IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KOOME & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 258 OF 2017

BETWEEN

NATIONAL SUPER ALLIANCE (NASA) KENYA …….....…..APPELLANT

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ……..…….....1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL ….....……..…...…2ND RESPONDENT

JUBILEE PARTY OF KENYA …….....……..… 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Kimondo, Mabeya & Ong'undi, J.J.) delivered on 21st July, 2017 in Petition No. 328 of 2017)

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REASONS FOR THE JUDGMENT DELIVERED ON 4TH AUGUST, 2017

(Rules 32(5) of the Court of Appeal Rules)

[1] On 4th August 2017, we delivered an extempore judgment due to the urgency of the matter as it touched on an aspect of the conduct of the 8th August, 2017 general election. The issues for determination were threefold, that is whether voter identification and transmission of results of the 8th August, 2017 general election was exclusively electronic, whether, the 'complementary mechanism' envisaged under Section 44A of the Elections Laws (Amendment) Act of 2017, is what was enacted by the Independent Electoral and Boundaries Commission (IEBC) especially under Regulations 69, 82 and 83 contained in Legal Notice No 72 of 21st April, 2017 and lastly, whether the appeal should be struck out, the learned judges of the trial court having found the issues as pleaded or the prayers sought in the petition were not the subject of determination. The Court held as follows:-

> **"1. There is no basis for setting aside the High Court judgment as prayed for by the appellant, save for the prayer for further orders and costs.**
>
> **2. Accordingly, granted that all parties agreed to adopt the aforesaid Memo issued by the 1st**

respondent on 27th July, 2017 this appeal is partially allowed in terms that the contents of the 1st respondent's Internal Memo dated 27th July, 2017 shall be adhered to by all concerned persons in application of Regulations 69 and 83.

3. The 3rd respondent's cross appeal is hereby dismissed with no order as to costs.

4. Each party shall bear its own costs of both the petition in the High Court and this appeal."

We reserved the reasons for the said judgment, which we hereby give within the same context and the preamble outlined in the aforesaid judgement.

[2] On 30th June, 2017 the **National Super Alliance (NASA) Kenya**, the appellant herein, filed a petition in the High Court of Kenya at Nairobi. In the petition, the appellant was described as **"a coalition of several political parties in Kenya with a substantial voter support base in the Republic of Kenya".**

The petition was anchored on **Articles 10, 19, 20, 21, 22, 23, 162(2) (B), 258 & 259** of the **Constitution of Kenya, 2010 (the Constitution).** It was said to be for enforcement of the fundamental rights enshrined **under Article 2(1), 2(4), 2(5), 2(6), 10, 36, 38, 81, 82(2), 86, 88 and 232** of the **Constitution**.

[3] The appellant stated, *inter alia*, that **section 19** of the **Elections Laws (Amendment) Act** amended **section 44** of the **Act** by inserting immediately after the said provision **section 44A** which reads:

"Notwithstanding the provisions of section 39 and section 44 of the Act, the Commission shall put in place a complementary mechanism for identification of voters and transmission of elections results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution."

[4] **Section 109** of the **Elections Act 2011** provides that the complementary mechanism ought to be put in place by regulations with the approval of Parliament at least sixty (60) days before the general election and only with the approval of Parliament to be granted four (4) months before the general election, the appellant argued.

[5] However, the appellant contended, **"with less than forty (40) days to the 8th August, 2017 general elections, there is no evidence and/or indication that the Respondent has complied with the aforesaid provisions of the Elections Act".**

(Emphasis supplied).

[6] In the alternative, the appellant averred, the respondent had neither consulted with relevant stakeholders nor made public the complementary mechanism. Consequently, the respondent was time barred, and therefore, any complementary mechanism of voter identification and transmission of electoral results that may be developed by the respondent after the prescribed deadline shall be invalid and/or illegal for all intents and purposes of the law, the appellant stated.

[7] The appellant's prayers as contained in its petition were as follows:

***"(a)* A declaration that the Respondent ought to have developed the complementary mechanism for identification and transmission of election results within sixty (60) days before the 2017 general elections.**

(b) A declaration that the Respondent ought to have developed the complementary mechanism for identification and transmission of election results as envisaged by section 44A of the Elections Act within the prescribed period of sixty (60) days.

(c) A declaration that the voter identification and transmission of results of the elections to be

held on 8th August, 2017 shall in the circumstances be exclusively electronic.

(d) Any other orders and reliefs as the court may deem fit.

(e) Costs of the petition."

[8] The petition was opposed by all the respondents. In a nutshell, the 1st respondent stated that complimentary mechanism was put in place by dint of **Regulations 69** and **83** of the **Elections (General) Regulations 2012** (as amended by **Legal Notice No. 72 of 2017**) published on 21st April, 2017.

[9] The relevant part of **Regulation 69** states as follows:

"(e) in case the electronic voter identification device fails to identify a voter the presiding officer shall –

(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

(ii) complete verification Form 32A in the presence of agents and candidates;

(iii) identify the voter using the printed Register of voters; and

(iv) once identified proceed to issue the voter with the ballot paper to vote."

[10] Regulation 83 relates to tallying and announcement of results and provides as follows:

"(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present –

(a) tally the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(b) disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters in that polling station;

(c) disregard the results of the count of a polling station where the total votes exceeds the total number of voters who turned out to vote in that polling station;

(d) collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly;

(e) complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the –

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate or referendum side in each polling station;

(iv) number of rejected votes in each polling station;

(v) aggregate number of votes cast in the respective electoral area; and

(vi) aggregate number of rejected votes;

(f) sign and date the relevant forms and publicly declare the results for the position of-

(i) member of County Assembly;

(ii) member of National Assembly; and

(g) issue certificates to persons elected in the county assembly and National Assembly elections in Forms 36C and 35C respectively set out in the Schedule;

(h) deliver to the county returning officer the collated results for the election of the county Governor, Senator and county women representative to the National Assembly; and

(i) deliver to the Chairperson of the Commission the collated results for the election of the president to the national tallying centre.

(4) The Chairperson of the Commission shall tally and verify the results received at the national tallying centre."

The 1st respondent urged the High Court to dismiss the petition in its entirety.

[11] The 2nd and 3rd respondents supported the position taken by the 1st respondent that indeed the complimentary system as required had been developed in good time. They added, *inter alia*, that there was public participation in the development of the complimentary system; and that exclusive use of electronic voter identification or transmission of results could violate political rights enshrined in **Article 38** of the **Constitution**.

[12] Having heard all the parties, the High Court held, *inter alia*, that the complimentary mechanism had been put in place in terms of **section 44A** of the **Elections Act 2011** in that, the 1st respondent, with public participation, had also set up regulations to operationalize **section 44A** aforesaid. With that, the High Court found no merit in the petition and dismissed it with costs to the respondents.

[13] Being aggrieved by that decision, the appellant preferred an appeal to this Court. The memorandum of appeal consists of six grounds of appeal. The appellant contended that the learned judges misapprehended the petition and the issues it raised and thereby made findings that were not before them for consideration; that the learned judges erred in law and fact in finding that **Regulations 69** and **83** comprised the complementary mechanism contemplated under **section 44A** of the **Elections Act**; in holding that there was public participation in the process of developing **Regulations 69** and **83;** that the learned judges ignored available evidence that revealed parliament's intention for the complementary mechanism; and lastly, that the learned judges erred in law in awarding costs to the respondents in a public interest matter. The appellant urged this Court to set aside the High Court's judgment, grant the prayers as sought in its petition, and direct that each party bears its own costs.

[14] The 3rd respondent filed a cross appeal against the judgment of the High Court, contending that the learned judges erred in law in making a finding that the constitutional petition did not satisfy the criteria of a constitutional petition for enforcement of fundamental rights and freedoms; but nonetheless proceeded to hear and determine the matter. They urged the Court to allow the cross appeal, dismiss the appeal and award them costs.

