IN THE COURT OF APPEAL AT NAIROBI

(CORAM: KARANJA, MWERA & M'INOTI, JJ.A)

CIVIL APPEAL (APPLICATION) NO 309 OF 2013

BETWEEN

DIANA KETHI KILONZO.……..…….……..……. APPLICANT AND

THE INDEPENDENT ELECTORAL & BOUNDARIESCOMMISSION…….
…….....1STRESPONDENT

THE INDEPENDENT ELECTORAL

& BOUNDARIES COMMISSION

DISPUTES RESOLUTION COMMITEE..……2ND RESPONDENT

SALAD BORU GURACHA

MAKUENI COUNTY RETURNING OFFICER……..3RD RESPONDENT

(Application to admit additional evidence in an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mwongo, Ngugi and Korir, JJ.) dated 19thJuly,

2013 in

Constitutional Petition No. 359 of 2013)

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RULING OF THE COURT

The applicant, **Diana Kethi Kilonzo**, has moved the Court under Rule

29 of the Court of Appeal Rules to take additional evidence in her appeal challenging a decision of the High Court that found her ineligible to contest the **Makueni Senatorial Seat** in a by-election held on 26th July 2013. She asserts that the additional evidence is necessary for the just and proper determination of her appeal. The respondents, the **Independent Electoral**

and Boundaries Commission (the IEBC), the **Independent Electoral and Boundaries Commission Dispute Resolution Committee (the Committee)** and **Salad Boru Guracha (the Returning Officer)** vigorously oppose the application as misconceived and without merit. They contend, among others things, that the discretion of the Court under Rule 29 cannot be invoked in this case, firstly because the applicant's appeal arises from the supervisory rather than the original jurisdiction of the High Court, and secondly because the applicant was aware all along of the

existence of the evidence that she now seeks to adduce in this Court.

The background to the application is fairly straightforward. Following the death of the duly elected Senator for **Makueni County**, the **Hon Mutula Kilonzo** on 27th April, 2013, the applicant was nominated by the **Wiper Democratic Movement-Kenya (Wiper Party)** to contest the ensuing by-election, which the IEBC had scheduled to be held on 22 nd July,

2013. On 27th June, 2013, the applicant presented herself to the Returning Officer, Makueni County, as the duly nominated Wiper Party candidate, upon which a nomination certificate was issued to her, effectively clearing her to contest the by election.

Soon thereafter matters took a rather dramatic turn when two complaints were registered with the IEBC challenging her nomination. The gist of the complaints was that the applicant was not a registered voter as required by **Article 99(1)(a)** of the **Constitution** and **section 24(1)(a)** of the **Elections Act, 2011** and was therefore not qualified to be nominated as a candidate in the by-election. The complaints were heard by the Committee

which took evidence from among others, two of the complainants, the applicant, the returning officer and the IEBC's **Director of Voter Registration and Electoral Operations**. Those witnesses were subjected to cross-examination and in addition the Committee called for and perused the principal register as well as the 'green books' that contained the original entries of all registered voters in **Langata Constituency**, where the applicant alleged to have registered. On 8th July 2013, the Committee held that the applicant's name was not in the register of voters in Langata Constituency; that her voter registration acknowledgement **Slip No.**

0002058624 bearing **Elector No. 0007331112141125-6** was suspect;

that the applicant was not consistent regarding the station in which she had registered as a voter and that she could not have registered as a voter, as she alleged, using an expired passport and a photocopy of her national identity card. Ultimately the Committee concluded that the applicant was not a registered voter and revoked the nomination certificate issued to her by the retuning officer. The Committee also ordered that investigations be launched to establish how the applicant had obtained her purported acknowledgement slip from a booklet that had been used exclusively to register the immediate former president, and which was not among the booklets distributed to voter registration centers.

Aggrieved that her nascent political ambitions had been so abruptly nipped in the bud, the applicant and Wiper Party lodged **Petition No. 359 of 2013** in the High Court challenging the decision of the Committee. On her part, the applicant sought declarations that the proceedings before the

Committee were unconstitutional; that her rights and freedoms had been violated by the Committee; that the Committee had acted ultra vires; that she was indeed a duly registered voter; and that she had been validly nominated as a candidate. Additionally the applicant sought an order of certiorari to quash the decision of the Committee and an order of mandamus to compel the IEBC to include her name in the **Register of Voters** and to restore her as a candidate in the Makueni senatorial by-election. Wiper Party, on the other hand, sought an order that it was entitled to nominate another candidate in lieu of the applicant, should her disqualification be upheld.

The petition was heard by a three Judge bench empanelled by the Chief Justice, comprising **Mwongo, Ngugi** and **Korir, JJ.** The learned judges**,** as far as the applicant is concerned, framed four issues that were raised for determination in the petition, as follows:

i) **Whether the High Court had jurisdiction to hear and determine the petition, and if so the extent of the jurisdiction;**

ii) **Whether the Committee had jurisdiction to hear and determine the complaints**

leading to the petition;

iii) **Whether the respondents had violated the applicant's constitutional rights; and**

iv) **Whether the respondents had violated the applicant's legitimate expectation.**

On 19th July 2013 the High Court found in favour of the respondents and dismissed the applicant's petition. It however allowed Wiper Party an opportunity to nominate another candidate in lieu of the applicant. Against

that decision, the applicant filed **Civil Appeal 309 of 2013**, which is pending for hearing before this Court. She followed it up with the present application for the taking of additional evidence.

The main grounds upon which the application is based are that the evidence is necessary for the just and proper determination of the appeal; that the evidence was in the possession of the IEBC but was not timeously availed to the applicant; that the evidence was relied upon at the hearing before the Committee but it was not available to the applicant; that the applicant was ambushed with that evidence; that due to limited time, the applicant was not able to seek the evidence earlier; and that the applicant had only managed to obtain some of the evidence pursuant to a court order.

The additional evidence sought to be admitted is "all the reports of the

respondent (sic) referred to and produced by its witnesses in the proceedings before the Nominations Dispute Resolution Committee: Makueni Senatorial By-Election during the hearing of Complaint No 1 and 3 (consolidated) of 2013 against Diana Kethi Kilonzo", all and any reports touching on the matter of Kethi Kilonzo in the custody of the respondent (sic), a certified copy of the voter registration booklet of acknowledgement slips produced by the IEBC before the Committee; a certified copy of the inventory and serial numbers of all the acknowledgement slips made by or on behalf of the Respondent; and a certified copy of the distribution list of all acknowledgement slip booklets.

The respondents resisted the application on the basis of grounds of opposition filed on 7th April, 2014 and a replying affidavit sworn on 3rd April,

2014, by **Moses Kipkogei**, the IEBC Legal Officer. The gist of the response was that the additional evidence was not relied upon before the High Court; that the evidence would have been available to the applicant after the exercise of due diligence; that the applicant had not applied for the additional evidence during the High Court hearing; that the application for that evidence was made only after the judgment of the High Court; that the additional evidence is not relevant to the fair and just determination of the appeal; that the application does not lie because the pending appeal is against a judgment of the High Court in the exercise of its supervisory rather than its original jurisdiction; and that the applicant has made a similar application before the High Court.

With the consent of all counsel, the application was heard by way of written submissions.

On behalf of the applicant, **Ms Soweto**, learned counsel, submitted

that the additional evidence was in the possession of IEBC and despite the applicant's best efforts, including seeking a court order to compel production, IEBC had declined or stalled in availing the evidence. It was counsel's argument that although that evidence was produced before the Committee, the applicant had not had time to peruse it and had thus been ambushed. Learned counsel further contended that due to limitation of time, the applicant's petition before the High Court was heard and determined without the additional evidence, which she considered critical to her case. It was only after the petition was determined, counsel submitted, that the

applicant obtained the evidence which she now seeks to be admitted in this

Court.

Ms Soweto relied upon the ruling of this Court in **ESTHER NJOGU & ANOTHER V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION, Civil Appeal No 238 of 2013** on the principles that guide the Court in determination of applications for leave to adduce additional evidence and submitted that the application before us satisfied those principles. The fact of filing of suit to compel IEBC to avail the evidence was cited as evidence of reasonable diligence on the part of the applicant, while on relevance of the evidence, it was submitted that the additional evidence would show that the applicant was denied a fair hearing and administrative action that was lawful, reasonable and procedurally fair. Counsel further contended that evidence which had come to light after the decisions of the Committee and the High Court showed that there were three "green books" instead of one and several discrepancies in the number of registered voters in the polling station where the applicant alleges to have registered as a voter. Relying on the decision of this Court in **THE ADMINISTRATOR, H H THE AGHA KHAN PLATINUM JUBILEE HOSPITAL VS MUNYAMBU (1985) KLR 127**, learned counsel urged us to admit the additional evidence because some assumption basic to both sides had been falsified by subsequent events, and that refusing the application would affront commonsense or a sense of justice.

Counsel concluded by submitting that to be admitted, the additional evidence need not be decisive; it only needs to be shown that it would probably have an important influence in the case.

For the 2nd respondent, **Ms Omuko** submitted that the application was incompetent because the High Court was sitting in its supervisory rather than original jurisdiction. In learned counsel's view, an application under Rule 29 lies only in an appeal from a decision of the High Court exercising its original jurisdiction. Counsel urged that under Article 165 of the Constitution, the High Court has original, appellate and supervisory jurisdiction and that under Rule 29, adduction of additional evidence is allowed only in an appeal arising from the exercise of the original jurisdiction of the High Court.

Counsel relied on the ruling of this Court in **PENINAH NANDAKO KILISWA VS IEBC & 2 OTHERS, CA No 201 of 2013** in which this Court declined to entertain an application under Rule 29 in respect of an appeal arising from the exercise of the review jurisdiction of the High Court.

The application was opposed on the further ground that the decision of the High Court, the subject of the appeal, had been arrived at without the evidence in issue and by seeking to introduce that evidence before this Court, the applicant was merely seeking to reconstruct her case or to have the same heard afresh. Learned counsel relied on the decisions in **PENINAH NANDAKO KILISWA VS IEBC & 2 Others (supra)**, **ELIZABETH CHEPKOECH SALAT VS JOSEPHINE CHESANG SALAT, CA (APP) No 211 of 2014**, **KARMALI TARMOHAMED & ANOTHER VS I H LAKHANI & CO LTD (1958) EA 367**and **CENEST AIRLINES LTD VS KENYA SHELL LTD**

(1999) eKLR for the principles that guide the court in applications for additional evidence and to make the point that an appellate court will admit additional evidence only in exceptional circumstances.

Ms Omuko further contended that the applicant had not shown due diligence in seeking the evidence because she had not sought the same during the High Court hearing, and that she had filed **Misc Application No.**

400 of 2013, to ask for the evidence from IEBC only on 5th August, 2013,

which was after the Court had delivered its judgment.

On the relevance of the additional evidence, learned counsel submitted that the same was not relevant for the determination of the appeal because the applicant was seeking to adduce evidence on reports and acknowledgement slips from all the 290 constituencies in the Republic whilst the issue in the appeal related to Langata Constituency only.

The last two submissions by learned counsel were that the documents that the applicant wanted the IEBC compelled by this Court to produce were not in its possession, but were instead in the custody of the courts handling the election petition against the Governor, Nairobi County, which was pending before the Supreme Court and that the applicant was abusing the process of the Court because she had filed another application in the High Court seeking the same documents, which application had been heard and determined.

Mr Mwangi and Mr **Somane,** respectively for the 1st and 3rd

respondents filed joint written submissions in which they adopted in entirety the submissions made on behalf of the 2nd respondent.

We have considered the motion, the affidavits in support and opposition, the grounds of objection, the ruling and proceedings of the Committee, the judgment and proceedings of the High Court, the illuminating submissions of learned counsel, the authorities cited to us and the law.

The principles that guide this Court in determining applications for additional evidence under Rule 29 are fairly clear, having been discussed in a long line of cases in this jurisdiction. In 1958, the predecessor of this Court in **K. TARMOHAMED & ANOTHER VS LAKHANI & CO (1958) EA 567**, adopted the judgment of Lord Denning in **Ladd vs Marshall (1954) 1**

WLR, 1489, and stated that except in cases where the application for

additional evidence is based on fraud or surprise:

> **"To justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."**

Since then these principles have been repeated and applied in such cases as **WANJE & OTHERS VS SAIKWA & OTHERS (1984) KLR 275;**

THE ADMINISTRATOR, H H THE AGHA KHAN PLATINUM JUBILEE

HOSPITAL VS MUNYAMBU (supra); EDGAR OGECHI & 12 OTHERS VS

UNIVERSITY OF EASTERN AFRICA, BARATON (CA No 130 of 1997); CENEAST AIRLINES LTD VS KENYA SHELL LTD (CA No. 174 of 1999); JOGINDER AUTO SERVICES LTD VS MOHAMMED SHAFFIQUE & ANOTHER (CA No Nai 210 of 2000); KUWINDA RURINJA CO LTD VS

KUWINDA HOLDINGS LTD & OTHER (CA No 8 of 2003); JUDITH

DEBORAH CAVE SHAW VS FRANCIS ROBER SHAW (CA No Nai 361 of

2005; JOHN WAGURA IKIKI & 3 OTHERS VS LEE GACHUIGA MUTHOGA

(CA No 196 of 2009 (Nyeri); PENINAH NANDAKO KILISWA VS IEBC &

2 OTHERS (supra); ELIZABETH CHEPKOECH SALAT V JOSEPHINE

CHESANG CHEPKWONY SALAT (supra); and as late as this July in

NATIONAL CEREALS & PRODUCE BOARD VS ERAD SUPPLIES &

GENERAL CONTRACTS LTD (CA No 9 of 2012).

In **THE ADMINISTRATOR, H H THE AGHA KHAN PLATINUM**

JUBILEE HOSPITAL VS MUNYAMBU (supra), this Court emphasized that the principal rule in admission of additional evidence is that there must be exceptional circumstances to constitute sufficient reason for receiving fresh

evidence at the appellate stage. And in **WANJE & OTHERS VS SAIKWA &**

OTHERS (supra) this Court considered at length the rationale behind the obvious restriction of reception of additional evidence in rule 29, in an appellate court. **Chesoni, JA**., as he then was, observed as follows, at page

280:

> **"This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case**
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> **or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."**

For his part, **Hancox, JA**., as he then was, stated that the requirement of reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.

Justice Opio of the Court of Appeal of Uganda, in **GENERAL PARTS**

(U) LTD VS KUNNAL PRADIT KARIACA No 266 OF 2013, saw the restriction in the equivalent of rule 29 as one calling for a delicate balance. In his words:

> **"The need to adduce additional evidence has been a long time common law practice. The courts of law have long championed the doctrine that "interest republicease ut sit finis litium" – it is the interest of the State that there be an end to litigation. The background of the above doctrine is that courts should not be mired by endless litigation which would occur if litigants were allowed to adduce fresh evidence at any time during and after trial without any restrictions. On the other hand, courts must administer justice and in exceptional circumstances, new evidence should be allowed. The appellate court should weigh these two interests when determining whether a party can adduce additional evidence not present at the original trial."**

We are alive to the fact that in exercising the discretion donated by rule 29 and in considering whether the conditions for reception of additional evidence have been satisfied, each case must be considered on its own merit. Thus in **WANJE & OTHERS VS SAIKWA & OTHERS (supra),** the application was declined among other reasons, because most of the evidence sought to be admitted on appeal was not new, having been used

before the trial court and because, as the Court put it, the applicants were

merely trying to have a second bite at the cherry. Similarly in **ELIZABETH**

CHEPKOECH SALAT V JOSEPHINE CHESANG CHEPKWONY SALAT

(supra), the application was dismissed because the evidence sought to be admitted was in the possession of the applicant at the time of the hearing

before the High Court. On the other hand, in **JOGINDER AUTO SERVICES**

LTD VS MOHAMMED SHAFFIQUE & ANOTHER (supra), the application was allowed due to deliberate suppression of evidence by the respondent,

and in **KUWINDA RURINJA CO LTD VS KUWINDA HOLDINGS LTD &**

OTHER (supra), additional evidence was admitted to prove death of some

of the parties after the date of judgment in question. In the **GENERAL**

PARTS (U) LTD VS KUNNAL PRADIT KARIA (supra), and in **NATIONAL**

CEREALS & PRODUCE BOARD VS ERAD SUPPLIES & GENERAL

CONTRACTS LTD (supra) the application was declined because the additional evidence sought to be adduced was found to be unnecessary for the determination of the appeal.

In the application before us, the respondents contend that under the terms of rule 29, the same is incompetent and misconceived because the **Civil Appeal 309 of 2013** is not an appeal from a decision of the High Court acting in the exercise of its original jurisdiction. There is no doubt in our minds that, subject to satisfying the conditions we have outlined above, rule

29 allows for adduction of additional evidence only in appeals from the exercise of the original jurisdiction of the High Court. This was also the

conclusion of this Court in **PENINAH NANDAKO KILISWA VS IEBC & 2**

OTHERS (supra), NATIONAL CEREALS & PRODUCE BOARD VS ERAD

SUPPLIES & GENERAL CONTRACTS LTD (supra) and, albeit in a criminal law context, in **ROBERT MWANGI NJOROGE VS REPUBLIC (Crim. App No**

111 of 2006).

The respondents contend that the jurisdiction of the High Court from which **Civil Appeal 309 of 2013** arises is its supervisory rather than original jurisdiction. This view appears to be based on the following passages from the judgment of the High Court:

> **"71. In exercising its supervisory jurisdiction over the respondents, the Court must ensure that the respondents have complied with the spirit and letter of the law. In our view, where the respondents fail to do that which is demanded of them by the Constitution, this Court will step in, at the request of an aggrieved party, to provide appropriate relief as required by Article 23(3).**
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> **72. On reading the pleadings in this matter we have come to the conclusion that we have two disparate petitions before us. On one hand, Ms Kilonzo challenges the constitutionality of the decision of the respondents. She appeared before the Committee and her case was heard and determined. In our view, her case calls for the exercise of our jurisdiction as specified by Article 165**
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> **Clauses (3)(d)(ii) and (6). Doing anything more would amount to granting her another opportunity to present her case afresh. We would be stepping into the shoes given to the IEBC by the Constitution."**

Since we apprehend that this may be a substantive issue in the appeal where jurisdictional issues are raised, we shall refrain from expressing any views lest we prejudice the appeal. We shall accordingly determine this application on the basis of the other considerations.

From the material before us, there is no doubt that most of the evidence, at least the most important evidence, that the applicant seeks to be admitted at the hearing of the appeal is evidence that was in fact before

the Committee and was duly considered in arriving at the decision of the Committee. Thus for example, the IEBC Director of Voter Registration and Electoral Operations produced before the Committee, and was cross examined on several documents that the applicant seeks to be admitted as new evidence. These include the registration booklet from which the applicant's acknowledgement slip had come **(Defence Exhibit 1);** the Gazette notices showing official polling stations which did not contain the "Karen Polling Station" where the applicant purported to have registered **(Defence Exhibit 2);** the file in respect of the loss of the applicant's acknowledgement slip **(Defence Exhibit 3);** and the Distribution Register of acknowledgement slips **(Defence Exhibit 4)**.

The three green books relating to Langata Constituency, where the applicant maintains she registered as a voter, were produced by **Teresia Wanjiru Mwai, (DW4)** who was also subjected to cross-examination like all the other witnesses. As far as the green books are concerned, it was the evidence before the Committee that DW4 had in her possession one of the green books whilst the other two were by erroneously sealed in a ballot box for Langata Constituency. Pursuant to a court order, the Committee was allowed to open the ballot box and access the green books therein for purposes of verifying whether the name of the applicant was in any of them. Three green books **Serial Nos. 25516, 07612** and **26282** were perused by the Committee in the presence of the parties and their counsel. Indeed, the record shows that DW4 was cross examined on the three green books not

only by the applicant's lawyers, but also, and rather unusually by the applicant herself.

In these circumstances, the applicant's submission that evidence had come to light after the decisions of the Committee and the High Court showing that there were three "green books" instead of one is to say the least curious because the three green books were before the Committee and the applicant cross-examined on those three green books.

As framed, the applicant's prayers also confirm either by inadvertence or otherwise, that the materials sought to be introduced at the hearing of the appeal were indeed before the Committee. In her application the applicant expressly states that she seeks to produce reports **"referred to and produced by…witnesses in the proceedings before the Nominations Dispute Resolution Committee."**

Further confirmation that this evidence was before the Committee comes from the letters from the applicant's advocates attached to her affidavit sworn on 17th February, 2014 in support of the Motion before us. In those letters, written after the judgment of the Committee, the applicant informs the 1st respondent that she seeks **"all the reports of IEBC referred to and produced by the witnesses before the Committee"**.

Regarding the question whether the evidence could have been produced with due diligence, it is noteworthy that the applicant did not seek production of any other evidence that she considered necessary and in the possession of the Committee during the proceedings before it. She also did not seek any during the proceedings before the High Court.

It is true that the applicant filed a suit, **HCCC No. 400 of 2013**, to access some evidence, but that suit was being filed on 5th August, 2013, several weeks after the decision of the Committee and the judgment of the High Court. During the hearings before the Committee and the High Court, the applicant was aware of the existence of the evidence but did not ask for it then; she only sought it after the hearings "for the purposes of lodging an appeal." As we have noted, that evidence was in any event produced and considered by the Committee.

Lastly, and with due respect, the relevance of some of the evidence sought to be admitted at the hearing of the appeal is very questionable. Requesting admission of "all and any reports touching on the matter of Kethi Kilonzo in the custody of the respondent" sounds more of a request in discovery before a court that is hearing issues of fact, rather than a prayer for leave to present relevant and focused evidence contemplated by rule 29 in an appellate court. In addition and as the respondents legitimately query, the relevance of production at the hearing of the appeal, of evidence of acknowledgement slips issued in all constituencies throughout the Republic is not apparent to us.

The issues raised in the memorandum of appeal in **Civil Appeal No**

309 of 2013 are whether the Committee had jurisdiction to hear the complaint against the applicant; whether the hearing before the Committee was fair and in accordance with constitutional guarantees; the veracity of the green books; whether the burden of proof was wrongfully shifted to the applicant; whether an expired passport is a valid document for purposes of

voter registration; and whether the applicant's legitimate expectations were violated. In our view, to determine those issues does not require production of hordes of election materials from all constituencies in Kenya.

The argument has been made that Article 159 (2) (d) can be invoked in

this application to allow adduction of additional evidence. In **ROBERT**

MWANGI NJOROGE VS REPUBLIC (supra) a similar argument was addressed by the Court when it considered the relationship between article

159 of the Constitution and rules of procedure, although, in the context of a criminal appeal. The

Court expressed itself as follows, a view which we affirm in this application:

> **"Article 159 (2) of the Constitution sets out the principles that shall guide the Judiciary in the administration of justice. Among these is the principle that justice shall be administered without undue regard to procedural technicalities. From the outset, we have no doubt in our minds that Article 159 was never intended to do away with rules of procedure in the administration of justice. The use of the phrase "undue regard" in Article 159 does not suggest that no regard shall be paid at all to rules of procedure. What the Constitution seeks to stop, in our view, is overreliance on procedure, as an end in itself. In MOSES ODERO OWOUR & OTHERS V ANDRONICO OTIENO ANINDO, (CIVIL APPEAL (APPLICATION) NO 248 OF**
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> **2011 (KISUMU), this Court observed as follows regarding**
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> **Article 159 of the Constitution and rules of procedure:**
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> > **'In our view, the purpose of rules of procedure is nothing more than to facilitate the realization of the values and objectives of the judiciary as stipulated in the Constitution and the relevant legislation. The rules of procedure are not an end in themselves. However, their value and importance cannot be denied. It is through the rules of procedure to be observed by both the appellant and the respondent that equality and fairness between contending parties is guaranteed. It is through rules of procedure which prescribe the period within which a party should take specified action that expeditious disposal of disputes is assured; and undue delay eliminated or minimized. It is through rules of procedure that a party knows the precise case it has to meet or answer, without**
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> > **being ambushed or taken by surprise. If this be the true purpose of the rules of procedure, then Article 159 of the Constitution … cannot be read, as the appellant invites us to do, to negate sundry and all the rules of procedure. All that those provisions require is where it is possible to overlook a rule of procedure without prejudicing the opposite party or without undermining the values and objectives of the Constitution and the Act; such rule of procedure should not stand in the way of the Court.' "**

In the event, we do not find any merit in the Motion date 18 th February,

2014 and accordingly the same is hereby dismissed with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of October, 2014

W. KARANJA

JUDGE OF APPEAL

J. W. MWERA

JUDGE OF APPEAL

K. M'INOT

JUDGE OF APPEAL

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

DEPUTY REGISTRAR