IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, G.B.M. KARIUKI & KIAGE, JJ.A)

CIVIL APPEAL NO 324 OF 2013

BETWEEN

FERDINAND NDUNG'U WAITITU ……..…….APPELLANT

VERSUS

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION (IEBC)….……..……..1ST RESPONDENT

ISAAC HASSAN (RETURNING OFFICER

OF THE NATIONAL TALLYING CENTRE…..…….....……..2ND RESPONDENT

THE NAIROBI COUNTY RETURNING OFFICER…...….....…...…….....3RD RESPONDENT

EVANS ODHIAMBO KIDERO…...…….…….....…….…....4TH RESPONDENT

JONATHAN MUEKE……...….....…….…….…….…….…...5TH RESPONDENT

THE HON. ATTORNEY GENERAL…….....……..……...6TH RESPONDENT

THE DIVISIONAL COMMANDING OFFICER

(DCIO) GIGIRI POLICE STATION, NAIROBI…… .....……...7TH RESPONDENT

THE DIVISIONAL COMMANDING OFFICER

(DCIO) KAYOLE POLICE STATION, NAIROBI… …….....……..8TH RESPONDENT

THE INSPECTOR GENERAL

OF THE NATIONAL POLICE SERVICE…….. …….…....……...…….9TH RESPONDENT

(being an appeal from the judgment, decree and order of the

High court of Kenya at Nairobi (Justice R. Mwongo)

in

Election Petition No. 1 of 2013)

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JUDGMENT OF WARSAME, J.A.

The contest, literally speaking, is between two men who stormed Nairobi, like many of us, from opposite directions. Both are genius for their self-creation. One is a good friend of enthusiastic journalists and news casters for his propensity to make headline news. The other is a conservative, dignified, image conscious man of the old school of politics.

One of them is perceived as an unrestrained populist, best known for taking no prisoners in pursuit of his political goals. The other is an outsider or wild card in the political equation of this county. He is here purely at the invitation of his hard work and credentials. He has no political experience. He is a scholarly and persuasive blue chip manager.

On electronic media, one appears to speak English with a lot of difficulty, and with a heavy and prodding tribal accent. One is a man who has paid scant attention to civil liberties in the process of achieving his goals. He is formidable and aggressive, while the other is laid back and hooded in his approach.

One thing that is clear is that Hon. Waititu is the darling of the common man, with whom he seems to resonate.

On 4th March 2013, Hon. Ferdinand Waititu was in the same political party as the Senator Mike Sonko, and Women Representative, Hon. Rachel Shebesh. Both of his friends triumphed. He is lost for words and breath. It is difficult to imagine Nairobi politics without Hon. Waititu and his ilk. Nonetheless, he was overwhelmingly defeated by Evans Kidero, a perceived outsider to the throne. Maybe Hon. Waititu was deluded by his belief that he is the most popular man in Nairobi.

Now, as judges, we are deeply honoured and privileged to determine the opposite and contrasting positions of these heavy weights. Our task is simple, and our duty is clear. Follow the path of the truth and that is through evidence and the law. The judges? job is to scrutinize the law for evidence. The court must subject the evidence of the parties to the most rigid scrutiny, analysis and re-evaluation, to ascertain whether or not the case is based on mere allegations.

Parties demand, and we are obliged, to undertake strict judicial scrutiny in order to uncover the truth of the dispute. An appellate court like ours must review the facts, read the judgment and ruling of the superior court, and do proper research on the applicable law. The point is what you would do if you were in the shoes of the trial judge. Don?t be shy or modest. If you must disagree, say so clearly. Be a critic, and sound broad, but with respectful language.

The tool for shaping the case is of course, the findings. Get it right as the consequences can be grave and far reaching. Let the word „findings? be imprinted in your mind. Say it over and over again, knowing that you can overrule the trial judge on the law, but on facts, they are supreme. The real challenge is finding the right facts to marry with the law. Getting it right is what I intend to do in this dissenting judgment.

I have read the lead judgment of my brother Kiage J.A. and having done so extensively, I am entirely unable to agree with the determination of the appeal on merit, the analysis, the reasons therein and the

conclusions, and therefore dissent from the lead and concurring judgments of my distinguished brothers G.B.M. Kariuki and Kiage, JJ.A.

The contest in this appeal is between ***Mr Ferdinand Ndung'u Waititu***, hereinafter referred to as the appellant, and ***Mr Evans Odhiambo Kidero***, herein after referred to as the 4th respondent. The appellant and the 4th respondent took part in the general election of 4th March 2013 as candidates for the position of Governor, Nairobi County.

The 1st Respondent, the Independent Electoral Boundaries Commission or IEBC, conducted the general election in exercise of its constitutional duty under Articles 86 and 88 (4) of the Constitution of Kenya 2010, the Elections Act No 24 of 2011, and the rules and regulations made thereunder, to wit, the Elections (General) Regulations, 2012.

In that first contest on 4th March 2013, it emerged that the appellant lost to the 4th respondent by a margin of 74,644 votes. The 4th respondent was thereafter declared winner of the Nairobi gubernatorial seat.

Being aggrieved by the process and outcome of that election, the appellant filed Election Petition Number 1 of 2013 before the High Court of Kenya at Nairobi.

The gist of the petition is captured in the appellant?s affidavit sworn on the 11th March 2013, in support of the petition. The brief highlights of the averments made therein are as follows:

> ***?26. shockingly, although I had been by far the most popular political candidate for the Nairobi Governor elective post among the other candidates in the said election, the 3rd respondent returning officer has purportedly returned EVANS ODHIAMBO KIDERO as being the purportedly duly elected Nairobi County Governor, which I contest vehemently.***
>
> ***27. I believe that the 4th respondent herein, EVANS ODHIAMBO KIDERO and by extension the 5th respondent, JONATHAN MWEKE (sic) were invalidly declared as the purportedly duly elected Nairobi County Governor and Nairobi County Deputy governor respectively by the 3rd respondent, and so confirmed by the 2nd respondent.***
>
> ***28. My belief in the foregoing paragraph is based on my scrutiny of the purported Form 36 which by law ought to be executed by the 3rd respondent in the following terms. I now annex hereto and marked as exhibit ?FW5' a copy of Form 36 in respect of Nairobi County Governor elections.***
>
> …
>
> ***30. I noted that the 3rd respondent purported to declare the 4th respondent to have won the Nairobi county Governor election by 692,483 votes, while he purported to declare me to have garnered 617,839 votes. This cannot be valid as the 3rd respondent totally failed to include the tallies of Embakasi South and Embakasi North in his tallies, in the form 36 he purported to furnish me with.***
>
> ***31. I recall that the 1st respondent had through its chief Executive Officer (CEO) unilaterally and without legal basis personally taken over the enrollment of IEBC clerks and polling staff as well as presiding officers for Nairobi County with the aim of what I believe was to assist and aid the invalid election of the 4th respondent as the Nairobi County Governor.?***

In his challenge to the result of the election, the appellant sought various orders, inter alia, that the Court

do declare that the election of the 4th Respondent was unlawful, and order a fresh election in respect of the position of Nairobi governor.

On 10th June 2013, during the status conference before the High Court, counsel for the parties framed the issues for determination as follows:

> ***1. Whether the Nairobi County Governor Election was conducted in accordance with the principles laid down in the Constitution and the electoral law;***
>
> ***2. Whether the results of the Nairobi County Governor election were announced through a valid Form 36;***
>
> ***3. Whether the 4th respondent obtained highly inflated and non- existent votes;***
>
> ***4. Whether the Nairobi County Governor election was marred by the alleged electoral malpractices;***
>
> ***5. Whether the alleged electoral malpractices invalidated the Nairobi County Governor election;***
>
> ***6. Whether the 4th and 5th Respondents were validly elected as the Governor and Deputy Governor respectively; and***
>
> ***7. Who was to bear the costs of the Petition, and to what proportion.***

The appellant?s case was led by himself, as PW1, and ***Moses Muratha Kamau*** (PW2). The appellant relied *in toto* on his affidavit in support of his petition. He said that he was surprised that the 4th respondent was declared winner, while he considered himself to be the most popular candidate. He contended that there were breaches of law in the Form 36, which was neither dated nor executed: meaning that there had been no valid declaration of results.

He further alleged that the Chief Executive Officer of the 1st respondent, Mr James Oswago, had improperly hired his daughters to work as election and polling clerks with a view to aiding the 4th respondent win the election; that there was double voting that marred the exercise, and in particular where one Susan Kathure had issued two ballot papers for the governor?s position to one Samuel Ngomali. Both were subsequently charged before the Chief Magistrate?s Court in Nairobi in Criminal Case No. 324 of 2013, and Samuel Ngomali was convicted on his own guilty plea.

The applicant further alleged that there was an excess of votes cast as against the registered voters such as at St Mary?s Primary School in Karen Ward, Langata Constituency, where the total number of registered voters was officially indicated as 4,059 voters yet the total votes cast were 4,510. The appellant also faulted the Form 36 for not naming the Embakasi constituencies by name.

The appellant?s final complaint before the trial court was that the 3rd respondent had failed to secure election materials from Westlands Constituency, some of which were found scattered in some areas of Westlands Constituency.

The evidence of ***Moses Muratha Kamau*** (PW2) was also on the basis of some paragraphs of his affidavit. The trial court had previously struck out paragraphs 17 - 24 of his affidavit because they related solely to the contest for the County representative position for Kitisuru Ward, where he was a candidate.

The evidence of PW2 was that he had received numerous telephone calls from agents of the TNA party, who told him that they had been ejected from the polling stations, while the agents of the opposing side were allowed to remain inside. On cross examination, PW2 stated that he did not know any of the phone numbers of the agents who had been calling him with complaints, that he did not have a record of the

telephone calls, and that none of those agents who had complained of being thrown out had sworn affidavits in support of the petition before the court.

The final evidence on behalf of the appellant considered by the trial court in support of the petition was an affidavit sworn by ***Mr. Ibrahim Ahmed***, who was the running mate of ***Mr. Jimnah Mbaru***, one of the candidates in the Nairobi gubernatorial election. He testified that when he went to vote at St. Teresa?s Boys Primary School in Kamukunji Constituency, he found that his name was not on the list of voters. That notwithstanding, he cast his vote. He further deponed that he noted that there were other people who were casting their votes, yet their names were not on the polls register.

The respondents denied the assertions by the appellant. The first witness, ***Fiona Nduku Waithaka***, RW1, who was the Nairobi County Returning officer and the 3rd respondent herein, testified as follows: that all the forms 36 from the 17 constituencies were in accordance with the law, she looked at all the forms 36 from the 17 constituencies in Nairobi before generating the form 36 for the entire County. She stated that the correct form 36 is the signed one which the 4th respondent had attached to his documents. She also denied that any agents had been removed from the tallying centers.

RW1?s further testimony was that the daughters of James Oswago were recruited by the Human Resource Officer of the 1st respondent; that they applied for the positions advertised, and being qualified, they were appointed. This evidence was reiterated by ***Joseph Leboo Masindet***, RW2. RW2 testified that there had been no complaints of favouritism to the 4th respondent before and after the recruitment of the two girls, and further that there was no such disclosure made to the IEBC.

Pamela Wandeo, RW3, denied the appellant?s allegations that his agents were barred from polling stations in Westlands Constituency. She stated that no one had complained of being thrown out of the polling stations, with the exception of one agent from the Wiper Democratic Party Movement (WDM) who had no letter of appointment. Her further testimony was that all the forms 35 were availed to candidates and agents present, and they signed them, and that there was no complaint or request for re-tallying.

Regarding the unsecured election material, RW3 admitted that the presiding officer at one of the polling stations had neglected to keep the unused ballot papers in the ballot boxes after the conclusion of the election. They were later found by a passer-by who called the police. These ballots were unmarked and therefore no candidate was either favoured or prejudiced by this eventuality. The police went and collected the material and retained it at Gigiri Police Station. She denied that there were any unused ballots stuffed in favour of any candidate, or that results for Westlands Constituency contained votes from unused ballots not cast by voters.

Abdullahi Hussein, RW4, the Orange Democratic Movement (ODM) Chief Party Agent for Kamukunji Constituency, testified that he went round the various stations in Kamukunji, and that he was in constant communication with the party agents. Once tallying was completed, he verified and confirmed the results as filled out in form 36 by the Returning Officer, and these results tallied with what was announced in forms 35. He thereafter signed form 36.

This evidence was followed by ***Vincent Mujenyi Omollo***, RW5, the ODM Chief Agent for Westlands Constituency. His evidence was that the agents in the polling stations assured him that the elections proceeded without any hitch. There were agents of other parties present during the entire voting exercise, except when at the tallying centre, a gentleman who introduced himself as Moses Muratha Kamau attempted to interrupt the tallying process. He demanded an entire recount of votes in the polling stations. He was advised to follow the laid down procedures, but he made a scene.

RW5?s further testimony was that in the ensuing confusion, the police ordered everyone out of the tallying centre, and tallying was stopped for some time. The police officers formed a ring around the ballot boxes. This state lasted for about ten minutes, after which calm returned and the said Moses Muratha Kamau left. Tallying thereafter proceeded smoothly.

The trial judge considered all the material facts and evidence and the law presented before him, and rendered the impugned decision dated 10th September 2013. In the said decision, the Honourable trial judge found no merit in the issues raised by the appellant, and dismissed the petition with costs, provoking the appeal now before us.

After the filing of the appeal, the 4th and 5th respondents filed a cross appeal on 20th December 2013 as against the costs in the election court. The 4th and 5th respondents also brought a motion seeking an order either that the entire record of appeal be struck out, or in the alternative, various pages in the record of appeal be struck out. These respondents based this application on the grounds that these documents, which are forms 35 and 36 relating to various constituencies in the Nairobi County, did not form part of the trial record, and therefore could not be included in the record of appeal before this Court. The 4th and 5th respondents argue that to allow these forms to remain on record would amount to introduction of new evidence without leave.

Before that application was heard, this Court raised the preliminary matter regarding the time of filing of the appeal and the requirements of section 85A(a) of the Elections Act. In the interests of time, the Court ordered that the parties do canvass the issues raised in the application by the respondents, as well as those giving rise to the substantive appeal at once.

There are six (6) things which I consider to come up for determination by this Court. The first, and the most important, is the jurisdiction of the court to determine this appeal. The second is the issue of cross - examination; the third is on scrutiny and recount of votes, the fourth is the burden of proof, the fifth is the issue of *stare decisis*, and the sixth and final issue is whether the judgment of the trial judge is a nullity, or if it varies materially from the oral judgment pronounced.

I must begin this judgment by first considering whether this Court has jurisdiction to determine the appeal before it. In law, jurisdiction is everything, and without it, the court has no power or authority to determine the issue in dispute. ***Halsbury's Laws of England Volume 24 (2010) 5th Edition*** at paragraph 623 says this of jurisdiction:

> ***? … by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.?***

It is this passage that the late Nyarangi JA was quoting in the *locus classicus* of ***Owners of Mot or Vess el ?Lil ian S ' [1989] 1*** at page ***14*** when he stated that jurisdiction is the most important of powers that clothe a court. The learned judge expressed himself in the following manner:

> ***?Jurisdiction is everything. Without it, a court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.?***

In ***Re The Matter of the Interim Independent Electoral Commission [2011] eKLR (Constitutional Application No 2 of 2011)*** the Supreme Court of Kenya cited with approval the words of Nyarangi JA

and expressed itself at paragraph 30 as follows:

> ***?[30] The Lillian ?S' case establishes that jurisdiction flows from the law, and the recipient - Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.?***

It is only after determining the competency of the appeal that the merits can be addressed. Jurisdiction is the bridge or power that enables the court to undertake the process of analyzing, re-evaluating, and determining the weight, veracity, authenticity, accuracy and appropriateness of the decision rendered by the trial judge. It is the first and last step that the court must take before addressing its mind to the issues for determination. In the words of this Court, comprised of Karanja, Ouko & Kiage, JJ.A, in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2013] eKLR (Civil Appeal No. 154 of 2013):***

> ***?So central and determinative is the question of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceeding is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it, once it appears to be in issue, is a desideratum imposed on courts out of a decent respect for economy and efficiency and a necessary eschewing of a polite but ultimately futile undertaking of proceedings that will end in barren cul de sac. Courts, like nature, must not act and must not sit in vain.?***

Why is the issue of jurisdiction coming up?

The petition was heard before *Mwongo, J* who rendered his decision on 10th September 2013. Being aggrieved, the appellant lodged a notice of appeal on 11th September 2013. It was transmitted to this Court on 12th September 2013. By a letter dated 11th September 2013, the appellant, through his advocates, requested the Deputy Registrar of the High Court for certified copies of the proceedings, judgment and decree for the purposes of lodging an appeal in this Court.

On 12th September 2013, the Deputy Registrar responded to the appellant, and informed him that a certified copy of the judgment would be availed upon payment of the sum of Kshs 3180.00, and that he would be informed to collect the typed proceedings as soon as the same were prepared. On 30th October 2013, the appellant was issued with a certificate of delay. According to this certificate of delay, typed proceedings and ruling were ready on 9th October 2013. On 22nd November 2013, the appellant eventually filed his record of appeal, which contains the memorandum of appeal, the proceedings in the High Court and the pleadings filed before the High Court. This record of appeal comprises thirteen volumes, and runs into over 6,000 pages.

In disputes arising out of elections, such as the one before the Court now, jurisdiction stems from the Constitution of Kenya, 2010 and the Elections Act No 24 of 2011. With respect to presidential election petitions, Article 140 of the Constitution of Kenya provides that:

> ***?140. (1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the presidential election.***
>
> ***(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.?***

In respect to other petitions, Article 87 of the Constitution of Kenya, 2010, provides:

> ***?87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.***
>
> ***(2) 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.***
>
> ***(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.?***

The Constitution further gives timelines within which such electoral disputes must be heard and determined. Article 105, for example , states that a petition filed in the High Court for the determination whether a person has been validly elected as a Member of Parliament ***?shall be heard and determined within six months of the date of lodging the petition.?***

In response to the power given to it by Article 87 (1) of the Constitution, parliament enacted the Elections Act, No 24 of 2011, to give provision for the timely determination and disposal of electoral disputes. Section 75 of the Elections Act provides for appeals to the High Court in respect of a County election. It reads in part that:

> ***?75. (1) A question as to validity of a county election shall be determined by High Court within the county or nearest to the county.***
>
> ***(1A) A question as to the validity of the election of a. member of a county assembly shall be heard and determined by the Resident Magistrate's Court designated by the Chief Justice.***
>
> ***(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.?***

There is no mention of the manner or procedure of preferring an election petition appeal in the Constitution. In general, this Court derives its jurisdiction, first from the Constitution which provides that:

> ***?164. (1) There is established the Court of Appeal, which—***
>
> ***…***
>
> ***(3) The Court of Appeal has jurisdiction to hear appeals from—***
>
> ***(a) the High Court; and***
>
> ***(b)any other court or tribunal as prescribed by an Act of***
>
> ***Parliament.?***

There is no prescription in the Constitution on the manner of lodging an appeal from a decision of the High Court or any other tribunal. The Constitution only gives the right of appeal from decisions rendered by the High Court.

Article 164 is complemented by the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya, which confers on the Court jurisdiction to hear appeals from the High Court. Section 3 (1) provides that:

> ***?3. (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law.?***

The Court of Appeal Rules then come into play by virtue of section 5 of the Appellate Jurisdiction Act. These rules regulate the practice and procedure in the Court. In appeals from election petitions, the Court derives its jurisdiction from the Elections Act which provides at Section 85A that:

> ***?85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be–***
>
> ***(a) filed within thirty days of the decision of the High Court; and***
>
> ***(b) heard and determined within six months of the filing of the appeal.?***

The rules of procedure for the determination of election petitions and appeals are the ***Election (General) Regulations, 2012*** (hereinafter referred to as the Election Regulations) and the ***Elections (Parliamentary and County Elections) Petition Rules, 2013*** (hereinafter referred to as the Election Petition Rules).

Rule 5 of the Election Petition Rules provides that:

> ***?5. (1) For the purpose of furthering the overriding objective provided in rule 4, the court and all the parties before it shall conduct the proceedings for the purpose of attaining the following aims—***
>
> ***(a) the just determination of the election petition; and***
>
> ***(b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act? .***

Rule 35 of the Election Petition Rules further provides that:

> ***?35. An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules.***"

A reading of the provisions of law that I have endeavoured to set out hereinabove shows clearly that this Court?s jurisdiction is circumscribed by the Constitution of Kenya ***?to hear appeals from the High Court, and from other tribunals or courts as Parliament may prescribe.?*** With regard to election petitions, by virtue of the Elections Act, the Court of Appeal is enjoined only to hear and determine an election appeal subject to three conditions: the first of this is that it will only be determined on ***matters of law***, secondly, ***it must be filed within thirty days of the date of delivery of the decision sought to be appealed from, and finally, this Court must hear and determine it within six months of filing.*** These conditions must be met by any party who intends to exercise his right of appeal. The Authority of ***Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others [2014] eKLR (Civil Appeal No. 36 of 2013)*** succinctly sums up this position as follows:

> ***"…The Constitution of Kenya 2010 that establishes the Court of Appeal under Article 164(1) grants it jurisdiction under Article***
>
> ***164(3) …***
>
> ***Therefore the Court of Appeal has a general jurisdiction to hear and determine appeals. Whereas the Constitution has not provided any limitation to this general jurisdiction, it has provided a window for the scope of the exercise of the jurisdiction to be limited by statute. Article 164 (3) of the Constitution has to be read together with the Appellate Jurisdiction Act Cap 9 which is a statute specifically enacted to confer jurisdiction on the Court of Appeal. Section 3(1) of this Act states as follows:***

?3. Jurisdiction of Court of Appeal

(1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in

which an appeal lies in the Court of Appeal under law.?

The Appellate Jurisdiction Act has introduced one qualification for the exercise of the court's jurisdiction, that is, that the law must specifically provide for the right of appeal. Indeed both the Constitution and the Appellate Jurisdiction Act envisages an Act of Parliament giving a specific right of appeal and the scope of that right. As regards, appeals arising from election petitions, the Court of Appeal is empowered to hear such appeals by dint of section 85A of the Elections Act 2011….?

As I have already stated, judgment in the present appeal was delivered on 10th September 2013. Going by section 85A(a) of the Elections Act, the appellant ought to have filed his appeal within thirty days of this date, that is, by 10th October 2013. He did not do so.

When the appeal came up for hearing on 25th February 2014, this Court informed counsel that they would need to address it on the issue of section 85A(a) of the Elections Act with regard to the time within which the appeal had been filed.

This preliminary matter was canvassed by way of oral and written submissions.

It is the argument of the 4th respondent that this appeal was filed after the expiry of the mandatory period of 30 days provided under section 85A(a) of the Elections Act. On the other hand, it is the position of the appellant that the appeal was filed within the time provided under Rule 82 of the Court of Appeal Rules, 2010.

Mr Muite, learned senior counsel for the appellant, submitted that since the appellant has, in his possession, a certificate of delay, he cannot be punished for a delay caused by the High Court in the supply and preparation of proceedings. Mr Muite submitted that the time taken for the preparation and supply of the proceedings be excluded in computing the period for filing. He relied heavily on Articles 50, 159 and 259 of the Constitution of Kenya, 2010 and urged us to rule that an appeal filed within 30 days is a naked attempt to take away the gains in the constitutional provisions.

The appellant has therefore urged this Court to consider whether a strict construction of section 85A(a) of the Elections Act will violate his right to access justice, and whether to the extent that this section attempts to limit the time within which a party may file an appeal to this Court in respect of an election dispute, goes against the values and principles contained in the Constitution.

The appellant alleges that a strict construction of section 85A of the Elections Act will violate the appellant?s right to access justice, which right is contained in Article 48 of the Constitution. The appellant further submits that he has a right to have an election dispute heard and determined fairly by this Court under Article 25(c) of the Constitution, and should the Court fail to hear him, then his rights under the Constitution will further be abrogated. He further argues that section 85A, to the extent that it limits the provisions on fair trial, found at Articles 25 (1), 50 (1) and 259 (1) of the Constitution, is unconstitutional and thus void.

According to the appellant, there is no procedure for the filing of an appeal from an election petition, and neither does section 85A of the Elections Act, make a distinction between the filing of the notice of appeal, or in the filing of the record of appeal. An election appeal can therefore only be filed in accordance with the Court of Appeal Rules, and he submits that he met the requirements contained therein.

The appellant further alleges that section 96 (1) of the Elections Act 2011 confers power to the Rules Committee, as constituted under the Civil Procedure Act to make rules generally to regulate the practice and procedure of the ***High Court*** with respect to the filing and trial of election and referendum petitions. He argues that this section does not confer powers to the Rules Committee to prescribe the rules of procedure on the filing of an appeal from a judgment of an election court.

Since there seems to be a lacuna, the appellant therefore submitted that illumination is to be found at Rule 35 of the ***Elections Petition Rules***, which stipulates that:

> ***?An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal Rules.?***

Using these provisions, the appellant urged us to find that the term "filing an appeal? refers to filing of the notice of appeal in this Court.

The appellant buttresses this submission by stating that election petitions are matters *sui generis*. They do not fall in the category of civil or criminal proceedings. Because they are sui generis, the appellant submits that this Court can be guided by the Court of Appeal Rules, 2010, on the filing of appeals in both criminal and civil appeals. With regard to criminal appeals, rule 59 (1) of the Rules provides that:

> ***?Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and <u>the notice of appeal shall</u> <u>institute the appeal.?</u>***

Rule 75 (1), which governs civil appeals, provides that a party intending to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court. In the appellant?s view, the intention of rules 59 (1) as applied under Rule 35 of the Elections (Parliamentary and County) Petition Rules, 2013, and read with rule 75 (2) of the Court of Appeal Rules would imply that it is the lodging of the Notice of Appeal that would amount to the institution of an appeal.

Rule 75 of the Court of Appeal Rules is supplemented by rule 82, on the institution of appeals, which provides that:

> ***?(1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged—***
>
> ***(a) a memorandum of appeal, in quadruplicate; (b) the record of appeal, in quadruplicate;***
>
> ***(c) the prescribed fee; and***
>
> ***(d) security for the costs of the appeal:***
>
> ***Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.?***

The appellant therefore argues that the time for filing of a record of appeal has been enlarged by Rule 82 (1). As a result, the record of appeal should be prepared and filed within 60 days of the filing of the notice of appeal.

The appellant therefore considers himself to be within time, and bases this on the certificate of delay,

which he obtained from the High Court on 31st October 2013. This document shows that the High Court took a period of 49 days to prepare the proceedings. It is this period of 49 days that he submits should be excluded from the computation of time.

The appellant has therefore urged the Court to adopt a liberal and wide interpretation of the rules and the Elections Act, since a narrow construction of section 85A of the Elections Act would operate to technically bar an appeal even before the proceedings of the elections court are ready. He argues that it could not have been the intention of Parliament to impose an impossible time limit of 30 days to lodge an appeal in this Court, when practice has shown that the more practical period for filing an appeal is as set out in Rule 82 of this Court?s rules.

The appellant further called on us to interrogate the role of the Registrar of the election court in the preparation of election proceedings, and urges that this Court, under Rule 117 of the Court of Appeal Rules, has the power to issue directions with regard to the Registrar?s role in the preparation of proceedings.

In addition, the appellant argued that to strictly construe section 85A of the Elections Act would amount to an abrogation of his constitutional right to access justice, and that would be contrary to Article 25 (1) of the Constitution, which provides that the right to a fair trial shall not be limited. His position is that the right to a fair trial includes the right to lodge an appeal and to have that appeal heard on merit. It would also, according to the appellant, violate his right under Article 50 (1).

The appellant therefore urged us to uphold Article 159 (2) (d) of the Constitution and adjudicate on the substantive issues raised in the appeal *"**without undue regard to procedural and technical considerations?***. He urges that this constitutional provision supersedes section 85A of the Elections Act. He further urged the Court to be guided by Article 259 (8) of the Constitution, which stipulates that ***?if a particular act is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as the occasion arises.?***

The appellant submitted that there is a good appeal which this Court is bound to admit under Article 259 (8) and invites us to do so, bearing in mind that there has been no prejudice suffered by the respondents. This is in view of the fact that the respondents failed to lodge any objection to the appeal within the 30 day period provided under Rule 84 of this Court?s rules. He argues that they cannot lawfully object at this stage.

The final limb of the appellant?s submission regarding the propriety of the appeal before us was the nature of election petitions. Apart from being sui generis matters, the appellant submitted that there is a substantial public interest. He relied on the decision of the majority in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral And Boundaries Commission & 6 others [2013] eKLR (Civil Appeal No 228 of 2013)*** where Gatembu, JA., in the lead, stated that:

> ***?In considering an application for striking out an election petition or an appeal arising from an election petition, the court concerned must bear in mind the fact that an election petition is not a matter in which the only persons interested are the candidates who competed against each other in the elections. The public are substantially interested in its outcome and that is an essential part of the democratic process…. In modern times, the courts do not apply or enforce the words of statute or rules but their objects, purposes and spirit or core values….?***

In view of the above, the appellant invites this Court to take the approach it has taken in various decisions, such as ***Deepak Chamanlal Kamani & Another v Kenya Anti-Corruption Commission & 3 Others [2010] eKLR Civil Appeal (Application) No 152 of 2009*** where this Court had this to say:-

> ***?… the initial approach of the Courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the legislation. If away or ways alternative to a***

striking out are available, the Courts must consider those alternatives and see if they are more consonant with the overriding objectives than a striking out?

I have extensively captured the able submissions of Mr Muite, Senior Counsel, which I will answer in detail in the latter part of the judgment. However, that is not to say the submissions by the respondents were irrelevant. Far from it.

The 1st, 2nd and 3rd Respondents did not address the Court on this issue and left it to the Court to make a determination. The 4th and 5th Respondents are of the view that the appeal was filed out of time, and is therefore incompetent. They argue that Rule 82 (1) of this Court?s rules

will not apply to election appeals because electoral matters are sui generis proceedings. As they are sui generis, the law to be applied is contained in a code on its own. In support of this counsel relied on the decision of this Court in ***Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission, IEBC & 8 others*** ***[2013] eKLR (Civil Application No. 137 Of 2013 (UR 94 of 2013)*** where this Court, differently constituted, stated that:

> ***?The Elections Act and the Rules made thereunder constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Articles 87 (1), and 105 (2) and (3) of the Constitution is null and void. The Constitution is the supreme law of the land and all statutes, Rules and Regulations must conform to the dictates of the Constitution?.***

I have considered the able, inspiring and illuminating submissions of all the advocates. I have also taken the time to go through the jurisprudence emanating from the Supreme Court of Kenya, the Court of Appeal and the High Court. It seems to me that the main issue that fall for determination at this point is whether section 85A(a) of the Elections Act has the effect of circumventing the constitutional provisions on time, what the place of Rule 35 of the Election Petition Rules is in the face of section 85A(a) of the Elections Act is, and whether Rule 82 of the Court of Appeal Rules is refuge that can sustain life into this appeal.

I agree that electoral matters are sui generis in nature, and that they are governed by a self-contained regime. This has been held time and again in our own courts. In the Indian case of ***Jyoti Basu & Others vs Debi Ghosal & Others*** ***[1982] AIR 983; [1982] SCR (3) 318***, the Supreme Court of India stated as follows regarding the special nature of election petitions:

> ***?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, Court is put in a straight jacket.?***

The rules of procedure governing ordinary civil and criminal cases are inapplicable in electoral matters, with the exception of where they are specifically imported. This was held by this Court in the 1998 case of ***Murathe v Macharia*** ***[2008] 2KLR (EP) 244*** at ***249*** as follows*:*

> "***Election petitions are governed by a special self-contained regime and the civil procedure rules were inapplicable except where expressly stated. Moreover, Order 49 rule 3A of the Civil Procedure Rules was a piece of subsidiary legislation promulgated by the Rules Committee for the purposes of the Civil Procedure Act and under the rules of statutory interpretation, they could not override the express***

provisions of an Act of Parliament.?

This position was reiterated in ***Muiya v Nyagah & 2 others [2008] 2 KLR (EP) 493*** where Mwera J (as he was then) stated that:

> ***?The law states in no uncertain terms that presentation and service of a petition as the case is here, must be within 28 days from the date of publication in the gazette of the election result. On this strictness, this Court has one thing or two to say: Elections are serious matters of a State with its citizens. As elections are held, the outcome announced, the electorate must know their political leader quickly and assuredly. There must be limited or no uncertainty about this. Roles of elected representatives are many and diverse vis a vis their electors. To perform the roles well the elected must be sure of his post and the elector of his leader. And the sooner the better to give that certainty. So either the election is accepted at once or if challenged, that challenge must be moved along to the end swiftly enough to restore certainty. And for that, election petitions are governed by this Act with its Rules in a very strict manner. Election petition law and the regime in general, is a unique one and only intended for elections. It does not admit to other laws and procedures governing other types of disputes, unless it says to itself?.(Emphasis Mine)***

The law therefore that governs election petitions is primarily the Constitutional provisions, some of which are cited hereinabove, the Elections Act, No 24 of 2011, and regulations and rules made thereunder.

Having so found, what is the time within which an appeal from the decision of the High Court is to be filed and determined The answer to this question is to be found at Section 85A(a) which is worded, in very clear terms, that an appeal from an election petition ***„shall be … filed within thirty days of the decision of the High Court.‘***

The word shall used in section 85A(a) of the Elections Act connotes an emphatic intention, an expression of strong assertion or command, a duty rather than a wish required to perform a function in a discretionary manner. In my understanding, the use of words ***shall*** and ***filed within 30 days*** of the decision of the High Court confer a mandatory sense that the drafters typically intended, and that courts typically must uphold. It means the filing of an appeal from the decision of the High Court is to be done ***within 30 days***. In other words, the filing is to be done within the period, not exceeding or beyond the 30 days from the date when the decision is rendered.

Can the requirement set out by Parliament in section 85A(a) be said to be deficient or wanting? This section was enacted by Parliament pursuant to the constitutional call in Article 87 (1), where Parliament is to ***?enact legislation to establish mechanisms for timely settling of electoral disputes.***? The right of appeal therefore, with respect to electoral disputes is to be exercised pursuant to the jurisdictional time limit donated by the Constitution. It follows therefore that section 85A is not in conflict with the Constitution, in fact, it furthers the purpose of timely settlement of electoral disputes which is contained in the donating law.

I reiterate the sentiments of Okwengu J.A in ***Basil Criticos v Independent Electoral And Boundaries Commission & 2 Others [2014] eKLR (Civil Application No. Msa 33 of 2013)*** wherein she stated that:

> ***?[11] In my considered view the argument that section 85Aof the Elections Act is ultra vires the Constitution, is an argument that cannot hold, as section 85A is simply complimentary. That section provides a right of appeal to the Court of Appeal from the judgment of the election court, and does not in any way take away the authority of the Court to hear appeals under Article 164 of the Constitution. It should further be noted that the general jurisdiction to hear appeals, which is conferred on the Court by Article 164 of the Constitution is distinct from a right of appeal, which is not automatic but is conferred through specific legislation, which in this case is the***

Elections Act.

[12] Thus under section 85A of the Elections Act, the right to a hearing in regard to an appeal from an election petition is tied to the timelines provided in that Act. In this way the right to a hearing is appropriately balanced with the public interest of expeditious disposal of electoral disputes. This is as it should be, for one party may have brought an appeal, but the outcome affects the interest of the public whose right to representation is in a limbo during the pendency of the appeal.?

These time strictures regarding election matters do not apply to the Court of Appeal only. As I have set out above, the filing of a petition concerning an election petition, with the exception of a presidential election petition, must be done within ***28 days*** of declaration of the results. That is the law according to Article 87 (2) Constitution. Similar provision is also found at section 77 of the Elections Act. This is supplemented by section 75 (2) of the Elections Act, which provides that petitions challenging the validity of the election of a member of a county assembly shall be heard and determined by the Magistrate?s Court within six months of the date of lodging of the petition. Section 75 (4) of the said Act provides that appeals from the decisions of the Magistrate?s Court must be filed in the High Court within thirty days of the decision appealed from, and the High Court has a duty to hear and determine those appeals within six months as well.

Similarly, with respect to petitions before the High Court, section 75 (2) requires that petitions challenging the election of a county governor be heard and determined within six months. This too, is in compliance with the Constitutional requirement found at Article 105 which requires that determinations as to questions as to whether a member of parliament has been validly elected be made within six months. To my mind, appeals from the High Court cannot be treated any differently. They too must follow the strict timelines provided in the Constitution and the Elections Act.

Can Rule 82 of the Court of Appeal Rules, 2010, which provides for the certificate of delay, defeat the statutory provision contained in section 85A of the Elections Act? The answer to this question must be in the negative.

Section 85 is the legal foundation and all the rules must be interpreted in a manner that will not displace it. In exercise of the power donated under Article 87 of the Constitution, parliament exercised its legislative role and delineated the time frame for filing an appeal under Section 85A(a) in the Elections Act No 24 of 2011. Therefore the Elections Act is the parent Act. It has all the mechanisms and structures for the filing and hearing of competent election disputes, save for filing of the petition which is provided for in the Constitution. A court of law therefore cannot go outside this contours set by Parliament, as to do so would distort the clear intention of Parliament, and purport to enlarge that time, in violation of the law and the principle of *stare decisis*.

In statutory interpretation, the rules of procedure must be read so as to bring them in conformity with the parent act. It should be remembered that rules are promulgated for the better operation of the substantive provisions of the Act. There is therefore a hierarchy of law, so that the Constitution is the highest, the Act of Parliament enacted for operation of the constitutional provision comes after, and the rules or subsidiary legislation is at the bottom. This is a fact recognized by Gatembu J.A. in the ***Nicholas Kiptoo Arap Korir Salat case (supra)*** where he states that:

"***Essentially the rules remain subservient to the Constitution and statutes.?***

See also the statement of the Court in ***Mwalagaya v Bandali [1984] KLR 75****1* at 757 where Law JA quoted with approval the following statement from ***Taylor v Taylor [1875 – 6] l CH D 426*** at page 431.

?when a statutory power is conferred for the first time upon a court, and the mode of exercising it is pointed out, it means that no other mode is to be adopted?.

The time for lodging and determination of appeals in election disputes is found at section 85A of the

Constitution, and a party who does not comply cannot find refuge in the rules of this Court. It is not tenable to elevate the rules of procedure of the Court above a statutory provision, and in the same way, it can never be that a statutory provision can be elevated above the Constitutional provision because the Constitution is the supreme law of the land. To do so would be to circumvent and to defeat the hierarchical structure of law. This principle is captured by Article 2 (1) and 2 (4) of the Constitution itself.

I endorse the holding of Mwera J, (as he was then in ***Muiya v Nyaga (supra)*** where he stated that:

> ***?… Here it spells out firmly and clearly that a petition must be presented and served within 28 days of the publication of election results. Anything outside that time is invalid and this one here is thus invalid.?***

I have already said that section 85A(a) of the Elections Act is in consonance with the Constitutional provisions. What then of Rule 35 of the Election Petition Rules? This is the rule that imports the application of the Court of Appeal Rules, 2010, in the resolution of election disputes.

In ***Maitha v Said & another [2008] 2 KLR (EP) 337,*** the Court of Appeal was confronted with an appeal the circumstances of which were similar to the one before us. In that appeal, the appellant had come to the Court of Appeal out of time, and in violation of section 23 (4) of the National Assembly and Presidential Elections Act (now repealed) which provided that:

> ***?an appeal shall lie to the Court of Appeal from any decision of an Election Court, whether the decision be interlocutory or final, within thirty days of the decision.?***

In that appeal, the appellant had cited section 3 (1) of the Appellate Jurisdiction Act and Rule 74 of the then Court of Appeal Rules (which is presently found at Rule 75 of the Court of Appeal Rules, 2010) and argued that since he had lodged his notice of appeal within the prescribed time, and later had lodged the record of appeal after receiving the certified copies of the proceedings, and the issuance of a certificate of delay, then his appeal had been instituted within the time prescribed in section 23 (4). The majority, (Gicheru and Omolo JJ.A, with Shah JA dissenting) rejected this argument and it was held that:

> ***?1. If an Act giving the right of appeal from the High Court to the Court of Appeal has set out the time limit within which such right should be exercised, failure to comply with such time limit would extinguish the right of appeal and an appeal would not lie outside the time limit.***
>
> ***2. The lodging of the appellant's appeal outside the period of 30 days after the decision of the High Court was in violation of the express provisions of section 23(4) of the National Assembly and Presidential Elections Act.?***

In ***Lorna Chepkemoi Laboso v Anthony Kipkoskei Kimeto & Two Others Civil Appeal (Application) No. 172 of 2005*** (unreported) this Court was confronted with an application to strike out an appeal filed outside the 30 days stipulated by section 23(4) of the repealed National Assembly and Presidential Elections Act was allowed. This Court (Omollo, Tunoi & Githinji) allowed the application and followed the decision, in ***Maitha v Said & another (supra),*** finding this to be good law**.** The Court stated that the time put in place by Parliament was sufficient for a diligent party to lodge his appeal. The Court expressed itself in the following manner:

> ***?The practicality of lodging an appeal within 30 days as stipulated by section 23(4) of the Act has not been questioned. On our part, we think that the 30 days stipulated are sufficient for a vigilant and diligent party to lodge an appeal. If that period be considered too short, then it is only the Parliament and not the Court which can intervene by legislation after necessary consultation with all interested parties. For our part we do not think the section is particularly oppressive to intending appellants. Many appeals from the***

decisions of the superior court on election petitions have been brought to this Court and apart from Emmanuel Karisa Maitha case, we are not aware of any other case complaining against section 23(4) of the Act.?

Similar circumstances are obtaining here as those that arose in the case of ***Maitha v Said & another (supra)***. The supreme law having spelt out the time for which an election petition is to be filed and disposed of, and enabling legislation having brought in a timeline for the expeditious disposals of appeals as well, and the appellant having failed to abide with those timelines, he cannot be said to be in a position to exercise any right of appeal. The right of appeal is extinguished.

The appellant argues that all these decisions would need to be re-looked at because they were decided under the old dispensation, and under old laws. My response to this is that first, the provisions of law were similar, so that the interpretation of the law would follow suit, and secondly and more importantly, under the current Constitution and electoral laws, the issue of time is of utmost importance.

I am fortified in this finding by the recent decision of this Court in ***Wavinya Ndeti v IEBC & Others Civil Appeal No 323 of 2013***, delivered on 9th April 2014 wherein the Court (Githinji, Nambuye & M? Inoti) held that:

> ***?In conclusion when construing section 85A (a) the Court must presume that Parliament intended a construction which corresponds to the legal meaning and should find against a construction which circumvents or otherwise evades the objective of the section which is the timely resolution of appeals from election courts. Further, the Court should uphold the principle that law should be coherent and self-consistent and find that Parliament intended the entire electoral law relating to timely resolution of electoral dispute stipulated both in the Constitution and the Election Act to be coherent and self-consistent and to be strictly adhered to by the implementing courts of law. No room was left for any exercise of judicial discretion.***
>
> ***[15] From the foregoing we find that section 85A(a) is sacrosanct and that Rule 82 is*** *ultra vires* ***and is inapplicable to the extent of the inconsistency. Thus, this appeal which was filed outside the stipulated 30 days is incompetent. The cross appeal which is anchored on an incompetent appeal is also incompetent. Having so found, it is not necessary to pronounce on the merits of the appeal and the cross appeal.?***

We must appreciate the background from which we come from, when electoral disputes would take a longer time to hear and determine. It must be for this reason that the drafters of the Constitution included these timelines, and the Court cannot purport to extend these timelines as to do so would amount to exercising a jurisdiction that we do not have. This is the fact that was considered by our Supreme Court in the case of ***Hassan Ali Joho and Hazel Ogunde Vs Suleiman Said Shahbal, IEBC and Others (Petition No 10 of 2013)*** where the Court stated that:

> ***?While the principle of timely disposal of election petitions affirmed by the Court of Appeal, must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and rule of law must be constantly held paramount.? (emphasis mine)***

I have taken into consideration that the delay may have been caused by the High Court in the preparation and supply of the documents required for the preparation of the record of appeal. I am, however, not persuaded that this is reason enough for which this Court can turn its back on the Constitutional and statutory timelines that it is enjoined to apply. It is of utmost importance to understand the reason why the timelines in elections were put in place. This is a fact that was recognized by our Supreme Court during the hearing of the presidential election petition, where one of the petitioners attempted to produce a supplementary affidavit that had been filed out of time and without leave of the Court. In its ruling, ***Raila Odinga & 5 Others V Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR (Petition Nos 5, 3 & 4 of 2013)*** the Supreme Court stated that timelines provided in the law **must**

be followed. The Court expressed itself in the following manner:

> ***?The period for the filing, prosecution and determination of a Presidential Election is only 14 days from the time the results are declared. This is a very tight, short and limited period. The background to the setting of the strict time – lines must be known to most Kenyans. There was a purpose to this and the intention of the People of Kenya and of Parliament must be respected.***
>
> ***The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.? (emphasis mine).***

The Kenyan people, as well as the drafters in the Constitution must have had this in mind when they chose to include Article 87 (1) of the Constitution, which states that:

> ***?Parliament shall enact legislation to establish mechanisms for the timely settling of electoral disputes.?***

With respect to the timelines that have been imposed by the Elections Act, I am, like the Court in the ***Wavinya Ndeti Case (supra)***, persuaded that section 85A(a) is not in any way unconstitutional. I agree with the earlier ruling of this Court, where the appellant brought an application ***(Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission, IEBC & 8 others (supra))*** for stay of proceedings before the trial court and the Court in refusing that stay, rendered itself as follows:

> ***?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. That means a trial court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Elections Petition Rules be amended to bring about mechanisms of expediting trials….The Elections Act and the Rules made thereunder constitute a complete code that governs the filing, prosecution and determination of election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Articles 87 (1), and 105 (2) and (3) of the Constitution is null and void. The Constitution is the supreme law of the land and all statutes, Rules and Regulations must conform to the dictates of the Constitution .?***

I would agree and add that these statements apply with equal force to appeals in election petitions. Parties are enjoined to strictly follow the timelines provided in the Constitution and in the Elections Act. The law is very strict on this, and it therefore behooves parties to ensure that the trial court is reminded of its obligation to provide proceedings promptly and urgently so as not to jeopardize or inhibit the right of appeal which is so restricted by timelines. To interfere with these timelines amounts to judicial legislation on matters which the law has clearly provided for. I think we must always guard against judicial intrusion and incursion of areas reserved for Parliament. To undertake the exercise suggested by my distinguished brothers would not be the interpretative role of the court, but rather amounts to judicial trespass on the authority of Parliament in the exercise of its duties.

I am also guided by the words of the Court of Appeal of Uganda at Kampala in ***Kasibante Moses Versus Electoral Commission Election Petition Application No. 07 of 2012*** wherein the court emphasizes that it is the duty of an intended appellant to ensure that he pursues every step of the appeal to ensure that it is lodged and disposed of expeditiously.

> ***?In case of an election petition appeal, the intending appellant has even a higher duty to expeditiously pursue every step in the appeal so that the appeal is disposed of***

> ***quickly. This is so because Section 66 (2) of the Parliamentary Elections Act and Rule 33 of the Parliamentary Elections (Election Petitions) Rules enjoin this court to hear and determine an appeal expeditiously and may, for that purpose, suspend any other matter pending before it. Rule 34 requires this court to complete the appeal within thirty (30) days from lodging the record of appeal, unless there are exceptional grounds. Time is thus of the essence in election petition appeals.?***

In the ***Hassan Ali Joho and Hazel Ogunde Vs Suleiman Said Shahbal, IEBC and Others (supra)***, the Supreme Court of Kenya also stated that:

> ***?As the apex Court, we must always be ready to settle legal uncertainties whenever they are presented before us. But in so doing, we must protect the Constitution as a whole. Election Courts and the Court of Appeal, have a discretion in ascertaining the justice of each case to balance justice, but that discretion must be concretised in enforcing the Constitution.?***

This Court sitting in Nyeri in ***Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR (Civil Appeal No. 23 of 2013),*** while determining the jurisdiction of Court in interlocutory appeals under Rule 35 of the said rules had this to say:

> ***?27. It is our considered view that a subsidiary legislation or rules of procedure or a rule made by the Rules Committee cannot confer, create, establish, limit or subtract the jurisdiction of any court of law or tribunal as established by the Constitution or Statute. Rule 35 of the Election Petition Rules is a subsidiary legislation which is contained within the Rules of Procedure for the conduct and trial of Election Petitions. We hold that Rule 35 of the Election Petition Rules, being a subsidiary legislation within procedural rules, is not a jurisdictional rule and cannot confer or limit the jurisdiction of the Court of Appeal to hear and determine Election Petitions. We further hold that Rule 35 of the Election Petition Rules cannot limit the jurisdiction of the Court of Appeal as granted under Article 164 (3) of the Constitution and as operationalized by Section 85A of the Elections Act. A subsidiary legislation cannot expand, add to or reduce the jurisdiction of any court as spelt out in the Constitution or by Statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or Statute. A rule cannot limit the jurisdiction of a court of law. (emphasis mine)***

In the same way the jurisdiction of this Court cannot be limited by a rule, it cannot also be expanded by a rule. The jurisdiction of this Court is limited by the Constitution and statute, and as the learned judges of appeal observed in the ***Peter Gichuki King'ara v Independent Electoral And Boundaries Commission & 2 others (supra)***,

> "***subsidiary legislation cannot expand, add to or reduce the jurisdiction of any court as spelt out in the Constitution or by Statute. Jurisdiction is neither derived nor does it emanate from regulations or rules; jurisdiction is either from the Constitution or Statute?***

The Court of Appeal rules will only apply after due compliance with the Elections Act. Rule 35 and Rule 82 of the Court of Appeal Rules must be read to accord with section 85A to avoid a clash or inconsistency between the rules and the statute or the Constitution.

Even if I am wrong on that point, it is clear from the certificate of delay that the proceedings were ready for collection on 9th October 2013. The appellant therefore had two days within which he could have filed a competent appeal. He did not do so, but instead collected the proceedings on 30th October 2013, and filed the appeal on 22nd November 2013. There is no explanation before us as to why the appeal was not filed on or before the 10th October 2013; the appellant only attached the certificate of delay. It is

also not explained why the appellant took a further 22 days, from the date he collected the proceedings to the date that he filed his appeal, on 22nd November. In my humble view, the conduct and omissions of the appellant smacks of manifest indolence.

Does the time limitation under Article 105 of the Constitution, and section 85A of the Elections Act amount to a violation of the right to access justice, and the right to a fair trial, as has been alleged by the appellant? These rights are guaranteed by the Constitution by dint of Article 25, and cannot be limited. As provided at Article 50 (1) of the Constitution:

> ***?50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body***."

Access to courts is a fundamental content of the right to access justice and the right to a fair trial. This was stated by the Court of Appeal of Tanzania in ***Ndyanabo v Attorney General [2001] 2 EA 485. :***

> ***?Access to courts is, undoutbtedly, a cardinal safeguard against violations of one's rights, whether those are fundamental or not. Without that right, there can be no rule of law, and no democracy. A court of law is the last resort of the oppressed and the bewildered. Anyone seeking a remedy should be able to knock on the doors of justice and be heard.?***

This is a proposition with which I completely agree. However, the right to a fair trial is also encompassed in the constitutional limitations provided. These provisions set out the timelines within which various acts in the resolution of election disputes are made. These are well known to all the parties, and aim to create a fair playing field and ultimately expedite the hearing and resolution of those disputes so that elected representatives can go on to perform the work for which they have been chosen. I will repeat what was stated in the ***Raila Odinga Case (supra):***

> ***?the period for the filing, prosecution and determination of a Presidential election (sic) is only 14 days from the time the results are declared. This is a very tight, short and limited period. The background to the setting of the strict timelines must be known to most Kenyans. There was a purpose to this and the intention of the People of Kenya and of Parliament must be respected.***
>
> ***The parties have a duty to ensure that they comply with their respective timelines, and the Court has a duty to adhere to its own. There must be a fair and level playing field so that no part or the Court loses the time that he/she/it is entitled to, and no extra burden is imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.?***

This was also the position of the Supreme Court of Nigeria in the case of Senator ***John Akpanudoedehe & Others v Godwill Obot Akpabio & Others SC 154 of 2012*** where the judges stated that:

> ***?When the Constitution provides a limitation period for the hearing of a matter… the right to a fair hearing is guaranteed by the courts within [that time]. Once elapsed the hearing of the matter fades away along with any right to fair hearing. There is no longer a live petition left. There is nothing to be tried even if a retrial order is given. It remains extinguished forever. Put in another way fair hearing …is only applicable when the petition is alive…. A petitioner who is unable to argue his petition to his satisfaction [within the prescribed time] or finds the time too short should approach the National Assembly with an appropriate bill to amend the [law]. If this court extends the time provided… for the hearing of election petitions it would amount to judicial legislation and would be wrong.?***

The appellant has asked this Court to act in consonance with the values and principles of the Constitution, and in particular those that are embodied in Article 159 of the Constitution. These principles require the court to do justice without undue regard to procedural technicalities, and to promote the values and principles of the Constitution.

In the body of electoral law, Article 159 is further embodied in Rule 4 of the Election (Parliamentary and County Petitions) Rules, 2013. The rule is headed the „***overriding objective***?. That rule provides that:

> ***?4. (1) The overriding objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the Act.***
>
> ***(2) The court shall, in the exercise of its powers under the Constitution and the Act or in the interpretation of any of the provisions in these Rules, seek to give effect to the overriding objective specified in sub-rule (1).***
>
> ***(3) A party to an election petition or an advocate for the party shall have an obligation to assist the court to further the overriding objective and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.?***

In ***Interim Independent Electoral Commission & Another V Paul Waweru Mwangi [2011] eKLR (Civil Application No. Nai. 130 of 2011 (UR.85/2011))*** this Court, dealing with an application where the overriding objective had been invoked, stated that:

> ***?The common thread is that the ?overriding objective? of civil litigation which those sections [section 3A and 3B] introduced, conferred on the Court considerable latitude in the interpretation of the law, the rules made there under, and in exercise of their discretion in order to achieve the objectives of just, expeditious, proportionate and affordable resolution of disputes.?***

In that application, the Court referred to a previous decision in, ***City Chemist (NBI) Ltd. & 2 Others vs. Oriental Commercial Bank Ltd., Civil Application No. 302 of 2008 (UR),*** where it had stated that the Court stated:-

> ***?It (the overridin g objecti ve) was tailored to enabling the court to deal with cases justly which includes as far as practicable:***
>
> ***(a) ensuring that the parties are on an equal footing;***
>
> ***(b) saving expenses;***
>
> ***(c) dealing with the case in ways which are proportionate-***
>
> ***(i) to the amount of money involved; (ii) to the importance of the case;***
>
> ***(iii) to the complexity of the issues; and***
>
> ***(iv) to the financial position of each party;***
>
> ***(e) ensuring that it is dealt with expeditiously and fairly; and***
>
> ***(f) allotting to it an appropriate share of the court‘s resources, while taking into account the need to allot resources to other cases.? (emphasis mine)***

The Court further stated that it is important to note that the overriding objectives were not to be used as a

"***panacea to all manner of ills and in every situation?,*** and would only be used as "***a shield to protect those who are on the right side of the law, as well as a sword to eliminate transgressors of the law?.***

See also the sentiments of this Court (Karanja, Ouko & Kiage, JJ.A**)** in ***Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others (supra)***where it is stated that**:**

> ***?The question of a right to appeal goes to jurisdiction and is so fundamental we are unprepared to hold that absence of statutory donation or conferment is a mere procedural technicality to be ignored by parties or a court by pitching tent at*** *Article 159 (2)*
>
> *(d)* ***of the Constitution. We do not consider*** *Article 159 (2) (d)* ***to be a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation.***
>
> ***[Jurisdiction] goes to the very heart of substantive validity of court processes and determinations and certainly does not run afoul the substance-procedure dichotomy of Article 159 of the Constitution.?***

Regarding the application of Article 159 of the Constitution to save an appeal filed out of time, the learned judge of appeal Okwengu expressed herself thus in the ***Basil Criticos Case (Supra)***:

> ***?As regards*** Article 159 ***of the Constitution, it merely vests judicial authority in the courts and provides for the principles under which the authority of the court is to be exercised.*** Section 85A ***of the Election Act does not in any way derogate from these principles. Indeed by providing for a specific period for determination of the appeals, the provision ensures*** **inter alia** ***that justice shall not be delayed.?***

I accept the proposition that the appellant has put forward, that the Constitution must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at Article 259 (1) of the Constitution which is framed as follows:

> ***?259. (1) This Constitution shall be interpreted in a manner that—***
>
> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits the development of the law; and***
>
> ***(d) contributes to good governance.?***

These principles have been reiterated time and again by our courts. In ***Njoya & 6 others - vs- Attorney General & 3 others No 2 [2008] 2 KLR (EP),*** this Court held that:

> ***?The Constitution is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it.?***

This was reiterated in ***Re In the matter of the Interim Independent Electoral Commission (2011) eKLR***, where the Supreme Court of Kenya adopted the finding of the Namibian Supreme Court in the case of ***Minister of Defence, Namibia -vs-Mwandinghi, 1992 (2) S.A 355*** and stated that the ***? Constitution must therefore be purposively interpreted to avoid the 'austerity of tabulated legalism.'?*** The Court thereafter held that:

> ***?Interpreting the Constitution is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.?***

See also the holding of this Court in ***Dr. Thuo Mathenge & another v Nderitu Gachagua & 2 others [2013] eKLR (Civil Appeal No. 29 Of 2013)*** where this Court held that:

> ***?… the spirit and tenor of the Constitution which embodies the ideals, aspirations and values of the Kenyan citizens must preside and permeate the process of interpretation. Further, in determining and understanding the spirit of the Constitution the language of the various provisions of the Constitution ought to be taken into account.***
>
> ***… the Constitution ought to be given a purposive interpretation so that the objectives of a particular provision are realized.?***

As I have stated above, we must bear in mind the circumstances that were obtaining, and the mischief sought to be barred, when the people of Kenya and parliament chose to include the strict timelines for the resolution of election disputes. These timelines are constitutionally sanctioned; the objectives of those provisions is to ensure that even as justice is done, electoral disputes are resolved in the quickest manner possible. There is no conflict between them and those provisions contained in the Bill of Rights. To state so would amount to a challenge on the Constitution itself, which is prohibited by Article 2 (3).

Therefore to attempt to enlarge time would be to completely disregard the Constitutional provisions, and the law, and would defeat the overriding objectives of the rules as they are found in the Election Rules. The Supreme Court pronounced itself on this very issue in ***Raila Odinga & 5 Others V Independent Electoral And Boundaries Commission & 3 Others (supra)*** as follows:

> ***?It may be argued that the Supreme Court ought to apply the principle of substantial justice, rather than technicalities, particularly in a petition relating to Presidential election, which is a matter of great national interest and public importance. However, each case must be considered within the context of its peculiar circumstances. Also, the exercise of such discretion must be made sparingly, as the law and Rules relating to the Constitution, implemented by the Supreme Court, must be taken with seriousness and the appropriate solemnity. The Rules and time – lines established are made with special and unique considerations.?***

In the ***Basil Criticos Case (supra)*** as well, the applicant had requested the Court to exercise its jurisdiction under Rule 4 of this Court?s rules and extend the time within which he could file his appeal. The Court, having found that Section 85A of the Elections Act prevailed over the rules, refused extension, expressing itself as follows:

> ***?Indeed, the Election‘s Act and Rules [have] provided specific timelines and clear guidelines. There is no room for extension of time as there is a specific period within which the appeal must be determined. The omission to provide for extension of time is therefore not accidental but is a deliberate move, which cannot be countered by the exercise of the Court‘s inherent jurisdiction or the application of the oxygen principle. Indeed an interpretation adopting the strict timelines is consistent with the spirit of the Constitution as reflected by Article 87 that advocates for timely settlements of electoral disputes.?***

In ***Abdi Nasir Yasin Ahmed & 2 Others v Ahmed Ibrahim Abass & 2 Others, Civil Appeal No 294 of 2013 (unreported)***, a bench of Maraga, GBM Kariuki and Mwilu, JJ.A disallowed an appeal on the grounds *interalia* that the petition giving rise to the appeal had been filed out of time, hence the appeal was incompetent. This decision was based on the interpretation of Article 87 which is on the filing of the appeal in the High Court. Section 85A

deals with the filing of appeals to this Court. In ***Mary Wambui Munene v Peter Gichuki King‘ara &***

2 others [2014] eKLR (Petition No. 7 Of 2014) the Supreme Court of Kenya found invalid a petition that had been filed in the High Court outside the stipulated time of 28 days. In their decision, the Supreme Court judges quoted with approval the decision of the Court in ***Macfoy v. United Africa Co. Ltd [1961] 3 All E.R***. where the Court stated that:

> ***?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 to 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.?***

Thus a petition in the High Court filed out of the statutory timelines is void, and there is no way the Court can breathe life into it.

In my understanding, what is good for the goose is good for the gander. The jurisprudence in ***Hassan Ali Joho and Hazel Ogunde Vs Suleiman Said Shahbal, IEBC and Others (supra)***, and in ***Mary Wambui Munene v Peter Gichuki King'ara & 2 others (supra)*** in so for as they dealt with the correct interpretation of the law regarding time will apply mutatis mutandis to appeals in the High Court and in this Court.

Finally, I turn to the decision in ***Patrick Ngeta Kimanzi v Marcus Mutual Muluvi & 2 others [2014] eKLR* (Civil Appeal No. 191 of 2013)** where a bench comprising G.B.M. Kariuki, Kiage and M?Inoti, JJ.A, cited the earlier decision of ***Charles Kamweru vs Grace Jelagat Kipchoru & 2 others Civil Appeal No.159 of 2013 (unreported)*** where this Court held that held that the time frames set by the Elections Act for filing and service of election petitions are peremptory and do not admit variations. In the ***Patrick Ngeta Kimanzi*** appeal, the Court found that the appeal before it was incompetent for being filed out of time, and struck it out. I do not accept the appellant?s attempt at distinguishing this case from the present one by stating that in that appeal the appellant conceded. It did not matter that the appellant in that appeal conceded that his appeal was out of time. The reason for the striking out was because the said appeal was filed out of time. In any event a concession by a party to a dispute cannot be the basis to amend the law.

With profound respect and deference to my distinguished and learned brothers who were involved in the appeal in ***Patrick Ngeta Kimanzi v Marcus Mutual Muluvi (supra)*** we cannot depart from the decision reached therein. The process for departing from settled principles of law made by this Court is crystal clear to me. Again, with tremendous respect, the circumstances in ***Patrick Ngeta Kimanzi v Marcus Mutual Muluvi*** are the same in all four corners with those obtaining in this appeal. The simple question that lingers in my mind is whether this Court can review its previous decisions merely because another view is possible or attractive. In ***Mary Wambui Munene v Peter Gichuki Kingara Case (supra)*** the Supreme Court further held as follows:

> ***?This Court has been keen to ensure predictability, certainty,uniformity and stability in the application of the law.?***

I agree and add that the principles of jurisprudence enunciated above are also a weapon and a shield for advocates and parties of what they may encounter if similar disputes were to arise. Mine is fidelity to the principle of stare decision and consistency in the application of the Constitution and the statutes. I respectfully decline any other invitation, however attractive and laudatory it may be.

For these reasons, I would also decline the invitation by the appellant to save his appeal under Article 159 of the Constitution. This Court cannot attempt to extend the time for which he was to have filed his appeal. It must always be noted that Article 159 of the Constitution does not attempt to completely do away with the rules of procedure, rather it enjoins courts not to pay ***undue*** regard to technicalities. This does not mean that the rules of procedure are to be done away with in their totality, rather it means that they should not be the only issue for consideration by the court in determining matters before it. Again, I turn to the words of our Supreme Court in ***Raila Odinga v The Independent Electoral & Boundaries***

Commission (Supra), where the Court stated that:

> ***?the provisions of Article 159 (2)(d) were never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the courts of law.?***

Moreover, Article 159 (1) states that judicial authority is sourced from the citizens, and in exercising such judicial authority justice shall be administered without undue regard to procedural technicalities, and that the purpose and principles of the Constitution shall be promoted and protected. If I understood Mr Muite, learned counsel for the appellant, he was saying that the provisions contained in section 85A(a) of the Elections Act, in so far as they contain a limit on the time for filing an appeal is antithetical to the Constitution and the Court of Appeal Rules. The learned counsel also stated that section 85A(a) impedes the right to a fair trial and the right to access to justice. With profound respect to counsel, I do not understand how a statutory power, donated, and enacted, in terms of Article 87 of the Constitution itself can then be unconstitutional.

Moreover, the enforcement of that rule cannot be said to be a procedural technicality, or any technicality at all; it is a substantive provision in the law. To attempt to import the time lines governing other appeals under rule 82 of the Court of Appeal rules amounts to a disregard, a watering down or a white wash of the clear constitutional provisions. In this vein, it cannot be said that these provisions also infringe the purpose and principles of the Constitution because the purpose of that article is the timely settlement of electoral disputes.

The purpose, principle and spirit of Article 87 in donating power to limit time, which was enacted as section 85A, was in answer to a legitimate concern arising from the delay in the filing, prosecution and determination of election petitions and appeals. In my understanding, section 85A was an answer to a historical legal and constitutional problem that bedeviled the determination of election petitions and appeals to their finality and conclusion. Indeed it was a legitimate answer to a somewhat inherent and intrinsic legal lacuna that was abused by parties, advocates, and to some extent, by courts during the hearing of such matters.

Therefore to give effect to the clear provisions of section 85A is administering justice without undue regard to procedural technicalities. In my humble view, the attempt to rely on Article 159 of the Constitution, or the Court of Appeal rules is an attempt to circumvent, abrogate and annihilate the clear provisions of the law. It is also my understanding that section 85A of the Elections Act is for all intents and purposes similar to Article 105 of the Constitution, and it applies squarely to election appeals for gubernatorial positions.

In conclusion, and having considered the jurisprudence emanating from our Supreme court, the Court of Appeal and the High Court, as well as the persuasive jurisprudence from other jurisdictions, I am of the firm view that an appeal filed to challenge the decision of the High Court in an election matter must be filed within 30 days of that decision. Where the appeal is filed outside that mandatory period of 30 days, there is nothing that this Court can do; its hands are tied by the interpretation, the implication and the application of section 85A(a). The Court cannot attempt or purport to give a determination in a matter outside the boundaries or the beacons of the said section. In short, Rule 82 of the Court of Appeal Rules cannot give what the parent Act has rightly removed. The precursor to a competent appeal is filing it within 30 days. That was not the case hear, and consequently, this appeal is incompetent and ought to be struck out. I would so order. However, I am alone in that persuasion.

I think I have extensively and exhaustively dealt with the prime and primary issue of jurisdiction, and now address must address my mind to the merit of the appeal. In doing so, I am mindful of the fact that a court with no jurisdiction must down its tools. However, in order to express my mind in some germane and important matters raised in the appeal, and so determined in the lead judgment of my brother Kiage JA, it is my obligation to render myself.

In my considered view, one important issue arising is that of scrutiny and recount. Submitting on the issue of scrutiny, the appellant argued that the margin between himself and the 4th respondent was very

narrow – just about 70,000 votes - and on this basis alone, the court ought to have ordered scrutiny. He submitted further that the purpose of this scrutiny was to ascertain the accuracy of the poll. The appellant further faults the trial court because even after ordering the scrutiny *suo moto*, the reports showed that there was a difference running to over 400 votes. The appellant therefore submitted that once these malpractices were discovered, then it was an indication of failure of the entire election, and the electoral court was duty bound to order a fresh election.

The respondents on their part submitted that the issues raised in respect of the scrutiny report are issues of fact, and therefore do not fall for determination before this Court. Professor Ojienda further submitted that in any event, scrutiny was ordered by the trial court in order to satisfy itself on the accuracy of the results, and the outcome of that scrutiny was that the trial court satisfied itself that the result declared by the 1st respondent was correct.

Section 82 (1) of the elections Act provides that:

> ***?An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.?***

The appellant takes the view that the learned judge failed to exercise his discretion correctly as required by law when he failed to consider the appellant?s motion for scrutiny. The appellant relies on the dissenting opinion of Kiage JA in the ***Salat Case (supra)*** wherein the learned judge stated that:

> ***?It is no exaggeration to say that the true place of scrutiny and recount of votes after an election raises fundamental questions of public and legal policy the importance of which cannot be overestimated. It also calls for an authoritative and overarching jurisprudence that is truly reflective of the electoral justice that our nascent Constitution of 2010 aims to achieve.?***

The discretion to order scrutiny flows from Section 82 (1) above. Under Rule 33 of the Election Petition Rules, 2013, a party may apply for scrutiny for the purpose of establishing the validity of the votes cast. However, Rule 33 (2) of provides that the Court may order scrutiny if it is satisfied that a basis for the same has been laid. This was reiterated by Gatembu Kairu, JA in his lead judgment in ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR*** in the Salat Case where he stated as follows:

> ***?The discretion to order scrutiny is conferred under Section 82(1) of the Elections Act No. 24 of 2011. Under Rule 33 of the Election (Parliamentary and County Elections) Petition Rules, 2013 a party may at any stage of the proceedings apply for scrutiny for purposes of establishing the validity of votes cast. Rule 33(2) requires the court to be satisfied that there is sufficient reason and the manner in which the scrutiny is to be carried out is set out in detail. An order for scrutiny and recount is therefore not automatic; sufficient reason has to be shown before the court orders scrutiny and recount. There must be enough material placed before the court, which will impel the court to order scrutiny or re-count of votes. Whether or not that criterion is met will depend on the nature of the claims being put forward by the petitioner and the weight the court will attach to the evidence in support of the matters complained of. The irregularities complained of by the petitioner should be of such a nature that would compromise the electoral process so that it was capable of affecting the results and cannot be said to have been free and fair.?***

As a matter of good practice, and to enhance transparency and accountability, courts should readily and with little hesitation allow scrutiny as it is likely to capture, show or demonstrate, and give a clear picture of the allegations of irregularities or malpractices complained of. The outcome of such an exercise can give the court and the parties the true picture, position and outcome of the entire electoral process. I say so because through such an exercise, the legitimacy, appropriateness, transparency of the

exercise is disclosed.

The basis for scrutiny must be laid. It is only out of a basis being laid either in the petition, or in the application for scrutiny, or in the evidence presented, that a judge will exercise his discretion to allow or reject an application for scrutiny. It is for the petitioner, or in this case the appellant, who is alleging that the election was conducted contrary to Article 86 of the Constitution to lay a basis for so saying. For example he ought to say that in certain polling stations A, B, or C, there were such irregularities, that the votes counted and announced were not a reflection of how the people of Nairobi County voted.

That burden is on the person seeking that application. As I have said, scrutiny ought to be readily allowed, but it is a discretion that can only be exercised where a petitioner has laid appropriate basis for it. The appellant alleges that the learned judge was in error for refusing his application for scrutiny; there cannot be a generalised assertion that the learned judge refused the application for scrutiny yet there had been no basis laid for the same. That is the most fundamental point that seems to have been missed by the appellant.

The basis for seeking a scrutiny or recount ought to be disclosed in the petition and in the affidavits supporting the petition. It is not enough for a petitioner to state that he wants this or that - he must say why he wants it. At the very minimum, there must be circumstances and evidence that leads inescapably to the need for scrutiny. For example, you must indicate that in a certain polling station, the registered voters were of a certain number, but the respondent wrongly garnered votes exceeding that number, or that he was wrongly denied votes in circumstances that were unlawful. Such denial must have a direct impact, or effect, on the final outcome of the election and must have given undue advantage to the ultimate winner. If it is not a trivial mistake or error, or something that is likely to change the outcome of the election, then the court will be obliged to order the scrutiny.

However, where there are no such circumstances obtaining, then a purported recount or scrutiny would only be an attempt to achieve some ulterior motive. It is not the law, as I understand it, that every application for scrutiny must be allowed. It is also not the law that failure to order recount or retally in a particular case would automatically vitiate an election; if that was the case, there would be no need for the discretionary power donated to judges under section 82 of the Act and Rules 32 and 33 of the Election Petition Rules. The headnote of Rule 32 shows that this is not a blanket machinery to be allowed at every turn: it reads that ***?the Petitioner may request for recount or examination of tallying.?***

This request may be acceded to by the trial Court if there are sufficient reasons borne out by the petition or the application. This means that scrutiny is subject to the supervisory and discretionary jurisdiction of the court. There is no obligation placed on the election court to allow each and every application for scrutiny or recount.

It is trite law that an appellate court ought not to interfere with the discretion of a trial judge. This has been restated many times by this Court, for example in ***Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commmission & 2 others [2013] eKLR (Civil Appeal No. 18 of 2013)*** wherein the Court stated that:

> ***?…a Court of Appeal will not interfere with the exercise of the trial Judge's discretion unless it is satisfied that the Judge in exercising his discretion misdirected himself in some matters and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice.?***

The obligation is to allow scrutiny and recount in appropriate circumstances, and with sufficient grounds raised in the petition, the supporting affidavits or any other evidence, and the application for scrutiny itself.

My learned brother judge Kiage JA states that there are no conditions precedent imposed by the Elections Act before an application for scrutiny can be allowed. With greatest respect, I disagree. The

fact that the law uses the word *„may?*, in Rule 32, is in itself a restriction on the conditions that the discretion of the judge is wholesomely reserved. This means that the scrutiny may be carried out in such manner as the election court may itself determine. These are two restrictions, and that restriction finds itself in Rule 33 (2) which has clarified that:

> ***?… the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.?***

The process is restrictive in nature and is within the control and management of the election court. The discretionary power to allow and refuse the same is with the trial judge and unless there is express disclosure of evidence that such denial had a direct bearing on the outcome of the election or violated the fundamental rights of the parties or resulted in a fundamental miscarriage of justice which is apparent and clearly seen or manifested, then an appellate court should be reluctant, and should exercise caution in interfering with the discretion of the trial judge to refuse a scrutiny application. It is also my view that the Election Act has not given parties unlimited and unfettered power to make applications for scrutiny that the court would allow without basis. If that was to be the case, then section 82 of the Act and Rules 32 and 33 would be rendered spurious.

More importantly, the issue of recount and scrutiny is a factual issue, and this court is prohibited under section 85A from dealing with factual issues.

To that end, I agree that the learned judge ought to, bearing in mind the nature of the complaints raised in the petition, allowed scrutiny as requested by the appellant. However, this misdirection was cured by the court?s order of scrutiny *suo moto*. Moreover, I disagree with the sentiments of Kiage JA that the requirement of sufficient cause is in conflict with section 82 of the Act, or that it represents an impermissible fetter on the discretion of the trial judge. This is because after the learned judge observed that there had been some errors and discrepancies, he went ahead and dealt with them in the judgment. He did not just observe them and fail to deal with them. In the final analysis, and after determining that these discrepancies were not of a nature to have an effect on the outcome of the election, the trial judge dismissed the petition. He correctly exercised his judicial discretion. I cannot fault him for doing so.

As stated by the Supreme Court in the final decision of ***Raila Odinga versus IEBC (supra)*** to prove any irregularities is a question of fact, but as is well settled that it is an issue of law whether a court has properly appreciated the evidence before it. See also ***Damiano Migwi V Timothy Maina Waitugi [2009] eKLR (Civil Appeal 335 of 2003)*** where it was stated that:

> ***?It is an issue of law, as stated in the 1stground of appeal, to consider whether the first appellate court properly analysed and re-evaluated the evidence on record as it is its duty to do at that stage. A first appellate court has a duty to reappraise the entire evidence on record and make its own findings of fact on the issues, while allowing for the fact that it had not seen the witnesses testify, before it could decide whether a trial court‘s decision could be supported – see Peters v SundayPost Ltd [1959] EA 424, and Selle& Another vs. Associated Motor Boat Company Ltd & others [1968] EA 123.?***

In ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR (Civil Appeal No. 38 of 2013)*** this issue was also considered and the Court stated that:

> ***?This Court is enjoined to deal with points of law only. We cannot interfere with the findings of the trial judge unless we are satisfied and convinced that the trial judge either misdirected himself on a point of law or erred in law in considering a matter which he ought not to have considered or he erred in law by failing to take into account a matter which he ought to have considered.?***

See also the exposition of the learned judges in the ***Peter Munya Case (Supra).***

Once that scrutiny was done, it revealed several things. The trial judge captured, and dealt with the major

discrepancy in the following terms:

> ***?123. ….the Registrar found that at Mathare Youth Polytechnic, Stream 7, Ballot Box No. 094175, disclosed 726 registered voters whilst the total number of votes cast was 737. This was reported in Scrutiny Report No. 2 at page 8. It means there were eleven (11) votes cast not attributable to registered voters, or eleven registered voters who voted twice. Kidero obtained 550 votes and Waititu obtained 154 votes in that stream. The other candidates shared 27 votes and 6 were rejected votes.***
>
> ***…***
>
> ***124. The returning officer was entitled to disregard the results for the entire polling station. She appears not to have noticed the excess valid votes cast, as she did not act in accordance with Regulation***
>
> ***83 (1) (a). The power to disregard excess valid votes is vested only in the returning officer at the constituency level. Is this error, now discovered, fatal to the election??***

Another discrepancy that was noted was that in Embakasi Central and Mathare Constituencies, the entries for all the candidates in the Constituency form 36 and those in the County form 36 did not tally. This discrepancy necessitated a second scrutiny, where the Deputy Registrar undertook a re-tally of votes. Following this, she was able to verify the results in the county form 36 with respect to some of the constituencies. This re-tally resulted in the votes of the appellant being added by 28 votes, whereas the votes of the 4th respondent were added by 4.

The scrutiny and partial recount also revealed that in one of the streams in Mathare Constituency, ***?the total number of registered voters is 726, while the total votes cast are 737. The votes cast are therefore more than the registered voters.?***

The exercise also revealed that in Ndururuno Primary School polling station, there were 18 votes which had been rejected but were later on found to be valid. This resulted in the votes for the 4th respondent increasing by 8, while those for the appellant increased by 6.

Do these discrepancies fall within the ambit of section 83 of the Elections Act, or did they have the effect of vitiating the electoral result? The trial court was of the opinion that they did not. He rendered himself as here under:

> ***125. In these circumstances, the lesson implicit from the law itself is that it recognises and anticipates that such an error may occur in an election. The law's remedy, where there are more valid votes than registered voters in a polling station, is to disregard the results of that station, not to invalidate the entire election. The remedy lies in the hands of the returning officer.***
>
> ***126. Section 82 of the Elections Act, which the court invoked on its own motion to conduct the scrutiny, states at Section 82 (2) (a) – (f) which votes can be struck off upon scrutiny, These include:***
>
> > *"82 (2) (a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which vote was recorded or who had not been authorised to vote at that station."*
>
> ***127. This provision clearly allows, after scrutiny, for the striking out of votes of a person whose name was not on the register or list of voters assigned to Mathare Youth Polytechnic Stream 7.The total valid votes being 731 exceeded the number of registered voters being 726. The excess valid votes are five (5) in number. There is, however, no evidence to show***

whether these were unregistered voters or registered voters who cast one or more votes each.

128. How is the court to grapple with this situation? I must apply the principle from section 83 on the effect of non-compliance with the written law. That is, whether the non-compliance did or did not affect the result of the election. It seems to me that whether the excess votes are struck out, or the entire results of Mathare Youth Polytechnic polling station are disregarded, the effect on the outcome of the election is unsubstantial. The exclusion of 550 votes from Kidero and 154 votes from Waititu in the stream has no significant effect on the outcome, since the difference between the two was over 70,000 votes. Similarly, the exclusion of the entire votes of the Mathari Youth polling station – 4,410 from Kidero and 1,030 from Waititu – has no significant result on the outcome of the election.

129. I therefore find and hold that in terms of section 83, that this non compliance is insufficient for the election to be declared void as prayed by the Petitioner.?

I believe that this was a correct analysis of the discrepancies, borne out by the scrutiny report and the learned judge rightly found that the figures would not have had an effect on the outcome of the election. The learned judge took refuge, and rightly so, under Section 83 of the Elections Act which provides that:

?83. No election shall be declared to be void by reason of non- compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.?

In reaching his decision, the trial judge also relied on the decision *of* ***Islington West Division Case, Medhurst V Lough And Gasquet (1901) 5 O'M & H 120, 17 TLR 210, 230*** where Kennedy J, held that:

,An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e. the success of the one candidate over the other, was not, and could not have been, affected by those transgressions. If, on the other hand, the transgressions of the law by the officials being admitted, the court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognised, and acted upon, by the tribunals which have dealt with election matters.?

I do believe that this was a correct exposition of the law. On this, I am fortified by the finding of the court in ***John Fitch vs. Tom Stephenson and 3 Others [2008] EWHC 501 (OB)*** that:-

?… the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches… This is because where possible, the courts seek to give effect to the will of the electorate .?

This decision was reached through application of ***Morgan and Others v. Simpson and Another [1974] 3 All ER 722***. In this case Lord Denning MR was of the view that an election ought to be vitiated where

the following three main circumstances are prevailing:

> 1. ***If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not;***
>
> ***2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election;***
>
> ***3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the results – then the election is vitiated…?***

My brother Kiage JA has held, quoting the sentiments of Lord Denning in ***Morgan and Others v. Simpson and Another (supra)***, that the provision giving rise to this finding, which was couched in similar terms to our section 83, was expressed in the negative. I only see that this provision reminds us of the very high threshold of evidence or weight that is attached to the nullification of an election. Nullification or invalidation of an election petition is not a simple and straight forward walk in the park. It is a serious business which must not be undertaken by demonstrating that the final result is not a reflection of the will of the people.

This high threshold can only be satisfied by cogent, clear and express evidence. Courts should not be quick to remove a winner from the seat of success unless there is evidence that the winner did not attain success by following the law. On this I adopt the sentiments of the court in the decision of ***Jeet Mohinder Singh V. Harminder Singh Jassi, AIR 2000 SC 256,*** stated that:

> ***,The success of a candidate who has won at an election should not be lightly interfered with. Any person seeking such interference must strictly conform to the requirements of the law. Though the purity of the election process has to be safeguarded and the court shall be vigilant to see that people do not get elected by flagrant breaches of law or by committing corrupt practices, the setting aside of an election involves serious consequences not only for the returned candidate and the constituency, but also for the public at large in as much as re-election involves an enormous load on the public funds and administration.?***

The consequences of the nullification of an election are far reaching and wide. There is an effect on millions of residents and the public. There are financial consequences, both on the individual who loses his seat, and also on the general public. In this case, the appellant only made a generalised attack on the election of the 4th respondent. He further stated that he thought he was a winner because of the opinion polls that had been published. A belief to win doesn?t guarantee votes. Surveys are not conclusive, and if the surveys were always correct, the appellant would never have filed his petition.

Yes, section 83 is couched in negative terms, but it reminds judges and magistrates not to exercise their powers in the nullification of elections for flimsy or flippant reasons. It places a greater burden on judicial officers to ensure that cogent and credible evidence of misdeeds of either the IEBC or other parties is led so that the will of the people, and the principles of electoral law as encapsulated in the Constitution have been done away with. This negative aspect is a clear show of our positive aspiration.

The Constitution places a great premium on the law of representation and sets the guidelines for the conduct of elections. Article 81, for instance provides for an electoral system that is free, fair, based on universal suffrage and is grounded by freedom of citizens to exercise their right to political participation. This is because elections are not contests between a winner and loser who vied for political seats. I therefore do not subscribe to the view that Parliament was wrong in the enactment of section 83 of the Elections Act, and the manner in which it was framed does not derogate from the principles of electoral

law that are contained in our Constitution.

To determine whether a result was materially affected, a quantitative test, not a qualitative one, is called for. In ***Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others*** ***[2014] eKLR (Civil Appeal No. 38 of 2013)*** this Court (Visram, J. Mohammed & Odek, JJ.A) considered what the term *„materially affected the result*? means. This Court set out the following analysis.

> ***90. The central theme in this appeal is whether the irregularities and malpractices identified materially affected the results of the election. This requires us to consider and determine the qualitative and quantitative aspects of the elections. We take this opportunity to lay out the relevant principles on irregularities that materially affect the results of elections. These principles will enable us to determine if the appellant was able to prove that the irregularities identified materially affected the results of the elections.***
>
> ***91. Irregularities in elections refers (sic) to mistakes and serious administrative errors in the conduct of elections. In determining whether irregularity affects the result of an election, one has to look at the number by which irregular votes exceed the plurality of the winning candidate. The margin between the winning and losing candidate is a factor in determining whether the irregularity affected the results of the election. In deciding whether to annul an election, an important consideration is whether the number of impugned votes is sufficient to cast doubt on the true winner of the election or whether the irregularities are such as to call into question the integrity of the electoral process. If a court is satisfied that, because of irregularities, the winner is in doubt, it would be unreasonable for the court not to annul the election. Before annulling an election based on irregularity, the magic number test has to be considered. This means that the contested or irregular votes casts when set aside must exceed the margin between the winner and the runner up.***
>
> ***92. ?Materially affecting the result of election? is interpreted to mean that the final aggregate figure arising from the tallying process will be affected arithmetically to the extent that the margin between the returned candidate and the runner up is not only narrowed but significantly eliminated to the point that a reasonable doubt is raised as to whether the returned candidate garnered votes that exceed the runner up. If after an arithmetical calculation has been made and the returned candidate still maintains a lead over his nearest rival, the results of the election has not been materially affected. The purpose of the arithmetical calculation is to remove any possibility that any difference in votes between the returned candidate and the nearest rival could be wiped out and the result of the election being materially affected.?***

I respectfully adopt this exposition by the learned judges. In this appeal, it is undisputed that the margin of votes declared between the appellant and the 4th respondent is over 70,000 votes. Even if the votes from the impugned polling station were to be subtracted, the net effect would not be a reduction in this margin, so that we are doubtful as to the winner of the election. Needless to say, I find this challenge on the judgment of the trial court devoid of merit.

Mr Kinyanjui faults the election court for arriving at a wrong decision, which is at variance with past decisions of this Court. In particular, the appellant faults the electoral court for failing to apply the decision of ***James Omingo Magara v Manson Onyongo Nyamweya & Others*** ***[2010] eKLR (Civil Appeal No 8 of 2010, Kisumu)*** without distinguishing it in any respect. The appellant submits that instead, the electoral court went ahead and relied on decisions that had no justification or bearing on the proceedings before him.

Prof Ojienda on his part took the position that the election court did not violate the principle of *stare decisis*, and that the electoral court refused to apply the decision in the ***Magara Case*** (Supra) because in that appeal, unlike the present one, the margin in the votes case was small, about 4,446 votes, while in the present appeal, the margin was about 70,000 votes. In addition, in the ***Magara case***, there were many

glaring irregularities, such as missing ballot boxes, open ballot boxes and unsigned form 16A for over half of the polling stations. Counsel further submitted that the electoral court did not consider irrelevant authorities as the case law invoked by the trial judge was on all fours with the current case.

It is commonplace that we are bound by *stare decisis*, and cannot depart from sound precedents of law unless there is reason to distinguish it. The doctrine of precedent is of paramount importance to our jurisprudence. It is incumbent on lower courts to adopt and follow the principles set out by higher courts, unless there are good reasons to depart. The importance of the doctrine of precedent is captured in ***Halsbury's Laws of England, Volume 1 2010 5th Edition*** at paragraph 11 as follows:

> ***?… judicial precedent plays a crucial and significant part in civil procedural law. Some of the cases decided by the courts are of far-reaching importance and may be said to have a virtually legislative effect, so much have they changed the operation of procedural law. The decision of a court upon a procedural question, on what may be called 'procedural facts', may well have the effect of creating a substantive legal right or imposing a substantive legal duty, without deciding the substantive merits in the particular case.?***

In ***Kibaki v Moi (2008) 2 KLR (EP) 351*** the Court held that the High Court

> "***has no jurisdiction to flout the principles of precedent and stare decisis and while it has the right and indeed the duty to examine the decisions of the Court of Appeal, it must follow those decisions unless they can be distinguished from the case under review on some principle such as obiter dictum.***"

See also ***Abu Chiaba Mohamed v Mohamed Bwana Bakari & 2 others [2005] eKLR (Civil Appeal No. 238 of 2003)*** where Githinji, JA stated that:

> "***This Court is bound by principle of stare decisis to follow its own decisions except where, inter alia, the decision was given per incuriam and a decision is given per incuriam if it is given in ignorance or forgetfulness of some inconsistent statutory provision or authority binding on it.?***

These statements apply to us in respect of decisions from the Supreme Court. They are binding on this Court unless we are able to distinguish them. We are therefore bound by authority in the ***Raila Odinga Case (supra)***, that the timelines that are contained in the Constitution cannot be varied or expanded. Similarly, the High court is bound by decisions of this Court unless it able to distinguish such cases.

With respect to counsel for the appellant, there was no way in which the trial court could correctly have relied on the ***Magara decision***, and the Court?s determination on irregularities revealed herein to vitiate the election at hand. The irregularities in this case, as I have stated above, were not so manifest that they could have materially affected the result of the election.

To my mind, the reason electoral court refused to apply the decision in the ***Magara Case*** (Supra) because in that appeal, unlike the present one, the margin in the votes case was small, about 4,446 votes, while in the present appeal, the margin was about 70,000 votes. In addition, in the ***Magara case***, there were many glaring irregularities, such as missing ballot boxes, open ballot boxes and unsigned forms 16A for over half of the polling stations, many of the ballot box seals were broken, and there had even been an attempt to burn down the premises where these ballot boxes were kept. Even after a recount in which the appellant had emerged winner, the court was of the view that the source of the votes in the ballot boxes could not be conclusively determined. After considering these numerous irregularities, the learned judge of appeal Omolo (with Tunoi JA (as he was then) concurring) found that they did not fall under the ambit of section 28 of the National Assembly and Presidential Elections Act (repealed). They therefore upheld the election court?s decision to vitiate the election. Section 28 of the repealed Act is worded the same way section 83 of the Elections Act is now worded.

With respect to counsel for the appellant, there was no way in which the trial court could correctly have relied on the ***Magara case***, and the Court?s determination on irregularities revealed herein to vitiate the election at hand. The irregularities in this case, as I have stated above, were not so substantial that they could have materially affected the result of the election.

Mr Kinyanjui submits that the election court made an error of law on the burden of proof when he fixed the burden of proof on the appellant throughout the trial, despite the fact that the burden of proving that the election had been conducted fairly was on the 1st respondent. In addition, the appellant alleges that there was proof that the election was compromised due to the fact that there had been election material strewn in some parts of Nairobi County, meaning that the burden shifted to the 1st respondent, and it was up to them to discharge that burden.

Prof Ojienda responded that the appellant failed to discharge the burden on him to prove that the election was marred by irregularities, and that those irregularities amounted to non- compliance of the law, and that the result of the election was so affected, that the results are invalid. The respondents submit that the appellant never discharged that burden, and having failed to produce any evidence that would show his assertions to be true, the trial court was forced to dismiss the appellant?s petition.

This therefore begs the question as to who the burden of proof lies upon in an election petition. This issue was the subject of the Supreme Court of Kenya in the ***Raila Case***. The Court analysed several decisions, among them the Ugandan case of ***Col. Dr. Kizza Besigye v. Museveni Yoweri Kaguta & Electoral Commission, Election Petition No. 1 of 2001*** where the majority decision of the Supreme Court of Uganda was that***:***

> ***?….the burden of proof in election petitions as in other civil cases is settled. It lies on the Petitioner to prove his case to the satisfaction of the Court. The only controversy surrounds the standard of proof required to satisfy the Court.?***

The Court also considered the decision of the Supreme Court of Canada ***Opitz v. Wrzesnewskyj 2012 SCC 55, [2012] 3 S.C.R. 76*** where it was stated that:

> ***?an applicant who seeks to annul an election bears the legal burden of proof throughout…?***

The Court in the ***Opitz Case*** considered the relevant provision of law which reads:

> "***After hearing the application, the court may dismiss it if the grounds referred to in paragraph 524 (1)(a) or (b), as the case may be, are not established and, where they are established, shall declare the election null and void or may annul the election, respectively?***

The Canadian Court stated of this provision that:

> ***?The word ?established? places the burden squarely on the applicant. ?***

The Supreme Court of Kenya also considered the position in Nigeria, and evaluated some of the decisions from there, such as ***Buhari v. Obasanjo (2005) CLR 7K***, in which the Supreme Court stated:

> ***?The burden is on petitioners to prove that non-compliance has not only taken place but also has substantially affected the result….There must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election...He who asserts is required to prove such fact by adducing credible evidence. If the party fails to do so its case will fail. On the other hand if the party succeeds in adducing evidence to prove the pleaded fact it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party's adversary to prove that the fact established by the evidence adduced could not on the preponderance***

of the evidence result in the Court giving judgment in favour of the party.?

After considering all this case law, the Supreme Court of Kenya thereafter rendered itself in the following manner:

> ***?There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil case: the legal burden rests on the petitioner, but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made. (em ph asis ou rs)?***
>
> ***…***
>
> ***While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.?(emphasis mine)***

See also the decision of Maraga J (as he then was) in ***Joho v Nyange & Another (No 4) (2008) 3 KLR (EP)*** wherein he stated that:

> ***?1. Election petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not the kind of evidence required in such proceedings. Election petitions should be proved by cogent, credible and consistent evidence. For instance, where allegations of bribery are made, instances of the bribery should be given.***
>
> ***2. The burden of proof in election petitions lies with the petitioner as he is the person who seeks to nullify an election.***
>
> ***While the proof has to be done to the satisfaction of the Court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences a very high degree of proof is required.?***

In the earlier decision of ***Mbowe vs. Eliufoo (1967) EA 240,*** the court stated that:

> ***,There has been much argument at the meaning of the term 'proved to the satisfaction of the court'. In my view it is clear that the burden of proof must be on the Petitioner rather than the Respondents because it is he who seeks to have this election declared void.?***

And what is the standard of proof? I believe that the correct position is that encapsulated in the decision of ***Mbowe vs. Eliufoo (supra)*** where the Court further stated that:

> ***,And the standard of proof is one which involves proof to the satisfaction of the court. In my view these words in fact mean the same thing as satisfying the court. There have been some authorities on this matter and in particular there is the case of Bater v Bater (supra). That case dealt not with election petitions, but with divorce, but the statutory provisions are similar i.e. the court had to be satisfied that one or more of the grounds set out in S.99 (2) (a) has been established. There Denning, LJ in his judgment took the view that one cannot be satisfied where one is in doubt. Where a reasonable doubt exists then it is impossible to say that one is satisfied and with that view I quite respectfully agree and say that the standard of proof in this case must be***

such that one has no reasonable doubt that one or more of the grounds set out in S.99 have been established.?

To discharge this burden and standard of proof, a petition should be composed of assertions, grievances, complaints and the cause of action of the person seeking the intervention of the court. In election matters, the petition must be precise. Indeed, **Rule 10 of the Election Petition Rules** is instructive on the matters that need to be contained in the election petition, and in particular, each must be divided into paragraphs and contain a distinct portion of the subject.

It must also capture or disclose the fundamental grievances of the petitioner, who he deems to be responsible for the grievance and how it affected him and the effect on the person who declared the eventual winner. The petitioner must also state the nature of orders and declarations that he seeks as a result of the transgressions committed by either the I.E.B.C, or the other respondents. In essence, the petition is an embodiment of all the grievances and complaints of the petitioner, and it ought to be in a specific manner. It should not contain generalised assertions , or be a fishing expedition, or a vexing process or a blind attempt to achieve some kind of ulterior motive, and to abuse the process of litigation. It ought to be a reflection or manifestation of the errors and omissions committed by the IEBC which result in the loss of some advantage by the petitioner from the position of success, and whose success would impeach the final outcome of the election.

The petition is therefore crystallised through the supporting affidavits of witnesses who have information or evidence, or knowledge of the alleged transgressions. Because of the strict timelines involved, the petitioner must be precise in the framing of his petition, as well as with the choosing the number of witnesses he intends to support him, and he must do so within the shortest time possible. He has 28 days from the date of declaration of the election result to prepare his pleadings and evidence. It must be of such a nature that sets out the specifics, the particulars and the instances that have led to a miscarriage of justice.

Once the petition is filed together with the witness statements, Rule 14 of the Election Petition Rules requires the respondents, if they intend to respond, to do so within 14 days. In their responses, they ought to answer each and every allegation that has been levelled against them.

Once this process is completed, the court is then seized of the petition, the supporting affidavits and the replying affidavits with powers to regulate or control or manage the manner in which the hearing ought to be conducted, beginning with the pre- trial conference.

The petition that forms the basis of this appeal is unfortunately ill-crafted. The appellant included numerous allegations with no specific grievances, save those found at paragraphs 26 - 31 of his petition, and which I have enumerated at the beginning of this judgment. To support his case the petitioner filed four supporting affidavits. The 1st, 2nd and 3rd respondents filed a joint response to the petition, while the 4th and the 5th respondents filed their own joint response. Together, the respondents had a total of 8 affidavits in opposition to the petition. The appellant only called two witnesses, while the respondents called four witnesses.

From my reading of the petitioner's affidavit, it is not clear what they intended to achieve because they did not refer to any of the forms 35 or 36s that they later attempted to introduce at cross-examination stage. They did not attempt to produce any documents, even those annexed to their own affidavits.

I set out these facts because they are relevant to the issue of burden of proof. The law is that the burden of proof is on the person who alleges, save of course for the exceptions mentioned in section 111 of the Evidence Act. It therefore fell on the appellant to prove that there were irregularities so massive that they affected the outcome of the election, or that the election was not conducted in substantial compliance with the law. The only way in which this burden would have shifted to the 1st respondent, was to prove that it did not indeed conduct the election within the law.

In addition, nothing came of the allegations of double voting, or that the unmarked ballot papers were

somehow used in favour of the 4th respondent. The allegation that James Oswago?s daughters were hired to give an advantage to the 4th respondent was also conclusively debunked, as was the allegation that some of the appellant?s agents were unlawfully removed from the polling station. Nothing comes of this ground of appeal as well, and it must fail.

Constitutional responsibility cannot be equated to the burden of evidential proof. For the burden to shift to the 1st respondent, there must be evidence of violation and abrogation of its constitutional responsibility. It is clear that the 4th respondent garnered 692,483 votes, while the appellant garnered 617,839 votes. The margin between them is a massive and unassailable figure of over 70,000 votes. It is also clear that the appellant did not lead any evidence to show how such a huge number of votes were stolen. To his credit, 4th respondent in his affidavit stated in response to the petition what he got in each of the 17 constituencies.

This evidence remained uncontroverted. It was therefore not dislodged through the evidence in chief of the appellant, nor in the subsequent cross-examination, I highly doubt, and I take judicial notice, that any sensible human being would disregard such a margin as amounting to nothing. I also doubt whether the officials, agents and employees of the 1st and 4th respondents would have the capacity, the audacity, strength, resources and the will to steal over 70,000 votes from the appellant.

The appellant is a man who is well grounded in Nairobi politics, and therefore such an exercise would not only be difficult, but it would also be dangerous. I say so because a contest with the appellant, in any form, is not a walk in the park. The appellant enjoys massive grassroots support, with the necessary and the attendant consequences if his rights were violated by any person. In my view, the appellant is a heavy weight in Nairobi county politics. It would be difficult for any entity or person to violate or compromise his rights. A reasonable by stander who has read all the material tendered before the trial court can only draw one conclusion, that the over 70,000 votes could not have been stolen from the appellant. This was not borne out in the evidence before the court. Anybody saying otherwise is, in my humble opinion, deluding himself, or may be day dreaming.

It is therefore not true that the trial judge never addressed his mind to the aspect of the shifting burden and the fact that he used the term „beyond reasonable doubt? doesn?t mean that he never shifted the burden. I agree that the judge was wrong in using that term but it suffices to say that the burden placed on the appellant cannot be said to establish a prima facie standard to trigger the shift.

In my understanding the standard of proof in election petitions is the same like in ordinary civil disputes, unless the allegations of electoral offences alleged are proved. However, where there are allegations of criminal offences alleged to have been committed, the standard of proof is much higher than the balance of probabilities, but is below the standard of beyond reasonable doubt.

In my understanding, the word *„prima facie?* cannot be equated to the standard of proof as set out above. To conclude this aspect, I think the learned judge appreciated that the burden of proof was rightly on the petitioner and applied the correct factual and legal analysis and came to the right conclusion.

Another issue raise by the appellant is the refusal of the trial judge to admit the affidavits filed on his behalf, and the implication of such refusal to the principle of fair trial. Timeliness of filing of the petition and the witness statement and affidavits is an imperative constitutional obligation of the parties to put forward what they think their cause of action, or their complaint is. They should prepare the necessary witness statements before the filing of the petition so that the same can be filed contemporaneously. It is true that when preparing the cause of action that the parties would decide on the number and the nature of witnesses to support the petition. This petition was filed on 11th March 2013. The pretrial conference was on 10th June 2013 and the matter was eventually set down for hearing from 25th June 2013 before Mwongo J.

During this time, the appellant filed an application dated 10th May 2013 by which he sought to introduce additional evidence by way of seven new affidavits. It is alleged that the judge applied different standards or used prejudicial treatment at the expense of the appellant. As I have already stated, at the

time the application was made, the respondents had already filed their responses and these had already been served upon the appellant, at that time, pleadings had already closed. It is unclear why he did not introduce these affidavits at the time of filing of the petition or before service of the response to the petition, or before the close of pleadings. In my understanding, it defeats logic and common sense to file a petition with four supporting affidavits and then be served, at a much later date, with an additional seven affidavits.

The only inference or conclusion that can be derived from the haphazard conduct of the appellant is that the additional affidavits were filed in anticipation of the responses filed by the respondents. It is also an attempt to establish a case through speculation, guesswork and blind shipping. Surely, the law cannot be called upon to aid an indolent litigant who is unsure of his cause of action, the number and nature of his witnesses to support the same. If that was to be allowed, the purpose and objective of pleadings would be lost.

The refusal by the learned judge of the application to allow these affidavits cannot be equated to shutting out evidence. If the appellant knew that the discovery of the truth and proof of his cause would require those witnesses, then he ought to have made the necessary attempts to secure them within reasonable time and in any event, before the close of pleadings. The appellant did not show that what he attempted to introduce was evidence, or was material discovered at a later date which he could not reasonably have been found earlier. And as already stated, election disputes have been accorded strict timelines by the Constitution and statute, and they must be adhered to.

The next issue that must be dealt with is the propriety of the county form 36. The appellant faults the form for being unsigned, undated and for having unsupportable data. Regulation 83 (1) of the Election Regulations, provides, for the constituency returning officer to sign and date the form, and then present this to the county returning officer. The election court was correct in stating that this regulation does not place any obligation on the county returning officer to sign and date the form. In any event, upon scrutiny of all the forms 36 in the county, only minor discrepancies, that I have dealt with above were discovered. These did not have any material effect on the election of the 4th respondent.

The appellant also faults the election court for denying him an opportunity to cross examine witnesses on the forms 35 and 36 that were before the court, and submits that this was a violation of his Constitutional rights to a fair trial and to access justice. By way of background, I will set out the events that seem to give rise to this ground of appeal.

On 25th June 2013, the court was receiving the evidence of ***Fiona Nduku Waithaka***, the first witness for the 4th respondent. The witness stated that she had looked at all Forms 36 for all the 17 constituencies of Nairobi before she compiled Form 36 for Nairobi County. During cross examination, the appellant attempted to rely broadly on all the forms 35 and 36 deposited in court per rule 21 of the Election Petition Rules.

This prompted an objection from the respondents for various reasons, chief among them being that these forms were not contained in the affidavits that had been filed as part of pleadings by the appellant, meaning that the appellant was going beyond the scope of cross examination, that it would be unfair to the respondents because these run into thousands of pages, that cross examination was only to be limited to contested issues and that the respondents had not been served with those forms.

Mr Kinyanjui for the appellant stated that the witness was the maker of the county form 36 and therefore he would not be going out of the scope of the witnesses own testimony and further that since the forms had been delivered to court, the court could not be asked to close its eyes just because the 4th and 5th respondents had not been served with them. In his ruling, the trial judge rendered himself in the following manner:

> ***?To my mind, therefore, cross examination of a deponent in respect of an election petition must relate to the substance of the evidence of that witness. But it must also be relevant and material to the scope of that witness‘s deposed role, actions and***

involvement in the subject matter as circumscribed by the issues in contention and the party's pleadings.

Under rule 15 (4) a respondent's witness cannot give evidence unless he or she has previously filed a sworn affidavit setting out the substance of the evidence and which has been filed and availed to the parties. Given the aforesaid parameters, it is clear to me that documents or items filed or delivered to the court pursuant to rule 21 of the Rules are not, and do not become part of the trial record unless and until the court grants leave for their use and inclusion in the trial. In such case, then they may assume a place on the trial record.