[15] The appeal came up for hearing on 3rd August, 2017, just five (5) days before the scheduled date of the general election. The appellant was represented by **Mr. Paul Mwangi**, **Professor Sihanya**, **Mr. Jackson Awele and Mr.Ochieng' Oginga**; while the 1st respondent was represented by **Mr. Paul Muite, S.C., Professor P.L.O. Lumumba, Mr. Paul Nyamodi and Mr. Edwin Mukele. Professor Githu Muigai,** the **Attorney General, Mr. Charles Mutinda and Mr. Samuel Kaumba** represented the 2nd

respondent. The 3rd respondent was represented by **Mr. Ahmednasir, S.C., Mr.Macharia**and **Miss Hanan.**

[16] Before the appeal was heard, good sense prevailed upon all the counsel on record as they recorded a consent allowing applications by the 1st and 3rd respondents to introduce additional evidence. By the same consent, the appellant withdrew a video and transcript that had been introduced by the affidavit of **Norman Magaya,** its **Chief Executive Officer**, and substituted it with an Internal Memo issued on 27th July, 2017 by the 1strespondent. In the same consent order, the 1st respondent also conceded that it has sufficient technicians on the ground and emergency kits to deal with any emergencies.

[17] It is important that we reproduce the contents of the Internal Memo stated above for its full effect and import. The same reads as follows:

> **"INTERNAL MEMO**
>
> **FROM: Commission**
>
> **Secretary/CEO TO: County Election Managers**
>
> **Constituency Returning Officers**
>
> **Deputy Returning Officers**
>
> **County ICT Officers**
>
> **REF: IEBC/VREO/2/149 DATE: 27th July, 2017**
>
> ---
>
> **RE: POSSIBLE VOTER VERIFICATION SCENARIOS AND ACTION TO BE TAKEN BY PRESIDING OFFICERS AT THE POLLING STATION**
>
> **Reference is made to the above subject matter.**
>
> **The Commission wishes to share the attached scenarios that Presiding Officers, Deputy Presiding Officers and Polling Clerks may encounter while operating KIEMS during verification of voters on Polling Day.**
>
> **<u>Biometric Verification.</u>**
>
> **Presiding Officers must ensure that Voters are identified by biometrics upon production of identification document used during Registration. Biometric verification is the primary mode of identifying voters.**
>
> **<u>Complementary Mechanism</u>**
>
> **Where a voter cannot be identified using biometrics, then the Presiding [officer] shall use a complementary mechanism of alphanumeric search in the presence of agents and the voter shall fill form 32A before being issued with six ballot papers.**
>
> **<u>Use of Printed Register of Voters</u>**
>
> **The Presiding Officer will resort to the use of printed Register of Voters after approval from**

the Commission upon confirmation that KIEMS kits has completely failed and that there is no possibility of repair or replacement.

All the possible scenarios and recommended action must be brought to the attention of all of POs, DPOs and Clerks during the cascaded training with immediate effect.

(Signed)

EZRA CHILOBA

Copy to: Chairperson

DCS Operation

DICT

DVREO

Encl."

[18] Attached to the Internal Memo was a two (2) page schedule describing eighteen (18) possible scenarios that Presiding Officers, Deputy Presiding Officers and Polling Clerks may encounter while operating KIEMS during verification of voters on the polling day and the appropriate action required to be taken by the Presiding Officer. Item No. 14 of the said Memo provided for a scenario where voter details are missing in KIEMS whether searched by finger print or using alphanumerical method and no voter record is found in the Register of Voters. Such a voter was not to be allowed to vote as he/she could not be identified. However, where a voter identification using the Hard Copy of Register of Voters when KIEMS totally fails and the voter's details match fully as per the identification document (ID/Passport), the voter would be allowed to vote. The above consent did not however settle the appeal as the appellants were insisting that the complementary mechanism that was envisaged by the Act was an electronic backing. In other words, electronic system was supposed to be backed by an electronic system and counsel for the appellant was completely opposed to any use of printed register of voters even if it was a print out of the same. We agree with counsel for the respondents that the appellant's case and the prayers sought in the High Court seemed to have changed substantially. We will nonetheless deal with the matters as they were argued before us.

[19] All the parties filed written submissions and bundle of authorities. The submissions were exhaustively highlighted by counsel. The main issue in this appeal concerned the interpretation of **Section 44A** of the Elections Act which required IEBC to put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure the Commission complies with provisions of **Article 38** of the Constitution. The appellant seemed to have abandoned the prayers seeking a declaration that the IEBC failed to develop the complementary mechanism for identification and transmission of election results within 60 days and mainly focused on failure to ensure public participation in the development and enactment of "complementary mechanism" and failure to comprehend the real meaning and intention of Parliament while enacting Regulation 69 which Mr. Mwangi, learned counsel for the appellant, maintained meant an electronic back up as failure of a biometric identification or transmission can be backed by an electronic system. Similarly, we have to deal with the issue of whether there was public participation when Regulations 69, 82 and 83 of the Elections (General Regulations) 2017 were enacted and finally, the fate of the 3rd appellant's cross appeal that urged the entire appeal and the suit before the High Court was a non starter as the issues that were determined were not at all pleaded and lack of standing of the appellant who is not a juridical person.

[20] What is at the heart of the instant appeal, which we propose to deal with first, is the interpretation of the provisions of **Section 44A** of the Elections Act and Regulations 69, 82 and 83 of the Elections (General Regulations) 2017 that comprise what the IEBC perceived as 'Complementary Mechanism'

contemplated by the aforesaid Act; which must be read together or juxtaposed with the provisions of **Articles 38 (2) (3), 81** and **86** of the Constitution. Taking the totality of the aforesaid provisions of the Constitution, the Elections Act and Regulations, the plain intention of the Legislature was to ensure that every eligible citizen should not be disenfranchised or denied a right to vote; the elections should be free and fair, are by secret ballot, free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. Further, IEBC that is charged with the mandate of conducting elections is supposed to ensure that whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent. Needless to re-emphasize, conduct of free, fair and transparent elections is an essential prerequisite of a democratic society. As the sovereign will of the people is expressed through the elections, the process must also ensure that no eligible voter is disenfranchised. Therefore the electoral system that is used to identify voters, if it be electronic, must ensure every eligible voter is able to cast their ballot. The elephant in the room was, in the event of failure of technology, how to facilitate the identification of a voter whose biometrics cannot be picked by the KIEMS and also in the event of failure of technology in transmission of Presidential results.

[21] It is trite where there is an infringement of a right such as voters' rights or the process leading to a free and fair elections that are entrenched in the Constitution, it is the duty of the court to effectively adjudicate upon them and offer tangible solution to an aggrieved party. Unfortunately or fortunately, in this case, there was no allegation of voters' right that was alleged to have been infringed or an abuse or breach of any of the electoral laws. As indeed the 8th August, 2017 general election had not happened therefore, the appellant's complaint was the interpretation of 'Complementary Mechanism' which it alleged introduced the use of a manual system of identification of voters in the event of an electronic failure of the voter identification and result transmission. We have considered the findings of the High Court regarding the interpretation of the intention of Parliament in enacting **Section 44A** of the Elections Act and whether there was any ambiguity in what its intention was in providing for a '*Complementary mechanism'* to supplement **Section 39 (IC)** of the Elections Act which provides as follows;

> **"(IC) For purposes of a presidential election the Commission shall;-**
>
> **a) electronically transmit in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;**
>
> **b) tally and verify the results received at the national tallying centre; publish the polling result forms on an online portal maintained by the Commission**
>
> **c) publish the polling results."**

It is necessary to mention that voting in Kenya is largely manual in that, voters register manually; they go to line up and mark the candidates of their choice manually. Technology was introduced vide several amendments as seen in Act No 36 of 2016, Act No 37 of 2016 and Act No. 1 of 2017, in particular **section 44(7)** which states that the technology used for purpose of the first general elections upon commencement of this section shall;

> **a) be restricted to the process of voter registration, identification of voters and results transmission,**
>
> **b) be procured at least one hundred and twenty days before the general elections.**

[22] In our considered view, the High Court judges properly appreciated the meaning of **Section 44A** when they posited as follows at paragraphs 80-82 of the impugned judgment;

> **"80. A plain interpretation of section 44A shows that the legislature intended the establishment of a mechanism that is complementary to the one set out in section 44 of the Act. The system under section 44 is an integrated electronic electoral system that enables**

biometric voter registration, electronic voter identification and electronic transmission of results. It places emphasis on the use of technology.

81. In The Concise Oxford English Dictionary, Oxford University Press, 12th Edition 2011, the word *Complementary "means forming a complement or addition, …combining in such a way as to form a complete whole or enhance each other"* while complement means *"a thing that contributes extra features to something else so as to enhance or improve it…"* That being the plain and literal meaning of the word complementary, our view is that section 44A of the Act presupposes a mechanism that will compliment, add, enhance or improve the mechanism already set out in section 44 of the Act.

82. It follows therefore that the complimentary mechanism in section 44A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution. This complimentary mechanism only sets in when the integrated electronic system fails."

[23] Counsel for the appellant urged us to consider the Hansard report on the detailed debate on the amendment of **Section 44A** which in his view envisaged an electronic backup and not a manual register which in his view was alternative and not complimentary. To us, the plain and literal meaning of a complimentary mechanism which was envisaged was a system that would ensure that no eligible voter who is registered was left out of voting because the voter's biometrics could not be identified or the results could not be transmitted because of an electronic failure of a system as enshrined in **Article 38 (2)** and **(3)** of the Constitution. It is common ground that even the best technology can fail; it was also admitted that in the conduct of 2013 general elections it largely failed; it can also be interfered with through criminal and human elements; for these reasons we sought to know, from counsel for the appellant what would happen if technology failed in the process of voter identification and result transmission and it resulted to some voters being disenfranchised. Sadly, counsel did not provide a solution that would be in line with the provisions of **Article 83 (3)** which provides;

"Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny an eligible citizen the right to vote or stand for election"

[24] We are acutely aware that a statute should be construed according to the intention expressed therein and bearing in mind the dictates of **Article 259 (3)** the Constitution which provides;

"Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking and therefore, among other things-

a) a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding that office."

See also a persuasive case of **South Dakota v North Carolina 192 US 268 (1940) L ED the US Supreme Court at page 465;** a case that has been cited with approval in many decisions of this Court, for example, in **Centre for Rights Education and Awareness & Another v John Harun Mwau & Others [2012] e KLR.** The court held, *inter alia:*

b) "Elementary rule of constitutional construction is that no one provision of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be interpreted as to effectuate the general purpose of the instrument."

The IEBC is an independent body that is charged with the mandate of conducting elections in Kenya and

ensuring due compliance with the provisions of the Constitution, Election Laws and Regulations. Surely, Courts cannot step in to police or prefect independent constitutional bodies or to direct them how to carry out their own mandates unless there is wilful neglect or violation of their constitutional or statutory functions. In this case, there was no particular breach that had occurred. The appellant was apprehensive that the complementary mechanism in form of a manual register would expose the electoral system to manipulation. In our view, this fear or apprehension was assuaged by the memo that gave very clear directions; those directions in our view are simple, verifiable, transparent and accountable, in line with the provisions of **Article 86 (a)** of the Constitution.

[25] One of the core attributes of functional and operational independence of institutions such as the Judiciary, the Legislature, the Executive and Constitutional Commissions for example the IEBC, is that, their mandate is clothed with discretion and latitude to decide the governance process or procedure to employ, as to how and when to execute their mandate, as long as it is within the law. This operational and functional independence has constitutional underpinning. Although there is no mention of the principles of separation of power in the Constitution, the *Montesquieu* influence of separation of powers is palpable in that the principle of independence runs through the Constitution. Courts generally show deference to the independence of other arms and offices because courts do not generate laws nor do they implement laws, policies and programmes of the government. See what this Court differently constituted stated in the case of **Mumo Matemeu V Trusted Society Human Rights Alliance & 5 Others** [2013] e KLR:

> **" …It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a licence to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that' [Separation of powers] must mean that the courts must show deference to independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the respondents also concede, the Courts have an interpretive role – including the last word in determining the constitutionality of all governmental actions…"**

[26] Back to the instant case, the learned judges took into account the dangers of relying purely on technology when it is empirical that any technology can and does fail. This was well captured in the case of **Raila Odinga & 5 Others V Independent Electoral And Boundaries Commission & 3 Others** [2013] e KLR in which the Supreme Court had the following to say regarding the use of technology;-

> **"We take judicial notice that, as with technologies, so it is with electoral technology; it is rarely perfect, and those employing it must remain open to the coming of new and improved technologies. Analogy may be drawn with the traditional refereeing methods in football which, as their defects became apparent, were not altogether abandoned, but were complimented with television-monitoring, which enabled watchers to detect errors in the pitch which had occurred too fast for the referees and linesmen and linewomen to notice…**
>
> **But as regards the integrity of the election itself, what lawful course could IEBC have taken after the transmission technology failed? There was no option, in our opinion, but to revert to the manual electoral system, as was done…**
>
> **From case law, and from Kenyan's electoral history, it is apparent that electronic technology has not provided perfect solution. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for**

the conduct of the electoral process. This negates the Petitioner's contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner's case, insofar as it attributes nullity to the Presidential election on the grounds of failed technology devices, is not sustainable."

[27] Moving away from the experiences of 2013 general election and in order to improve on electoral process, the Legislature directed under **Section 44A** of the Elections Act, that IEBC do develop a 'complementary mechanism'. This came in the form of the enactment of Regulations 69, 82, and 83 so as to operationalize the provisions of the said **Section 44A** which in turn is supposed to give full effect to the provisions of **Article 38 (2) (3)** and **81, 86 (a) and 87 (1)** of the Constitution. There was no allegation that the complementary procedure in the aforesaid regulations contradicted the provisions of the Constitution. Therefore, just like the learned trial judges of the High Court, we dispose of the grounds of appeal challenging the provisions of the aforesaid regulations as a non-starter as the greatest danger lies in withdrawing those regulations that are supposed to back the electronic voter identification and result transmission and thereby leaving IEBC with no alternative fall back system of ensuring the dictates of the Constitution are fulfilled in the discharge of its mandate. In so doing, we underscore the fact that the IEBC has a constitutional duty of balancing all the rights and ensuring all voters, especially those whose biometrics are not be picked by KIEMS are accorded an opportunity to vote if they are genuinely registered voters who can be traced from the register of voters and who can be identified by their identification card or passport.

[28] This now takes us to the next issue of whether there was public participation when Regulations 69, 82 and 83 of the Elections (General Regulations) 2017 were passed. According to Professor Sihanya, learned counsel teaming up with Mr Mwangi for the appellant, there was no public participation when the aforesaid Regulations were issued on the 21st April, 2017. There was no evidence that the public discussed the complementary mechanism, yet they affect the public, which went contrary to the values in the Constitution. We have examined the above allegations within the context of the respondent's response that gave a chronological events of how an inter – parliamentary joint committee was formed in July, 2016 to look into all matters relating to the IEBC and the conduct of elections in Kenya. The committee consulted the public and made recommendations on legal, policy and institutional reforms to strengthen the IEBC and improve the electoral process. The said Committee made a raft of proposed amendments to the Elections Act. Although the appellant, then operating as CORD, tried to block Parliamentary debate on the amendments, on 16th January, 2017, **Section 44A** of the Elections Act was enacted through the Elections Laws (Amendment) Act, 2017 which we have reproduced elsewhere in this judgment.

[29] There were debates on the proposed regulations for several days and one of the constitute parties of the appellant, the ODM party, submitted written memoranda on the said regulations. Finally, on 21st April, 2017 the IEBC issued the impugned regulations which were published vide Legal Notice No. 72 contained in a special issue of supplement No. 65 of the Kenya gazette, having been laid before Parliament in accordance with the provisions of **Section 109** of the Elections Act. We find this chronology of the events on how the regulations were enacted was not disputed by the appellant. Besides, both the IEBC and the Jubilee party filed applications seeking, *inter alia*, to adduce further documentary evidence that demonstrated the extent of public consultations and memoranda that were received from various groups and persons before the drafting of the regulations and the extent of debates that took place in both houses of Parliament that consist of the peoples' representatives.

[30] Part of this evidence was apparently locked out by the High Court but the applications to allow the same evidence in this appeal were allowed by consent of the parties. Indeed, we do not underestimate the need for public participation which is one of the values and principles that are entrenched in the Constitution. This is an issue we considered with tremendous anxiety. However, as we have noted, and this was common ground, there was a Parliamentary debate on the regulations, which went on for several days. That notwithstanding, the appellant seriously contested the aspect of public participation in the discussion leading to the enactment. In this regard, we have examined the documents that the IEBC attached to the Notice of Motion dated 27th July, 2017. These documents consist of many reports of meetings with various stakeholders and key among those documents is an explanatory memorandum to

the proposed regulations that also provides the summary of meetings held with the members of the public to discuss the draft. This material was not challenged and on our part, we are satisfied there was public participation.

[31] Another issue that we considered in this regard was the delay in filing the instant matter. The petition was filed on or about the 29th June 2017 to challenge a regulation that was enacted on 21st April, 2017 and the outcome was meant to guide the voting scheduled on 8th August, 2017. Clearly, the appellant was guilty of delay in seeking relief over this aspect and we cannot fault the learned trial judges for declining to grant the order as they weighed one thing against another which is necessary before a court can arrive at a remedy that is efficacious in the circumstances. The date for the 8th August, 2017 general election was completely cast in stone; coming to court on the 11th hour did not help matters. By declining to grant the orders, the learned judges did not misapprehend the law or precedent as every case is unique in its own ways. In our view, the judges appreciated the guiding principles that guide a court on when to deny a party a relief. These are, *inter alia*, undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained about or waiver of the right to object. Other considerations, of course, include whether granting the remedy is a futile exercise or whether practical problems, including administrative chaos and public inconvenience and the effect to third parties who were to be affected by the general election that was scheduled for 8th August, 2017. See **Halsbury's Laws of England 4th Edn. Vol. 1 (1) para 12 page 270.**

[32] On the last issue that we ruled on, whether to allow the cross- appeal, this was argued by Mr Ahmednasir, learned Senior Counsel for the Jubilee Party. Counsel opposed the appeal and at the same time argued a cross-appeal. Counsel faulted the pleadings in the petition as presented by the appellant, especially the prayers that seemed to mutate such that the appellant is seeking the interpretation of **Section 44A,** having moved from the allegations that the IEBC had failed to put in place a 'Complementary mechanism' as provided in the Elections Act. Counsel referred to the following factual background as pleaded by the appellant in its own words;-

> **"Under section 109 of the Elections Act 2011 (as amended) the said mechanism ought to be put in place by regulations with the approval of Parliament at least sixty (60) days before the general elections and only with the approval of Parliament to be granted four (4) months before the general elections.**
>
> **However with less than forty (40) days to the 8th August, 2017 general elections, there is no evidence and/or indication that the respondent has complied with the aforesaid provisions of the Elections Act.**
>
> **In the alternative and without derogating from the foregoing, with less than forty (40) days to the 8th August General Elections, the respondent has neither consulted with relevant including the petitioner herein nor made public the complementary mechanism.**
>
> **In the circumstances, the respondent is time barred to develop a complementary mechanism of voter identification and transmission of election results with the input and participation of relevant stakeholders in the electoral process.**
>
> **The petitioner avers that any complementary mechanism of voter identification and transmission of electoral results established by the respondent after the deadline prescribed by legislation shall be invalid and/or illegal for all intents and purposes of the law."**

[33] According to counsel for Jubilee Party, the appellant accused the IEBC of failure to enact a 'complementary mechanism' but not for enacting one that was deficient, and that the IEBC had run out of time. Counsel pointed out that although they raised an objection before the High Court; the learned judges directed that the issue would be addressed in the final judgment so as to save on judicial time. These allegations were made in the face of enacted Regulations that the appellant's constituent parties took to court seeking to stop Parliament from debating the amendments. There was a memorandum submitted to

the IEBC by the appellant on the content of the said regulations but above all, the regulations were published in the Kenya Gazette on 21st April, 2017 after exhaustive deliberations even by members of the appellant. Counsel invited us to find that the suit was filed by NASA which is not a juridical person that can litigate under the Bill of Rights. NASA is not a political party and did not sponsor any candidate for a political seat but merely provides for power sharing arrangements.

[34] While dealing with this issue of pleadings, the learned trial judges accepted and in our view rightly so, that the petition was slovenly drawn and it fell short of the test set out in the case of **Anarita Karimi Njeru V Republic** [1979] e KLR. Nonetheless, the Court was able to discern the issues for determination as can be seen from a pertinent paragraph 70 of the judgement where it was stated that;-

> **"After carefully analysing the supporting and supplementary affidavits, we have established that the petitioner's complaint is the following; that although Articles 81 and 86 of the Constitution require the respondent to establish an electoral system that is simple, accurate, verifiable and transparent; and, that although section 44A of the Elections Act provides for a complementary mechanism for identification of voters and transmission of election results, the respondent had failed to establish the same less than 30 days to the next general election. Since counsel for all the parties ably addressed us on the matter, we see no prejudice suffered and we shall proceed to make our determination on the matter."**

We recognize the cardinal rule in construction of pleadings, especially in our adversarial system of litigation, is that a party is bound by their pleadings, which is meant to protect the other party who should not be ambushed with new claims in the course of hearing. A party cannot keep shifting or as it was argued in this matter, the pleadings kept mutating. We are acutely aware of the guiding principles in the administration of justice that takes a very dim view of procedural technicalities over substantive justice as ideally, rules of procedure ought to be the handmaidens and not mistresses of justice. We have no doubt in declining to strike out the petition the trial judges were also guided by the overarching objectives in the administration of justice which is to facilitate a just, expeditious, proportionate and affordable resolution of disputes. In doing so the court is enjoined to always focus on the bigger picture that is substantive justice.

[35] On our part, we would entirely agree with the trial judges that although the pleadings were slovenly drawn, an appeal or a pleading cannot easily be struck off because a right to a hearing is a fundamental one under our Constitution. This Court differently constituted observed in **Richard Ncharpi Leiyagu - vs- Independent Electoral and Boundaries Commission and 2 Others**, **C.A. No. 18 of 2013, Nyeri, as thus;-**

> **"The right to a hearing has always been a well-protected one in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality."**

However, going through the petition and the various responses and submissions, it is quite discernible that the appellants were opposed to the use of manual voters register and manual transmission of results, thus the court was able to frame the issues for determination which are the same issues that were cross- cutting the entire petition. We are also alive to the provisions of Order ***15 rule 2*** of the Civil Procedure Rules, which provide that a court has power to frame issues it considers pertinent for the determination of a dispute between the parties before court. In this case the aforementioned issues were relevant and arose from both the pleadings, submissions and sworn depositions. See also the case of **Odd Jobs vs Mubia, [1970] EA Page 47**6, where it was held:

> **"(i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision;**
>
> **(ii) On the facts, the issue had been left for decision by the court as the advocates for the**

appellant led evidence and addressed the court on it."

[36] In view of the above findings, and having carefully considered the entire record of appeal, submissions by counsel and the cited authorities, and bearing in mind the ramifications of our decision as it related to the general election that was scheduled to take place in 3 days' time, we therefore made the orders as outlined on paragraph 1.

Dated and Delivered at Nairobi this 22nd day of September, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

M.K. KOOME

……

JUDGE OF APPEAL

D.K. MUSINGA

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR