IN THE COURT OF APPEAL

AT MALINDI

CORAM: MARAGA, M'INOTI & MURGOR, JJ.A.

CIVIL APPEAL NO. 42 OF 2013

BETWEEN

SULEIMAN SAID SHABHAL ……..……..…...……. APPELLANT

AND

THE INDEPENDENT ELECTOTAL

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

MWADIME MWASHIGADI ……..…….... 2ND RESPONDENT

HASSAN ALI JOHO ……..……. 3RD RESPONDENT

HAZEL EZABEL NYAMOKI OGUNDE ……. 4TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Mombasa (Ochieng, J.) dated 27th September, 2013

in

HC EP NO. 8 OF 2013)

****

RULING OF THE COURT

The appellant, ***Suleiman Said Shabhal***, insists that we must hear his appeal on merit, notwithstanding the fact that the Supreme Court, on 4th February, 2014, in ***HASSAN ALI JOHO & ANOTHER VS SULEIMAN SAID SHAHBAL & 2 OTHERS, SC Petition No 10 of 2013***, declared unconstitutional section 76(1) (a) of the Elections Act, 2011, upon which the petition giving rise to this appeal was founded. He asserts that while aware that this appeal was pending before this Court, the Supreme Court merely declared S. 76(1) (a) unconstitutional without striking out this appeal, an option that was available to the apex Court under the Supreme Court Act, 2011. To the appellant, that fact in itself is sufficient authority from the Supreme Court that his appeal must be heard and determined on merit by this Court.

The respondents argue in reply that, the effect of the Supreme Court's judgment is to render the appellant's appeal constitutionally and legally untenable. The legal foundation upon which the appeal was

founded had been found to be violative of the Constitution. In their view, what the Supreme Court did on 4th February, 2014 was to administer the last rites on this appeal. To purport to hear the same in the face of the Supreme Court decision would therefore be most subversive of the constitutionally ordained hierarchy of our courts. In short, those are the contending positions in the Preliminary Objection that we are about to rule on.

This appeal has had a truly chequered history. The appellant, ***Suleiman Said Shabhal*** and the 3rd respondent, ***Hassan Ali Joho***, together with five others, contested the office of Governor, Mombasa County, during the 4th March, 2013 general elections. The 4th respondent, ***Hazel Ezabel Nyamoki Ogunde***, was the 3rd respondent's running mate. On 7th March, 2013, the 2nd respondent, ***Mwadime Mwashigadi***, who was the Returning Officer, declared the 3rd respondent duly elected Governor, having garnered 132,583 votes to the appellant's 94,905 votes. He accordingly issued a certificate of the results dated 6th March, 2013. By virtue of the provisions of Article 180(6) of the Constitution, the 4th respondent automatically stood elected the Deputy Governor of Mombasa County upon declaration of the 3rd respondent as the duly elected Governor. On 13th March, 2013, the 1st respondent, the ***Independent Electoral and Boundaries Commission (IEBC)*** published the election of the 3rd and 4th respondents in the ***Kenya Gazette No 3155***.

On 10th April, 2013, the appellant filed in the High Court at Mombasa ***Petition No 8 of 2013*** challenging the election of the 1st respondent as the Governor of Mombasa County, on account of various alleged illegalities and malpractices. As far as is relevant for the purposes of this ruling, the respondents, in their answer to the petition, called into question the validity of ***Petition No. 8 of 2013***. In short, they contended that the petition was filed outside the time prescribed by ***Article 87(2)*** of the Constitution, which requires the petition to be ***"filed within 28 days after the declaration of the election results by IEBC"***. In addition, the respondents argued that ***section 76 (1) (a) of the Elections Act, 2011*** which required the petition to be filed within 28 days ***"after the date of publication of the results of the election in the Gazette"*** was inconsistent with the Constitution, and to that extent, null and void.

The 3rd and 4th respondents followed up their objection with a Chamber Summons dated 29th April, 2013 in which they sought, among others, declarations that section 76(1) (a) of the Elections Act was unconstitutional, null and void; that Petition No 8 of 2013 was filed out of time and was therefore invalid, and an order striking out or dismissing the petition with costs.

The application was heard by Ochieng, J., who on 23rd May, 2013 declared section 76(1) (a) of the Elections Act, 2011 unconstitutional. However, the learned judged declined to strike out the petition, on the basis that when it was filed, section 76(1) (a) of the Elections Act was *prima facie* lawful and that striking out the petition would be acting retroactively.

Aggrieved by that ruling, the 3rd and 4th respondents lodged ***Civil Appeal No. 12 of 2013*** in this Court at Malindi. The ruling of Ochieng J was impugned primarily on the ground that the learned judge, having found that section 76(1) (a) of the Elections Act was inconsistent with Article 87(2) of the Constitution, he had no choice but to declare it null and void and to strike out the appeal, which had been filed in violation of the Constitution. The appellant filed a cross-appeal challenging the finding of Ochieng, J., that section 76(1) (a) was inconsistent with Article 87(2).

On 25th July, 2013, this Court ***(Githinji, Makhandia & Sichale JJ.A)*** dismissed the appeal, allowed the cross appeal and set aside the decision of Ochieng, J., thus setting the stage for the hearing and determination of Petition No. 8 of 2013 on merit. The 3rd and 4th respondents were once again aggrieved by the said judgment of this Court and lodged a further appeal in the Supreme Court, ***HASSAN ALI JOHO & ANOTHER VS SULEIMAN SAID SHAHBAL & 2 OTHERS, Supreme Court Petition No 10 of 2013***, invoking the jurisdiction of the apex Court conferred by Article 163(4) (a) of the Constitution to hear an appeal as of right in any case involving the interpretation or application of the Constitution.

In the meantime, Petition No 8 of 2013 was heard by Ochieng, J. in the High Court, and on 27th

September, 2013, the learned judge, after hearing 59 witnesses, including the appellant and the 3rd respondent, and undertaking scrutiny of the votes in some 193 disputed polling stations, held that the 3rd and 4th respondents were validly elected. He accordingly dismissed the petition with costs to the respondents. The appellant responded by filing the present appeal on 28th October, 2013, citing 28 grounds of appeal.

By an order dated 20th November, 2013, the Supreme Court stayed the hearing of this appeal until the determination of the appeal before it. On 4th February, 2014, the Supreme Court delivered its judgement and concluded as follows:

> ***"[100] After considering the relevant provisions of the law, as well as the submissions made before us, and after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared at the county level by the County Returning Officer who issues the presumptive winner with a certificate in Form 38.***

[101] Insofar as the Constitution (Article 87(2)) 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…,"***

while the Elections Act, 2011 (Section 76 (1)) provides that:

> ***"A petition –***
>
> a. ***to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette…,"***
>
> ***and as it is clear that expedition in the disposal of electoral disputes is a fundamental principle under the Constitution, we hold the said provision of the Elections Act to be inconsistent with the terms of the Constitution.***

By Article 2(4) of the Constitution,

> ***"Any law…that is inconsistent with this Constitution is void to the extent of the inconsistency, any act or omission [in contravention] of [this] Constitution is invalid".***

ORDERS

> ***[103] The Appeal is allowed, with the holding that Section 76(1) (a) of the Elections Act, 2011 is inconsistent with Article 87(2) of the Constitution of Kenya, 2010 and, to that extent, a nullity."***

With the Supreme Court pronouncing itself thus without equivocation, it would have been expected that this matter would have been finally laid to rest. However, that was not to be, for the appellant listed his appeal, not for formal disposal, but for hearing on merit. The appellant's move spurred the 3rd and 4th respondents into filing a notice of preliminary objection on 2nd April, 2014. At the hearing of the appeal on 9th April, 2014, we directed, on the authority of ***THE OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS CALTEX OIL (KENYA) LTD (1989) KLR 1***, that the preliminary objection be heard and determined first and the outcome thereof to determine whether or not the appeal will be heard on merit.

