HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

ELECTION PETITION APPEAL NO.5 OF 2018

(As consolidated with Election Petition Appeal No.1 of 2017)

AMANI NATIONAL CONGRESS PARTY.....1ST APPELLANT

FAITH TUMAINI KOMBE.....2NDAPPELLANT

VERSUS

HAMIDA YAROI SHEK NURI.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2NDRESPONDENT

(Appeal against the Judgment and decree of the Honourable

D.W. Mburu (Election Petition No.23 of 2017) delivered

at Nairobi on the 19th day of January 2018)

JUDGMENT

On 20th December 2017, the 1st Appellant, Amani National Congress and the 2nd Appellant, Faith Tumaini Kombe filed an appeal against the ruling and orders of Hon. D.W Mburu, Principal Magistrate (trial court) delivered on 22nd November 2017 in Election Petition No.23 of 2017. The appeal was filed against Hamida Yaroi Shek Nuri (1st Respondent) and the Independent Electoral and Boundaries Commission (2nd Respondent). The Appellants' appeal was registered as election Petition Appeal No.1 of 2017. The grounds of appeal were set out in the memorandum of appeal filed in court. In the grounds of appeal, the Appellants are aggrieved that the trial court improperly exercised its discretion in dismissing their application. The Appellants also criticized the trial court for dismissing the application when reasons advanced by their counsel for the delay in filing their respective responses to the petition remained uncontroverted. Lastly, the Appellants complain that the trial court made a wrong finding that the 1st Appellant ought to have appointed a person in an acting capacity following the resignation of its officials.

The Appellants also filed an appeal against the judgment of the trial court in the petition delivered on 19th January 2018. This appeal was also filed against the same respondents respectively. It was registered as Election Petition Appeal No. 5 of 2018. In the memorandum of appeal filed in court, the Appellants are

aggrieved that the trial court failed to apply the correct standard of proof required in election petitions. The Appellants also took issue with the fact that the trial court failed to take into consideration that the proper procedure for resolving the dispute was not followed. They contend that the 1st Respondent failed to discharge the evidentiary burden to prove her case. They further complain that the trial court erred in granting adverse orders against them when they were not party to the proceedings. The Appellants are also aggrieved that they were not afforded a fair hearing. They aver that the trial court made wrong findings to the effect that the 2nd Respondent could choose the most qualified candidate from the list submitted by the 1st Appellant and further that the 2nd Respondent's defence that no complaint was lodged after it published the names in the local dailies was not plausible. Finally the Appellants complain that the trial court failed to acknowledge that an election is a process and not an event.

In turn, 1st Respondent in her application filed on 5th March 2018 applied to have the Appellants' record of appeal filed on 14th February 2018 and/or memorandum of appeals dated 24th January 2018 and 20th December 2017 struck out. In the alternative, the 1st Respondent sought to have the Appellants compelled to deposit in court Kshs.500,000 being security for costs. The application was brought under **Sections 78(1)(2)(3), 79(a), 8 (d), 80(3)** of the **Elections Act** and **Rules 13(1), 34(6)(d), 34(6)(e), 34(10), 36** of the **Election (Parliamentary and County) Petition Rules** (hereafter called ***'Election Petition Rules'***). The grounds of the application are that the record of appeal filed on 14th February 2018 is incompetent and incurably defective for reason that it does not comply with the provisions of **Rules 34 (6)(c)(d)** and **(e)** of the **Election Petition Rules** and further that it does not contain the order emanating from the ruling of the trial court delivered on 22nd November 2017.

Both appeals together with the 1st Respondent's application were consolidated and heard together since they arise from the same petition. The background to the appeals is as follows: The 1st Appellant is one of the political parties registered with the 2nd Respondent, Independent Electoral and Boundaries Commission to contest the general elections held in this country on 8th August 2017 in respect of National Assembly, Senate, Woman Representative, Gubernatorial and County Assembly elections. Pursuant to **Article 90** of the **Constitution**, each party was required to nominate and submit a list of all persons who would stand elected if the party were to be entitled to seats in Parliament provided for under **Articles 97 (1)(c), 98 (1)(b)** and **(d)** of the **Constitution** and for the Members of County Assemblies under **Article 177 (1) (b)** and **(c)** of the **Constitution** to represent special interest groups. The law provides that the said special interest seats shall be allocated to political parties in proportion to the total number of seats won by candidates of the political party at the general election. Following the election, the 1st Appellant was entitled to one (1) seat for the nominated Member of County Assembly for Tana River County under the Gender Top up category. Under **Section 34(4)** and **(5)** of the **Elections Act,** the 1st Appellant was required to submit to the 2nd Respondent it's party list in accordance with **Article 177(1)(b)** and **(c)** of the **Constitution** in the order of priority.

The 1st Appellant called for applications from its members for those interested to be so nominated. Faith Tumaini Kombe, the 2nd Appellant, Catherine Muthoni Mwamba and Hamida Yaroi Shek Nuri, the 1st Respondent applied for the position and emerged as the best candidates for nomination. The 1st Appellant forwarded their names to the 2nd Respondent with the 2nd Appellant listed first, Catherine Muthoni Mwamba listed second and the 1st Respondent listed third in the order of priority on its party list. The 2nd Respondent published the names in the local dailies on 23rd July 2017 pursuant to **Regulation 54(8)** of the **Election (General) Regulations** *(hereafter called the 'Election Regulations')*. No objection was received by the 2nd Respondent to the appointment of the nominees to the position. The 2nd Respondent therefore picked the 2nd Appellant for the position and duly published her nomination in the Kenya Gazette Notice No. 8380 dated 28th August 2017 after the election results of Tana River County had revealed that the 1st Appellant was entitled to one gender Top Up seat.

On 25th September 2017 the 1st Respondent petitioned this court for nullification of the 2nd Appellant's nomination and prayed for an order compelling the 2nd Respondent to Gazette her name instead as the

duly nominated Member of the County Assembly, Tana River County. She claimed that the 2nd Appellant was ineligible for nomination since she was not a registered voter. The 1st and 2nd Appellants filed their responses to the petition on 6th November 2017. On 7th November 2017, they filed an application under **Rule 19(1)** of the **Election Petition Rules** seeking for extension of time to file their responses to the petition. The application was supported by an affidavit sworn by the Appellants' counsel. The 2nd Respondent filed its response to the petition on 13th November 2017 and also filed an application for extension of time to file its response to the petition. The application was made under **Article 159(2)(d)** of the **Constitution**, **Section 80** of the **Elections Act** and **Rules 5(1)** and **19(1)** of the **Election Petition Rules**. It was supported by an affidavit also sworn by the 2nd Respondent's counsel. The 1st Respondent filed grounds of opposition on 13th November 2017 opposing both applications.

Both applications were argued together. In his oral submissions in court, learned counsel for the 1st and 2nd Appellants explained to the court the reason why the Appellants' responses were not filed in time was because officials of the 1st Appellant namely its Secretary General and the Chief Executive officer who were mandated to swear affidavits on its behalf had resigned from office. Counsel for the Appellants informed court that it was not until 3rd November 2017 that he received instructions from the 1st Appellant that its' Deputy Executive Director could swear the affidavits on its behalf. He submitted that he deemed it prudent to file the Appellants' responses at the same time since he was acting for both parties. Counsel submitted that the delay in filing the responses was as a result of factors beyond his control. He urged that the 1st Respondent would not suffer any prejudice if the application was to be allowed. Counsel argued that the petition had not yet been heard and therefore the 1st Respondent could still be granted leave to file further response. He contended that the application had been brought to court without delay. According to learned counsel, it was necessary for the court to allow the application since the dispute was of great public interest to the people of Tana River County. He relied on the case of **Nicholas Kiptoo Arap Korir Salat –versus- IEBC & 7 Others [2014] eKLR** to support his submissions.

On her part, learned counsel for the 2nd Respondent submitted that the reason for the delay in filing the 2nd Respondent's response to the petition was because its manager, Political Parties and Campaign was unable to peruse and respond to the petition on time as she was engaged in preparations for fresh elections as ordered by the Supreme Court. She submitted that the delay was not inordinate or intentional. She urged the court to allow the application as the 1st Respondent would not be prejudiced. In response, learned counsel for the 1st Respondent vehemently opposed both applications. He submitted that the right to equal treatment under **Article 27** of the **Constitution** applies to all parties in the proceedings in that, the petition would obviously have been struck out had it been filed out of time thus the same should apply to the responses filed by both the Appellants and the 2nd Respondent. The learned counsel further urged the court to strike out the responses for reason that they were also filed out of time without the leave of court. He urged that election petitions are time bound thus any delays in filing pleadings should not be permitted. He also submitted that the pleadings had been filed after inordinate and inexcusable delay. According to learned counsel, the explanations given by the applicants did not hold water. He urged that **Article 159** of the **Constitution** should not be used to cure all manner of irregularities. Counsel for the 1st Respondent also relied on the case of **Nicholas Kiptoo Arap Korir Salat -versus- IEBC & 7 Others [2014] eKLR** to support his submissions.

In its ruling on both applications, the trial court found that the explanation for the delay given by the 2nd Respondent was reasonable and acceptable owing to the strict timelines set by the Supreme Court and the complex nature of the assignment bestowed upon the 2nd Respondent with regard to the conduct of the presidential election which was a national exercise. The court therefore allowed the 2nd Respondent's application for extension of time and ordered that the 2nd Respondent's response be filed by close of business on 24th November 2017.

As for the 1st and 2nd Appellants' application, the trial court found that counsel for the Appellants had not

annexed any document to show that he sought instructions from the 1st Appellant on who would swear the affidavits or the responses. The trial court also found that there was no explanation by the 1st Appellant for the delay in giving instructions on who was mandated to swear the affidavits due to the vacancies left following the resignation of its Secretary General and the Chief Executive officer. The trial court had this to say:-

> ***"The resignation of the officials of the 2nd Respondent are internal affairs of the 2nd Respondent. These are matters within the control of the 2nd Respondent. Ordinarily, whenever an officer of an organization, public body or legal entity resigns or a vacancy in the office arises for whatever reason, the concerned entity would designate another person to hold the vacant position to ensure the continuity of the functions of the said office. This was within the powers of the 2nd Respondent to do so. There was inordinate delay on the part of the 2nd Respondent which has not been explained at all. None of the officers of the 2nd Respondent has sworn an affidavit to explain the delay and the affidavit sworn by the counsel does not explain the delay. I do herby find and hold that the 2nd Respondent has failed to satisfy the court that it has any reasonable grounds for the extension of time.***
>
> ***"Similarly, the 3rd Respondent has not explained her failure to file her response on time. Whereas the law allows respondents to put in a joint response to the petition, this is not a mandatory requirement. It cannot be an excuse for a respondent to state that they failed to file their response on time because they were waiting to file a joint response with a co-respondent whose response was not ready. The 3rd Respondent does not have any reasonable explanation for her delay that would convince this court that she deserves an extension of time. In any case, she has not even sworn an affidavit to explain her delay. The court further notes that she appointed the firm of Keengwe & Company Advocates way on 28th September 2017. They filed notice of appointment but no other document. The 3rd Respondent has been sued in her own personal capacity and the filing of her response did not have to await that of the 2nd Respondent. I do find and hold that the 3rd Respondent is an indolent litigant who does not deserve the equitable remedy that she seeks. The application by the 2nd and 3rd Respondents therefore lacks merit and is for dismissing."***

The trial court dismissed the 1st and 2nd Appellants' application with costs to the 1st Respondent and struck out their responses to the petition. The petition was heard on 11th December 2017. The 1st Respondent's case was contained in her petition filed in court on 25th September 2017 accompanied by an affidavit in support of the petition together with a supplementary affidavit filed sworn by the 1st Respondent. Learned Counsel for the 1st Respondent further made oral submissions in support of her case. The 1st Respondent's case was basically that both the 2nd Appellant and Catherine Muthoni Mwamba were ineligible for nomination since they were not registered voters contrary to **Article 193(1)(a)** of the **Constitution** and **Section 25(1)(a)** of the **Election Act.** She claimed to have searched their names and national identity card numbers as published in the Kenya Gazette Notice Number 8380 in the register of voters for Tana River County and found them missing. To prove her assertions, the 1st Respondent relied on annexure ***[HYSN1]*** attached to the supplementary affidavit in support of her petition purported to be a print out of a text message received on her mobile phone. She relied on a copy of her voter's acknowledgement slip annexed to her affidavit in support of the petition to confirm that she was indeed a registered voter. Learned counsel for the 1st Respondent argued that because the two nominees were ineligible for nomination, the 2nd Respondent was duty bound under **Regulations 54(5), 54(6)** and **55(2)** of the **Elections Regulations** to gazette the 1st Respondent as duly nominated. He contended that the 2nd Respondent did not produce the voter register to dislodge the claims made by the 1st Respondent.

The 2nd Respondent's response was contained it's response to the Petition filed on 24th November 2017. Learned Counsel for the 2nd Respondent further made oral submissions in support of its case. The 2nd

Respondent's case was that it discharged its mandate in accordance with the law. The 2nd Respondent stated that it received from the 1st Appellant its party list and published the same in the Standard and Daily Nation Newspapers on 23rd July 2017 pursuant to **Regulation 54(8)** of the **Election Regulations.** The 2nd Respondent contended that it did not receive any dispute or complaint from the 1st Respondent or anyone else for that matter in accordance with **Section 74(1)(2)** of the **Elections Act** thus proceeded to nominate the 2nd Appellant for the position. It was the 2nd Respondent's further contention that the 1st Respondent did not exhaust the dispute resolutions mechanisms available in law before petitioning the trial court. According to the 2nd Respondent, even if the 2nd Appellant was ineligible for nomination, Catherine Muthoni Mwamba who was not enjoined in the suit would have been next in line for nomination based on the 1st Appellant's party list in the order of priority.

In a rejoinder, learned counsel for the 1st Respondent submitted that the 2nd Respondent failed to comply with **Regulations 54(5)** and **55(2)** of the **Elections Regulations** to ensure that the nominees met the qualifications for nomination. He submitted that the trial court was seized of the jurisdiction once the 2nd Appellant was gazetted and deemed to be an elected member of the county assembly. On the issue of the 2nd nominee not being enjoined, the learned counsel submitted that the 1st Respondent was only challenging the nomination of the 2nd Respondent. Nonetheless, counsel for the 1st Respondent argued that the petition having been gazetted is in the public domain therefore, had she been interested in the suit, she would have applied to be enjoined in the suit.

The trial court delivered its judgment in the petition on 19th January 2018. In its' judgment, the court found that by failing to produce a certified extract of the voters register, the 2nd Respondent failed to discharge the evidentiary burden cast upon it by law to establish whether or not the 1st Appellant and Catherine Muthoni Mwamba were registered voters. The trial court noted that the 2nd Respondent had a constitutional and statutory duty to reveal who is or is not a registered voter which duty could not be shifted to the 1st Respondent. The court held that the issue raised in the petition would have been determined by the production in court of the relevant information regarding the registration details of the three nominees of the 1st Appellant political party.

During the hearing of the appeal, the Appellants presented to court written submissions in support of their case. Learned counsel Mr. Ngome also made oral submissions in support of the Appellants' appeal. The 1st Respondent was represented by the learned counsel, Mr. Mokua. The 2nd Respondent chose not to take a position with regard to the Appellants' appeals. It was argued on behalf of the 1st and 2nd Appellants that in the spirit of **Article 159** of the **Constitution** and **Rule 4** of the **Election Petition Rules,** the trial court ought to have decided the case on its merits as opposed to procedural technicalities. Learned counsel submitted that the party list submitted by the 1st Appellant complied with the law. He relied on the cases of **Linet Kemunto Nyakeriga & Another -versus- Ben Njoroge & 2 Others [2014] eKLR and Moses Mwicigi & 14 Others -versus- Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** to submit that the discretion to prepare the party lists lies with political parties. Relying on **Sections 34, 35, 36** and **37** of the **Elections Act** and **Regulations 54, 55** and **56** of the **Elections Regulations**, counsel for the Appellants submitted that the trial magistrate erred in holding that the 2nd Respondent could choose from the list submitted to it by the 1st Appellant the most qualified candidate. According to learned counsel, the 2nd Respondent was required to undertake due diligence to confirm that the party list complied with the law and if not, return it to the 1st Appellant to ensure compliance.

Learned counsel for the Appellants submitted that on receipt of the list resubmitted to it by the 1st Appellant, the 2nd Respondent was required to confirm compliance then proceed to publish the list in the local dailies inviting those aggrieved to lodge their complaints either at the Political Parties Disputes Tribunal or the Independent Electoral and Boundaries Commission's Dispute Resolution Committee. The learned counsel contended that because no complaint was filed in either of the two forums with respect to the 1st Appellant's party list for Tana River County this court should not exercise its discretion in favour

of an indolent Petitioner. He relied on the case of J**osiah Taraiya Kipelian Ole Kores -versus- Dr. David Ole Nkedienye & 3 Others [2013] eKLR** to support this submission. He further relied on the case of **Moses Mwicigi & 14 Others -versus- Independent Electoral and Boundaries Commission & 5 Others [2016] eKLR** to submit that an election is deemed to have taken place in a party list nomination when the 2nd Respondent gazettes a nominee from the list submitted by the 1st Appellant. According to the learned counsel for the Appellants, the trial court usurped its mandate in directing the 2nd Respondent to gazette the 1st Respondent as the nominee.

In opposition to both appeals, Mr. Mokua referred to the Court of Appeal decision in **Nicholas Kiptoo Arap Korir Salat -versus- IEBC & 7 Others [2014] eKLR** to submit that no leave of court was sought by the Appellants to extend the period for filing the responses as required by the law. He urged that the decision to dismiss the Appellants' application was made in exercise of discretion thus this court should not interfere with the trial court's decision except in circumstances which would afford a good reason to depart from the decision. Counsel further submitted that although generally, the burden of proof rested on the 1st Respondent, the burden shifted once the 1st Respondent established a *prima facie* case against the Appellants and the 2nd Respondent. According to learned counsel therefore, it was up to the 2nd Respondent to avail the register of voters confirming whether or not the nominees on the 1st Appellant's party list were registered voters.

On the issue of jurisdiction, learned counsel submitted that the trial court was seized of the jurisdiction to hear and determine the petition immediately the 2nd Appellant was gazetted. Addressing the question of the 2nd nominee's right to be heard, counsel relied on the authority of the Court of Appeal in **Aga Khan Education Service -versus- Republic & Others, Civil Appeal No. 257 of 2003** to submit that since the filing of the suit was published in the Kenya Gazette, the 2nd nominee had the opportunity to seek to be enjoined in the proceedings. According to the learned counsel therefore, she was deemed to have waived her right to participate in the suit. He reiterated that the 2nd Respondent failed to ensure that the nominees were competent to be so nominated as required under **Regulations 55(2)** and **88(5)** and **(6)** of the **Elections Regulations**.

Submitting on the 1st Respondent's application to have the Appellants' record of appeal struck out, the learned counsel submitted that the same did not comply with **Rule 34(6)** of the **Election Petitions Rules**. In particular, he submitted that the record of appeal did not contain a certified copy of the judgment and decree. To this end, he cited the case of **Boy Juma Boy & 2 Others -versus- Mwambole Tchappu Mbwana & Another [2014] eKLR** to support this submission. He submitted that although this court has the discretion to extend time to file a record of appeal, there is no provision for a supplementary record of appeal under the **Election Petition Rules**. According to learned counsel, failure to comply with the mandatory provisions of law rendered the appeal incompetent. He urged that under **Section 79** of the **Elections Act** and **Rule 34(10)** of the **Election Petition Rules**, this court had power to summarily reject the appeal. According to learned counsel, the Appellants' appeal further ought to be struck out for non-compliance with **Section 78(2)** of the **Elections Act** requiring the Appellants to deposit security for costs.

In response to the 1st Respondent application for striking out the record of appeal, learned counsel for the Appellants explained that the Appellants did not include the certified copy of the decree and judgment in the record of appeal since it was not availed to them on time by the trial court. Counsel for the Appellant cited the case of **Martha Wangari Karua -versus- Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** to urge the court to apply its discretion under **Rule 34(10)** of the **Election Rules** to admit the documents filed out of time. He argued that though the issue of the supplementary record of appeal is not expressly provided for under the **Election Petition Rules**, the same was filed pursuant to the leave granted by court and that its admission will ensure a just determination of the issues raised in the appeal. He submitted that **Rule 34** of the **Election Rules** makes reference to a *'decision'* and not specifically a decree as claimed by counsel for the 1st Respondent. With regard to the deposit of security for costs, counsel for the Appellants' argued that **Section 78** of the **Elections Act** makes reference to the Petitioner's payment of security for costs and not the Appellants as is in the instant case.

As the first appellate court, this court is required to reconsider and to re-evaluate the evidence adduced before the trial court with a view to reaching its own independent determination whether or not to uphold the decision of the trial court. In doing so, this court must always bear in mind that it neither saw nor heard the witnesses as they testified and therefore must give due allowance in that regard. (See **(see Selle –Vs- Associated Motor Boat Co. Ltd. & Another [1968] E.A. 123**).

This court has carefully considered the matters in dispute in this appeal. As stated earlier in this Ruling, the application filed by the 1st Respondent seeking to have the appeal struck out essentially on the grounds that it was incompetent, and the two appeals lodged by the Appellants were consolidated and heard together at the same time. This was due to the exigencies of time and the strict timelines under the **Elections Act**, specifically **Section 75(4)(b)** thereof. The appeals are required to be heard and determined within six (6) months from the date of filing of the appeals.

This court will first address the issues raised in the Notice of Motion lodged by the 1st Respondent dated 5th March 2018 which sought to have the record of appeal lodged by the Appellants, in respect of the second appeal dated and filed on 14th February 2018, to be struck out as being incompetent and incurably defective on account of the fact that it did not comply with the mandatory requirements of **Rule 34(6)(e)** of the **Election Petition Rules 2017**. The said Rule provides that upon the filing of the appeal, a record of appeal shall be filed including ***"a signed and certified copy of the judgment appealed from and certified copy of the decree".*** The Appellants do not dispute that they did not file the certified copy of the decree at the time they filed the record of appeal. However, they pleaded with the court to allow them to file a supplementary record of appeal to include the said certified copy of the decree. The Appellants explained the reason for the failure to file the certified copy of the decree was on account of the fact that the trial magistrate had not signed the decree at the time the Appellants filed the record of appeal. The 1st Respondent submitted that the filing of a certified copy of the decree was mandatory and failure to file the same within time could not be cured by the Appellants filing a supplementary record of appeal. Learned counsel for the 1st Respondent relied on several decisions to support the 1st Respondent's contention that the appeal ought to be struck out for this failure.

Having considered the rival arguments made by the parties in that regard, this court takes the view that although **Rule 34(6)** of the **Election Petition Rules** is coached in mandatory terms, this court guided by **Rule 4** of the **Election Petition Rules**, cannot struck out the record of appeal filed by the Appellants because to do so would mean that this court would have determined the appeal on a technicality rather than on its merits. The said **Rule 4** provides thus:

> ***"(1) The objective of these rules is to facilitate the just, expeditious, proportionate and affordable resolutions of election petitions.***
>
> ***(2) An election court shall, in the exercise of its power under the constitution and the Act, or in the interpretation of any of the provisions in these Rules, seek to give effect to the objective specified in sub-rule (1)".***

This court is satisfied by the explanation given by the Appellants for their failure to file the certified copy of the decree in time. This court has power to extend time for the Appellants to comply with any act to be done once a petition or an appeal has been filed. In this regard, the Appellants explained that they were unable to secure the certified copy of the decree in time to include it in the record of appeal because the trial magistrate had not signed and certified the same. This court takes judicial notice of the fact that once parties present draft orders and decrees to be signed by court officials, the time upon which the said documents will be signed by judicial officials is not within their control. The Appellants have established that they indeed lodged the certified copy of the decree with the court but the same was not signed and certified in time. This court therefore extends the time for the Appellants to lodge the said certified copy of the decree, and since the same has been filed, deem the same to be properly filed.

Another issue that was raised by the 1st Respondent in the application seeking to struck out the appeals is whether the appeals were competent by virtue of the fact that the Appellants had not deposited the sum of

Kshs.500,000/- as security for costs prior to the lodging of the appeal. The 1st Respondent was obviously alluding to the provisions of **Section 78(2)(b)** of the **Elections Act** that requires a deposit of Kshs.500,000/- to be made in court at the time of lodging of the petition in the High Court. The Appellants in response to this assertion submitted that **Section 78** of the **Elections Act** requires security for costs to be deposited by Petitioners and not by Appellants. Having considered the arguments made in that regard, this court agrees with the Appellants that indeed **Section 78** of the **Elections Act** talks of ***"Petitione***r" and not an ***"Appellant***". It is clear that Appellants, appealing against decisions of lower courts are not required to deposit security for costs in a similar manner that a petitioner is required to deposit such security. Whereas there is logic in the argument advanced by the 1st Respondent that to compel a petitioner to make a deposit of security for costs before lodging a petition and not demand the same of an appellant is discriminatory, this court guided strictly by the law cannot interpret a ***"Petitioner"*** referred to in **Section 78** of the **Elections Act** to include an "***Appellant".*** This court is of the considered view that if Legislature intended for Appellants to deposit security for costs before lodging appeals, nothing would have been easier than for such intention to be codified in law. That does not mean or imply that a court of law exercising its discretion cannot, where the circumstances called for, order that such security for costs be deposited. In the premises therefore, this court finds no merit with the application lodged by the 1st Respondent. The same lacks merit and is hereby dismissed.

On the merits of the appeals, the Appellants lodged two appeals. The first appeal to be filed was an interlocutory appeal. The Appellants were aggrieved by the decision of the trial court that denied them a chance to file their replying affidavits and pleadings out of time. The Appellants, may be out of abundant caution, had filed the replying affidavits in opposition to the petition. They did this in anticipation that the trial court would favourably consider their application for extension of time to file their respective responses. The 1st Respondent vehemently opposed the application. The trial court upheld the objection by the 1st Respondent. It declined to allow the Appellants extension of time to file their responses out of time. The trial court was not convinced that the Appellants had given cogent reasons for the delay in filing their responses in time. It was this refusal that provoked the Appellants to file the first appeal.

During the hearing of the appeal, this court heard oral rival submission made by counsel for the Appellants and counsel for the 1st Respondent. Both counsel appreciated the principle laid down by the Supreme Court in the Case of **Nicholas Kiptoo arap Korir Salat –vs- Independent Electoral and Boundaries Commission & 7 Others [2014] eKLR** where the court set out the principles to be considered in determining whether or not to grant extension of time. This is what the court said:

> ***"This being the first case in which this court is called upon to consider the principles for extension of time, we derive the following as the underlying principles that a court should consider in exercise of such discretion:***
>
> > ***1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;***
> >
> > ***2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
> >
> > ***3. Whether the court should exercise discretion to extend time, is a consideration to be made on a case to case basis;***
> >
> > ***4. Whether there a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;***
> >
> > ***5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
> >
> > ***6. Whether the application has been brought without undue delay; and***

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

Rule 19 of the **Elections Petition Rules** grants jurisdiction to the court hearing the petition to extend or reduce time for which time is prescribed by the Rules. It provides that:

"(1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an election court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.

(2) Sub-rule (1) shall not apply in relation to the period within which a petition is required to be filed, heard or determined."

It is clear from the foregoing that other than the time prescribed by statute, any other time prescribed under the **Election Petition Rules** for an act to be done is amenable for time to be extended provided the court forms the opinion that it is in the interest of justice for such time to be extended.

In the present appeal, as stated earlier in this judgment, the trial court was not persuaded that the Appellants had presented sufficient cogent grounds to enable the court exercise its discretion in their favour by extending time to allow the replying affidavits that had been filed by the Appellants in response to the petition to deemed to be properly filed. In the considered view of this court and with greatest respect to the trial court, that court fell in error because it restrictively interpreted its jurisdiction to extend time. At the time the Appellants sought extension of time to file their response to the petition, substantive hearing had not yet commenced. By declining to allow the Appellants application for extension of time, the trial court denied itself the opportunity of interrogating and considering the matters in dispute on its merit. It was apparent that the trial court failed to take into consideration the fact that an election petition is not a suit in the ordinary sense of the word because the parties to such petition are dealing with a significant issue regarding representation of the people.

The trial court ought to have taken into account the fact that in such cases it would serve the interest of justice for the matters in dispute to be determined on its merit rather than on mere technicalities. The authorities cited by the 1st Respondent in support of her objection to the application for extension of time, with greatest respect, were authorities that were applicable prior to the Supreme Court decision in **Raila Odinga & Another –vs- IEBC & 2 Others [2017] eKLR**. In a Ruling delivered on 27th August 2017, the Supreme Court while considering an application seeking strike out certain affidavits and responses filed out of time, held thus:

"We have considered the application, the affidavit in support thereof, and submission of counsel. The nature of this application is such that were it to be granted, it would dispose of the entire case of the 1st, 2nd and 3rd Respondents at this preliminary stage. Such drastic consequences in our view cannot be justified if the scales of justice are weighed in favour of all parties to this petition."

In the present appeal, it was evident that the trial court did not weigh the consequences of its refusal to grant the Appellants leave to file their responses out of time. If the trial court had done that, it would not have been compelled to render a decision that for all intent and purposes was pursuant to exparte proceedings. The trial court did not take into consideration the prejudice that the Appellants would suffer once it made the decision to lock them out of the proceedings. In the circumstances of this case, this court holds that the trial court erred when it failed to allow the Appellants' application to file their responses to the petition out of time. The Appellants' first appeal has merit and shall be allowed.

As regard the second appeal, the trial court justified its decision to nullify the nomination of the 2nd Appellant as the nominee of the 1st Appellant for the position of Member of County Assembly for Tana

River County on the grounds that the 2nd Respondent had failed to produce evidence to the effect that the 2nd Appellant was a registered voter. This is what the trial court held:

> ***"17. In this case, the 1st Respondent assumed a passive role and failed to produce certified extracts of the voters' register to prove that the 3rd Respondent (2nd Appellant) and the other nominee by the 2nd Respondent (1st Appellant) were registered voters. The 1st Respondent therefore failed to discharge the evidential burden of proof cast upon it by the law. The 1st Respondent's constitutional and statutory duty to reveal who is or is not a registered voter cannot be shifted to the petitioner. The 1st Respondent cannot hide behind the concept of legal burden of proof and neglect its duty to provide a voters' register that is well within its knowledge and custody. Had the 1st Respondent not failed in its duty, this petition which is a single issue petition would have been automatically determined by the production in court of the relevant information regarding the registration details of the three nominees of the 2nd Respondent.***
>
> ***18. In the circumstances of this case, and in view of the refusal and/or neglect by the 1st Respondent to avail the voters' register, the court hereby accepts the uncontroverted evidence produced by the petitioner (1st Respondent) and therefore finds and holds that the 3rd Respondent (2nd Appellant), and indeed the other nominee of the 2nd Respondent, are not registered voters."***

It was clear from the above decision that the trial court shifted the burden of proof from the 1st Respondent to the 2nd Respondent thereby absolving the 1st Respondent of the evidential burden to proof her assertion that the 2nd Appellant was not a registered voter. The 1st Respondent was required by law to discharge the burden of proof placed upon her by establishing what she had alleged in her petition that indeed the 2nd Appellant was not a registered voter as required by the law. In **Martha Wangari Karua & Another v Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR,** L. W. Gitari, J held thus:

> ***"The petitioner has to discharge the legal burden of proof of the grounds raised in the petition. In Raila Odinga & 5 Others –v- Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR, the Supreme Court stated as follows on burden of proof in election petitions;***
>
> ***"Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary….while it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributed to the responsible agency, it behoves the person who thus alleges to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting…the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question."***

The thrust of the 1st Respondent's petition was that the 2nd Appellant was not a registered voter and thus not eligible to be nominated as a Member of the County Assembly for Tana River County by the 1st Appellant. The Appellants do not dispute that this was a requirement for those seeking to be nominated by the political party to such position. Indeed, **Article 193(1)(a)** of the **Constitution** and **Section 25(1)(a)** of the **Election Act** makes it mandatory that anyone offering himself or herself to be elected or nominated as a Member of County Assembly must be a registered voter. In support of her case, the 1st Respondent annexed a printout of a short message service (SMS) from her mobile phone which indicated that the 2nd Appellant was allegedly not a registered voter. The trial court appreciated that the evidence placed before the court by the 1st Respondent was not sufficient to prove that indeed the 2nd Appellant

was not a registered voter. The trial court went ahead and placed the burden of proof on the 2nd Respondent to provide the voters' register to the court to prove or disapprove the 1st Respondent's assertion that the 2nd Appellant was not a registered voter. When the 2nd Respondent failed to produce the register, the trial court held, as quoted above, that the failure by the 2nd Respondent to produce such register meant that the 1st Respondent had discharged her evidential burden of proof.

On re-evaluation of the finding by the trial court, in light of the submission made on this appeal, this court holds that the trial court misdirected itself by shifting the burden of proof from the 1st Respondent to the 2nd Respondent. If the trial court had allowed the Appellants' response on record, the 2nd Appellant would have had the opportunity to establish whether or not she was a registered voter. By locking out the Appellants from the proceedings, the trial court denied itself the opportunity of considering the question whether the 2nd Appellant was a registered voter on its merit.

The trial court erred when it placed the evidential burden of proof on the 2nd Respondent who was not directly affected by the decision of the court. The complaint by the Appellants to the effect that the finding made by the trial court to the effect that the 1st Respondent had discharged the burden of proof placed on her to establish that the 2nd Respondent was a registered voter was misdirection has merit. This court holds that the 1st Respondent failed to establish to the required standard of proof that the 2nd Appellant was not a registered voter. Again, due to the earlier decision rendered by the trial court, the 2nd Appellant did not have the opportunity to prove or disapprove that she was not a registered voter. The trial court had no basis to make the finding that the 1st Respondent had established that the 2nd Appellant was not a registered voter.

It is clear from the foregoing that this appeal is for allowing. It is hereby allowed on the following terms:

i. The Appellants' first appeal (i.e. **Election Appeal No.1 of 2017**) is hereby allowed as a result of which the responses filed by the Appellants are deemed to have been properly filed.

ii. The Appellants' second appeal (i.e. **Election Appeal No.5 of 2018**) is hereby allowed as a result of which the 1st Respondent's petition filed in court in the **Election Petition No.23 of 2017** at the Chief Magistrate's Court Nairobi (Milimani Commercial Courts), having not been proved to the required standard of proof, is hereby dismissed.

iii. The 1st Respondent's application dated 5th March 2018 seeking to strike out the Appellants' appeal is hereby dismissed.

iv. Any steps taken in execution of the Judgment and decree of the trial court are hereby set aside and shall have no legal effect.

v. The Appellants shall have the cost of the two appeals, the application, and the petition before the trial magistrate's court.

It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF MAY 2018

L. KIMARU

JUDGE