...

Accordingly, and for the above reason, I am not inclined to allow the documents filed by the IEBC to be used in wide and general manner for cross examination which may amount to mere fishing for information.

…

where the petitioner or his witnesses have deposed to a specific form 35 or 36 of IEBC in respect of or alleging an irregularity, malpractice or otherwise, this court shall grant leave to the petitioner to cross examine a witness using a specified form contained in the forms 35 & 36 filed under rule 21. The court shall grant leave on a case by case basis to ensure that the rights of all parties are duly protected, to guard against the enlargement or stifling of a party's case, and so as to bring on to the trial record only such matters in respect of which the pleadings specifically relate.?

This is the ruling that sparked the decision in ***Ferdinand Ndung'u Waititu v Independent nElectoral & Boundaries Commission, IEBC & 8 others [2013] eKLR (Civil Application No. 137 of 2013 (UR 94 of 2013))*** where this Court, differently constituted held that this Court did not have the jurisdiction to entertain interlocutory appeals. The issue now falls before us for determination and the appellant alleges that due to failure to cross examine this witness and reliance on the Forms 36, his rights to a fair trial were violated by the learned judge.

The appellant submits that the refusal of the judge to let him cross examine witnesses on the accuracy of those forms undermined his rights. He also submits that the refusal of the judge to allow him scrutiny also undermined his right to a fair trial, and because of this patent unfairness, the judgment reached by the trial court cannot be sustained.

The 4th and 5th respondents on their part argue that the appellant was bound by his pleadings and also by the disposition of his witnesses, and therefore leave was granted to the appellant to cross-examine only those issues contained in specific forms that had been deponed to. The respondents therefore contend that the appellant cannot complain about the failure of cross examination, when it was him who failed to identify the forms that he wished to have cross examined upon.

Rule 21 of the Elections Act provides:

?21. The Commission shall deliver to the Registrar—

(a) the ballot boxes in respect of that election not less than forty- eight hours before the date fixed by the court for the trial; and

(b) the results of the relevant election within fourteen days of being served with the petition.?

Pursuant to this rule, the 1st Respondent delivered to the High Court all the ballot boxes and the results

of the election in respect of Nairobi County Governor. At this juncture, it cannot be stated, as the appellant states, that these forms were part of the trial record. They did not form part of the evidence presented during the petition. Rule 21 ensures that these materials are present so that in the event of a recount or scrutiny, the material is readily available to the court. It expedites the process of a recount, or where the court can make appropriate orders, as the court below us did in this instance, where it set out the specific forms to be used by the parties, and ordered that the same be photocopied and provided to them so that the hearing could continue.

I hold the opinion that the fact that RW4 was shown the form 36 during cross examination meant nothing, this is because, first, any evidence extracted during this cross examination would have no probative value or competence, because these documents were not part of the evidence relied upon or produced by the appellant.

Cross & Tapper on Evidence, 11th Edition (Collin Tapper, UOP) at page 336 states that

> ***?… the object of cross-examination is two-fold: first to elicit information concerning the facts in issue or relevant to the issue that is favourable to the party on whose behalf the cross- examination is conducted; second to cast doubt upon the accuracy of the evidence in chief given against such a party. So far as cross-examination to the issue is concerned, the ordinary rules with regard to the admissibility of evidence apply so that the prosecution cannot cross-examine the accused on the contents of an inadmissible confession?***

These sentiments apply, in my view, with equal force to documentary evidence. In addition, it is the law that if a party wishes to cross examine a witness on any document, then it must first of all be marked for identification with the aim of ultimately being produced before the court for admission. It is true that under rule 21 of the Election Petition Rules election material is brought to court and deposited with the Deputy Registrar, but that does not make them evidence or mean that they can be relied upon by either of the parties, or the court without marking them for identification and then producing them so that they form part of the court record. This step of marking for identification will enable parties, and the court, to verify the competency of the documents.

It also enables the court to interrogate their correctness, their truthfulness and the contents. It is through the means of identifying the documentation, and the subsequent admission of the same that the court will establish the veracity of the same. Therefore it is clear that the documents that the appellant sought to cross examine the respondent?s witnesses on were not part of the evidence relied upon by the appellant, or any of his witnesses. The particular form in question was also not produced by RW4 who was being cross-examined.

In his ruling on the 26th June 2013 the trial judge made directions for the forms that the court would allow cross examination on. The learned judge was correct in saying that not all the election material deposited in court was a part of the trial record. If the appellant intended to rely on them, then these documents should have been given to the parties before a competent cross examination could be mounted. I know of no law that permits parties to rely on documents whose contents, whose maker and whose source cannot be verified. I do not accept that the election material deposited in court pursuant to Rule 21 will form part of the trial record. I also do not accept that the material so deposited is prima facie a manifestation of the correct position on the ground. The possibility of showing forged documents is high, and can only be eliminated when the correct procedure is followed.

I say so because the possibility of manipulation and inclusion of documents can only be eliminated if parties and their advocates follow the correct procedure and processes if they intend to rely on or derive an advantage from such documents. In my view, the procedure adopted by the appellant, of showing the form 36 for Embakasi to the RW4 during her testimony was an attempt to circumvent the clear process of identification and admission of documents. The prejudicial effect, borne out by the respondents? objections, were justified in that they were never served with these documents, and even more telling, is that neither the appellant nor any of his witnesses, made any reference to this document when they gave

their evidence.

It is true that cross-examination holds a place of pride in the trial process and that it is used to test the veracity of evidence adduced by opposing parties; it can only be on factual issues, or on documentation that is before the court, and documents only become part of the court record as and when they are produced and identified as evidence to be relied upon. It defeats logic that the credibility of evidence being adduced in court can be tested by other evidence which no party has produced.

Cross examination is not a wild and unregulated mechanism that can be employed by parties in any manner they desire. It must be relevant and appropriate. This powerful resource of cross examination can only be used within the confines of the law, and in this case the law is the Election Act, the Evidence Act and the Civil Procedure rules.

Evidence obtained outside the legal mechanism of due process is prejudicial and is a perversion of the interests of justice and as such, I take the firm view that the respondents were justified in objecting to the mode, the content and the nature of cross examination, and the trial court on its part was justified. To control parties on the purview and extent of cross examination cannot be equated with denial of the right to fair trial. As I have stated, the guiding principles are relevance, admissibility and competency of the intended cross examination mounted by any of the parties. Therefore cross examination per se is not an open cheque. It must be applied within the parameters of the law. There can be no prejudice resulting or arising from an irrelevant cross examination which would add no value to the case of the parties.

In this case, it is my position that the purported cross examination that was denied by the trial judge would have added no value to the case of the appellant. More importantly a court cannot and should not allow a cross examination which is valueless and which would have no effect on the case of the party mounting it. My brother Kiage JA takes refuge in the decision of ***R v Ndawd & Others [1961] 1 SA (N)*** where the Court stated that the denial of a right of cross examination of witnesses, that immediately causes prejudice to an accused person, especially since it was not known what the evidence would have been revealed during cross examination. With respect, I do not think that this authority, which is persuasive at best, ought to be applied to the appeal at hand as this is not a criminal case, where the court would not know what evidence the witness would have given. Unlike the South African court, this court knows what the cross examination would have turned up, and this was only a wishful and uncoordinated mechanism employed by the appellant.

I am therefore persuaded that there was no failure of the principle of fair trial and access to justice as the appellant employed the wrong mechanism to achieve an incompetent outcome. I say so because if the appellant desired to rely on any of the election material delivered to the Court, it was incumbent upon him to follow the procedure for production and admission of such material onto the record. He did not do so, and so cannot mount a challenge now.

My brother judge Kiage JA has stated that he had occasion to peruse the forms 35 and 36 on record. I am of the view that whether these documents had stamps is neither here nor there because these issues were never brought out in evidence. The learned judge could not have been justified in the perusal of these forms. It is unclear that these, the documents produced by the appellant, are the same documents that were delivered by the 1st respondent. Without such verification, the Court cannot attempt to rely on them.

It is trite law that parties are bound by their pleadings. In ***Malawi Railways Ltd Vs. Nyasulu [1998] MWSC 3***, the learned judges of the Supreme Court of Malawi adopted the statements in an article by Sir Jack Jacob entitled ***?The Present Importance of Pleadings***" found in ***Current Legal Problems [1960]***, where the author states that:

> ***?As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he***

has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings.

Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called ?Any Other Business? in the sense that points other than those specific may be raised without notice.?

These sentiments remain true in South Africa, where the court in ***Vermeulen and Others v Minister van Veiligheid en Sekuriteit en Anders (1377/2008) [2011] ZANWHC 85 (10 March 2011)*** stated as follows:

A defendant is free to frame his exception in any way he chooses, but is bound by the way in which his case is made out in the exception. Jacob and Goldrein on Pleading: Principles and Practice at 8–9 put it thus:

> ***?As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings. . . . For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The Court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the Court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation. . . . Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own inquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called ?any other business‘ in the sense that points other than those specified in the pleadings may be raised without notice.?***

These general statements apply to an exception. A party is bound by the terms in which it is framed and by the issues which it raises.

These principles apply with equal force to our jurisdiction. In ***Nzoia Sugar Company Limited v Capital Insurance Brokers Limited [2014] eKLR (Civil Appeal No. 86 of 2009)*** and ***Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR*** this Court

quoted with approval the above statement appearing in Sir Jacob?s article.

Applying the principle to the present appeal, the appellant had full advantage of having the forms with him, and he has not complained that he was not provided with all the forms. It therefore does not lie for him to claim that the judge was wrong in refusing him a blanket cross examination on all the witnesses. The learned judge cannot be faulted for ruling, as he did, that the appellant was bound by the pleadings he raised and by the disposition of those witnesses. In addition, there is no reason why these forms should be struck out by this Court; these are primary documents - that is the reason the law requires them to be deposited in court. All the courts are entitled to rely on them. However, they must follow the correct procedures as I have stated above. And in election matters, it must be a part of the pleadings of the petitioner, and must be relevant. You cannot for example, mount an inquiry into the propriety of the election of the member of parliament in a case as this one that is challenging the gubernatorial election.

The appellant considers the judgment rendered by the election court a nullity in law. He submits that there is a material variance between the judgment of the trial court that was rendered orally, and the one that was subsequently issued, and therefore, it is null and void. The appellant takes issue with these judgments for two reasons. The first is that the election court, in delivery of the judgment, referred to the 1st respondent as the Interim Independent and Boundaries Commission. The second reason is that the trial judge, in his judgment read in open court on the 10th September 2013, stated that he had found the election for Nairobi County Governor to be in violation of the electoral law and the Constitution, yet in the written judgment, the trial court made a finding that was completely opposite and upheld the election.

The appellant seeks to prove these errors by reliance on a DVD which attached to the record of appeal. In response, Prof Ojienda first argued that this Court cannot admit a video demonstration of what the judge allegedly did because it cannot properly form a part of the record of appeal, and is therefore inadmissible under rule 87 of this Court?s rules. He argued further that to admit the said video evidence would amount to introducing new evidence in this Court, which is contrary to the provisions of Rule 29 of the Court of Appeal rules. Prof Ojienda further argued that there is only one judgment of the Court, and that one is proper, and is the final judgment of the election court.

Professor Ojienda argued in the alternative, that even if there was an error, then it is important to look at the intention of the court. He argues that even if there was such an error, then these errors did not affect the judgment in any material respect, and under the slip rule, the electoral court has the right to amend its judgment.

In his view, with which I agree, the learned judge could not have intended to refer to the 1st respondent as the „interim? Electoral Boundaries Commission, or to have found that the election in question was not conducted in accordance with the law because the learned judge had already made specific findings with regard to the specific allegations raised by the appellant. A reading of the judgment is plain in that regard.

The learned judge has not had an opportunity to rebut the grave allegations made against him. More importantly, he is not a party to the proceedings before us, and the appellant never sought his views. It would therefore be preposterous, if not dangerous, to assume that the learned judge changed or varied his judgment. We cannot doubt or cast aspersions on the conduct, or the integrity of the judge in the manner suggested or proposed by the appellant. This is especially so because it is unclear why learned counsel for the appellant waited over three months to raise this issue. On my part, I cannot give any weight or premium to the allegations against the learned trial judge.

In addition, I have gone through the judgment of learned trial judge and it is clear in my mind that he captured thoroughly the factual and legal analysis, that he recast and evaluated all the pertinent issues raised by the parties, and as such, it cannot be said that the trial judge departed from the path that he adopted from the start to the end. There is no material to show that the judge intended to rule in favour of the appellant. In addition, there is no confusion or contradiction in the judgment of the learned trial judge. It really is not clear to me how and where the DVD recording of the trial judge as he read his

judgment would fit in. It is unclear whether the recording was authorized by the trial judge; to my mind, it is improper for parties to use recording mechanisms in a clandestine manner, without the permission or consent of the trial court. Seeking such consent would enable parties and the court to verify the accuracy, authenticity, competency and correctness of any information generated therefrom.

As matters stand, I am unable to lend any credence to this DVD, as the contents cannot be verified. The possibility of manipulation and distortion cannot be eliminated. Speaking for myself, I do not think the mode and manner of the making and production of the DVD is acceptable. In fact, I find it utterly unjustified, suspicious and speculative. The attempt to impeach the decision of the judge through an unregulated mechanism is to say the least, a collateral attack on the dignity, integrity and respect of the court. There is due procedure for that. I think to contravene such a procedure would be to destroy the rule of law, which is embodied by the judges, or judicial officers. I am firmly convinced that the attempt by the appellant to trivialize such a weighty issue cannot be allowed.

Professor Ojienda?s final submission was on the issue of costs, which he has raised in his cross-appeal. He submits that curbing of costs, as was done by the election court, is contrary to the Act, as it will prejudice the taxing master and violate his right to a fair hearing. Learned senior counsel further contended that the capped figure of Kshs 2.5 million awarded by the trial court was not reasonable, taking into account the number of applications heard before the final determination of this matter, which were all dismissed with costs to the respondents.

Learned counsel Mr Kinyanjui on his part argued that the costs should be borne by the 1st, 2nd and 3rd Respondents for it is their failures that spawned the petition, and costs should not be visited upon the appellant as that would be a gross miscarriage of justice.

Section 84 of the Elections Act is couched in mandatory terms. It provides that

> "***an election court shall award the costs of and incidental to a petition and such costs shall follow the cause***."

Further, Rule 36 (1) of the Election Petition Rules requires an election court, at the conclusion of an election ***petition ?to make an order specifying the total amount of costs payable and (b) the persons by and to whom the costs shall be paid.?***

Again, the trial judge cannot be faulted on this ground, and in my view, it follows that the cross appeal ought to be dismissed.

As I conclude, it would be remiss if I did not mention that it seemed to me that the appellant placed before this court voluminous documents in which no clear grievances were brought out. There was no evidence to invalidate the election of the 4th respondent. Ultimately, there was no documentary evidence produced in the lower court, but instead, documents that were irrelevant and unauthenticated were found as part of the record of appeal before us. There was no explanation given by the appellant on this; such a route as has been employed by the appellant is a clear demonstration of a party who thinks he has a cause of action but is not sure of the evidence or material to be used to prove his case. With greatest respect to the appellant and his thirteen (13) volumes of the record of appeal, his cause is somewhat disjointed and a replication of a person who is not sure of what he intends to achieve. It has been a torturous exercise going through his petition and to attempt to decipher his grievances. This state of confusion is mirrored in the memorandum of appeal which runs into twenty (20) typed pages. As has been clearly stated by my brother Kiage JA in his lead judgment, the prolixity of the petition, or the memorandum as the case may be, is diametrically opposite of what is expected of a party bringing us his case, and what is clearly stated in Rule 64 (2) of this Court?s rules, that:

> ***?The memorandum of appeal shall set forth concisely and under distinct heads numbered consecutively, without argument or narrative, the grounds of objection to the decision appealed against, specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law, which are alleged to have***

been wrongly decided.?

A petition, or a memorandum of appeal is like a smart bomb, or the medicine used in chemotherapy. It must target the point of illness if it to be effective. It should not result in a wandering process that can result in visiting injustice to parties in a suit, or to third parties.

I think that the trial judge, with exemplary distinction, dealt with the petition and with the various applications which were sometimes frivolous and vexation, and correctly determined those matters. There was, in my view, no misdirection on his part, and I would uphold his decision and dismiss this appeal as well as the cross-appeal.

I would also order that the appellant bear the costs of the respondents in this appeal as well as those in the High Court.

Before I conclude, this judgment, I am obliged to make a few observations. First, this decision is a reflection of the tremendous hard work and industrious labour of all the advocates who appeared before us. To say the least, they all deserve a word of gratitude for their hard work and industry. Secondly, I must confess that it has been a difficult, even torturous exercise sieving through the numerous documents and authorities filed, most of which, with profound respect, were unnecessary, and a duplication of resources and labour. The petition and memorandum of appeal were not elegantly drafted; the contents and style ought to have been more precise to the specificity of the grievances. That was not the case.

Thirdly and most importantly, we cannot guarantee a particular outcome in our endeavor to do justice between parties. It is the pleadings, the facts and the law as presented, and as we understand and appreciate it, which determines a particular outcome. By dint of the majority decision, the fruits of success today belong to the enigmatic, energetic, endearing and sometimes overzealous son from Eastlands; a man who symbolizes hard work, poverty and resilience all in one basket. He was not been deterred by the events of 4th March 2013. To his credit, he has used these attributes positively. He inspires many but equally frowned upon by many, for his abrasive, overzealous nature, and lack of self-control. To the rich and educated Nairobians, he is seen as an outsider to the breakfast table. All in all, the man who stormed Nairobi from the East, has vanquished the man from the West. The battle of the foreigners is now over, perhaps. I am not sure.

The orders shall be those proposed by Kiage, JA.

Dated and Delivered at Nairobi this 13th day of May, 2014.

M. WARSAME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF G.B.M. KARIUKI, JA

1. The 4th March 2013 elections attracted a big number of candidates for the office of the county governor of Nairobi County. Among the candidates were **Ferdinard Ndungu Waititu**, the appellant and **Evans Odhiambo Kidero**, the 4th respondent in this appeal. The elections were historic. They ushered in a new democratic order in Kenya. They were the first elections in our Republic to be held under the

2010 Constitution (promulgated on 27th August 2010)in which Kenyans expressed their determination to live in peace and unity as one indivisible sovereign nation proudly recognizing our ethnic, cultural and religious diversity and the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law and committed themselves to abide by the Constitution.

2. Kenyans introduced a devolved system of government in the Constitution. For the first time, power to manage the affairs of the Kenyan nation was devolved to the people through each county government comprising a county assembly and a county executive.

3. The provisions of our Constitution are a product of struggle spawning many years. They have created a new constitutional order that manifests inclusivity and participatory democracy in which affirmative action measures are reflected for the purpose of addressing and redressing imbalances in our society in social, economic and political processes.

4. Chapter Eleven of our Constitution contains provisions, objects and principles of devolved government. A county governor and deputy county governor are directly elected by voters registered in the county, on the same day as a general election of Members of Parliament and if two or more qualified candidates are nominated, as was the case in the 4th March 2013 elections an election must be held in the county and the candidate who receives the greatest number of votes is declared elected.

5. Each candidate for election as County governor is required under Article 180 (5) to nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor. Under Article 180(6) the Independent Electoral and Boundaries Commission (IEBC) is not required to conduct a separate election for the deputy governor but instead to declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.In the 4th March 2013 county election for the county governor of Nairobi County, the 4th respondent had nominated the 5th respondent as a running-mate.

6. In the Declaration of Persons elected as Governors and Deputy Governors published in Gazette Notice No.3155 on 13th March 2013 by IEBC Evans Odhiambo Kidero and Jonathan Mwekethe 4th and 5th respondents respectively were declared as governor and deputy governor-elect respectively of Nairobi County with Evans OdhiamboKidero, the 4th respondent shown as having garnered 692,483 votes against the runner-up, Ferdinard Ndung'u Waititu, the appellant,who garnered 617,839 votes.

7. By dint of Section 75(1) of the Elections Act 2011, a question as to the validity of an election of a county governor is determined by the High Court within the County or nearest to the County.

8. The appellant, aggrieved by the conduct and the results of the Nairobi County gubernatorial election, filed pursuant to the provisions of the Elections Act (S.75) Election Petition No.1 of 2013 in the High Court at Nairobi challenging the validity of the election of the County Governor of Nairobi County and the declaration of the 4th respondent as the winner.

9. The petition was made on the grounds that there were irregularities in the election and it queried the accuracy and legitimacy of Forms 35 and 36 and the declared results for county governor of Nairobi County. The appellant *qua* petitioner contended in the supporting affidavits that the constitutional threshold of free and fair election was not attained and that the irregularities cited in relation to the conduct of the election affected its integrity and the results. It was the petitioner's case that as the election was not conducted in substantial compliance with the electoral law, it was null and void.

10. The 1st, 2ndand 3rd respondents denied the allegations by the appellant as did also the 4th and 5th respondents who contended in their replying affidavits that the conduct of the election was in compliance with the law and any irregularities found were minor and did not affect the final results of the election. The Attorney General and the 7th to 9th respondents did not participate in the proceedings in the High Court.

11. It was the duty of the High Court to investigate the complaints made in the petition and to apply the law and fairly determine whether the election was free and fair and whether it was conducted substantially in accordance with the electoral law and whether the integrity of the process was compromised and whether the results reflected the true picture of the voters' decision.

12. The election petition was heard from 10th May 2013 by Mwongo, P.J. after his gazettement and, within the statutory period of six months, delivered judgment on 10th September 2013 dismissing the petition with costs and declined all the prayers sought by the appellant.

13. The appellant, dissatisfied with the decision of the High Court filed appeal No.324 of 2013 in this Court on 23.11.2013.

14. The memorandum of appeal contained 39 grounds of appeal spread out on 20 pages of A4 size paper. Though bearing various headings, many of the grounds overlapped or were repetitive. The central issue emerging however is on validity of votes cast and the common thread running through the grounds is accuracy of Forms 35 and 36; curtailment of cross-examination; denial of scrutiny and court's refusal to allowadduction of further evidence by the appellant; orders made bythe court *suomoto*, in addition to the issues of burden and standard of proof, and the court's failure to adhere to stare decisis by declining to follow the decision in the case of *James Omingo Magara v. Manson Onyango Nyamweya& 2 Others C.A. Appeal No.8 of 2010 at Kisumu*;and generally compliance with the electoral law.

15. The 4th and 5th respondents filed on 20.12.2013 notice of cross-appeal in which they sought reversal of the decision of the election court with regard to the capping of costs payable to them of Shs.2.5 million on the ground that the amount is manifestly low. They also filed on 20.12.2013 notice of grounds for affirming decision of the High Court on the grounds set out in the notice.

16. The appeal was filed after the expiry of 30 days after the delivery of the judgment on 10th September 2013. But as the appellant lodged the appeal within 24 days of receipt of the proceedings, but after 49 days following delivery of the judgment by the High Court, a question arose whether the appeal is competent on account of being lodged outside the period of 30 days from the date of the delivery of the judgment stipulated in S.85A(a) of the Elections Act or whether by dint of the certificate of delay issued by the Deputy Registrar pursuant to rule 82 of the Court of Appeal Rules, the Court has power to discount and exclude the 49 days taken by the Court to prepare the proceedings so as to leave intact the period of 30 days accorded to the litigant by Section 85A(a) of the Elections Act. This question was raised by the Court and counsel were asked to address it, which they did.

17. On 25th February 2014, all the counsel for the parties agreed that the issue whether the Court has power to exclude time expended in preparation of proceedings from computation of time for filing appeal stipulated by S.85A(a) of the Elections Act was crucial as the validity of the appeal reposed on it and learned Senior Counsel Mr. Paul Muite having intimated that he needed time to consider it and address the Court, the hearing of the appeal was adjourned with the orders that the motion dated 19.12.2013 by the 4th and 5th respondents seeking to strike out the appeal would be deemed to be part of their response to the appeal and that the latter were at liberty to file and serve a supplementary record of appeal within 14 days, which they did on 3.3.2014. Further, the Court ordered parties to file written submissions within the timelines set in the order. The appellants filed their written submissions and list of authorities. They had filed written submissions on the notice of motion by the 4th and 5th respondents. The 1st to 3rd respondents filed their written submissions and bundle of authorities on 11th March 2014. The 4th and 5th respondents filed supplementary record of appeal on 3.3.2014 and written submissions on 10.3.2014. They had filed on 21.2.2014 written submission on the said notice of motion. In addition, they filed on 20.12.2013 notice of cross- appeal (dated 19.12.2013) and notice of grounds for affirming the decision of the High Court (Mwongo, J.) dated September 10th, 2013. I have perused the same.

18. The appeal came up for hearing before us on 11th March 2014. Learned Senior Counsel Mr. Paul Muite appeared with learned Counsel Mr. J. Harrison Kinyanjui for the appellant while learned counsel Ms. Wairimu Njoroge appeared for the 1st, 2nd and 3rd respondents. Learned Senior Counsel Prof. Tom Ojiendaappeared with learned counsel Ms. Mugambi for the 4th and 5th respondents. The 6th,

7th, 8th and 9th respondents who did not participate in the hearing of the election petition in the High Court did not appear. The full submissions made by the learned Senior Counsel Mr. Paul Muite on behalf of the appellant and by the learned Senior Counsel Prof. Ojienda on behalf of the 3rdand 4th respondents have been eloquently summarized in the judgment of my brother Mr. Justice Kiage, JA and I need not repeat them. Nor do I need to re-echo that the election petition was initially framed as a constitutional petition which M. Ngugi, J. of the Constitutional Division of the High Court referred to Mwongo, J. who was gazetted to hear the same.Mr. Muite submitted that the central issue in the appeal was on validity of votes cast and that the appellant had questioned the accuracy of forms 35 and 36. Prof. Ojienda contended that the appeal was incompetent and was devoid of evidence to buttress the allegations made. Counsel for the 1st, 2nd and 3rd respondents, Miss Wairimu supported the submissions of the 4th and 5th respondents.

19. The first issue in this appeal is whether or not the appeal is competent in view of the fact that it was filed after the expiry of the period of 30 days prescribed by section 85A(a) of the Elections Act 2011.Mr. Muite submitted that it is competent. He drew our attention to the fact that the respondents had not raised the issue and went on to submit that the appellant had furnished a Certificate of Delay to show that the appeal was filed within 30 daysafter receipt of the proceedings from the High Court. He drew our attention to rule 35 of The Elections (Parliamentary and county elections) Petition rules 2013 (hereinafter referred to as "rule 35 of Elections Petition Rules")and rule 82 of the Rules of this Court and contended that access to justice would be denied if Section 85A(a) is not interpreted in harmony with rule 82 and the time taken by the Court to prepare the proceedings excluded from the period of 30 days prescribed by S.85A(a). He pointed out that when the law gives 14 days to appeal, the Court can interpret the same to mean working days without distorting the law. The right of appeal, he submitted, would be denied if the time taken by the Court to prepare the proceedings is not excluded through issuance of a certificate of delay under rule 82. He contended that the constitutional rights relating to access to justice and fair hearing would be compromised by a narrow interpretation of S.85A(a) and the Court's discretionary power to exclude the time taken by it to prepare proceedings would be taken away.

20. Prof. Ojienda was of the opposite view. The appeal, be submitted, has not complied with Section 85A(a) and is therefore incompetent. For it to be competent, he said, it had to be brought within 30 days of the impugned decision of the election court dated 10th September 2013. That period elapsed on 10th November 2013 and the appeal was lodged 22 days later on 22.11.2013. It was Prof. Ojienda's contention that the High Court availed the proceedings on 9.10.2013 as evidenced by the certificate of delay dated 31.10.2013 which states in item 3 that *"the proceedings and ruling were ready on 9.10.2013."* But it is to be noted that the same certificate of delay also states in item 4 that *"the certificate of delay was prepared and was ready for collection on 30.10.2013."*The issue, it seems, is not whether the appellant received the proceedings before the expiry of the 30 day period prescribed by Section 85A(a) of the Elections Act because judgment was on 10.9.2013 and if, as Prof. Ojienda states, the appellant received the proceedings on 9.10.2013 leaving the appellant with only one day to go before the expiry of the 30 day period, it is inconceivable that the exercise of compiling the record and lodging the same could have been successfully mounted within one day, modern technology notwithstanding. The real issue is whether the Court has power under rule 82 of this court's rules to exclude the time taken to prepare the proceedings. Prof. Ojienda contended that the notice of appeal lodged by the appellant within 14 days on 12.9.2013 was not an appeal as required by law and that no appeal was lodged until 22.11.2013 by which time the period prescribed for appealing had ran out. He contended that parties were enjoined to comply with the Constitution and the Elections Act which the appellant had failed to do and urged the Court to strike out and dismiss the appeal as incompetent. In response to the reference to rule 35 of the Election Petition Rules and rule 82 of the Court of Appeal rules, he contended that these were applicable only where there is a competent appeal which the instant appeal is not.

21. Learned Counsel Ms. Wairimu associated herself with the submissions of Prof. Ojienda and contended that there was no competent appeal before the Court as Section 85A(a) was not complied with.

22. In view of the fact that the issue of the competence of the appeal is crucial, I shall deal with it first.

23. The question for determination where an appeal is lodged outside the period of 30 days stipulated in Section 85A(a) of the Election Act is whether the Court has judicial discretion to exclude the time taken by the election court to prepare the proceedings. In doing so, the Court must examine whether the intention of the legislature was to invalidate an appeal so filed even though the time frame of 6 months in Section 85(b) is unaffected. In other words, should the appellant be condemned for the time taken by the High Court to prepare the proceedings? Section 85A of the Elections Act states:

> ***"85A. An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be-***
>
> ***(a) filed within thirty days of the decisions of the High Court; and***
>
> ***(b) heard and determined within six months of the filing of the appeal.***

24. In respect of the timelines imposed on the High Court, the Court of Appeal and on the litigant, one thing stands out, namely, that litigation on elections must be concluded within 6 months, in the case of the High Court, from date of declaration of results as ordained by Article 87(2) of the Constitution and in the case of this Court from the date of filing of the appeal as stipulated in S.85A(a) of the Elections Act 2011. Rule 35 of the Election (Parliamentary and County Elections)Petition Rules 2013 states:

> ***"35. An appeal from the judgment and decree of the High Court***
>
> ***shall be governed by the Court of Appeal Rules."***
>
> ***Rule 82* of the Court of Appeal Rules states:**
>
> ***"r 82 (1) subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within sixty days of the date when the notice of appeal was lodged –***
>
> ***(a) A memorandum of appeal, in quadruplicate;***
>
> ***(b) The record of appeal, in quadruplicate;***
>
> ***(c) The prescribed fee; and***
>
> ***(d) Security for costs of the appeal:***
>
> ***Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.***
> **(underlining is ours)**
>
> ***(2) An appellant shall not be entitled to rely on the proviso to sub- rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.***
>
> ***(3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.***
>
> **The Bill of Rights in Chapter Four of the Constitution contains important Articles which bear on the rights of litigants in appeals before us and in particular as relates to access to justice and fair hearing.**
>
> ***Article 48 provides "The State shall ensure access to justice for all persons and, if any fee is***

required, it shall be reasonable and shall not impede access to justice."

Article 50 (1) provides: "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or, if appropriate, another independent and impartial tribunal or body."

25. *Article 25 (e)* stipulates that despite any other provision in the Constitution, the right to a fair trial, shall not be limited. In applying the Bill of Rights, Courts are enjoined to develop the law to the extent that they give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom besides promoting the values that underlie an open and democratic society and the spirit, purport and objects of the Bill of Rights.

26. The issue relating to the question whether there is scope for judicial discretion on our part to exclude the time taken by the High Court to type, prepare and deliver proceedings required by an appellant to compile and lodge record of appeal has witnessed robust debate in legal circles. Chapter seven of the Constitution contains provisions on general principles for the electoral system, voting and mandate given to Parliament to enact legislation to provide, inter alia, for conduct of elections. In particular, Article 87(1) mandates Parliament to enact legislation to establish mechanisms for timely settling of electoral disputes. Prior to the promulgation of the Constitution on 27th August 2010 and the enactment of the Elections Act 2011 elections petitions and appeals from decisions of the election court dragged on and on*ad infinitum*and sometimes went on up to the next election. It became scandalous. The effect of this was to deny the people the right of knowing their representatives in Parliament. A new legal regime to forestall this scandalous phenomenon was called for. The 2010 Constitution mandated Parliament to enact law to restore sanity by restricting the period for determination of electoral disputes to specified time frames. It is against this background that the provisions of the Elections Act 2011 and the regulations made thereunder should be viewed and interpreted. Rule 35 of the Elections Petition rules 2013 applied wholesale the Court of Appeal Rules to appeals from decisions of the Election Court.

27. The application of the Court of Appeal Rules to appeals from decisions of the Election Court was not abridged. The question that has occupied legal minds and has emerged in this appeal is whether rule 82 of the Court of Appeal Rules is in conflict with or is overridden by Section 85A(a) of the Elections Act or whether the two provisions are symbiotic and can sit side by side so as to retain the Court's discretionary power without which the rights on access to justice and fair hearing would be prejudiced. This debate has escalated due to conflicting decisions on the matter and from this ruling will definitely ensue another view. Hopefully such view will illuminate and add to the more acceptable jurisprudence rather than add to vague jurisprudence or cloud the issue.

28. What is salient in the current electoral legislation is the cure or panacea provided by imposition of strict timelines to rid the country of the erstwhile scandalous procrastination in resolution of electoral disputes. What is glaring in the entire scheme of the electoral legislation is the time frames within which election disputes must be concluded.In the case of the High Court it is six months from the date of declaration of results (as per Article 87(2) of the Constitution) and in the case of this Court, it is within six months from the date of filing of appeal (S.85A(b) of the Election Act)).

29. Article 87(1) of the Constitution mandated Parliament to enact legislation to establish mechanisms for <u>timely settling</u> of electoral disputes. As stated above, Article 87(1) of the Constitutionand the Elections Act and the Rules and Regulations made thereunder were informed by the bad experience Kenya had in which litigation on election disputes went on and on *ad infinitum*. This was the mischief that the statute aimed to cure in imposing the 6 months timelines as aforesaid. But in doing so, it could never have been the intention of Parliament to prejudice the right of a citizen to access justice or the right to appeal an election decision where, for no fault of his, the period for appealing ran out. If Parliament intended that rule 82 should be overridden by S.85A (a) (supra), Parliament could have expressly so stated. It did not. The Court of Appeal Rules were applied wholesale to appeals from the Election Court. That was not purposeless. Admittedly, the courts' judicial function is to interpret the law in a manner that ensures that the intention of the legislature is given effect to because Parliament could never have

intended a conflict between the Constitution (which,*inter alia,* confers rights and freedoms to the citizens) and the Elections Act that regulates the conduct of the electoral process. This appreciation is important because it bears on the principle of separation of powers.

30. The true meaning of Section 85A(a) of the Election Act 2011 vis-avis rule 82 of this Court's Rules cannot be discerned without looking at and seeking illumination from the Constitution especially in Articles 10, 20, 25 (c), 38, 48, 50, 87(1)(e) and 87(1) which relate to important rights conferred on a litigant. In an intended appeal against a decision of an election court, it cannot be a good argument to posit that the rights to access justice and to fair hearing under Articles 48 and 50 respectively including the principle that citizens have the freedom to exercise their political rights (Article 81 (a)) are compromised by want of judicial power under rule 82 of this court's rules to exclude the time taken to furnish proceedings to facilitate lodging of appeal. A construction of Section 85A(a) of the Elections Act that prejudices, stifles or renders these rights meaningless would, in my view, be repugnant to the spirit and intendment of the Constitution because it could never have been the intention of the Constitution that an intending appellant who is intent on exercising his right to challenge the outcome of an election decision can be prevented from doing so for not beating the 30 days' deadlinestipulated in Section 85A(a) for no fault of his.

31. This problem is not peculiar to Kenya. Dealing with a similar legal issue, the Supreme Court of Uganda in SitendaSebala v. Sam K Njuba and the Electoral Commission (Election Petition No. 26 of 2007) considered Section 62 of the Uganda Parliamentary Elections Act (PEA) and rule 6(1) of the Parliamentary Elections (Election Petitions) Rules (PE)(EP). The Sections of the Act provide that:

> ***"Notice in writing of the presentation of petition accompanied by a copy of the petition shall, within 7 days after filing of the petition, be served by the Petitioner on the respondent or respondents, as the case may be."***

This provision is repeated in rule 6(1) of the PE (EP) Rules. The rule states:

> ***"Within 7 days after filing the petition with registrar, the petitioner or his or her advocate shall serve on each respondent notice in writing of the presentation of the petition, accompanied by a copy of the petition."***

32. In that case, the petitioner after filing the petition failed to serve the respondents with the notice within 7 days as required by S.62 (supra) and rule 6(1) (supra) and by an application filed in the High Court sought enlargement of time to serve the notice. The High Court ruled that it had no jurisdiction to extend time fixed by the statute. An appeal was preferred to Uganda Court of Appeal which upheld the decision of the High Court. A second appeal was preferred to the Uganda Supreme Court. The Supreme Court observed that both the High Court and the Court of Appeal below appear to have held that the Court had no power to extend time fixed by statute even though the rules conferred the power. The Supreme Court expressed its view thus-

> *"**It appears to us that in so holding, the Court of Appeal misconstrued its previous decision in the appeal in BesweriLubuyeKibuka v. Electoral Commission & Another and overlooked the decision of the Constitutional Court."***

33. The decision in the latter case was that the petition was rendered a nullity upon the Court refusing to exercise its discretion to extend time, and not that the Court had no power to extend the time, since by virtue of Article 137 (6) of the Uganda Constitution, both the trial Court and the Court of Appeal were bound to dispose of the case in accordance with the decision of the Constitutional Court. The Uganda Supreme Court went on to expound on the interpretation as follows:

> ***"It cannot be over-emphasized that while the court must rely on the language used in a statute to give it proper interpretation, the primary target and purpose is to discern the intention of the legislature in enacting the provision.***

The courts have overtime endeavoured, not without difficulty, to develop some guidelines for ascertaining the intention of the legislature in legislation that is drawn in imperative terms. One such endeavor, from which the courts in Uganda have often derived guidance is in the case of The Secretary of State for Trade and Industry vsLangridge [1991] 3 All ER 591, in which the English Court of Appeal approved a set of guidelines that are discussed in Smit h's Judicial Revie w of Administrati ve Action 4th Ed.1980, where at p. 142 the learned author opines that the court must formulate its criteria for determining whether the procedural rules are to be regarded as mandatory or as directory notwithstanding that judges often stress the impracticability of specifying exact rules for categorizing the provisions. The learned author then states –

"The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act."

In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused by holding them to be mandatory or if the court is for any reason disinclined to **(emphasis added)**

"More recently, Lord Steyn aptly observed in Regina vs. Soneji and another [2005] UKHL 49 (HL Publications on Internet) that-

"A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply does not invalidate what follows. There were refinements. For example, a distinction was made between two types of directory requirements, namely (1) requirements of a purely regulatory character where a failure to comply would never invalidate the act, and (2) requirements where a failure to comply would not invalidate an act provided that there was substantial compliance."

"He then proceeded to consider what he termed "a new perspective" discerned from decisions of the English Court of Appeal, the Privy Council, and courts in New Zealand, Australia and Canada and concluded-"

Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in Attorney General's Reference (No.3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can be fairly taken to have intended total invalidity."(emphasis added) also agree, was expressed in Project Blue Sky Inc. vs. Australian Broadcasting Authority (1998) 194 CLR 355, where, after referring to the mandatory and directory classification of statutory provisions as outmoded, that court said"

"...a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory, and if directory, whether there has been substantial compliance. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid..... In determining the question of purpose,

***regard must be had to the language of the relevant and the scope and object of the whole statute.*" (emphasis added)**

34. The Uganda Supreme Court concluded by stating that regard must be had to the whole statute and the purpose and intention of the legislature. In that case, the purpose was to ensure in public interest, that disputes concerning election of peoples' representatives are resolved without undue delay. The Court stated:

"We had no hesitation in answering in the negative, the question whether the purpose and intention of the legislature was to make an act done in breach of section 62 of the PEA invalid. In so doing, we noted the use of imperative language in the provision but also took into consideration the whole purpose of enactment of Part X of the PEA. It is evident from the provisions on limitation of time within which to file the petition, (section 60(3)), and to serve the Notice, (section 62), together with the directive to the trial and appellate courts to expeditiously dispose of the petition and appeals arising from it, giving them priority over other matters pending before the courts, (sections 63(2) and 66(2) and (4)), that the purpose and intention of the legislature, was to ensure, in the public interest, that disputes concerning election of people's representatives are resolved without undue delay. In our view, however, that was not the only purpose and intention of the legislature. It cannot be gainsaid that the purpose and intention of the legislature in setting up an elaborate system for judicial inquiry into alleged electoral malpractices, and for setting aside election results found from such inquiry to be flawed on defined grounds, was to ensure, equally in the public interest, that such allegations are subjected to fair trial and determined on merit."

"In our view, the only way the two complimentary interests could be balanced, was to reserve discretion for ensuring that one purpose is not achieved at the expense or to the prejudice of the other. In the circumstances, the legislature could not have intended, as counsel for the 2nd respondent submits, the rigid application of section 62, thereby excluding any court discretion over the provision, while the same statute, in section 93, mandates the Chief Justice, in consultation with the Attorney General, to make rules providing for practice and procedure in respect of the exercise of the court's jurisdiction in general, and for "service of an election petition on the respondent" in particular."

"Our conclusion is that through that provision (i.e. S.93 of Parliamentary Elections Act) the legislature authorized the making of rules providing for balancing the two complimentary interests. Rule 6 of the PE (EP) Rules, therefore, is neither ultra vires nor superfluous. It is in conformity with the said statutory mandate. Consequently, the discretion under rule 19 for enlarging the time "appointed" for service of the Notice, is applicable to rule 6. Accordingly, in respectful disagreement with the learned trial judge and Justices of Appeal, we found that the trial court had jurisdiction to hear and determine the appellant's application for extension of time."

35. In interpreting the Election Act, regard must be had to common-law principles. Although the electoral law is a special regime that is *sui generis*, common-law principles on interpretation of statutes and documents including statutes on parliamentary and county elections sanctioned by the Constitution (such as the Election Act 2011) apply to them save where common-law is expressly excluded by written law. Section 3(1) of The Judicature Act (Cap 8) applies common-law and in interpreting the Elections Act, common-law principles apply.

36. A long time ago, Lord Shaw also seems to have dealt with a scenario similar to that in the case of Sitenda Sebala (supra) in The Privy Council in Shannon Realties v. Ville de St. Micheal [1924] AC 185 at pg 192 (per Lord Shaw) when he expressed the view that:

Where the words of a statute are clear, they must, of course be followed, but in their lordships opinion, where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be

regulating and that alternative to be rejected which will introduce uncertainty, friction or confusion into the working of the system.(the underlining is ours)

37. In its wisdom, the Kenyan Parliament in addition to imposing 30 days in Section 85A(a)(supra) for filing an appeal in this Court from the decision of the Election Court also imposed in S.85A(b) a time frame of 6 months from the date of filing of the appeal within which the litigation must be concluded. Within the latter period, the Court has jurisdiction to hear and determine appeals brought before it including jurisdiction to determine whether an appeal is competent or not and, along with this, the issue of fairness and right to access justice which the Constitution emphasis throughout. It also enjoins courts to construe the rights in the Bill of Rights in a manner that most favours enforcement of those constitutional rights and freedoms and encourages development of the law to give effect to a right or fundamental freedom. Further, Article 10(1) of the Constitution binds judicial officers whenever any of them interprets any law to apply national values and principles of governance which include the rule of law, democracy and participation of the people, equity, human rights and good governance. Would it not be against the intention and repugnant to the spirit of the Constitution to shut out an intending appellant from appealing a decision in an election matter only because the Court does not furnish the proceedings in time? Would it not be against the intention and spirit of the Constitution for the Court, as an organ of government, not to ensure access to justice in line with Article 48 of the Constitution? I think that we ought to protect the rights of citizens to access justice and we cannot do so if we gave Section 85A(a) a narrow interpretation. Courts of law, in my view, ought to be jealous of statutory provisions which attempt to oust their jurisdiction, and a narrow interpretation of the section will do just that. The jurisdiction of superior courts including jurisdiction to interpret statute law to give effect to constitutional rights and freedoms cannot be taken away except by express words or necessary implication (see Tindall C.J. in Albion v. Pyke (1842) 4 M & G. 421 at pg 424 and Baron v. Sunderland Corp. [1966] 2 QB56. In my view, it should not be presumed without express words that the power of this Court under rule 82 of the rules of this court has been taken away on the basis that S.85A(a) overrides rule 82 for that interpretation fails to have regard to the mischief the election law was designed to get rid of and the fact that the electoral law entrenched the right of the voter to participate in elections and to challenge election results in courts. In my considered view, the two provisionsare symbiotic and go hand in hand, the rule being applicable only where delay is attributable entirely to the Court which has discretion, not to enlarge the 30 days stipulated in Section 85A(a), but rather, to exclude in a certificate of delay such time as the Court needs to make available the proceedings to the litigant. To hold otherwise would be to create a presumption and a construction that lends itself to absurdity. If there was an express statutory provision to the effect that rule 82 would not apply to appeals from an election court, the position would be different as the question then would be whether such statutory provision would be in conflict with the Constitution and if so, invalid. Moreover in construing statutes, there is a presumption that the legislature knows the law and that Parliament does not intend what is inconvenient or unreasonable. That is why in a case such as R v. Tonbridge Oversees [1884] 13 QBD 339 at page 342 Brett MR said:

> ***"...if an enactment is such that by reading it in its ordinary sense, you produce a palpable injustice, whereas by reading it in a sense it can bear, though not exactly its ordinary sense, it will produce no injustice then I admit one must assume that the legislature intended that it should be so read as to produce no injustice."***

Judges must not be timorous souls afraid to make decisions in favour of what is right or what makes sense or promotes fairness and justice. It is better to err in the process of trying to do what is right rather than shy away from making a decision.

38. It is well settled that construction of statutes must be done as far as possible to avoid absurdity. The presumption against absurdity in rules of construction of statutes requires courts to lean against a construction that would give rise to absurdity. Courts are also enjoined to construe statutes in a manner that gives them validity rather than invalidity, hence the principle *"ut res magisvaleat quam pereat"*which according to Black's Dictionary 9thEdn simply means that they must be construed in a manner that gives validity and sustains them. (seePye v. Minister for Lands for New South Wales [1954] 1 W.L.R. 1410 at pg 1423). It is worth remembering that courts are enjoined to carry into effect the

intentions of the legislature. That is why, for example, in the English case of Dutton v. Atkins [1871] LR 6QB 373 where the Vaccination Act of 1867 in England which authorized a summons to a parent "to appear with a child" was held to be complied with by the appearance of the parent without the child, for otherwise the parent could defeat the statute by refusing to produce his child. It is Lord Blackburn who said in Edinburgh Street Tramways v. Torbain [1877] 3 App. Cas.58 at pg 68 that:

> ***"I quite agree in construing an Act of Parliament we are to see what is the intention which the Legislature has expressed by the words, but then the words again are to be understood by looking at the subject matter they are speaking of and the object of the Legislature, and the words used with reference to that may convey an intention quite different from what the self-same set words used in reference to another set of circumstances and another object would or might have produced."***

39. In Westminster Bank Ltd v. Zan [1966] AC 182 at pg 222, Lord Reid stated in this regard:

> ***But no principle of interpretation of statutes is more firmly settled than the rule that the Court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous – if they are reasonably capable of more than one meaning – or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the Court may depart from the natural meaning of the words in question; but beyond that we cannot go."*** **(emphasis added)**

40. The application of the Court of Appeal Rules by Rule 35 of the Elections Petition Rules to appeals from decisions of the election court to this Court is in itself an acknowledgment that the time given for appealing could run out for no fault of the intending appellant while the Court is engaged in typing and preparing the proceedings necessary for compiling the record of appeal, an exercise over which the intending appellant has no control. Should Section 85A(a) of the Election Act be construed in complete disregard to this? Should the discretionary power of the Court to exclude, pursuant to rule 82, time taken by the Court in preparing the proceedings from the time stipulated by Section 85A(a) be ignored? I think the court ought to adopt an interpretation that gives meaning to the intention of the Legislature.

41. In Caledonian Ry v. North British Ry [1881] 6 Appl. Cas.114 at pg 121, 122.) Lord Selborne L.C. expressed the view that although:

> ***"there is always some presumption in favour of the more simple and literal interpretation of the words of a statute, the more literal construction ought not to prevail if it is opposed to the intentions of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."*** **(emphasis added)**

42. As stated earlier, the Elections Act imposes time frames on the Election Court and on the appellate court. These time frames of six months for finalizing determination of election disputes are cast in iron. Not so, in my view, the period of 30 days under S.85A(a) for lodging appeal. As long as there is a notice of appeal lodged in time, and as long as the Court in determining the appeal does not go outside the six months period set by S.85A(b), the court has discretionary power to exclude the time taken by the High Court to prepare the proceedings providing that the proviso rule 82 has been complied with. This,tomymind, is the construction to S.85A(a) that does not result in absurdity. The contention that to do so amounts to judicial legislation does not hold water for the simple reason that the time so excluded does not benefit the appellant who is without the proceedings until they are provided and it cannot therefore be legitimately argued that the period for lodging appeal is enhanced by the amount of time excluded.

43. In myview, where a notice of appeal has been lodged, as required by the rules,signifying the appellant's intention to appeal, the appeal cannot be said not to be underway and if, for no fault of the intending appellant, the period of 30 days elapses before lodgement of the record of appeal, the

jurisdiction of the court under rule 82 is not taken away to exclude the time taken by the election court to furnish the proceedings. In my view, the words of a statute must be construed so as to give a sensible meaning to them. Section 85A(a) must be read with the Constitution in mind. It cannot correctly be construed without regard being had to the mischief intended to be eliminated. Among the canons of construction recorded in the famous Heydon's case which is the *locus classicus* on construction of statutes and documents, one must see what the law was before the Act was passed, and what the mischief or defect for which the law had not provided for, what remedy Parliament provided, and the reason for the remedy. Lord Turner L.J., in Hawkins v. Gathercole [1855] 6 De M.G. & G 1 at page 1 had this to say on construction on the point:

> ***"We have therefore to consider <u>not merely the words</u> of this Act of Parliament, but the <u>intent of the legislature</u> to be collected from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light on the subject."***

44. At the risk of being repetitive, the Constitution emphasis in the Bill of Rights the values of fairness and the right to access justice in articles 50 and 48 respectively. As I stated above, in interpreting Section 85A(a), it must be realised that to deny a litigant the right to be heard on an electoral dispute by rejecting an appeal for failure by the Court to furnish proceedings in time cannot meet the test of fairness not least because it is tantamount to shutting the door to justice on a litigant in circumstances in which the blame for lateness reposes on the Court (where a Certificate of Delay has been issued) and amounts to depriving the appellant of his right to access justice, and hence the right of appeal. That is antithetical to the value of fairness in the Bill of Rights. An interpretation of Section 85A(a) that upholds rejection of an appeal where the appellant is not to blame for lateness is certainly against the spirit of the Constitution and the Bill of Rights. Parliament is deemed to know the law and it could never have been its intention to contradict the Constitution by breaching the right to fair hearing and impending access to justice. In my view the application of rule 82 of the Court of Appeal Rules, amongst others, provided the cure to what would otherwise have created injustice and prejudiced constitutional rights. Clearly, the interpretation that harmonises with the Constitution even though it may, on the face of it, appear at variance with Section 85A(a) is the one in which rule 82 of this Court's rules sits side by side with S.85A(a). That is the interpretation that is in harmony with and promotes the values of the Constitution. It is the interpretation that is in tandem with the spirit of the Constitution. It is the interpretation that ensures the rights in the Bill of Rights relating to access to justice and to fairness are living and organic. It is the interpretation that sustains the discretionary power of the Court under rule 82 of the Court of Appeal Rules so as to give meaning to the provisions of the Constitution and obviate absurdity. It is for this reason that I hold the view that the Court (where a Certificate of Delay is in place) is entitled to exclude time taken in preparing the proceedings.

45. One does not have far to seek to see that Rule 35 of the Elections Petition Rules by applying the Court of Appeal Rules to appeals from decisions in Election Court seeks to make S.85A(a) compliant with the letter and spirit of the Constitution which sanctioned the Elections Act in the first place in Article 87(1). It is not difficult to discern that the mischief that the Elections Act sought to eliminate did not lie in the time laid down for exercising the right to lodge appeal. Rather, the mischief lain in the delaying tactics adopted by litigants bent on prolonging *ad inifinutum* election proceedings to forestall court decisions. As I have stated this mischief was cured by the time frame of six months within which firstly the Election Court must determine the petitions and secondly this Court must dispose of appeals from decisions in such petitions. I must emphasize that this is the mechanism the legislature introduced through Rule 35 of the Elections Petition Rules to ensure that the High Court in furnishing an intending appellant with the proceedings did so without eating into the statutory period of 30 days. Without such mechanism, different stations of the High Court would undoubtedly furnish intending appellants with the proceedings after varying periods of time after applications are made and there can be no argument that the 30 days statutory period given by Section 85A(a) to compile and lodge appeals would suffer diminution due to the time taken up by the Court in preparing proceedings. That would never have been the intention of the legislature. The application of rule 82 of the Court of Appeal Rules ensured standardization so that intending appellants would not lose any of the days given by Section 85A(a) on account of the time taken up by the Court in preparing proceedings. That mechanism ensures that all

intending appellants enjoyed equally the period of 30 days given by S.85A(a). An interpretation of Section 85A(a) that does not have regard to this is bound to result in injustice and unfairness. Bearing in mind that different Court stations will for obvious reasons (that may range from issues of equipment, resources, technology and even efficiency of Court staff) take varying periods to supply the proceedings to intending appellants, it cannot be correctly argued that the legislature intended that intending appellants be treated differently and would have only such time, if any, as would remain after the Court has utilized time in preparing proceedings. Such an argument would lead to injustice and absurdity.

46. If more support was needed, even a more clear statement on the subject was made by Lord Denning in Escoigne Properties Ltd. v. I.R.C. [1958] AC 549 at pg 565 where he stated:

> ***"A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used: and what was the object, appearing from those circumstances, which Parliament had in view. That was emphasized by Lord Blackburn in River Wear Commissioners v. Adamson and by Lord Halsbury in Eastman Photographic Materials Co. Ltd. v. Comptroller of Patents in passages which are worth reading time and again. But how are the courts to know what were the circumstances with reference to which the words were used and what was the object which Parliament had in view, especially in these days when there are no preambles or recitals to give guidance. In this country we do not refer to the legislative history of an enactment as they do in the United States of America. We do not look at the explanatory memoranda which preface the Bills before Parliament. We do not have recourse to the pages of Hansard. All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well-informed people."***

47. The construction of S.85A(a) therefore ought to be in harmony with the Constitution and the Elections Act as a whole, the latter showing that the time frame of 6 months is what is cast in iron while the rights in the Bill of Rights relating to access to justice is not prejudiced by an interpretation that fails to appreciate the fact that longevity in electoral litigation was the mischief sought to be eliminated. Many of those involved in the struggle for reforms in this country whichhave resulted in positive changes witnessed today have vivid recollection of what the struggle was all about namely quest for changes that would enhance the rule of law, human rights, democracy and promotion of public interest and it is in this context and in support of these values that an interpretation of S.85A(a) must be viewed. My experience in this type of litigation is that the High Court will in normal circumstances cause the proceedings to be furnished immediately after the decision is rendered by election court as typing is normally done continually on day to day basis as the hearing of each election petition progresses. Only in rare cases are proceedings delayed. It is with regard to such cases that the Court is called upon to decide the fate of intended appeals. It must not be forgotten that the genesis of the Elections Act whose Section 85A is the subject of interpretation in this appeal is the Constitution which in Article 87(1) mandated Parliament to enact legislation "*to establish mechanisms for timely settling of electoral disputes.*" It is to the Constitution therefore that the Elections Act must make obeisance and seek illumination. I agree with the submissions by Mr. Muite that there is no conflict between rule 82(supra) and S.85A(a)(supra).

48. In light of what I have stated above, it is clear that the mischief the legislature intended to get rid of had nothing to do with the period for lodging the appeal. Invariably always, petitions in the erstwhile dispensation were instituted in due time and as the law required. The devil was in the time taken by the courts and litigants, often delaying tactics being adopted by respondents to stifle the Court's efforts to finalize the litigation with expedition. That is why I hold the view that the six months statutory period within which an appeal from the decision of an election court must be finalized is cast in iron and cannot be extended.

49. I wish to comment on the case of *Maitha v. Said and Another [1999] EA 181 a*nd on *Lorna ChepkemoiLaboso v Anthony KipkoskeiKimeto& Two Others (Civil Appeal(application) No.172 of 2005* (unreported) as well as the Nigerian Case of *Senator John Akpanudoedehe*. In the Maithacase, the Court

by a majority rejected the view that the Court of Appeal Rules applied to appeals from decisions of the Election Court. The National Assembly and Presidential Elections Act (now repealed), unlike the present Elections Act did not invoke and apply the Court of Appeal Rules to appeals from decisions of the Election Court the way the Elections Act 2011 does. It is doubtful whether the decision in the Maitha Case (which decided that *"if an Act of Parliament giving the right of appeal from the High Court to the Court of Appeal has set out the time limit within which such right should be exercised, failure to comply with such time limit would extinguish the right of appeal and an appeal would not lie outside the time limit ...."*) would have been the same if the repealed National Assembly and Presidential Elections Act had invoked application of the Court of Appeal Rules to appeals from the Election Court the way the Elections Act 2011 does by dint of Rule 35 of the Elections Petition Rules and if the former Constitution had entrenched fundamental rights the way the 2010 Constitution does. The same argument goes for the decision in Lorna's case (supra) which went so far as to say that the 30 days set by S.23(4) of the repealed statute was sufficient for lodging appeal and further that only Parliament could intervene by legislation if additional time was required as, ostensibly, the Court could not engage in "judicial legislation".

50. In the case of Patrick NgelaKimanzi v. Marcus Mutual Mulavi and 2 Others (Civil Appeal No.191 of 2013) in which I sat with my learned brothersJusticesof Appeal P. O. Kiageand K. M'Inoti the petitioner filed the appeal outside the period of 30 days stipulated by Section 85A(a) of the Elections Act and did not have a certificate of delay to show that the Court utilized part of the time in preparing the proceedings. When the appeal came up for hearing, the appellant's counsel applied to withdraw it. The point whether the Court had jurisdiction under rule 82 of this Court's rules to exclude the time taken in preparing proceedings was not argued and did not arise. It is therefore not an authority to the effect that the Court has no power to exclude time taken in preparing proceedings. It can be distinguished for these reasons.

51. In WavinyaNdeti v. The Independent Electoral and Boundaries Commission (IEBC) & 4 Others (Civil Appeal No.323 of 2013) the decision of the Court to the effect that an appeal to this Court from a decision of the election court must be filed within 30 days followed Maitha v. Said & Another (Civil Appeal No.292 of 1998[2008] 2 KLR (EP33) which was decided before the promulgation of the 2010 Constitution and when the Court of Appeal Rules had not been imported and applied to appeals from decisions of the election court the way the rules now are by dint of Rule 35 of the ElectionsPetition Rules. It can be distinguished on this account. Lorna ChepkemoiLaboso v. Antony KipkoskeiKimeto& Two Others (Civil Appeal (Application) No 172 of 2005 (unreported) which followed Maitha v. Said & Another (supra) can be distinguished for the same reasons. So too the case of Murathe v. Macharia [2008] 2 KLR (E.P.) 244 which was decided before the 2010 Kenya Constitution.

52. The authority of AnaritaKarimiNjeru v. Republic (No.2) [1979] KLR 162 is not in conflict with the position I have taken in this appeal. It held that the Court of Appeal enjoys no general supervisory role over judicial process and only has such jurisdiction as is expressly conferred on it by statute. The issue in the instant appeal is whether there is a conflict between Section 85A(a) and rule 82 of this Court's rules under which the Court can issue a certificate of delay to exclude the time taken by the Court in preparing proceedings so as to ensure that the period of 30 days given by S.85A(a) of the Elections Act 2011 does not suffer diminution and more importantly to further ensure that fundamental rights given by Articles 48 and 50 of the Constitution pertaining to the right to access justice and to fair hearing are not prejudiced. That cannot be said to be an exercise in which the Court is conferring jurisdiction on itself. On the contrary, the Court is construing the law to give meaning and effect to the constitutional rights as it should.

53. The Supreme Court of Kenyain the case of Samuel KamauMacharia& Another v. Kenya Commercial Bank Limited & Others [2012] stated that a court of law can only exercise jurisdiction conferred on it by the Constitution or other written law. In the instant appeal, I have not stepped out of that boundary for the simple reason that Rule 35 of the Election Petition Rules applies the Court of Appeal Rules to appeals from decisions of the election court and rule 82 of this Court's rules gives the court power to issue a certificate of delay, not to enlarge the period of 30 days stipulated by Section 85A(a) but rather, to exclude the time taken by the court in preparing proceedings so as not to distort Section 85A(a)(supra) and to ensure that the fundamental rights in the Bill of Rights as regards access to

justice and fair hearing are given effect to and upheld.

54. Finally, the cases of Maitha and Lorna ChepkemoiLaboso are not, in my view, authoritative in interpretation of Section 85A(a) of the Elections Act vis-à-vis The Court of Appeal Rules. It is a correct statement of the law that, Section 85A(a) of the Elections Act cannot be construed in a manner inconsistent with the right of access to justice and the right to fair hearing. The Nigerian Supreme Court decision in the case of *Senator John Akpanudoedehe v. GodswillObotAkabio SC No.154 of 2012* dealt with a different scenario from the instant appeal and it held that the right to fair hearing is guaranteed by the Courts within the period specified in the statute for hearing and determining an appeal. In that case, the period within which the Supreme Court should have heard and determined the appeal had ran out and the Court held, with respect, rightly, that it had no jurisdiction and the right to fair hearing was guaranteed during the period within which the appeal should have been heard and determined and that once that time elapsed, the Court lacked jurisdiction and the intending appellant's right of appeal was extinguished. As can be discerned, the time frame in that case was in relation to the period within which the Supreme Court itself should have determined the appeal. Not so here where the time frame for determining the appeal is yet to elapse and therefore the court still has jurisdiction to interrogate issues of validity of the appeal (or even the validity of the petition in the High Court). In the result I hold that the instant appeal is competent.

55. Having found that the appeal is competent I now turn to the merits of the appeal. Appeals to this Court are on matters of law only as required by Section 85A of the Elections Act. The section stipulates:

> ***"85A An appeal from the High Court in an Election Petition concerning membership of the National Assembly, Senate, or the Office of the County Governor shall lie the Court of Appeal on matters of law only and shall be***
>
> ***(a)*** ***…….***
>
> ***(b)*** ***……"***

56. The Appellant put forward in 38 paragraphs grounds for the Petition and it is discernible that they related to validity of forms 35 and 36, accuracy of valid votes cast; excess of the total number of registered voters in some constituencies; failure of IEBC and the Returning Officer in Nairobi County to secure election materials; alleged double voting in favour of the 4th respondent; IEBC's failure to secure the ballots cast in the Westlands Constituency; and generally breaches of the election law especially as regards Embakasi North and South and Langata constituencies.

57. The affidavits filed in support of the election Petition were by the Petitioner, Ferdinard Ndungu Waititu, Moses Muratha Kamau, an aspirant for the position of County Representative for Kitsuru Ward under TNA and Edward Chege Waweru, County election Coordinator for the Petitioner; and Ibrahim Ahmed, a running-mate of Jimnah Mbaru who was a candidate for the office of County governor, Nairobi County.

58. The 1st, 2nd and 3rd Respondents filed a joint response to the Petition and denied the allegations made by the appellant as did also the 4th Respondent who contended that the election for the Nairobi County Governor was free and fair and was conducted in accordance with the law. The 1st, 2nd and 3rd Respondents filed affidavits sworn by Fiona Nduku Waithaka, the Returning Officer of Nairobi County and, Teresia Wanjiru Mwai, Constituency Election Coordinator of the 2nd Respondent in Langata Constituency, Nairobi County; Joseph Leboo Madindet, Constituency Election Coordinator of the 2ndRespondent in Kamukunji Constituency, Nairobi County; Steve Biko Roy, the Presiding Officer for St. Teresa's Boys Primary School Polling Station stream two in Kamukunji Constituency, Nairobi County; Pamela Wendeo constituency election coordinator of the 2nd Respondent in Westlands constituency, Nairobi County; Wycliffe Odongo Odondi, Presiding Officer for Loresho Primary School polling station stream 7 in Westlands Constituency, Nairobi County; and Josephine Anzema Kivuti, Presiding Officer for lower Kabete Polling Station Stream 1 in Westlands Constituency, Nairobi County.

59. The 4th respondent in addition to his own affidavit also filed 14 other affidavits sworn by Messrs: *Jonathan Mweke, Frank Otieno Koyoo, Okidi Fred Onesmus, Gladys Vihenda, Mark Ochieng Juma, Patricia Agure Onunga, Patrick Otieno Wandhala, Stephen Okala Kuya, Vincent Muyenyi Omollo, Abdillahi Hussein, Chrispine Oluoch Otieno, David Wanjala, Geoffrey Okuto Otieno*

60. At the status conference, the parties to the election petition agreed on and drew up issues for determination by the Court. The agreed issues were: -

> "1. *Whether the Nairobi County Governor election was conducted in accordance with the principles laid down in the Constitution and the electoral laws.*
>
> 2. *whether the results of the Nairobi County Governor election were announced through a valid Form 36.*
>
> *3. whether the respondent obtained highly inflated and non-existent votes.*
>
> *4. whether the Nairobi County governor election was marred by the alleged electoral malpractices.*
>
> *5. Whether the alleged electoral malpractices invalidated the Nairobi County Governor election.*
>
> *6. Whether the 4th and 5th Respondents were validly elected as governor and deputy governor respectively.*
>
> *7. Who should bear the costs of the Petition and in what proportion."*

61. In his judgment, the learned Judge expressed the view that the petition was "*remarkable in its paucity of substance"* and proceeded to state:

> ***"I would sum up the essential character of the petition like this. It is a petition hastily crafted before the dust of the announcement of results had settled. It was signed on 11th March 2013, before the statutory publication of the results in the gazette. It was lodged in Court on 13th March 2013, as the ink of publication of the gazette was drying. It was filed as a constitutional reference. In it numerous lofty allegations were made of various breaches. Many were bare, generalized allegations, with scant concrete evidence in support. Nowhere was there a claim that x number of votes was lost or manipulated or miscast to the petitioner's prejudice."***
>
> ***"... the petitioner sought to obtain information to support his petition through several applications and by fishing expeditions in cross- examination. The Court saw through this. It put a firm end to such schemes. The Court's foremost duty is to quickly get to the root of the dispute, and resolve it. The respondents read into the weakness of the petitioner's case. They developed a strategy to avoid providing the petitioner with ammunition for his case. They opted not to call most of the witnesses in their lists."***
>
> ***"... on its own notion, the Court ordered partial scrutiny in respect of specific disputed aspects. The intention was to elicit evidence disclosing whether the will of the voters had been upheld. The outcome of the scrutiny disclosed various irregularities and instances of non-compliance with the law. However, these had no substantial effect on the outcome of the election. In a sense, the case was not ripe for prosecution..."***

62. These were strong sentiments by the Court which may appear to trash the petition and hence denigrate counsel for the appellant and/or deprecate his work. Regrettably, the context was unfortunate as it related to a serious electoral dispute in which the Court was called upon to fairly adjudicate on the validity of the election. Such mordant comments which risk appearance ofprejudice or even

appearance of bias ought to be eschewed as they may reflect badly on the role of the Court as an impartial arbiter. Judges should always display dispassionate attitude and avoid the appearance of being impressed or unimpressed by one or the other of the litigants. Election matters, especially, can be very emotive and when results are disputed the interest transcends that of the parties to the litigation and extends to the public. I have said enough.

63. After these remarks, the learned trial Judge then proceeded to answer issues numbers 1, 2 and 6 in the affirmative and issues numbers 3, 4 and 5 in the negative and with regard to issue 7,he awarded costs to the respondents and capped the same at Shs.2.5 million.

64. It is against that judgment that the appellant has appealed. What were the allegations made by the appellant in his petition to the High Court? Did the Court properly examine the dispute and apply the law correctly? Did it fairly adjudicate on it? Was the election conducted in accordance with the law? What did the record before the Court show? Did the Court exercise its discretion during the hearing of the petition properly in relation to requests by the appellant for adduction of additional evidence and cross-examination of witnesses and scrutiny and recount?

65. I have read in draft the judgments of my brothers Warsame and Kiage, JJA. They are not in agreement on the issue of competence of the appeal. My brother Warsame, JA has held that the appeal is incompetent while my brother Kiage, JA shares my views that the appealis competent. Ihave addressed the issue at length in this judgment.

66. On the merits of the appeal, I am persuaded by the views expressed by my brother Kiage JA that the trial Judge did not give the appellant a fair hearing. He took each irregularity in isolation and expressed the view that each did not impact on the final results.

67. The main legal issues raised in the appeal on which, in my view, the appeal turns are whether the appeal is competent; whether the trial Judge facilitated a fair hearing of the petition; the combined effect of irregularities and errors of law on the validity of the election; the legal effect of the Court's failure to follow the principle of *stare decisis*; the issue of burden and standard of proof; and whether the trial Judge's exercise of discretion during the trial was proper.

68. The gravamen of the appellant's complaint in the appeal as rightly pointed out by Mr. Muite was the accuracy of the votes. The grounds on which the election of the 4th respondent was challenged also included bias on the part of the trial Judge and his refusal to hear the appellant's notice of motion dated 10th March 2013 seeking scrutiny of election materials such as marked register to prove breach of one-man-one vote principle. Bias was alleged on the grounds that the trial Judge favoured the 4th respondent and was prejudiced against the appellant and it was contended that the appellant's right to equality before the law under Article 27(1) was violated as was his right to access justice under Article 48 of the Constitution; further, that the net result of the learned trial Judge's actions in blocking evidence is that the appellant did not have a fair hearing.

69. Contemporaneously with the filing of the petition in the High Court, the appellant filed an application by way of a notice of motion dated 11.3.2013 lodged in court on 13.3.2013 seeking, *inter alia*, orders to compel the CEO of the 1st respondent to furnish the appellant with a copy of the register used during the election of the county governor for Nairobi County and copies of the results in respect of Westlands, Ruaraka, Langata, Kibra, Embakasi East, Embakasi South and Mathare constituencies of Nairobi County as well as copies of results of each polling station. The appellant also sought a plethora of other orders in respect of other election documents. His prayers were denied.

70. The documents requested in the application were in possession of the 1st respondent and ballot boxes and election results had been relayed to the Court under Rule 21 of the Elections Petition Rules. In terms of time-lines and the need for expeditious determination of the litigation, the application was brought in due time. Moreover, the 1st respondent, being a public body, had the resources to facilitate the exercise.

71. The petition, though not very elegantly drafted clearly showed that the votes were contested. The litigation was a public interest matter in so much as it related to representation of the people of Nairobi County in the county government. The interest transcended that of the litigants and extended to the public. The Court should have had regard to the public interest nature of the litigation. This is what rule 4 of the elections petition rules mandates. The election was hotly contested and the appellant and the 4th respondent each garnered over 600,000 votes and the disparity of 70,000 votes in a county where the number of registered voters was high, that margin was in the circumstances small.

72. The 1st to 3rd respondents who had the conduct of the elections admitted that unused ballot papers were found at St. Martins Primary School polling station but the 3rd respondent explained in the short and limited cross- examination that they were forgotten there after the elections and an unnamed nun found them. Their number is not known. She also made admission about counterfoils and tampering with ballot papers that were marked. She admitted that one Samuel Ngonali Muema was charged in court after being found in possession of two ballot papers for county representative and two ballot papers for county governor. It was however denied that he voted and that there was double voting.

73. In Langata constituency of Nairobi County (at Karen Assembly Ward) at St. Mary's Primary School, the votes cast were in excess of the number of registered voters.

74. In Vet Lab Primary School polling station of Westlands constituency, the appellant's agent, Florence Wambua, was thrown out by the presiding officer, one Sylvia Wachira and some of the Forms 35 were not signed by the appellant's political party's (TNA) agents on the ground that they did not tally with the valid votes cast.

75. At St. Martins Secondary School Polling Station the polling station was locked and could not be accessed.

76. In Loresho Primary School, the appellant's agent, Moses Muratha Kamau, averred that the appellant's political party's agents (TNA) were thrown out of the polling stations by security guards and he himself visited Loresho Primary School where he found Orange Democratic Movement (ODM) agents inside the polling station while TNA agents had been removed. He intervened and he feared that mischief had already taken place.

77. At Lower Kabete, similar allegations were made of agents being forced out of polling stations and the appellant's said agent had to intervene.

78. There was an averment that at Loresho Primary School polling station, the presiding officer did not supervise the tallying of votes and that he filled form 35 without tallying the votes.

79. Pamela Wandeo, election coordinator at Westlands admitted that unused ballot papers were not kept in boxes and that after the election ballot papers were found in Kitsuru and Ruai areas of Westlands strewn all over.

80. At St. Teresa's polling station of Kamukunji constituency Abraham Ahmed averred that voters voted without anyone checking the register of voters providing the voters had identity cards.

81. There was evidence that election materials were found at Kayole and taken to Kayole Police Station.

82. At Mathare Youth Polytechnic (steam 7) the votes cast (731) exceeded the number of registered voters (726) though the number was negligible.

83. The appellant's chief agent and witness, Edward Chege Waweru, swore an affidavit that averred that Form 36 was not signed by the Nairobi County Returning Officer nor was it attested to by the Candidates' Agents and therefore did not contain a valid declaration of results for Embakasi South and Embakasi North.

84. At a crucial point on 25.6.2013 during the cross-examination of Fiona Nduku Waithaka, the Returning officer of Nairobi County, the trial Court stopped her further cross-examination at a time she was being questioned about Form 36 and the Court adjourned the proceedings at 3.24 p.m. to prepare a ruling on what documents the witness would be cross-examined on. On 26.6.2013 the trial Judge delivered a ruling in which he directed the appellant's counsel on the documents (in the three categories, A, B and C prepared by the Court) that would be the subject of cross-examination. The ruling was prompted by the objection taken by counsel for the respondents.

85. The Nairobi County Returning Officer admitted having received written complaints and protest letter from the appellant's agents relating voting and accuracy of votes.

86. Moses Muratha Kamau, the agent for the appellant testified on the question of unused ballot papers with the returning officer at Westlands, Pamela Wandeo, and had filed a complaint with the police at Gigiri. Ballot papers had been found within the Nairobi County relating to the election of the county governor for Nairobi County. In her replying affidavit sworn on 9.5.2013, Fiona Nduku Waithaka averred that upon completion of the tallying of results, from the constituencies in Nairobi County for the gubernatorial election, she completed and signed on an unspecified date Form 36 and admitted, curiously, that she did not differentiate between Embakasi North and Embakasi South which were indicated with code names and the results for both were recorded and tallied in Form 36. My perusal of the copy of Form 36 in the record of this appeal shows that it is not signed.

87. Pursuant to rule 21 of the Elections Petition Rules, IEBC delivered to the Registrar of the High Court, as it was bound to do, ballot boxes in respect of the election of the governor of Nairobi County and the results of that election. Rule 17(2) of the Elections Petition Rules, requires that interlocutory applications which could, by their nature, have been made before the commencement of the hearing of the petition in the High Court were to be disallowed as they would interrupt the flow of the proceedings which were required by law to continue on day to day basis. The Court was under a duty to exercise circumspection and to apply the rules so as to facilitate just resolution of the electoral dispute.

88. The evidence of the appellant as contained in his affidavit sworn on 11.3.2013 in support of the petition was to the effect that Form 36 was not signed by the 3rd respondent and therefore the 4th respondent could not on the strength of it be declared the winner of the election. But this allegation was denied by the 4th respondent in his replying affidavit sworn on 26.3.2013. The 3rd respondent did not annexe to her affidavit a copy of Form 36. She referred to the form and stated that it was annexed to the affidavit of the 4th respondent. Perusal of a copy of it in the 4th respondent's affidavit in volume 2 of the appellant's record shows that the 3rd respondent did not sign it.

89. The appellant alleged that the CEO of IEBC helped the 4th respondent to unfairly get undeserved votes in the election and that the former even had recruited his two daughters to assist in that exercise. The appellant did not prove that allegation which was grounded on mere suspicion only.

90. The appellant testified that he is said to have lost the election because of wrong and incorrect tabulation of figures from Forms 35 to Form 36. His chief agent, who testified had complained about this, he said. He alleged double voting and that the votes were inflated in favour of the 4th respondent and that that is why the 4th respondent is said to have had more votes. The appellant referred in his evidence to St. Mary's School polling station at Langata Constituency where the total number of votes cast was 4510 while the registered number of voters was 4059. The 3rd respondent testified that the number of registered voters was an error. The Registrar's scrutiny report showed it to be 4061 and the votes cast as 3475 but valid votes as 3440. This clearly showed that there were irregularities in form 36 resulting from wrong or incorrect data and this was indicative of the fact that the electoral exercise in this station was not being conducted in accordance with the law. The trial Judge in his judgment referred to the allegation as No.5 and noted that what the appellant was alleging double voting. The discrepancy was revealed in the Registrar's scrutiny report following the recount ordered by the Court itself.

91. The Court dismissed the appellant's allegation of double voting although it was plain to see that the voting process at St. Mary's did not accord with the law and the data filled in Form 36 was

distorted.

92. Another scrutiny initiated by the Court at Mathare Constituency, stream 7 revealed that the total number of votes cast was 737 while the number of registered voters was 726. The trial Judge correctly noted that what this exemplified was either that eleven registered voters voted twice (double voting) or eleven votes were illegal. In either case, it was against the law as no voter is entitled to vote twice and ballots not attributable to voters were illegal. The significance of this revelation was its implication on compliance with the law especially having regard to the fact that these irregularities did not imply accidental or innocuous mistakes but rather deliberate actions by the perpetrators. The law recognizes that as long as we remain human, mistakes resulting in irregularities will always occur and where they do innocuously, they will be excused and disregarded unless they impact on the final outcome of the voting. Where they impact on the results, whether they are innocent or not, the results must be annulled with a rider that where the errors are contumacious, having been perpetuated deliberately, those found culpable get penal sanction.

93. The appellant alleged that the 1st – 3rd respondents failed to secure ballot boxes and ballot papers. He alleged that his agents were barred from polling stations.

94. The trial Judge also disallowed cross-examination of the returning officer of the County of Nairobi, Fiona Nduku Waithaka, by the appellant when objection was taken by the respondents during her cross-examination. This was the single most important witness in the trial as she co-ordinated the electoral exercise and was in charge and therefore the person accountable. The appellant's counsel had the right to cross-examine her on the conduct of the election and in particular the voting exercise and the electoral documents to enable the Court to make its evaluation about the accuracy of the exercise and whether the will of the voters prevailed. Instead, the Court curtailed her cross- examination and earmarked the only documents in categories A, B and C in respect of which the Court allowed cross-examination. This impeded adduction of evidence. In doing so, the Court exercised its judicial discretion wrongly not least because it did not pay due regard to the need to facilitate transparency and ascertainment of accuracy in the results in the Nairobi County gubernatorial election. In effect, therefore, the Court failed to have regard to the overriding principle in rule 4(1) of the Elections Petition Rules which demand accuracy of votes and the need for verification. Moreover, election petitions being public interest litigation, the learned trial Judge should have appreciated that he had the duty to exercise his judicial discretion on the basis of demands of justice which entailed the need to ascertain accuracy and validity, of the voting and instead exercised arbitrary will which resulted in impediment of a fair hearing.

95. The provisions of Article 86 of the Constitution made it clear that the 1st to 3rd respondents were enjoined to manage the election in an accurate and transparent manner and were accountable for the electoral materials, hence the need to allow cross-examination of their witness, the 3rd respondent, Fiona Nduku Waithaka on Forms 35 and 36.

96. The appellant requested before the hearing of the petition to file additional affidavits and the learned Judge on 10.5.2013 ordered that request would be subject to an application within 3 days with annextures of the affidavits in question. On 17.5.2013, the appellant's counsel informed the Court that he had filed on 15.5.2013 a motion seeking leave to file additional affidavits of his witnesses. The 1st, 2nd and 3rd respondents did not object but the 4th respondent took objection. The Court turned down the appellant's application. The affidavits intended to be filed as additional evidence were annexed to the application and clearly the Court was in a position to tell whether the evidence was relevant. There was no ambush and the respondents had time to respond to them. The trial Judge did not seem alive to the need to have before him relevant evidence and materials to facilitate fair adjudication of the electoral dispute without giving the appearance of shielding any party from alleged irregularities and malpractices. In my view, the appellant in pointing out the various irregularities in all but 4 out of the 17 constituencies that constitute Nairobi County clearly challenged the validity and accuracy of the votes cast and although the burden reposed on him to prove that the will of the voters was not upheld, this he could do only in a fair hearing where cross- examination of vital witnesses including the Returning Officer of the Nairobi County was not impeded.

97. By declining to allow scrutiny and recount, the learned trial Judge was not in a position to verify the extent of the irregularities and errors and the accuracy in the tallying of votes as the evidence in this regard was shut out. Without the requested recount and scrutiny the Court could not verify the extent to which the irregularities and errors impacted on the results of the election, and hence the democratic will of the voters. Consequently, it could not be verified whether the constitutional requirements in Articles 81 (v) and 86(a) were met. These constitutional provisions are not a mere rhetoric. They are organic. Without scrutiny and recount, where, as here, a case for them is made out, and without cross-examination of vital witness, such as the Returning Officer, the Court was not in a position to verify whether the 4th respondent had been validly elected. A candidate who has fairly won and a body that has fairly conducted an election should never be averse to lay bare the materials used in an election for a court of law to examine with a view to verify the accuracy of the voting and a trial Court should not be averse to delve into scrutiny where a case for it is made out or where justice demands. In this case, the respondents robustly opposed adduction of further evidence and cross-examination of a vital witness and scrutiny and recount as it was their right to do. The ballot boxes were with the Registrar of the Court having been submitted to him in pursuance with rule 21 of the Elections Petition Rules. The trial Judge had no evidential basis to make a finding about the extent to which the errors and malpractices impacted on the result of the election, in absence of scrutiny and recount and hence the democratic will of the voters.

98. In his judgment, the learned trial Judge did not consider that the evidence in the affidavits filed by the appellant's witnesses had any weight unless the deponents were cross-examined. He did not also attach any weight to allegations of any witness who testified with regard to incidents of irregularities unless such witness was present at the relevant polling stations when the incidents took place. He shielded the Returning Officer, Fiona Nduku Waithaka, who was the over-all in charge from cross-examination that would have brought illumination on the issues.

99. The global picture of the case made out by the appellant before the trial Judge showed, in my view, improper exercise judicial discretion.The duty of the court was to ascertain the truth through evidence and material before it and then render a just decision in the electoral dispute. In applying the elections petition rules, the Court ought to have had regard to the fact that while the rules must be complied with, they were intended to be the hand- maidens of justice, not to defeat it. Their overriding objective under rule 4(1) was to facilitate the just, expeditious, proportionate and affordable resolution of the election dispute under the Constitution and the Elections Act 2011.

100. The respondents contended that the appellant was attempting to expand his petition by asking in cross-examination questions that were not on contested issues. Yet the questions asked by the appellant's counsel related to documents (relayed to the Court by the 1st respondent pursuant to rule 21 of the Elections Petitions Rules) in respect of which the Court had discretionary power to allow cross-examination as they were relevant to the matter before the Court and answers in cross-examination were not unlikely to throw more light on the issues for determination. Although the 4th respondent's counsel contended that injustice would be visited on his client if cross-examination was allowed on those documents, it is difficult to see how elucidation of the matter would occasion injustice. Lack of it, instead, would serve to obfuscate the issue. All the parties were going to have equal opportunity to ask questions on them. There was time for the exercise as it was early in the hearing. The documents were referred to in the petition. The trial Judge was correct in stating that the documents were not part of the trial record and he rightly acknowledged that he had discretionary power to grant leave for their use and inclusion in the trial. But he declined to do so and reasoned that they were relayed to Court pursuant to rule 21 of the Elections Petition Rules for the purpose of scrutiny, tallying or recounting of votes! This was an acknowledgment that they were intended to assist the Court in ascertainment of the accuracy of the voting in the election.

101. The evidence on the basis of which the result of the election was declared was contained in the Forms 35 and 36 on which the appellant's counsel was intent on conducting cross-examination. The forms were vital and the object of the cross-examination was to establish the truth regarding voting so as to fairly resolve the dispute as to who fairly won.

102. The exercise of the discretion by the learned trial Judge in refusing to allow cross-examination

was premised on irrelevant considerations and impaired fair hearing.

103. What do the principles laid down in the Constitution and in the Elections Act dictate with regard to the Parliamentary and County Elections which include gubernatorial election?

104. Firstly, affidavits filed with the petition in compliance with the rules constitute evidence. They cannot be ignored. Where the deponents to such affidavits are cross-examined, the evidence is tested as correctly observed by the trial Judge. Where the deponents do not testify, their evidence is not useless, especially where admissions are made on issues that are in contention. The effect of admitted breaches to the Election Act and the Constitution should have raised concerns to the trial Court whether the election was in compliance with the Constitution and the Act. The trial should have been conducted in a manner that would have facilitated ascertainment of the accuracy of the votes but instead the trial Court stifled adduction of evidence through restricted cross-examination of the 3rd respondent and shut out additional affidavits and scrutiny and recount. As the Court did not exercise its discretion properly, the effect of this was to deny the appellant a fair hearing. Although the burden of proving the allegations reposed on the appellant, the Court had a duty under the Constitution to fairly ensure that the appellant got a fair hearing which it failed to do thus making it impossible for the appellant to discharge the burden. The manner in which the Court conducted itself vi-a-vis the appellant *qua* petitioner did not evince likelihood of fairness and justice. The exercise of discretion by the Court in rejecting the requests for recount, scrutiny and cross-examination of the Returning Officer and filing of additional affidavits resulted in miscarriage of justice.

105. The principles that govern the exercise of judicial discretion as seen in many cases including Mbogo & Another v. Shah [1968] EA 93, and Matiba v. Moi & 2 Others [2008] 1 KLR 670 show that judicial discretion should be exercised to achieve justice. This can only be attained if the correct considerations are taken into account. An appeal Court is entitled to interfere with exercise of discretion where the lower court has misdirected itself on law or taken into account irrelevant considerations or failed to take into account relevant considerations and in doing so arrived at a wrong decision or where it is manifest from the case as a whole that the Judge has been clearly wrong and that as a result there has been injustice. In the US Supreme Court decision (though in a criminal in Burns v. US (Case No.287 S. 216) decided on December 5-1932)) the Court examined the exercise of court discretion and held that the exercise implies conscientious judgmentnot arbitrary action. It stated:

> ***"The question is simply whether there has been an abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. The Styria v. Malcomson, 186 U.S. 1, 186 U.S. 9. It takes account of the law and the particular circumstances of the case, and is "directed by the reason and conscience of the Judge to a just result." Langnes v. Green 282 U.S. 531, 282 U.S. 541." (emphasis added)***

106. The Supreme Court of Indiain Sangram Singh v. Election Tribunal, Kotah, Bhurey Lal Baya [1955] AIR 425 1955 SCR (2) 1, the Court stated:-

> ***"the Court is invested with the widest possible discretion to see that justice is done to all concerned. No hard and fast rule can be laid down; and the Court in the exercise of its judicial discretion will have in a given case, to determine what consequences are to follow...."***
> **(emphasize added)**
>
> ***"...broadly speaking, after all the various factors have been taken into consideration and carefully weighed, the endeavor should be to avoid snap decisions and to afford the parties a real opportunity of fighting out their cases fairly and squarely."***
>
> ***"By "ends of justice" is meant not only justice to the parties but also to witnesses and others who may be inconvenienced."***

107. The Supreme Court of Phillipines at Baguio City in the case of Ricardo B. Bungayan v. Rizal

Commercial Banking Corp. & Philip Sarca had this to say on the exercise of discretionary power:

> ***"Discretionary power is generally exercised by trial Judges in furtherance of the convenience of the Courts and the litigants, the expedition of business, and in the decision of interlocutory matters on conflicting facts where one tribunal could not easily prescribe to another the appropriate rule of procedure.***

125 [125] Thus, the court ruled:

> ***"In its very nature, the discretionary control conferred upon the trial Judge over proceedings had before him implies the absence of any hard-and-fast rule by which it is to be exercised, and in accordance with which it may be reviewed. But the discretion conferred upon the Courts is not willful, arbitrary, capricious and uncontrolled discretion. It is sound, judicial discretion which should always be exercised with due regard to the rights of the parties and the demands of equity and justice.*** **As was said in the case of Styria v. Morgan [186 U.S., 1, 9]:** ***"The establishment of a clearly defined rule of action would be the end of discretion, and yet discretion should not be a word for arbitrary will or inconsiderate action."*** **So in the case of** ***Goodwin v. Prime [92 Me., 355],*** **it was said that** ***"discretion implies that in the absence of positive law or fixed rule the Judge is to decide by his view of expediency or by the demands of equity and justice."*****(emphasis).**

108. The Supreme Court of Phillipines observed that an appeal court will not attempt to control the exercise of discretion by the Court below unless it plainly appears that there was "inconsiderate action" or the exercise of mere "arbitrary will", or in other words that his action in the premises amounted to "an abuse of discretion."

109. In the Supreme Court of Kenya in the case of Hassan Joho v. Suleiman said Shabhai & 2 Others stated:

> ***"as the apex court, we must always be ready to settle legal uncertainties whenever they are presented before us. But in doing so, we must protect the constitution as a whole. Election Courts and the Court of Appeal, have discretion in ascertaining the justice of each case to balance justice, but that discretion must be concretized in enforcing the Constitution."***

110. In the Supreme Court of Kenya in the case of Raila Odinga v. The I.E.B.C. & 3 Others(Supreme Court Petition No. 5 of 2013), the Court held that the requirements of such disciplined trial framework fully justify the unlimited exercise of the Court's discretion in making orders that shape the course of the proceedings. The Court had only 14 days under the Constitution to hear and determine the appeal from the date of filing and it dismissed two applications during the pre-trial conference. One of them was for an order of production of certain documents and the other was in respect of notice to produce a marked voter register found at numerous polling stations right across the country. The Court also made an order to exclude from the proceedings a "further affidavit" which had just been filed by the first petitioner to introduce new material well after the filing of the petition. The Supreme Court was constrained by time (14 days) and the Country was waiting with bated breath for resolution of the dispute. The circumstances in which the discretion was exercised were peculiar to the case and in no way can they be compared to the circumstances in the instant appeal in which the High Court had a time frame of six months to hear and determine the election petition.

111. In the instant appeal, the trial Court failed to consider that the constitutional requirements were intended to safeguard the rights of the voters to be represented by a person of their choice and in hearing the electoral dispute the trial Judge should have kept in mind that the petition before him was not an ordinary litigation involving only the parties to it but was *sui generis*and its interest transcended that of the parties and extended to the Nairobi County electorate. The trial Judge also failed to consider the role of the Court in public interest litigation, which the election petition was, and used his discretionary power wrongly to stifle exposure of electoral malpractices.

112. The trial Judge's exercise of discretion is denying the appellant the right to cross-examine the returning officer (3rd respondent) violated the appellant's right to fair hearing under Article 50 of the Constitution. And on scrutiny, it was not enough for the Court to itself determine what documents would be the subject of scrutiny. Under no circumstances should a Judge undertake to conduct a case for a party save where the Court's action is designed to achieve the ends of justice.

113. In this case, it cannot be said that the results of the election were unaffected and therefore it is doubtful the will of the voters prevailed.

114. In short, the discretion was exercised wrongly and it deprived the appellant of a fair hearing which is guaranteed by the Constitution in Article 50 and which the Constitution under Article 25 requires shall not be limited.

115. As the appellant did not get a fair hearing, the issue of whether the 4th respondent was validly elected was not fairly determined and moreover, Form 36 on the basis of which the results of the gubernatorial election for Nairobi County should have been declared was not valid for want of proper execution as stated earlier.In my view, there was miscarriage of justice which can only be redressed by allowing the appeal.

116. In conclusion, may I state that the decisions we make should always uphold constitutional values and principles and dispense justice and in the eyes of the society should be redolent of fairness if they are to boost public confidence in our system of justice.

117. I am in agreement with the findings and reasoning expressed in the lead judgment of my brother Kiage JA on the issue of merits particularly as they appertain to the doctrine of *stare decisis,* the burden and standard of proof, scrutiny and recount and the errors of law and I do not see the need to re-echo or re-emphasize the same.

118. I am also in agreement with the orders proposed by my brother Kiage JA that the appeal be allowed and the election of the 4th respondent be nullified and costs be awarded to the appellant as ordered. I commend counsel in this appeal for their industry and the professional manner in which they made their submissions with focus, clarity and erudition and for the case law quoted and if some of them are not cited in this judgment, the principles emerging in them have been applied.

Dated and delivered at Nairobi this *13thday of May 2014*.

G. B. M. KARIUKI SC

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JUDGE OF APPEAL

JUDGMENT OF KIAGE JA

1.0 BACKGROUND

The appellant ***FERDINAND NDUNGU WAITITU*** considers himself a man more sinned against than sinning. Notwithstanding his confident hopes that he would win, coupled with a firm belief that he won, the Nairobi Gubernatorial contest during the epochal General elections held on 4th March 2013, the results declared another the winner. That other was **EVANS ODHIAMBO KIDERO**, the 4th Respondent herein who won garnered 692,482 votes to the appellant?s 617,839.

Unable to accept the results, the appellant wasted no time in moving to the High Court to challenge them in what must rank as the fastest filed election petition ever. It was prepared in a record four days and was

before the High Court at Nairobi less than a week after the declaration of the result, filed on the same day the Independent Electoral and Boundaries Commission (IEBC) the 1st Respondent, herein, published Gazette Notice Number 3155 containing the names of the person elected Governors and Deputy Governors in the Republic.

That petition had a number of peculiar, if curious, features especially when viewed against the rather simple and straight forward stipulation of Rule 8 of the Elections (Parliamentary and County Elections). Petition Rules 2013 (hereafter the Petition Rules?) and Form EP.1 in the Schedule thereto with which petitions should conform. The appellants? petition quoted within its title various constitutional, statutory and subsidiary legislation. Provisions in the matter whereof it declared itself to be brought. It also enjoined and impeached, beyond and besides the ordinary respondents contemplated by Rule 2 of the Petition Rules (namely the person whose election is complained of, the Returning Officer and the Commission). This Petition went on to name the Honourable Attorney General and various ranking Police Officers namely the Divisional Commanding Officers (which it called „DCIOs?) for Kayole and Gigiri Police Divisions as well as the Inspector General of the National Police Service.

The Petitioner sought no less than a dozen prayers. Simultaneous with its filing, a Notice of Motion application was lodged at the High Court seeking various interlocutory reliefs including the production of copies of various electoral materials to effect which prayers for mandatory injunction to compel such production were made. The prayers were no less than a score. Mr. Harrison Kinyanjui, the appellant?s learned counsel there as there, executed acertificate of urgency raising some twenty - seven grounds in aid of the need for the Petition and that application to be dispensed with expeditiously.

The matter came for hearing before Mumbi Ngugi, J who requested the parties to first address her on the issue of jurisdiction. Whereas the appellant urged that the High Court had jurisdiction to entertain the petition as framed and the application, the respondents took the view that the Petition was premature having been filed before the results were declared and that the court was therefore bereft of jurisdiction to entertain it especially because Mumbi Ngugi J had not been gazetted as the Judge to preside over the matter as an election court.

The learned Judge delivered a considered ruling on 21st March 2013 by which she found that the petition was filed within time but had not complied with the rules and procedures set out in the Elections Act and the appropriate Rules made thereunder which provides for, among other things, the manner in which interlocutory applications, such as the motion dated 13th March 2013, we to be dealt with. She took the view that the appellant, by bringing the petition under the High Court?s jurisdiction under Article 165(3) (a) of the Constitution was attempting to circumvent the rigorous rule set out in the electoral legislation. So finding, the learned Judge declined to strike out the Petition and the Motion as sought by the 4th Respondent but directed that the same be heard and determined in accordance with the relevant law as contained in Legal Notice No. 54 of 2013.

So it was that the honourable Principal Judge of the High Court, Mwongo J, came to be seized of the appellant?s petition. He was gazetted to hear it on 19th April 2013 and he held a status conference on 16th May 2013 on which directions were issued on filing of pending pleadings. That conference also fixed some two applications for hearing on 23rd May 2013. One was by the appellant seeking to file additional evidence by way of seven additional witness depositions and the other by the 2nd and 3rd Respondents seeking to strike out the petition. These applications were canvassed and by a ruling delivered on 10th June 2013, the one by the appellant was dismissed with costs while the one by the 2nd Respondent was only partly allowed in that only certain of the prayers in the petition and of the paragraphs in the affidavit of **MOSES MWATHA KAMAU**, the appellant?s intended witness, were struck out.

Other than those applications, Mwongo, J was to hear and determine several others in the course of the trial of the Petition including a Ruling on 26th June 2013 arising from an objection by counsel for the 1st, 2nd and 3rd Respondents to certain cross-examination of **FLORA NDUKU WAITHAKA** (RW1) which objection was upheld; another on the same day dismissing an application by the 4th and 5th Respondents seeking to expunge the affidavits of **DR. EDWARD WAWERU CHEGE** and **IBRAHIM**

AHMED from the record on account of the appellants? failure to avail them for cross-examination; one on 27th June 2013 dismissing with costs the appellant?s application for stay of proceedings pending the appellant?s appeal against the adverse ruling of the previous day; another on the same 27th June 2013 dismissing with costs the appellant?s oral application seeking to determine the sequence in which the respondents? witnesses were to testify; on 28th June 2013 giving directions as to the parameters of cross-examination in determining the appellant?s application seeking to cross-examine three of the 1st – 3rd Respondents? witnesses; and one on 9th July 2013 dismissing with costs the appellant?s application regarding scrutiny.

The Petition proceeded to trial with the appellant testifying on his own behalf as PW1 and had two other witnesses **MOSES MURATHA KAMAU (PW2)** and **IBRAHIM AHMED (PW3)**. This last witness was, however, not availed for cross-examination and the learned Judge noted, correctly in my view, that his evidence remained untested.

For the 1st, 2nd or 3rd Respondents, that is the IEBC and its officers, there were three deponents to affidavits in response to the Petition and they were all called to testify. They were **FIONA NDUKU WAITHAKA (RW1**) who was the County Returning Officer for Nairobi; **JOSEPH LEBOO MASINDET (RW2)** the Constituency Election Coordinator for Kamukunji Constituency and **PAMELA WANDEO (RW3)** his Westlands counterpart. The 4th and 5th Respondents called **ABDULLAHI HUSSEN (RW4)** who was the Orange Democratic Movement Party Chief Agent for Kamukunji and **VINCENT MUJENYI OMOLLO (RW5)** his Westlands counterpart.

After the testimony of the witnesses and the submissions made by learned counsel for the parties, the learned Judge proceeded to determine the Petition in accordance with the issues pre-agreed by the parties at the start of conference of 10th June 2013. These were:-

> *1. **"Whether the Nairobi County Governor election was conducted in accordance with the principles laid down in the Constitution and the electoral law;***
>
> ***2. Whether the results of the Nairobi County Governor election were announced through a valid Form 36;***
>
> ***3. Whether the 4th Respondent obtained highly inflated and non-existent votes;***
>
> ***4. Whether the Nairobi County Governor election was marred by the alleged electoral malpractices;***
>
> ***5. Whether the alleged electoral malpractices invalidated the Nairobi County Governor election;***
>
> ***6. Whether the 4th and 5th Respondents were validly elected as the Governor and Deputy Governor respectively; and***
>
> ***7. Who is to bear the costs of this Petition and to what proportion."***

The learned Judge delivered his judgment on the Petition on 10th September 2013 in which he found against the appellant on all the issues, declined all the prayers sought in the petition and dismissed it with costs.

2.0 **THE APPEAL**

Aggrieved by that judgment the appellant instantly prepared, on that very day, a Notice of Appeal which he lodged in the High Court on 11th September 2013 intimating that he intended to appeal to this Court against the said entire judgment. On the same date counsel for the appellant wrote to the Deputy Registrar of the High Court a letter bespeaking the typed copies of the proceedings for purposes of lodging an appeal. The letter was duly copied to respective counsel on record for the various respondents. I

shall be returning to this letter more fully for its significance and relevance in the determination of one of the threshold issues in this appeal.

The appellant subsequently filed a massive record of appeal on 11th November 2013. It comprised a dozen or so bond volumes and its pages ran well beyond 5,000. It was founded on a Memorandum of Appeal of such a character as I should hope not to often see. Running into twenty typed pages, it attacks or faults the learned Judges fifty–four page judgment by way of some thirty-nine lengthy and almost invariably repetitive and argumentative grounds. Some of the grounds run into several paragraphs. Ground Number10 for instance, is divided into paragraphs (a) to (s) meaning that it, alone, is some twenty paragraphs long. With the greatest respect to the appellant and his legal advisers, his memorandum of appeal is a study and an object lesson of what a memorandum of appeal ought not to be. It may be that they may not have acquainted themselves of this Court?s repeated pronouncements in the recent past to the effect that memorandum of appeal must per force be drafted with the straightforward and mandatory provision of Rule 86(1) of the Court of Appeal Rules in mind;

"86(1) A Memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision a wrongly decided, and the nature of the order which it is proposed to ask the Court to make".**(my emphasis)**

Having had to plough through the exhausting and torturous memorandum of appeal filed herein, I have come to the distinct conclusion that counsel do get carried away sometimes in the course of preparing memorandum of appeal with the result that they let fly therein their considerable learning that is best left for argument and elucidation during submissions. Counsel must resolutely resist the temptation to collapse and conflate these issues into a pleading that should be marked by pithy brevity pregnant with promise, not lengthy legal soliloquies. I will repeat, for

emphasis, what I said on this very subject but a little while ago in **LAW SOCIETY OF KENYA – VS- THE CENTRE FOR HUMAN RIGHTS & DEMOCRACY & 13 OTHERS (CIVIL APPEAL NO. 308 OF 2012) [2013]eKLR;**

"Purported memoranda of appeal that are repetitive, argumentative and replete with such material as excerpts and quotations, argumentative and replace with such material as excerpts and quotations from books and judgments, as well as historical and political background, do not favours to counsel who prepare them. Moreover, they serve only to obfuscate issues. It is time counsel practicing before this Court went back to basics and in particular re-acquainted themselves with the simple and straightforward provision of Rule 86(1) of the Court of Appeal Rules.

The memorandum of appeal filed herein is a classic repudiation of the foregoing provisions. It is a worse version of what we recently decried in ABDI ALI DEREVs. FIROZ HUSSEIN TUNDAL & OTHERS Civil Appeal No. 310 of 2005

„The appellant filed a long-winded and repetitive memorandum of appeal raising 26 grounds of appeal. With all due respect to the appellant who appeared to labour under the false impression that prolixity and repetition of issues would enhance the chances of his appeal, this appeal in our view, turns on the following five issues only…..?"

We adverted to the same theme in **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER –VS- STEPHEN MUTINDA MULE & 3 OTHERS (CIVIL APPEAL NO. 219 OF 2013) and ISAACK OSMAN SHEIKH –VS- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & OTHERS (CIVIL APPEAL NO. 180 OF 2013.** It is time we saw consistently memoranda of appeal that evince a consciousness and consideration of Rule 86(1). Counsel are well advised to consider this re-acquaintance and compliance with the rule as part of their broader duty under Section 3A (3) of the Appellate Jurisdiction Act to assist the Court in meeting the overriding objective of the statute.

The appellant?s complaints against the High Court decision have been captured under several heads

within the expansive memorandum of appeal namely:-

a) Violation of the appellant?s constitutional rights

b) Ignoring the stare decisions principle

c) Error on burden of proof

d) Consideration of irrelevant authorities

e) Violation of the appellants? constitutional rights during the trial

f) Violation of the appellant?s right to a fair trial under Article 25(c) of the Constitution

g) Invalid and defective Nairobi County Form 36

h) Errors of law in assessing the invalid Nairobi County Form 36

i) Error amounting to miscarriage of justice.

The record of appeal was served on the respondents herein and on 20th December 2013, the law firm of Professor Tom Ojienda & Associates Advocates made a filing of the following pleadings on behalf of the 4th and 5th Respondents;

(i) Notice of Grounds for Affirming Decision pursuant to Rule 94(1) of the Court of Appeal Rules.

(ii) Notice of cross-appeal under Rule 93(1) against the learned Judge?s capping of costs to the 4th and 5th respondents at KShs. 2.5m and seeking a declaration that Rule 36 of the Elections Rule be declared null and void for being in conflict with Section 82 of the Act.

(iii) A notice of motion application under Rule 84 of this Court?s Rules seeking to strike out the record of appeal as being defective for purporting to introduce new evidence or for excluding relevant documents that were part of the trial record. In the alternative it sought striking out certain parts of the record of appeal deemed offensive.

When the appeal first came for hearing before us, we raised *suo motu*, a question on the competence of aspect in light of Section 85A of the Elections Act and invited the parties to address us on the same. We in particular drew the attention of the parties to the decision of this Court in **PATRICK NGETA KIMANZI –VS- MARCUS MUTUA MULUVI & OTHERS, CIVIL APPEAL NO. 191 OF 2013** in which my learned brother **G. B. M. Kariuki JA** and I were on the bench. All counsel expressed the view that the question was an important one on which they needed time before addressing us. They all also voiced their non-objection to my brother and I hearing this appeal notwithstanding the views we had expressed therein.

The motion was accordingly adjourned and by consent of the parties it was directed that the appeal proper be set down for hearing. The issues raised by the 4th and 5th respondents? said motion were deemed to be part of those parties? response to the appeal which was to proceed by way of written submissions to be filed and orally highlighted at the bar. Submissions were duly filed as were lists and bundles of authorities prior to the hearing which took place on 11th March 2014.

2.1 APPELLANT?S CASE

For the appellant, Mr. Muite, learned Senior Counsel appeared with Mr. Kinyanjui. He commenced his address with the submission that the core issue in the Petition before the High Court was the validity of the votes case as captured in the Statutory Form 35 or 36 which the appellant impugned. Learned Senior Counsel submitted that these forms should have attracted particular attention as regards accuracy given

the evidence led and admitted that some election materials were found strewn in various parts of Nairobi City County.

Given the centrality of the accuracy or otherwise of those forms, Mr. Muite assailed the learned Judge for denying or curtailing the appellant?s right to cross-examine the respondents? witnesses on the very forms on which the case hinged. He asserted that such denial constituted an untenable denial of the right to fair trial which is so fundamental that the Constitution declares it non- dergable.

Mr. Muite further contended that the unlawful infringement of the right to a fair trial was compounded by the learned Judge?s refusal to grant the appellant?s repeated pleas for scrutiny of the voters register in respect of some seven constituencies where irregularities were alleged. Such denial, it was stressed, rendered the trial unfair contrary to Article 50 of the Constitution. Senior Counsel was categorical that the cross-examination sought and denied was well-founded. Far from being a fishing expedition as characterized by the learned Judge, it was furtherance of the constitutional requirement of simplicity, accuracy, verifiability, security, accountability and transparency in elections that flow from Article 86 of the Constitution.

Senior Counsel was emphatic that there was no reasonable basis for the denial of cross-examination on the forms that were readily available having been availed by the 1st Respondent. He posited further that the imperatives of scrutiny were made all the more plain by the fact that the partial scrutiny ordered by the learned Judge in respect of a single polling station revealed huge discrepancies and by consideration that in the context of the most populous county in the country the margin of votes between the appellant and the 4th Respondent that stood at below 70,000 was „a narrow one?.

Mr. Muite further urged that the courts must take a broader view of electoral contests as transcending the narrow question of winner versus loser to implicate and affect the larger public who must have faith in the electoral system of our security and democracy is to be assured. He did not agree with the learned Judges finding that the irregularities and discrepancies did not affect the outcome of the election.

Mr. Muite next addressed the contentious issue of the DVD material that has been attached to the record of appeal in support of Ground 1 of appeal to the effect that the judgment rendered orally in court differed from the official signed copy of the same. Mr. Muite contended that orally in court the Judge had stated that the election was not conducted in accordance with the Constitution and the electoral Law. This, variances the Senior Counsel?s submission, vitiated the entire Judgment.

Turning to the question of the competency of the appeal since it was admittedly filed long after the expiry of the 30 days past Judgment contemplated by Section 85A of the Elections Act, Senior Counsel sought to distinguish the **PATRICK KIMANZI** (Supra) decision on the basis that unlike there, the appeal herein is curved by the presence of a certificate of delay filed pursuant to Rule 81 of the Court of Appeal Rules which are incorporated in the adjudication of electoral appeals by Rule 35 of the Elections Petition Rules. He contended that the days take for the preparation of the copy of proceedings duly certified by the Registrar of the High Court must be excluded in reckoning the 30 day period set by Section 85A of the Elections Act which does not, in any case oust Rule 82 the Court of Appeal Rules,. He urged us to give Section 85A an interpretation that would be in consonance with the Constitution.

Mr. Kinyanjui took up the case for the appellant by first submitting that the learned Judges? understanding of Regulation 87(3) of the Elections (General) Regulations, 2012, Counsel took issue with the learned Judges apparent absolution of the County Returning Officer from the duty to accurately tally the election results which duty he in fact bore and failed to discharge.

This ought to have led to a nullification of the election in line with this Courts? decision in **JAMES OMINGO MAGARA –VS- MANSON ONYONGO NYAMWEYA & 2 OTHERS [2010] e KLR** which was binding on him, considering that the partial scrutiny showed that thirteen out of the seventeen constituency results could not be verified. In the circumstances, Counsel argued that conclusion was inevitable that the final result declared was incurably inflicted with invalidity and the learned Judge ought

to have so found.

Mr. Kinyanjui perorated that whereas Article 86(D) of the Constitution demanded a safekeeping of all electoral material by the 1st Respondent, there was a clear admission that some were found strewn in Westlands and Kayole and it was a reversible error for the learned Judge to have minimized and excused this breach of law and obligation. It was urged that this is a matter that went to the root of the election and constitutional fidelity and purity of the electoral process demanded a nullification of the result as there was in the circumstances no validity elected Mayor of the Nairobi City Council.

2.2 CASE FOR THE 4TH AND 5TH RESPONDENT.

From among the Respondents, Professor Ojienda, learned Senior Counsel was first to rise in opposition to the appeal. He first addressed the competency of the appeal positing that the appeal was devoid of it. Section 85A of the Elections Act provided a mandatory and peremptory timelines in obedience to which the appeal should have been filed no later than 10th October 2013. He was unimpressed that the appellant did not file his record of appeal on that last day having been availed the proceedings on 9th October 2013.

Prof. Ojienda was categorical that a Notice of Appeal such as was filed herein was not an appeal for purposes of the timelines set by Section 85A of the Elections Act and the appeal having been filed and of time was incompetent in entirety and the appellant was therefore beyond help. As the Elections Act was a particular statute, the general Rules of court had to be construed as subservient to the Act. We posed the question why the 4th and 5th Respondent or indeed any of the Respondents had not moved to strike out the appeal for being incompetent as alleged but beyond the rather obscure answer that they had applied to strike out the appeal but for other reasons, Prof. Ojienda did not provide direct illumination on that point.

Senior Counsel next attacked the appeal for impermissibly mixing issues of fact and of law. He in particular chided the appellant for purporting to use technology to introduce matters that are not part of the record such as the DVD of the oral rendition of the judgment yet this was not one of the documents contemplated by Rule 81 of the Court of Appeal Rules. To illustrate the absurdity of the situation, learned Senior Counsel posed with a rhetorical flourish; **“Can this C**ourt admit videos capturing the demeanor of **witnesses?”**

Professor Ojienda categorically affirmed that there is only one version of the judgment, a handwritten one not having been availed. Anything else smacked of cloak and dagger business and **“we cannot have C.I.D tactics in court”** - by which he was questioning the propriety of judges being video- recorded unbeknownst to them.

Turning to the complainant about Form 36 for Nairobi County and the electoral materials strewn in Nairobi, Prof. Ojienda was dismissive stating that the allegations were bare, constituting no proof and that the Petition was built on quicksand. He urged this Court to reject the appellant?s invitation to reevaluate the evidence afresh since the learned Judge had already made conclusive factual findings. Senior Counsel blamed the appellant for authoring his own misfortune in not complying with the learned Judge?s direction to first identify which of the Form 35 he has intended to rely on.

On the question of stare decisis, Prof. Ojienda defended the learned Judge against the criticism that he ignored the **MAGARA case**, stating that the case was distinguishable from the one before the learned Judge. He also challenged the contention that the learned Judge erred regarding the burden of proof stating his understanding; of the onus that a petitioner bears thus;

“You must establish the standard of beyond the balance of probabilities and below beyond reasonable doubt before **there can be a shift”.**

This, according to Prof. Ojienda, is the true meaning to be ascribed to the concept of the shifting evidentially burden pronounced by the Supreme Court in **RAILA ODINGA –VS- IEBC & OTHERS (PETITION NO. 5 OF 2013) [2013]EKLR.**

As to scrutiny, learned Senior Counsel sought to distinguish the decision of this Court in **PETER GICHUKI KINGARA –VS- IEBC & 2 OTHERS, Nyeri. Civil Appeal No. 31 of 2013**. It was Senior Counsel?s view that the decision was inapplicable because, unlike there, the learned Judge herein did in fact order partial scrutiny which revealed some clerical errors but these were minor and not deliberate. He then questioned the probative value of a scrutiny report which he considered untested since it was not subjected to cross-examination. He did concede, however, that the parties? counsel were invited to send their clerks or agents to be present during the partial scrutiny and recount, an exercise ordered by the learned Judge which, according to Prof. Ojienda, was an act of judicial magnanimity as, according to Senior Counsel, the same had not been sought in the Petition.

Prof. Ojienda finally submitted on the cross-appeal urging us to allow it since its foundation is on a rule that is violative of the Election Act which provides that costs should follow the event. In his view, costs are within the discretion of the Deputy Registrar of the High Court and a capping of them unduly curtails that discretion.

2.3 FIRST, SECOND AND THIRD RESPONDENTS? CASE

Ms Wairimu, the learned counsel for the 1st, 2nd and 3rd Respondent on rising declared that she aligned herself with the submissions made on behalf of the 4th or 5th Respondent. She then added that the statutory Forms 35 and 36 do not form part of the record of the trial court. Their filing with the High Court is in simple compliance with Rule 21 of the Petition Rules. Even then, averred counsel, the learned Judge did allow some cross-examination based on them and so the appellant has no genuine basis for complaint. Nor could he complain about denial of scrutiny and recount, counsel concluded, since the Judge did order two of them.

2.4 APPELLANT?S REPLY

Mr. Muite countered the respondents? submissions by asserting that the appellant did pray for scrutiny in the Petition itself and in specific applications thereafter, which the trial court denied. His need was not met by the learned Judge?s own *Suo Motu* order for scrutiny. The discrepancies complained of and those revealed were not trivial, it was submitted, and the irregularities captured in reports to the police and the charging of culprits in court all went to show the gravity of the matters complained of. He urged that even though appeals to this Court are on matters of law only, it was permissible for us to examine what transpired before the trial court to determine whether it had a reasonable basis for arriving at the conclusions it did.

Adverting to the burden of proof, Mr. Muite submitted that the same shifts **„**once certain evidence emerges**?** and in this case there was sufficient evidence for the IEBC to be required to prove that the elections were conducted in accordance with the Constitution and the law.

As to the true meaning and application of Section 85A of the Elections Act, learned Senior Counsel urged us to eschew a technical and narrow construction and to also be slow to adopt the approach by various cases cited by the Respondents **including MWAI KIBAKI –VS- DANIEL TOROITICH ARAP MOI [1999] e KLR; CHELAITE –VS- NJUKI & 2 OTHERS CIVIL APPEAL NO. 150 OF 1998 and MAITHA –VS- SAID & ANOTHER** which shared the common denominator of having been decided prior to the 2010 Constitution which presented a paradigmatic shift. He urged us to accept at face value and give full effect to the Certificate of Delay which states that the days it took to have the copy of proceeding ready was forty nine and we should not go behind it.

3.0 ANALYSIS AND DETERMINATION

For all its length in record, in submissions and the catalogue of authorities cited by the main protagonists, the determination of this appeal turns on the following few issues:-

(i) Whether the appeal is competent in light of Section 85A of the Elections Act.

(ii) Whether the denial or curtailment of cross-examination infringed the appellant?s right to a fair trial.

(iii) Whether the rejection of the appellant?s plea for scrutiny and recount vitiated the judgment.

(iv) Whether the High Court committed errors of law. (v) Whether the costs should have been capped

I shall now deal with these issues serially cognizant that some of the analysis may be cross-cutting so that the determination of one may implicate one or more others.

3.1<u>COMPETENCY OF THE APPEAL</u>

As I have previously mentioned this was not an issue raised by any of the respondents. It is the Court itself that sought the parties? views on the matter since it goes to the very foundation of the appeal. That invitation spawned copious amounts of submissions from the appellant and from the 4th and 5th Respondents. Given though, learned counsel Ms Wairimu Njoroge indicated to us that she aligned her submissions with those of Professor Ojienda for the 4th and 5th Respondent, we note that the submissions filed on behalf of her clients the 1st to 3rd Defendant took no position on the competency of the appeal. They expressly left the matter to the Court and that is how I take their position to have remained throughout.

The meaning of Section 85A of the Elections Act is plain enough, as far as timelines go, admitting to no controversies of construction:

"85A: An appeal from the High Court in an election Petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be:-

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

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

The Section provides specific cut offs in the adjudication of appeals so that the process does not stretch out indeterminately in a manner that makes a travesty of the appeals system. It seeks to impact sanity and reason by imposing two obligations:-

(i) On an appellant to file his appeal within thirty days of the impugned judgment being delivered and;

(ii) On this Court to put in place mechanisms for the expeditious disposal of election petition appeals within six months of their being filed.

In enacting Section 85A, Parliament was doubtless acting in obedience to Article 87(1) of the Constitution which mandated it **"**to enact legislation **to establish mechanisms for timely settling of electoral disputes"**. The principal legislation is the Elections Act which sets various timeliness for different types or stages of electoral disputes. It is noteworthy, though, that the Constitution itself, in Article 87(2) imposed a timeline for the filing of election Petitions concerning an election which is "within twenty-eight days after the declaration of the election results" by the Independent Electoral and Boundaries Commission. The only exception to the twenty eight day limit is a petition concerning a Presidential election for which a much shorter timeline of seven days is prescribed by Article 140(1) of the Constitution and must, by dint of Sub-article (2), be determined within fourteen days of filing.

The twenty eight days limit for filing of non-presidential election petitions in the Constitution is repeated by Section 76(1) of the Elections Act as follows:-

"A petition**- to question the validity of an election shall be filed within twenty eight days aver the date of publication of the results of the election or the Gazette and served within **fourteen days of presentation".

Parliament in enacting this provision not only reproduced the Constitutional timeline but also attempted to inject clarity as to the start date by substituting ***"declaration of results"*** which is in the constitutional text, with **"**publication of the results on the Gazette". That adventurism, though probably well intended, has the effect of altering the timelines. Not surprising, the Supreme Court has ruled the section to be inconsistent with the Constitution and restated that time starts to run from the declaration of the result by the returning officer. See **HASSAN ALI JOHO & ANOTHER -VS- SULEIMAN SAID SHAHBAL PETITION NO.10 OF 2013.**

Whereas the time for filing of election Petitions whether before Resident Magistrates Courts to challenge the election of a member of a County Assembly (Section 75 (1A) of the Elections Act) or before the High Court to challenge that of a County Governor (Section 75(1) of the same) or any other election other than a presidential election is set by the Constitution itself in Article 87 (2), the time for filing appeals from the decisions of those courts is to be found, not in the Constitution, but in the Elections Act. This, to my mind, is an important aspect to bear in mind when dealing with the matter under consideration. I could posit that time set by the Constitution itself bears greater weight than that set by a statute by the sheer fact of the hierarchy of laws with the Constitution being supreme.

That is by no means a suggestion that statutory timeliness are to be disregarded or accorded scant respect. The Supreme Court in JOHO took cognizance of this Court?s hesitancy to take up any appeals from interlocutory decisions of an election court as expressed by the bench that decided Civil Appeal No. 137 of 2013 which was between the very parties now before us. On the issue of timelines we delivered ourselves thus;

***"These time**lines 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. That means a trial court must manage the allocated time very well so as to complete a hearing and determine an election petition timeously. It was therefore imperative that the Election Petition Rules be amended to bring about mechanisms of expediting trials.*

"The Elections Act and the Rules made there under constit**ute a complete code that governs the filing, prosecution and determination of election petitions in Kenya. That being the case, any statutory provision or rule of procedure that contradicts or detracts from the expressed spirit of Article 87 (1), and 105 (2) and (3) of the Constitution is null and void. The Constitution is the Supreme law of the land and all statutes, Rules and Regulations must conform to the dictates **of the Constitution"

As a declaration of principle, I believe we were correct in asserting the importance, inviolability even, of the timelines in the Constitution and the Elections Act. As to whether in fact the same cannot be extended by any court for whatever reason as we expressed ourselves, I must admit to some doubts upon further reflection. It is to be remembered that the view we expressed was in fact broad principle or probably *obiter* since the only issue that was for determination before us was whether we could entertain appeals from interlocutory decisions of the High Court.

A better approach, it seems to me, is one that pays due homage to the timelines but takes heed in the language of the Supreme Court in JOHO **"**to ensure that justice is not sacrificed at the altar of technicality. That Court, as well as this, **"is enjoined to invoke its inherent power while** interpreting the Constitution and legislation, to preserve the values and principles **of the Constitution"**. That court has been consistent on the need to avoid a minimalist and overly technical approach to interpretation of the text of the Constitution which portends a dilution of the norms that permeate and pervade the Constitution as a charter of liberty and the bedrock of the rule of law. One of its decision capturing this approach is its advisory opinion in **THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE S.C. ADVISORY OPINION NO. 2 OF 2012;**

***"A consideration of different constitutions shows that they** are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute **one for the other".**We are bound by the approach laid down authoritatively by the Supreme Court that the principle of justice must prevail at all time; and we should therefore approach the issue of timelines with that apex courts? cautionary word in JOHO; **"[48]** While the principle of timely disposal of election petitions affirmed by the Court of Appeal must be steadfastly protected by any Court hearing election disputes, or applications arising from those disputes, the interests of justice and the rule of law must be constantly held paramount." (my emphasis)

This paramountcy of substantial justice and the rule of law will be a guiding light in my analysis and judgment over other issues I shall be addressing shortly. Its application to the immediate question of competency of this appeal leaves no doubt in my mind that I cannot, consistently with principle and good conscience, declare this appeal incompetent. It is not lost to me that the 1st to 3rd Respondents left this issue to the Court. It is also not lost to me that the 4th and 5th Respondents did not move the Court under Rule 84 to strike out the appeal for incompetence for being filed out of time. I take it that those respondents, who had the presence of mind and opportunity to file a motion to strike out the appeal for other and different reasons, considered the appeal to have been filed within time or that the Certificate of Delay took care of the delay. It was so until we, on our own motion, raised the issue of Section 85A.

My understanding of Section 85A of the Elections Act, as concerns time for filing of an appeal from the decision of the High Court in an election petition, is that it constricts the time from the usual period for filing appeals under the Court of Appeal Rules. Those Rules, of course, generally apply to all appeals to this Court from the High Court and any other Court or tribunal as prescribed by an Act of Parliament, by virtue of Article 164 (3) of the Constitution. Section 5(1) of the Appellate Jurisdiction Act, Cap 9, states that the rules of court are made for regulating the practice and procedure of the Court of Appeal with respect to appeals, and in connection with such appeal, for regulating the practice and procedure of the High Court. No class, type or category is exempted under the Act from the application of the Rules. Indeed, under the Rules themselves only two types of appeals are known namely criminal appeals governed by Part III, and Civil Appeals governed by Part IV. The appeals contemplated by Section 85A of the Elections Act are, doubtless, Civil Appeals.

Under the Court of Appeal Rules, an intending appellant?s first contact with this Court is not a direct one. Rather, it is by transmission, in that the appropriate registry of the Court receives a Notice of Appeal lodged by such intended appellant from the registrar of the superior court whose decision is intended to be appealed against. See Rule 75 and 76 of the Court of Appeal Rules. As far as time is concerned, such an intending appellant has up to fourteen days of the date of the impugned decision to lodge the notice of appeal. He lodges it at that court, not the Court of Appeal.

After the Notice of appeal, what follows is the institution of the appeal proper. Rule 82 (1) states that "an appeal shall be instituted" by lodging in:-

"the appropriate registry, within sixty days of the date when the notice of appeal was lodged;

(a) A memorandum of appeal, in quadruplicate. (b) The record of appeal, in quadruplicate.

(c) The prescribed fee; and

(d) **Security for costs of the appeal"**

It is my understanding that unless and until the four items are lodged within the time stipulated, there can be no competent appeal. The Court may at its discretion provide relief by way of waiver or reduction of the filing fees or security for costs by virtue of Rule 115 of the Court of Appeal Rules but as far as the Memorandum of Appeal and the Record of Appeal are concerned, there can be no valid appeal without them. The Rule is couched in mandatory terms.

It is clear by simple arithmetic calculation that the time provided by the Court of Appeal Rules for the filing or institution of appeals is the fourteen days before filing a Notice of Appeal plus the sixty days thus amounting to seventy- four days after the date of the decision appealed from. It is this seventy-four-day period that is targeted and reduced to thirty days by Section 85A of the Election Act and, as I have already stated, there are perfectly sound historical and valid practical reasons for Parliaments? desire to reduce the time within which election appeals may be filed. The Elections Act supercedes the Court of Appeal Rules and I would therefore hold that election appeals from the High Court to the Court of Appeal are required to be filed within 30 days of the judgment of the High Court.

The Elections Act itself does not provide for the procedure and manner in which such appeals are to be filed, however. I do not see this as an accidental slip or omission, less still as an invitation to some kind of procedural free-for-all. One cannot, for example, write a letter to the Court stating his grievances against the High Court judgment and so view himself an appellant. He cannot file a Petition of Appeal or a bare Memorandum of Appeal and consider himself compliant with Section 85A of the Elections Act. He must perforce file his appeal by lodging all the items requisite under Rule 81 of the Court of Appeal Rules. Nothing less will do.

This perfectly reasonable conclusion finds expression Rule 35 of the Elections Petition Rules 2013, which I see as a wholesale and necessary importation of the Court of Appeal Rules without qualification and without the faintest suggestion that the Rules of Court have been ousted or modified;

"*An appeal from the judgment and decree of the High Court shall be governed by the Court of Appeal* ***Rules".***

That this was the intent of the Rule maker is clear from the fact that immediately preceding Rule 34 of the Election Petition Rules provides a detailed set of provisions running into ten sub-rules to govern the timelines, pleadings and procedure of election appeals to the High Court. That Rule effectively ousts and replaces the entire Order 42 of the Civil Procedure Rules as the regime governing appeals to the High Court in matters elections

As I have stated, there is neither ouster nor replacement of the Court of Appeal Rules. They certainly are not supplanted. What we have is an affirmation and restatement of their application. They are controlling.

The express and unqualified importation and application of the Court of Appeal Rules by rule 35 of the Elections Petition Rules, 2013 as the procedural require governing electoral appeals marks the fundamental point of departure between this appeal and those decided by this Court under the law as it previously stood including MAITHA –VS- SAID & ANOTHER [2008] 2KLR (EP) 337 and LORNA CHEPKEMOI LABOSO –VS- ANTHONY KIPKOSKEI KIMETO & 2 OTHERS CIV. APPEAL(APPL) NO. 172 OF 2005 (unreported). I have anxiously perused the repealed National Assembly and Presidential Elections Act then in force as well as the Petition Rules that were made thereunder. They did not apply the Court of Appeal Rules whether explicitly or implicitly and that, in my view, is the context in which the absolute and unflexible pronouncements therein must be understood. The law as now gives the entirety of this Court?s Rules pride of place. To force and apply them is not to violate electoral law but to give it effect. I see no inconsistency whatsoever.

Having come to that conclusion, I now must consider whether an appeal lodged outside of the statutory thirty days is, *ipso facto*, incompetent. It seems to me that the thirty-days period is premised on an assumption that an appellant will not be hindered or prevented by factors outside his control in obtaining the documents requisite for his filing of the appeal, particularly the documents that constitute a record of appeal. The Election Petition Rules in the case of appeals to the High Court seem to recognize tacitly the

challenge of obtaining what goes into the record. They thus require an appeal to be instituted by merely filing a Memorandum of Appeal within fourteen days of the day of the judgment under Rule 34 (1) and (3). Even though a record of appeal containing the same memorandum of appeal, the pleadings, the proceedings, the affidavits as documentary evidence and the signed, certified copy of the judgment and decree are to be filed within twenty one days thereafter, the obligation of readying and also availing them to the High Court is placed squarely on the courts under the following sub-rules of Rule 34 of the Elections Petitions Rules:

"(7) Upon filing of the memorandum of appeal, the registrar of the court to which the appeal is preferred shall, within seven days, send a notice of appeal to the court from whose decree the appeal is to be preferred.

(8) The court shall, on receiving a notice under sub-rule (7) send the proceedings and all relevant documents relating to the petition (sic) to the high Court to which the appeal is preferred."

Should there be any delays in the availing of the documents on the part of the court there is no doubt as to where the responsibility lies.

Reverting to the appeals hereto from the High Court, there is no gain- saying the centrality of the record of appeal. As to what constitutes the record, Rule 87 (1) of the Rules of this Court is exhaustive enough;

"87 (1) for purpose of an appeal from a superior court in its original jurisdiction, the record of appeal shall, subject to sub-rule (3), contain copies of the following documents-

(a) An index of all the documents in the record with the numbers of the pages at which they appear;

(b) A statement showing the address for service of the appellant and the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service as required by rule 79, his last known address and proof of service on him of the notice of appeal;

(c) The pleadings;

(d) The trial judge?s notes of hearing;

(e) The transcript of any shorthand notes taken at the trial;

(f) The affidavits read and all documents put in evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;

(g) The judgment or order;

(h) The certified decree or order;

(i) The order, if any, giving leave to appeal; (j) The notice of appeal; and

(k) Such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant:

Provided that the copies referred to in paragraphs (d), (e) and (f) shall exclude copies of any documents or any parts thereof that are not relevant to the matters in controversy on the appeal."

Now, even a cursory look at the contents of a record of appeal immediately reveals that a number of the items or documents mentioned are not under the control or custody of an appellant. Rather, they have to be sought or applied for from the trial court. And the question that arises is what the consequence would be to an appellant?s well - intentioned appeal if he should be unable to get into possession of those documents within the time prescribed by the Rules. Such a question is not an idle one as such delays, far from being rarities, are in fact quite common place as any practitioner and Judge would know.

The argument is attractive but ultimately false and spurious that such appellant should simply file such documents that make the record as he may have, and afterward file a supplementary record of appeal containing the rest of the documents under Rules 88 and 92 (3) of the Court of Appeal Rules. I say the argument is false and spurious because it presupposes that the rule that permits the filing of omitted documents by way of a supplementary affidavit is some kind of *carte blanche* for an appellant to place in his purported record of appeal only such documents as please him secure in the knowledge that the supplementary record will cure it. I think, rather, that Rule 88 which permits the lodging of "omitted" documents should not be read as such invitation. The rule exists, to my way of thinking, for the curing of inadvertent as opposed to willful, deliberate and contumacious omissions.

It is also false and spurious because it presumes that the rest of the omitted documents, in this case those that must be obtained from the trial court, will necessarily be available within the fifteen days after filing the record allotted by Rule 88 within which the supplementary record containing them can be filed without leave of Court. This may not always be the case and the documents may only become available much later necessitating application for leave.

A more troubling aspect of the argument, which further weakens it, is that it pre-supposes that an appellant will necessarily be able to prepare a solid and satisfactory memorandum of appeal without the benefit of having and perusing the proceedings, documentary evidence and judgment of the trial court. If one is to be expected to properly apply his mind to the preparation of the memorandum, the availability of the entire record of the trial record is a critical *sine qua non.*

Against that argument, which was propounded by learned Senior Counsel for the 4th and 5th Respondents, and which I must respectfully reject, we have the rest of Rule 82 of the Court of Appeal Rules which provides as follows:

"82...provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted be excluded such times as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.

(2) an appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent…."

It seems clear to me that so long as proceedings are bespoken by an appellant within the time specified by this Rule and the request is in writing and duly copied to the opposite side, a certificate of delay duly issued is conclusive. It ensures that when reckoning the days, be they the sixty past notice of appeal for all appeals generally, or any shorter period as may be specified by a special Act of Parliament, the days so certified are excluded, as indeed they must. Such exclusion is not in any way offensive, violative or subversive of the statute that sets time limits. It is a common-sensical and pragmatic rule borne of practical day- to -day experience which has shown that the proceedings do delay. That may end some day when proceedings can be prepared and availed real time or contemporaneously but before that happens, the certified days must be excluded.

The letter requesting proceedings herein was written within time and copied to all the respondents? advocates. It made clear to the registrar of the High Court that the proceedings were required for purposes of appeal. The appellant did enough to trigger the exclusionary element in the proviso to Rule

82 and he was required to do no more. The High Court registrar knew and must be presumed to have known that what was at stake was a time-bound election appeal. He needed no reminding. At any rate, the forty-nine days certified are in no wise inordinate. The certificate has not been impeached and in fidelity to law, I would exclude the said days with the result that the appeal before us was lodged within the time contemplated by the Elections Act and is therefore competent.

In arriving at this conclusion I have not engaged in an exercise of time extension at all. I have merely performed a computation in much the same way I would rule that if the last day for the filing of the appeal had fallen on a Sunday or a public holiday, the appeal could properly and efficaciously be filed on the next following day so long as that too, is not a public holiday or a Sunday which could push it further back. In short, the 30 days are not to be computed in a manner that would lead to absurdity.

Before I part with this issue, I would add that the right of appeal is an integral element of access to justice and the right to fair hearing under our constitutional order. There is nothing to suggest that Parliament in enacting Section 85A of the Elections Act intended to curtail or render illusory the very right of appeal it was legislating. Nor could it without running afoul the Constitution. As a Court we must be vigilant not to adopt a construction of the provision that would render it nugatory and afford opportunity to mischief makers to frustrate intended appellants? attempt at obtaining proceedings from the High Court in time, thereby locking them out of appeal.

I take cognizance that in England a mechanistic and inflexible application and interpretation of special provisions regarding appeal timelines starting with the former House of Lords in **MUCELLI VS GOVERNMENT OF ALBANIA** [2009] UKHL, [2009] 1 WLR 276 where it held that where a statutory provision fixes a time limit for the making of an appeal the appeal court had no power to extend it (under its Rules) unless the statute itself so provided, could not long endure. After being followed in such cases as **R. (HARRISON) VS GENERAL MEDICAL COUNCIL [2011]** EWHC 1741 involving the Medical Act 1983; **MITCHEL VS THE NURSING AND MIDWIFERY COUNCIL [2013]** EWCA CIV 818 involving the Nursing and Midwifery Order 2001 and **MASSAN VS SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2011] EWCA CIV 686 involving the Immigration, Assylum or Nationality Act 2006, it was ripe for re-consideration and rejection.

In **POMIECHOWSKI VS POLAND [2012]**, UK SC 20, [2012] 1 WLR 160, SC, the English Supreme Court reconsidered the absolute and highly legalistic approach and held that the statutory appeal time limits had to be read down in accordance with the European Convention on Human Rights and Strasbourg jurisprudence. The English Court of Appeal followed this approach in **R (ADESINA) VS NURSING & MIDWIFERY COUNCIL [2013]** EWCA CIV 818 where the court was emphatic, and I readily agree, that to adopt an absolute and overstrict approach would be to allow a time limit to impair the very essence of the statutory right of appeal. Thus was the absolute approach abandoned in favour of applying the time limits in a manner that avoids conflict with or negation of access to an appeal process. This reasoning fully persuades me. I am persuaded and so hold without detracting from or conflicting with our ruling in **PATRICK KIMANZI** (supra). It is a case that is distinguishable from the present on the single but vital point that there was no certificate of delay there. The appellant therein did not attempt to urge that his appeal was competent, electing instead to completely capitulate and concede. He had made no attempt to comply with the all important Rule 82 of our Rules. It would have saved is appeal.

I note that our sister state, neighbouring Uganda, which has a historical, socio-political and legal experience similar to our own, has also enacted legislation that lays emphasis on the need for expeditious resolution of electoral disputes for basically the same reasons as we have. It is telling, however, that the law on timelines, as expressed by our counterpart Court in **KASABANYE MOSES – VS- ELECTORAL COMMISSION** E.P, APPL. NO. 07 OF 2012, while pointing that time is of essence, acknowledges enlargement if there be exceptional grounds". I am persuaded that this is a sound and entirely reasonable approach for I am loathe to think that substantive justice can, consistently with good sense, be sacrificed at the guillotine of time. We are doers of Justice not mere keepers of time.

In short, this appeal is competent.

3.2 DENIAL OR CURTAILMENT OF CROSS EXAMINATION

The substance of the appellant?s complaint under this head is that the learned Judge, notwithstanding that he had allowed the appellant to have copies of the Forms 35 and 36 for certain specified constituencies, nevertheless proceeded to impose curtailing conditions on the appellants? cross examination of the respondents? witnesses using the statutory forms. The appellant contends that the conditions and limits imposed amounted to a perverse exercise of discretion which fettered his right to freely cross-examine the said witnesses and rendered the trial unfair and oppressive.

The incident that provoked the imposition of conditions by the learned Judge is captured at the beginning of his Ruling dated 26th June 2013;

"During the cross-examination of Fiona Nduku Waithaka RW1, by Mr. Kinyanjui for the Petitioner, she was shown Form 36 for Embakasi Constituency. She had given evidence that she had looked at all forms 36 for all 17 Nairobi constituencies before she compiled the Form 36 for Nairobi County. Mr. (sic) Ojienda for the 4th and 5th respondents and Mr. Okonji for the 1st, 2nd and 3rd respondents objected to the line of questioning of counsel for the Petitioner on sever**al grounds…."**

None of the grounds of objection mounted the questioned the authenticity of the documents being put to the witness or asserted in admissibility as such.

After hearing arguments by both sides, the learned judge made a determination that he would not allow the documents filed by the I.E.B.C. pursuant to Rule 21 of the Election Petition Rules to be "used in wide and general manner for cross examination which may amount to mere fishing expedition." He would only allow cross examination on specific Forms 35 deposed to by the appellant or his witness or in respect of particular allegations of irregularity or malpractice in which case leave would be granted to cross examine on forms 35 and 36. The learned Judge then set out certain categories of documents in respect of which he would allow cross examination.

In arriving at that determination, the learned Judge had distilled a number of principles which included the following;

"Fourthly, and this is another distinction of election procedure and practice as against that under the Evidence Act in section 146 (2), a deponent of an affidavit may be cross examined and may be re-examined under Rule 15 (3). The

implication here is that the cross-examination relates to and concerns matters deposed to in the affidavit which mandatorily and automatically became part of the trial record.

To my mind therefore, **cross ex amination….must relate to the** substance of the evidence of that witness**…"** (my emphasis)

With great respect to the learned Judge, the distinction he drew between the Elections Petition Rules and the Evidence Act in the matter of cross- examination is tenuous and questionable. The Petition Rules do not in any manner dilute, limit or denigrate the salutary place of cross examination in the adjudicative process. All they do is save time by adopting witness depositions as if they were the evidence given by the particular witness during examination in chief.

It would seem as if the learned Judge proceeded on the basis, in the event erroneous, that the Election Petition Rules had somehow diminished the importance and critical place of cross examination in election disputes. There is no basis for such a view. There is equally no basis for the notion that Rule 15(3) confines or limits cross examination to such issue as a witness deposed to in the filed affidavit. Were that the case, the trial of election petitions would be rendered a travesty of justice wherein deponents would swear only to scanty and safe matters secure in the knowledge that what they concealed would

remain suppressed by such curtailment of cross examination. Such perverse consequence cannot reasonably be said to have been expressed or intended by the Rules Committee.

That cross examination holds pride of place in any trial is too plain for argument. The learned judge himself appreciated this when in his judgment he repudiated the probative value of witnesses who swore affidavits but were not called so as to have their evidence tested by cross examination. Professor Vijay K. Bhatia in his paper *titled "Judicialization of International Commercial* ***Arbitral Practice; Issues of Discovery and Cross examination"*** expresses views which I readily endorse;

"The best known purpose of cross-examination is to test the credibility of the witness. But there can be a number of other purposes as well: for example to provide a more complete story than the edited one presented during direct examination [or, for that matter, in the witness affidavit] to explore the weakness in the logic of the opponent?s case, and to gain concessions about facts, thereby making them as irrefutable as possible. Cross examination thus is seen as a strategically powerful resource in litigation as well as arbitration."

The learned author also says, and incorporates the opinion of R. Du Cann in the *Art of the Advocate* (1964) Hormondsworth: Penguin;

"In cross-examination on the other hand, witnesses are invariably controlled by counsel, and all forms of coercive questioning strategies are used without any hesitation, unless they are seen as eliciting irrelevant or inappropriate testimony. Cross-examination thus is regarded as a crucial weapon in the armory of the counsel not only to test the accuracy of the evidence revealed in direct examination but also, and perhaps more importantly, to challenge the testimony as well as the credibility of the witness." *(My emphasis)*

So regarded, cross-examination is a critically important part of the tools indispensable to counsel?s discharge of his advocacy duties for and on behalf of his client and a court ought to be extremely slow and circumspect before interfering or curtailing its use for to do so opens the court to charges of unfairness or even bias, which, in the event, have been leveled herein against the learned Judge. This is inevitable because in denying, limiting or inhibiting a party?s cross –examination of an adverse witness, a judge may be seen as literally grounding and mortally wounding the cross-examining party?s ability to conduct his trial because, as stated in Wigmore on Evidence, 3rd Edition Vol. V par 1367, *"[cross examination] is beyond doubt the greatest legal engine ever invented for the discovery of* ***truth."***

The authorities I have encountered in the common law tradition based on the adversarial system are all quite consistent that an undue denial of cross examination implicates the fairness of a trial whatever the subject matter.

The appellate court in the South African case of R –vs- NDAWD & OTHERS [1961] 1 SA 16 (N) a criminal case held, and I would respectfully agree;

"Now it seems to us that once there is a denial of a right of cross-examination of witnesses, that immediately causes prejudice to an accused person, and since we do not know what evidence this witness could have given [in cross examination] we cannot say that there has not been a failure of justice." *(Emphasis mine)*

The view taken by the appellant is that there has in fact been a failure of justice. So aggrieved was the appellant by the curtailment of his right to cross- examine that he filed Civil Application No.137 of 2013 (UR 94 of 2013) seeking an order of stay of the High Court proceedings and seeking the setting aside of the learned Judge?s order forbidding the use of Forms 35 and 36 in cross-examination of the respondents? witnesses. Indeed in this appeal the appellant makes these contentions at Ground 10:-

> ***(i) "Had the Learned Judge of the trial Court permitted the cross examination of the 1st and 3rd Respondents on their own Forms 35 and 36 of the impugned election as contemplated by the law, the Appellant would have demonstrated that a large and substantial number of***

Forms 35 of the impugned election directly affecting the said election?s result:

(i) Were NOT dated at all, rendering them invalid;

(ii) Were NOT signed at all by the respective Presiding Officers, rendering them invalid;

(iii) Contained data that was totally conflicted, and had no countersignatures to resolve the conflicting figures, violating Article 86c of the Constitution;

(iv) Had conflicting dates thereon as entered by the Presiding Officers and the Deputy Presiding Officers;

(v) Had numerical data that had been crossed over, re-written over, and illegible figures thereon, invalidating the same and thus affecting the final results;

(vi) Had no stamps of the IEBC at all rendering them invalid;

(vii) Were blank where parties? agents ought to have signed and where such incidents arose, there were no statutory comments of the IEBC presiding officers explaining the default;

(viii) Had no statutory data of the percentage of voters who voted, or the total number of valid votes cast in violation of the electoral law, rendering the same invalid;

(ix) Had figures that did not tally correctly or accurately concerning the details of the impugned election, thus violating Article 86(a) of the Constitution, rendering the final result a nullity;

(x) Had votes attributed to the 4th Respondent in excess of the votes contained in specific polling stations? and constituencies tallies, such as Mathare Constituency, Langata Constituency, Westlands Constituency, Embakasi East, and Ruaraka Constituency,

All of which the learned Judge of the Election Court was aware were in contest, even as submitted in the opening Submissions by the Appellant, and which affected the validity of the impugned election?s final result (as stated in paragraph 18, 19, 20, and 21 of the Judgment).

The net result of the evidence blocked by the Order of the learned Judge of the Election Court is that the Court was deprived of the evidence already filed in Court demonstrating that the impugned election was NOT conducted in accordance with the Election law and the Principles laid down in the Constitution of Kenya and thereby violated Section 83 of the Election Act, 2011."

Now, like the South African Court this Court cannot know what the cross examination could have turned up. The lengthy contentions as to what the cross-examination would have proved may well be no more than wishful thinking and a litigator?s chest-thumping but then again, they could well be true. My own perusal of the Forms 35 and 36 that are in the record do indeed show that some are undated; some are unsigned by the Presiding officers; many have alterations in figures that are not countersigned, some are written over; some do not have any agents? or candidates? signatures and also are lacking certain statutory data as alleged by the appellant. And this is far from exhaustive. I am not prepared to dismiss as idle and mischievous the complaint about denial of cross examination. To the contrary, I am persuaded that it was a fundamental error on the part of the learned Judge that rendered the trial a mere parody.

I am particularly concerned that the learned Judge fell into and proceeded on the basis of the rather elementary error that cross examination should be confined to matters that arose in examination- in -chief

which in this case is the evidence deposed to in the witness affidavits. This cannot be correct. The law, as I perceive it, is that so long as a matter is relevant and admissible, a question can be led on it in cross examination. Indeed, I would offer that the potency and genius of cross examination lies in the ability to bring up truths that the witness may have carefully tried to shield from view by a sanitize form of deposition or examination-in-chief. This is the true meaning and intent of section 146(2) of the Evidence Act, Cap 80 and, with tremendous respect to the learned Judge, he had absolutely no basis for concluding that the wide scope the provision portends has no application or needs to be constricted in election petitions. There is no constitutional, statutory or practical basis for such a view and I hold that the learned Judge misdirected himself to the extent that cross-examination in electoral disputes should be any less potent or important than in any other proceedings.

The error on the part of the learned Judge seems to have proceeded from his understanding of the Appellants? case after **"carefully perusing the Petitioner?s Pleadings"** whereupon he decided to draw the contours of what he considered to be the confines of proper or appropriate questioning. The learned Judge might have benefited from the cautionary word of Lord Justice Munby of the English Court of Appeal in J (A CHILD) [2012] EWCA 1231, who after finding that the Recorder had fallen into **"plain and obvious"** error in rejecting counsels entirely justified desire to explore certain issues worthy of exploration by cross examination stated;

"Of course, and even in a family case, a judge should stop irrelevant or time wasting cross-examination. But a judge should always bear in mind that, however carefully he has read the papers before hand, counsel is likely to have a better grasp of the inner forensic realities of the case. And a judge does well to think twice if, as here, his intervention is met by counsel standing her ground and carefully explaining why she wishes to cross-examine in a particular way, especially if, as here, counsel?s reasons have obviously been carefully considered and not just „of-the-cuff?." – par 35 *(My emphasis)*

As the adjudication of electoral disputes is of constitutional and statutory provenance, I consider it to be a serious abdication of the court?s role were an election court to fail to conduct the proceedings with scrupulous regard to the principles of a fair trial. The Constitution demands it. The Elections Act decrees it. And parties are entitled to demand it. A violation of fair trial is not

a trivial thing and I, for one, am not prepared lightly to ignore it. Its denial is a matter so fundamental and so grave that it vitiates the judgment of the trial court. Appellate courts with reversal powers must take a decidedly firm view against such aberrations, and I do. Munby LJ expressed it well in J(A CHILD) (supra);

"In my judgment, the effect of this was indeed, as submitted to us, to disable the Recorder from carrying out the task required of him and to deny the father a fair hearing. But I go further. To deny the father a fair hearing and a proper opportunity to put this case was also of course to deny J, a fair hearing. And for the reasons given by McForlane LJ it may also have meant **that the mother?s case was not properly considered." (Par 36).**

A denial of a fair hearing to one party also deprives the opposing side of a fair hearing. And a denial of fair hearing by a trial court must inevitably invite a setting aside of the judgment. I am persuaded by the holding of the Nigerian Court of appeal in ONWUKA VS OWOLEWA CA 110/99 on this precise point and would adopt and apply the sentiments of Onalaja, J.C.A. in the lead judgment;

"The submission of respondent that cross examination is procedural is untenable, as under our adversarial system of jurisprudence the art of cross-examination is the greatest weapon to attack an adversary. It is fundamental, the pivot, the central hub and gravity of our civil system because cross- examination is based on our rules of pleading with its source on the rule of natural justice of *audi alterem partem* (that is hear the other side). To deny a party from cross-examination (sic) of his adversary without justifiable legal reasons amounts to denial of fair trial as enshrined in….the Constitution."

On this basis alone I would allow the appeal for I am firmly persuaded that fair trial of election petitions is at the very heart of the judicial facet of electoral justice. We cannot afford to ignore, excuse or trivialize its violation. To do so would be an authetical to the clear architecture of electoral dispute resolution as established by the Constitution itself and to do violence to the spirit and vision of electoral integrity as interrogated and affirmed or re- established by election courts.

C. <u>SCRUTINY</u>

The appellants? grievance with regard to scrutiny is twofold: the learned Judge improperly rejected the appellant?s application for scrutiny and, when he ordered partial scrutiny *suo motu*, failed to make the correct conclusion and draw proper inferences therefrom. Ground 15 of the Memorandum of Appeal avers that the learned Judge erred in rejecting or failing to adjudicate on the appellant?s application dated 12th July 2013 which had specifically requested for the marked register. It was the appellant?s contention that the register would have demonstrated excess votes in Mathare Youth Polytechnic Polling station with unregistered voters double voting in violation of the one man one vote principle.

The appellant?s application by motion on notice dated 11th April 2013 filed contemporaneously with the Petition contained an astonishing twenty- two prayers. I need not repeat the sentiments I have already expressed about the absolute inappropriateness of such lengthy pleadings. Be that as it may, prayers 11, 12 and 13 of the said application sought the scrutiny and recount of the votes cast in six named constituencies within Nairobi County pending the hearing of the Motion and pending the hearing of the Petition. The grounds on which the application was premised were equally numerous but they included alleged illegal excess votes in Lang?ata Constituency; use of Forms 36; illegal for being unsigned, lacking data, or undated,; multiple votes for the 4th respondent, scattered electoral materials among many other ills.

My own reading of the allegations made by the appellant in his Petition reveals that they were not insubstantial. They went to the very heart of whether or not the election for Governor for Nairobi had been conducted in a manner that demonstrated due discharge of the duty imposed on the IEBC to show fidelity to the principles captured in Article 86 of the Constitution on voting;

> **"At every election, the Independent Electoral and Boundaries Commission shall ensure that:-**
>
> **(a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**
>
> **(b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**
>
> **(c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**
>
> **(d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."**

In the face of allegations of malpractices, over-voting, discrepancies, mistallying, lost documents and the like, I find it difficult to accept that an election court Judge, properly directing his mind to the high standards of probity, integrity and accuracy demanded by the Constitution can rather non- chalantly dismiss a petitioner?s repeated application for scrutiny in circumstances such as obtained herein. The law on scrutiny as set out in the Elections Act is, to my mind, part of the adjudicative effectuation of the principles set out in the Constitution itself. Section 82(1) of the statute provides as follows:-

"An election court may, on its own motion or on application if any party to the petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine".

My reading of this provision does not reveal any sign of parliamentary antipathy or suspicion towards scrutiny. It is a tool and process that the statute affords not just the parties on application, but the court as well to do so on its own motion. No conditions precedents are imposed by the statute before a party may be granted scrutiny. It is noteworthy, though that the Rules Committee, in coming up with Rule 33(2) of the Election Petition Rules fettered the election courts? wide discretion in the matter of scrutiny by requiring that the applicant/petitioner do demonstrate "sufficient cause". In my dissenting judgment in the case of NICHOLAS KIPTOO ARAP KORIR SALAT –VS- IEBC & OTHERS CIVIL APPEAL NO. 228 OF 2013 I did explore this anomaly in these terms;

"A question does arise, but which I do not find it necessary to definitely answer on this occasion, as it was not raised by the parties herein, whether, on a proper consideration, Rule 33(2) of the Elections Petition Rules is inconsistent with the parent Act. It is noted that whereas under Section 82(1) of the Act scrutiny of votes is at the absolute and unfettered discretion of the Election Court and may even be exercised suo motu, the Rule imposes the condition that the court has to be satisfied that there are „sufficient reasons? before a scrutiny or recount can be ordered. I very much doubt that subsidiary legislation can efficaciously purport to limit and fetter a jurisdiction that is absolutely free under the Act itself. It appears to me that Courts have, in a juridical vivification of the philosopher Jean-Jacques Rousseau?s complaint that man is born free but everywhere he is in chains, voluntarily assumed and defended fetters to discretion that may be subject to question. A full answer to that question must await a proper occasion."

Having observed the regularity with which election courts seen to be miserly and reluctant to grant applications for scrutiny, I am persuaded that the requirement for sufficient cause in Rule 33(2) is inconsistent with Section 82(2) of the Act and represents an impermissible intrusion on the courts? grant of scrutiny when sought.

It is ironical that the learned Judge elects to order scrutiny for polling stations of his own choosing yet failed to order scrutiny for the particular constituencies that the appellant sought it and for reasons, that were not flimsy. That the two scrutiny reports made by the Registrar of the High Court revealed discrepancies and inconsistencies in the votes should have been further reason for the grant of the scrutiny requested by the appellant. What is more, basis for the scrutiny request went far beyond the mere calculation and tallying of votes and focused, with some insistence, on the voter register. I am unable to fathom why the learned Judge would reject such application when there was material placed before him that should have commended an investigation into the allegation of irregularities and malpractices. The learned Judge himself did observe, and this out of the two constituencies in which he had ordered scrutiny as follows;

"The scrutiny revealed various discrepancies. The most glaring are as follows:-

For Embakasi: Central and Mathare Constituencies, all entries for all consolidates votes a constituency Form 36 and county Form 36 did not tally. The Deputy Registrar was unable to verify the accuracy of results tallied for these two constituencies."

I am far from satisfied that the step taken by the Judge in ordering a second scrutiny of his own motion went to cure the situation that cries out for a targeted scrutiny with respect to the constituencies and matters identified as prayed by the appellant.

I consider valid and a proper exposition of the law on scrutiny the sentiments of this Court in – PETER KINGARA –VS- IEB & 2 OTHERS CIVIL APPEAL (EP) No.31 of 2013 and which are deserving of in extensy reproduction;

"The issue as to the extent of errors in the counting and tallying of votes was not resolved by evidence, and there was no way it could have been resolved, without an order of recount and scrutiny. There was also no way of verifying whether those errors affected the overall results and the democratic will of the people of Othaya constituency. In the first place, the admission of so many errors should have reversed the onus of proof to 1st and 2nd respondents who should have, in order to vindicate

themselves, desired to demonstrate and lay bare to the all-world that, what was contained in the ballet boxes was the democratic will of the people of Othaya Constituency. Instead the respondents strenuously opposed the request for scrutiny which in any event was within their right. We find that without an opportunity of examining what was contained in the ballet boxes, we agree with the appellant that there was no evidential foundation for the trial Judge to conclude that the errors were minor. In election matters qualitative and quantitative tests are applied as a basis of establishing whether the errors materially affected the outcome.

Given that there was no test that was applied to justify the conclusion that the totality of the errors was negligible (sic). If any attempt was made to examine the evidence critically, it would have been evident to the learned Judge that there was no factual basis for the conclusion that the errors committed during the counting and tallying did not affect the outcome of the results. The only way a correct conclusion could be arrived at, was through a recount and scrutiny of the ballots.

The question that lingers in our minds is whether there could have been more errors if the ballot boxes were opened, or indeed the opening of the ballot boxes would have vindicated the respondents all together from any wrong doing. With all these mistakes by the election officers, it was necessary to order the recount and scrutiny of the ballots so as to establish whether the election was substantially conducted according to the law. We have to state here that a recount or scrutiny of ballots is not rocket science, the terms are synonymous and there cannot be one without the other. There was sufficient evidence to show with was not an exercise meant to abuse the court process or take the court on a „wild goose chase?, there were sufficient grounds in this matter to justify the request. As it was held in the case of Said v Hemed [2008] eKLR (ED) 323. The aim of a recount is to assist the court to establish the correctness or otherwise of the allegations by a petitioner. Also a recount is meant to assist the court in its duty to investigate the validity of alleged breaches of the law and the irregularities. We think we have said enough to demonstrate that there was justification to order a recount and scrutiny of the errors alleged by the appellant and those which were admitted by the respondents."

I would also respectfully repeat for reiteration what I said of and concerning scrutiny as captured in Rule 32 of the Petition Rules in the NICHOLAS SALAT case.

"This Rule shows that the phenomenon of scrutiny is actually wider than the very narrow and limited meaning the learned Judge ascribed to it. It does not deal merely with the votes cast but also involves an examination of statutory statements, the register, the statutory forms containing the results, as well as any written complaints that the candidates and their representatives may have made. Without a doubt scrutiny is wider and more comprehensive than a mere counting and allocation or ascription of votes. It provides an opportunity to explore and interrogate a greater collection of materials that go to show a clear picture of the propriety or otherwise of the electoral process. I would posit that in a rea sense, scrutiny is the triumph of transparency over opacity. If U.S Supreme Court Justice Louis Brandies was right that it is said sunlight is the best disinfectant, and I think he was, I am quite convinced that scrutiny provides one of the safest and most effective therapies for our electoral malaise. Let there be light? must surely be the first step towards the creation of the new electoral reality that the Constitution promises. It behoves election courts to midwife that child of promise, careful not to abort the vision."

Bearing those considerations in mind, I find and hold that the learned Judge fell into error in rejecting the Appellants? application for review and must accordingly be reversed.

3.4 ERRORS OF LAW

Even though the complaints I have already addressed are on matters of law or involve the learned Judges handling of matters of fact that raises legal question so that our jurisdiction is properly invoked consistent with Section 85A of the Elections Act, the Appellant in his memorandum of appeal raises some specific grievances in which he alleges the learned Judge committed errors of law amounting to miscarriage of justice. I shall address but three of them which I consider critical. First, the appellant charges that the

learned Judge ignored and shunned the doctrine of stare decisis which required him to uphold and follow the binding decisions of this court especially the case of JAMES OMINGO MAGARA –VS- MANSON ONYONGO NYAMWEYA &2 OTHERS (KISUMU Civil Appeal No. 8 of 2010) [2010] e KLR. That case is important in several respects including the effect of improperly filled, unsigned, inaccurate or otherwise defective statutory forms carrying election results as well as whether electoral law is curative of those errors, omissions or misdeeds.

In the case before us the learned Judge, though acknowledging that there were errors of tallying, discrepancies and irregularities, including his categorical finding that "Report No. 1 disclosed that it was not possible to verify the accuracy of results tallied for Embakasi Central and Mathare Constituencies," nevertheless concluded that; "more likely it shows inadvertent errors. The discrepancies do not affect the result of the election". In arriving at this view of the matter, the learned Judge took into consideration the English case of ISLINGTON WEST DIVISION CASE, MEDHURST V LOUGH AND GASQUET (1901) 5 0?M & H 120, 12 TLR 210. He quoted Kennedy J who at p230, held as follows:-

The third principle is that, as in all litigation, a petitioner is bound by his pleadings. It is common that a petitioner will file a petition and will in the course of the proceedings veer away from the initial track. This puts the opponents into difficult position in knowing what the real case they must answer is, and what it is the court must determine. The point was well put by Justice Kimaru in MAHAMUD MUHUMED SIRAT V ALI HASSAN ABDIRAHMAN AND 2 OTHERS NAIROBI PETITION NO. 15 OF 2008 [2010] eKLR where he stated that:

"An election ought not to be held void by reason of *transgressions of the Law committed without any corrupt motive by the returning officer or his subordinates in the conduct of the election, where the court is satisfied that the election was, notwithstanding those transgressions, an election really and in substance conducted under the existing election law, and that the result of the election, i.e the success of the one candidate over the other, was not, and could not have been, affected by those transgressions of the law by the officials being admitted, the court sees that the effect of transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether these transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the court is then bound to declare the election void. It appears to us that this is the view of the law which has generally been recognized, and acted upon, by the tribunals which have* ***dealt with election matters."*** *(my emphasis)*

The learned Judge?s approach appears to have laid greater emphasis on the first part of Kennedy Js? holding. It does not appear to me that he paid due attention to the latter part which I have highlighted for emphasis. And that differential of emphasis led, in my respectful view, to an erroneous estimate of the errors, inaccuracies discrepancies and irregularities that abounded in this case.

The learned Judge quite currently indicated that the principle referred to by Kennedy J finds statutory expression in Section 83 of on Election Act;

"No election shall be elected to be void by reason on non- compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and that written law or that the non-compliance did not affect the result of the **election."**

This section, if approached from an uncritical and un-nuanced standpoint, can lead to great mischief. Way too often a judge falls into the trap of seeing in it some kind of peace for all the wrongs and misdeeds of electoral conduct. It cannot have been the intention of Parliament to lower the bar on the conduct of elections when the Constitution has clearly annunciated the principles that must govern elections including simplicity, accuracy, verifiability, security, accountability, and transparency. It must follow that the IEBC and all its officials are under a constitutional injunct to uphold and demonstrate these principles in the counting, tabulation, collation and announcing of election results. It cannot be right or permissible for courts to diminish, readily excuse or trivialize the failure on the part of the IEBC to live up to the high but eminently attainable standards set by the Constitution itself. A drip-drop diminution

and leaking of integrity, accuracy and dependability of the electoral process unchecked and uncondemned is what leads to a flood and avalanche that imperils the very foundations of our democracy.

I must say in this regard that I find the learned Judge?s findings with regard to County Form 36 by a perplexing curiosity. At paragraph 101 of the judgment, the learned Judge stated as follows:

"There is, however, a curious gap in the law. It is that there *is no specific Regulation regarding the completion of Form 36 by the County Returning Officer at the county tallying stage. In the result, the petitioner cannot strictly rely on the law to* ***criticize the manner in which it was filled."***

With great respect to the learned Judge, this was a patent misdirection and a fundamental error of law. By so finding, the learned Judge effectively immunized the Nairobi County Form 36 from examination to test whether it was filled in a manner that complied with the law. I do not see the gap in the law that the learned Judge saw. There is none. Regulation 87 (3) provides that:

"The county returning officer shall upon receipt of the results from the Returning officers, as contemplated in under regulation (1).

(a) Tally and announce the results of the presidential elections, elections of the county governor, senator and county representative to the National Assembly; and

(b) Submit all the results received from the returning officers, together with the results tallied under these regulation to the Commission; and

(c) Issue the persons elected pursuant to the results announced under paragraph (a) with certificates indicating their election in Form 38 set out in the Schedule."

It is noteworthy that the tallying and announcing that the county returning officer is required to do is along the same lines as a returning officer is required to do for the results required to be tallied and announced at the constituency level by dint of Regulation 87(2). The duty of accuracy, simplicity, transparency and verifiability that applies to the one applies equally to the other. That is why Form 36 as crafted is exactly the same for the constituency as well as the county level. It is actually the same one form titled:

"DECLARATION OF ELECTION RESULT AT ……..CONSTITUENCY/COUNTY"

Had the learned Judge appreciated that the county Form 36 is required as a matter of law, to be filled with the same scrupulous care for accuracy and attention to detail, he would not have been so quick to dismiss the appellant?s complaints that there was no valid declaration of results for governor of Nairobi County.

Now, the MAGARA VS NYAMWEYA Case (Supra), which was cited before the learned Judge but of which he made no mention, whatsoever, addressed the myriad issues raised by these various failures was follows (per Omolo JA, with whom Tunoi JA concurred);

I should mention one more thing in respect of Section 83 of the Election Act, which in similar terms with Section 28 of the repealed National Assembly and Presidential Elections Act in force when MAGARA –VS- NYAMWEYA was decided. Reading a number of decisions of election courts, the impression created is that these provisions are over eager to overlook electoral failure. This emanates from the rather negative terms in which the provision is couched. It makes more sense to adopt positive interpretative approach in order to seize the full meaning of what is intended. In the oft cited English of Appeal decision of MORGAN & OTHERS –VS- SIMPSON & ANOTHER [1974] ALL ER 722, Lord Lenning Denning MR. proposed that nuanced and deliberate approach to similar provision and I think he was right;

"That section is expressed in the negative. It says when an election is not to be declared invalid.

The question of law is whether it should be transformed into the positive so as to show when an election is to be declared invalid"

Were we to take that positive, more sensible approach, our section 83 of the Elections Act could then read;

"An election shall be declared to be void by reason of non- compliance with the Constitution or any written law relating to that election if it appears that the election was not conducted in accordance written the principles laid down in the Constitution and in that written law or that the non- compliance did affect the result of the election."

I am persuaded, as was Lord Denning in dealing with their statute, that this is the more rational approach. Speaking for myself, it is an approach that eliminates cognitive dissonance and ensures consonance with the spirit and intent of probity and accountability that flows from the Constitution. A small detail often lost when MORGAN –VS- SIMPSON (Supra) is cited before courts is that Mr. Simpson?s challenged election was in fact declared invalid by that court. That is telling.

The other error of law about which the appellant complains relates to the burden of proof on election petitions in that the learned Judge allegedly failed to apply the principle of the shifting burden of proof enunciated by the Supreme Court in RAILA –VS- IEBC (Supra). The learned Judge is criticized for quoting but not applying that decision and for improperly invoking decision such as MBOVE –VS- ELIUFO [1967] EA 240; JOHO –VS- NYANGE [2008] KLR (EP) 500. I do not think that the learned Judge failed to apply the RAILA –VS- IEBC decision. It appears to me that he did bear in mind the principle pronounced therein which he quoted as follows;

"There is apparently, a common thread on the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause; the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made".

The more valid criticism of the learned Judge, it seems to me, lies in the fact that he cited without comment or qualification the MBOWE Case (Supra) on which there was the opinion that;

"Where a reasonable doubt exist (sic) then it is impossible to say that one is satisfied and with that view I quite respectfully agree and say that the standard of proof in this case must be such that one has no reasonable doubt that one or more of the grounds set out in S.99 have been established."

With tremendous respect, it has never been our law that election petitions need be proved to the standard, which we associate with criminal cases, of beyond reasonable doubt. The impression created and left in place that the learned Judge accepted that view means that he appears to have fallen into an error of law. Indeed, there is no indication from the judgment that the learned Judge directly addressed his mind to the aspect of the shifting burden. This is critical because absent such indication, the criticism may be made that the beyond reasonable doubt standard, itself inappropriate in consideration of the Petition as a whole, may well have been impermissibly applied at the initial stage of the incidence of proof where, to my mind, all a petitioner needs meet is a *prima facie* standard to trigger the shift. Given the absence of that clear distinction in the learned Judge?s judgment, I must conclude that the learned Judge did not properly direct his mind on the shifting burden propounded by the Supreme Court. This too, is a reversible error.

The final aspect I will address is the learned Judge?s rejection of the appellant?s application dated 10th May 2013 by which the appellant sought to introduce additional evidence through the affidavit of some seven new witnesses.

Bearing in mind that one of the appellant?s grievances before the High Court as captured in paragraph 21 of the Petition and which implicated the integrity of the election, was that the 4th Respondent

***"obtained highly** inflated, fictional and outright non-existent votes without proof of registered voters"*, it seems to me that there was a sound and compelling case for the admission of the additional evidence. Much as this is a matter that was in the discretion of the learned Judge, it seems that there was no rational basis for the rejection of the application. Had the learned judge properly considered the probable value and relevance of the evidence sought to be introduced, he would have been constrained to allow it. That he did not address his mind to this aspect amounted to a non-direction which was erroneous on point of law on which he was plainly wrong and therefore forming a basis for this Court?s interference with the learned Judges discretion (See MBOGO –VS- SHAH [1968] EA 93 and MWANGI –VS- KENYA AIRWAYS LTD. [2003]KLR 487).

I am persuaded that the proposed additional evidence of Felix Amway Luseka, James Kariuki Njoroge, James Ndungu Kinuthia, Sarah Otieno, Stephen Kagoiyo Mwangi, Samuel Ngomali Muema and Dorcas Wanjiri Chege about voter bribery, double voting ballot stuffing and other malpractices and misconduct at Donholm Primary School, Lucky Summer Open Ground and Mathere North Primary School polling stations and ballot stuffing instigated by Joseph Onyango and Jane Kagai who dished out money at Soweto Social Hall warranted investigation in the context of a judicial hearing. These people swore affidavits that were attached to the application for additional evidence. They each attached copies of their identification papers. One of them, Samuel Ngomali Muema swore his affidavit at Athi River GK. Prison where he was serving a 4 year jail term for possession of an extra ballot for the post of Governor in what he claimed was an elaborate scheme to rig the election in favour of the 4th appellant.

A locking out of such evidence on technical as opposed to merit grounds instead of delving into it to establish its veracity appears to me to be the very antithesis of that court?s raison **d?etre** as an election court.

The dismissal of the application of course meant that these witnesses could not be called to testify in the petition. The application had been filed in time for the status conference. It is asserted by the appellant that the learned Judge improperly and unfairly rejected this application yet he had, in a different election petition in which he presided to wit Petition NO. 9 of 2012. MARY MWANGI –VS- JOHN OGUTU permitted the additional evidence of the foresaid SAMUEL NGOMALI also sought to be introduced by the appellant. This is not the only instance of differential or prejudicial treatment at the hands of the learned Judge the appellant complained of. There were several others in Ground 7 of the Memorandum of Appeal, hence the allegation of bias.

In consideration of the importance of election petitions as proceedings that transcend the immediate interests of the parties before court, I take the view that courts should be slow to shut out evidence unless the same is sought too late in the day or is likely to be so prejudicial to the opposing party or disruptive of the just determination of the dispute as to be best locked out. I do not see that there was anything particularly objectionable or onerous about the admission of the additional evidence sought. It could have been admitted on such terms as the court considered just. I say this mindful that the true role of a court of law is the discovery of truth in the contending narratives of the parties before it. In this regard, I respectfully adopt the learned sentiment of the Supreme Court of India in MARIA MARGARIDA SEQUIERA FERNANDES –VS- ERASMO JACK DE SEQUIERA CIVIL APPEAL NOL. 2968 OF 2012;

"What people expect is that the court should discharge its obligation to find out where in fact the truth lies. Right from inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying the existence of the courts of justice".

I am of the firm persuasion that courts must avoid making decisions and adopting stances in the exercise of the judicial function that may raise a reasonable basis for a complaint that they have abdicated their primary duty of being truth-finders. Courts must not be seen to aid, condone or actively encourage the suppression of truth and, unfortunately, the learned Judge, inadvertently fed that impression by his ruling. Perception cannot be ignored considering the aphorism that justice must not only be done but be manifestly seen to be done". As stated by Viscount Hewart nearly a century ago in R- VS- SUSSEX JUSTICES EXPARTE MC CARTHY [1924] 1KB 25 6.

4.0 CAPPING OF COSTS

The capping of costs forms the basis of the 4th and 5th Respondents? cross-appeal. It is the 4th and 5th Respondents? submission that Rule 36 of the Elections Petitioner Rules, 2013 by providing for the capping of costs, takes away and unduly fetter the taxing masters? discretion. They argue further that considering the complexity, urgency and industry involved in handling the Petition at the High Court, compounded by the appellants? numerous applications, the KShs.2.5 million at which the learned Judge capped costs was manifestly too low.

Whereas the 4th and 5th Appellants? complaints in this respect command my sympathy, for I doubt neither counsel?s industry nor the enormity of the task, I am also aware that run away costs awarded against Petitioners can have a huge dampening effect on the exploration and investigation of truth by mistaken of the fear of ruinous costs. I am therefore unable to agree that there is anything doctrinally wrong with the proviso in the Petition Rules for the capping of costs.

The view I would take for the meeting of the 4th and 5th Appellants concerns is that only once they prepare their bill of costs and the same gets taxed in a manner that is violative of their rights can their complaint be ripe for adjudication. As things now stand, without such bill having been prepared and taxed, I would hold that the argument is pre-mature and essentially speculative and would therefore dismiss the cross-appeal.

5.0 DISPOSITION

In view of the views I have expressed herein, I find and hold that the appellant?s appeal is meritorious and is upheld. The orders that commend themselves to me are therefore as follows:-

a) The Judgment and decree of the High Court given on 10th September 2013 is set aside in entirety.

b) It is declared that EVANS ODHIAMBO KIDERO the 4th Respondent herein and JONATHAN MWEKE the 5th |Respondent herein were NOT validly elected on 4th March 2013 as Nairobi County Governor and Deputy Governor respectively in the General election held on 4th March 2013.

c) The 1st, 2nd, 3rd, 4th and 5th Respondents shall pay the Appellants costs of this appeal and of High Court Petition No. 1 of 2013.

d) The 4th and 5th Respondents cross-Petition is dismissed with costs to the Appellant

e) A certificate of the determination under (b) shall issue forthwith, pursuant to Section 86(1) of the elections Act.

As my learned brother, **G.B.M KARIUKI** JA, agrees, it is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MAY 2014

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR