**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPEAL NO. 248 OF 2008**

**ESPOSITO FRANCO ..........................................................APPELLANT**

**AND**

**AMASON KINGI JEFFAH …......................................... 1ST RESPONDENT**

**AMINA KALE .............................................................. 2ND RESPONDENT**

**ELECTORAL COMMISSION OF KENYA .................. 3RD RESPONDENT**

***(An appeal against the ruling and order of the High Court of Kenya at Malindi (Ombija, J.) dated 24th April, 2008***

**in**

**ELECTION PETITION NO. 1 OF 2008)**

**************************

**JUDGMENT OF THE COURT**

1. Two civil appeals Nos. 248 of 2008 and 249 of 2008 were heard together on 8th October, 2010 but were not consolidated. They arose from interlocutory applications made in Election Petition No. 1 of 2008 filed in the superior court in Malindi by ***Esposito Franco*** (*Esposito*).

2. Esposito was one of 13 candidates who stood for election as Member of Parliament for Magarini Constituency in the general elections held on 27th December, 2007. He lost that election by 146 votes to ***Amason Kingi Jeffah*** (*Jeffah*) who was declared the elected member for that constituency.

3. For several reasons stated in his election Petition filed on 11th January, 2008, Esposito sought to have the election of Jeffah declared null and void, amongst other orders. His advocates appointed for purposes of the petition and who accepted that appointment were M/S. Kittony Maina Karanja Advocates of Nairobi.

4. Jeffah was named as the first respondent in the petition, while the returning officer, ***Amina Kale*** *(Amina)* and the ***Electoral Commission of Kenya*** *(ECK)* (now disbanded) were named as the 2nd and 3rd respondents respectively. Jeffah says he was not served with the petition but only saw a news item in the media on 28th January, 2008 (the last day of service) and rushed to appoint M/S. Charles Kioko, Munyithya & Co. Advocates who filed a notice of appointment under protest on 29th January,

2008. Amina and ECK appointed M/S. Madzayo Mrima & Co. Advocates after they were timeously served with the petition.

5. Upon entering appearance on 29th January, 2008 Jeffa's advocates perused the court record in the superior court at Malindi and also wrote to the Deputy Registrar there protesting non-service and enquiring whether Esposito had deposited the security required under the law. The Deputy Registrar responded on the same day confirming that there was no security deposited by the petitioner.

6. On 11th February, 2008, Esposito's advocates filed a notice of motion under certificate of urgency seeking an order for extension of time to enable the petitioner to pay security for costs into court. The motion was prompted by the rejection of a banker's cheque dated 7th February, 2008 for shs.250,000/= made payable to the "Senior Principal Magistrate" which was forwarded under cover of a letter backdated 5th February, 2008 and filed on 7th February, 2008 signed on behalf of Esposito by one ***Richard Kazungu Mwangandi***. In rejecting the cheque on 8th February, 2008 the Deputy Registrar wrote to Esposito, thus:

> *"Your unreferenced letter dated 5th February, 2008 and signed by a Richard Kazungu Mwangandi, statedly on your behalf, presenting a cheque for security for costs refers.*
>
> *I observe that you wrote that in person but the records held in court show that you appointed an advocate, M/S. Kittony Maina Karanja.*
>
> *I nevertheless draw your attention to section 21 of National Assembly & Presidential Elections Act (Cap 7 Laws of Kenya) which provides that such security should be deposited not more than three (3) days after presentation of the petition. You presented yours many days later.*
>
> *You may want to collect your cheque back.*
>
> *J. Kiarie*
>
> *DEPUTY REGISTRAR"*

7. On the same day that Esposito filed and served the notice of motion through his advocates on record, Jeffah filed his own motion through his advocates seeking to strike out the petition on two grounds: (1) that the same was not served within time (2) that the petitioner did not give security as by law provided. Three days later on 14th February, 2008, Amina and ECK also filed a notice of motion seeking to strike out the petition for the reason that the security deposit was not made at all.

8. On 13th February, 2008, the superior court (Ombija J) gave directions, amongst others, that the motion by Esposito would be heard first and it was set down for hearing on 21st February, 2008 when all counsel were heard but was adjourned to 28th February, 2008 for cross-examination of two court clerks. For reasons that will be discussed shortly, that cross-examination did not take place and an adjournment sought by Esposito's advocate was refused. The advocate further orally applied for disqualification of the Judge but that too was declined in a reasoned ruling. The advocate orally applied to cease acting in the matter but that found no favour with the Judge either, who ordered the filing of a formal application. There being no further evidence or submissions, the Judge set down the matter for ruling and on 24th April, 2008 he delivered a considered ruling dismissing the notice of motion. It is that dismissal which gave rise to C.A. No. 248 of 2008.

9. The two motions by Jeffah, Amina and ECK were then set down for hearing by consent of the parties on 22nd May, 2008. Come that day, however, Esposito's lawyer did not attend but asked another advocate to hold brief and state that Esposito had filed a constitutional reference No. 298/2008 (sic) in Nairobi (filed on 21st May, 2008 but not served) and therefore further proceedings in the Election Petition

should be stayed. In a considered ruling the learned Judge declined to grant an adjournment whereupon the advocate holding brief for Esposito's lawyer said he would take no further part in the proceedings as his instructions were limited to seeking an adjournment. The applicants presented their applications and made submissions which were subsequently considered in a ruling delivered on 10th July, 2008. By that ruling Esposito's petition was dismissed as against Jeffah for the twin reasons of non-service as required by law and failure to deposit security; and as against Amina and ECK for failure to deposit security. That is the ruling which gave rise to Civil Appeal No. 249 of 2008.

10. In view of the inter-relationship between the two appeals as chronicled above, it is only logical that we consider appeal No. 248/2008 first and if it succeeds, proceed to consider the other appeal. If it fails, it would matter not whether the refusal of adjournment or want of service which are the central issues in Appeal No. 249/08 were properly considered. For those issues to arise there must be a valid Election Petition on record first. We must therefore revert to the motion that gave rise to this appeal.

11. The motion was predicated on several provisions of the law: viz: ***section 23 (1) (d)*** of the National Assembly and Presidential Elections Act ("*the Act*" ), ***sections 3*** and ***3A*** of the Civil Procedure Act, and *"all other enabling provisions of the law"*. As would turn out in the end, the *"enabling provisions"* were not identified. Section 23 (1) (d) of the Act, as material, simply provides:

> "**In the exercise by an election court of its jurisdiction –**
>
> **(a) ...........**
>
> **(b) ...............**
>
> **(c) ...................**
>
> **(d) the election court shall decide all matters that come before it without undue regard to technicalities."**

And ***sections 3*** and ***3A*** of the Civil Procedure Act reserves special jurisdiction and the inherent powers of the court when no other provisions of the law are available.

12. The grounds upon which the application was made were that ***section 21*** of the Act required it; that it was not prejudicial to the respondents; that it was made expeditiously and in good faith; and that it was in the interests of justice. ***Section 21*** of the Act states:

> **"21. (1) Not more than three days after the presentation of a petition, the petitioner shall give security for the payment of all costs that may become payable by the petitioner.**
>
> **(2) The amount of security under this section shall be two hundred and fifty thousand shillings and shall be given by deposit of money.**
>
> **(3) If no security is given as required by this section, or if an objection is allowed and not removed, no further proceedings shall be had on petition, and the respondent may apply to the election court for an order directing the dismissal of the petition and for the payment of the respondent's costs; and the costs of hearing and deciding that application shall be paid as ordered by the election court, or if no order is made shall form part of the general costs of the petition."**

13. The affidavit in support of the application was sworn by an advocate known as ***Churchill Midwa*** (Midwa) who was practicing in the firm on record for Esposito. He deponed that on the 10th of January at about 2.30 p.m. he went to the High Court registry in Malindi with the intention of filing the petition and was accompanied by another advocate known as ***Samuel Maina Karanja*** from the same firm. What followed is best reproduced verbatim in relevant part:

*"4.THAT upon presenting the petition to the Executive Assistant one Gladys Kalama she informed me that she first had to seek guidance from the office of the Registrar of the High Court in Nairobi as to whether to accept the petition or not.*

*5. THAT the Executive Assistant further informed me that she was unable to assess the petition and would similarly seek guidance from the Office of the High Court Registrar in Nairobi as to assessment of the filing fees.*

*6. THAT on the same day the Higher Clerical Officer Mr. Douglas Randu requested me to leave the petition with him and return the next day for further direction.*

*7. THAT on 11th January, 2008 at about 9.30 in the forenoon, I and my colleagues Mr. Samuel Maina Karanja returned to the Registry for further audience with the Executive Assistant as directed by her.*

*8. THAT the Higher Clerical Officer informed me that he had been directed by the Office of the High Court Registrar at Nairobi to assess the filing fees for the petition at Kshs. 25,000.00.*

*9. THAT I promptly paid the filing fees and the petition was duly stamped with the Official High Court Stamp."*

14. As regards the security, Midwa swore as follows: -

*"10. THAT I enquired further from the Higher Clerical Officer on the mode of payment of security of costs of Kshs.250,000.00 having requested to pay the same whereupon he informed me, which information I verily believed to be true, that the matter shall await further directions from the Judge who at the time was not in the station and we said to be on leave.*

*11. THAT I had on me the sum of Kshs.250,000.00 in cash which I had obtained from your petitioner that morning and I was ready, willing and able to pay the said sum into court but was unable to do so for reasons stated herein above whereupon I returned the money to your petitioner.*

*12. THAT your petitioner is a man of means and has always been and is ready, able and willing to pay security for costs but has been denied the opportunity to do so for the reasons I have deponed to above."*

15. On the directions of the election court, the court officials mentioned in the supporting affidavit swore responding affidavits. Douglas Randu works as a clerk in the registry and received the two advocates who presented 9 bundles of mixed papers which he passed on to the executive assistant, his immediate senior, Gladys Kalama. Gladys took them to the Deputy Registrar Mr. Kiarie who was in his office at the station and she returned the documents to Randu after assessing the filing fees and instructed him to open a file. There was no truth that Gladys went to seek instructions from the Registrar of the High Court in Nairobi or that the court filing fees could not be assessed as there is always a guide in the registry. He further swore that he took the file to the cashier for payment but he was not in and on asking the two gentlemen to wait they said they would come the following day which they did and the petition was filed. The advocates then asked for a mention date for the petition before the Judge and Randu gave them 21st February, 2008. He continued:

*"14. THAT the two advocates did not mention to me about any security to be deposited neither did the cashier refuse their deposit at the cash office but after getting the mention date they said they would appear before the Judge on that day.*

*15. THAT I do not know whether the advocates for the petition had the security deposit or not at the time of filing the petition but there was no attempt whatsoever, sign or symbol of will for paying security deposit on the date of filing the petition by the advocates representing the petitioner herein and the registry did not at all deny the petitioner or his advocate from paying security for costs as*

*alleged in paragraph 12 of the supporting affidavit."*

16. Gladys Kalama supported Randu's account of events and emphasized that she informed both counsel that she was going to seek administrative directions from the Deputy Registrar, Mr. Joshua Kiarie, who was in the office and not the Registrar of the High Court in Nairobi. She then assessed the filing fees using the *"Guide to assessment of court fees"* Revised Edition 1995 by Karanja Kinyanjui, DR, High Court, and handed over the documents to Randu. She had no further contact with the two advocates and she deponed:

> *"9. THAT during all that transaction the counsel did not mention to registry officials that they had in hand kshs.250,000.00 which they wished to deposit as security as alleged in paragraph 10 of the said affidavit neither were they denied opportunity to do so."*

17. Other affidavits were filed by Jeffah and Kivuitu for ECK and Amina. Jeffah stated amongst other things that there was no deposit made for security within 3 days of filing the petition, that is to say on or before 14th January, 2008, and the first attempt was made on 7th February, 2008 by a stranger to the petition, one ***Richard Kazungu Mwangandi*** who tried to sneak in a banker's cheque for Shs.250,000/= on behalf of Esposito; that the Deputy Registrar confirmed that position in his letter dated 8th February, 2008 which provoked the filing of the motion for extension of time; and that in all probability the petitioner's advocates filed a petition and proceeded to take a date for directions for 21st February, 2008 oblivious of any requirement for security. Kivuitu for his part believed the two court clerks and the Deputy Registrar who resisted the late payment of the security by a person who had no *locus standi* and wondered why the petitioner's advocates never raised the issue with them before filing their motion after inordinate delay which was evidence of lack of *bona fides*.

18. In his responding affidavit filed with leave Midwa reiterated that he spoke to Gladys but did not know that she was seeking administrative directions from the Deputy Registrar in Malindi, he did not know who between Randu and Gladys assessed the filing fees, and he saw an old and outdated Guide to Assessment of Court Fees with the clerks and that is why they were seeking directives from higher authority on the correct assessment and acceptance of security. He continued to blame the court clerks as he swore:

> *"15. THAT in response to paragraph 12 of Mr. Randu's affidavit, he made me to understand that the registry could not accept the security costs without directions from the Judge and that is why he requested me to take a date for directions specifically on that issue of security for costs.*
>
> *16. THAT Mr. Randu proceeded to fill a hearing notice in his own writing indicated that the petition was coming up for directions on 21st February, 2008 and further indicating on the left upper part of the hearing notice the date for directions. Annexed herewith and marked "CM1" is a copy of the said notice.*
>
> *17. THAT it is my belief that Mr. Randu being lay in matters of law, his advise could have been subject to directions from someone competent and authorized to direct him as such.*
>
> *18. THAT if at all Mrs. Kalama sought guidance from the Deputy Registrar one Mr. Kiarie, then he too did not know how to handle the matter and was oblivious to the fact that once an Election Petition is filed it shall await gazettment by the Chief Justice as to the constitution of an election court and the date for directions to be set therein.*
>
> 19. *THAT I reaffirm and reiterate the contents of my supporting affidavit in addition to what is contained herein.*
>
> 20. *THAT cumulatively, the chain of events deponed to in my supporting affidavit and reinforced by this further affidavit point to the inability, lack of knowledge, confusion and inexperience on the part of the Malindi High Court Registry Officials to comprehend, deal, assess the petition and*

*accept payment of security of costs of the petition.*

*21. THAT knowing the procedure and requirements of presentation, filing and complying with all other requirements especially deposit of security for costs, I and the petitioner were rendered unable and powerless to comply with this requirement in the face of the circumstances the Registry Officials found themselves in."*

19. The submissions of counsel at the hearing of the motion were centered on the affidavit evidence on record but the respondents' counsel also raised issues of law as to whether ***section 23 (1) (d)*** of the Act which was relied on, and the provisions of the Civil Procedure Act were applicable in view of ***section 44*** of the Constitution which made an election court a special court with its own procedure; whether ***section 21*** of the Act admits any extension of time for deposit of security or the application was, misconceived and fatally defective; and whether there is any provision for exercise of discretionary power by the court when the issue of security was not a mere formality but a legal requirement. They also raised the question, which remained unanswered throughout, as to why, at anytime between 11th January and 8th February, 2008 (a period of 28 days), the advocate filing the petition made no effort to see the Deputy Registrar who was at the station and who signed and acknowledged the petition, and instead allowed a stranger who had no *locus standi* to sneak in the security payment. They surmised that the advocate was ignorant of the law applicable which ignorance could not avail him.

20. As stated earlier, the two court clerks were not cross-examined as intended because Esposito's advocates failed to serve the Attorney General with the hearing notice despite an order having been made by the court to that effect, reasoning that the two court clerks were civil servants who ought to be represented by the Attorney General. In any event, the Judge reasoned, ***Rule 36*** of the National Assembly Elections (Election Petition) Rules (*"the Rules"*) required that the Attorney General or a person appointed by him shall attend the trial of every election petition.

21. Upon considering the application, the affidavits on record and the submissions of counsel and the authorities cited before him, the learned Judge found as a fact that there was no security deposit offered and refused by the court registry at the time of filing the petition. He also found that the advocates of the appellant were not candid with the court. He stated in part:

**"There is no dispute that the petition was presented within the time prescribed by the law, and was received and acknowledged by the Deputy Registrar. What is in dispute is whether the court clerks, and by extension the Deputy Registrar, refused to accept the deposit for security for costs, so that time should be extended for that purpose. What is further in dispute (and fundamental) is whether the court has jurisdiction to extend time for deposit of security for costs.**

**From facts and evidence, discernible from the affidavit evidence and copies of pleadings on record, it is clear to me that the Deputy Registrar of the High Court was at the station at all material times. He received and acknowledged the petition. There were two counsel for the petitioner who presented the petition. The two advocates are deemed to have known the intent and purport of Section 21 of the Act and Rule 12 (1) of the rules. If the two clerks were not co-operative, nothing would have been easier than to take up the matter with the Deputy Registrar personally. I have had the advantage of reading the various affidavits filed herein. It would appear to me that the failure to deposit the security for costs, was either by reason of ignorance or misreading of the law.**

**Alternatively, the petitioner did not have the deposit at that point in time. This application appears to me to be an afterthought. In my view, had the Deputy Registrar not written the letter of 8th February, 2008 asking the petitioner to collect his cheque, the petitioner's advocates may not have made this application. But that is not all. There is a further omission which is not only relevant but compounds the problem – service of the petition. The said advocates also failed to serve the Attorney General with a copy of the petition notwithstanding the clear provisions of Rule 36 of the National Assembly [Election Petition]**

**Rules, 1993. In my view the total effect of the aforesaid omissions lends credence to the assertion that this application is not only made in bad faith but also an afterthought. The said advocates are not candid with the court, I find and so hold."**

22. On issues of law, the learned Judge held:

> **"The National Assembly and Presidential Elections Act [Cap 7] Laws of Kenya, inclusive of its support subsidiary legislation, is a comprehensive code of substantive and procedural election law. Hence the Civil Procedure Act [cap 21] Laws of Kenya, and the rules made thereunder, do not apply to the National Assembly and Presidential Elections Act [Cap 7] Laws of Kenya, except where expressly provided for in the Act or the rules made thereunder (see Rule 18 (1). Hence an application for extension of time, which is germane to the Civil Procedure Act and Rules, is inapplicable under the National Assembly and Presidential Elections (Cap 7) Laws of Kenya.**
>
> **Section 21 of the Act is worded in preemptory** (sic) **language. It does not admit of ambiguity or further search for the intention of Parliament. Failure to deposit the security within 3 days is not a mere irregularity. It goes to the root of the matter – jurisdiction. I find and hold that this Court lacks jurisdiction, under the National Assembly and Presidential Elections Act (Cap 7) Laws of Kenya, to extend time within which to deposit security for costs. All authorities cited before me and some known to me back this view."**

The application was dismissed thus provoking the appeal now before us.

23. Esposito's advocates on record filed the notice of appeal and gave their address for service. But they are not the ones who subsequently filed the memorandum and record of appeal or argued it before us and there was no notice of change of advocates. The Advocates who did all that are M/S. Miller & Co. Advocates. They are also the advocates who appeared before a single Judge of this Court and applied for extension of time to serve the notice of appeal and to file and serve a record of appeal for the reason that the previous advocates forgot to serve the notice of appeal and had not obtained copies of proceedings to facilitate the filing of the appeal. The learned single Judge (O'Kubasu, J.A) allowed the extension of time to serve the notice of appeal by 14 days and 21 days for filing and serving the record of appeal. It was also M/S. Miller & Co. who followed through that order and filed the appeal. We may also observe that Esposito fell out with his advocates' on record and sued them for negligence in HCCC 270 of 2009.

24. Objections have now been raised by both counsel for Jeffah and ECK at the hearing of the appeal by way of written and oral submissions, that the appeal was incompetent since there was no notice of change of advocates contrary to ***rule 23*** as read with ***rule 74*** of this Court's rules; that the notice of appeal was not served on Amina and ECK either within 14 days of the order extending time or at all; that the notice of appeal was defective as it is not specific on what is appealed against; that there was no security for costs made contrary to ***rule 81 (d)*** of this Court's rules; and that therefore no appeal exists in law and the record before us ought to be struck out.

25. We think in passing that those objections are raised in contravention of ***rule 101 (b)*** of the rules of this Court which prohibits the raising of objections as to the competence of the appeal without leave of the Court. As no leave was sought or granted, we shall not dwell on the objections which are irregularly raised and will deal with the substantive issues raised in the appeal.

26. Seven grounds of appeal were laid out in the memorandum of appeal but learned counsel Mr. Miller, who was assisted by Mr. Wena argued them in two tranches. The first tranche challenged the finding of fact that there was no deposit of Shs.250,000/= made or attempted to be made on 10th and 11th January, 2008. The second tranche challenged the denial of the opportunity to cross-examine the two court clerks, Gladys Kalama and Douglas Randu.

27. The submission of Mr. Miller on the first ground was that there was sufficient compliance with ***section 21 (1)*** of the Act when the required security of Shs.250,000/= was tendered at the time of filing

the petition and that it was the court officials who failed to deal with the issue. It was wrong therefore for the superior court to reject the explanation given on oath by the advocate seized of the matter, which was not dented by bare denials from the registry clerks. The explanation for the long wait until 11th February, 2008 was for the advocate to give time to the court clerks, who were ignorant of procedure to seek directions of the Resident Judge, and the delay should not therefore be blamed on the advocate or the appellant.

28. On the second ground, Mr. Miller faulted the superior court for denying the appellant an opportunity to cross-examine the court clerks on the pretext that the Attorney General was not served in accordance with ***rule 36*** of the Rules. He submitted that there was no requirement in law that the Attorney General be served with an election petition and that ***section 24*** of the Act which required the Attorney general be a party to election proceedings was repealed by **Act No. 10 of 1997**. That repeal thus rendered rule 36 inoperative. Furthermore ***section 23 (1) (d)*** of the Act enjoins the election court to determine matters without undue regard to technicalities and it was incumbent on the court to allow for cross-examination, for the appellant's advocate to show the ineptitude, inaction, and outright deception of the court clerks. In his view, evidence of the clerks was accepted without being tested.

As for the procedure adopted in seeking extension of time, Mr. Miller submitted that ***section 23 (1) (d)*** was properly invoked since there is no other procedure provided.

29. In response to those submissions, Mr. Weloba who led Mr. Munyithya in urging the appeal emphasized the provisions of ***section 20 (1***) and ***21 (3)*** of the Act which he submitted must be read together and which show clear finality. In both the period within which the petition must be served and the security deposited, the sections are mandatory and non-compliance with either, renders the petition a nullity. For this proposition he cited a persuasive authority **Ahmed v Kennedy [2003] 1 WLR 1830.**

30. He also submitted that the provisions of the Civil Procedure Act relating to extension of time were not applicable nor was ***section 23 (1) (d)*** of the Act which addresses technicalities. Non-payment of security deposit was not a technicality and therefore the section could not be invoked. In his view, matters of elections and election petitions were covered by special procedures which ought to be complied with, and for that view he cited this Court's decision in **Speaker of the National Assembly v James Njenga Karume Civil App. NAI. 92/92** which was applied by the full court in ***Kipkalya* Kones v Republic & Another Ex parte Kimani Wanyoike & others (2006) eKLR.**

31. On the facts, he supported the findings of the learned Judge and submitted that the consequence of non-payment was spelt out in section 21 of the Act. He referred to this Court's decision in **Rotich Samwel Kimutai v Ezekiel Lenyongopeta & 2 others C.A No. 273/03** where ***section 21*** as construed and submitted that the only consequence for non-payment of security deposit within 3 days was dismissal of the petition. There was admission by the advocate of failure to deposit the security and their conduct was inexplicable even assuming that they were misled by court clerks on the first two days. Nothing was said about the third day and the only conclusion, in his submission, was that the advocates were incompetent in handling the petition.

32. Finally Mr. Weloba submitted that there was no notice of appeal filed to challenge the ruling made on cross-examination of the court clerks and the grounds of appeal relating to that issue ought to be disregarded. At all events, he submitted, there was no denial of any request for cross-examination since an opportunity was given on terms which were not complied with by the appellant and he cannot take advantage of his own fault.

33. Mr. Kithii, who appeared for Amina and ECK was in agreement with the superior court and with Mr. Weloba in his submissions but added that ***section 21*** does not contemplate attempts to deposit security; that a constitutional reference **(JR Misc. Petition No. 392/2008)** was filed by Esposito to declare section 21 as unconstitutional for being arbitrary and discriminative, but was dismissed by two Judges of the superior court and there was no appeal; and that the petitioner's advocate could not seek advice from court clerks if he knew the law and had the money to deposit.

34. We have reviewed and analysed the facts and circumstances of this matter in some detail because the appellant expects no less from the first appellate court. Although this Court is entitled to arrive at its own conclusions in the matter, it would nevertheless not lightly interfere with the findings of fact made by the superior court unless such findings were based on no evidence at all or on a perversion of such evidence or unless on the whole it can be shown that the Judge acted on wrong principles.

35. We must first deal with the issues of law raised by both counsel for the respondents: firstly, whether there was provision under the Act for extension of time to comply with the default provisions of ***section 21***; secondly, whether the provisions of the law invoked to underpin the motion before the superior court were applicable;; and thirdly, whether the issue of cross-examination of the court clerks can be raised in this appeal.

36. On the first issue it is worthy of note that ***section 21*** is under ***Part VI*** of the Act which specifically governs election petitions and makes special provisions for the filing and conduct thereof. The section also comes hot on the heels of section 19 which provides that a petition *"...shall be heard and determined on priority basis"*, ***section 20*** which provides that it *"shall be presented and served within 28 days of publication"*, on security that *"...the petitioner shall give security"* (21(1)) *"No more than 3 days of filing the petition.."* (21/(1), *"...shall be Shs.250,000"*, 21(2), *"...if no security .......no further proceedings shall be had on the petition ....."* 21(3). The other sections under ***Part VI*** are couched in similar peremptory language. There is in addition a constitutional underpinning in ***section 44*** of the Constitution (now repealed) which created a special regime in the High Court for hearing and determination of election petitions. Parliament under ***section 44 (4)*** reserved for itself the power to make provisions with respect to:

> *"(a) the circumstances and manner in which the time within which and the conditions upon which an application may be made to the High Court for the determination of a question under this section; and*
>
> (b) *The powers, practice and procedure of the High Court in relation to the application."*

Hence the **National Assembly and Presidential Elections Act, Cap 7**, and the **Rules** thereunder.

We think the message is clear that Parliament intended to elevate the matter of representation of the people in the National Assembly to a special level where the democratic rights of the individual would not be unduly violated. By using peremptory language in **Part VI**, it eliminated vexatious litigants who cannot provide security and assured expedition of election petitions by setting deadlines. The consequence of non-compliance with the provisions must therefore be to invalidate the petition. Whether the public interest in the speedy determination of elections petitions warrants such a draconian regime is again a matter for Parliament to review.

37. This court has had occasion in the ***Kimutai case*** (supra) to consider the nature and manner of payment of security deposit under ***section 21*** when it stated:

> **"A deposit made upon the filing of an election petition towards security for costs in form of cash, banker's cheque or personal cheque is sufficient compliance with the provisions of the section, unless in the case of a personal cheque it be shown that the practice of the Court is not to accept personal cheques, in which case payment has to be made in cash or by banker's cheque. The section must also be read together with the Rules thereunder, and Rule 12 provides:**
>
> ***"12. (1) The deposit of money by way of security for payment of costs, charges and expenses payable by the petitioner shall be made by payment to the Registrar, and such deposit shall be vested in and drawn upon from time to time by the Chief Justice for the purpose for which security is required by these Rules.***
>
> ***(2) The Registrar shall give a receipt for any such deposit and shall file the duplicate of the***

***receipt, and shall keep a book, open to the inspection of all parties concerned, in which shall be entered from time to time the amount and petition to which it is applicable."***

38. The court also examined the consequence of non-payment and stated as follows:

> **"Was the delay in paying the deposit fatal to the petition? Mr. Majanja submits not, and relies again on the purposive construction of the statute. The purpose, in his view, was to ensure that the remedy provided by Parliament, that is, the deposit of money, was in place by the time the petition was heard. The mischief that the respondent may incur costs and expenses which cannot be recovered is thus suppressed. There was no prejudice caused by the delay, and the delay has no bearing on the remedy. On the other hand, Mr. Mukele was of the view that the time limit was a necessary precondition for exclusion of busy bodies from that vital and expensive process. That is why sub-section 3 has clear wording on the consequences for non-compliance.**
>
> **Once again we think the intention of parliament was clear in enacting the time limit in such peremptory language. *"Not more than three days ... shall give"* does not admit of ambiguity or further search for the intention of parliament. Whether or not parliament should have enacted a further provision for seeking extension of time in appropriate cases, would of course be academic for purposes of this appeal and in any event there was no attempt to apply for extension of time at all. *Section 21 (3)* provides for the consequences of non-compliance which is what in the end transpired in this case. Failure to deposit the money within time was not a mere irregularity which could be waived by the parties."**

39. Unlike the case before us, the ***Kimutai case*** was one where the petitioner conceded that there was no deposit offered or made. It is also evident from the decision that the issue as to whether extension of time was permissible was left undecided but it is the issue now before us. In our view, the tenor of the Constitution (now repealed), statutory provisions, and rules relating to petitions, coupled with the absence of any express provision for extension of time, are pointers to the intention of Parliament that time would not be extended. Another pointer to the intention to limit the discretion of the court was the deletion in 1979 (by **Act. No. 19/79**) of a useful provision in ***section 21 (4)*** which donated the power to the court to accommodate poor persons who were unable to raise the security deposit of Sh.5,000 at the time. The upshot is that the terms set for the filing of an election petition are conditions precedent, non-compliance of which attracts the irreversible consequence of nullifying the petition.

40. There is also considerable force, backed by authority, in the submissions of the respondents on the second issue of law, that the failure to comply with the provisions of ***section 21*** is not curable under ***section 23 (1) (d)*** of the Act which is invoked in this matter. ***Section 21*** enacts substantive legal requirements and non-compliance with those provisions is not a mere technicality. Nor are the provisions of the Civil Procedure Act and the rules thereunder available to address the situation. As this Court has stated before in the ***Karume*** and ***Kones*** cases (supra):

> **"........What we are saying is that there are special procedures when it comes to matters of election and those procedures ought to be strictly followed as the Court observed in <u>KARUME'S Case</u>. We would unhesitatingly prefer to base our decision on the <u>KARUME Case</u> rather than the <u>CHEBOIWO Case</u>. The case of <u>THE QUEEN VS. THE COUNTY JUDGE OF ESSEX AND CLARK</u> [1887] 18 QB. 704 which was cited to us in also similar effect.**
>
> **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 of 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.**

**..........................................................................**

**We have said enough, we think to show that the procedure of judicial review, like that of plaint or any such like procedure, is and was not available to the parties aggrieved by the acts or omissions of the Commission. We re-assert, as we previously did, that the only valid way of challenging the outcome of the electoral process, and for that purpose nominating members to the National Assembly is part of the electoral process, is through an election petition as provided in the Constitution and the National Assembly Presidential elections Act. Section 44 of the Constitution merely talks of an "application" being made to the High Court. But section 19 (1) of the Act specifically provides that the application to the High Court ......**

***"shall be made by way of petition'***

**That has been the way, is the way and shall continue to be the way until and unless Parliament decrees otherwise."**

In our judgment, the procedural provisions invoked in making the application for extension of time are inapplicable.

41. The objection raised by the respondents' counsel on the third legal issue is that the matter of cross-examination of the court clerks was not germane for discussion in this appeal because it arose from a considered ruling of the superior court upon which there was no notice of appeal. The ruling therefore stands unchallenged. We think, with respect, that the order made by the superior court was only an interlocutory one that did not determine the proceedings with finality. It is not contended that there was an order made totally rejecting the application for cross-examination. On the contrary, there was an order for cross-examination subject to certain terms which were not complied with and the main application proceeded to finality. To question the manner in which the proceedings were conducted after conclusion of such proceedings cannot in our view be unprocedural. That is not to say that the ground of appeal is meritorious and this will be considered as we now examine the facts of the case.

42. We have carefully examined the evidential material on record and in the end we are left in no doubt that the advocate seized of the matter on behalf of the petitioner was clueless about the provisions, and therefore the requirements of ***section 21*** of the Act and ***Rule 12*** thereunder. The expectation that he should have been advised by the court clerks on the law and procedure instead of offering that advice to them is as baffling to us as it was to the learned Judge of the superior court. It would not matter in the circumstances how long he wanted to take in cross-examining those clerks. We cannot therefore blame the Judge in surmising that the advocate either misread the law or was ignorant of it, or alternatively he did not have the deposit at all. Indeed that alternative is more probable since there is no support for the advocate's assertion that he had shs.250,000/= in cash on 10th January, 2008 which he returned to the petitioner. The petitioner himself says nothing about giving out the money or receiving it back and does not explain why he did not return the following two days which were still available for depositing the amount and waited until 7th February, 2008 to ask a stranger to the petition to forward a bankers cheque to the court which was properly rejected. The advocate was also accompanied by another advocate from the same firm but surprisingly that advocate too swore no affidavit in support. More importantly, ***Rule 12*** designates the Registrar as the recipient of the deposit. There was always a Deputy Registrar at Malindi Law Courts as the advocate lamented about the incompetence of the clerks, but he made no effort to seek audience with him. At no time in these proceedings did he explain why that was not possible. With respect, such conduct cannot form the basis of favourable treatment by a court of law.

43. In our judgment, there was simply no deposit of security made in accordance with the law and the motion before the superior court was properly dismissed on that score, even if the law allowed for extension of time, which it does not.

Consequently we find no merit in the appeal and we order that it be and is hereby dismissed with costs.

***Dated and delivered at Nairobi this 19th day of November, 2010.***

**R.S.C. OMOLO**

**........................**

**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

**..........................**

**JUDGE OF APPEAL**

**P.N. WAKI**

**..........................**

**JUDGE OF APPEAL**

I certify that this

is a true copy of the original.

**DEPUTY REGISTRAR**