



REPUBLIC OF KENYA



**Dado v Godhana & 2 others (Election Petition Appeal
E002 of 2023) [2023] KECA 869 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 869 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
ELECTION PETITION APPEAL E002 OF 2023
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 7, 2023**

BETWEEN

HUSSEIN TUNEYA DADO APPELLANT

AND

DHADO GADDAE GODHANA 1ST RESPONDENT

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

YONAH OGAYO OWILO 3RD RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Garsen (Hon. Lady Justice Njoki Mwangi) delivered on 3rd March, 2023 in Election Petition No. E001 of 2022)

JUDGMENT

1. Article 180(1) of constitution the [Constitution of Kenya](#), 2010 provides that:

The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.

2. Pursuant to the above Article, Kenyan voters went to general elections on 9th August, 2022 and the voters in Tana River County joined the other Kenyans in electing their Governor. At that election, the Appellant, Hussein Tuneya Dado, contested the said elections through the vehicle of Orange Democratic Movement (ODM) political party while the 1st Respondent, Dhado Gaddae Godhana, contested on a United Democratic Alliance (UDA) political party.

3. At the end of the electoral process the Electoral Management Body, the Independent Electoral and Boundaries Commission, the 2nd Respondent in this Appeal, announced the outcome thereof whose



results were that the 1st Respondent had emerged the winner of that election having garnered 26,982 votes while the Appellant herein came a close second with 26,633 votes.

4. The Appellant was not satisfied with those results and challenged the same before the High Court sitting in Malindi vide Election Petition No. E001 of 2022 contending that the said election was not conducted in accordance with the principles laid out in the Constitution of Kenya, 2010, the electoral laws and regulations as it was tainted with serious illegalities, substantial irregularities and electoral malpractices on the part of the 2nd and 3rd Respondents. This, according to the Appellant, rendered the announcement and declaration of the said elections null and void. The Appellant herein therefore sought the following reliefs:
 - i. A declaration that the election for Governor, Tana River County held on 9th August, 2022 was not conducted in accordance with the principles laid down in the Constitution of Kenya 2010 and the applicable electoral laws and regulations and the results declared on 12th August, 2022 and gazetted on 23rd August, 2022 are invalid, null and void;

A declaration that the election for Governor, Tana River County held on 9th August, 2022 was not conducted in accordance with the principles laid down in Constitution of Kenya 2010 and the applicable electoral laws and regulations and the results declared on 12th August, 2022 and gazetted on 23rd August, 2022 are invalid, null and void;
 - ii. A declaration that Dhadho Gaddae Godhana was not validly elected as the Governor Tana River County;
 - iii. The election of the 1st respondent Dhadho Gaddae Godhana as Governor Tana River County during the elections held on 9th August, 2022 is hereby declared null and void and a certificate to that effect do issue;
 - iv. The respondent do pay your (sic) petitioner's costs to this petition;
 - v. Such other relief this Honourable Court may deem fit to grant.
5. After hearing the evidence adduced by all the parties to the petition, the High Court (Njoki Mwangi, J) on 3rd March, 2023, dismissed the petition and upheld the 1st Respondent's election as the Governor of Tana River County. The Learned Judge ordered the 2nd Respondent to pay to the 1st Respondent Kshs 3,000,000.00 being the costs of the petition while the Appellant was ordered to pay to the 1st Respondent the sum of Kshs 2,000,000.00 in respect thereof. Aggrieved by the said decision, the Appellant filed a Notice of Appeal dated 24th March, 2023 on 28th March, 2023.
6. By a Notice of Motion dated 4th April, 2023 expressed to be brought pursuant to Rule 36 of the *Election (Parliamentary and County) Election Petition Rules, 2017* and Rule 6(2) of the Court of Appeal (Election Petition) Rules, 2017 (hereinafter referred to as "the Rules"), the 1st Respondent moved this Court seeking to have that Notice of Appeal be struck out for being filed and served outside the time stipulated by law. On his part the Appellant, in his Notice of Motion dated and filed on 6th April, 2023 expressed to be brought pursuant to Rules 5 and 17 of the Rules, supported by his affidavit sworn on even date, sought extension of time for filing and serving the said Notice of Appeal.



7. The main appeal was lodged on 30th March, 2023. In his memorandum of appeal, the Appellant based his challenge to the determination of the High Court on the following grounds:
1. The Learned Judge erred in law by failing to inquire whether the elections for Governor Tana River County held on 8th August, 2022 were conducted in accordance with the provisions of article 81(e) of the Constitution of Kenya 2010 which requires an election to be carried out in a transparent manner and to be administered in an impartial, neutral, efficient, accurate and accountable manner.
 2. The Learned Judge erred in law by failing to find that the elections for Governor Tana River did not meet the threshold set by Article 81(e)(5) of the Constitution of Kenya 2010 as the said election was not conducted in an efficient, accurate and accountable manner
 3. The Learned Judge erred in law by failing to inquire whether the elections for Governor Tana River County held on 8th August, 2022 were held in accordance with Article 86(b) of the Constitution of Kenya 2010 which requires votes to be counted, tabulated and the results announced promptly by the Presiding Officer at each polling station.
 4. The Learned Judge erred in law by failing to find that the elections for Governor Tana River County held on 8th August, 2022 did not adhere to the threshold outlined in Article 86 of the Constitution of Kenya 2010.
 5. The Learned Judge erred in law by giving a wrong interpretation of Section 83 of the Elections Act and requiring the Appellant to prove that Non-conformity or Non-compliance with Election laws by the 2nd and 3rd Respondents affected the outcome of the elections thereby departing from the disjunctive test laid down by the Supreme Court of Kenya in Election Petition No. 1 of 2017 Raila Amollo Odinga & Another Versus Independent Electoral & Boundaries Commission (iebc) & Others.
 6. The Learned Judge erred in law by failing to hold that the elections for Governor Tana River County held on 8th August, 2022 were conducted in contravention of the applicable provisions of the Constitution of Kenya, 2010 and other electoral laws and regulations to the such an extent that the elections ought to be nullified as it was impossible to determine which candidate won the said elections.
 7. The Learned Judge erred in law by failing to hold that the shortage of ballot papers for the election of Governor, Tana River County at Nywangwani Primary School and Kaba Wells Mobile Polling Station which shortage was admitted by the 2nd and 3rd Respondent, amounted to an infringement of voters rights under article 38(3)(b) of the Constitution of Kenya, 2010 which infringement was sufficient to nullify the entire election of Governor, Tana River County.
 8. The Learned Judge erred in law by holding that the shortage of Ballot papers for the election of Governor Tana River County at Nyangwani Primary School and Kaba Wells Mobile Station during the elections held on 8th August, 2022



did not affect the outcome of the election as other candidates other than the Petitioner would have garnered more votes in the said polling stations if there sufficient ballot papers, yet is impossible to predict for which candidate the voters who were denied the right to vote would have voted for.

9. The Learned Judge erred in law by ignoring the evidence of two witnesses Abdullahi Haji Guco and Gawawa Said Bashora (R1 W1) who both confirmed that the ballot box for Governor elections at Kitere Primary School was opened at the Constituency Tallying Centre and votes recounted at the Constituency Tallying Centre contrary to article 86(b) of the Constitution of Kenya, 2010 and the Election (Amendments) (Regulations) 2017.
 10. The Learned Judge erred in law by holding that the failure by the Presiding Officer at Kitere Primary School to sign the Form 37A and affix the seal of the 2nd Respondent was inconsequential as the issue of not signing or affixing the seal of the 2nd Respondent to the Form 37A had not been pleaded by the Petitioner.
 11. The Learned Judge erred in law by failing to apply the provisions of article 86(b) of the Constitution of Kenya, 2010 with regard to the failure to announce the results of the Governor elections Kipao Primary School Stream 1 Polling Station at the polling station when the evidence of two (2) witnesses Abdullahi Haji Gudo (PW4) and Salad Ijema Mkenga (RW 1-4) confirmed that the votes for the Governor elections at the said polling station were not announced at the polling station but were counted and announced at the Constituency Tallying Centre.
 12. The Learned Judge erred in law by failing to hold that the inaccurate recording of votes in FORM 37A and FORM 37B for the elections of Governor as contained in paragraph 38 of the petition was in contravention of articles 81 and 86 of the Constitution of Kenya, 2010 which requires voting counting, recording and announcement of election results to be done in a manner that is efficient, accurate, accountable and verifiable with the result that the failure to adhere to the said Constitutional principles vitiated the elections for Governor Tana River County which were held on 8th August, 2022.
 13. The Learned Judge erred in law by dismissing the petition yet at the same time holding that the 2nd and 3rd Respondents had occasioned the irregularities complained of by the Petitioner and thereby awarding the costs against the 2nd and 3rd Respondent.
8. The Appellant therefore sought orders that;
- a. The Appeal herein be allowed.
 - b. The Judgment and Decree delivered on 3rd March, 2023 be set aside.
 - c. The court holds and declares that the election for Governor Tana River County held on 8th August, 2022 was not conducted in accordance with the principles laid out in the Constitution of Kenya, 2010 rendering the results declared on 12th August, 2022 null and void.



- d. The Court hold and declare that Dhadho Gaddae Godhana was not validly elected as Governor, Tana River County on 8th August, 2022.
 - e. The Respondents do pay the costs of the Petition in the High Court and this Appeal.
 - f. Any other Order as the Court may deem fit and just to grant.
9. On 17th April, 2023, Learned Counsel for the Appellant and the Respondents appeared before Gatembu, JA, and agreed by consent that the Appellant's Notice of Motion dated 6th April, 2023 and the 1st Respondent's Notice of Motion dated 4th April, 2023 be heard together with the appeal herein on 17th May, 2023. Consequently, the said applications were subsumed in the appeal. Directions were then given as to the filing of the submissions. Pursuant to the said directions, all the three matters were physically heard by us on 17th May, 2023. At the hearing, the parties were represented by learned counsel. Mr Cecil Miller appeared with Mr Peter Wena for the Appellant, Senior Counsel Prof Tom Ojienda appeared with Ms Awuor and Ms Siati for the 1st Respondent while Mr Muniyithya appeared with Mr Mokaya for the 2nd and 3rd Respondents.
 10. Since the issues raised in the two Motions go to the jurisdiction of this Court, we propose to dispose of the two Motions first and, depending on their outcomes, proceed to deal with the appeal thereafter.
 11. The 1st Respondent's Notice of Motion dated 4th April, 2023 is supported by the affidavit sworn on 4th April, 2023 by the 1st Respondent herein, Dhadho Gaddae Godhana. In that affidavit, the 1st Respondent averred that the Appellant's appeal was inordinately filed out of time, 25 days after the delivery of the impugned judgment hence the Notice of Appeal ought to be struck out. It was averred that the Appellant was attempting to deceive this Court into determining a matter which was filed out of time.
 12. On the other hand, the Appellant's Notice of Motion dated and filed on 6th April, 2023 expressed to be brought pursuant to Rules 5 and 17 of the Rules supported by his affidavit sworn on even date sought extension of time for filing and serving the very Notice of Appeal that is sought to be struck out. According to the Appellant, pursuant to the aforesaid Rules, this court has the power to enlarge time for filing a Notice of Appeal. He averred that he was indisposed and had to take some time to rest and recover from 4th March, 2023 to 12th March, 2023 hence was unable to meet his advocates on record with a view of understanding the court's judgment to enable him decide whether or not to appeal. He further averred that from 13th March, 2023 to 23rd March, 2023, he was unable to meet his advocates due to conflicting schedules and eventually met his advocates on 24th March, 2023. It was then that the advocates explained to him the context of the judgment and it was thereafter that he made the decision to lodge the appeal against the judgment by instructing the advocates to do so. His Notice of Appeal was filed on 28th March, 2023 and served on the Respondents Advocates on 30th March, 2023.
 13. The Appellant, however, disclosed that although the Notice of Appeal was filed on 28th March, 2023 after the expiry of seven (7) days as provided by the Rules, the Record of Appeal was filed within 30 days as provided by Section 85A(b) of the Act and Rule 9 of the Rules. In the Appellant's view, by extending time for filing and service of the said Notice of Appeal, the Court will not compromise the statutory requirement for the appeal to be heard timeously within the prescribed six (6) months as the Record of Appeal was filed electronically on 31st March, 2023. According to the Appellant, the 1st Respondents will not suffer any prejudice if the orders sought are granted as he will remain in the office pending the determination of the Appeal. It was therefore the Appellant's case that it is in the interest of justice that the orders he has sought are granted and the Appeal is heard on merit.



14. In opposition to the Appellant’s application, the 3rd Respondent, the County Returning Officer, Tana River County, on behalf of himself and the 2nd Respondent filed a replying affidavit sworn on 9th May, 2023. According to him, the fact that the Appellant filed a Notice of Appeal on 28th March 2023, 25 days from the date of judgment, his application seeking the validation of the same can only be an attempt to defeat the orders sought by the 1st Respondent in his Application filed before this court and therefore an afterthought aimed at defeating the ends of justice. He averred that since rule 6(2) of the Rules stipulates that a Notice of Appeal shall be filed within 7 days of the date of the decision appealed against, the Notice of Appeal filed by the Appellant on 28th March 2023, contrary to the said rule, was incompetent and bad in law. In the 3rd Respondent’s view, the delay for 25 days from the date of judgment to file a Notice of Appeal was inordinate and the Appellant was guilty of laches. In his averment, there was no justifiable reason offered by the Appellant as the Appellant did not disclose and or explain to the court the circumstances under which he was indisposed and as such it was no reason enough to move the court to enlarge time to have the Notice of Appeal deemed as filed. He asserted that by filing the Notice of appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, was tantamount to moving the Court to remedy an illegality.
15. At the hearing of this appeal, Learned Senior Counsel Prof. Ojienda and Ms. Awuor relied on their written submissions filed on which they briefly highlighted. According to them, the Appellant did not seek leave of the Court to file the Notice of Appeal out of time. Based on the decision of the Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & Others (2014) eKLR, it was submitted that the filing a timely Notice of Appeal is a jurisdictional prerequisite. Citing the decision of the Supreme Court in the case of James Lusweti Mukwe v Independent Electoral and Boundaries Commission & 2 Others [2019] eKLR, Learned Counsel urged us to declare proceedings a nullity since the Notice of Appeal had been filed out of time without leave.
16. According to the 1st Respondent, since the Appellant did not adhere to the timelines stipulated in the Election (Parliamentary and County Election Petition) Rules, 2017 and Rule 6(2) of the Court of Appeal Election (Parliamentary and County Election Rules) 2017, the Notice of Appeal was an afterthought and was made in bad faith to waste the court’s time. Reliance has been placed on the Supreme court judgment in Evans Odhiambo Kidero & 4 Others v Ferdinand Ndungu Waititu & 4 Others [2014] eKLR where the Supreme Court faulted this Court for admitting and determining an appeal filed out of time against the provisions of Section 85A(a) of the Elections Act as read with article 87(1) of the Constitution.
17. In support of the 1st Respondent’s Notice of Motion dated 5th April, 2023, the 2nd and 3rd Respondents, through Mr Munyithya and Mr Mokaya, similarly relied on their submissions dated 11th April, 2023 which they briefly highlighted. They submitted that the Appellant having failed to adhere to Rule 6(2) of the Rules which prescribes the period within which a Notice of Appeal ought to be filed, the Appellant’s action of seeking extension of time was an illegality hence this Appeal was irregularly accorded a case number by the court’s registry. According to the said Respondents, the Notice of Appeal was filed 25 days after the expiry of the stipulated timeline without any justifiable reasons given by the Appellant. Relying on the decision in Christopher Odhiambo Karani v David Ouma Ochieng & 2 Others [2018] eKLR, it was submitted that the Appellant failed to explain or disclose to the court the circumstances under which he was indisposed.
18. The 2nd and 3rd Respondents asserted that the filed Record of Appeal is completely inconsequential as this court is bereft of jurisdiction due to the absence of a valid Notice of Appeal and cited in



support [Lesirma Simeon Saimanga vs IEBC & 2 Others](#) [2018] eKLR and [Lemanken Aramat v Harun Meitamei Lempaka & 2 Others](#) [2014] eKLR for the proposition that the court cannot breathe life into a suit that is a nullity from the onset having been filed out of the time.

In the 2nd and 3rd Respondents' view, the Appellant failed to satisfy the conditions laid down to justify extension of time as no sufficient reasons for the inordinate delay were disclosed; the said Notice of Appeal was filed before seeking leave; and the deliberate failure to adhere to the strict timelines provided in the Rules. The net effect of such a blatant disregard of the law, it was submitted, is that the Notice of Appeal ought to be struck out with costs to the 2nd and 3rd Respondents.

19. On behalf of the Appellant, the 1st Respondent's application was opposed on the basis of the fact that the Appellant had sought, vide the Motion dated 6th April, 2023, extension of time to file and serve a Notice of Appeal pursuant to Rule 17 of the [Rules](#). It was urged that instead of striking out the Notice of Appeal, this Court should instead, deem as duly filed and served the said Notice of Appeal filed electronically on 27th March, 2023 and physically on 28th March, 2023 by invoking its discretionary power. According to the Appellant, the circumstances of this case are distinguishable from those of [James Lusweti Mukwe v Independent Electoral and Boundaries Commission & 2 Others](#) (*supra*) in that the Court of Appeal extended time to file a Notice of Appeal which was filed in the High Court and not in the Court of Appeal. In the Appellant's view, sufficient reasons for the delay were given warranting the Court's favourable exercise of discretion.
20. It was urged that the Record of Appeal was filed within 30 days prescribed under section 85A 1(a) of the [Elections Act](#), 2011. According to the Appellant, [Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & Others](#) (*supra*) case is not applicable as that was a case that related to the extension of time to file the Petition of Appeal in the Supreme Court. Similarly, it was submitted, the case of [Lemanken Aramet v Harun Meitamei Lempaka & 2 Others](#) [2014] eKLR was not applicable to this case as it related to the issue of whether the entire proceedings in Superior Court and the Court of Appeal were void ab initio on account of the filing of the Election Petition in the Superior court after the expiry of the time allowed. The Appellant contended that the case of [Apungu Arthur Kibira v IEBC & 2 Others](#) [2018] eKLR was also inapplicable as the Notice of Appeal was filed before the Superior court and not the Court of Appeal as required by the 2017 [Rules](#). The Appellant submitted that the timelines to hear the appeal will not be affected by placing reliance on the case of [Andrew Toboso Anyangwa v Mwale Nicholas, Scott Tindi & 3 Others](#) [2017] eKLR.

Analysis and Determination

21. We have considered the Notices of Motion dated 4th April, 2023 and 6th April, 2023 respectively, the affidavits filed in support of and in opposition thereto, the submissions both written and oral and the authorities relied upon. Rule 6(2) of the [Court of Appeal Election \(Parliamentary and County Election Rules\) 2017](#) provides as follows:

A Notice of Appeal shall be filed within seven days of the date of the decision appealed against.
22. In this case judgement was entered on 3rd March, 2023. Going by Rule 6(2) of the [Rules](#), the Notice of Appeal ought to have been filed, at the latest, on 10th March, 2023. It was however not filed until 28th March, 2023. Though the Respondents have contended that the said Notice was filed 25 days after the expiry of the prescribed period, that may not necessarily be correct. After the delivery of the judgement, the Appellant had seven days within which he could file his Notice of Appeal. He could choose to do so on the first day or the last day. Therefore, the prescribed period lapsed 7 days after the delivery of the judgement sought to be appealed from. See [Jackson Mutuku Ndeti v A. O. Bayusuf & Sons Ltd.](#) Civil



Application No. Nai. 231 of 2002. That however, does not change the fact that the Notice of Appeal was filed 25 days after the judgement as opposed to within 7 days from the date thereof.

23. This Court has, however, held that a delay, however, short ought to be explained and there is a plethora of decisions to the effect that a delay, even if only for one day, must be explained. It is true that the period of the delay is a factor to be considered. However, that is just one of the factors for consideration, along with others and it does not mean that on its own, it constitutes a basis for extension of time. While it may be that the Appellant has a good appeal, even good appeals must be filed within the prescribed periods and when that is not done, some explanation must be given for the delay. See *Reliance Bank Limited (In Liquidation) v Grandways Ventures Ltd Others* Civil Application No. Nai. 118 of 2007.
24. Whereas it may be argued that adopting such a stand is too restrictive when it comes to exercise of discretion, it must be appreciated that once the compliance with the rules is relaxed and subjective to vague considerations, without clear legal parameters being set as to how discretion is to be exercised, rules of procedure are bound to be rendered meaningless. When, for example non-compliance is excused on the grounds of short delay, without explanation, the doors for the whimsical exercise of discretion creeps in and with that the floodgates of mischief are thrown wide open. Without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. That position was appreciated by this Court in *Onjula Enterprises Ltd vs. Sumaria* [1986] KLR 651, where it was held that:

“The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & Another v Greenlands Limited* [1916] 2 AC 15 at 38.”

25. The importance of the Notice of Appeal and the timelines appertaining to its filing and service was emphasized by the Supreme Court in *Hamida Yaroi Shek Nuri v Faith Tumaini Kombe & 2 others* [2019] eKLR where that Court expressed itself as follows:

“Being such an important document, the law provides on when it should be filed and served. We agree with the 3rd respondent that service of a Notice of Appeal is crucial as this Court noted in the case of *Zacharia Okoth Obado v Edward Akong’o Oyugi & 2 others* [2014] eKLR thus:

"37. Service of a notice of appeal is crucial. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR states:

‘... 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 destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, 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, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a 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 application are concerned...’

38. We are persuaded by this dictum of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.”

26. This Court in *Sukwinder Singh Jutley v. Prudential Association Co. of Kenya Ltd & Another* Civil Appeal (Application) No. 62 of 2004 stressed that:

“In procedural rules that lack clarity, the Court is at liberty to lean on constructions which aid the course of justice but not in clear rules which have been interpreted many times by the Court as to depart from the rule without changing it would be an aberration that would confound and confuse litigants and should not be countenanced even for a solitary unintentional omission.”

27. Compliance with timelines is even more critical when the dispute before the Court relates to general elections. In such disputes the Court must always keep in mind that being public law litigation, it is not just the interests of the protagonists that are in focus. General elections transcend the interests of the parties before the Court as their outcome do affect the electorate who are keen to know, within the shortest time possible their representative to whom they have delegated their sovereignty pursuant to article 1(3) of the *Constitution*. Governors as the Counties’ Chief Executive Officer have at their disposal, the budgetary allocations and it is only fair and just that the person entrusted with the management of such allocation of taxpayers’ money be the one that the electorates have actually entrusted with the task of doing so. Accordingly, such determinations ought to be made as soon as practically possible without unnecessary delays. Recognising this, the Supreme Court in in *Leman Ken Aramat v Harun Meitamei Lempaka & 2 others* [2014] eKLR held that:

“(73) Timeliness is a manifest example of such exemplary standards; and quite appropriately, it is a precondition in the prosecution of electoral causes. This is a constitutional requirement that goes to the root of democratic governance.

(74) Efficient and dependable plays and interplays of governance entities, is a fundamental principle underlying Kenya’s democratic *Constitution* of 2010. The vital primary agencies of discharge of the public mandate, must each function within a disciplined time-frame, if they are not to hold up the functioning of a different public agency, with the effect of occasioning immobility in one or more of the governance-units. Only through efficient and responsive functioning, can these agencies operate in synergy, so as to bear out the people’s sovereign expression as declared in article 1(1) and (2).”



28. Similarly, the Supreme Court, in *Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others* SC Petition No. 7 of 2014, while annulling the proceedings of the High Court and Court of Appeal in an election petition that had been filed outside the time-frame prescribed in article 87(2) of the Constitution, stated as follows:

“...Time as a principle, is comprehensively addressed through the attribute of accuracy, and emphasized by article 87(1) of the Constitution, as well as other provisions of the law. Time in principle and applicability, is a vital element in the electoral process set by the Constitution. This Court’s decision in *Joho* was guided by this consideration. For purposes of this case, we apply the precedent in *Joho*, taking into account that the issue in question involves imperatives of timelines demanded by the Constitution in settling electoral disputes which involve accuracy, efficiency and exactitude, limiting any other considerations, in the exercise of our discretion.”

29. This therefore explains the strict interpretations of the electoral dispute resolution timelines which are cast in stone by the Constitution of Kenya, 2010 and Acts of Parliament, particularly the Elections Act (hereinafter referred to as “the Act”). While article 87(1) of the Constitution donates to Parliament the power to enact legislation to establish mechanisms for timely settling of electoral disputes, article 87(2) thereof provides that:

Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

30. Parliament carried out its duty under article 87(1) in enacting the Elections Act which also concerns itself with the question of time. The Act, in section 75(1)(2) provides that a question as to validity of an election of a county governor shall be heard and determined within 6 months of the date of lodging the petition while in section 76(1)(a) it provides that a question as to validity of an election shall be filed within 28 days after the declaration of results. Section 85A of the same Act provides that an appeal of the decision of the High Court concerning the membership of the National Assembly, Senate or the office of county governor shall be filed within 30 days of the decision of the High Court and heard within 6 months. What comes out from the above provisions is that an election dispute before an election court should ideally be fully determined within a year, that is 6 months before the trial court and another 6 months before the appellate court.

31. The seeming obsession with timelines is historical and is a reflection of the country’s rather unfortunate history of election dispute resolution before the promulgation of the Constitution 2010. According to the Supreme Court in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others* [2014] eKLR, this history is marked by instances where election disputes were never resolved and where resolved the decisions were ineffectual decisions because of the delay in making them. The Court added that it was not unheard of for some election disputes within one election cycle to spill over to the next election cycle thereby rendering their outcome pyrrhic. The Court explained that:

“Article 87 (1) grants Parliament the latitude to enact legislation to provide for “timely resolution of electoral disputes”. This provision must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about “timelines and timeliness”, was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional



imperative that the electorate should know with finality, and within a reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive by endless litigation."

32. Whereas in ordinary civil litigation the timelines are prescribed by subsidiary legislation, in election disputes timelines are central to their resolution and are accordingly prescribed by the Constitution or Acts of Parliament. It is therefore our view that where the timelines are prescribed by the Constitution or Acts of Parliament, time is a matter of substantive law as opposed to being procedural law where the timelines are prescribed by subsidiary legislation. As a result, this Court in Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission [IEBC] & 8 others [2013] eKLR emphasised that:

"these timelines set by the Constitution and the Elections Act are neither negotiable nor can they be extended by any court for whatever reason. It is indeed the tyranny of time, if we may call it so."

33. However, where the timelines are set out under subsidiary legislation or imposed by the court, the courts when exercising their discretion to extend the timelines are required to consider the overarching constitutional and statutory timelines that cannot be extended. This is because the Elections Act is not an ordinary statute. It was enacted by Parliament pursuant to a constitutional command being Article 87(1) and is therefore a normative derivative of the Constitution.

34. In Gatirau Peter Munya v. Dickson Mwenda Kitbinji & 3 Others [2014] eKLR., the Supreme Court clearly established the constitutional genealogy of Section 85A of the Elections Act, when it declared that the same was "neither a legislative accident nor a routine legal prescription. "Section 85A", the Court affirmed, "is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion." This means in interpreting the provisions of the Act the principles and values underpinning elections as prescribed in the Constitution must be kept in mind. Therefore, when considering the statutory timelines, one has to also consider the constitutional principle of timely resolution of election disputes under article 87(1). This is what informs the elevation of the status of the statutory timelines in the Act since its provisions are meant to mirror the said constitutional principle. It follows that the consequence is that the failure to adhere to these timelines is incurable, not even article 159(2)(d) can remedy it. This is our understanding of the decision in Lemanken Aramat v Harun Meitamei Lempaka & 2 others (*supra*) where the Supreme Court stressed that:

"75. ...the legitimacy of a challenge to electoral outcomes speaks for itself: it is an avenue for ascertaining the mode of conveying the people's expression of their right of franchise.

76. The Court, as a device of sanctification of the people's electoral determination, is not an unregulated forum, where so critical a dispute can linger for indeterminate periods of time. Thus, the Supreme Court, in asserting the authority of the Constitution, underlines the element of the immanent time-constraint, in the resolution of electoral disputes, throughout the judicial system. The ultimate principle is: while citizens are at liberty to contest electoral outcomes, they will proceed within prescribed timelines, and in this way help to sustain the due functioning of other constitutional processes.

77. This gives context and principle to our determination of a central question in this case. We hold, in line with our earlier decision in the Mary Wambui case (at paragraph 68), that the phenomenon of nullity, in any transaction that bears legal incident, is a pure jurisdictional issue. This issue, particularly



in this instance, forms a direct link with the timelines bearing upon the Courts determining electoral disputes, and is a vital element in the relevant constitutional prescriptions...

78. We are not, with respect, in agreement with learned counsel for the 1st respondent, that there is any conflict at all in this case, between the electoral requirements of timelines, on the one hand, and the values of the Constitution, on the other hand. It is clear to us that compliance with timelines, is itself a constitutional principle, one that reinforces the constitutional values attendant upon the electoral process.
79. Such a scenario, it is apparent to us, is consistent with the inherent character of the Constitution – especially the manner in which it engages with the people: at varying removes, bearing commands, directions, guidance, counsel. This Constitution allows the fulfilment of individual rights, by laying out accessible procedures to sustain the citizen’s stakeholder and nationality-claims; but it concurrently reprobates complacency in the assertion of legitimate claims. It bears an inner entreaty for predictability, transparency, and service-orientation to the people; but the realization of such values has a time-element.”
35. It therefore follows that adherence to timelines in election disputes go to the jurisdiction of an election court since an election court’s jurisdiction can only be engaged within a set timeline and can only remain engaged for a set timeline. The centrality of the timelines in election disputes was the subject of the Supreme Court decision in Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019] eKLR. In that case the Supreme Court held that where a petition has been filed before the High Court sitting as an election court, it must be determined within 6 months without exception and that even where an appeal is filed and the matter remitted to the High Court, the High Court must still ensure that its determination is made within the prescribed 6 months window. The Supreme Court therefore found that this Court’s decision remitting the matter back to the High Court for hearing was an act in futility. In arriving at the said decision the Supreme Court arrived at the said decision not without sympathy to the petitioner who “without any fault of her own, has been locked out of the seat of justice”.
36. However, the Appellant, Martha Wangari Karua, took the matter to the East African Court of Justice. In its decision made in Reference No. 20 of 2019 - Martha Wangari Karua vs The Attorney General of the Republic of Kenya. The First Instance Court found fault with the Supreme Court’s view that the this Court ‘should have decided to terminate the matter at that stage, well aware that any substantive determination of the petition by the High Court would been an exercise in futility.’ The Court found this statement on futility to violate the applicant’s right to access justice, including exhausting her right of appeal and denoted a recommendation to courts to disregard their duty to administer justice purely because in their estimation, to do so would be “an exercise in futility.” The Court therefore awarded the Applicant USD 25,000 in damages. Aggrieved by this decision the Attorney General of the Republic of Kenya preferred an appeal to the Appellate Division of the East African Court of Justice and in Appeal No. 4 of 2021 – Attorney General of the Republic of Kenya v Martha Wangari Karua & 2 Others. That appeal was however found unmerited and was dismissed, the Court upholding the decision of the Court of First Instance.
37. Rule 17 of the Rules, however grants the Court the power to extend or reduce the timelines prescribed by those Rules, for sufficient reason, and upon such terms and conditions it may deem just and



expedient. This was explained by the Supreme Court in *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* (*supra*) at paragraph 123 that:

“A Court dealing with a question on procedure where jurisdiction is not expressly limited in scope as in the case of article 87(2) and 105(1)(a) of the Constitution – may exercise a discretion to ensure that any procedural failings that lends itself to cure under article 159, is cured. We agree with the learned counsel that certain procedural shortfalls may not have a bearing on the judicial power (jurisdiction) to consider a particular matter. In most cases, procedural shortcomings will only affect the competence of the cause before the court, without in any way affecting Courts’ jurisdiction to entertain it. A court so placed, taking into account the pertinent facts and circumstances may cure such defects; and the Constitution requires such exercise of discretion in matters of a technical character”.

38. We have set out to explain the centrality of timelines in election disputes to show that even where the timelines are prescribed by subsidiary legislation, in election matters, the Court will adopt a more restrictive approach as opposed to ordinary civil cases since the delays in taking steps may impact on the adherence to the prescribed constitutional and statutory timelines. This is captured in Rule 5 of which states that:

“The effect of any failure to comply with these Rules shall be a matter for determination at the Court’s discretion subject to the provisions of article 159 (2) (d) of the Constitution and the need to observe the time set by the Constitution or any other law.”

39. In *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, (*supra*), the Supreme Court laid out the following as the general under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

40. Guided by the above principles we hold that what may ordinarily amount to sufficient reason for the purposes of extension of time in purely civil disputes may not necessarily meet the same threshold when it comes to election matters.



The Supreme Court, while affirming this position expressed itself in Moses *Masika Wetangula v Musikari Nazi Kombo & 2 others*, S.C Pet. 12 of 2014; [2015] eKLR at paragraph 157 as follows:

“...It is now an indelible principle of law that the proceedings before an election Court are sui generis. They are neither criminal, nor civil. The parameters of this jurisdiction are set in statute the *Elections Act*. As such, while determining an election matter, a Court acts only within the terms of the statute, as guided by the *Constitution*. This approach is in keeping with the stand taken by the Supreme Court of India in *Jyoti Basu & Others v. Debi Ghosal & Others* 1982 AIR 983:

“An Election petition is not an action at Common Law, nor in Equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to election law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the Court is put in a strait jacket.”

41. In this case, the decision sought to be appealed against was, as already stated, rendered on 3rd March, 2023. Rule 6(2) of the *Rules* required the Appellant to file the Notice of Appeal within 7 days, the last day being 10th March, 2023. It is not disputed that the said Notice was filed electronically on 27th March, 2023 and physically on 28th March, 2023 which was clearly out of time. The reasons given by the Appellant are that from 4th March, 2023 to 12th March, 2023 he was indisposed and had to take some time to rest and recover hence was unable to meet his advocates on record with a view of understanding the court’s judgment to enable him decide whether or not to appeal. However, he has not disclosed the nature of his indisposition.
42. The Appellant ought to have given some material on the basis upon which the Court could decide whether his indisposition was such that he was unable to instruct his advocates. Was he, for example, so indisposed that unable to communicate?

Was he bedridden? Was he admitted in an institution with no access to communication network? In the absence of disclosure of the relevant material, we are left to speculate as to the nature of the indisposition.. In this age and era there are several mediums of communication, and one does not have to meet his advocate physically in order to be briefed on the outcome of the proceedings and to give further instructions. Even in ordinary civil appeals, this Court appreciates that a Notice of Appeal is a simple thing that is routinely filed. See *Meghji Velji Chhaya v Attorney General & 3 Others* Civil Application No. Nai. 136 of 1996.
43. The Appellant further averred that he was unable to meet his advocates from 13th March, 2023 to 23rd March, 2023 due to conflicting schedules. We are not informed which schedules these were and why they had to be prioritised. While we appreciate that a Notice of Appeal in election matters is not as simple as in ordinary civil appeals, still one can give instruction to file the same remotely without the necessity of a physical meeting. Conflict in schedules, without more, does not therefore justify the failure to take a step in an election matter within the prescribed time. Even after the Appellant met his advocate on 24th March, 2023, a Thursday, it was not until Monday 27th March, 2023 that a step was



taken. No explanation is given as to why the Notice could not be filed immediately taking into account the fact that the filing was electronic.

44. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*, (*supra*), held that:

“where the law provides for the time within which something ought to be done, if that time lapses, one need to first seek extension of that time before he can proceed to do that which the law requires. By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and in- appropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.”

45. The danger, in our respectful view, of one filing a document and seeking that it be legitimised by being deemed as properly filed is that such applications tend to tie the Court’s hands since the Court is then left with very little option considering that the document has already been filed and there is no application seeking that it be expunged from the record or struck out. We must however appreciate that there may be situations where a wording of a legal provision permits such deeming. For example, Section 79G of the *Civil Procedure Act* provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

46. This provision was interpreted in *Mugo & Others v Wanjiru & Anor* [1970] EA 482 where it was held that:

“Clearly, as a general rule the filing and service of the notice of appeal ought to be regularised before or at least at the same time as an application is made to extend the time for filing the record and the fact that this has not been done might be a reason for refusing the application or only allowing one on terms as to costs. But it does not mean that such an application must be refused.”

47. In this case however, the *Rules* talk of the power to extend or reduce the timelines. It does not talk of deeming documents duly filed or admitting documents filed out of time. We therefore agree, as we are bound to do, that where timelines are prescribed and the law requires an Applicant to seek extension of time the same if not filed within the prescribed time, it would be an abuse of the process to file the



document and then seek to have the same regularised. In the case before us, the Appellant however seeks to have his Notice of Appeal which was already filed, albeit irregularly, before the application was made regularised. Based on the decision of the Supreme Court cited above, such course is unavailable to him and is unacceptable.

48. For the reasons of the failure by the Appellant to sufficiently explain the delay in filing the Notice of Appeal within the prescribed time as well as the fact of filing the Notice of Appeal before the time is extended to do so, we find that the Notice of Appeal was not properly filed and, as held by the Supreme Court in Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others (*supra*), it is a nullity.
49. It is now trite that this Court becomes seized of a matter only upon the filing of a Notice of Appeal or the Appeal. This was stated in Safaricom Limited v Ocean View Beach Hotel Limited & 2 others [2010] eKLR where it was held that:

“Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under Rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.”

50. The Supreme Court was more succinct in Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others, (*supra*), where it 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. The California Supreme Court while reversing the Court of Appeal decision that had dismissed the appellant’s notice of appeal as having been filed out of time in *Silverbrand v County of Los Angeles* (2009) 46 Cal. 4th 106, 113 stated inter alia:

“As noted by the Court of Appeal, the filing of a timely notice of appeal is a jurisdictional prerequisite. “Unless the notice is actually or constructively filed within the appropriate filing period, an appellate court is without jurisdiction to determine the merits of the appeal and must dismiss the appeal.” (Sic) The purpose of this requirement is to promote the finality of judgements by forcing the losing party to take an appeal expeditiously or not at all.”

51. As we have found that the Notice of Appeal filed herein is a nullity having been filed before the order for extension of time was sought and granted, it follows that no subsequently document filed pursuant to the said Notice of Appeal can survive. As was held by this Court in Association of Member Episcopal Conference in East Africa (Amecea) v Alfred Roman T/A Romani Architects & Others Civil Appeal (Application) No. 22 of 2001, while citing *Macfoy v United Africa Co. Ltd* [1961] 2 All ER 1169 at 1172 that:

“If an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. You cannot put something on nothing and expect it to stay there as it will collapse. But if an act is only voidable, then it is not automatically void as is only an irregularity, which may be waived and is not to be avoided unless something is done to avoid



it. There must be an order of the Court setting it aside: and the Court has the discretion whether to set it aside or not and it will do so if the justice of the Court demands and not otherwise meanwhile it remains good and a support for all that has been done under it.”

52. Based on our finding above as regards need to seek extension of time before filing the Notice of Appeal, it follows that the 1st Respondent’s Notice of Motion dated and filed on 6th April, 2023 seeking extension of time for filing and serving the already filed and served Notice of Appeal is misconceived. It is dismissed. In the premises, we allow the 1st Respondent’s Notice of Motion dated 4th April, 2023 and strike out the Appellant’s Notice of Appeal filed herein on 28th March, 2023 together with this Appeal.
53. In light of our finding hereinabove it is no longer necessary nor prudent that we should enter into a discourse on the merits of the appeal.
54. We award the costs to the 1st Respondent.
55. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

