



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Arale v Independent Electoral and Boundaries Commission & 4 others (Election  
Petition Appeal E013 of 2023) [2023] KECA 1045 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 1045 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
ELECTION PETITION APPEAL E013 OF 2023  
HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA  
JULY 28, 2023**

**BETWEEN**

**AHMED BORAY ARALE ..... APPELLANT**

**AND**

**THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**ABDIBASHI ALINOOE IBRAHIM THE CONSTITUENCY RETURNING  
OFFICER ELDA CONSTITUENCY ..... 2<sup>ND</sup> RESPONDENT**

**MARYAN HASSAN MOHAMMED THE DEPUTY CONSTITUENCY  
RETURNING OFFICER ELDA CONSTITUENCY ..... 3<sup>RD</sup> RESPONDENT**

**FEISAL ABDI BILLOW PRESIDING OFFICER OROTE POLLING  
STATION ..... 4<sup>TH</sup> RESPONDENT**

**ADAN KEYNAN WEHLIYE ..... 5<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the High Court at Garissa  
(S. N. Riechi, J.) dated 6th March 2023 in Election Petition No. E004 of 2022)*

**Procedure for filing election petition appeals at the Court of Appeal**

*The appeal was against the declaration of the 5th respondent as the winner of the election for Member of National Assembly for Eldas Constituency. The court noted that no appeal to the court could be initiated without the filing of a notice of appeal in the court's registry. The court found that the notice of appeal was not filed within the prescribed timeframe, and so the invocation of the jurisdiction of the court to hear the appeal was time barred. The court further highlighted the procedure for filing an election petition appeal at the Court of Appeal. The court also found that the impugned notice of appeal was not filed in the prescribed format and the outcome would be to strike it out.*

Reported by Kakai Toili



**Civil Practice and Procedure – appeals – filing of appeals at the Court of Appeal - procedure for filing election petition appeals at the Court of Appeal – whether an appeal could be initiated at the Court of Appeal without the filing of a notice of appeal in the court’s registry.**

**Civil Practice and Procedure – appeals – election petition appeals - notice and record of appeals – timeline for filing notice and record of appeals - whether the filing of a notice and record of appeal outside the prescribed timelines was fatal in an election petition appeal - whether failure to file a notice of appeal in an election petition appeal at the Court of Appeal in the prescribed format was fatal – Constitution of Kenya, article 159(2)(d); Elections Act (cap 7), section 85A(1); Court of Appeal (Election Petition) Rules, 2017, rules 4 and 6; Court of Appeal Rules, 2022, rule 3.**

### **Brief facts**

The 5<sup>th</sup> respondent was declared the winner of the election for Member of National Assembly for Eldas Constituency. The appellant being aggrieved filed an election petition in the High Court. The appellant sought among other orders; a declaration that the election of Eldas Constituency held on August 10, 2022 and subsequent tallying and declaration of results and certificate issued to the 5<sup>th</sup> respondent was illegal, null and void for not being free, fair, credible, verifiable and transparent. The petition was dismissed with costs to the respondents. Aggrieved, the appellant filed the instant appeal.

The 1<sup>st</sup> to 4<sup>th</sup> respondents filed an application seeking among other orders; the striking out of the appellant’s record of appeal dated April 3, 2023 and served upon them on April 12, 2023 for being filed out of time and as there was no notice of appeal on record. The 1<sup>st</sup> to 4<sup>th</sup> respondents contended that; the judgment of the High Court was rendered on March 6, 2023 while the instant appeal was filed on April 6, 2023, a date beyond the 30 days within which the appeal ought to have been filed; that service of the appeal ought to have been effected within 5 days of filing which was April 11, 2023, but it was served on April 12, 2023; and that there was no notice of appeal filed or served upon them, and the one annexed to the appeal was nothing more than an unfiled draft document.

The 5<sup>th</sup> respondent filed another application seeking that: the notice of appeal dated March 7, 2023 and filed on April 6, 2023 be struck out; the memorandum of appeal dated April 3, 2023 and filed on April 6, 2023 be struck out; and that the appellant’s record of appeal dated April 3, 2023 and filed on April 6, 2023 be struck out and the appeal be dismissed. The application was based on among other grounds that; the appellant served a draft notice of appeal dated March 7, 2023, on March 10, 2023 indicating that it was to be filed in the Court of Appeal registry; that the same was not filed within 7 days as required by the law.

### **Issues**

- i. What was the procedure for filing an election petition appeal at the Court of Appeal?
- ii. Whether an appeal could be initiated at the Court of Appeal without the filing of a notice of appeal in the court’s registry.
- iii. Whether the filing of a notice and record of appeal outside the prescribed timelines was fatal in an election petition appeal.
- iv. Whether failure to file a notice of appeal in an election petition appeal at the Court of Appeal in the prescribed format was fatal.

### **Relevant provisions of the Law**

#### **Elections Act (cap 7)**

#### **Section 85A - Appeals to the Court of Appeal**

*(1) An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only shall be—*

*(a) filed within thirty days of the decision of the High Court; and*

*(b) heard and determined within six months of the filing of the appeal.*

#### **Court of Appeal (Election Petition) Rules, 2017**



## **Rule 6 - Filing of notice of appeal**

*(1) A person who desires to appeal to the Court shall file a notice of appeal, which shall be lodged in quadruplicate in the registry.*

*(2) A notice of appeal shall be filed within seven days of the date of the decision appealed against.*

*(3) A notice of appeal shall be in separate numbered paragraphs and shall—*

*(a) specify whether all or part of the judgment is being appealed and, if part, which part;*

*(b) provide the address for service of the appellant and state the names and addresses of all persons intended to be served with copies of the notice; and*

*(c) contain a request that the appeal be set down for bearing in the appropriate registry.*

*(4) It shall not be necessary that the decree or order be extracted before lodging a notice of appeal.*

*(5) A notice of appeal shall be substantially in the Form EPA 1 set out in the Schedule and shall be signed by or on behalf of the appellant.*

### **Held**

1. Jurisdiction was everything and without it a court had no other recourse but to down its tools. Jurisdiction was a matter of law; it was a matter that must be determined before a court could embark on the main dispute at hand.
2. The impugned judgment was rendered on March 6, 2023. Therefore, the notice of appeal ought to have been filed within 7 days, which meant that the appellant had until March 13, 2023 to file it. A notice of appeal as lodged in the High Court was not what was contemplated within the meaning of the Court of Appeal (Election Petition) Rules, 2017. The Rules envisioned that a notice of appeal ought to be filed in the instant court's registry within 7 days of the date of judgment.
3. No appeal to the court could be initiated without the filing of a notice of appeal in the court's registry. Indeed, it was a notice of appeal, properly filed, that triggered the jurisdiction of the court.
4. The instant court did not operate a distinct or separate e-filing system from other courts in Kenya. Kenyan Judiciary operated one e-filing system, namely the Judiciary e-filing system. What that meant was that, if a party was not able to lodge documents in one court, then it would be impossible to lodge the same documents at the same time in another court anywhere in the Republic of Kenya. Therefore, the appellant could not be heard to say that after he was unable to file the notice of appeal in the Court of Appeal registry, he was able to file it in the High Court registry. The Judiciary e-filing system was not at all experiencing any downtime; and the appellant never attempted to file the notice of appeal within the prescribed time in the Court of Appeal registry.
5. The 1<sup>st</sup> to 4<sup>th</sup> respondents annexed to their application, a document titled 'judiciary tracking number' demonstrating that the filing date was effected on April 6, 2023 at 1.04.06 hours, which was a pointer that indeed the appellant did not lodge the appeal on April 5, 2023 as alluded.
6. A case number and for that matter an election petition number could not be generated until all necessary court fees were paid. It was an auto-generated number. The court e-filing system was up and running as at March 7, 2023, and the appellant could only blame himself for not doing what he was required to do on that day and the succeeding 6 days. A notice of appeal was not filed within the prescribed timeframe, and so the invocation of the jurisdiction of the court to hear the appeal was time barred.
7. The dates within which the appeal should be filed should be read and interpreted conjunctively with section 85A(1)(a) of the Elections Act. In the current operating structure of the Judiciary since digitization of the court's registry, the filing of an election petition appeal entailed the following:
  1. the petitioner uploaded a notice of appeal;
  2. he/she then made the requisite court fees, and
  3. the system then auto generated a case number.



8. Payment of court fees was a prerequisite to allocation of a case number. Further, if the e-filing system was experiencing downtime, a notice was issued to all parties and any court stakeholder. In the event that a party wished to file documents that related to a matter that was time bound, they were not turned away. Instead, they were advised to send their documents through the Judiciary email. The registry would then take it upon itself to upload the documents when the system started working again. After the uploading by the registry, the appellant was then advised on the fees assessed so that he/she could make the payment and a petition number was generated. If the system did not resume within time, the email correspondence sending the documents to the registry, become the *prima facie* evidence that the petitioner filed his/her notice of appeal/documents on time.
9. Although there was the allegation that the registry turned away the appellant and his counsel, there was no evidence that they forwarded the notice of appeal through the Judiciary email as would be expected. Further, they still had six more days to attempt to lodge the record of appeal which they did not seize advantage of.
10. With respect to the annexures, the emails' dates were way after the timelines within which the petition ought to have been filed. That implied that if any hacking to the appellant's counsel email portal happened, it definitely was after closure of the timelines. Accordingly, the assertion that the record of appeal could not be filed on time because of a takeover of the counsel's email portal could not then be used as an excuse or reason for not filing the record of appeal on time.
11. The lodging of a document was compounded by several steps and one could not claim completion of lodgment of an appeal without completing all steps. The process of lodgment could only be deemed as completed and successful upon all the mandatory and integral steps having been undertaken by all parties involved. In short, all the required steps operated conjunctively and not disjunctively. The record of appeal was filed on April 6, 2023, and, as such, it was filed out of time by one day.
12. Rule 8(5) of the Court of Appeal (Election Petition) Rules, 2017 provided that the record of appeal shall be filed within thirty days from the date of the judgment of the High Court. Rule 8(6) on the other hand provided that the appellant shall serve a copy of the record of appeal on all the parties named in the notice of appeal within five days of filing of the record of appeal. The appellant served the record of appeal on April 12, 2023.
13. The Court of Appeal (Election Petition) Rules, 2017 did not make provision in regards to computation of time. However, rule 4 of the Rules thereunder, allowed the court to apply the Court of Appeal Rules, 2010 (now 2022 Rules), where there was no applicable provision in relation to election petition appeals.
14. The appellant ought to have filed the record of appeal pursuant section 85A(1)(a) of the Elections Act, on April 5, 2023, and accordingly serve it by April 10, 2023. Between the April 5<sup>th</sup> and 10<sup>th</sup> 2023, there were the two public holidays which as per rule 3 of the Court's Rules, 2022, were excluded in the computation of time. That meant that the record of appeal ought to have been served by April 12, 2023 which it was, and, as such, the record of appeal was served in accordance with the provisions of the law.
15. Section 85A(1) of the Elections Act and rule 6(3)(c) of the Court of Appeal (Election Petition) Rules, 2017 were couched in mandatory terms, so much so that there was no wriggle room for a party who did not comply, to seek refuge in any other provision. There was no provision for filing of a memorandum of appeal in the record of appeal in an election petition appeal. The grounds of appeal should be contained in the notice of appeal, and no more.
16. So as not to leave room for any error, rule 6(5) of the Court of Appeal Election Rules, 2017 provided for the format in which the notice of appeal should be drawn, which as per Form EPA 1 set out in the Schedule of the Rules. In the circumstances, the impugned notice of appeal was not filed in the prescribed format and the outcome would be to strike it out.
17. Election petition appeals were special in nature due to the strict timelines within which they should be heard and determined. Further, the court's election petition rules were formulated so that parties



- endeavour to comply with all procedures without making any error. Otherwise, if errors of procedure were excused, the timelines would never be met as each party would always seek an opportunity to argue the merit or demerit of any request made to the court with a view to condoning the error.
18. The appellant had to strictly file the notice of appeal in strict compliance with rule 6 of the of the Court of Appeal Election Rules, 2017, both in form and content. The oxygen principle under article 159(2) (d) of the Constitution could not, unfortunately come to his aid. The submission that the respondents' notice of address of service that was filed in the Court of Appeal was not served on the appellant was neither here nor there, as, the jurisdiction of the court was invoked by a properly filed notice of appeal.
  19. A notice of appeal was that document which conferred upon the court the jurisdiction to adjudicate over matters before it. Jurisdictional failings were non-excusable and could not be waived.

*Appeal struck out.*

### **Orders**

- i. *The notice of motion by the 1<sup>st</sup> to 4<sup>th</sup> respondents dated April 13, 2023 was allowed.*
- ii. *The notice of motion by the 5<sup>th</sup> respondent dated April 17, 2023, was allowed.*
- iii. *The notice of appeal dated March 7, 2023 was struck out.*
- iv. *The record of appeal dated April 3, 2023 was struck out.*
- v. *The costs of the applications and the struck-out appeal shall be borne by the appellant.*

### **Citations**

#### **Cases**

1. Abdullahi v Independent Electoral and Boundaries Commission & 3 others (Election Petition Appeal E004 of 2022; [2023] KECA 207 (KLR)) — Applied
2. Abdullahi v Independent Electoral and Boundaries Commission & 3 others (Election Petition Appeal E004 of 2022; [2023] KECA 207 (KLR)) — Mentioned
3. Adan Yare Hassan, Mohamud Mohamed, Farhan Abdi Hussein, Ahmed Mohammed Hussein, Ahmned Abdullahi, Abdisalah Hassan, Noor Hussein & Mohammed Abdi v Habiba Ali and Batula Ali t/AaEmirates Shopping Mall (K) Ltd (Tribunal Case 22 of 2020; [2021] KEBPRT 323 (KLR)) — Applied
4. Aurthur Kibira Apungu & another v Independent Electoral & Boundaries Commission & 2 others (Election Petition 7 of 2013; [2013] KEHC 6125 (KLR)) — Applied
5. Aurthur Kibira Apungu & another v Independent Electoral & Boundaries Commission & 2 others (Election Petition 7 of 2013; [2013] KEHC 6125 (KLR)) — Explained
6. Daniel Nkirimpa Monirei v Sayialele Ole Koilele, Land Registrar, Kajiado, Senior Resident Magistrate, Kajiado, Chairman, Land Dispute Tribunal, Kajiado & Attorney General (Civil Appeal (Application) 140 of 2015; [2016] KECA 148 (KLR)) — Mentioned
7. Edwin Gichangi v Kenya Cultural Center (Cause 998 of 2018; [2021] KEELRC 1523 (KLR)) — Applied
8. KCB Bank Kenya Limited v Mwandoro (Civil Application E044 of 2021; [2023] KECA 260 (KLR)) — Applied
9. Kenya Commercial Bank Limited & another v Samuel Kamau Macharia & 2 others (Civil Appeal 181 of 2004; [2008] KECA 334 (KLR)) — Applied
10. Kidero & 4 others v Waititu & 4 others (Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR)) — Mentioned
11. Lesirma Simeon Saimanga v Independent Electoral and Boundaries Commission, Returning Officer Samburu County & Lenolkulal Moses Kasainie (Election Appeal 7 of 2018; [2018] KECA 533 (KLR)) — Mentioned
12. Loitiptip v Independent Electoral and Boundaries Commission & 2 others (Civil Application 21 of 2018; [2018] KESC 55 (KLR)) — Mentioned



13. *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission (I E B C), Eldama Ravine Constituency Returning Officer (Ndirangu Peter Kuria) & Moses Lessonet* (Election Petition 1 of 2017; [2018] KEHC 8396 (KLR)) — Mentioned
14. *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission (I E B C), Eldama Ravine Constituency Returning Officer (Ndirangu Peter Kuria) & Moses Lessonet* (Election Petition 1 of 2017; [2018] KEHC 8396 (KLR)) — Followed
15. *Mwamlome Tchappu Mbwana & Kalimbo Naveed Mwaega v Boy Juma Boy, Rashid Soud & Independent Electoral and Boundaries Commission of Kenya* (Election Petition 5 of 2013; [2013] KEHC 3448 (KLR)) — Applied
16. *Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission, Wilfred Rottich Lesan, Robert Siolei, Returning Officer, Bomet County, Kennedy Ochanyo, Wilfred Wainaina, Patrick Wanyama & Mark Manzo* (Civil Appeal 228 of 2013; [2013] KECA 113 (KLR)) — Mentioned
17. *OKIYA OMTATAH OKOITI V ATTORNEY GENERAL & 2 OTHERS* (Petition 192 of 2013; [2013] KEHC 4176 (KLR)) — Followed
18. *Patricia Cherotich Sawe vs IEBC & 4 Others* ([2015] eKLR) — Applied
19. *Shah & 7 others v Mombasa Bricks & Tiles Ltd & 5 others* (Application 3 (E008) of 2022; [2022] KESC 25 (KLR)) — Applied

#### **Statutes**

1. Constitution of Kenya, 2010 (Const2010) — article 82 & 86; article 159(2)(d) — Cited
2. Court of Appeal (Election Petition) Rules (sub leg) — rule 6(3)(c); rule 8 (5); rule 3 — Cited
3. Court of Appeal Rules (cap 8 sub leg) — rule 4 — Cited
4. Election Offences Act (No. 37 of 2016) — section 6 — Cited
5. Election Regulations 2012 (revised 2017) (SUB LEG) — In general — Cited
6. Elections Act (No. 24 of 2011) — section 82; section 85A (1) — Cited
7. Evidence Act (CAP. 80) — section 80 — Cited
8. Public Holidays Act (Cap. 110) — section 2 — Cited

#### **Advocates**

*Mr. Hashi* for Appellant

*Mr Mwiti* for Respondent

*Mr Issa* for Respondent

## **JUDGMENT**

1. Kenyans went to the polls on 9 August 2022. Among the contested seats was the seat for Member of National Assembly for Eldas Constituency for which the appellant, Ahmed Boray Arale, the 5<sup>th</sup> respondent Adan Keynan Wehliye and one Mr Salat Omar Haji were the duly nominated candidates. Upon the results being announced, the 5<sup>th</sup> respondent was declared the winner. The appellant being aggrieved filed an election petition in the High Court, being Election Petition No E004 of 2022.
2. A highlight of the background to this appeal is that, pursuant to its mandate, the Independent and Electoral Boundaries Commission (IEBC) appointed election officials for the 72 polling stations in Eldas Constituency and forwarded the names to the candidates. The appellant was dissatisfied and filed Petition No 14 of 2022 at Garissa High Court, seeking a declaration that the appointments of the election officials were void, unconstitutional and contrary to regulation 5 of the Election (general) Regulations, and an order of certiorari quashing the said appointments; he however withdrew the petition before it was determined.



3. In the absence of any hindrances, IEBC proceeded to publish the names of the appointed election officials at the Constituency Development Fund (CDF) Hall of the Constituency Tallying Centre on 8 August 2022. The appellant being aggrieved that IEBC did not take into consideration his input, protested to the Returning Officer, Mr AbdiBashir Ali Noor Ibrahim. Chaos erupted, disrupting the collection of election materials and the Constituency Returning Officer, the 2<sup>nd</sup> respondent, immediately and effectively resigned. On account of the disruption and security risks, the 1<sup>st</sup> respondent postponed the elections for Eldas Constituency to 10 August 2022, the results were duly announced on 13 August 2022, with the 5<sup>th</sup> respondent garnering 7517 votes, the appellant garnered 6836 and one Mr Salat Omar Haji had 66 votes. The 5<sup>th</sup> respondent was declared as the duly elected Member of National Assembly, Eldas Constituency and was issued with a certificate dated 13 August 2022.
4. Dissatisfied, the appellant filed a petition in the High Court at Garissa dated 8 September 2022, seeking the following; -
  - a. An order to secure the election materials including ballot boxes whereby petitioner seeks to place additional seals to the ballot boxes, take inventory on the status of the ballot boxes and seek that the deputy registrar supervises the exercise and a report be filed in court.
  - b. An order do issue for securing of data stores in the KIEMs kit for the member of National Assembly Eldas Constituency.
  - c. An order of scrutiny and recount and/or re- tallying of all the votes cast to ascertain the elected member of National Assembly, Eldas Constituency.
  - d. A declaration that the election of Eldas Constituency held on 10 August 2022 and subsequent tallying and declaration of results and certificate issued to the 5<sup>th</sup> respondent was illegal, null and void for not being free, fair, credible, verifiable and transparent.
  - e. A declaration do issue invalidating the election of the 5<sup>th</sup> respondent as member of National Assembly Eldas Constituency.
  - f. In the alternative to (b), an order do issue ordering fresh elections for member of National Assembly Eldas Constituency.
  - g. Such election offences by the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent as pleaded, disclosed, heard and determined be recommended to the DPP for appropriate action.
  - h. The declaration of results for Eldas Constituency allegedly done on 13 August 2022, the certificate issued pursuant thereto be nullified.
  - i. An order do issue quashing the entry returning the 5<sup>th</sup> respondent as the member of National Assembly for Eldas Constituency as contained in Gazette Notice No 9950 dated 22 August 2022.
  - j. The respondents be condemned to pay costs.
5. It was the appellant's contention that after being dissatisfied with the list of the election officials, filing his petition, withdrawing it and having a gentleman's agreement with IEBC that his concerns would be addressed, this did not happen. He approached the Returning Officer who subsequently resigned



and the candidates had a meeting with IEBC Commissioner, Mr Guyo. It was communicated that the election would be postponed and he was to submit a list of 17 preferred presiding officers which he did, but his list was not considered and the elections proceeded. On the election day, violence erupted at Dela Yarey polling station and election materials were destroyed, his agent was arrested, voting also started late in some polling stations, voters were disenfranchised by being turned away, votes were swapped and results varied. At the tallying centre, he raised his concerns with the Deputy Returning Officer on vote swapping. Chaos erupted, a Presiding Officer was shot, pictures and videos recorded on mobile phones were confiscated by the police and erased, the Deputy Returning Officer was ferried to the County tallying centre where the 5<sup>th</sup> respondent was declared as the winner. He did his own independent tallying and got the following results: himself had 7190 votes, the 5<sup>th</sup> respondent 6893 votes and Mr. Salat Omar Haji had 42 votes. He omitted counting votes for two polling stations, namely Dela Yarey and Orote, where no elections were held.

6. The 1<sup>st</sup> to 4<sup>th</sup> respondents opposed the petition, vide a response dated September 27, 2022, averring that the appellant, of his own volition withdrew Petition No 14 of 2022, and contrary to his assertion, it was not withdrawn as a result of a consent arrived at by the parties. They posit that the recruitment and appointment of the election officials was done in a transparent and competitive manner, and that the adjournment of the election was done in accordance with the law. There was no alteration, change or manipulation of the election results which would otherwise be unlawful or illegal ab initio. The results declaring the 5<sup>th</sup> respondent as the winner were never disputed in any of the 72 polling stations in the Constituency, and there were no errors or irregularities and if any existed, they were negligible, inconsequential and incapable of affecting the integrity, credibility, process and result of the election. They prayed that the petition be dismissed with costs.
7. The 5<sup>th</sup> respondent opposed the petition, vide a response dated 27 September 2022, averring that he was a candidate for Member of National Assembly for Eldas Constituency under Jubilee Party, while the appellant was under Orange Democratic Movement (ODM) Party. He argued that, upon conclusion of the elections, he was declared as the duly elected Member of Parliament with the result being; the appellant-6838, Mr Salat-66 and himself 7517 votes, and he was issued with a certificate of the elected Member of Parliament for Eldas Constituency. According to him, there was no vote swapping and the results as declared at the polling station was what was declared at the tallying centre. He conceded there were chaos at Dela Yare polling station, but voting resumed after calm was restored; that three people who were known supporters of the appellant, were arrested as a consequence of the chaos; that the appellant was at the Constituency tallying centre when he claimed that his votes had been swapped with those of 5<sup>th</sup> respondent's and due to the chaos, the results could not be declared there, necessitating them to be declared at the County tallying centre; that there was no variance in votes; that no voter was disenfranchised; and that the security incidents were all instigated by the appellant.
8. The petition proceeded to hearing with the appellant calling 8 witnesses, 1<sup>st</sup> to 4<sup>th</sup> respondents calling 14 witnesses while the 5<sup>th</sup> respondent called 10 witnesses. The court in its judgment found that the issues for determination revolved around; swapping of results, results in stations where elections were allegedly not held, variance of votes, disenfranchisement of voters, police intimidation and violence, declaration of results, security of election materials and election offences. The court held that the appellant had failed to prove any of the allegations; that the election for Member of National Assembly for Eldas Constituency was conducted substantially in accordance with the principles of *the Constitution* and the electoral laws; and that if there were any irregularities, they did not affect the outcome of the elections. The petition was accordingly disallowed with costs to the respondents at Kshs. 1,000,000.00 for the 1<sup>st</sup>-4<sup>th</sup> respondents and the 5<sup>th</sup> respondents respectively.



9. Aggrieved by the judgment, the appellant filed the instant appeal listing 22 grounds in his memorandum of appeal dated 3 April 2023. The grounds may be collapsed as follows; -
- a. The learned Judge erred in law by misinterpreting and misapplying section 82 of the *Elections Act* as read with rule 29 of the Election Parliamentary and County Elections Petition Rules, 2017 on scrutiny of votes and imposed a non-existent prerequisite for issuing an order for scrutiny.
  - b. The learned Judge erred in law in failing to give a finding on whether the petitioner had met the threshold for granting an order for scrutiny.
  - c. The learned Judge erred in law in disregarding the violations of articles 82 & 86 of the *Constitution* by the 1<sup>st</sup> to 4<sup>th</sup> respondents by equating them to procedural irregularities, and thus arrived at an erroneous conclusion that the elections were conducted in substantial compliance with the law.
  - d. The learned Judge erred in law by misconstruing the variances between the votes cast and the voters authenticated via the KIEMS Kit as pleaded in the petition for Biladul Amin Primary stream 1 of 2, Junction Primary, Elnur Primary and Dadantalai polling stations and went on a tangent of his own thus creating issues non-existent in the petition and arrived at the erroneous conclusion that the variances were not proved.
  - e. The learned Judge erred in law by disregarding the principle of stare decisis and binding decisions of the Supreme Court on finality of results, promptness/timeliness in election processes and verifiability and accountability of declared outcomes, all being guiding principles on the questions/issues that were before him.
  - f. The learned Judge erred in law in failing to consider arguments and authorities presented to the court by the appellant and as a result made unbalanced findings that disregarded the principle of election petitions as being sui generis litigation and are inherently a suit in public interest, not purely a private suit.
  - g. The learned Judge applied and interpreted sections 78A and 106B of the *Evidence Act* selectively to the appellant's documents on one hand and relaxed the mandatory provisions of section 80 of the *Evidence Act* that applied to the 1<sup>st</sup> to 4<sup>th</sup> respondents contrary to article 27 and 50 of *the Constitution* and section 112 of the *Evidence Act*.
  - h. The learned Judge erred in law by failing to make a finding that persons who were not election officials conducted and upheld elections in Waradey and Junction polling stations in which these unauthorized persons conducted elections contrary to regulation 2 of the *Election Regulations 2012 (revised 2017)*.
  - i. The learned Judge erred in law by labelling and affirming a duly registered voter and a citizen of this country (an expensive voter) and returned a finding that there was no disenfranchisement of the voter whilst the 4<sup>th</sup> respondent admitted in evidence to a violation of regulation of the *Elections General Regulations 2012* as revised in 2017.



- j. The learned Judge erred in law in finding that the election for the election of member of National Assembly, Eldas Constituency was verifiable despite the trial having shown that there were admitted arithmetic errors and variances, un-countersigned alterations, disputed signatures among other errors in the disputed polling stations and forms.
  - k. The learned Judge erred in law in excusing and disregarding an admitted election offence by the 3<sup>rd</sup> respondent contrary to section 6 of the [Election Offences Act](#) as read with article 86 of [the Constitution](#).
  - l. The learned Judge erred in law in awarding costs to the respondents despite an admission by the 3<sup>rd</sup> respondent that she had prior knowledge of an illegal plan to destroy election material and chose to abet the exercise; thus on the one hand unfairly enriching them and on the other hand excusing the aiding and abetting of what was the destruction of election material to the detriment of the appellant.
  - m. The learned Judge misinterpreted the law, pleadings and evidence and in all circumstances altered the jurisprudence of this country on elections by finding that an election court can conduct an audit of an election in the absence of original forms, polling station diaries, tallying centre diary, votes cast, counterfoils, KIEMS kits or any other electoral material and that uncertified copies of form 35 series were sufficient to declare an election free, fair, accurate, credible, transparent, accountable and verifiable in accordance with articles 38 and 86 of [the Constitution](#).
  - n. The learned Judge deviated from the law by purporting to determine what exactly transpired in the disputed polling stations, the Eldas tallying centre and finally the Wajir County tallying centre in the absence of polling station diaries or the tallying centre diaries.
10. The appellant prays that the appeal be allowed with costs, the Judgment be set aside in its entirety and be substituted with an order allowing the election petition dated September 8, 2022 with costs; a declaration be issued that the 5<sup>th</sup> respondent was not validly elected and a certificate to that effect be transmitted to the speaker of the National Assembly; the 1<sup>st</sup> respondent be directed to conduct a fresh election for the Member of National Assembly, Eldas Constituency in compliance with the [Constitution](#) and electoral laws; and that costs of the appeal and the proceedings before the High Court be borne by the respondents.
11. The respondents filed two applications; the first in time was filed by the 1<sup>st</sup> to 4<sup>th</sup> respondents and is dated April 13, 2023, seeking; -
- i. The appellant's record of appeal dated April 3, 2023 and served upon them on April 12, 2023 be struck out for being filed out of time.
  - ii. The appellant's record of appeal dated April 3, 2023 and served upon them on April 12, 2023 be struck out as there is no notice of appeal on record.
  - iii. The appellant's record of appeal dated April 3, 2023 and served upon them on 12<sup>th</sup> April 2023 be struck out for being served out of time.



- iv. The memorandum of appeal dated April 3, 2023 be struck out and be expunged from the court record.
  - v. The entire appeal be struck out.
  - vi. Costs of the application and appeal.
12. The application is supported by the grounds stated on the face of the motion and an affidavit sworn by the 3<sup>rd</sup> respondent on April 17, 2023. He deposes that judgment of the High Court was rendered on March 6, 2023 and the appeal herein was filed on April 6, 2023, a date beyond the 30 days within which the appeal ought to have been filed as stipulated in rule 9(1) of the *Court of Appeal (Election Petition) Rules* 2017; that service of the appeal ought to have been effected within 5 days of filing which was April 11, 2023, but it was served on April 12, 2023; that there was no notice of appeal filed or served upon them, and the one annexed to the appeal is nothing more than an unfiled draft document; that the filing of a notice of appeal is a jurisdictional prerequisite and not a mere technicality; that the memorandum of appeal is a strange document as it is not contemplated under rule 6 of this court's Election Petition Rules as grounds of appeal should be captured in the notice of appeal; and that, accordingly, the memorandum of appeal should be struck out.
13. The 2<sup>nd</sup> application in time was filed by the 5<sup>th</sup> respondent and is dated April 17, 2023. It seeks that:
- i. the notice of appeal dated March 7, 2023 and filed on April 6, 2023 be struck out.
  - ii. the memorandum of appeal dated April 3, 2023 and filed on April 6, 2023 be struck out.
  - iii. the appellant's record of appeal dated April 3, 2023 and filed on April 6, 2023 be struck out and the appeal be dismissed; and
  - iv. the appellant do bear costs of the application and appeal.
14. The application is supported by the grounds stated on the face of the motion, and affidavits of the 5<sup>th</sup> respondent and one Jacinta Wangeci Wang'ombe, an advocate in the law firm of the 5<sup>th</sup> respondent's counsel, sworn on April 17, 2023 respectively. The gist of the affidavits is that, after judgment was delivered on March 6, 2023, the appellant served a draft notice of appeal dated March 7, 2023, on March 10, 2023 indicating that it was to be filed in the Court of Appeal registry; that the same was not filed within 7 days as required by the law; that it was filed on April 6, 2023
15. It is also stated that the notice of appeal is also defective as it does not set out the grounds of appeal; that the record of appeal is equally defective as the appellant in his memorandum of appeal purports to challenge the High Court ruling of January 30, 2023 dismissing the application for scrutiny without filing a notice of appeal against the ruling; and that on the whole, this court lacks jurisdiction to entertain the appeal, and as a result, the appeal should be struck out.
16. The appellant opposed the applications vide five (5) replying affidavits. We shall analyse them based on the sequence of filing. The first two in time were sworn on April 22, 2023 by the appellant, in response to the 5<sup>th</sup> respondent's application. In the first affidavit, he deposes that at no time was a draft notice of appeal served on the respondents, but that what was served was a notice of appeal dated March 7, 2023, which was duly filed on the same date electronically at the Court of Appeal registry; that on March 8, 2023, the notice of appeal was lodged and presented in quadruplicate at the Court of Appeal registry, but the registry staff refused to stamp the copies, indicating that they no longer receive physical



copies pursuant to the Court of Appeal Registry Manual Script; that out of abundance of caution, the Notice of Appeal was filed in the High Court on the same day and subsequently electronically in the Court of Appeal despite the fact that the Court of Appeal Electronic Case Management Practice Directions 2021 do not make reference to, or give directions on, the electronic filing of the election petition appeal; that the respondents have failed to demonstrate that they accessed the e-filing portal between March 7, 2023 and March 13, 2023 for them to allege that no notice of appeal was filed; that he followed all necessary steps before filing the record of appeal, and which steps were approved by the Deputy Registrar of the court; that undisputedly, the appeal was filed on April 5, 2023 which was within the 30 days sanctioned by the rules.

17. As to service of the notice of appeal, the respondents acknowledged receipt and the 5<sup>th</sup> respondent subsequently filed a notice of address of service dated March 10, 2023 lodged at Garissa High Court; that the notice of address of service, despite having been paid for on April 17, 2023 has never been served, in stark deviation from the 5-day requirement within which it should be served; that premised on the latter ground, the 5<sup>th</sup> respondent lacks the locus to be heard by the court as he ought to have first sought leave for extension of time to serve the notice of address of service.
18. It is further deposed that, there is no requirement that the grounds of appeal must be anchored in the notice of appeal, and in any case, rule 8(1)(j) of the Court of Appeal (Election Petition) Rules 2017 provides for the filing of such other documents as may be necessary for the proper determination of the appeal; that the appeal also challenges the impugned Judgment's reasoning/rationale on scrutiny, which is a legal matter, and consequently the appeal is not defective for want of form.
19. Whilst maintaining that the record of appeal was filed on April 5, 2023, the appellant states that on both 4<sup>th</sup> and April 5, 2023, the judiciary e-filing system was inaccessible; that he went with his advocate to the Court of Appeal registry where they asked the staff to receive the hard copies of the Record of Appeal but they refused; that an invoice was generated at 12:50pm on April 5, 2023 which was paid for immediately, being payment for the filing of the record of appeal; that his advocate informed him that the e-filing portal resumed working at around 1:20am on April 6, 2023 when they were issued with a case number; that they served the record of appeal within the stipulated timelines of five days from April 5, 2023; that taking into consideration rule 3(d) of the Court of Appeal Rules which provide that excluded days shall not be reckoned where time is less than six days, it follows that service was within the statutory timelines.
20. The appellant further states that on April 14, 2023, his advocates' law firm e-filing portal was hacked and the username changed which compromised their data; that his advocates were only able to get the judiciary ICT assistance on April 25, 2023; that the 5<sup>th</sup> respondent has failed to demonstrate what prejudice he is likely to suffer by the institution of the appeal; that the striking out of the appeal would be tantamount to driving him from the seat of justice; that this court is clothed with power to exercise its discretion under article 159(2)(d) of the Constitution to do substantive justice where a party has not passed the test of compliance with timelines; and that in this respect, the court should consider that the appeal touches on a matter of great public importance that involves the right of the voters of Eldas Constituency to freely make political choices.
21. The 2<sup>nd</sup> affidavit is in response to the 1<sup>st</sup> to 4<sup>th</sup> respondent's application. As regards the timing of the filing and service of both the notice and record of appeal, the appellant regurgitates the contents of the 1<sup>st</sup> affidavit sworn in response to the 5<sup>th</sup> respondent's application. We will only therefore, highlight any salient issues which may have been emphasised or was not addressed.
22. He emphasises that after his advocate finally uploaded the record of appeal online, he was issued with an invoice for payment of court fees and as well advised on the amount of security for costs; that the



payment was deposited in the bank which could only be done during business hours on April 5, 2023 and not April 6, 2023; that upon payment, it is the judiciary that ought to have issued a receipt on time, and the failure to do so cannot be visited on him.

23. The 3<sup>rd</sup> affidavit was sworn on April 24, 2023 by Sandrah Moraa Muturi, an advocate practising with the law firm of the appellant's counsel. She avers that the notice of appeal dated March 7, 2023 was filed both electronically and physically in both the High Court and Court of Appeal registries, and on time; that on April 4, 2023 when they were ready to file the record of appeal, the judiciary e-filing portal had a total down time for the entire day which was common knowledge among advocates; that on April 5, 2023, the system was still down necessitating her colleague to personally visit the Court of Appeal registry to explore the option of filing it manually, but they were turned away and told to await the system's resumption; that her colleague visited the registry a second time and was again turned away; that later, the portal resumed operation, and although it was unreliable, they managed to upload the Record of Appeal by close of business on April 5, 2023 and got invoices for the Record of Appeal and deposit for security; that unfortunately, they were only allocated the appeal number on April 6, 2012 at 1.20am; that they were unable to ascertain the extent of the compromise to their law firm's email portal for the 11 days during which they lost control; and that to the best of their knowledge, they complied with all timelines as set out under the Court of Appeal (Election Petition) Rule 2017.
24. The 4<sup>th</sup> affidavit was sworn on April 26, 2023 by one Elisha Wanga, a process server, in the law firm of the appellant's counsel. He states that he received instructions from the appellant's advocate to physically file a notice of appeal at the High Court and Court of Appeal registries at Milimani Law Courts; that the notice of appeal dated March 7, 2023 was duly received in the High Court registry and on proceeding to the Court of Appeal registry, he was informed that it was already filed, so he left behind 4 copies; that while the registry staff at the High Court requested for proof of payment of court fees through the e-filing system, this did not happen with the Court of Appeal registry; and that none of the registries acknowledged receipt of the documents filed by stamping on the first page.
25. The 5<sup>th</sup> affidavit in time was sworn on April 28, 2023 by Joseph Ondier Onyango, a lawyer and ICT officer at the firm of the appellant's advocates. He states his work involves doing the e-filing for the firm; that on March 7, 2023 at around 11.00am, he successfully filed the notice of appeal dated March 7, 2023 through the judiciary e-filing portal in the Court of Appeal; that at around 2:50pm on the same day, when he checked the portal to see if the appeal had been assigned a number, he got an error on the portal and out of caution, he took a picture; that the error displayed on the screen stated 'invalid JSON response; that such an error occurs when a web application returns a response that is not in a valid JSON format and more often than not, it is caused when expected data is available but cannot be relayed to the user due to a programming error or direct human intervention on the server side of the application; that out of an abundance of caution, on March 8, 2023 he filed the same notice of appeal in the High Court and physically sent a process server to file it in quadruplicate at both the High Court and Civil Appeals' registries; that both copies were brought back without any stamp as it was explained to them that both registries no longer stamp physical documents received by them; that on 10<sup>th</sup> March 2023, he instructed the office assistant to serve the notice of appeal upon the advocates of the respondents who acknowledged receipt; that on March 13, 2023 he emailed the notice of appeal and the letter requesting for certified copies of the Judgment, decree and proceedings to the respondent's advocates which receipt they also acknowledged; that on 4<sup>th</sup> April 2023 when they planned to file the record of appeal, the judiciary e-filing portal had an absolute downtime countrywide which was common knowledge among advocates and stakeholders; that on April 5, 2023, the system was still down and he physically rushed to the Court of Appeal registry at 8:40am requesting to file the Record of Appeal, but he was turned away and told to await the return to normalcy of the system; that he went back at 10:15am and was again turned away; that the system had limited access and it took five hours



- to upload the record of appeal and get invoices in respect of the court fees and deposit for security for which he paid and uploaded immediately; that he managed to file the record of appeal at 4:05pm and stayed in the office until 1:30am on April 6, 2023 waiting for the appeal to be assigned a case number which happened at 1:26 am; and that the portal indicated that the appeal had been filed on April 6, 2023, for which they cannot be blamed.
26. He went to state that on the day he logged into the judiciary e- filing portal, he discovered the instant appeal was mixed up with another appeal, being COAEPA E013 of 2023-Dr Daniel Kabara v Kenya Conference of Catholic Bishops; that there was also mix-up in COAEPA E012 of 2023-*Hassan Mobamed Adam Vs Ahmed Abdullabi Jiir & Ahmed Mubumed Abdi & 2 others* with COACAAPPL E102 of 2023 *Kenya Cultural Center v Dr Edwin Gichangi*; that this led to election petition appeals being allocated civil appeal numbers and others being allocated two numbers; that on April 14, 2023, he learnt that he could not access the firm’s judiciary e-filing portal account from his end and he took all necessary steps to regain control but was unable to; that consequently, he sent their court process server to judiciary ICT office at Milimani to seek help; that it is then that they were informed that the their account’s key credentials had been altered as the email and password then in use were unknown to the judiciary ICT officers; that he wrote an email to the ICT office requesting for assistance after the malicious take over but none came by; that their e-system was only restored on April 25, 2023 after they sent a protest letter to the judiciary ICT Directorate; that subsequently, he received a call from a judiciary ICT officer who alleged that the account issue was caused by an attempt at mapping a new matter with a wrong email address which response was illogical and irrational as they never tried to do this; that the issues highlighted above were due to technological failures, human mistake or hacking, and the appellant should not be punished for acts that were well beyond his advocates’ control; that furthermore, it is not unusual for the judiciary e-filing system to experience downtime; and that although the system is restored immediately after a downtime, it was surprising how this did not happen in the instant scenario which took them aback.
27. The matter came up for hearing before us on June 5, 2023. In regards to the applications, the 1<sup>st</sup> to 4<sup>th</sup> respondents filed submissions dated May 14, 2023, those of the 5<sup>th</sup> respondent are dated May 16, 2023 and for the appellant are dated May 30, 2023. In respect to the appeal, those of the appellant are dated May 16, 2023, and for the 1<sup>st</sup> to 4<sup>th</sup> respondents and 5<sup>th</sup> respondent are dated May 26, 2023 and May 29, 2023 respectively. Learned counsel Ms Hashi and Ms Muturi appeared for the appellant, learned counsel Mr Mwititi appeared for the 1<sup>st</sup> to 4<sup>th</sup> respondents and learned counsel Mr Issa, Ms Caroline Daudi and Mrs Jacinta Wahome appeared for the 5<sup>th</sup> respondent.
28. The court gave directions that in view of the strict statutory timelines for hearing of election petition appeals, it would proceed to hear both the applications and the appeal back to back, but determine the applications first, and should it find that the applications have merit, it would down its tools; if not, it would proceed to determine the appeal on merit.
29. Ms. Hashi in response to the applications, submitted that the notice of appeal was filed electronically on 7<sup>th</sup> March, 2023. It was zero-rated so there was nothing to be paid in terms of court fees, and hence they (advocates) were not issued with an invoice. However, they discovered an error on the e-filing system, being a programme/syntax error on the part of the judiciary. Thus, they pursued physical lodgement of the notice of appeal on 8<sup>th</sup> of March, 2023 at the Court of Appeal registry in Nairobi in quadruplicate. The same was not stamped as they were informed that the registry had ceased to receive physical files. They then lodged the notice both electronically and physically in the High Court registry at Nairobi on March 8, 2023. They also filed the record of appeal which was receipted on April 6, 2023 but was stamped on April 5, 2023. There was a downtime on 4<sup>th</sup> and 5<sup>th</sup> April 2023 across all courts in this country. Nonetheless, they were invoiced on April 5, 2023 and they paid the filing fees on the



same date. As such, the fact that they were issued with a receipt on April 6, 2023 was something that was well outside their control and whose culpability they cannot shoulder.

30. On the issue that the notice of appeal ought to be struck out for want of proper format as it lacks grounds of appeal, counsel submitted that the operational law on election petitions is the [Court of Appeal \(Election Petition\) Rules, 2017](#) which do not make a requirement that a notice of appeal should contain grounds of appeal under rule 6. Further, that rule 6 does not bar a party from filing a memorandum of grounds of appeal; that rule 8(1)(j) provides for the filing of any other document, which then implies that a memorandum of appeal may be included in the record of appeal; that the [Rules](#) do not provide in mandatory terms the format that a notice of appeal should take; and, that therefore, the appellant's record and the notice of appeal are correct in form and accord with the law.
31. On the failure to serve the notice of appeal within the time prescribed, counsel relied on section 2 of the [Public Holidays Act](#) which regard Good Friday and Easter Monday as public holidays. Therefore, by virtue of rule 3 of the Court of Appeal Rules, these holidays are excluded in computation of time. Accordingly, the respondents having been served on 12<sup>th</sup> April 2023 that service was within that 5-day limit as envisioned in rule 9 of the [Court of Appeal \(Election Petition\) Rules, 2017](#). She relied on the case of [KCB Bank Kenya Limited vs Mwandoro \(Civil Application E044 of 2021\) \[2023\] KECA 260 \(KLR\) \(17 March 2023\)](#) to buttress this point. She concluded by stating that the appellant had complied in service, filing and instituting the appeal within the ambit of this court's Election Petition Rules, 2017. We were urged to find and hold that the appeal was filed within time.
32. Counsel questioned the respondents' locus in the proceedings, averring that the 1<sup>st</sup> to 4<sup>th</sup> respondents had not filed a notice of address of service as required by the law. She argued that the same was served upon them (advocates), but it was never filed in the Court of Appeal registry. She submitted that the 5<sup>th</sup> respondent filed his notice of address of service at the High Court in Garissa and served it upon them and then 27 days later, filed in the Court of Appeal registry another notice of address of service which was not served upon them, contrary to rule 7 of the [Court of Appeal Rules](#). For the foregoing reason, the respondents did not have the right to address the Court, the appeal was undefended and ought to be allowed as prayed.
33. In addition, counsel submitted that there had been an issue of malicious hacking of their law firm's e-filing system and emails thereon. She submitted that it was not possible on their end to trace the extent of the damage/hacking, but judiciary was able to detect that their username and their office telephone number had been changed for a period of 12 days. Counsel however submitted that the office could not ascertain whether the interference was human or deliberate. She pleaded that we should not visit the hacking of their system on the appellant as it was an issue beyond their control.
34. Mr. Mwiti submitted that the record of appeal should be struck out for not containing a notice of appeal as contemplated under rules 6 and 8 of the Court of Appeal (Election Petition) Rules, 2017. He submitted that no notice of appeal was filed electronically by the appellant, being that the appellant attempted to file it on March 7, 2023, but no case number was generated. Further, there was no evidence that the appellant attempted to file the notice during the six remaining days after judgment was rendered, nor did he file an affidavit from this court's registry staff to explain what they termed as "a programming error". He relied on the case of [Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others](#) [2016] eKLR where this court held that the failure to prove that the notice of appeal has been lodged in a court registry is a glaring authentication deficiency. For this reason, the appellant's assertion that the Court of Appeal registry does not receive documents is not true as the registry stamps at the bottom of the notice of appeal to acknowledge lodgement.



35. He emphasized that the failure to comply with mandatory provisions of the law ultimately means that this court has no jurisdiction to entertain the appeal. Counsel placed reliance on the case of *Boy Juma Boy & 2 others v Mwamlole Tchappu Mbwana & another* [2014] eKLR, where this court held that it cannot excuse a delay even in the case of mistake by counsel, and in that case, the notice of appeal was struck out. Furthermore, that the Supreme Court has also rendered itself, that no mistakes would be entertained in an election petition, and indeed where a notice of appeal is not filed, the court cannot be properly seized of the matter.
36. Counsel further submitted that section 85A(1) of the *Elections Act* and rule 9 of the Court of Appeal (Election) Petition Rules require that a record of appeal be filed within 30 days of the judgement. In this case, the impugned Judgement was rendered on the 6<sup>th</sup> of March, 2023 and the filing of the appeal was concluded on April 6, 2023, which date overshoot the mandatory 30 days within which the appeal ought to have been filed. Counsel emphasised that the filing of an appeal is concluded after an appeal number is generated; which number was generated on April 6, 2023.
37. The allegation that the e-filing system was on downtime, was rebutted by submitting that it is in public domain that any time the judiciary experiences a downtime, it informs parties and the public in relevant platforms, and in this case, no such notice was put up. Therefore, the record of appeal having been filed on April 6, 2023 it ought to have been served by close of business on April 11, 2023; instead, it was served on the April 12, 2023.
38. Counsel also urged us to strike out the memorandum of appeal because it is a document not known by the *Court of Appeal (Election Petition) Rules*, 2017.
39. On his part, Mr Issa submitted that a notice of appeal is required to be filed within 7 days of its lodgement. He submitted that it was not true that the judiciary electronic system was not working on March 7, 2023. And, in any case, the specific time that the alleged downtime was experienced was not indicated. In support of this submission, counsel filed a further affidavit, sworn by one Jecinta Wangechi Wan'gombe, an advocate in his law firm, sworn on May 5, 2023 in which he annexed email communications between his law firm and the Registrar Court of Appeal. In the first email, dated March 7, 2023, the law firm was informing the registry that they intended to file a notice of appeal and not a record of appeal, and that the e-filing system had no provision for filing a notice of appeal. The registry responded on the same day stating that they could file the document through the judiciary e-filing system and make payment of court fees thereof, and that the system would auto generate the election petition number as well. The law firm, on the same date sent another communication forwarding two notices of appeal and copied all the advocates for the respondents.
40. The law firm also annexed to the further affidavit a communication from the Deputy Registrar of this court in respect of another election petition that Mr Issa was involved in where the Registrar communicated to the parties therein to the effect that the notice of appeal was filed on the evening of 7<sup>th</sup> March, 2023. The communication also indicated that the system shall generate an election petition appeal number and the invoice for payment. Counsel also annexed a tracking number page which shows that on the March 7, 2023, three payments were made in regard to the notice of appeal (which was allocated a case number 'Court of Appeal Election Petition Number E003 of 2023'; and three court fees receipts issued on the March 7, 2023 in respect to a service fee of Ksh. 400/-, and two notices of appeal of Ksh 450/- each.
41. Counsel submitted that in this case, the petition number was generated on April 6, 2023, which was a date beyond the 30 days since the filing of the appeal. He submitted that even if the first attempt to file the notice of appeal failed, there was no proof that the appellant made a second or third attempt to file and he was unsuccessful. He argued that the filing of a notice of appeal is not premised on faith; it



is a matter of fact which must be proved. The proof can only be demonstrated by way of payment of filing fees and in turn the issuance of a payment receipt by the registry.

42. In urging us to down our tools for want of jurisdiction, counsel relied on the cases of *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others* [2014] eKLR, in which the Supreme Court observed that where a question of jurisdiction is raised in an application within an appeal, the application should always be decided first; *Apungu Arthur Kibira vs Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, to the effect that if a notice of appeal is not filed in the Court of Appeal within 7 days, then the court must find that it has no jurisdiction to entertain the appeal; *Lesirma Simeon Saimanga vs Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, *Anuar Loitiptip vs Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR and *Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR in which this court held that a notice of appeal filed in the High Court does not confer jurisdiction to the Court of Appeal even if it is filed on time. Consequently, the notice of appeal that was filed in the High Court must be considered as defective as it cannot trigger the jurisdiction of this court to hear and determine the appeal.
43. Finally, counsel submitted that a notice of appeal must comply in form with rule 6(2) and (3) of the *Court of Appeal (Election) Petition Rules*, 2017. It must be in the format provided under the Schedule of the rules, being Form EPA 1. It must also state which part of the impugned judgment is/are appealed pursuant to rule 6(3)(a). For the reason that the Notice of Appeal the appellant relies on did not comply with these mandatory provisions, we were urged to strike it out. To buttress this submission, counsel relied on the cases of *Apungu Arthur Kibira*, *Lesirma Simeon Saimanga* and *Musa Cherutich Sirma* (*supra*).
44. In the same vein, we were urged to strike out the memorandum of appeal, firstly, because it is not envisaged under the *Court of Appeal (Election) Petition Rules*, 2017. Indeed, rule 8 spells out what should constitute a record of appeal and in this case, a memorandum of appeal is not one of the documents listed among its contents. Furthermore, under the Memorandum of Appeal, the appellant seeks to challenge the impugned Judgment on matters of law and fact, which renders it defective.
45. On the assertion that the respondents did not serve a notice of address upon the appellant, counsel submitted that the rules did not provide for such service. Instead, the rules only require the appellant to serve the respondent(s) directly with a record of appeal and the notice of appeal. They were served and they filed their notice of address, and therefore, they were properly before the court. Reliance was placed on the case of *Abdullahi vs Independent Electoral and Boundaries Commission & 3 others* (Election Petition Appeal E004 of 2022) [2023] KECA 207 (KLR) (24 February 2023) (Judgment), where this court held that: -

“Although the appellant raised various issues for our determination, the appeal turns on the question of its competence. It matters not that the preliminary objection was not filed within seven (7) days of service of the appeal as required under rule 19. The objection touches on the jurisdiction of the court to hear and determine the appeal on its merits. Such an objection can be raised at any stage of the proceedings, even by the court on its own motion. See *Attorney General & 2 others v Okiya Omtata Okoiti & 14 others* [2020] eKLR. The 1st to 4th respondents submitted that the appeal was filed out of time and that, therefore, this court has no jurisdiction to hear and determine it on its merits. The appellant does not dispute that the appeal was filed three days outside the statutory period but urges us to exercise our discretion and enlarge the time so that we can assume jurisdiction and determine the appeal on its merits.



He submitted that the court in that case made a finding that the record of appeal was filed three days out of time and they struck out the record of appeal. He urged us to make a similar determination in dismissing the appeal.

46. In a quick rebuttal, Ms Hashi submitted that the position of the law had been established by the Supreme Court in *Shah & 7 others vs Mombasa Bricks & Tiles Ltd & 5 others* (Application 3 (E008) of 2022) [2022] KESC 25 (KLR) (8 July 2022) (Ruling). In that case, the court dealing with inadequacy of technology placed only one requirement as a pointer that a party attempted to file documents, and that was, that a party must demonstrate that he/she was at the registry within the prescribed timelines. In an attempt to show that this requirement was satisfied, counsel submitted that the ‘Visitor’s Notes’ annexed to the affidavit of Joseph Ondier Onyango sworn in opposition to the respondents’ applications, remains a testament that the appellant and his counsel were in the court’s registry. Suffice it to note that there are two Visitor’s Notes for entry into the Supreme Court Building: one indicates that the office being visited is the Court of Appeal registry for filing inquiry on April 5, 2023 at 8:36Hours; and the second, also dated April 5, 2023 at 10:00 Hours to the same registry for the purpose of filing a record of appeal.
47. She reiterated that a notice of appeal is not subject to payment of court fees and so no invoice would have been generated. That it is also common knowledge that technology fails and when that happens, parties revert to what the law says, which is that parties must lodge their documents physically in quadruplicate at the registry. They complied with this requirement and after filing, the notice of appeal was neither marked as civil nor criminal in terms of the case for which it was filed. It was her contention therefore, that the notice of appeal is properly on record and should be upheld.
48. We have considered the appeal, the applications, the respective detailed written and oral submissions on the applications and the appeal, the cited respective authorities and the law. It is needless to say that the issues raised in the applications are preliminary in nature. They challenge the jurisdiction of this court to hear and determine the main appeal. They impact on the competence of the appeal. Consequently, it is only prudent that we first dispense with the applications. We say so taking to mind that jurisdiction is everything and without it a court has no other recourse but to down its tools. See *Owners of Motor Vessel “Lilian S” v Caltex Oil (k) Ltd* [1989] eKLR.
49. The same principle was enunciated by the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR as follows:
- “A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the 1st and 2nd respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings.”
50. It is a settled legal principle that jurisdiction is a matter of law; it is a matter that must be determined before a court can embark on the main dispute at hand. We shall therefore first deal with the applications, and if we find we have no jurisdiction, we shall down our tools; if the contrary obtains, we shall proceed to determine the appeal on its merit.



51. As regards the applications, we have demarcated three issues for determination, namely:
- a. Whether the notice of appeal, memorandum and record of appeal were filed within the required timeframe.
  - b. Whether the notice of appeal, memorandum and record of appeal were served within the required timeframe.
  - c. Whether the notice of appeal is incompetent and/or defective.
  - d. Whether the appeal is merited.
52. On the first limb of the first issue, what is in dispute is whether the notice of appeal was actually filed and if it was, whether it was filed within the stipulated timelines. The appellant claims to have tried filing the notice of appeal on March 7, 2023, but was unable to do so due to what his counsel termed as 'an e-filing program error'. After the counsel failed to file online, they (counsel and the appellant) then tried to file it physically in the court's registry but it was not received. This prompted them to file it in the High Court, both electronically and physically on the March 8, 2023.
53. It is uncontested that the impugned Judgment was rendered on March 6, 2023. Therefore, the notice of appeal ought to have been filed within 7 days, which means that the appellant had until the March 13, 2023 to file it.
54. The meaning of a 'notice of appeal' is provided for under section 2 of the [\*Court of Appeal \(Election Petition\) Rules, 2017\*](#) as:
- .....notice lodged in accordance with rule 6.
55. Rule 6 of the Rules in part provides as follows: -
- 6(2) A person who desires to appeal to the court against a decision of the High Court in an election petition shall, within seven days of the date of the decision appealed against, lodge a notice of appeal.
56. And the term 'registry' under section 2 of the rules has been given the meaning of:
- ...means the registry of the court and includes a sub-registry;
57. Under the same section, the word 'court' means:
- ..... means the Court of Appeal;
58. It cannot be gainsaid therefore, that a notice of appeal as lodged in the High Court is not what is contemplated within the meaning of the Court of Appeal (Election Petition) Rules, 2017. It is categorical that the Rules envision that a notice of appeal ought to be filed in this court's registry within 7 days of the date of judgment.



59. This position was reaffirmed by the Supreme Court in *Musa Cberutich Sirma vs Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR when upholding this court’s decision, thus; -

“(56) In that context and specific to this case, the Court of Appeal made a factual finding that:

“On the face of the document that was filed at the High Court at Kabarnet, it was the intention of the 3<sup>rd</sup> respondent to file the document at the High Court in Kabarnet. That is what the document says on its face.

The document also shows that it was lodged with the Deputy Registrar at the High Court in Kabarnet. It cannot therefore be said that the 3<sup>rd</sup> respondent at any time complied with filing a proper notice of appeal as required by the rules of this court regarding election petition appeals where a notice of appeal must be filed at the registry of the court.”

57. The Court of Appeal was thus categorical that Rule 6 of the *Court of Appeal Rules*, 2017, requires any person intending to appeal the decision of the High Court, to file a notice of appeal in the prescribed format at the Court of Appeal Registry and not at the High Court Registry as was the case herein. It emphasised on the role played by a notice of appeal as was enunciated in this court’s decision of Nicholas Salat where we stated that the filing of a notice of appeal is a jurisdictional pre-requisite and cannot be equated to a mere technicality. The court was also guided by the case of Raila Odinga 2013 in which we advised on the need to take the unique circumstances of each case into consideration when determining the extent of the application of article 159(2)(d) of *the Constitution*. The Court of Appeal also went further and noted that no evidence was tabled to support the allegation that a Court of Appeal Registry official misled the petitioner’s advocate’s clerk by directing him to file the notice of appeal at the High Court in Kabarnet. Taking all these matters into account, the Court of Appeal then concluded that the record of appeal filed by the petitioner contained an invalid notice of appeal and hence incompetent and ought to be struck out.

58. On our part, we can only interfere with the appellate court’s exercise of discretion if the appellant can show that:

- i. The appellate court acted on a whim or that;
- ii. Its decision is unreasonable and
- iii. It is made in violation of any law or the *Constitution* or that;
- iv. It is plainly wrong and has caused undue prejudice to one party.

60. On the latter issue however, we are aware that the *Court of Appeal (Election Petition) Rules*, 2017 were published on 28th July 2017 and parties (and their advocates) may not have been aware of them by the time notices of appeal from



Election Courts were being filed in 2018. The Court of Appeal thereafter, sitting as different benches of the court made a number of decisions in exercise of discretion in the manner described above. With the rules now being in the public domain and notwithstanding our refusal to interfere with the exercise of discretion in this case, parties are now on notice as to where and how notices of appeal under the Court of Appeal Rules aforesaid ought to be filed. The apparent conflicting decisions of that court should not therefore be an issue in the next election cycle. That is all there is to say on that matter.”

60. What is paramount and worth noting is that no appeal to this court can be initiated without the filing of a notice of appeal in this court’s registry. Indeed, it is a notice of appeal, properly filed, that triggers the jurisdiction of this court. We place reliance on the case of *Patricia Cherotich Sawe vs IEBC & 4 Others* [2015] eKLR where the Supreme Court had this to say:

“What is the objective purpose of a notice of appeal? It serves the important role of informing the relevant parties to the suit, especially the successful litigants, that their gains may be cut short or delayed. It signals the intention to pursue an appeal. It is only fair that parties, in light of their legitimate anticipation, should know within the shortest time possible, whether to rest their litigious poise. It is consistent with the general rule guiding the judicial process; “litigation must come to an end.”

61. Did the appellant file a notice of appeal so as to trigger our jurisdiction in this appeal? The appellant argued that when he tried to file the notice of appeal on March 7, 2023, the system was experiencing a downtime due to a program error. However, as aptly stated by Mr Mwiti, the appellant had six remaining days to try and file it, but he never attempted to do so. It is also curious that on the 8<sup>th</sup> March 2023, the appellant successfully filed the notice of appeal in the High Court registry through the e-filing system. The question that arises is; why did he not attempt to do so in this court?
62. We do not ask the latter question in vain. With due respect to counsel for the appellant, this court does not operate a distinct or separate e-filing system from other courts in the Republic. Kenyan Judiciary operates one e-filing system, namely ‘the judiciary e-filing system’. What this means is that, if a party is not able to lodge documents in one court then it would be impossible to lodge the same documents at the same time in another court anywhere in the Republic of Kenya. Therefore, the appellant cannot be heard to say that after he was unable to file the notice of appeal in the Court of Appeal registry, he was able to file it in the High Court registry. Furthermore, by his counsel as well as the law firm’s ICT officer who swore one of the affidavits in opposition to the respondents’ applications, one Joseph Ondier Onyango, confirmed that the Judiciary e-filing system was not working on the 7<sup>th</sup> and March 8, 2023 anywhere in the Republic. It is therefore, self-conflicting to turn around to purport to have managed to file a notice of appeal on March 8, 2023 at the High Court registry. We then pose this other question; why did the appellant not exhibit a copy of a notice issued by the judiciary informing its stakeholders that it was experiencing a downtime, yet admittedly, the Judiciary always issues such a notice?
63. The inescapable conclusion from this chronology is that firstly, the judiciary e-filing system was not at all experiencing any downtime; and secondly, the appellant never attempted to file the notice of appeal within the prescribed time in the Court of Appeal registry.
64. In emphasising the foregoing, we reckon that the 1<sup>st</sup> to 4<sup>th</sup> respondents annexed to their application, a document titled ‘judiciary tracking number’ demonstrating that the filing date was effected on April



6, 2023 at 1.04.06 hours, which is a pointer that indeed the appellant did not lodge the appeal on April 5, 2023 as alluded.

65. Further, we have versed ourselves with the further affidavit of Jecinta Wangechi Wan'gombe, an advocate in the law firm of the 5<sup>th</sup> respondent's counsel, sworn on May 5, 2023. As submitted by learned counsel Mr Issa, the law firm was able to effect filing of a notice of appeal in another election appeal petition, namely EPA E003 of 2023. They were also able to make all requisite court fees upon which the election petition number was generated. Indeed, as explained above, a case number and for this matter an election petition number cannot be generated until all necessary court fees are paid. It is an auto-generated number. We thus disagree with counsel for the appellant that the notice of appeal is not charged, or that a case number was generated a day after the notice of appeal had been lodged. The evidence availed by the 5<sup>th</sup> respondent is a clear testament that the court e-filing system was up and running as at March 7, 2023, and the appellant can only blame himself for not doing what he was required to do on this day and the succeeding 6 days.
66. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court aptly held that:

“A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite.”

67. From the foregoing, it is clear that a notice of appeal was not filed within the prescribed timeframe, and so the invocation of the jurisdiction of this court to hear this appeal was time barred.
68. The other limb of the first issue is whether the record of appeal was filed within the stipulated timelines. The record of appeal is dated April 3, 2023. The appellant contends that he filed it on April 5, 2023 while the respondents contend that it was filed on April 6, 2023. The *Court of Appeal (Election Petition) Rules*, 2017 do not provide for the filing of a memorandum of appeal, as a component of the record of appeal. They provide for the filing of a record of appeal that ought to be filed within 30 days, which in this case runs from March 6, 2023 when the Judgment of the High Court was rendered, which would have been the April 5, 2023.
69. Before we move on, it is necessary to point out that counsel for the appellant has consistently referred to rule 9(1) and (2) of the *Court of Appeal (Election Petition) Rules*, 2017 when referring to the date within which the Notice and Record of Appeal ought to have been filed. As noted in the case of *Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & 2 others* (supra), the current operating *Court of Appeal Election Rules* came into force on 28<sup>th</sup> July 2017 after amendment. The Supreme Court was categorical that in subsequent election cycles, after the 2017 cycle, the court is not expected to make conflicting decisions on account that it is not clear how to resolve issues of procedural technicalities as regards to the filing of election petition appeals. The court opined that, as at present, the current rules are in the public domain and must be strictly observed, more so bearing in mind the strict timelines within which election petition appeals should be heard and determined. Rule 9 of the current Rules provides for the style of cause in notice and not the timeframe of filing the appeal. For avoidance of doubt, it reads:

The style of cause shall set out without abbreviation-

- a. the name of the appellant together with the designation “appellant(s)”, and
- b. the name of each party against whose interest the appeal is taken, together with designation “respondent(s).



The current rule that provides for the timeframe is rule 8(5) which provides that the record of appeal shall be filed within thirty days from the date of the Judgment of the High Court.

70. Therefore, the dates within which the appeal should be filed as espoused above should be read and interpreted conjunctively with section 85A(1)(a) of the [Elections Act](#), which provides that:

2. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of the county governor shall lie to the Court of Appeal on matters of law only shall be-
  - a. filed within thirty days of the decision of the High Court;

71. In the current operating structure of the judiciary since digitization of this court's registry, the filing of an election petition appeal entails the following: the petitioner uploads a notice of appeal; he/she then makes the requisite court fees, and the system then auto generates a case number. Payment of court fees is a prerequisite to allocation of a case number. Further, if the e-filing system is experiencing downtime, a notice is issued to all parties and any court stakeholder. In the event that a party wishes to file documents that relate to a matter that is time bound, they are not turned away. Instead, they are advised to send their documents through the judiciary email. The registry will then take it upon itself to upload the documents when the system starts working again. After the uploading by the registry, the appellant is then advised on the fees assessed so that he/she can make the payment and a petition number is generated. If the system does not resume within time, the email correspondence sending the documents to the registry, become the prima facie evidence that the petitioner filed his/her notice of appeal/documents on time.

72. In this matter, the appellant, advanced the argument that when he and his advocate went to file the documents physically in the registry, they were turned away. To this end, he annexed to a replying affidavit of Joseph Ondieki, an advocate in the firm of his advocates, a Visitor's Note as a testimony that they (with is advocate) went to the Court of Appeal registry for the purpose of filing inquiry on April 5, 2023. (A Visitor's Note is the equivalent of an entry pass which visitors entering the court building are issued with at the gate to show the purpose of access to the building). Also annexed to the affidavit is an email dated April 14, 2023 addressed to 'ictsupport@court.go.ke complaining that they (appellant and his counsel) were unable to log into the judiciary e-filing portal account and they needed assistance in the recovery of the said account and in some of their files. They cited three files including the appeal herein. There are also two emails dated April 18, 2023 and April 24, 2023 respectively which are a follow up on the issue of the alleged hacking of the e-filing portal account.

73. On the former issue, although there is the allegation that the registry turned away the appellant and his counsel, there is no evidence that they forwarded the notice of appeal through the judiciary email as would be expected. Further, they still had six more days to attempt to lodge the record of appeal which they did not seize advantage of.

74. As regards to the annexures, it is notable that the emails date way after the timelines within which the petition ought to have been filed. This implies that if any hacking to the appellant's counsel email portal happened, it definitely was after closure of these timelines. We say no more on this aspect, as we have demonstrated that any alleged hacking of the appellant's counsel email portal account could only have happened after the lapse of the timelines within which the notice ought to have been filed. Accordingly, the assertion that the Record of Appeal could not be filed on time because of a takeover of the counsel's email portal cannot then be used as an excuse or reason for not filing the record of appeal on time.



75. The appellant also argues that he filed the record of appeal on April 5, 2023, but were stamped on April 6, 2023, which, according to him means that he lodged the appeal on April 5, 2023. We then pose the question; was the record of appeal lodged at the point of payment of court fees or at the point of issuance of receipt of payment? The answer lies in the succeeding paragraph.
76. The foregoing analysis and cross checking with the court's registry on how election appeals are filed, leads to the conclusion that the lodging of a document is compounded by several steps and one cannot claim completion of lodgement of an appeal without completing all steps. The process of lodgement can only be deemed as completed and successful upon all the mandatory and integral steps having been undertaken by all parties involved. In short, all the required steps operate conjunctively and not disjunctively. We have accordingly arrived at a finding that the record of appeal was filed on April 6, 2023, and, as such, it was filed out of time by one day.
77. On the second issue which is whether the notice and record of appeal were served within the stipulated timelines, having held that there was no notice of appeal filed, our focus is on the record of appeal only. Rule 8(5) of the *Court of Appeal (Election Petition) Rules*, 2017 provides that the record of appeal shall be filed within thirty days from the date of the Judgment of the High Court. Sub-rule (6) on the other hand provides that the appellant shall serve a copy of the record of appeal on all the parties named in the notice of appeal within five days of filing of the record of appeal.
78. It is not in dispute that the appellant served the record of appeal on April 12, 2023. Counsel for the appellant submitted that this was on account that Good Friday and Easter Monday, that were on the 7<sup>th</sup> and 10<sup>th</sup> of April 2023 respectively, were excluded days as provided for under section 2 of the *Public Holidays Act*, and as contemplated under rule 3 of the Court of Appeal Rules, 2022. As such, having served the record of appeal on the April 12, 2023, it means that it was served on a date well within the 5-day limit spelt out under rule 8(6). In this regard, the appellant relied on the case of *KCB Bank Kenya Limited vs Mwandoro* (Civil Application E044 of 2021) [2023] KECA 260 (KLR) (17 March 2023) (Ruling).
79. We note that the *Court of Appeal (Election Petition) Rules*, 2017 do not make provision in regards to computation of time. However, rule 4 of the Rules thereunder, allows this court to apply the *Court of Appeal Rules*, 2010 (now 2022 Rules), where there is no applicable provision in relation to election petition appeals. In this respect, we take recourse in rule 3 of the 2022 Rules which makes the following provisions on computation of time:

Any period of days fixed by these rules or any decision of the court for doing any act shall be computed in accordance with the following provision-

- a. the period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;
- b. if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;
- c. where any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;



- d. where any act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of time; or unless the court otherwise directs, the period of the Christmas vacation shall not be reckoned in the computation of time.

80. It is now undisputed that the appellant ought to have filed the record of appeal pursuant section 85A(1) (a) of the *Elections Act*, on the 5<sup>th</sup> of April 2023, and accordingly serve it by April 10, 2023. We take cognizance that between the 5<sup>th</sup> and April 10, 2023, there were the two public holidays which as per rule 3 of this *Court's Rules*, 2022, are excluded in the computation of time. This means that the record of appeal ought to have been served by April 12, 2023 which it was, and, as such, we do hold that the record of appeal was served in accordance with the provisions of the law.

81. On the third issue, which is whether the notice of appeal is incompetent and/or defective, the respondents urge that it is, on the ground that it seeks to appeal matters of fact and that it does not contain the grounds of appeal.

82. Section 85A (1) of the *Elections Act* provides as follows:

1. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county government shall lie to the Court of Appeal on matters of law only and shall be-
  - a. filed within thirty days of the decision of the High Court; and
  - b. heard and determined within six months of the filing of the appeal.

Tied to the above provision is rule 6(3)(c) of the *Court of Appeal (Election Petition) Rules*, 2017 which provides that:

A notice of appeal shall identify the judgment from which the appeal is based and shall, in separate numbered paragraphs-

- c. precisely set out the grounds of the appeal.

83. The above provisions are couched in mandatory terms, so much so that there is no wriggle room for a party who does not comply, to seek refuge in any other provision. As rightly submitted by counsel for the respondents, there is no provision for filing of a memorandum of appeal in the Record of Appeal in an election petition appeal. The grounds of appeal should be contained in the notice of appeal, and no more.

84. Indeed, so as not to leave room for any error, sub-rule (5) of rule 6 of the afore stated Court of Appeal Election Rules provides for the format in which the notice of appeal should be drawn, which as per Form EPA 1 set out in the Schedule of the Rules. This was enunciated by the Supreme Court in the case of *Musa Cherutich Sirma vs Independent Electoral and Boundaries Commission & 2 others* (supra).



We shall only rehash paragraph 57 in that case which we think aptly suits this scenario. The court had this to say;

“(57) The Court of Appeal was thus categorical that rule 6 of the Court of Appeal Rules, 2017, requires any person intending to appeal the decision of the High Court, to file a Notice of Appeal in the prescribed format at the Court of Appeal Registry and not at the High Court Registry as was the case herein. It emphasised on the role played by a notice of appeal as was enunciated in this court’s decision of *Nicholas Salat* where we stated that the filing of a notice of appeal is a jurisdictional pre- requisite and cannot be equated to a mere technicality. The court was also guided by the case of *Raila Odinga 2013* in which we advised on the need to take the unique circumstances of each case into consideration when determining the extent of the application of article 159(2)(d) of the *Constitution*. The Court of Appeal also went further and noted that no evidence was tabled to support the allegation that a Court of Appeal Registry official misled the petitioner’s advocate’s clerk by directing him to file the notice of appeal at the High Court in Kabarnet. Taking all these matters into account, the Court of Appeal then concluded that the record of appeal filed by the petitioner contained an invalid notice of appeal and hence incompetent and ought to be struck out.”

85. In the circumstances, we find and hold that the impugned notice of appeal was not filed in the prescribed format and the outcome would be to strike it out. To quote this court (differently constituted) in *Abdullahi v Independent Electoral and Boundaries Commission & 3 others* (Election Petition Appeal E004 of 2022) [2023] KECA 207 (KLR) (24 February 2023), it was held that:

“It is clear to us beyond any peradventure that an appeal from the High Court to this court in an election petition must be filed within thirty (30) days as stipulated by section 85A(1)(a) of the *Elections Act*, 2011. This provision accords with article 87 of the *Constitution* which provides for the timely settling of electoral disputes. The provisions of section 85A(1)(a) of the *Elections Act*, 2011 are cast in stone and there is no wriggle room for the consideration of the question of enlargement of time.”

86. Counsel for the appellant pleaded with us that, in the event we find that the Notice of Appeal does not accord in form with rule 6 of this *Court’s Election Petition Rules*, we apply the provisions of article 159(2)(d) of the *Constitution* in the interest of doing substantive justice. We would accede only if we had the leeway to do so. We have said in the foregoing that election petition appeals are special in nature due to the strict timelines within which they should be heard and determined. Further, the court’s Election Petition Rules were formulated so that parties endeavour to comply with all procedures without making any error. Otherwise, if errors of procedure were excused, the timelines would never be met as each party would always seek an opportunity to argue the merit or demerit of any request made to the court with a view to condoning the error. In the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others* [2014] eKLR, Kiage, JA, while dissenting stated that:

“I am not in the least persuaded that article 159 of the *Constitution* and the oxygen principles which both 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 aid in the overthrow or destructions of rules of procedure and to create an anarchial free for all in the administration of justice. This court must never provide 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, when it seems to be aiding one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in this even handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their applications are concerned.”

87. We are of a similar view that, the Court of Appeal having expressed itself that there is no room for not strictly adhering to this *Court’s Election Petition Rules*, it is a testament that the appellant had to strictly file the notice of appeal in strict compliance with rule 6 thereof, both in form and content. The oxygen principle under article 159(2)(d) of the *Constitution* cannot, unfortunately come to his aid. Having said that, it follows that the submission that the respondents’ notice of address of service that was filed in the Court of Appeal was not served on the appellant is neither here nor there, as, the jurisdiction of this court is invoked by a properly filed notice of appeal.
88. In conclusion, we do hold that a notice of appeal is that document which confers upon the court the jurisdiction to adjudicate over matters before it. Jurisdictional failings are non-excusable and cannot be waived. As aptly stated in *Apunga Arthur Kibira v IEBC & 2 others* [2018] eKLR that
- “...the court has no business crafting a jurisdiction it does not have, whatever amount of sympathy it may have on the applicant. It has to down its tools.”, our business in this matter rests at this point. We cannot arrogate to ourselves jurisdiction that has not been conferred on us by the law.”
89. And, now, having found that the appellant failed to comply with the mandatory provisions and statutory timelines, and having held that there was no notice of appeal filed herein, we find that the appeal before us is incompetent and we can do no more than down our tools.
90. Accordingly, we allow the applications as follows;
- a. The notice of motion by the 1<sup>st</sup> to 4<sup>th</sup> respondents dated April 13, 2023 be and is hereby allowed.
  - b. The notice of motion by the 5<sup>th</sup> respondent dated April 17, 2023, be and is hereby allowed.
  - c. The notice of appeal dated March 7, 2023 be and is hereby struck out.
  - d. The record of appeal dated April 3, 2023 be and is hereby struck out.
  - e. The costs of the applications and the struck out appeal shall be borne by the appellant.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**J.M. MATIVO**

.....



**JUDGE OF APPEAL**

**G.W NGENYE-MACHARIA**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**Deputy Registrar**