Before us Mr Mosota, learned counsel, who held brief for Mr Balala, learned counsel for the 3rd and 4th respondents, prosecuted the preliminary objection. Counsel submitted that after the judgment of the

Supreme Court, this Court lacked the jurisdiction to entertain this appeal, the same having emanated from proceedings that were a nullity, by reason of having been filed out of time, contrary to the requirement of the Constitution. Relying on the decision of the Privy Council in ***MACFOY VS UNITED AFRICA CO LTD (1961) 3 All ER, 1169,*** Mr Mosota submitted that an act that is void is a nullity which does not require an order of the court to set it aside.

Learned counsel also relied on the judgement of this Court delivered on 8th April, 2014 in ***NUH NASSIR ABDI VS ALI WARIO & 2 OTHERS, Civil Appeal No 43 of 2013*** regarding the effect of the judgement of the Supreme Court in ***HASSAN ALI JOHO & ANOTHER VS SULEIMAN SAID SHAHBAL & 2 OTHERS (supra)***, on an appeal arising from an election petition filed under section 76 (1) (a) of the Elections Act. Counsel asked us to sustain the preliminary objection and strike out the appeal with costs.

My Nyamodi, learned counsel for the 1st and 2nd respondent joined the 3rd and 4th respondents in supporting the preliminary objection. Counsel started by invoking Article 163(7) of the Constitution which stipulates that all courts in Kenya, other than the Supreme Court are bound by the decisions of the Supreme Court. In his view, the effect of that provision was to require this Court to faithfully apply the judgment of the Supreme Court. Learned counsel cited the judgement of this Court in ***STEVEN KARIUKI VS GEORGE MIKE WANJOHI & 2 OTHERS CA No 272 of 2013*** where the Court followed ***HASSAN ALI JOHO & ANOTHER VS SULEIMAN SAID SHAHBAL & 2 OTHERS (supra),*** as a judgment binding upon it.

Counsel concluded his submissions by arguing that an appeal predicated upon a petition, the filing of which has been found to be out of time, is incompetent and must be struck out. On costs counsel argued that the petition and the appeal were rigorous, with voluminous records, and that there was no justification why the Court should depart from the general rule that costs follow the event. He prayed for costs to be awarded to the respondents both in this Court and in the High Court, at Kshs 3 million in each court.

Mr Gikandi, learned counsel for the appellant, vigorously opposed the preliminary objection. In his view, the preliminary objection was raised unprocedurally because the respondents were obliged to file an application to strike out the appeal under rule 84 of the Rules of this Court, which they had failed to do. Learned counsel submitted further that before the Supreme Court, the 3rd and 4th respondents had sought a prayer for the striking out of the petition, but the Supreme Court had refused to do so, holding only that Section 76(1) of the Elections Act was null and void. In counsel's opinion, that was significant because under Section 21 of the Supreme Court Act, on an appeal, the Supreme Court has the power to make any order that could have been made by this Court.

It was Mr Gikandi's further argument that, once a statute or a provision thereof is nullified, the nullification does not operate retrospectively, but only prospectively, because all statues are presumed to be legitimate until declared otherwise. When a statute is declared to be null and void, counsel continued, it is not null and void *ab initio*, but only from the date of the declaration. To support the proposition, learned counsel cited the judgement of the Constitutional Court of South Africa in ***SOUTH AFRICAN NATIONAL DEFENCE UNION VS MINISTER OF DEFENCE & ANOTHER, Case No CCT 27/98.*** On the basis of that judgement, counsel contended, the decision of the in ***MACFOY VS UNITED AFRICA CO LTD (supra)*** was distinguishable.

Mr Gikandi also invoked the doctrine of res judicata and submitted that the question of striking out the petition was live and directly in issue before Ochieng, J., in the High Court, before this Court in the interlocutory appeal, and before the Supreme Court. All the three courts refused to strike out the petition and therefore the issue was res judicata. By inquiring into the competence of the appeal, learned counsel submitted, this Court would be purporting to overrule the Supreme Court.

Mr Gikandi concluded his submissions by invoking Article 10 of the Constitution on national values and principles of governance and argued that striking out the petition would be violating the constitutional values and principles. In his view, the cause of justice would only be served by hearing this appeal on merit.

On costs, Mr Gikandi submitted that the appellant cannot be condemned to pay the costs because there was no wrong doing on his part, having complied with the law as it stood before the judgement of the Supreme Court. He invited us to follow the Supreme Court in ***HASSAN ALI JOHO & ANOTHER VS SULEIMAN SAID SHAHBAL & 2 OTHERS (supra),*** and this Court in ***NUH NASSIR ABDI VS ALI WARIO & 2 OTHERS (supra)*** and order that each party should bear its own costs.

In determining the preliminary objection before us, the first issue to dispose of is the appellant's contention that the preliminary objection is not properly before this Court and that the 3rd and 4th respondents were obliged to invoke rule 84 of the Rules of this Court. Rule 84 provides for applications to strike out the notices of appeal or appeals in the following terms:

> ***"84. A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time."***

In our opinion, that is one of the options that were available to the 3rd and 4th respondents. As they are asserting that no appeal lies in light of the judgment of the Supreme Court, they could have opted to file an application under rule 84. That however did not preclude them from raising a preliminary objection as to the competence of the appeal, at any time. The essence of a preliminary objection was given by Law, JA and Sir Charles Newbold P. in ***MUKISA BISCUITS MANUFACTURING CO LTD VS WEST END DISTRIBUTORS (1969) EA 696***. At page 700, Law, JA stated that:

> "…***a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

Sir Charles Newbold P. added as follows at page 701:

> ***A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion***."

This Court, in ***THE OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS CALTEX OIL (KENYA) LTD (supra)*** stated that a question as to the jurisdiction of the court, which may be raised by way of a preliminary objection, ought to be raised at the earliest opportunity and the court seized of the matter is obliged to decide the issue straight away on the material before it.

We accordingly do not find any merit in the appellant's challenge of the competence of the preliminary objection.

Nor do we agree with the appellant that the issue raised in the preliminary objection is res judicata. To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy. (***See, GR MANDAVIA VS RATTAN SINGH (1965) EA 118).*** The Supreme Court has conclusively determined the inconsistency of section 76(1) (a) of the Elections Act with Article 87(2) of the Constitution. That issue is not and cannot be before us. The issue before us in this preliminary objection is simply whether, in light of the judgement of the Supreme Court, there is a competent appeal before us to be heard on merit.

The submission that the issue of the competence of the petition upon which this appeal is based was conclusively determined by the High Court and this Court in Civil Appeal No. 12 of 2013 is, with respect, not correct. Ochieng J, held that section 76(1) (a) of the Elections Act was inconsistent with Article 87(2) of the Constitution, but declined to strike out the petition. On appeal to this Court, it was held that there

was no inconsistency. On further appeal to the Supreme Court, it was held that there was a glaring inconsistency. To the extent that the judgement of the High Court was appealable and was indeed appealed to this Court and the decision of this Court was in turn appealable and was appealed to the Supreme Court, there was no conclusive determination, save that of the Supreme Court. The Judgement of the Supreme Court however did not address the issue of competence or otherwise of this appeal, because the Supreme Court advisedly and deliberately, in our view, restricted itself to the issue before it which was the interpretation of the Constitution, as mandated by Article 163(4) (a) of the Constitution.

In our opinion, the Supreme Court restricted itself to its mandate under Article 163(4) (a) to avoid prejudicing this appeal, the pendency of which the Supreme Court had taken notice of, and had stayed, awaiting the delivery of its own judgement. We prefer to see the issue in this perspective: the Supreme Court conclusively stated the law as far as the inconsistency between section 76(1) (a) of the Elections Act and Article 87 (2) of the Constitution was concerned, and left it to this Court to dispose of this appeal, bearing in mind the interpretation of the Constitution it had given. We reiterate that in the preliminary objection before us, we are not inquiring into the inconsistency between the Elections Act and the Constitution; that issue has conclusively been determined by the Supreme Court. We are only considering the competency of this appeal in light of the judgement of the Supreme Court, which issue was not addressed by the Supreme Court.

We are accordingly satisfied that the Supreme Court did not determine the competence or otherwise of this appeal, and the issue is not res judicata and that the same is properly before us after the Judgement of the Supreme Court.

The appellant's submission is that section 76(1)(a) of the Elections Act became null and void with effect from 4th February, 2014, upon the pronouncement of the judgment of the Supreme Court. In his view, the judgement of the Supreme Court is prospective and has no retrospective operation. In simple terms, the appellant is inviting us to find that before the pronouncement of the Supreme Court, the conflict between section 76(1) (a) of the Elections Act and Article 87(2) of the Constitution was no more than a voidable irregularity; that so long as section 76(1) (a) had not been declared unconstitutional, it remained valid and actions founded on it could not be impeached. On the other hand the respondents contend that the effect of the judgement of the Supreme Court was to declare section 76(1) (a) void *ab initio*, right from the date of its commencement.

In ***MACFOY VS UNITED AFRICA CO LTD (supra)*** Lord Denning distinguished between an act that is a mere irregularity and one that is a nullity. A mere irregularity is not void, but voidable. An act that is voidable is valid until it is made or declared void. It ceases to have effect ***after*** it is declared void; it is not void ab initio. What has been done or accomplished before, pursuant to that act, is not affected by the declaration. On the other hand, a nullity is really something that is void, a nothing right from the beginning. In the words of Lord Denning:

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse…But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It 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 a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it."***

The burning question therefore is whether the inconsistency of section 76(1) (a) of the Elections Act with Article 87(2) of the Constitution rendered section 76(1) (a) a mere irregularity or a nullity. Article 2 of the Constitution provides for the supremacy of the Constitution and Sub-Article (4) provides as follows:

> ***"Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any acts or omission in contravention of this Constitution is***

invalid."

The edict in Article 2(4) speaks for itself. The letter and spirit of the above provision leaves no doubt in our minds that a provision of the law that is inconsistent with the Constitution is not a mere irregularity, but a nullity. In a system founded on the supremacy of the Constitution, the argument that legislation that is contrary to the Constitution can be a mere irregularity does not seem plausible.

In the United States of America, the question of the effect of a statute that is declared unconstitutional has, for a long time, been the subject of a searing debate. In ***MARBURY VS MADISON, 5 U.S. 137*** Marshall CJ stated:

> ***"Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society."***

Justice Field was more explicit in ***NORTON V. SHELBY COUNTY, (1886) 118 U. S. 425, 6 S. Ct. 1121, 30 L. Ed. 178*** when he stated:

> ***"Their position is that a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent. That position, although not stated in this broad form, amounts to nothing else. It is difficult to meet it by any argument beyond this statement: An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."***

In ***CHICOT COUNTY DRAINAGE DIST. V. BAXTER STATE BANK, 308 U.S. 371 (1940),*** Hughes CJ, speaking for the Supreme Court expressed the view that whether or not an invalid statute was retrospective or prospective depended on the facts of the case. In his words:

> ***"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. Norton v. Shelby County,*** 118 U. S. 425, 118 U. S. 442***; Chicago, Indianapolis & Louisville Rwy. Co. v. Hackett,*** 228 U. S. 559, 228 U. S. 566***. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact, and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects -- with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."***

Nearer home in Tanzania, in ***A. A. SISYA & 35 OTHERS VS THE PRINCIPAL SECRETARY, MINISTRY OF FINANCE & ANOTHER, High Court, Dodoma, Civil Case No 5 of 1994*** (unreported, but discussed in ***Helen Kijo-Bisimba & Chris Maina Peter, JUSTICE AND RULE OF LAW IN TANZANIA: SELECT JUDGEMENTS AND WRITINGS OF JUSTICE JAMES L. MWALUSANYA AND COMMENTARIES, LHRC, 2005***) Mwalusanya J, upon finding the Motor Vehicle Surtax Act, 1994 unconstitutional stated as follows:

> ***"Under Article 64(5) of the Constitution I declare the Motor-Vehicle Surtax Act, 1994 as***

unconstitutional and so void for being discriminatory of the affected group on account of their status of life. The law which is void is as if it was not there i.e. not passed by Parliament."

In our opinion, the preliminary objection before us must be determined on the terms and interpretation of our own Constitution. Article 2(4) of the Constitution is clear enough that legislation that is inconsistent with the Constitution is void to the extent of the inconsistency. The provision further stipulates that any act or omission in contravention of the Constitution is invalid. Article 259 of the Constitution demands that we interpret the Constitution in a manner that promotes its purposes, values and principles; that advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights, that permits the development of the law and that contributes to good governance. We do not believe that it would be promoting the purpose of the Constitution, or advancing its principle and values or contributing to good governance to ignore Article 2(4) and hold, on the facts of this case, that a statute that is blatantly violative of the Constitution can form the foundation of valid legal claims. At a time when the Constitution of Kenya is still in its early years of interpretation, the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained. Holding otherwise would be contributing to the erosion of the supremacy and preeminence of the Constitution in the hierarchy of legal norms.

In particular, we are alive to the fact that when section 76(1) (a) of the Elections Act, 2011 was enacted, Article 87(2) of the Constitution was already in operation. Giving that statutory provision legal effect from the date of its enactment, would, in a sense be tantamount to holding that from the date it came into operation until it was declared unconstitutional on 4th February, 2014, that provision of the statute overrode the clear provisions of Article 87(2) of the Constitution. We are not convinced. On the contrary, we are respectfully in agreement with the reasoning of this Court in ***NUH NASSIR ABDI VS ALI WARIO & 2 OTHERS (supra)***, where it was stated:

"In the result, while the law relating to accrued rights under a repealed statute is very clear, we would be slow to apply the same to an action declared by the Constitution to be unconstitutional as held by the Supreme Court. This Court, as a creation of the Constitution with a clear mandate to uphold the Constitution, cannot entertain a position that is founded on a provision of the law that has been declared by the highest court in the land to be unconstitutional. That would amount to this Court perpetuating unconstitutional conduct."

Before we leave this issue, we would like to comment on the judgment of the Constitutional Court of South Africa in ***SOUTH AFRICAN NATIONAL DEFENCE UNION VS MINISTER OF DEFENCE & ANOTHER (supra)*** which was relied upon by the appellant. Section 126B of the South African Defence Act, 1957 prohibited members of the South African National Defence Forces from participating in public protest and joining trade unions. That provision was declared unconstitutional by the High Court, which suspended the effective date of the order of invalidity to a future date. As required by Article 172(2) (a) of the Constitution of South Africa, the matter was referred to the Constitutional Court for confirmation.

O'Regan J. confirmed the invalidity order, but directed that the same should take effect from the date of the judgement of the Constitutional Court. The question of the invalidity order being effective retroactively did not arise; the question before the Court was whether it should take effect in some future date. The Court was not convinced that there was any basis for delaying the effective date of the invalidity order. Clearly, therefore the judgement is no authority for the proposition that a declaration of a statute unconstitutional operates only prospectively.

We have ultimately come to the conclusion that this Appeal is incompetent and the same is hereby struck out with costs to the respondents. Pursuant to ***Rule 34 of the Elections (Parliamentary and County Elections) Petition Rules, 2013*** we cap those costs at Kshs 500,000/- for the 1st and 2nd respondents and at Kshs 1,000,000/- for the 3rd and 4th respondents.

Dated and delivered at Nairobi this 23rd day of April, 2014.

D. K. MARAGA

JUDGE OF APPEAL

K. M’INOTI

JUDGE OF APPEAL

A. **K. MURGOR**

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR