has urged the court to allow the application.

40. Furthermore, she has submitted that this court has jurisdiction by virtue of section 80 of the Civil Procedure Act as well as Orders 42 Rule 6 and 45 of the Civil Procedure Rules and all the enabling provisions of the law; where no appeal has not been preferred. Additionally, she has submitted that even in the absence of specific enabling provisions in the Elections Act, this court is not barred from reviewing its decision; citing section 80 (1) (d) of the Elections Act as the basis of her submission, since it is obliged under the provisions of that section to "***facilitate the just, expeditious, proportionate and affordable resolution of petitions under the Constitution and the Act.***" She also has cited articles 35 (2) and 259 (1) of the Constitution.

41. She also cited ***Godfrey Masaba v IEBC & 2 Others [2013] eKLR*** in which the court held that notwithstanding the absence of express provisions for review in the Elections Act and the Rules made thereunder, an election court would in appropriate circumstances review its orders if in doing so, it would be giving effect to a right that the law in question has failed to give effect to. Again in ***Ahmed Abdullahi Mohamad & Another v Mohamed Abdi Mohamed & Others [2017] eKLR*, in which the court recognized the inherent powers of the court in exercise of its function as an election court to exercise that power for the ends of justice without undue regard to technicalities.** She further cited ***Apungu Arthur Kibira v IEBC & Others (2018) eKLR***, in which the court held that in appropriate cases the court can resort to its inherent powers to review its own orders.

42. Furthermore, counsel cited ***John Nduati v IEBC & 4 Others [2018] eKLR*** in which the court pointed out that as a general rule every court including an election court has power to recall its decision to correct an error or slip so as to give effect to the manifested intention of its decision. That court observed that to refuse to do so is to refuse to acknowledge that judicial officers just like other human beings will from time to time commit clerical or arithmetical mistakes, accidental slips or omissions. She also cited the case ***of Lakhamshi Brothers Ltd v R. Raja & sons [1966] EA 313 at page 314,*** in which that court expounded on the slip rule and the court in part stated that the inherent jurisdiction to recall a judgement in order to give effect to its manifest intention are very circumscribed and are: "***Broadly these circumstances are where the court is asked in the application subsequent to judgement to give effect to the intention of the court when it gave its judgement or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted……."***

43. Counsel has submitted that the present application is a classic example of where the slip rule would be applicable. She has further submitted that the grounds that would prompt an election court to give effect to its intention at the time of delivery of judgement or where it is satisfied as to the order which it would have made had the matter been brought to its attention. Furthermore, the 3rd respondent supports the review application for the ends of justice to be made due to an apparent error on the face of the record and for this court to point out the correct position of the law as regards the formula for allocation of gender top-up seats. Apart from reviewing a judgement on the basis of an error apparent on the face of the record, the other ground is where the court seeks to give effect to the true intention of the judgement. In paragraph 31 of the judgement of the court, the court found that: "*In view of the foregoing, it is clear that the IEBC used the proper formula in allocating seats to the political parties, who are the interested parties in the instant appeal."* Counsel has submitted that awarding an extra seat to Jubilee Party would be unconstitutional as the same does not meet the formula set out in Regulation 56 (2) of the Elections (General) Regulations made pursuant to Article 177 (1) (b) of the Constitution.

44. Counsel for the 3rd respondent has submitted that they have established that the court has jurisdiction to review its order. She also submitted that the applicant has demonstrated that there are sufficient grounds that warrant review of the judgement with a view to give effect to its judgement of 14th August 2018. Counsel therefore has urged the court to find that the applicant was validly elected by way of nomination as a member of the Narok County Assembly by the 3rd respondent.

Issues for determination

45. I have considered the affidavit evidence of the parties, their submissions and the authorities they have cited in the light of the applicable law. As a result, I find that the following are the issues for determination.

1. Whether or not the Civil Procedure Act and the Civil Procedure Rules of 2010 apply to this application.

2. Whether or not the applicant has made out a case for review of the judgement.

3. Who bears the costs of this application?

Issue 1

46. The submission of Mr. Sang for the applicant and that of Ms. Ng'etich for the 3rd respondent is that the Civil Procedure Act and its Civil Procedure Rules apply to election petition disputes including the instant application. The submission of Mr. E.K. Mutua for the 3rd respondent is that the Civil Procedure Act and the Civil Procedure Rules are inapplicable. My findings in that are as follows.

47. I find that election petition disputes are governed by the Elections Act 2011, the rules and regulations made thereunder. The Elections Act and the rules and regulations made thereunder provide for the substantive and procedure law that govern elections disputes. However, there are certain provisions of the Civil Procedure Rules, which have been incorporated or imported into the election rules. This is clear from Rule 12 (14) of the Elections (Parliamentary and County Elections) Petitions Rules 0f 2017, which has imported Order 19 of the 2010 Civil Procedure Rules and the Oaths and Statutory Declarations Act into the Elections Rules of 2011. The provisions of that rule state that: *"12 (14) The Oaths and Statutory Declarations Act (Cap 15) and Order 19 of the Oaths and Declarations Act and the Civil Procedure Rules shall apply to affidavits under these Rules."*

48. Furthermore, I find as persuasive the case of **Patrick Ngeta Kimanzi v Marcus Mutua Muturi (sic) & 2 others, being Machakos High Court EP No. 8 of 2013 at para 23,** in which the court stated that: "Similarly the petitioner cannot call in aid the provisions of Civil Procedure Rules. The Election Act 2011 and Rules and the Regulations made thereunder is comprehensive code of substantive and procedural election hence the Civil Procedure Act Cap 21 Laws and Rules made thereunder do not apply to Election Act 2011 except where expressly provided for in the Act or the rules.

49. With the above legal principle in mind a reading of the Election Act, Rules and Regulations made thereunder clearly shows that there is no express or implied provision for the review, setting aside or reinstatement of a dismissed petition."

50. I further find that electoral law is a special jurisdiction that is conferred upon electoral courts and the ordinary civil processes are not applicable to election disputes and this is not limited to Kenya. In this regard, also I find as persuasive the case of ***Apungu Arthur Kibira v IEBC & Others (2018) eKLR***, in which the court pronounced itself as follows *"I predicate my analysis by making the categorical statement that matters election, election petitions and election petition appeals in particulars are sui generis. They cannot be placed on the same plane with ordinary civil appeals …….in the case of **Rozaah Akinyi Buyu v IEBC & 2 Others [2014] eKLR,** which held that courts in Kenya and elsewhere have interpreted electoral law strictly within the corners and confines of the same as electoral is a special jurisdiction created by the constitution and statutes, and the civil process is not applicable to the same. "*

51. As regards issue 1, I find that the Civil Procedure Act and its Civil Procedure Rules do not apply to election petition disputes including the instant application.

Issue 2

52. Mr. Sang, counsel for the applicant has submitted that this court has power to review its judgement pursuant to the powers donated to it by section 80 of the Civil Procedure Act and Order 45 of the 2010 Civil Procedure Rules. I have already found that this is not correct and I will not pursue the issue further.

53. Mr. E. Mutua, counsel for the 1st respondent has submitted that this court does not have jurisdiction to review its judgement, since it is *functus officio*, following the handing down of the judgement sought to be reviewed. Secondly, he submitted that this application is time barred as all election petition appeals to the High Court must be determined within six months after being filed in the High Court in terms of the section 75 (4) (a) (b) of the Elections Act.

54. Mr. E. K. Mutua cited the case of ***Nicholas Kiptoo arap Korir Salat v IEBC & 6 Others [2013] eKLR,*** in which Kiage, J.A, in rejecting the application of article 159 of the Constitution had this to say: *"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principle which command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice of justice. This court, indeed all courts, must never succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aide one side, it unfairly harms the innocent party who strives to abide by the rules."*

55. The applicant has consistently followed the rules. Therefore the statement of Kiage, J.A in the preceding case does not apply to her.

56. Ms. Ng'etich and Mr Sang appear to have taken the view that review under Order 45 (1) (1) (b) of the Civil Procedure Rules has no time limit, since the only requirement is that it has to be prosecuted without unreasonable delay. This provision is inapplicable to the instant application.

57. I will now consider the issues of *functus officio* and limitation of time. In this regard, the law is that every court retains inherent control over its judgement and order until it is executed. Moreover, the instant application is merely to give effect to the manifested intention of the court when it delivered its judgement by correcting an error. Additionally, it is not sitting as an appeal court over its judgement. It therefore follows that this court has not become *functus officio.*

58. The next point for enquiry is whether this application is time barred for having been filed outside the six months' period of limitation. This court found that IEBC used the correct formula in allocating the seat to the applicant. The two respondents as nominees of Maendeleo Chap Chap were disqualified since their party did not submit their names within the stipulated time: see paragraph 38 of the judgement sought to be reviewed. In this regard, the court pronounced itself in paragraph 31 of the judgement sought to be reviewed in the following terms: "***31. In view of the foregoing, it is clear that the IEBC used the proper formula in allocating seats to the political parties, who are the interested parties in the instant appeal."*** That formula has been set out in paragraph 20 of the replying affidavit of the 3rd respondent, in which KANU was allocated one seat, in respect of which it nominated the applicant as its nominee. This is new evidence which I cannot ignore. She only lost it due to an error in the computation by the court, and that is the error that is being sought to be reviewed. IEBC found that KANU was entitled to one seat by rounding off 0.52 seat to one seat, since a seat cannot be fractionalized. This practice was used in Nigeria in the case of ***Chief Obafemi Owolowo v Alhaji Shehu Shagari, supreme Court Case No. 62 of 1979, in which Judge Obaseki, JSC***, held that two thirds of nineteen states gave 13 states and not 12 2/3 states. By virtue of article 159 (2) (d) of the 2010 which mandates the court to administer substantive justice as read with the supremacist sub-article 1 of Article 2 of the Constitution the six months' period of limitation that is imposed by section 75 (4) (a) (b) of the Elections Act has to give way to the supremacy of the Constitution. It is therefore superseded by those provisions. I therefore find that this court has not become *functus officio* and the application is not time barred. It is properly before the court.

59. Furthermore, it is important to set out how the error sought to be reviewed arose. I had found in the judgement sought to be reviewed that IEBC used the correct formula in the allocation of seats to the parties. I committed an error in the computation by using the 27 elective posts as the seats available for distribution, when I should have used the 25 seats that had been allocated to the County Assembly of Narok in respect of the Gender Top-Up Category since Maendeleo Chap Chap had been excluded from sharing in the seats available for distribution through its failure to forward the names of the 1st and 2nd respondent within the stipulated time. If it had submitted its nominees within the time stipulated, the number of available seats was to be 27 and not 25. They should not be allowed to harvest, where they never planted. I then proceeded to use the 27 seats which wrongly produced one seat for Jubilee Party. Jubilee party never and does not claim the seat that rightly belonged to the applicant. The two respondents through the Maendeleo Chap Chap party were under the IEBC formula not entitled to any seat, since their party failed to present them as their nominees to IEBC within the stipulated time; which position I confirmed in my judgement. As a result of using the 27 elective posts, it produced a seat for Jubilee party. Not surprisingly, the applicant and IEBC filed appeals in the Court of Appeal, which they later withdrew and then proceeded to pursue this instant application. The workings of the IEBC formula and the results are set out in paragraph 20 of the replying affidavit of Salome Oyugi, which I have reproduced in a modified form in paragraphs 31 and 32 of this ruling.

60. I now turn to the issue whether this court can review its judgement pursuant to its inherent powers. I find that the electoral laws do not provide for review of judgements and orders that are handed down by the courts in election disputes. It is therefore necessary to carry out an enquiry whether this court has the review jurisdiction to review the judgement that is sought to be reviewed. This is a real live issue, since the review powers of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules are not applicable to election disputes. The issue is whether the inherent power of the election court may form the legal basis for the review sought. This court sitting as an election petition appeal court has held before that it had inherent powers to grant on order for stay of execution in order to enable an appellant to exercise his statutorily guaranteed right of appeal, since the Elections Act, rules and regulations had no legal provision for stay of execution: see ***Wilfred Kikaet Kuyo v Letulal Ole Masikonde & 2 others, in the Narok High Court Election Petition Appeal No. 3 of 2018.*** First, it is important to point out that it is a power vested in every court to ensure that the ends of justice are not defeated. Secondly, they cannot be exercised where there are express statutory enactments to meet the ends of justice. Thirdly they cannot be invoked to defeat the express terms of the statute: see ***Wilfred Kikaet Kuyo v Letulal Ole Masikonde & 2 others, supra*, and the cases cited therein.** In the instant dispute there is no provision in the Elections Act and its rules and regulations donating jurisdiction to the court to review its judgement and order. Again in this instant application the invocation of the court's inherent will not run into conflict with any provision in the Elections Act, its rules and regulations. I find as persuasive the case cited by Ms. Ng'etich namely ***Apungu Arthur Kibira v IEBC & Others (2018) eKLR***, in which the court held that in appropriate cases the court can resort to its inherent powers to review its own orders. I also find as persuasive the case of ***Lakhamshi Brothers Ltd V R. Raja & sons, supra,*** that this court may use its inherent jurisdiction to review its judgement and order to give effect to its manifested intention or to give effect to what clearly would have been the intention of the court had the matter not been inadvertently omitted.

61. It is to be borne in mind that errors will be made from time to time. They should not be visited upon the litigants. It should not be forgotten that the duty of the court is not to enforce a manifest error that is correctable either upon application or on the court's own motion. See ***Scott v Brown (1892) 2 QBD 724 at page 728.*** Furthermore, it should be borne in mind that judges are not angels. They are human beings. They are prone to commit errors or make mistakes. Mr. Sang submitted that the information and the evidence on the formula that was used by IEBC only came to the applicant after the court had given its orders. He further submitted that the calculations and allocation in the Kenya Gazette is a new and important evidence which was not within the knowledge of the applicant when the court passed its judgement. That may be so. It should be borne in mind that judges are not angels and that is why the provisions of article 159 (2) (d) have to be called in aid in order to administer substantive justice. It is important point out that Rule 5 of the Elections (Parliamentary and County Elections) Petitions Rules of 2017 has incorporated the provisions of Article 159 (2) (d) of the Constitution for the purpose of administering substantive justice, wherein there is a failure to comply with the rules. Writing of this human weakness in the context of checks and balances in the federal government of the USA in the *Federalist Papers in Paper No 51* that country's 4th President said: "*If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."*

62. The inherent power of the court whose source is section 3 of the Judicature Act (Cap 9) Laws of Kenya is designed to assist the courts where there is no statutory enactment to meet the justice of the case. It is a reservoir of power to be used when need arises. It is designed to cover situations where Parliament could not humanly possible foresee which situations may arise in future; hence its application in situations which are not governed by statute and the rules.

63. In the light of the foregoing considerations, I find that this court has inherent power to review its judgement and order of 14 th August 2018 as read with Article 159 (2) (d) of the 2010 Constitution.

64. I now proceed to review the judgement and order dated 14th August 2018, which I hereby set aside. In this place, I hereby declare that Ann Potisho Kapasar was validly nominated by KANU as a member of the Narok County Assembly

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65. The applicant has succeeded in her application dated 21st May 2019 with the result that she will also have the costs of this application.

Final and Disposal Orders.

66. The upshot of the foregoing is that the court makes the following orders.

1) This court's judgement and order of 14th August 2018 declaring the election of Ann Potisho Kapasar as a member of the county assembly, null and void is hereby set aside.

2) Ann Potisho Kapasar, is hereby declared to have been validly nominated by KANU as a nominee of the County Assembly of Narok County.

3) In terms of section 86 (1) of the Elections Act No. 24 of 2011, notice of this determination is hereby ordered to be served upon the Speaker of the Narok County Assembly.

4) Pursuant to section 86 of the Elections Act No 24 of 2011, notice of this determination is ordered to be served upon the Independent Electoral and Boundaries Commission.

5) The applicant will have the costs of this application.

6) The first respondent will bear the costs of the applicant and the third respondent.

7) Those costs will be shared equally between the applicant and third respondent.

8) Those costs are hereby capped at Shillings one hundred thirty thousand (Shs 130,000/=).

9) The security for costs, if any, that was deposited in this court to be released to the applicant/depositor.

Ruling signed, dated and delivered in open court at Narok this 7th day of November 2019 in the presence of Mr. Langat holding brief for Ms. Rotich for the applicant and also holding for Ms. Ng'etich for the third respondent and Ms. Karia holding brief for Mr. E.K. Mutua for the first respondent and also holding brief for Ms. Maritim for the fourth and fifth respondents.

J. M. Bwonwong'a

Judge

7/11/2019