IN THE COURT OF APPEAL

C. The proceedings in the High Court, Petition No. 71 of 2011 Paul Waweru Mwangi v The Interim Independent Electoral Commission, Masindet Joseph Leboo, The Returning Officer, Kamukunji Constituency in the High Court of Kenya at Nairobi be stayed.

D. Such further, other and consequential orders this Honourable Court deems fit and just."

3. A short background to the application is necessary before we consider those prayers:

On 25th February, 2011, the Speaker of the National Assembly published a special Gazette notice declaring a vacancy in Kamukunji Constituency, Nairobi, following the nullification of the election of the former Member of Parliament through a long, protracted and controversial election Petition.

*4. Pursuant to that publication, the Interim Independent Electoral Commission (IIEC) (1st applicant) proceeded under the relevant provisions of the **National Assembly and Presidential Elections Act** (NAPEA), Cap 7, and published Gazette Notice No. 2315 dated 3rd March, 2011 giving notice of a by-election to be held on 23rd May, 2011 and setting nomination dates for candidates as 27th and 28th April, 2011. Mr. Masinde Joseph Leboo, (Returning Officer) (2nd Applicant) was also Gazetted on the same day.*

*5. It is common ground that various political parties made their choices and eight candidates were nominated on the appointed dates and were gazetted on 6th May, 2011 in Gazette Notice No. 5123. However, Paul Waweru Mwangi (Mwangi) (the respondent) says he was one of the aspiring candidates but was unlawfully left out of the nominations. His case is that he was validly nominated by his party, the National Vision Party (NVP); that he collected his nomination papers from IIEC; that he completed and satisfied all the requirements; and that for reasons he was not given, IIEC did not allow him to return them, thus threatening his participation in the by-election. The IIEC therefore violated his political rights under Article 38 of the Constitution as well as other fundamental rights and freedoms under Articles 27, 28, 36, 47, 48 and 50 of the Constitution. He also contended that IIEC was enjoined by the Constitution in **Article 88(4)(e)** to settle disputes emanating from the nomination process but has neglected to do so.*

*6. On 11th May, 2011, Mwangi went before the High Court and filed a Petition under numerous Articles of the Constitution and the sixth schedule thereto, citing IIEC and the returning officer as the respondents and sought nine declarations and two orders of certiorari. The two orders of certiorari were sought to quash Gazette Notices 2315 and 5123 (cited above) for being null and void, while the declarations sought, inter alia, that the refusal, failure or neglect by the respondents to accept or clear him for nomination was in breach of his political rights under Article 38 of the Constitution; that the failure to settle the nomination dispute was a breach of **Article 88(4)(e)** of the Constitution; that the nominations made on 27th and 28th April, 2011 violated his rights to be a candidate in the by-election; and that IIEC was exercising its powers in breach of its duty to act fairly, independently, transparently, impartially, neutrally and accountably.*

7. With the filing of the Petition, Mwangi took out a Chamber Summons "Under Rules 20 and 21 of the Constitution of Kenya (Supervisory jurisdiction and protection of the individual) High Court Practice and Procedure Rules, and Article 22 of the Constitution" seeking four substantive orders, in summary:

1) To restrain IIEC from holding the by-election on 23rd May, 2011.

2) To stay the Gazette Notice No.5123 of 6th May, 2011 which declared 8 nominees for the by-election.

3) To issue a conservatory order for injunction to restrain IIEC from holding, directing, conducting or otherwise supervising the by-election.

4) To stay Gazette notice No. 2325 (sic) which gave notice of the nominations and the by-election.

All those orders were to issue pending the hearing of the Petition and were sought on the basis, inter alia, that IIEC had not only refused, failed or neglected to give an opportunity to Mwangi to present his nomination papers, but also had deprived him of the right to ventilate his grievances in breach of its duty to settle nomination disputes.

8. Only IIEC and the Returning Officer were served with the Petition and the interlocutory application and they responded thereto on 18th May, 2011. It was their case that the application was an abuse or misconception of the Bill of Rights under the Constitution which were not absolute and did not exist independently of other Laws of Kenya particularly ***NAPEA****, the* ***Political Parties Act (PPA)*** *and the old Constitution as reserved by the new Constitution; that the application was unduly delayed; and that there was no denial or violation of any rights because Mwangi never met the requirements for valid nomination as a candidate. He was not a member of NVP but a member of the Party of National Unity (PNU) up to the 27th April, 2011 when he purported to resign; and his proposer, seconder and supporters were not verified as members of NVP as required by the Political Parties Act. They also contended that collection of nomination forms was not clearance until the documents were scrutinized by the Returning Officer on nomination day.*

9. The matter fell before Musinga, J. for hearing inter partes under certificate of urgency on 18th May, 2011 when learned Counsel for Mwangi, Mr. Kibe Mungai, Mr. Adere for IIEC and Mr. Jabane for the returning officer, were heard. Written submissions were also filed by Mr. Mungai. Upon consideration of the application, the documents and authorities placed before him and the submissions of Counsel, the learned judge rejected Mwangi's assertion that Gazette Notices No. 2315 and 5123 were null and void, and instead declared that they were proper in law and were rightly issued. He also rejected the assertion that IIEC was under any obligation under ***Articles 88(4) (e)*** *of the Constitution to hear and settle any dispute relating to the nominations carried out on 27th and 28th April, 2011. The learned Judge further declined to consider, as invited by IIEC and the Returning Officer to do, that Mwangi was disqualified for nomination under NAPEA and PPA, or that those who were nominated for the by-election were interested parties in the application before him. Instead, the Judge zeroed in on the provisions of* ***Regulation 18(4)*** *of* ***NAPEA*** *which states as follows:-*

"Where a returning officer decides that a nomination paper is invalid he shall immediately record that decision and the reasons therefor on the paper and add his signature thereto and shall return the said invalid nomination paper to the candidate or its presenter."

10. He found, on the facts before him, that IIEC and the Returning Officer did not comply with that provision and that failure to do so was a serious omission which removed transparency in the nomination process and violated Mwangi's right to fair administrative action under ***Article 47*** *of the Constitution, apart from denying him the right to be a candidate in the Kamukunji by-election. He delivered himself thus:-*

"On my part, I would add that the court cannot trivialize breach of a mandatory requirement relating to the nomination process of candidates. Without transparent nomination of candidates there cannot be transparent elections. If the court were to sanction the conduct of the 2nd respondent, it would mean that a returning officer can be influenced by a party or other candidates to reject the nomination papers of a candidate for whatever fanciful reason he may have in his mind. That is a recipe for election chaos and can easily lead to violence as was witnessed in the recent past. Returning officers must be held to account for their actions in discharge of their lawful duties.

If the court, having found that the nomination exercise was seriously flawed, fails to grant an order of injunction to restrain the respondents from holding the by-election, it will be frustrating all the gains that have so far been made in our electoral process towards a free, fair and transparent elections based on universal suffrage and the free expression of the will of the electors to choose a candidate of their choice. The petitioner's right to be a candidate in the proposed by election will be lost for good.

11. He further weighed in on the primacy of the Constitution as against the rights of others, reasoning

as follows:-

"While the court appreciates that a lot of effort has been made by the respondents, various parties, candidates and the people of Kamukunji Constituency, toward the intended by-election, this court must discharge its constitutional mandate in terms of** Article 23(1) **and** (3) **of the** Constitution of Kenya, 2010 **to grant appropriate relief to the petitioner that is intended to promote the values of the rule of law, democracy, participation of the people, good governance, integrity, transparency and accountability as spelt out under** Article 10of ourConstitution**."

12. In the end, the following orders were granted and issued forth on 20th May, 2011.

"1. THAT an order of injunction be and is hereby granted restraining the respondents from holding, directing, conducting or otherwise supervising the parliamentary by-election for Kamukunji Constituency scheduled for 23rd May, 2011 until the petition is heard and determined.

2. THAT the Gazette Notices Nos. 2315 and 5123 are proper in law and were rightly issued by the 1st Respondent.

3. THAT the respondents shall bear the costs of this application."

13. The order of injunction sent shock waves to IIEC, the Candidates who had been nominated to contest the by-election, the Political Parties which had proposed them, and the electorate and people of Kamukunji Constituency who were waiting to vote and get a new member of Parliament, as it was issued on the eve of the by-election. The Ruling was made on Friday 20th May, 2011 while the by-election was due on Monday 23rd May, 2011 with a weekend in between. There was thus no opportunity for challenging the order and so, the by-election was not held.

14. On the same day IIEC and the Returning Officer filed a notice of appeal against the order of the High Court and on 27th May, 2011, they filed the motion now before us which was certified urgent. It would have been heard earlier than 12th July, 2011 when it was, if it was not adjourned twice for reasons on record. The applicants were subsequently joined by five other persons who were affected by the order as they were candidates in the by-election but were not parties before the High Court. They describe themselves as "interested parties" although in truth they are "respondents" exercising their right under ***rule 77*** *of the Rules of this Court. They included:-*

1. *David Mwaura Waihiga, represented by P.M. Nyagah Advocate.*

2. *Daniel Ondere Omao, represented by Mogikoyo A.O., Advocate.*

3. *Ibrahim Mohamed, represented by S.O. Owino, Advocate.*

4. *Muthoni Kihara, represented by C.N. Kihara, Advocate.*

5. *Yusuf Hassan, represented by Dr. Steven Njiru, Advocate.*

The applicants before us were represented by Mr. Pheroze Nowrojee and Mr. Steve Adere, while Mr. Kibe Mungai represented the respondent, Mwangi.

15. We must now revert to the motion before us and deal with the jurisdictional issue raised by Mr. Mungai, that this Court has no power to grant the orders sought. We must decide the issue, in limine, because jurisdiction is everything, and if we have none, we must down our tools.

The objections by Mr. Mungai were two pronged, and the first one as we understand it, is that in matters Constitutional, particularly, ***Articles 20(1), 21(1), 22*** *and* ***23****, only the High Court is vested with*

enforcement powers and this Court would have no business restraining it from executing that mandate. This Court would specifically be committing an illegality if it stopped the High Court from hearing the Petition before it, and all it can do is to wait until there is an appeal against the decision of the High Court in the petition itself. No authority was cited by Mr. Mungai for that profound submission, which Mr. Nowrojee dubbed "opinion of counsel" and submitted on his part that the laws which confer jurisdiction on this Court are still in effect, the new Constitution notwithstanding.

16. We have considered that objection and formed the following view of it: The jurisdiction of the Court of Appeal as provided in ***Section 164(3)*** *of the Constitution is not different from its jurisdiction under* ***Section 64(a)*** *of the former Constitution. It is a limited jurisdiction to "hear appeals from the High Court" and any other Courts which Parliament may prescribe. The manner in which those appeals may be heard is also governed by an Act of Parliament,* ***the Appellate Jurisdiction Act****, Cap 9 and the Rules thereunder. The extent of the jurisdiction and manner of exercise of it, has indeed been discussed in many decisions of this Court and we need only refer to* ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others*** *Civil Application No NAI.307/2003 (UR).*

It is obvious that this Court cannot purport to decide the issues raised in the main Petition even before the High Court has made a decision thereon. But a decision has been made by that Court in interlocutory proceedings within the Petition and one of the parties is aggrieved and has filed a notice of appeal. We have said, times without number, that it is the notice of appeal which, for purposes of ***rule 5(2)(b)*** *of the Courts Rule gives this Court jurisdiction to hear and determine an application under the Rule. An express provision of that Rule is to grant an order for:*
"..... a stay of any further proceedings."

The jurisdiction to grant that order is both original and discretionary. If on the merits of the application such order ought to be granted, this Court will do so "on such terms as the Court may think just". We shall consider that issue later in this ruling. For those reasons, we find no basis for upholding the first objection raised and reject it.

17. The second objection raised by Mr. Mungai was that the orders sought were unavailable under ***Rule 5(2)(b)****. That is because, the only other orders the Court may grant under the rule are "stay of execution" or "an injunction" but neither of these are sought by the applicants. In his submission, the real intention of seeking prayers [A] and [B] in the motion above is to set aside the injunction granted by the High Court even before the intended appeal is heard. It would be tantamount to granting an injunction on an injunction. At all events, he added, the order of the High Court has already taken effect and there was nothing to stay. Mr. Mungai drew our attention to various decisions of this Court in which it was held that* ***rule 5(2)(b)*** *does not give us jurisdiction to grant a stay of a prohibitory injunction, because the effect would be to nullify the injunction before the appeal against its grant had been heard. It was so held in* ***Delta Connection Ltd., vs. Delta Airlines Incorporated*** *[2000] eKLR and* ***Consolidated Bank of Kenya Ltd. & 2 Others vs. Usafi Ltd****. [2006] eKLR. In this argument, Mr. Mungai was supported by Mr. Kihara for one of the interested parties, who opined that the intended appeal should instead be expedited.*

18. In response thereto, Mr. Nowrojee submitted that the intention of seeking prayer [A] was not to obtain an injunction on an injunction but to unlock the by-election which was only suspended and not cancelled by the order of the High Court. Prayer [B] was in turn sought to stop the respondent from holding the applicants to contempt if they proceeded with the by-election. There was jurisdiction therefore to grant the two orders under ***Rule 5(2)(b)*** *and indeed the court has done so in the past. Those submissions found support from the remaining four interested Parties.*

19. We have anxiously considered the second objection and we think, with respect, that there is some merit in Mr. Mungai's submissions. It is true that this Court has in some decisions in the past issued orders under ***rule 5(2)(b)*** *to interfere with injunctory relief granted by the High Court pending the hearing of an appeal. It was indeed an argument advanced by Mr. Kiragu Kimani, Advocate who sought to stop an injunction granted in arbitration proceedings, in* ***Adopt -A- Light Ltd. vs. Magnate Ventures Ltd. & 3 Others*** *Civil Application No. 159 of 2009 (UR), but the Court stated as follows:-*

There is no denying that there are conflicting decisions of the Court on this point, but despite Mr. Kiragu Kimani's spirited submissions that we fall on the side that we have jurisdiction to grant the stay sought, we are afraid, we must disappoint Mr. Kiragu. If we were to accept Mr. Kiragu's arguments, we would merely be adding to the confusion already existing on the issue. As a bench of three Judges, it does not seem right to us that we should over-rule one line of authorities as being invalid and accept another line as being valid. There is no legal basis upon which a bench composed of three members of the Court can over-rule another bench composed of three other members. That is why we say we shall only be adding to the confusion already existing if we were to rule on the issue of jurisdiction one way or the other. That is why a practice has been developed by this Court that where it is felt that a particular decision or a line of decisions by the Court is not in accordance with the law and, therefore, ought to be over-ruled as not being good law, a bench of at least five Judges is constituted to do so. It is our hope that a situation similar to the one under discussion will soon arise and that a bench of at least five Judges will be constituted to finally pronounce on the matter.

*Decisions under **rule 5(2)(b)** are nonetheless discretionary and will depend on the facts and circumstances of each particular case. We have examined the main order of the High Court and we are persuaded that "an injunction" and not merely a conservatory order was issued by the High Court. It was prohibitory in nature and did, in fact operate to stop the by-election scheduled for 23rd May, 2011. The effect of granting prayers [A] and [B] as sought in the motion before us would therefore be tantamount to reversing the High Court when we are not sitting on the intended appeal. That was the basis of the authorities cited before us and we think we would be doing violence to our jurisdiction under **rule 5(2)(b)** if we proceeded as sought by the applicants in those two prayers. In exercise of its original jurisdiction, this Court would readily issue a stay against a mandatory injunction as it would issue a fresh one despite refusal by the High Court, but for reasons stated above, a prohibitory injunction falls under different considerations. We would uphold the objection and strike out the two prayers.*

*20. That, however, is not the end of the matter. There is prayer [C] which, as stated earlier, is capable of grant under **rule 5(2)(b)**. It will be granted if the applicants show not only that the intended appeal is arguable but also that the success of the intended appeal would be rendered nugatory if the proceedings in the High Court are not stayed. The applicants in their grounds, Affidavit in support and submissions of counsel, have laid out a long catalogue of issues that will be urged on appeal, and despite the spirited submission from Mr. Mungai that the intended appeal was not arguable, we hold the view that it is. We shall examine some of the grounds presently. What concerns us is whether the nugatory aspect under **rule 5(2)(b)** is proved, and we think, with respect, that it is not. We take the view, as this Court has done in several cases including **Silverstein vs. Chesoni** [2002] KLR 867 and **Kenya Commercial Bank Ltd. vs. Benjoh Amalgamated Ltd. & Another** [2000] LLR 3125, that even if the proceedings to be stayed went ahead and were determined, that would not render an appeal nugatory because if the appeal succeeded, the decision of the trial Court would be nullified and an appropriate order for costs in respect to the abortive hearing can be made. Being of that frame of mind, we would decline to grant prayer (C) in the motion.*

*21. Still, that is not the end of the matter! As stated in paragraph (2) above, the motion was not merely taken out under **rule 5(2)(b)** but was predicated on other provisions of the law. The prayers sought also included prayer [D] which is reproduced in the same paragraph. We must therefore examine the efficacy of those provisions of the law and whether they support the remaining prayer.*

*Sections 3A and 3B of the Appellate Jurisdiction Act came into force in **July, 2009** and their application and interpretation has since generated considerable learning. The common thread is that the "overriding objective" of civil litigation which those sections introduced, conferred on the Court considerable latitude in the interpretation of the law, the rules made thereunder, and in exercise of their discretion in order to achieve the objectives of just, expeditious, proportionate and affordable resolution of disputes. In one of the cases, **City Chemist (NBI) Ltd. & 2 Others vs. Oriental Commercial Bank Ltd.**, Civil Application No. 302 of 2008 (UR), the Court stated:-*

"It (the overriding objective) 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."

The caution has nevertheless always been sounded that those sections are not a panacea to all manner of ills and in every situation. It will 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. In the ***City Chemist*** *case, the Court further stated:-*

"That, however, is not to say that the new thinking totally uproots well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice. On the contrary, the amendment enriches those principles and emboldens the court to be guided by a broad sense of justice and fairness as it applies the principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

See also ***Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 3 Others****, Civil Appeal (Application) No. 152/09 (UR).*

The new Constitution, effective from August, 2010, is also cited in aid of the application. With its loud and bold pronouncements on matters of individual and community rights, fairness, expedition and non-reliance on technicalities, it strengthens rather than derogates from the overriding objective introduced by Parliament one year earlier.

We think therefore that those provisions are relevant for consideration in this application. The amorphous and unidentified "all other provisions of the law" citation is mere supplusage.

22. As stated at the opening paragraph of this Ruling, this matter has special peculiarities which set it apart from other run-of-the mill applications.

The appellate Court shall grapple with and decide with finality the weighty issues raised by the applicants and the interested parties, among them:- whether the Petition and the interlocutory application under it should have been brought under the new Constitution when the same Constitution reserves sections under the former Constitution which provided for the manner in which election nomination disputes ought to be decided, that is to say, through an election petition under ***NAPEA*** *after the elections are held; whether the delay in filing the Petition disentitled the respondent to any discretionary orders; whether the orders of the High Court were in breach of the rules of natural justice since the interested parties were not heard; whether the High Court had the jurisdiction to grant a final order in an interlocutory application; whether the injunction order is illegal and contrary to the Constitution; whether the applicants and the interested parties were subjected to unfair process; whether there was breach of the principles of electoral law; whether there was breach of proportionality in public law; whether there was breach of the principle of retrievability; whether the balance of convenience*

which is a feature of injunctory relief was considered; and whether the respondent who evidently had "unclean hands" was entitled to be given any written reasons for rejection of nomination papers.

*23. Other exceptional circumstances of the case are the apprehension that a precedent may be set for future elections, especially in **2012**, that they can be stopped on the eve of the election; the apprehension that the intended appeal may be delayed with the consequence that the people of Kamukunji Constituency will be irreversibly disenfranchised; the absence of an elected representative for Kamukunji to participate in Parliamentary debates on the reform process, the implementation of the new Constitution, the budget, County Government Systems, Revenue allocations, confirmation of nominations to public offices, and legislative bills; and finally the public interest reposed in the electorate and inhabitants of Kamukunji and the contesting Political Parties.*

*24. Mr. Mungai for the respondent poured cold water on many of those issues contending that they were of no consequence in view of the political rights of the respondent which are fully protected under the new Constitution and which are enforceable by the High Court. In his view, that Court simply obeyed the Constitution and the rule of law as the Court of Appeal stated in the case of **Dr. Christopher Murungaru vs. Kenya Anti-Corruption Commission & Another** Civil Application No. NAI. 43/06 (UR). There was therefore equality before the law and individual rights cannot be outweighed by public interests. As for apprehension about future elections, Mr. Mungai decried what he called the "jurisprudence of fear" as speculative and submitted that it was the duty of the High Court to stop bad elections even in **2012**, and not to shut its eyes.*

*25. We have anxiously considered the peculiar circumstances enumerated above, the rival submissions of the parties and the interested parties; and the applicable law. We appreciate fully the constitutional rights of the respondent which shall be ventilated fully before the High Court. We appreciate fully the constitutional rights of the applicants and the interested parties to pursue their remedy on appeal to this Court and their right to be heard expeditiously thereon. We must nevertheless appreciate too the right of the people and electorate of Kamukunji Constituency to participate in national debate through a lawfully elected representative, particularly at this crucial time when the implementation of the new Constitution process has taken centre stage. It is a right which the Constitution also protects. So too the rights of Political parties to nominate candidates and participate in an election. There must therefore be a delicate and proportionate balance to achieve a just result. There is no telling when the applicants and the respondent will finalise their battle in Court. We are persuaded, however, that an election would not be beyond recall by the Courts if the process of nomination or election was wanting in law and on this we borrow the reasoning of this Court in **Kones vs. Republic & Electoral Commission of Kenya ex parte Kimani Wanyoike** [2006] eKLR, thus:-*

"The jurisprudence underlying these decisions is that the Constitution itself and the National Assembly and Presidential Elections Act deal with and set out in detail the procedure of challenging elections and nominations to the National Assembly. Those procedures ought to be followed and the judicial review process, which in Kenya is provided for in the Law Reform Act, Chapter 26 of the Laws of Kenya and in Order 53 of the Civil Procedure Rules cannot oust the provisions of the Constitution in particular. The Law Reform Act and Order 53 of the Civil Procedure Rules are both inferior to and can only apply subject to the provisions of the Constitution. No doubt, mistakes even grievous mistakes, will be made in the process of elections or nominations but such mistakes cannot be used to stop the electoral or nomination process. In filing either their plaint or the judicial review process now under consideration, the clear intention of the parties aggrieved by the action of the Commission was to stop the Commission from proceeding with the process of nominating the Appellant. If the Commission can be stopped from completing the process of nomination, it can also be stopped from completing the process of elections. That cannot be allowed because if it were to be allowed, the country may well end up having no members in the National Assembly as there undoubtedly will be interventions by the courts in the process of either electing or nominating members to the National Assembly. Ojwang' J's orders are a clear example of such intervention, and inevitably such interventions might well become the order of the day if ordinary processes of approaching the courts – such as by way of a plaint, originating summons or judicial review – were to be allowed to take root in the electoral processes. It is to be remembered that neither the Constitution nor the National Assembly

and Presidential Elections Act, makes provisions for interim reliefs such as injunctions, orders of stay and so on during the hearing of an election petition. If an injunction were to be issuable against a sitting member of the National Assembly, the effect of that would be to render the constituency represented by such a member to be without a representative during the hearing of the petition, however long the hearing may last. Again if a plaint was filed seeking to stop the electoral process from going on and an interim injunction were to be issued pending the hearing and determination of the suit the people in the electoral area involved in the suit would be virtually disenfranchised pending the hearing and determination of the suit. In this particular case when an application for leave to apply for the orders was made, an order was also sought that the leave granted ought to act as a stay. Had the latter order been granted the process of nomination would have come to a grinding halt and probably upto this time, Ford People would still be without its nominated member. The framers of the Constitution must have had these considerations in mind when dealing with the issue of election petitions and come to the conclusion that it would be far much better to have even a defective election than no election at all and that after the members have all joined the National Assembly those whose elections are subsequently found to have been defective can be weeded out through election petitions and fresh elections held for the particular area(s). The same considerations must apply to nominated members. That the courts take such a long time to hear and determine election petitions is a serious blot upon the judicial system. But that blot must find its solution elsewhere and the solution does not lie in employing other methods except those provided for in the Constitution."

It is common ground that the Constitutional, legislative and procedural provisions on elections have been saved under ***section 3(2)*** *of the Sixth schedule of the new Constitution.*

26. In all the special and unusual circumstances reviewed above, the order that commends itself to us is to suspend the operation of the injunction issued by the High Court with the result that the IIEC is at liberty to conduct a by-election for Kamukunji Constituency in accordance with the law. We issue those orders under ***prayer [D]*** *of the application before us, and to that extent only would the application succeed. We must caution, however, that it is not in all cases that an omnibus prayer as couched in "prayer [D]" would attract independent orders. As stated earlier, this is a peculiar case. The costs of the application shall abide the result of the intended appeal.*

Dated and delivered at Nairobi this 29th day of July, 2011.

P.N. WAKI
.....
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
.....
JUDGE OF APPEAL

ALNASHIR VISRAM
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

RULING OF THE COURT