Waity v Independent Electoral & Boundaries Commission & 3 others (Petition 33 of 2018) [2019] KESC 54 (KLR) (8 February 2019) (Judgment)

Sammy Ndung'u Waity v Independent Electoral & Boundaries Commission & 3 others [2019] eKLR

Neutral citation: [2019] KESC 54 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 33 OF 2018

DK MARAGA, CJ & P, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

FEBRUARY 8, 2019

BETWEEN

SAMMY NDUNG'U WAITY ..... PETITIONER

AND

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1ST RESPONDENT

NDERITU MURIITHI ..... 2ND RESPONDENT

JOHN MWANIKI ..... 3RD RESPONDENT

COUNTY RETURNING OFFICER ..... 4TH RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal sitting at Nyeri in Election Petition Appeal No. 2 of 2018 (S. Ole Kantai, F. Sichale & A. Makhandia, JJ.A) delivered on 31st July, 2018)

Applicable guidelines for determining whether the IEBC, PPDT, or Election Court has jurisdiction over pre-election disputes, including those related to nominations

Reported by Ian Kiptoo

Jurisdiction *- jurisdiction of the Supreme Court - appellate jurisdiction - matters of constitutional interpretation and application - claim that the appeal involved matters of interpretation and application of the law - whether general references to constitutional provisions or claim of alleged violation of rights in a memorandum of appeal clothed the Supreme Court with jurisdiction under article 164(3)(a) of the Constitution - Constitution of Kenya, article 164 (3)(a).*

Jurisdiction *- jurisdiction of the Independent Electoral and Boundaries Commission (IEBC), Political Parties Disputes Tribunal (PPDT) and an election court - jurisdiction of the IEBC and PPDT vis-à-vis an election court - jurisdiction to hear and determine pre-election disputes - applicable guidelines in determining jurisdiction - who*

between the IEBC, PPDT and an election court had the jurisdiction to hear and determine pre-electoral disputes including those relating to, or arising from nominations - what were the applicable guidelines to determine who between the IEBC, PPDT and an election court had the jurisdiction to hear and determine pre-electoral disputes including those relating to, or arising from nominations - Constitution of Kenya, articles 88(4)(e), 105 1)(a) and 165(3) and (6); Elections Act, cap 7, section 74(1).

Electoral Law *- electoral disputes - pre-electoral disputes - disputes relating to or arising from nominations - dispute resolution mechanisms - where a petitioner approached an election court in a dispute that arose from nomination - whether a petitioner could approach an election court in a pre-electoral dispute, including those relating to or arising from nominations, without first exhausting the available dispute resolution mechanisms - Constitution of Kenya, articles 88(4)(e), 105(1)(a) and 165(3) and (6); Elections Act (cap 7), section 74(1).*

Brief facts

The petition of appeal sought to challenge the decision of the Court of Appeal. The appellate court in its judgment dismissed the petitioner's appeal, and in so doing, upheld the decision of the trial court. The grounds of the appeal were that the Court of Appeal erred in law: in finding that the 2nd respondent's nomination to run as an independent candidate was not in violation of article 82(1)(b)(d) and (2), article 85, article 88(4)(k) of the Constitution of Kenya, 2010 (Constitution) as read with section 33 of the Elections Act; in refusing to consider the issue of nomination, the court violated the constitutional doctrine of *stare decisis* established under article 163(7) of the Constitution and contradicted the decision made *in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others [2018]* eKLR.

On the other hand, the respondents contended that the jurisdiction of the court had not been properly invoked and that the grounds of appeal did not point out to the finding of the Court of Appeal, in which the appellate court's interpretation of the law was contrary to the provisions of the Constitution, or that the findings were illegal or perverse.

Issues

i. Whether general references to constitutional provisions or claim of alleged violation of rights in a memorandum of appeal clothed the Supreme Court with jurisdiction under article 164 (3) (a) of the Constitution.

ii. Who between the Independent Electoral and Boundaries Commission (IEBC), Political Parties Dispute Tribunal (PPDT) and the election court had the jurisdiction to hear and determine pre-electoral disputes including those relating to, or arising from nominations?

iii. What were the applicable guidelines to determine who between the IEBC, PPDT and election court had the jurisdiction to hear and determine pre-electoral disputes including those relating to, or arising from nominations?

iv. Whether a petitioner could approach an election court in a pre-electoral dispute, including those relating to or arising from nominations, without first exhausting the available dispute resolution mechanisms.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 88 - Independent Electoral and Boundaries Commission

(4)The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for—

(*e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;*

Article 105 - Determination of questions of membership

(1) There shall be—

(a) a Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members; and

(b)a Deputy Speaker for each House of Parliament, who shall be elected by that House in accordance with the Standing Orders, from among the members of that House.

Elections Act, cap 7

Section 74 - Settlement of certain disputes.

(1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

Held

1. Article 163(4) (a) of the Constitution of Kenya, 2010 (Constitution) provided that appeals lay from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of the Constitution. An appeal to the Supreme Court would not be sustainable unless it was demonstrated that it raised cogent issues of constitutional controversy. The appellant had to be faulting the Court of Appeal's interpretation or application of the Constitution that informed the impugned judgment.
2. It was not enough for the appellant to evolve grievances in the memorandum of appeal, in which he alleged violations of his rights, simply because he disagreed with the decision of the Court of Appeal. General references to constitutional provisions would not bring an appeal within the ambit of article 164(3)(a) of the Constitution, if such provisions were not a basis of contestation at the appellate court. Therefore, the petition of appeal did not meet the threshold for admission under article 163(4)(a) of the Constitution, save on one issue.
3. Whether an election court had jurisdiction to determine pre-election disputes had fallen for determination with recurring frequency in the superior courts. Two schools of thought had emerged as the courts grappled with the critical issue. On the one hand, there was the divestiture school that held the notion that the establishment of other organs by the Constitution to address pre-election disputes, including those relating to nominations, divested an election court of jurisdiction to determine the same.
4. Article 88(4)(e) of the Constitution provided that the IEBC would *inter alia,* be responsible for the settlement of electoral disputes, relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. In the same vein, The PPDT was also vested with the mandate to determine and settle pre-election disputes.
5. The preservative school on the other hand maintained that an election, being a process and not an event, meant the same continued, until the declaration of results. That being the case, an election court had to satisfy itself that the election was at all times conducted in accordance with the tenets of the Constitution. The court could not undertake such a task unless its jurisdiction including the power to look into pre-election disputes was preserved**.**
6. None of the positions could be treated lightly, as each was anchored upon the best traditions of judicial inquiry. But as admirable as both of them were the certainty of a recurrence of the same question, already so painstakingly navigated by the superior courts was such that, in the interests of certainty, the court had to pronounce itself on the same with finality. In order to undertake that task from an informed position, a review of the decisions that had been handed down by the High Court and Court of Appeal, concerning the two schools of thought, had to be undertaken.
7. Section 74(1) of the Elections Act was a derivative of article 88(4)(e) of the Constitution. Together, those provisions constituted the normative architecture for the resolution of pre-election disputes including those arising from nominations. That framework for dispute resolution came into existence

after the promulgation of the Constitution. Prior to that, the jurisdiction to determine pre-election disputes lay with the High Court sitting as an election court.

8. The Constitution and the resultant electoral law deliberately set out to delimit the institutional competencies for the settlement of all electoral disputes. In that regard, it donated jurisdictional authority to different judicial and quasi- judicial organs. The Supreme Court was vested with original and exclusive jurisdiction to determine petitions relating to the election of a president. The Court of Appeal had jurisdiction to determine appeals from the High Court on points of law, the High Court had original jurisdiction to determine petitions relating to the election of governor, senator, member of Parliament, and women representative. The Resident Magistrates Court had jurisdiction to determine petitions relating to the election of member of county assembly with appeals there from to the High Court on points of law only.

9. Coming to pre-election disputes, including disputes relating to, or arising from nominations, the Constitution was clear that they were to be resolved by the IEBC (through its committee on dispute resolution as provided for by section 12 of the enabling Act) or where applicable, by the PPDT. Where the Constitution or any other law established an organ, with a clear mandate for the resolution of a given genre of disputes, no other body could lawfully usurp such power, nor could it append such organ from the pedestal of execution of its mandate. To hold otherwise would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

10. That an election was a process, a continuum, which began from the registration of voters right up to the declaration of results, was a truism. However, that fact was not in itself capable of conferring jurisdiction on an election court to inquire into the entire electoral process. While an election was a process, in the context of dispute resolution, it had to be a structured process. That was why the framers of the Constitution were mindful of the need for a clear roadmap for the resolution of disputes along that continuum. Hence, those disputes that arose before an election were to be resolved by the organs established for that purpose.

11. Disputes that arose, during and after the elections, were reserved for the election court. Indeed, the election court itself came into real existence, after the elections proper**.** It was for that reason that the Constitution restricted every organ to its operational sphere. Hence, the IEBC was only responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. The latter were definitely a preserve of the election court, which meant that the former, were a preserve of the IEBC or the PPDT as the case may be.

12. Disputes relating to nominations or eligibility went to the root of an election. However, that fact did not confer jurisdiction on an election court to determine nomination related disputes, precisely because, those disputes were reserved for the IEBC by article 88(4)(e) of the Constitution. An election court ought not to trample upon the electoral process like a colossus in the face of clear and unambiguous provisions of the Constitution regarding its jurisdiction.

13. Where the Constitution or the law, consciously conferred jurisdiction to resolve a dispute, on an organ other than a court of law, it was imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that had to never be allowed to fester in the administration of justice.

14. Each of the schools of thought was borne out of the best traditions of judicial inquiry, and none could be dismissed lightly. Such traditions for example required courts of law to interpret the Constitution holistically and purposively. They were also a reminder that the Constitution was a living charter, which was always speaking, and in interpreting any of its provisions, a court of law had to keep in

mind that, the Constitution could not subvert itself. Towards that end, every constitutional provision supported the other, and none could be read so as to render another inoperable.

15. The preservative school maintained that while the IEBC had an undoubted mandate to resolve pre-election disputes, including those relating to and arising from nominations, an election court nonetheless, retained the jurisdiction to look into similar disputes. The proponents of that argument relied on article 105(1) of the Constitution which in their view mandated the High Court to determine any question whether a person had been validly elected. It was their argument that since the validity of an election could at the end of the day turn on the question as to whether a person was qualified to vie in the first place, an election court could not disregard such a question. However, what was not clear was given the provisions of article 88(4)(e) when such jurisdiction arose and when it ended.

16. The conflict could not be resolved by either, out-rightly discounting one school of thought or wholly embracing the other. What was critical was the need to harmonize those well-reasoned opinions so as to give effect to both articles 88(4)(e), and 105(1)(a) of the Constitution as read with section 75 (1) of the Elections Act. Doing so would be to stay faithful to the edict that a constitution had to be interpreted purposively and holistically.

17. The mandate of resolving pre-election disputes as provided for in article 88(4)(e) of the Constitution lay with the IEBC. The main issue for determining the validity of an election could turn on whether a person, ought to have been nominated in the first place. The implication in such a situation was that an election court retained a jurisdictional residuum from which it could draw to determine the said question in certain exceptional circumstances.

18. The twin approach of: recognizing the mandate of the IEBC or any other organ such as the PPDT, of resolving pre-election disputes, including those relating to or arising from nominations, whether such disputes revolved around the qualification of a candidate or otherwise; and ensuring that an election court or the judicial process for that matter was not helpless when faced with a critical factor to determine the validity of an election; ensured that article 88(4)(e) of the Constitution was not rendered inoperable while at the same time preserving the efficacy and functionality of an election court under article 105 of the Constitution. To achieve that noble objective, the following guiding principles were issued:

    a. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case could be in the first instance;
    b. where a pre-election dispute had been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution, such dispute would not be a ground in a petition to the election court;
    c. where the IEBC or PPDT had resolved a pre-election dispute, any aggrieved party could appeal the decision to the High Court sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution. The High Court would hear and determine the dispute before the elections and in accordance with the constitutional timelines;
    d. where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chose through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute would not be a ground in a petition to the election court;
    e. the action or inaction above would not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review court, or in exercise of its supervisory jurisdiction under article 165(3) and (6) of the Constitution, even after the determination of an election petition; and
    f. in determining the validity of an election under article 105 of the Constitution or section 75(1) of the Elections Act, an election court could look into a pre-election dispute if it determined

that such dispute went to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.

19. The only dispute between the parties in the instant case arose out of the nominations of the Jubilee Party. That dispute was litigated right from the party's own dispute resolution mechanism up-to the High Court sitting as a judicial review court. The question as to the validity of the 2nd respondent's independent candidature only arose in Election Petition No 2 of 2017, filed in the High Court challenging the declaration of the former as the Governor Elect for Laikipia County on August 11, 2017. The issue was neither canvassed at the IEBC or the PPDT.

20. The fact that the 2nd respondent had decided to contest the ensuing election as an independent candidate, was definitely known to the petitioner, since it was the basis of the preliminary objection in Election Petition No 10 of 2017. The petitioner having been the chief agent for the Jubilee Party for Laikipia East Constituency knew all along or ought to have known that the 2nd respondent had quit the party and would be contesting the ensuing election as an independent candidate. With that knowledge, he chose not to challenge the validity of the independent candidature at the appropriate forum.

21. The appellant should have pursued the available dispute resolution mechanisms in accordance with the Constitution and applicable Statutes instead of originating his grievance at the Election Court.

Per D K Maraga, CJ and P (Concurring)

22. The High Court erred in declining jurisdiction to determine the issue and the Court of Appeal equally erred in affirming High Court on that point.

23. IEBC had unquestionable jurisdiction under article 88(4)(e) of the Constitution to determine pre-election nomination disputes. It had exclusive jurisdiction to determine with finality, subject to appeal or judicial review, all intra-party nomination disputes. However, a holistic, and as required by article 259, harmonized interpretation of articles 81, 85, 86, 88, 99, 105, 137, 140 and 193 of the Constitution read together with sections 75 and 83 of the Elections Act left doubt that the election courts also had jurisdiction to determine pre-election nomination disputes which went into the root of an election, especially those that IEBC had not determined on merit like the one giving rise to the appeal.

24. The matters which went into the root of election were pre-requisites spelt out in the Constitution including a degree from a university recognized in Kenya as the minimum academic qualification for election as a county governor as prescribed by articles 180(2) and 193(1)(b) of the Constitution read together with section 22(2) of the Elections Act; and being a registered voter, nominated by a political party or as an independent candidate, was of sound mind and was not an un-discharged bankrupt as required by article 99 of the Constitution.

25. Whether the 2nd respondent had ceased to be a member of a political party for a period of three months preceding the date of the election in question as required by article 85(a) as read with section 33(1) of the Elections Act. Being a constitutional requirement was a matter that went into the root of the Laikipia County gubernatorial election. As such, the High Court, as the election court, had jurisdiction to entertain it.

26. Even if the High Court assumed jurisdiction and entertained it, it would have dismissed the ground for the simple reason that the 2nd respondent, having resigned from membership of Jubilee Party on May 8, 2017, had ceased to be a member of a political party for a period of at least three months prior to the August 8, 2017 general election.

Appeal dismissed.

Orders

i. *The judgment of the Court of Appeal dated July 31, 2018 was upheld.*

ii. *For the avoidance of doubt, the declaration of the result of the election by the IEBC in respect of Governor for Laikipia County was upheld.*

iii. *The appellant to bear the costs of the appeal.*

Citations

Cases

Kenya

1. *Abdalla, Albeity Hassan v Independent Electoral and Boundaries Commission (IEBC) & 3 others* Election Petition 8 of 2017; [2017] KEHC 2361 (KLR) - (Explained)
2. *Ahmed, Alhad Adam v Solomon Odanga Magembe Alias Solomon Beatrice Saki Muli & 4 others* Election Petition 14 of 2017; [2017] KEMC 8 (KLR) - (Followed)
3. *Anami, Silverse Lisamula & another v Independent Elecoral and Boundaries Commission & 2 others* Election Petition 1 & 4 of 2017; [2018] KEHC 8504 (KLR) - (Explained)
4. *Ekuru Aukot v Independent Electoral and Boundaries Commission & 3 others* Petition 471 of 2017; [2017] KEHC 9390 (KLR) - (Mentioned)
5. *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR) - (Explained)
6. *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* Petition 5 of 2016; [2018] KESC 46 (KLR) - (Applied)
7. *Ireri, Margaret Wanjiru & 2 others v Monica Gathoni Githae & 4 others* Election Appeal 13 of 2018; [2018] KEHC 3447 (KLR) - (Explained)
8. *Joshua Wakahora Irungu v Jubilee Party & Another* 62 of 2017, Joshua Wakahora Irungu v Jubilee Party & Another [2017] eKLR. - (Mentioned)
9. *Kabage, Karanja v Joseph Kiuna Kariambegu Nganga & 2 others* Election Petition 12 of 2013; [2013] KEHC 2345 (KLR) - (Explained)
10. *Karua, Martha Wangari v Independent Electoral & Boundaries Commission & 3 others* Election Petition 1 of 2017; [2018] KECA 791 (KLR) - (Mentioned)
11. *Kibeh, Annie Wanjiku v Clement Kungu Waibara & another* Election Appeal 20 of 2018; [2018] KECA 418 (KLR) - (Explained)
12. *Kilonzo, Diana Kethi & another v Independent Electoral & Boundaries Commission (IEBC) & others* Petition 359 of 2013; [2013] KEHC 6259 (KLR) - (Explained)
13. *Kina v Tunai & 9 others* Petition 16 of 2014; [2015] KESC 27 (KLR) - (Explained)
14. *Kituo Cha Sheria v John Ndirangu Kariuki & another* Election Petition 8 of 2013; [2013] KEHC 3485 (KLR) - (Explained)
15. *Kiwoi, Armstrong Mwandoo & another v Granton Graham Samboja & 7 others* Election Petition 1 of 2017; [2018] KEHC 8869 (KLR) - (Explained)
16. *Kombo, Musikari Nazi v Moses Masika Wetangula & 2 others* Election Petition 3 of 2013; [2013] KEHC 2156 (KLR) - (Followed)
17. *Lubwayo, Luka Angaiya & another v Gerald Otieno Kajwang & another* Petition 120 of 2013; [2013] KEHC 6324 (KLR) - (Explained)
18. *Mohamad, Ahmed Abdulahi & another v Mohammed Abdi Mahamud & 2 others* Election Petition 14 of 2017; [2017] KEHC 2173 (KLR) - (Explained)
19. *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] KECA 677 (KLR) - (Mentioned)
20. *Moki, Kennedy v Rachael Kaki Nyamai & 2 others* Election Petition 2 of 2017; [2018] KEHC 8722 (KLR) - (Mentioned)
21. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 3 others* Petition 2 of 2014; [2014] KESC 49 (KLR) - (Followed)
22. *Mututho, John Michael Njenga v Jayne Njeri Wanjiku Kihara & others* Civil Application 88 of 2008; [2008] KECA 205 (KLR) - (Followed)
23. *Ndeti, Wavinya & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others* Election Petition 1 of 2017; [2018] KEHC 8683 (KLR) - (Followed)

24. *Ndirangu, Isaiah Gichu 2 others v Independent Electoral and Boundaries Commission & 4 others* Petition 83 of 2015; [2016] KEHC 7364 (KLR) - (Explained)
25. *Nduttu, Lawrence & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012 - (Mentioned)
26. *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition 5, 3 & 4 of 2013 (Consolidated); [2013] KESC 6 (KLR) - (Followed)
27. *Odinga & another v Independent Electoral and Boundaries Commission Chairman (IEBC) & another* Election Petition 1 of 2017; [2017] KESC 52 (KLR) - (Mentioned)
28. *Okello, Jared Odoyo v Independent Electoral & Boundaries Commission (IEBC) & 3 others* Election Petition 1 of 2013; [2013] KEHC 2105 (KLR) - (Followed)
29. *Ole Kores, Josiah Taraiya Kipelian v Dr. David Ole Nkedienye & 3 Others* Petition 6 of 2013; [2013] KEHC 3480 (KLR) - (Explained)
30. *Parsimei, Francis Gitau & 2 others v National Alliance Party & 4 others* Constitutional Reference 356 & 359 of 2012; [2012] KEHC 2603 (KLR) - (Explained)
31. *Republic v Independent Electoral and Boundaries Commission Ex-parte Charles Ondari Chebet* Judicial Review 3 of 2013; [2013] KEHC 5175 (KLR) - (Explained)
32. *Republic v National Alliance Party of Kenya and another Ex-Parte Billy Elias Nyonge* Judicial Review 61 of 2013 - (Mentioned)
33. *Salat v Independent Electoral and Boundaries Commission & 7 others* Petition 23 of 2014; [2015] KESC 31 (KLR) - (Followed)
34. *Sammy Kilukei & 300 others v Jubilee Party & another* Election Appeal 10 of 2017; [2017] KEHC 8877 (KLR) - (Mentioned)
35. *Siamanga, Lesirma Simeon & another v Independent Electoral and Boundaries Commission (IEBC)* Election Appeal 7 of 2018; [2018] KECA 533 (KLR) - (Mentioned)
36. *Sirma, Musa Cherutich v Independent Electoral and Boundaries Commission (IEBC) & 2 others* Election Appeal 9 of 2018; [2018] KECA 544 (KLR) - (Mentioned)
37. *Speaker of the National Assembly v Karume* Civil Application 92 of 1992; [1992] KECA 42 (KLR) - (Explained)
38. *Tong'i, Richard Nyagaka v Chris Munga N Bichage & 2 others* Petition 17 of 2014; [2015] KESC 22 (KLR) - (Applied)
39. *Waibara, Clement Kungu v Annie Wanjiku Kibeh & another* Election Petition 1 of 2017; [2018] KEHC 7724 (KLR) - (Explained)
40. *Wanjohi v Kariuki & 2 others* Petition 2A of 2014; [2014] KESC 26 (KLR) - (Explained)

Democratic Republic of Congo

Jackson Tatao Pashile v Nina Daniel Mpute & 2 Others DRC Dispute no 27 of 201 - (Mentioned)

Statutes

Kenya

1. Advocates Remuneration Order (cap 16 Sub Leg) Schedule 6(1)(c)(vii) - (Interpreted)
2. Constitution of Kenyaarticles 1, 10, 22(2); 22(3); 25; 38; 38(2); 39; 40; 48; 50; 59(2); 63(4)(a); 81(e); 82; 82(1)(b); 85; 86; 87(1); 88; 88(4)(d); 88(4)(e); 88(4)(k); 99(1)(c); 105; 105(1); 105(1)(a); 159(2); 163(4)(a); 164(3); 164(3)(a); 165; 165(3); 165(3)(d)(iii); 165(6); 258 - (Interpreted)
3. Court of Appeal (Election Petition Appeals) Rules (cap 9 Sub Leg) rule 6(2) - (Interpreted)
4. Elections (General Regulations), 2012 (cap 7 Sub Leg) regulation 87(d)(d)- (Interpreted)
5. Elections (Parliamentary & County Election Petition) Rules, 2017 (cap 7 Sub Leg) rules 4(1); 12(3); 15(h); 24(1); 24(2); 24(6); 35- (Interpreted)
6. Elections Act (cap 7) sections 22(2); 28; 30; 30(1); 33; 33(1)(c); 74; 74(1); 74(1)(A); 74(3); 75; 75(1); 84; 85A - (Interpreted)
7. Electoral Code of Conduct (cap 7 Sub Leg) In general- (Cited)
8. Independent Electoral and Boundaries Commission Act (cap 7 C) section 4 - (Interpreted)

9. Political Parties Act (cap 7D) section 40(1)(b) - (Interpreted)
10. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)
11. Supreme Court Practice Directions (cap 9B Sub Leg) In general - (Cited)
12. Supreme Court Rules, 2012 (cap 9B Sub Leg) rule 9, 33, 51(1) - (Interpreted)

Advocates

None mentioned

JUDGMENT

Introduction

1. The Petition of Appeal before the court is dated September 6, 2018 and lodged on September 7, 2018. The petitioner seeks to challenge the decision of the Court of Appeal (Ole Kantai, Sichale & Makhandia, JJA) sitting on appeal in Election Petition Appeal No. 2 of 2018. The appellate court in its judgment of July 31, 2018 dismissed the petitioner's appeal, and in so doing, upheld the decision of the trial court (Kasango, J) in Election Petition No 2 of 2017 rendered on February 29, 2018.

B. Background

(i) At the High Court

2. The petitioner, a registered voter and Chief Agent of the Jubilee Party for Laikipia East Constituency, filed his petition at the High Court at Nanyuki on September 8, 2017 challenging the decision by the 4th respondent declaring the 2nd and 3rd respondents as the duly elected Governor and Deputy Governor of Laikipia County. The petitioner challenged the election process in Laikipia County, contending that the same was conducted in violation of articles 1, 10, 38, 39 & 40 of the *Constitution*, and that the entire process was unlawful, lacked transparency, and was not in accordance with the Constitution.

3. The petitioner also alleged that the members of the Pokot community were, on the eve of the gubernatorial elections conducted on August 8, 2017, forcibly and illegally removed from their homes, in violation of the right to vote by government agents and officers including the Kenya Defence Forces, the General Service Unit, the Administrative Police, the Regular Police and Police Reservists by preventing them from accessing polling stations, burning their homes, beating and intimidating them. It was contended that these acts affected the outcome of the elections, and that it denied the Pokot people, and Sosian Ward in particular, their right to vote. That consequently, the election results were not a true reflection of the will of the people.

4. The petitioner further claimed that the 2nd respondent was not qualified to vie as an independent candidate in the gubernatorial contest in Laikipia County. That he had unsuccessfully participated in the nomination exercise by the Jubilee Party where he lost and was afterwards time barred from submitting his credentials to the 1st respondent to vie as an independent candidate. He argued that the 2nd respondent being allowed to vie as an independent candidate was therefore a violation of section 33 of the *Elections Act*.

5. He also argued that the 2nd respondent engaged in unfair election campaign practice, in violation of the *Electoral Code of Conduct,* which conduct he was found to be in violation by the 1st respondent's Electoral Conduct Enforcement Committee. The petitioner further argued that the elections were marred with illegalities and irregularities, that there were discrepancies and variation of results in almost all polling stations, that the results announced at the tallying centres were different from what was

announced at the polling stations and that the results declared by the County Returning Officer were therefore, neither verifiable nor accurate.

6. The petitioner sought declaratory Orders, *inter alia*; that the 2nd respondent was not qualified to run as an independent candidate; that the campaign method adopted by the 2nd respondent was unlawful; that the 1st respondent proceeded with elections at Sosian Ward rather than postponing it; and that the 2nd and 3rd respondents were not validly elected as the Governor and Deputy Governor respectively for Laikipia County.

7. The petition was opposed by all the respondents.

(ii) Interlocutory Applications Before the High Court

8. In the course of the proceedings before the trial court, the court determined the following interlocutory applications:

   (i) In a Ruling made on November 9, 2017 the Court allowed the application by Dennis Kimnangaror Leman to withdraw as the 2nd petitioner. Alongside the said withdrawal, the Court allowed the expunging of the affidavits by the said former 2nd petitioner and 5 others whose affidavits had been attached to that of the 2nd petitioner's Affidavit, and awarded costs to each of the respondents at the sum of Kshs 125,000.

   (ii) On November 20, 2017, the courtmade a finding that the prayers sought were couched in wide terms which would not facilitate the just and expeditious determination of the petition. This followed an application by the petitioner for the preservation of all election material, provision of electronic data touching on the gubernatorial poll stored in the KIEMS kit and the provision of the final tally. The court ordered the petitioner to place seals on all ballot boxes for the gubernatorial contest and that the 1st respondent supply to the petitioner the SD Cards from the KIEMS kit for Sossian Ward only. (The petitioner argues that in the said Ruling, the court, suo motu reinstated to the record the affidavits of the 5 people which had been expunged alongside the withdrawal of the 2nd petitioner).

   (iii) On November 20, 2017 the trial court dismissed the petitioner's application for leave to file further affidavits in support of the petition albeit out of time.

   (iv) On November 22, 2017, the trial courton application by the 2nd respondent, reviewed its Ruling of November 20, 2017 expunging the 5 affidavits earlier mentioned.

   (v) On December 13, 2017, the trial courtdismissed with costs the appellant's application anchored primarily on a prayer for scrutiny.

   (vi) An application by Hon Joshua Irungu to be enjoined in the proceedings was dismissed for coming too late – 72 days after the close of pleadings.

9. In rendering her decision, the learned trial judgeset out the following issues for determination:

   (a) was the election of Governor for Laikipia County done lawfully, transparently and in accordance with the Constitution;

   (b) were the results announced by the County Returning Officer verifiable and accurate;

   (c) did the 1st respondent put in place adequate measures to ensure free, fair and transparent elections;

   (d) were the Pokot people disenfranchised;

(e) were votes in Sosian Ward inflated;

(f) were agents of Jubilee Party in Laikipia County denied entry to polling stations and denied the exact results at the tallying centre and were they shown hostility;

(g) were the votes of the 2nd respondent inflated;

(h) was the process of nomination, campaigns, voting and counting of votes, tallying and declaration of the winner of the gubernatorial election done lawfully in accordance with the Constitution and other electoral laws;

(i) was the 2nd respondent qualified to run for the position of the Governor of Laikipia County; and

(j) did the issues raised in the petition affect the results of the position of Governor of Laikipia County.

10. In her Judgment delivered on January 31, 2018, Kasango J. held as follows:

> "85. In the final analysis I find that the election of gubernatorial position of Laikipia County of August 8, 2017 complied with the written law relating to elections and with the provisions of the Constitution. And more importantly, despite the very grave allegations made by the petitioner in his petition, I find that only very minor failures occurred in Forms 37A and 37B which failures had no substantial effect on that election or its results and to echo the Supreme Court's finding in *Raila 2017*: "No election is perfect. Even the law recognizes this reality."
>
> 86. I am satisfied that the election of Governor of Laikipia County was conducted substantially in accordance with the *Constitution* and electoral law, and that as a result, Nderitu Muriithi was validly elected as the Governor of Laikipia County. That election was free and fair. I hereby dismiss the petition with costs."

11. Aggrieved and dissatisfied with this Judgment, the petitioner filed his Notice of Appeal on February 7, 2018 both at the High Court at Nanyuki, and the Court of Appeal in Nyeri. He also filed his memorandum of appeal dated March 1, 2018.

(iii) At the Court of Appeal

12. The appeal was heard before the Court of Appeal in Nyeri (Ole Kantai, Sichale & Makhandia, JJA) on July 10, 2018 when the respective parties highlighted their submissions. The appellant had raised twenty-three (23) grounds in his appeal, which the appellate court categorized as follows:

(i) Grounds 1 & 2 which primarily faulted the learned trial judge for expunging the 2nd petitioner's affidavit together with the annexures. The 2nd respondent had in a previous application dated September 18, 2017 sought leave to withdraw from the petition, which application was allowed by the court in a Ruling dated November 9, 2017;

(ii) Grounds 3, 4 & 5 that the learned judge erred in law by awarding costs of Kshs 125,000 to each of the respondents in the Ruling of November 9, 2017 which was excessive given the nature of the application, and which in any event, was not opposed. They argue that costs should have been pegged on the provisions of schedule 6(1)(c)(vii) of the *Advocates Remuneration Order*;

(iii) Grounds 6, 7 & 8 the learned judge was faulted for reviewing the Orders issued on November 20, 2017 based on an application dated November 21, 2017 by the 2nd petitioner who had ceased being a party to the petition following his successful application for withdrawal;

(iv) Ground 9 the learned judge was faulted for disallowing the application for joinder of parties dated October 12, 2017 and to file further affidavits;

(v) Grounds 10, 13 & 18 in which the learned judge was faulted for disallowing the application dated October 2, 2017 in its ruling dated November 20, 2017, and in which the petitioner had sought the supply of all material used in respect of the gubernatorial elections in Laikipia County;

(vi) Grounds 14, 15, 16 & 17 the learned judge was faulted for upholding the respondent's objection to have a deponent adduce evidence in an affidavit annexed to the petitioner's affidavit in support of the petition;

(vii) Ground 19 whereby the learned judge expunged the report by the appellant on the sealing of the ballot boxes, which report it was alleged, revealed electoral illegalities and irregularities, to wit missing Forms 37A;

(viii) Grounds 11, 12, 19, 20, 21 & 22 in which the appellant primarily contended that the 2nd respondent should not have been allowed to contest in the gubernatorial elections in Laikipia County as he had not complied with section 33(1)(c) of the *Elections Act*. It was also argued that the 1st respondent should have postponed the elections in Sosian Ward given the incidences of violence that had been reported to have allegedly occurred, and, that some of the forms did not have security features and while others were not signed;

(ix) Ground 23 was predominantly on the issue of costs, whereby the appellant reiterated Grounds 2, 4 & 5, and further contended that the final award of costs of *Kshs* 12,000,000 awarded to the respondents collectively was excessive.

13. On their part, the 1st and 4th respondents argued and raised the issue of the Notice of Appeal filed at the High Court registry at Nanyuki. It was argued that the same ought to have been filed at the Court of Appeal registry in Nyeri, and that as a result of filing in the wrong registry, there was no valid appeal in the Court of Appeal. It was also argued that there were no Notices of Appeal filed against each of the Orders from the interlocutory applications, contrary to rule 35 of the *Elections (Parliamentary & County Election Petition) Rules, 2017* and rule 6(2) of the *Court of Appeal (Election Petition Appeals) Rules, 2017*.

14. The 2nd respondent submitted and relied upon the cases of *Lesirma Simeon Siamanga & Another v IEBC* Election Appeal No 7 of 2018 and *Musa Cherutich Sirma v IEBC & 2 others* Election Petition Appeal (Application) No 9 of 2018 in support of the proposition that there was no valid appeal filed before the Court of Appeal; that the application for scrutiny and access to information had no basis in law; that there was no evidence of illegalities or irregularities; and that the award of costs was not excessive.

15. The 3rd respondent also raised the issue of the Notices of Appeal to the Court of Appeal contending that the same were not in the format contemplated under the *Court of Appeal (Election Petition Appeal) Rules, 2017*; and that the annexures in the affidavit of the 2nd petitioner who had withdrawn from the petition could not stand.

16. Upon deliberation, the Court of Appeal in upholding the decision of the trial Court, held, *inter alia*:

> " In the instant appeal, the inelegant drafting notwithstanding, we are not told of how the learned Judge erred in the interpretation or construction of a provision of the Constitution or any other law. We are also not told how the trial Judge erred in the application of a provision of the Constitution or any other law. Finally, on this point, it was not stated to us that the conclusions of the trial Judge were so perverse or so illegal that no reasonable tribunal would have arrived at the conclusion complained of. For this reason, we uphold the submissions of the respondent that the grounds of appeal did not conform to the dictates of section 85(A) of the *Elections Act.*"

17. On the issue of pre-elections dispute, the Court held;

> " In our view, the appellant should have pursued the available dispute resolution mechanisms as stipulated by the *Constitution* and Statutes. If he was still aggrieved with the outcome of the appeal (No 10 of 2017), then he should have explored other legal channels such as Judicial Review or appeals. We hold the view that the unresolved issues arising before an election is not within the preserve of an election Court. In our view, the Judge was correct in refusing to reopen issues arising before the election as that had been dealt with by other dispute resolution mechanisms."

(iv) At the Supreme Court

18. Aggrieved by the decision of the Court of Appeal dated July 31, 2018, the petitioner moved to the Supreme Court through this petition of appeal which is premised on the provisions of articles 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act*, as well as Rules 9 & 33 of the *Supreme Court Rules, 2012 2*.

19. The grounds of the appeal are that the learned judges of Appeal erred in law: in finding that the 2nd respondent's nomination to run as an independent candidate was not in violation of articles 82(1)(b)(d) and (2), articles 85, articles 88(4)(k) as read with section 33 of the *Elections Act*; in refusing to consider the issue of nomination, the court violated the constitutional doctrine of *stare decisis* established under articles 163(7) and contradicted the decision made in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR where the Court of Appeal found that an election Court has the jurisdiction to determine issues of nomination; in failing to find that the election of the Governor for Laikipia County was not conducted as per articles 10, 81(e) and 86 of the *Constitution* as the election was marred with massive irregularities and illegalities enough to vitiate the said election thus infringing on the petitioner's right to a fair trial as envisaged in articles 25 and 50 of the *Constitution*; in failing to consider the grounds of appeal raised against the numerous interlocutory applications in violation of the appellant's right to fair trial as envisaged in articles 25, 50, 159(2); in failing to find that Kasango J. did not accord the petitioner a fair hearing and the right to access to justice in accordance with the provisions of articles 10, 48, 50 and 159(2) of the *Constitution*; in failing to find that the petitioner had established a basis warranting grant of orders for scrutiny; in failing to address the irregularities on the forms and whether they affected the results vis-a-vis a small margin thus infringing on the petitioner's right to fair trial as envisaged in articles 25 and 50 of the Constitution;

20. The petitioner prays for a declaration that the Laikipia Gubernatorial election was marred with irregularities and illegalities enough to vitiate the said elections, that this petition be allowed and the decisions of the High Court and Court of Appeal dated January 31, 2018 and July 31, 2018 respectively, be set aside and that the costs be awarded to the petitioner.

21. The petitioner also filed his Supplementary Record of Appeal dated September 13, 2018 on September 14, 2018 and further supplementary record of appeal dated September 20, 2018 on September 21, 2018. He also filed his submissions dated October 1, 2018 on even date.

(a) Petitioner's Submissions

22. On grounds 1, 2, 3 & 4, the petitioner submitted that the Court of Appeal found that it lacked jurisdiction in handling the dispute as concerning the nomination of the 2nd respondent. He submits that the court did have the jurisdiction to determine election disputes (*Ekuru Aukot v IEBC & 3 others* [2017] eKLR and *Cohens v Virginia*) and in particular, a nomination dispute (Kennedy Muoki v Rachel Kaki Nyamai & 2 others [2018] eKLR). Further on this issue, he also cites the case of *Raila Amolo Odinga v IEBC & 2 others* [*supra*] and Moses Mwicigi & others v IEBC Supreme Court Petition No 1 of 2017 in which the Court stated that an election is a process and not an event. He submits that the 2nd respondent was not qualified to vie as an independent candidate for the Gubernatorial seat in Laikipia County, and that the latter's participation was in violation of section 33(1) of the *Elections Act*, as read with articles 82 and 85 of the *Constitution*.

23. With regard to grounds 5 & 6 on irregularities, the petitioner submits that the Court failed to independently consider the allegations, and failed to adhere to the national values and principles of governance, transparency and accountability as enunciated under articles 10 of the *Constitution*. Further, it is submitted that the tenets of articles 81(e) and 86 of the *Constitution* were not complied with, as there were numerous inconsistencies and variances in almost all the polling stations, and that it was unfair for the Court to have failed to consider these variations. It was also submitted that the 1st respondent failed to provide Form 37D contrary to regulation 87(d)(d) *Elections (General Regulations)*, 2012 thus rendering the election null and void. That the petitioner challenged all the forms, but the trial Court did not consider all the forms in rendering its decision.

24. On grounds 7 & 8, the petitioner submits that he challenged the numerous interlocutory applications but the Court observed that there were no Notices of Appeal filed, and that the failure by the learned Judges to consider the interlocutory applications was not founded in law and therefore contrary to the provisions of articles 164(3), as read with articles 25, 50 and 159(2) of the *Constitution*. The petitioner also submits that the trial Court erred in failing to allow the petitioner to file further affidavits of further witnesses thereby adversely affecting the appellant's case, and was contrary to the provisions of rule 15(h) of the *Elections (Parliamentary & County) Rules*, 2017. The petitioner further submits that he was not served with a pre-trial direction notice on 18th September, 2017 and that all parties in the matter appeared in court, and that this was prejudicial upon the petitioner as he testified without the inclusion of other key witnesses.

25. On ground 9, the petitioner submits that he was denied the right to fair trial and therefore a violation of his rights under articles 10, 48, 50 and 159(2) of the *Constitution*. The petitioner argues that the trial Court, in awarding costs of ksh 125,000 to each of the respondents was inordinately excessive, and went against the tenets of rule 4(1) of the *Election (Parliamentary & County Elections) Rules*, 2017 as well as articles 22(2) & (3), 38(2) and 48 of the *Constitution*, and as held in *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] eKLR. It is further submitted that the provisions of rule 22(2), 24(1) and 24(6) of the *Elections (Parliamentary & County Elections) Rules* were not complied with, and therefore the withdrawal of the 2nd petitioner (before the trial Court) should not have been allowed, and that there was no justifiable reason as to why the annexed affidavits were expunged from the record. It is also submitted that the learned Judge should not have expunged the report on the sealing of the ballot boxes, as in essence, she was locking out vital evidence in support of the petition.

26. On grounds 10, 11 & 12, the petitioner submits that the evidence contained in the SD card that had been served on the petitioner by the 1st and 4th respondents contained information which showed that there were illegalities and irregularities that had been perpetrated at Sosian Ward, yet the appellant had not been afforded an opportunity, to cross examine the expert witness, or prepare himself for the trial.

27. With regard to ground 13, the petitioner submits that the learned Judges erred in asserting that he had not shown how the learned trial Judge erred in the interpretation or construction of the Constitution. He relies on the cases of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* [2014] eKLR and *Wavinya Ndeti & Another v IEBC & 2 others* [2018] eKLR in which this Court held that the provisions of section 85(A) of the *Elections Act* are not a blanket cover for the Appellate Court not to consider and address its mind to the grounds of appeal.

(b) 1st & 4th Respondents' Submissions

28. On 12th October, 2018, the 1st and 4th respondents filed their submissions dated 10th October, 2018 opposing the petition. The respondents contend that an appeal under the provisions of articles 163(4)(a) of the *Constitution* is restricted to cogent issues of controversy regarding the application and interpretation of the Constitution, and as such, this court can only be invited to intervene to clear the ambiguities, if any, and pronounce itself on the issues. Instead, what the petitioner has done, argue the respondents, is to, regurgitate the arguments in the petition presented before the court of Appeal for re-evaluation of evidence, which is not within the purview of this court. The respondents therefore urge that the jurisdiction of this court has not been properly invoked (*Gatirau Peter Munya v Dickson Mwenda Kithinji* [*supra*]) and that the grounds of appeal do not point out to the finding of the Court of Appeal in which the appellate Court's interpretation of the law is contrary to the provisions of the Constitution, or that the findings are illegal or perverse.

29. On the issues of standard and burden of proof, the 1st and 4th respondents submit that the learned Judges of Appeal, in analyzing the evidence submitted before the trial Court, correctly found that the petitioner had not discharged the legal burden of proof, and that the allegations before the Court remained as such, allegations. They rely on the cases of *Raila Odinga & 5 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR and *Musikari Nazi Kombo v Moses Masika Wetangula & 2 others* [2013] eKLR. They further submit that the petitioner raises unsubstantiated allegations of irregularities and illegalities, and which in any event, as was considered in *Gatirau Peter Munya v Dickson Kithinji Mwenda & 2 others* [*supra*], are occasioned by human imperfection and are not enough by themselves to vitiate an election.

30. On the issue of scrutiny, it is submitted that the Court of Appeal correctly observed that an application for scrutiny or recount is not granted as a matter of right, and a party making such application has to establish a basis for an Order to be issued by the court as was held in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* [2015] eKLR and that no basis had been laid and that both the trial and Appellate Courts findings were correct.

31. On the question of expunging of affidavits and substitution of witnesses, it is submitted that the affidavits were properly struck out as they were not sworn in accordance with Rule 12(3) of the *Elections (Parliamentary & County Elections) Petition Rules* 2017. As for the substitution of witnesses, it is the respondent's argument that, whether to allow or deny an application for substitution, is a discretion exercisable by the Court under rule 24(2) of the *Elections (Parliamentary & County Elections) Petition Rules*, which had in any event, not been challenged. It is also contended that the petitioner, could not apply to be substituted as a party in the petition as he was already a party, and that the court correctly

denied the application to file fresh affidavits after the close of pleadings (see *John Michael Njenga Mututho v Jane Njeri Wanjiku Kihara & others* [2008] eKLR).

32. On the eligibility of the 2nd respondent to contest as an independent candidate, it was submitted that the Court of Appeal correctly observed that the 2nd respondent had been cleared by the Registrar of Political Parties to contest for the gubernatorial seat, and that there was no lawful impediment to him contesting. It is further submitted, that the election court was divested of jurisdiction to consider matters that had been dealt with by the Political Parties Disputes Tribunal and/or the Dispute Resolution Committee.

33. On costs, the 1st and 4th respondents submit that it was a discretion of the court as provided for under section 84 of the *Elections Act*, and that the decision by the appellate Court to cap the costs at ksh 1, 500,000/-, was based on the decision in *Dickson Daniel Karaba v Kibiru Charles Reubenson* [*supra*], and that nonetheless, the same was not appealed against.

(c) The 2nd Respondent's Submissions

34. The 2nd respondent filed his submissions dated 11th October, 2018 on even date. On the issue of jurisdiction, he relies upon the decisions of this court in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another* SC Petition no 3 of 2012 and *Chris Munga Bichage v Richard Nyagaka Tongi & 2 others* Supreme Court Petition No 17 of 2014 to argue that this Court lacks jurisdiction under articles 163(4)(a) of the *Constitution* to hear and determine the instant appeal as it does not raise issues concerning either the application and/or interpretation of the Constitution.

35. On nomination of the 2nd respondent as an independent candidate, it is submitted that as of 9th May, 2017, he had been cleared to vie in the Laikipia County gubernatorial contest by the Registrar of Political Parties, and had therefore complied with the provisions of section 33 of the *Elections Act*. Any dispute as to his candidature, more so as regards his nomination, was to be settled by the Independent Electoral & Boundaries Commission as provided under articles 88(4)(e) of the *Constitution* as read with section 74(1) of the *Elections Act*. It is submitted that the Courts are not to entertain such disputes relating to nominations as there were properly constituted mechanisms to deal with such issues, and that the court would only intervene after proper procedures have been followed (*Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* Petition No 5 of 2016).

36. On the right to fair trial and fair hearing, it is submitted that the appellate Court considered the petitioners' oral and written submissions in its decision. The trial Court considered the interlocutory applications before rendering its decisions and the petitioner was therefore not denied any access to justice by their dismissal.

37. The 2nd respondent further contends that under articles 87(1) of the *Constitution*, an election Court has limited timelines within which to determine election petitions, and as such, may expedite the manner in which interlocutory applications, are heard and determined.

38. On the issue of irregularities, the 2nd respondent relies on the case of *Raila Odinga v Independent Electoral & Boundaries Commission & 3 others* [*supra*] in support of the contention, that the petitioner had not satisfied the "materiality test", to the effect that, the irregularities were of such a nature or magnitude as to substantially affect the results or integrity of the election.

39. On costs, the 2nd respondent relies on the case of *Ledama Ole Kina v Samuel Kuntai Tunai & 9 others* SC Petition no 16 of 2014 where this Court stated that the issue of costs does not ordinarily entail the application or interpretation of the Constitution and therefore, the Supreme Court has no jurisdiction

to determine it. It is therefore submitted that the costs awarded by the Court of Appeal, should not be varied or otherwise disturbed.

(d) The 3rd Respondent's Submissions

40. The 3rd respondent's submissions are on all fours with those by the 1st 2nd and 4threspondents, save that the former also takes issue with the length of the petitioner's written submissions, which run up-to forty three (43) pages, well beyond the maximum length of fifteen (15) pages, prescribed by rule 51(1) of the *Supreme Court Rules* 2012, a read with the *Supreme Court Practice Directions* of 2013.

C. Issues for Determination

41. Upon careful consideration of the grounds listed in the Petition of Appeal, the oral and written submissions by counsel for the parties, and the authorities cited in support thereof, we have formed the distinct view, that two issues clearly stand out for determination, in order to dispose of this Appeal. These are:

    1. Whether this court has jurisdiction to determine the Petition of Appeal

    2. Whether the Election Court has jurisdiction to determine pre-election disputes.

(i) On Jurisdiction

42. The petitioner herein, has invoked this court's jurisdiction under articles 163(4)(a) of the *Constitution*. This articles provides that appeals lie from the Court of Appeal to the Supreme Court "as of right in any case involving the interpretation or application of the Constitution." This Court has pronounced itself severally on its appellate jurisdiction under the said articles. In this regard, an appeal to this Court will not be sustainable unless it is demonstrated that it raises cogent issues of constitutional controversy. The appellant must be faulting the Court of Appeal's interpretation or application of the Constitution that informed the impugned Judgment. It is not enough for the appellant, to evolve grievances in the Memorandum of Appeal, in which he alleges violations of his rights, simply because he disagrees with the decision of the Court of Appeal. Nor will general references to Constitutional Provisions suffice, to bring an appeal within the ambit of articles 164(3)(a), if such provisions were not a basis of contestation at the Appellate Court.

43. Looking at the Petition of Appeal before us, it is difficult to see how it meets the threshold for admission under articles 163(4)(a) of the *Constitution*, save on one issue. We agree with the respondents herein, in their contention that, the Petitioner is re-arguing the appeal, which he had filed at the Court of Appeal in total disregard of the Constitution and the decisions of this Court. Indeed the Court of Appeal, in dismissing the appeal before it, was categorical that the same did not meet the criteria for such appeals under section 85 A of the *Elections Act*. The said section limits appeals from the High Court to matters of law only. We cannot agree more with the Appellate Court in this regard.

44. This then leads us to the second issue for determination and that is; whether an Election Court has jurisdiction to determine pre-election disputes, including those relating to the nomination of candidates. It is the petitioner's case that the 2ndrespondent herein was not qualified to vie as an Independent Candidate, and that his participation in the elections was contrary to the provisions of section 33(1) of the *Elections Act*.

D. Analysis

45. The question as to whether an election court has jurisdiction to determine pre-election disputes has fallen for determination with recurring frequency in the superior Courts. Two schools of thought have

emerged as the Courts grapple with this critical issue. On the one hand, there is the judicial strand that holds the notion that the establishment of other organs by the 2010 Constitution to address pre-election disputes, including those relating to nominations, divests an election Court of jurisdiction to determine the same. Towards this end, articles 88(4)(e) of the *Constitution* provides that the IEBC shall *inter alia*, be responsible for "the settlement of electoral disputes, relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results [emphasis added]. In the same vein, The Political Parties Disputes Tribunal is also vested with the mandate to determine and settle pre-election disputes. For purposes of our analysis, we shall refer to this strand as the Divestiture School.

46. On the other hand, there is the school of thought, which maintains that an election, being a process and not an event, means the same continues, until the declaration of results. This being the case, an election Court must satisfy itself that the election was at all times conducted in accordance with the tenets of the Constitution. The court cannot undertake such a task unless its jurisdiction including the power to look into pre-election disputes is preserved. We shall refer to this strand as the Preservative School.

47. None of these positions can be treated lightly, as each is anchored upon the best traditions of judicial inquiry. But as admirable as both of them are, the certainty of a recurrence of the same question, already so painstakingly navigated by the superior Courts is such that, in the interests of certainty, this court must now, in its usual humility, pronounce itself on the same with finality. In order to undertake this task from an informed position, we now embark upon a review of the decisions that have been handed down by the High Court and Court of Appeal, concerning this vexed matter.

(i) The Divestiture School

48. We here-below review the decisions, which represent the view that an election Court, is divested of jurisdiction to hear and determine pre-election disputes, relating to or arising from, the nomination of candidates.

(a) In *Republic v The Independent Electoral and Boundaries Commission Ex-parte Charles Ondari Chebet* (Nakuru High Court Judicial Review Application No 3 of 2013); The High Court (Emukule J.) held that where the Constitution establishes specific organs for the resolution of pre-election disputes, such mechanisms should be exhausted before the jurisdiction of Court is invoked. The learned judge rendered himself thus:

> "In summary therefore, I find and hold that where there is clear constitutional and statutory provision for resolution of disputes including qualification and nomination disputes this court's jurisdiction is precluded. This court's jurisdiction would only arise after the due exercise by the mandated bodies, the Returning Officer and the Commission of their statutory mandate" [Emphasis added].

(b) In both *Republic v The National Alliance Party of Kenya and Another Ex-Parte Dr Billy Elias Nyonge* Nrb Judicial Review 61 of 2013 [2013] eKLR; Lenaola J. (as he then was) and in *Diana Kethi Kilonzo and another v IEBC and others* Constitutional and Human Rights Division Petition No 359 of 2013 [2013] eKLR (Mwongo, Ngugi & Korir, JJ) the High Court addressed the meaning to be attached to articles 88(4)(e) of the *Constitution* and section 74(1) of the *Elections Act* respectively. The court concluded, that it is only the Commission that has the exclusive mandate to resolve any dispute in relation to the electoral nomination exercise; that it is only after that IEBC mechanism has been exhausted that a party may go to the High Court to challenge the process; and such challenge would be through invoking the supervisory jurisdiction of the court under articles 165(6) of the *Constitution*.

(c) In *Jared Odoyo Okello v Independent Electoral & Boundaries Commission (IEBC) & 3 others* Kisumu Election Petition No 1 of 2013 [2013] eKLR; Muchelule J, while declining to assume jurisdiction over a dispute that had arisen during the nomination of candidates in and election petition before him, stated:

> "In the instant case, the Commission's Dispute Resolution Committee heard the petitioner's challenge and dismissed it. The Committee was established under section 109 of the Act and the Rules of Procedure of Settlement of Disputes made thereunder and published *vide* Legal Notice no 139 of 3rd December 2012. The petitioner did not move to the High Court to challenge the determination by the Committee. This Court is an election Court which is not sitting to supervise the decision of the Committee. It is sitting to determine the validity of the election that was conducted on 4/3/13. The petitioner lost the opportunity to challenge the decision and cannot be heard to raise the issue here. In short, he cannot contest the validity of the nomination in this petition. " [Emphasis added].

(d) In *Isaiah Gichu Ndirangu & 2 others v Independent Electoral and Boundaries Commission & 4 others* Constitutional and Human Rights Division Petition no83 of 2015 [2016] eKLR, the petition revolved around the legality or otherwise of the nomination made in regard to an election for membership to the Nandi County Assembly. The respondents maintained that an election Court lacked jurisdiction to entertain the matter owing to the availability of the IEBC Disputes Resolution Committee and the Political Parties Disputes Tribunal. The Election Court held that it was not the appropriate forum for addressing pre-election disputes more specifically disputes on nomination. Lenaola J (as he then was) rendered himself thus:

> "I agree that indeed this Court has unlimited jurisdiction in civil and criminal matters and further the jurisdiction to determine the constitutionality of anything alleged to have been done under the Constitution. I also appreciate that articles 258 of the Constitution grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. I however take the view that Parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.
>
> I take the further view that the existence of articles 165 and 258 of the *Constitution* is not a substitute or a means of excluding such other dispute resolution organs and agencies from exercising their statutory duties." [Emphasis added].

(e) In *Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others* [2012] eKLR; Majanja, J. opined:

> "It is also my view that articles 88(4)(e) and section 74(1) of the *Elections Act*, 2011 provide for alternative modes of dispute resolution specific to the nomination process. This court cannot entertain nomination disputes where such a process has not been invoked or it has been demonstrated that the process has failed."

(f) In *Josiah Taraiya Kipelian Ole Kores v Dr David Ole Nkedienye & 3 others* Nrb Petition No 6 of 2013 [2013] eKLR, the Court was moved to determine the eligibility of the 2nd respondent

to vie as a Governor for Kajiado County. After the declaration of the results, the petitioner challenged the declaration, on grounds that the 2nd respondent was ineligible to contest in the election, as he did not possess a Degree from a recognized institution. In response to the allegation of ineligibility of the 2nd respondent, the 1st respondent contended that the 2nd respondent was duly qualified and that he possessed a Master's Degree from a recognized University. That the issue of the 2nd respondent's academic qualifications and his status as a Public Officer had been dealt with by the DRC in Dispute No 27 of 2013 *Jackson Tatao Pashile v Nina Daniel Mpute & 2 others* wherein the DRC held that there was no evidence to show that the 2nd respondent was not qualified to vie as a Deputy Governor or that he was a public servant as at the date of his nomination as was alleged by the complainant.

49. Mabeya, J declined to assume jurisdiction to determine matters relating to qualification and eligibility. The Learned Judge held, that the law does provide a detailed procedure for pre-election dispute resolution which must be followed and that it would be a usurpation of jurisdiction for the High Court as an election court to enquire into pre-election disputes which are the preserve of another body, the IEBC.

(g) In *Kennedy Moki v Rachel Kaki Nyamai, IEBC & Another* Kitui Election Petition No 2 of 2017 [2018] eKLR; one of the grounds in the petition cited pre-election malpractices, gross impunity, and breaches of law. The Petitioner faulted the 2nd and 3rd respondents for failure to comply with articles 82(1)(b) of the *Constitution* regarding nomination of candidates. Consequently, the petitioner prayed for a declaration that: the 1st respondent was not validly nominated as required by articles 99(1)(c) of the *Constitution* of Kenya, 2010 and was therefore ineligible to stand as a candidate.

50. In a Judgment dated 24th January, 2018 the High Court (Mutende J.) dismissed the petition, holding that it was the Commission (IEBC) that had the mandate to settle electoral disputes including disputes relating to or arising from nomination under section 74(1) of the *Elections Act*. The Learned Judge concluded that it had not been demonstrated that, the mechanisms laid down in law as provided by the Constitution and Statutes had been exhausted; therefore the court being an Election Court, could not descend into the arena and clothe itself with non-existent jurisdiction to determine the matter.

(h) In *Margaret Wanjiru Ireri & 2 others v Monica Gathoni & 4 others* Nyahururu Election Appeal No 13 of 2018 [2018] eKLR the issue involved an appeal from the Judgment of Hon Wanjala, Chief Magistrate, delivered on 27th February, 2018 sitting as an election Court under section 75(1A) of *Elections Act*, 2011. One of the grounds of appeal was that the Learned Magistrate erred in law by failing to appreciate that the dispute before her was a nomination dispute under articles 88(4)(e) of the *Constitution* and that the petitioners having failed to challenge the party list when they were invited to do so by the IEBC, could not later challenge the list by way of election petition. The court held that under articles 88(4)(e) of the *Constitution* and section 74 of the *Elections Act* nomination is a pre-election dispute and the Court is precluded from determining such disputes.

(i) Wendoh J. stated:

> "Flowing from the above provisions, the Constitution and Legislature set out to enact various laws on resolution of disputes relating to electoral matters and it is incumbent upon the political parties and their members to adhere to those procedures. There is now a host of authorities that have held that when the Constitution or legislature prescribes the manner in which a dispute should be

resolved, that procedure should be adhered to. In *Speaker of National Assembly v Hon. James Njenga Karume* CA 92/1992 (2008) I KLR 425, the court held "where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed...

It was a nomination dispute and it was the duty of the 1st and 2nd respondent to lodge their objection or dispute with IEBC within 7 days in accordance with articles 88(4)(e) and section 74(1) of *Elections Act*. By failing to file any complaint with the IEBC, the 1st and 2nd respondents forfeited their right to complain once the notices were gazetted. They could only approach this Court, after the IEBC had carried out its mandate " [Emphasis added].

(j) In *Alhad Adam Ahmed v Solomon Odanga Magembe alias Solomon Beatrice Saki Muli & 4 others* Nairobi RMC Election Petition no 14 of 2017 [2017] eKLR, the petitioner sought among other Orders, the quashing of the nomination of the 1st respondent by the Party of Democratic Unity, for being irregular and contrary to section 28 of the *Election Act*, as amended by section 10 of the Election Laws (Amendment) Act, 2017. A Preliminary Objection was raised challenging the court's jurisdiction, as the petition was based on alleged irregularities during nomination and or malpractice allegedly committed during the campaign period. The main point of objection was that these were pre-election issues on nomination and had nothing to do with the election. In his ruling, Hon. Juma held that;

> " the jurisdiction of an election Court is invoked on issues touching on the processes during the voting, vote counting, tallying and declaration of the results and not the pre-nomination and pre-election issues."

(k) In *Clement Kungu Waibara v Annie Wanjiku Kibeh & Another* Kiambu Election Petition No 1 of 2017 [2018] eKLR, one of the issues in the petition before the Election Court was whether the respondent had been validly nominated to contest as a member of Parliament, having continued to draw salaries and enjoy privileges as a nominated Member of the County Assembly of Kiambu until 8th August, 2017. In declining jurisdiction, the High Court, (Ngugi, J.) held that an election Court could not entertain disputes that had been reserved for other competent organs under the Constitution. The learned Judge stated:

> " My position has not changed. Where the Constitution or a Statute creates an alternative forum for resolving disputes, a party is bound to use it before coming to court. Such a party must demonstrate to the court that he has exhausted the other forum before the court agrees to seize jurisdiction. This is a doctrine of vintage judicial ancestry in Kenya (see *Speaker of National Assembly v Karume* [1992] KLR 21) from which I do not intend to depart.'

(l) In *Silverse Lisamula Anami & another v Independent Elecoral and Boundaries Commission & 2 section* Kakamega Election Petitions No 1 & 4 of 2017 [2018] eKLR, (now before this Court), the question before the court was whether an election court had jurisdiction to determine the validity of the nomination of the 3rd respondent by the Orange Democratic Movement Party to run for election. The High Court (Njagi, J) held, that it was the PPDT and the IEBC Disputes Resolution Committee that have the mandate to determine issues of nomination of candidates and any party dissatisfied with their decision should either file an appeal or seek a review with the High Court.

In the learned Judge's opinion, section 74(3) of the *Elections Act* 2011 requires IEBC to determine all disputes relating to nominations before the date of the date of the election in issue. This was for good order as it was meant to ensure that all disputes relating to nominations were finalized before elections are held.

(m) In *Albeity Hassan Abdalla v Indepentedent Electroal and Boundaries Commission (IEBC) & 3 others* Malindi Election Petition No 8 of 2017 [2018] eKLR, one of the grounds in the petition was that the petitioner had been denied his right to appoint agents as provided for under section 30 of the *Elections Act*, No 24 of 2011. A preliminary objection was raised contending that by its nature, the dispute was primarily pitted the petitioner against his political party (the 4th respondent) and as such, the same ought to have been referred to the Political Parties' Disputes Tribunal (PPDT) as per section 40(1)(b) of the *Political Parties Act* consequently, that the trial court lacked jurisdiction to determine the petition. By a judgment delivered on 9th February, 2018, the High Court, (Ongeri, J) held that the petitioner ought to have taken his dispute to the political parties dispute Resolution Tribunal since the said issue arose prior to the general elections. The Learned Judge stated:

> "I find that this is not the right forum for the dispute between the petitioner and the 4th respondent."

(ii) At The Court of Appeal

(a) The High Court decision in *Albeity Hassan Abdalla v Independent Electoral and Boundaries Commission (IEBC), Mohammed Adan Ali, Anuar Loitiptip & Wiper Democratic Movement Party* Malindi Election Petition Appeal no 2 of 2018 [2018] eKLR; was appealed to the Court of Appeal. One of the issues for determination before the Appellate Court was whether the trial Judge, sitting as an Election court had jurisdiction to hear and determine, the petition concerning allegations that the appellant had been denied an opportunity to appoint agents. In upholding the Election Court's decision declining jurisdiction, the learned Judges of Appeal (Visram, Karanja & Koome, JJA) stated:

> "It is trite that a court's jurisdiction is established by the Constitution and statutes, the question as to whether that jurisdiction may be exercised with regard to a particular dispute is determined by the nature of the dispute, which is in turn informed by the pleadings. In this case, the bulk of the appellant's petition was concerned with the issue of appointment of agents; and what he perceived as the failure by the 1st respondent to allow him appoint an agent on each of the polling stations to monitor the election. Consequently, in so far as the grievance regarding the appointment of the party agent is concerned, given that party agents were indeed appointed by the 4th respondent in terms of subsection (1) of section 30 of the *Elections Act*, the subsequent internal wrangles pertaining to that appointment were between the appellant and his political party (the 4th respondent) and ought to have been referred to the PPDT for resolution. As we dispose of this issue we also point out that it is trite law that where the law provides a resolution mechanism, the same should be strictly adhered to (see. *Speaker of National Assembly v Njenga Karume* [2008] eKLR 425."

(b) The Election Court decision in *Silverse Lisamula Anami & another v Independent Electoral and Boundaries Commission & 2 others* Kisumu Election Petition Appeal no 7 of 2018) [2018] eKLR; was appealed to the Court of Appeal. In upholding the Election Court's decision declining to assume

jurisdiction, the learned Judges of Appeal (Waki, Sichale & Otieno-Odek, JJA) rendered themselves thus:

> "It is our considered view that the election Court was divested of considering matters that had been dealt with by the PPDT and/or the DRC of the 1st respondent. One may as well imagine that if this was not the case, then litigation would be open ended and time lines to file an appeal and/or judicial review would be of no consequence as matters determined by the PPDT and/or DRC would later be urged in an election Court inspite of their determination in the PPDT and/or the DRC. Such a fluid situation will not augur well in the administration of justice. The issue that was before the 1strespondent's Disputes Resolution Committee was that the 3rd respondent was not a registered voter in Shinyalu Constituency. The DRC considered the complaint and dismissed it. No review or appeal was filed."

(a) The Preservative School

51. The following cases under review represent the school of thought, which maintains that despite the existence of alternative pre-election dispute resolution organs and mechanisms established by the Constitution, the election court is not divested of jurisdiction to determine the same.

(a) In *Kituo Cha Sheria v John Ndirangu Kariuki* [2013] eKLR; the Election Court (Kimondo, J) held that notwithstanding the existence of other dispute resolution procedures, the Court still retained jurisdiction to intervene in certain pre-election disputes. The Learned Judge wondered what for example would happen if by negligence or otherwise, a non-citizen was nominated for election and was elected. In such an eventuality concluded the Learned Judge, it would be perfectly in order for the court to right the wrong. The Learned Judge cited with approval and applied the reasoning in *Luka Lubwayo & another v Gerald Otieno Kajwang & Anor* [2013] eKLR to the effect that articles 105(1)(a) of the *Constitution* appeared to widen the scope of the Court's jurisdiction in a petition to determine whether a person had been validly elected as a Member of Parliament to include the validity of a nomination. That nominations or determinations of qualification to run are part of the "continuum" consisting in "a plurality of stages" that make up an election as expressed by the Supreme Court in Advisory Opinion No 2 of 2012 In The Matter of the Gender Representation in the National Assembly and Senate.

(b) In *Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 section* Election Petition No 14 of 2017 [2018] eKLR following the declaration of the 1st respondent as the Governor of Wajir County in the August 8th, 2017 general election, a petition was filed before the High Court in Nairobi seeking the nullification of the appellant's elections. One of the grounds of the petition was that the 1strespondent was not constitutionally and statutorily qualified to contest the Governor's seat as he did not satisfy the requirements of section 22(2) of the *Elections Act*, 2011 in that, the degree certificate from Kampala University submitted in support of his nomination to the 3rd respondent was a fraud.

A Preliminary Objection challenging the Court's jurisdiction was raised. The main point of objection was that the issue before the Court was a pre-election dispute, which ought to have

been resolved by the IEBC. The Court (Mabeya, J), in a Judgment dated 12th January, 2018, held that it had jurisdiction to determine the dispute. The Learned Judge states:

> " It is clear from the foregoing that the term 'election' does not refer to the single event that occurs on the voting day, but to a long process of electing leaders. In my view therefore, the term election in section 75 of the *Elections Act* means, the entire electoral process commencing with the registration of voters up to the declaration of results.
>
> That being the case, the meaning to be given to section 75 is that, the election court has the jurisdiction to determine a question as to the validity of the electoral process leading to the return of a person as a governor... Accordingly, a question as to the legal sufficiency of an election is not to be restricted only to the day of election. The Election Court has the jurisdiction to audit the entire process provided the issue has been raised in the election petition" [Emphasis added].

The court proceeded to hold that the 1st respondent was not validly cleared to vie for the seat of Governor for Wajir County as he did not possess the educational qualifications.

(c) In *Armstrong Mwandoo Kiwoi & another v Granton Graham Samboja & 7 others* HC at Voi Election Petition no 1 of 2017 [2018] eKLR, the petitioner sought to authenticate the academic qualifications of the 1st respondent in the Gubernatorial race for Taita-Taveta County. The 1st respondent by way of a Preliminary Objection contended that the Petition was a premature invocation of articles 165(3)(d)(iii) and 258 of the *Constitution*, which give the High Court jurisdiction to act. It was the respondent's contention that by dint of articles 82(1)(b) and 88(4)(d),(e) and (k) of the *Constitution*, the appropriate body with the authority to investigate and authenticate academic qualifications of the 1st respondent in the Gubernatorial race was the IEBC and not the Election Court.

The court,(Ogola J) held that once a candidate is declared a winner in an election, the declaration terminates the mandate of the returning officer and the 2nd respondent, which in turn shifts the jurisdiction as regards the election outcome to the Election Court. The court found that it was clothed with the requisite jurisdiction to investigate all aspects of the election in order to determine whether the 1st Respondent was validly elected.

(d) In *Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others* Nakuru Election Petition no 12 of 2013; [2013] eKLR one of the issues in the petition was whether an Election Court had jurisdiction to hear and determine pre-election disputes. The Court (Emukule, J.) held that the Court had jurisdiction to entertain such disputes., The learned Judge stated:

> " an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results.... The concept of free and fair elections is expressed not only on the voting day but throughout the election process.... Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.' He further held that, "Therefore, where a matter raised in an election petition filed after the declaration of the results is one which should, properly have been raised earlier and determined by another body then the Court lacks jurisdiction to determine in the course of an Election Petition.

> The only exception is, where there is a breach of a mandatory provision of the law – for example the registration and election of a non-citizen. Though the power to disqualify such a candidate rests with the 3rd respondent, the court would interfere to right the wrong on the grounds of illegality" [Emphasis added].

(iii) At the Court of Appeal

(a) The decision in *Kennedy Moki v Rachel Kaki Nyamai & 2 others* Nrb Election Petition Appeal No 4 of 2018 [2018] eKLR; in which the Election Court had declined to assume jurisdiction, was appealed to the Court of Appeal. In overturning the High Court, the Appellate Court (Ouko, Murgor & Otieno-Odek, JJA) held that, the provisions of articles 88(4)(e) of the *Constitution*, and section 74(1) of the *Election Act*, could not oust the jurisdiction of an Election Court to determine pre-election disputes. In the learned Judges' view, a nomination dispute that goes to the root of the electoral process, or one that determines qualification and eligibility of a candidate to vie, is an issue of substance that goes to the root of the election. In such a situation opined the learned Judges, an election Court would retain its jurisdiction to hear and determine the dispute.

(b) The Appellate Court further held that an election Court, is a court with special jurisdiction and availability of alternative dispute resolution mechanisms and remedies under general law should not be a bar to remedies and procedures under the electoral law. Finally, the Appellate Court held that where the Constitution provides for two or three methods of resolving disputes, none can exclude the other; and therefore in such cases, the decision of the forum that has constitutional finality in resolving the dispute and cause of action prevails.

(c) The decision of the High Court in *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 others*; was appealed to the Court of Appeal. In upholding the decision of the Election Court wherein in assumed jurisdiction, the learned Judges of Appeal (Waki, Makhandia & Kiage, JJA) stated:

> " There is a substantial body of law that is quite categorical and authoritative that an election is a process and not an event and that being so, the High Court, as an election Court is possessed of jurisdiction to enquire into matters of nomination...
>
> On the basis of law and plain common sense, we are fully persuaded that an election court has jurisdiction to enquire into a question as to the qualification of a candidate which goes to his eligibility to vie in cases such as was before the learned Judge where the matter had not been dealt with finality by any other body constitutionally or statutorily mandated to do so. The learned Judge, committed no error holding that he had jurisdiction. He had."

(d) The decision of the High Court in *Annie Wanjiku Kibeh v Clement Kungu Waibara & Another* was appealed to the Court of Appeal in Nrb Election Petition Appeal no 20 of 2018 [2018] eKLR. In overturning the High Court wherein the latter had declined jurisdiction the learned Judges of Appeal (Nambuye, Gatembu & Murgor, JJA) rendered themselves thus: while determining an appeal challenging the election Court's refusal to assume jurisdiction to hear pre-election disputes held thus;

> " Concerning the question of whether the court had jurisdiction, we are of the view that the election court was wrong in declining jurisdiction in respect of the issue of the appellant's qualification.'
>
> > "Convinced that election is a process which includes nomination of candidates, we take the view that subject to finality and constitutional time lines of the jurisdiction of other competent organs, an election court has jurisdiction to hear

and determine pre-election nomination disputes if such dispute goes to eligibility and qualification to vie and contest in an election. If a nomination certificate is issued to a person who is neither qualified nor eligible to vie in an election, the Certificate is not conclusive proof of eligibility and qualification to vie. If a dispute arises as to the validity of such a certificate and eligibility to vie, an election court has jurisdiction to determine the validity of the nomination certificate and the eligibility to vie of the person bearing the certificate."

(iv) The Supreme Court Position

52. Although the Supreme Court is yet to pronounce itself specifically, on whether an election court has jurisdiction to determine pre-election disputes, including those related to or arising from nominations, it had occasion to address the mandate of the Independent Electoral and Boundaries Commission under articles 88(4)(e) of the *Constitution* in *George Mike Wanjohi v Steven Kariuki & 2 others* [2014] eKLR. The question was whether the Returning Officer, having announced the results of an election, and issued the requisite Form 38 to the declared winner, could thereafter cancel the same, and issue a different Form 38 to a different candidate, in the same election. The Court held that any dispute arising after the declaration of results and issuance of Form 38, being a post-election dispute, fell outside the mandate of IEBC, and could only be resolved by an election Court. At Para: 90 the Court stated:

> "...Once the election results have been declared, any dispute that has to do with the electoral process, then shifts from the electoral body, the IEBC, to the Judiciary....In light of articles 88(4)(e) of the *Constitution*, section 74(1) of the *Elections Act* and the decision in the Joho case, we hold that the jurisdiction of the 3rd Respondent ended at the time the Returning Officer issued the Certificate in Form 38, on 6th March, 2013; and no alteration could be made by its officers. Any disputes arising from the declaration, could only be determined by the Election Court." (Emphasis Added).

53. The court was alive to the mandate of the IEBC under articles 88(4)(e) of the *Constitution*, even as it found fault, with the latter assuming jurisdiction that properly belonged to an election court. At Para: 108 the court stated:

> "Elections are conducted, managed and supervised by the IEBC pursuant to its mandate under articles 88 of the *Constitution*. articles 88(4)(e) deals with the settlement of electoral disputes, which include disputes from nominations, but exclude election petitions and disputes subsequent to the declaration of results. This is restated in section 4 of the *IEBC Act*, no 9 of 2011 and section 88(4)(e) of the *Elections Act*." [Emphasis Added].

E. In Perspective

54. In the instant appeal, the petitioner questions the different treatment accorded to him on the question of whether an Election Court has jurisdiction to determine disputes relating to or arising from nominations. It is the petitioner's contention that the Court of Appeal departed (to his disadvantage) from its earlier holding in *Mohamed Abdi Mohamud* wherein the Court assumed jurisdiction over a similar dispute. However in the petition now before us, the learned Judges of Appeal stated:

> "In our view, the appellant should have pursued the available dispute resolution mechanisms as stipulated by the Constitution and statutes. If he was still aggrieved with the outcome of the appeal (No 10 of 2017), then he should have explored other legal channels such as Judicial Review or appeals. We hold the view that the unresolved issues arising before an

election is not within the preserve of an election Court. In our view, the Judge was correct in refusing to reopen issues arising before the election as that had been dealt with by other dispute resolution mechanisms."

55. The petitioner consequently feels treated unfairly by the Appellate Court in its application of what appears to him to be a double standard regarding a similar issue.

56. In resolving this question, the starting point must always be the Constitution; to wit, articles 88(4)(e), which provides that: the Independent Electoral and Boundaries Commission is *inter alia* responsible for:

> "the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results." [Emphasis added].

57. Section 74(1) of the *Elections Act* provides:

> Pursuant to articles 88(4)(e) of the *Constitution*, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.

58. Needless to state, the foregoing section is a replica, nay, a derivative, of articles 88(4(e) of the *Constitution*. Together, these provisions constitute the normative architecture for the resolution of pre-election disputes including those arising from nominations. This framework for dispute resolution came into existence after the promulgation of the 2010 Constitution. Prior to this, the jurisdiction to determine pre-election disputes, lay with the High Court sitting as an Election Court.

59. It is clear to us that the Constitution of 2010 and the resultant electoral law, deliberately set out, to delimit the institutional competencies for the settlement of all electoral disputes. In this regard, it donated jurisdictional authority to different judicial and quasi- judicial organs. The Supreme Court was vested with original and exclusive jurisdiction to determine petitions relating to the election of a President. The Court of Appeal has jurisdiction to determine appeals from the High Court on points of law, the High Court has original jurisdiction to determine petitions relating to the election of Governor, Senator, Member of Parliament, and Women Representative. The Resident Magistrates Court has jurisdiction to determine petitions relating to the election of Member of County Assembly with appeals there from to the High Court on points of law only.

60. Coming to pre-election disputes, including disputes relating to, or arising from nominations, the Constitution is clear. These are to be resolved by the IEBC (through its Committee on Dispute Resolution as provided for by section 12 of the enabling Act) or where applicable, by the Political Parties Disputes Tribunal. Where the Constitution or any other law establishes an organ, with a clear mandate for the resolution of a given genre of disputes, no other body can lawfully usurp such power, nor can it append such organ from the pedestal of execution of its mandate. To hold otherwise, would be to render the constitutional provision inoperable, a territory into which no judicial tribunal, however daring, would dare to fly.

61. That an election is a process, a continuum, which begins from the registration of voters right up to the declaration of results, is a truism. But this fact is not in itself capable of conferring jurisdiction on an Election Court, to inquire into the entire electoral process. Again, while we agree with the assertion that an election is a process, in the context of dispute resolution, it must be a structured process. That is why, the framers of the 2010 Constitution, were mindful of the need, for a clear roadmap for the

resolution of disputes along this continuum. Hence those disputes that arise before an election are to be resolved by the organs established for that purpose. By the same token, those that arise, during and after the elections, are reserved for the Election Court. Indeed, the "Election Court" itself, comes into real existence, after the elections proper. It is for this reason that the Constitution restricts every organ to its operational sphere. Hence, the IEBC is only responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. The latter are definitely a preserve of the Election Court, which means that the former, are a preserve of the IEBC or the PPDT as the case may be. This in our view is what this Court held in *George Mike Wanjohi v Steven Kariuki* [*supra*].

62. We are also in total agreement with the assertion that disputes relating to nominations or eligibility go to the root of an election. However, as we have observed elsewhere, this fact does not confer jurisdiction on an Election Court to determine "nomination related" disputes, precisely because, "these disputes" are reserved for the IEBC by articles 88(4)(e) of the *Constitution*. An Election Court ought not to trample upon the electoral process like a colossus, in the face of clear and unambiguous provisions of the Constitution regarding its jurisdiction.

63. Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in *Geoffrey Muthinja Kabiru & 2 others*; [2015] eKLR; wherein the Appellate Court observed:

> " It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts."

64. Our foregoing conclusion regarding the various institutional mandates relating to pre-election disputes, should on the face of it, resolve the conflicting strands of judicial opinion. However, as we observed earlier, each of these schools of thought is borne out of the best traditions of judicial inquiry, and none can be dismissed lightly. Such traditions for example require courts of law to interpret the Constitution holistically and purposively. They also remind us that, the constitution is a living charter, which is always speaking, and in interpreting any of its provisions, a court of law must keep in mind that, the constitution cannot subvert itself. Towards this end, every constitutional provision supports the other, and none can be read so as to render another inoperable.

65. It is in this regard that the preservative school maintains that while the IEBC has an undoubted mandate to resolve pre-election disputes, including those relating to and arising from nominations, an election court nonetheless, retains the jurisdiction to look into similar disputes. The proponents of this argument rely on articles 105(1) of the *Constitution*. This provision, in their view mandates the High Court to determine any question whether a person has been validly elected. It provides:

> " The High Court shall hear and determine any question whether -
>
> (a) a person has been validly elected as a member of Parliament."

articles 105 deals with the election of a Member of Parliament. As for gubernatorial elections, the relevant provision is section 75(1) of the *Elections Act*. It provides:

> " A question as to validity (sic) of a county election shall be determined by High Court (sic) within the county or nearest to the county."

66. It is their argument that, since the validity of an election may at the end of the day, turn on the question as to whether a person was qualified to vie in the first place, an election court cannot disregard such a question. What is not clear however, is given the provisions of articles 88(4)(e), is when such jurisdiction arises and when it ends.

67. In our perception, this conflict cannot be resolved by either, out-rightly discounting one school of thought or wholly embracing the other. What is critical is the need to harmonize these well-reasoned opinions so as to give effect to both articles 88(4)(e), and 105(1)(a) of the *Constitution* as read with section 75(1) of the *Elections Act*. Doing so would be to stay faithful to the edict that a constitution must be interpreted purposively and holistically.

68. It is undeniable that the mandate of resolving pre-election disputes as provided for in articles 88(4)(e) of the *Constitution* and affirmed by this Court in *Mike Wanjohi v IEBC* (*supra*), lies with the IEBC. By the same token, it is also true that the main issue for determining the validity of an election may turn on whether a person, ought to have been nominated in the first place. The implication in such a situation is that, an election Court retains a jurisdictional residuum from which it may draw, to determine the said question in certain exceptional circumstances.

69. So what is the interface between articles 88(4)(e) and articles 105(1) of the *Constitution* as read with section 75(1) of the *Elections Act*? How should we approach these provisions so as, instead of rendering any of them inoperable, we strengthen the scheme of electoral dispute resolution? The starting point in our view is to recognize the mandate of the IEBC or any other Organ such as the PPDT, of resolving pre-election disputes, including those relating to or arising from nominations, whether such disputes revolve around the qualification of a candidate or otherwise. The next logical step is to ensure that an election court or the judicial process for that matter is not helpless when faced with a critical factor to determine the validity of an election. This twin approach ensures that articles 88(4)(e) of the *Constitution* is not rendered inoperable while at the same time preserving the efficacy and functionality of an election court under articles 105 of the *Constitution*. To achieve this noble objective, we think that now is the time to issue certain guiding principles.

(i) All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.

(ii) Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under articles 165(3) and (6) of the *Constitution*, such dispute shall not be a ground in a petition to the election Court.

(iii) Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under articles 165(3) and (6) of the *Constitution*. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.

(iv) Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.

(v) The action or inaction in (4) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under articles 165(3) and (6) of the *Constitution*, even after the determination of an election petition.

(vi) In determining the validity of an election under articles 105 of the *Constitution* or section 75(1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.

70. Guided by the foregoing principles, we now turn to the case before us. The record shows that the Jubilee Party held its party nominations on 26th April 2017 in all three constituencies in Laikipia County (Laikipia West, Laikipia East and Laikipia North). The contestants in the gubernatorial nominations were, Josua Wakahora Irungu (the then incumbent governor), Ndiritu Muriithi, Sam Thuita Mwangi, James Mathenge, Gitonga Kabugi and Richard Mburu Kamau.

71. On completion of the nomination exercise, Josua Wakahora Irungu was declared the winner having garnered 40,983 votes, against Ndiritu Muriithi's 30, 586 votes and Sam Thuita's 16, 024 votes. However, aggrieved by the declaration, Ndiritu Muriithi and Sam Thuita Mwangi filed a complaint to the Jubilee Party National Elections Appeals Tribunal (JPNEAT) contesting the declaration on grounds of irregularities and other malpractices.

72. The Tribunal however did not annul the entire Jubilee party gubernatorial nominations for Laikipia county, but relied on the doctrines of necessity and materiality to nullify only the results of Laikipia North constituency. It also directed the National Elections Board (NEB) to issue a certificate to Ndiritu Muriithi, who as per its record had won in Laikipia East and Laikipia West constituencies.

73. Aggrieved by the cancellation of his nomination, Joshua Wakahora Irungu (the Complainant) moved the PPDT *vide* complaint Number 62 of 2017, *Joshua Wakahora Irungu v Jubilee Party & Another* [2017] eKLR.

74. He sought the following three main Orders, that:

(a) The decision, if any, made by the 1st respondent on 3rd May, 2017 be tendered to this Tribunal and served upon the parties.

(b) The Complainant be declared as the duly nominated candidate to vie for the position of the Governor Laikipia County under the Jubilee Party ticket.

(c) The 1st respondent be directed to issue a Certificate to the Complainant and the duly nominated candidate to vie for the position of governor Laikipia County on the Jubilee Party Ticket.

75. In support of the main complaint, it was urged that the cancellation of results for Laikipia North constituency and upholding of nomination results in the other two constituencies, was a violation of rule 28 of *party's Election Nomination Rules*. The said rule provides that a National Elections Appeal Tribunal can only either nullify an entire election, or declare a winner, depending on the evidence placed before it.

76. Ndiritu Muriithi (2nd respondent) filed his replying affidavit deponed to on 5th May 2017, and the Jubilee Party (1st respondent) filed its grounds of opposition on 6th May 2017. The two respondents defended JPNEAT's decision and argued that they had proven irregularities and malpractices warranting nullification of the results in Laikipia North constituency. The 2nd respondent in addition urged that the complainant had not exhausted the Party's internal dispute resolution mechanism set out under rule 28(4) of the party's Election Nomination Rules.

77. Three issues for determination arose in this matter:

(a) Whether the cancellation of the results of Laikipia North Constituency was proper and in accordance with the law.

(b) Whether the Complainant should be declared the winner of the nomination for the position of Governor Laikipia County.

(c) What reliefs ought to be issued?

78. In its decision dated 8th May, 2017 the PPDT found that JPNEAT could not conclusively determine a winner in a County comprised of three constituencies by disregarding the results in one constituency.

79. The tribunal agreed with the complainant's argument that the decision by JPNEAT was a nullity as it disenfranchised voters in Laikipia North constituency in contravention of articles 38 of the Constitution. The Tribunal ordered the Jubilee Party to issue the Complainant with a final Nomination Certificate.

80. Aggrieved by the entire holding by the PPDT, Ndiritu Muriithi (2nd Respondent herein) and 299 section filed Election Petition Appeal No 10 of 2017 *Sammy Kilukei & 300 others v Jubilee Party & Another* [2017] eKLR They preferred 17 grounds of appeal, the contents of which are detailed in the record. The appellants sought orders that:

(i) The appeal be allowed;

(ii) Judgment and orders by PPDT in Complaint No 62 of 2017 be set aside and the decision by JPNEAT be affirmed;

(iii) An injunction restraining the 1st respondent from forwarding the name of the 2nd respondent as its candidate to IEBC and further restraining IEBC form accepting the nomination certificate from the 1st respondent; and

(iv) In the alternative and without prejudice to prayers above, IEBC be directed to extend time within which the 2nd respondent can be cleared to run as an independent candidate.

81. A Preliminary Objection was raised by the 2nd respondent challenging the appellant's capacity to maintain the appeal. It was argued that the appellant had subsequent to filing the appeal resigned as a member of the Jubilee Party and was seeking to contest as an independent candidate. In support of this argument, the 2nd respondent attached letters from the Registrar Political Parties. The Appellant did not challenge this factual position.

82. In his Judgment dated 10th May 2017, Muchelule J dismissed the appeal for being incompetent. The learned Judge stated:

> " My view of the matter is that, the sworn statement by the 2nd respondent as supported by the letters from the Registrar of Political Parties, and especially when considered that the letter dated 8th May 2017 was addressed to the 2nd appellant, provided sufficient factual basis for

this court to find that the 2nd appellant was no longer a member of the Jubilee Party, and that he had been cleared by the Registrar of Political Parties to contest the governor's position in Laikipia County as an independent candidate"

83. The court proceeded to hold that the basis upon which, one could complain about a decision of a political party and its dispute resolution mechanism, was if one was a member of that party. That it was only on the basis of that membership that an individual could participate in the nominations called by the affected party, and, if aggrieved, could appeal to the PPDT for a remedy.

84. From this chronology of events, it is clear that the only dispute between the parties arose out of the nominations of the Jubilee Party. This dispute was litigated right from the Party's own dispute resolution mechanism up-to the High Court sitting as a judicial review Court. The High Court decided in favour of Mr. Wakahora Irungu thus effectively handing the latter the Jubilee ticket to contest in the ensuing general election. Ironically, the Appeal by Mr Muriithi (the 2nd Respondent herein) was dismissed following a Preliminary Objection to the effect that he was no longer a member of the Jubilee Party, having decided to run as an independent candidate.

85. The only time the issue of the 2nd respondent's independent candidature came up was in his Memorandum of Appeal dated 9th May, 2017 in Election Appeal No 10 of 2017. In the said memorandum of appeal, he had prayed in the alternative, for an Order, directing IEBC to extend time within which, he could be cleared to run as an independent candidate.

86. Accordingly, the question as to the validity of the 2nd respondent's independent candidature, only arose in Election Petition no 2 of 2017, filed in the High Court challenging the declaration of the former as the Governor Elect for Laikipia County on 11th August, 2017. This issue was neither canvassed at the IEBC or the PPDT. The fact that the 2nd respondent had decided to contest the ensuing election as an independent candidate, was definitely known to the petitioner, since it was the basis of the Preliminary Objection in Election Petition No 10 of 2017. The petitioner having been the Chief Agent for the Jubilee Party for Laikipia East Constituency knew all along or ought to have known that the 2nd respondent had quit the party and would be contesting the ensuing election as an independent candidate. With this knowledge, he chose not to challenge the validity of the independent candidature at the appropriate forum.

87. It follows that we agree with the Court of Appeal to the effect that the appellant/petitioner herein, should have pursued the available dispute resolution mechanisms in accordance with the Constitution and applicable Statutes, instead of originating his grievance at the Election Court.

F. CONCURRING OPINION OF DK MARAGA, CJ & P

88. I have had the advantage of reading in draft the majority Judgment in this appeal. While I agree with the rest of the majority Judgment and final Orders, I would like to say something about the election court's jurisdiction to entertain a pre-election nomination dispute. This first arose in Election Petition no 2 of 2017 at the Nanyuki High Court.

89. After failing to secure Jubilee Party's nomination as its Nanyuki County Gubernatorial contest flag bearer, on 8th May 2017, the 2nd respondent resigned from membership of that party and on the same day got the Registrar of Political Parties to clear him to vie in that election as an independent candidate.

90. In the ensuing election, the 2nd respondent was on 11th August, 2017 declared the Governor elect for Laikipia County. Aggrieved by that declaration, the appellant herein filed the said Election Petition No 2 of 2017 at the Nanyuki High Court on a myriad of grounds, inter alia, on the ground that the 2nd respondent was not qualified to vie in the election as he had not ceased to be a member of a political

party for a period of "at least three months preceding the date of the election", as required by both articles 85(a) of the *Constitution* and section 33(1)(a) of the *Elections Act*.

91. After hearing the petition, the High Court dismissed that ground holding that by dint of articles 88(4)(e) it is IEBC which had jurisdiction to resolve the dispute and not the High. The appellant raised the same issue in his appeal to the Court of Appeal against that decision. In its Judgment dated 31st July, 2018 the Court of Appeal affirmed the High Court decision and dismissed that ground holding that the election Court has no jurisdiction to entertain "issues arising before elections."

92. Still dissatisfied, the appellant has further appealed to this Court and raised the same issue of the 2nd respondent's ineligibility to vie in the election as one of his grounds of appeal arguing in his submissions that contrary to section 33(1) of the *Elections Act*, as read with articles 82 and 85 of the *Constitution*, the 2nd respondent was not qualified to vie as an independent candidate for the gubernatorial seat in Laikipia County.

93. On my part, I find that the High Court erred in declining jurisdiction to determine the issue and the Court of Appeal equally erred in affirming that High Court on that point. As I argued in the Wajir Case:

> "IEBC has unquestionable jurisdiction under articles 88(4)(4) to determine pre-election nomination disputes. It has exclusive jurisdiction to determine with finality, subject to appeal or judicial review, all intra-party nomination disputes. However, a holistic, and as required by articles 259, harmonized interpretation of articles 81, 85, 86, 88, 99, 105, 137, 140 and 193 of the *Constitution* read together with Sections 75 and 83 of the *Elections Act*, leaves me in doubt that the election Courts also have jurisdiction to determine pre-election nomination disputes which go into the root of an election, especially those that IEBC had not determined on merit like the one giving rise to this appeal."

94. The matters which go into the root of election are pre-requisites spelt out in the Constitution including a degree from a University recognized in Kenya as the minimum academic qualification for election as a County Governor as prescribed by articles 180(2) and 193(1)(b) read together with section 22(2) of the *Elections Act*; and being a registered voter, nominated by a political party or as an independent candidate, is of sound mind and is not an un-discharged bankrupt as required by articles 99 of the *Constitution*.

95. In this case, the issue was whether the 2nd respondent had ceased to be a member of a political party for a period of three months preceding the date of the election in question as required by articles 85(a) as read with section 33(1)() of the *Elections Act*. Being a constitutional requirement, on the basis of the criteria I have stated above, that is a matter that went into the root of the Laikipia County gubernatorial election. As such I find that the High Court, as the election Court, had jurisdiction to entertain it.

96. However, even if the High Court assumed jurisdiction and entertained it, it would have dismissed this ground for the simple reason that the 2nd respondent, having resigned from membership of Jubilee Party on May 8, 2017, had ceased to be a member of a political party for a period of at least three months prior to the August 8, 2017 general election.

97. For these reasons, I concur with the majority decision.

G. Conclusion and Orders of the Court

98. On the basis of the principles we have set out regarding the mandates of the IEBC, PPDT and the Election Court relating to pre-election disputes, including those relating to or arising from

nominations, it goes without doubt that both the Election Court and the Court of Appeal rightly declined to assume jurisdiction challenging the nomination of the 2nd respondent as an independent candidate. In the result, this Appeal must be disallowed.

(i) The Petition of Appeal dated 6th September, 2018 is hereby dismissed.

(ii) The Judgment of the Court of Appeal dated 31st July, 2018 is hereby upheld.

(iii) For the avoidance of doubt, the declaration of the result of the election by the Independent Electoral and Boundaries Commission in respect of Governor for Laikipia County is hereby upheld.

(iv) The petitioner/appellant herein shall bear the costs of this Appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF FEBRUARY, 2019.

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D.K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA