Karua v Independent Electoral and Boundaries Commission & 3 others (Petition 3 of 2019) [2019] KESC 26 (KLR) (Election Petitions) (6 August 2019) (Judgment)

Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 others [2019] eKLR

Neutral citation: [2019] KESC 26 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

ELECTION PETITIONS

PETITION 3 OF 2019

DK MARAGA, CJ & P, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

AUGUST 6, 2019

BETWEEN

HON MARTHA WANGARI KARUA ..... PETITIONER

AND

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

SEKI LEMPAKA ..... 2ND RESPONDENT

HON. ANNE WAIGURU ..... 3RD RESPONDENT

HON. PETER NDAMBIRI ..... 4TH RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal at Nyeri (Nambuye, Okwengu & Gatembu JJ.A) in Election Appeal No. 12 of 2018 delivered on 20th December, 2018)

Supreme Court issues proposals/guidelines to remedy denial of substantive justice due to impeding court process in light of strict timelines for settlement of electoral disputes

Reported by Ian Kiptoo

Electoral Law *– elections - electoral dispute settlement – time frame for settling of electoral disputes – where Court of Appeal decision reinstating a petition caused a 9 month delay in filing a petition - whether a court could extend the time provided for settlement of electoral disputes - what were the proposals/guidelines that sought to remedy denial of substantive justice due to impeding court process in light of strict timelines for settlement of electoral disputes – Constitution of Kenya, articles 87 (1) and 105 (2).*

Jurisdiction *– jurisdiction of the Supreme Court – appellate jurisdiction of the Supreme Court – where a party did not specify the constitutional provision through which to move the Supreme Court – where rule 9 and 33 of the*

Supreme Court Rules did not make specific reference to any particular jurisdiction of the Court - whether a party invoking the jurisdiction of the Supreme Court had to specify the constitutional provision through which it moved the court – Constitution of Kenya, articles, 50, 87 and 164 (4) (a); Supreme Court Rules, 2012, rules 9 and 33.

Brief facts

The appeal sought to set aside the judgment and orders of the Court of Appeal which dismissed the appellant's appeal thus upholding the election of the 3rd and 4th respondents as the Governor and Deputy Governor of Kirinyaga County on the grounds that: the Court of Appeal erred in interpreting article 50 of the Constitution of Kenya, 2010 (Constitution) on the right to fair trial, by upholding the rejection of the electronic evidence contained in a mobile device (a phone) belonging to one of the petitioner's witnesses; that article 87 of the Constitution was intended to prevent delay but not to abrogate a litigant's right to access justice.

On the other hand, the respondents contended that: the petitioner's video evidence was properly excluded as it was not produced as evidence within the correct rules of procedure; that the Court of Appeal was properly guided by holding that settling electoral disputes within the constitutionally provided timeframes undertaken after the expiry of the 6 months were a nullity.

Issues

i. Whether a party invoking the jurisdiction of the Supreme Court had to specify the constitutional provision through which it moved the court.
ii. Whether a court could extend the time provided for settlement of electoral disputes.
iii. What were the proposals/guidelines that sought to remedy denial of substantive justice due to impeding court process in light of strict timelines for settlement of electoral disputes?

Relevant provisions of the Law

Constitution of Kenya

Article 87 - Electoral disputes

(1) *Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*

Elections Act (cap 7)

Section 75 - County election petitions

(1) A question as to validity of an election of a county Governor shall be determined by High Court within the county or nearest to the county.

(1A) ...

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

Held

1. The need to specify the constitutional provision through which one moved the court flowed from the fact that not every appeal from the Court of Appeal was appealable to the Supreme Court. Appeals were limited by article 163(4) of the Constitution of Kenya, 2010 (Constitution), which categorised them either as of right or upon certification that a matter of general public importance was involved. Therefore, the court's jurisdiction had to be invoked within the confines of that constitutional provision.
2. In approaching the court as of right, a party had to demonstrate that questions of constitutional application or interpretation were in controversy. With regard to the second limb, one had to have been granted certification to appeal to the court. Such requirements therefore dispelled any notion of an automatic *locus* before the court. Thus, the jurisdiction upon which an appeal rested should not be left for speculation. It had to be out rightly stated.
3. The petitioner's appeal was filed pursuant to rules 9 and 33 of the Supreme Court Rules, 2012. Rule 9 specified the contents of a petition while rule 33 provided the time frame for filing an appeal as well as the documents that formed the record of appeal. Thus, the rules of the Supreme Court remained

an important tool in aiding the dispensation of justice. In the instant case however, rules 9 and 33 did not make reference to any particular jurisdiction of the court.

4. The appeal before the court, in its body, was crafted in a manner that demonstrated that the petitioner invoked the court's jurisdiction under article 163(4) (a) of the Constitution and specific provisions of the Constitution were cited as having been violated. The *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others SC Petition No. 12 of 2018 eKLR* case in that context was distinguishable. Inelegance in drafting was not encouraged nonetheless.

5. Parties had been cautioned, in the court's past decisions, against making fleeting statements alleging constitutional controversies where such questions were not pivotal for the determination of the dispute before the Court of Appeal. In the instant case, the grounds raised in the petition fell for the court to determine the interpretation of *inter alia* articles 81 and 86 of the Constitution in the context of the electoral process. Further, the petitioner alleged infringement of her right to fair hearing, which proposition called for interpretation of article 50 of the Constitution. Above all, the appeal raised an important issue of timelines for settling electoral disputes. Such a question was deeply rooted in the Constitution and the determination of it would require an interpretation of articles 87(1) and 105 of the Constitution. Therefore, the court had jurisdiction to determine the petitioner's appeal under article 163(4) (a) of the Constitution.

6. The span of 6 months from the date of filing of the petition was almost coming to an end at the time Court of Appeal decision reinstating the petition was made. As expected, by the time the High Court eventually determined the petition on June 11, 2018, 9 months had lapsed from the date of filing the petition. There had been conflicting decisions emanating from the superior courts with regard to consequences of determining an election petition after the specified time frames.

7. Timelines in resolving electoral disputes were first introduced by the Constitution of Kenya, 2010. The Constitution of Kenya Review Commission (2005) had proposed in its draft Constitution that election petitions should be heard within one year from the date of elections. That proposal was made against the backdrop of the long judicial processes which undoubtedly led to denial of justice to certain parties while also giving courts the opportunity to conclusively, and on merit, determine all electoral disputes placed before them for adjudication. By 2010, when the Constitution was being promulgated, that period had been reduced to 6 months as reflected in article 105 (2) of the Constitution.

8. The period provided for the settlement of electoral disputes could not be extended by any court and there was no reason to depart from that position. It was unfortunate that in remitting the matter back to the High Court after the determination of the prior appeal, the Court of Appeal appeared to have disregarded the court's decision in *Lemanken Aramat v. Harun Maitamei Lempaka & 2 others.* Had the appellate court applied the precedent in that case, it would not have made an open ended order of remission as it did. The court should have made a limited order with the requirement that the High Court determine the petition strictly within the timeline of six months. In the alternative, the appellate court should have decided to end the matter at that stage, well aware that any substantive determination of the petition by the High Court would be an exercise in futility, in view of the precedent in *Lemanken***.**

9. With regard to elections of a governor, the relevant provision was section 75 of the Elections Act as read with article 87(1) of the Constitution. Section 75 derived its authority from article 87 of the Constitution which required timely resolution of electoral disputes. Once an election petition was filed at the High Court sitting as the election court, it had to be determined within a period of 6 months.

10. In *Gerald Iha Thoya v Chiriba Daniel Chai & another* Election Appeal No 1 of 2018; [2018] eKLR , it was proposed that all applications ought to be heard together with the substantive matter and even if a court were to strike out the petition, it should still determine other issues since the actions were subject to appeal. In such a case, all applications would then be considered as a response to the petition including an application for striking out thus saving time and meeting the 6 months' deadline.

11. The *Samwel Kazungu Kambi v Nelly Ilongo & 2 others Election Petition No. 4 of 2017* case recognized that depending on the circumstances of a case, some interlocutory decisions could require immediate intervention by an appellate court. However, sight could not be lost of the danger of unnecessarily opening the appellate door for interlocutory applications. With regard to applications for striking out a petition, the Court of Appeal was categorical that such appeals were inevitably justiciable since striking out amounted to disposing of the petition.
12. All the suggested propositions had to be considered within the context of the strict timelines provided for the settlement of electoral disputes. The proposals sought to remedy the likelihood of denial of substantive justice due to impeding court processes or where a wrong could not be corrected at the appellate stage due to lapse of time. Hence, a proper consideration of the issue required a balancing of rights such as the right of appeal, access to court, the right to have a matter adjudicated within the specified time frames and the right to substantive justice.
13. Learning from the experience of the emerging jurisprudence in Kenyan courts, the following proposals were made;
    a. all applications by a respondent in an election petition, save in exceptional circumstances, should form part of the response to the petition. Similarly, a petitioner should as much as possible file any application arising from his petition for example for scrutiny or recount at the same time as the petition;
    b. unless for want of jurisdiction or in any other deserving circumstance, a trial court should exercise restraint in striking out a petition or a response, where such an action was likely to summarily dispose of the matter;
    c. all applications for striking out an election petition for want of jurisdiction, or for any other reason, had to be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In that regard, it was for the trial court, to make and enforce such case management orders, so as to meet that objective;
    d. appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial court; and
    e. in exceptional circumstances, an appellate court could dispose of an appeal arising from an interlocutory application filed and determined by the trial court while the substantive matter was still ongoing at the trial court. In doing so, the time frame question as explained had to always be borne in mind.
14. The proposals did not in any way provide an exception to the requirement of settling disputes within the specified time frame. All election petitions had to be resolved within the provided time frames without qualification. In the instant case, High Court determined the petition before it after the lapse of 6 months from the date of filing. That was an affront to the Constitution and the enabling electoral laws. As such, the High Court proceedings were a nullity.

Petition of appeal dismissed; each party to bear own costs before the High Court, Court of Appeal and the Supreme Court.

Editorial notes

The Supreme Court Rules, 2012, referred in the case summary has since been repealed and currently, the Supreme Court Rules, 2020 are in force.

Citations

Cases

Kenya

1. *Amoth, Cornel Rasanga v William Odhiambo Oduol & 2 others* Civil Application 26 of 2013; [2013] KECA 276 (KLR) - (Explained)

2. *Andama, Benjamin Ogunyo v Benjamin Andola Andayi & 2 others* Civil Application 24 of 2013; [2013] KECA 280 (KLR) - (Explained)
3. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Explained)
4. *Ibren, Nasra Ibrahim v Independent Electoral and Boundaries Commission (IEBC) & 2 others* Petition 19 of 2018; [2018] KESC 75 (KLR) - (Explained)
5. *Joho & another v Suleiman Said Shahbal & others* Petition No 10 of 2013; [2014] KESC 34 (KLR) - (Followed)
6. *Kambi, Samwel Kazungu v Nelly Ilongo & 2 others* Election Petition 4 of 2017; [2017] KEHC 2257 (KLR) - (Explained)
7. *Kamuren, Charles v Grace Jelagat Kipchoim & 2 others* Civil Appeal 159 of 2013; [2013] KECA 57 (KLR) - (Explained)
8. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014 (Consolidated); [2014] KESC 11 (KLR); [2014] eKLR - (Followed)
9. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] KESC 38 (KLR) - (Explained)
10. *Mwau & 2 others v Independent Electoral & Boundaries Commission & 2 others; Aukot & another (Interested Parties)* Election Petition 2 & 4 of 2017; [2017] KESC 54 (KLR) - (Explained)
11. *Njihia , Daniel Kimani v Francis Mwangi Kimani & Thika District Land Registrar* Civil Application 3 of 2014; [2015] KESC 19 (KLR) - (Explained)
12. *Thoya, Gerald Iha v Chiriba Daniel Chai & another* Election Appeal 1 of 2018; [2018] KECA 637 (KLR) - (Explained)
13. *Warrakah, Suleiman Mwamlole & 2 others v Mwamlole Tchappu Mbwana & 4 others* Supreme Court Petition No 12 of 2018; [2018] KESC 76 (KLR) - (Explained)

Jamaica

Paul Chen-Young v Ajax Investments Ltd & others Civil Appeal No 39 of 2006 - (Followed)

Statutes

Kenya

1. Constitution of Kenya articles 23(3); 27; 50; 81; 86; 87(1); 105; 159; 163(4) - (Interpreted)
2. Elections (Parliamentary and County) Petition Rules, 2017 (cap 7 Sub Leg) rule 8(1)(c)(d) - (Interpreted)
3. Elections Act (cap 7) section 75 -(Interpreted)
4. Supreme Court Rules, 2012 (Repealed) (cap 9B Sub Leg) rules 9, 33 - (Interpreted)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. The Petition before us, dated January 25, 2019, is filed pursuant to rules 9 and 33 of the *Supreme Court Rules, 2012*. The petitioner contests the Judgment of the Court of Appeal delivered on December 20, 2018 which dismissed her appeal thus upholding the election of the 3rd and 4th respondents as the Governor and Deputy Governor of Kirinyaga County, respectively.

B. Background

(i) Proceedings before the High Court and the subsequent preliminary appeals

2. The petitioner and the 3rd respondent were candidates for the position of Governor for Kirinyaga County during the election held on August 8, 2017. After the counting of votes, the 3rd respondent was declared the winner of that election. Being dissatisfied with the outcome, the petitioner filed an election petition at the High Court in Embu seeking nullification of the election results. She alleged *inter alia* that the election was not credible for reasons of bribery, tampering with ballot boxes, forgery of ballot papers and the failure to comply with the statutory and constitutional requirements with regard to voting, counting, tallying and transmission of votes.

3. In response to the Petition, the 3rd and 4th respondents filed an application to strike out the Petition for failure to comply with rule 8(1)(c) and (d) of the *Elections (Parliamentary and County) Petition Rules, 2017*. On November 15, 2017, the High Court upheld that application and struck out the Petition.

4. The petitioner, being aggrieved by the striking out of her petition, successfully appealed to the Court of Appeal and on March 2, 2018, the Appellate Court remitted the matter back to the High Court for its substantive disposal. While the matter was pending before the High Court, on March 29, 2018, the 3rd and 4th respondents filed an appeal to this Court against the Order of the Court of Appeal remitting the matter back to the High Court. In that appeal, they argued that the High Court lacked jurisdiction to hear and determine the petition as the 6 months' period provided by the law for the hearing of Petitions before the High Court had lapsed. They also sought stay of proceedings before the High Court. By a Ruling delivered on March 28, 2018, we declined to assume jurisdiction on that matter for the reason that the question then before us was also pending for determination before the High Court. We reasoned that it would have been premature of us to make a determination on that issue in those circumstances. That order paved the way for the substantive disposal of the election petition by the High Court.

5. Upon considering the election petition, on June 11, 2018, the High Court (Gitari J) dismissed the same and held that the gubernatorial election for Kirinyaga County was conducted in accordance with the Constitution. Further, the court determined that once an appeal is filed at the Court of Appeal, it operates as a stay of proceedings at the High Court pending the outcome of the appeal thus freezing the 6 months' period within which an election petition should be concluded upon filing.

6. Being aggrieved by the decision of the High Court with regard to the validity of the election, the petitioner once again filed an appeal at the Court of Appeal. The 3rd and 4th respondents cross-appealed contending that the High Court's Judgment was a nullity because that court lacked jurisdiction to hear and determine the election petition since 6 months had lapsed between the time of filing the petition and its final determination.

(ii) Proceedings before the Court of Appeal

7. Upon considering the appeal, on December 20, 2018, the Court of Appeal (Nambuye, Okwengu & Gatembu JJA) allowed the cross-appeal and found that the High Court lacked jurisdiction to hear and determine the election petition upon the expiry of 6 months after the election petition had been lodged. Further, the Court of Appeal did not find merit in all other grounds of appeal raised by the Petitioner and dismissed them.

(iii) Proceedings before the Supreme Court

8. Dissatisfied by that decision, the petitionerfiled the present Petition of Appeal seeking the following orders:

   (a) That the Judgment and Orders of the Court of Appeal be set aside.

   (b) The Petition be allowed.

   (c) Judgment be granted as prayed in the Petition filed in Kirinyaga High Court Election Petition No 2 of 2017.

   (d) Costs.

9. The summarized grounds of appeal are as follows:

   (a) The learned Judges of Appeal erred in law in their interpretation and application of article 86 of the *Constitution* in failing to find that the 1st Respondent has a constitutional duty to demonstrate that the Kirinyaga gubernatorial election was conducted in accordance with the Constitution.

   (b) The learned Judges of Appeal erred in law in their interpretation of article 50 of the *Constitution* on the right to fair trial, by upholding the rejection of the electronic evidence contained in a mobile device (a phone) belonging to one of the petitioner's witnesses, one Kepha Sagana, and rejecting the Petitioner's application for production of further evidence.

   (c) The learned Judges of Appeal erred after correctly making a finding that the Petitioner had as a matter of fact filed video evidence together with her Petition; by failing to make a finding that the disappearance and, or theft of the video from the custody of the court infringed on the petitioner's right to a fair trial under article 50 of the *Constitution*;

   (d) The learned Judges of Appeal misapprehended article 87 of the *Constitution* by finding that the hearing and determination of the petitioner's petition before the election Court was a nullity;

   (e) The learned Judges of Appeal erred in failing to take judicial notice of the nullification of the presidential election by this court in *John Harun Mwau v IEBC and 3 others* Supreme Court Election Petition No 2 of 2017, which election, was conducted simultaneously and in identical circumstances as the Kirinyaga gubernatorial election of August 8, 2017.

   (f) The learned Judges of Appeal erred in usurping the jurisdiction of this Court by overruling the judgment of a Court of concurrent jurisdiction;

   (g) The learned Judges of Appeal erred in failing to exercise their jurisdiction to evaluate the trial court's conclusions against the evidence on record relating to bribery and/or canvassing, thereby arriving at an erroneous conclusion of validating the trial Court's unlawful double standard contrary to articles 27 and 50 of the *Constitution*.

   (h) The learned Judges of Appeal failed to discharge their duty of evaluating the conclusions of the trial Court against the evidence on record thereby validating its failure to find that the Petition was virtually undefended.

   (i) The learned Judges of Appeal misapprehended article 86 of the *Constitution* in relation to scrutiny.

(iv) Parties' Submissions

a) The Petitioner's case

(i) Burden of Proof in Electoral Matters

10. It is the petitioner's case that the 1st respondent abdicated its constitutional obligation of ensuring that there was a free, fair and verifiable electoral process in the Kirinyaga gubernatorial contest. The petitioner's counsel also urged the point that when an election is challenged, as in the present case, it is the responsibility of the 1st respondent to demonstrate to the court that the impugned election complied with the constitutional requirements as provided for under article 86 of the *Constitution*. In that context, the petitioner urges that the 1st respondent failed to supply to the court and to all parties the information required to facilitate a just determination of the Case. Thus, the petitioner submits that an electoral system cannot be said to be verifiable, accountable, accurate and transparent in the absence of satisfactory documentation to prove such an assertion.

(ii) Fair Trial and hearing

11. The petitioner further faults the 1st respondent for reconfiguring the relevant KIEMs Kits for use in the repeat Presidential election without first seeking authority from the trial Court to do so since there was an application for scrutiny of the KIEMs Kit pending before that Court. She also questions why an unauthorized third party, namely M/s OT Morphol, was allowed to hold 50 SD cards which were not produced in Court. That in addition, 36 certified copies of Forms 37 as well as 15 originals of the same were not availed to court. She thus urges that the failure to produce those documents goes against the constitutional principle of transparency and infringed on the petitioner's right to a fair trial. In that context, the petitioner urges that the Court of Appeal ought to have found that the electoral process was incapable of being validated and thus nullified the impugned election for that reason alone.

12. The petitioner also faults the trial courtfor refusing to admit video evidence recorded on a witness's mobile device. She urges in that regard that the denial was a violation of the petitioner's right to fair hearing. It is further submitted that the gravity of the violation is compounded by the fact that the video evidence that had been pleaded by the witness was lost while in the custody of court, yet the court rejected the video recorded using the witness's mobile device which was the only available evidence on the issue. The petitioner thus faults the court of Appeal for not providing a remedy for the exclusion of the video evidence, yet it found that the video evidence had been properly filed in court.

13. Counsel for the petitioner furthermore contends that the appellate courtrejected the petitioner's application for further evidence thus validating the violation of her right to fair trial. He urged that the Court of Appeal erroneously held that the further evidence she sought to adduce was available during the trial. According to the petitioner, the respondents prevented her from relying on that evidence by claiming that it was never served, thus qualifying as new evidence which could not be introduced at that point.

(iii) Alleged nullity of the proceedings before the High Court

14. The Court of Appeal held that the High Court had no jurisdiction to hear and determine the election petition after the expiry of the 6 months from the date of filing. On that finding, the petitioner urges that the Court of Appeal misapprehended article 87 of the *Constitution* as well as section 75(2) of the *Elections Act* which were not intended to bar innocent litigants, who through no fault of their own,

get their cases remitted back for trial after a successful appeal. As such, she urges that article 87 was intended to prevent delay but not to abrogate a litigant's right to access justice.

(iv) Bias and discrimination against the Petitioner

15. The petitioner urges that the trial courtwas outrightly biased and discriminated against her in the manner in which it conducted its proceedings. To this end, it was submitted that the petitioner was obstructed on many occasions by being asked to withhold crucial testimony on matters relating to scrutiny, KIEMs kit and the Registrar's report and as such, she faults the Court of Appeal for not holding that there was miscarriage of justice in the manner the trial court treated her.

b) The 1st and 2nd Respondents' case

(i) Burden of proof in electoral matters

16. It is the 1st and 2nd respondents' case that they demonstrated before the trial court that the gubernatorial election for Kirinyaga County was conducted in accordance with articles 81 and 86 of the *Constitution*. In addition, they urge that the burden of proving that the election was not conducted in a free and fair manner rests with the Petitioner who had failed to discharge that duty.

(ii) Allegations of infringement of the Petitioner's right to fair trial and Hearing

17. On the issue of the KIEMs Kit, counsel for the 1st and 2nd respondents submitted that the order of the court on that issue required a read only access to the KIEMs Kit, which was done and that in place of the SD cards, the petitioner was given access to the voters' logs which contained the same information as the SD cards. Counsel however admitted that the KIEMs Kit was indeed reconfigured but explained that by the time the application for scrutiny was heard, the KIEMs Kit had already been reconfigured in preparation for the pending repeat presidential election, a matter that was beyond the trial court. With regard to the missing Forms 37A, the 1st and 2nd respondents explained that in some cases, the Presiding Officers inadvertently sealed the original forms in the ballot boxes, thus their unavailability. To remedy that situation, counsel urged that the petitioner was provided with all carbon copies of the said Forms.

18. On the issue of the exclusion of the video evidence, counselsubmitted that the petitioner's video evidence was properly excluded as it was not produced as evidence within the correct rules of procedure. As such, the petitioner's right to fair hearing and trial were not infringed as the court merely complied with the rules of procedure.

(iii) The nullity of the High Court proceedings

19. On this issue, Counsel submitted that the Court of Appeal was properly guided by this court's decision of *Lemanken Aramat v Harun Maitamei Lempaka & 2 others* which emphasised the importance of settling electoral disputes within the constitutionally provided timeframes. As such, all proceedings undertaken after the expiry of the 6 months were a nullity.

(iv) Costs

20. In conclusion, the 1st and 2nd respondents urge this court to dismiss the Petition with costs.

c) The 3rd and 4th Respondents' case

(i) Jurisdiction

21. Counsel for the 3rd and 4th respondents urge that the petitioner's appeal is not predicated on any constitutional provision thus this court has no jurisdiction to hear and determine it. In support, Counsel relies on this court's decisions in *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* SC Petition No 12 of 2018; [2018] eKLR, *Nasra Ibrahim Ibren v IEBC & others* SC Petition No 19 of 2018; [2018] eKLR and *Daniel Kimani Njihia v Francis Mwangi Kimani & another* [2015] eKLR all of which emphasized the need to quote the exact constitutional provision that invokes this court's jurisdiction. He thus submits that the petitioner's failure to indicate the constitutional provision through which he moves the court is not a procedural technicality curable under article 159 of the *Constitution* but a substantive question of jurisdiction.

22. Still on jurisdiction, it is the 3rd and 4th respondents case that the appeal does not raise any issue of constitutional interpretation or application. Rather, the petitioner merely cites various constitutional provisions alleged to have been violated by the Court of Appeal. According to the 3rd and 4th respondents, none of the issues before the Court of Appeal turned on the interpretation or application of the Constitution. That, further, the grounds of appeal before us do not elicit any constitutional controversies to be resolved by this court in exercise of its appellate jurisdiction under article 163(4)(a) of the *Constitution*. For those reasons, counsel urged that this court has no jurisdiction to hear the petitioner's appeal as of right and the same ought to be struck out.

(ii) The nullity of the High Court's proceedings

23. On the issue whether the High Court had jurisdiction to hear and dispose of the election petition upon expiry of 6 months after the filing of the Petition, counselurged that the 6 months' period fixed by section 75 of the *Elections Act* as read with article 87(1) of the *Constitution* could not be expanded. Thus, Counsel agreed with the Court of Appeal that the High Court proceedings, that occurred after the lapse of 6 months', were a nullity as was the Judgment delivered by that court.

(iii) The alleged infringement of the Petitioner's right to fair trial and hearing

24. With regard to the rejection of the video evidence, counselsubmitted that the video allegedly recorded using a witness' mobile phone was not part of the court's record. That further, during the examination-in-chief, the witness did not express the need to have his phone tendered into evidence. It was only during re-examination that the petitioner's Counsel made an application for the witness to produce the video which was saved on his mobile phone. Such an application, if allowed, would have been tantamount to introducing new evidence in the re-examination stage which is against the rules of evidence. As such, the failure to admit that evidence did not infringe on the petitioner's right to fair hearing and trial.

25. With regard to the Court of Appeal's rejection of the petitioner's application for further evidence, counselurged that the application was rightly rejected by the appellate courtas the evidence sought to be introduced did not meet the threshold for admission of additional evidence. In that regard, counselurged that the said evidence was available at the time of trial and was within the knowledge of the person seeking to introduce it. This further evidence was therefore properly rejected.

26. On the issue of verifiability of the election result, counselsubmitted that the High Court allowed the petitioner a read only access of the data in the KIEMs Kit and not the KIEMs Kit itself. In granting that access, the court took judicial notice of the fact that the KIEMs Kit had been reconfigured for the

purpose of the repeat presidential election to be held on October 26, 2017. That, further, access was supervised by the Deputy Registrar of the High Court who prepared a report for the Court. Counsel thus urged that by the time the KIEMs Kit was reconfigured, there was no court order compelling the 1st respondent to preserve it. Data from the KIEMs Kit had, in any event, been preserved in the SD cards which the petitioner was supplied with but for 50 SD Cards which could not be found. That fact notwithstanding, the petitioner was supplied with 659 Voter Turn Out Rolls which counsel urged contained similar data as the one in the missing SD cards. Counsel thus submitted that there was no injustice caused by the reconfiguration of the KIEMs Kit.

27. In concluding on this issue, counselsubmitted that the petitioner's right to a fair hearing is a personal right and has nothing to do with an election because an election is a reflection of the views of the people expressed through the vote and not just about the rights of individuals. Thus, he argues that the remedy for such a violation does not lie in the nullification of the election results of the 3rd and 4th respondents but rather fresh individual proceedings under article 23(3) of the *Constitution*.

(iv) Burden of proof

28. Counsel for the 3rd and 4th respondents urged that it is the duty of the petitioner to discharge the evidential and legal burden of proof to the effect that the impugned election was not conducted in accordance with the Constitution and other electoral laws. As such, he submitted that since the petitioner had failed to proof that the provisions of articles 81 and 86 of the *Constitution* were not complied with, the onus of proof could not shift to the respondents.

(v) Costs

29. On the issue of costs, counselsubmitted that the costs awarded to the 3rd and 4th respondents by the High Court were arbitrarily taken away by the Court of Appeal. That further, the Court of Appeal denied the 3rd and 4th respondents costs of appeal despite upholding the cross-appeal and dismissing the petitioner's appeal. Counsel thus urged that even though the proceedings at the High Court were declared a nullity, costs were still incurred in defending the petition. He thus urges the court to award the 3rd and 4th respondents costs of these and prior proceedings.

D. Issues for Determination

30. Having considered the Petition of Appeal, the responses thereto and the written as well as oral submissions of counsel, we are of the view that the following issues arise for consideration:

    (a) Whether the petitioner has properly invoked this court's jurisdiction under article 163(4)(a) of the *Constitution*.

    (b) Whether the proceedings before the High Court were a nullity, and if so, what are the consequences thereof?

    (c) Whether the petitioner's right to fair hearing and trial was violated by the respective findings of the trial courtand the Court of Appeal.

    (d) Which party bore the burden of proof?

    (e) Whether the Court of Appeal properly re-evaluated the evidence before it.

    (f) Whether the trial courtwas biased against the petitioner.

    (g) What relief should issue?

(h) Who should bear the costs of these proceedings?

E. Analysis

(a) Whether the petitioner has properly invoked this court's jurisdiction under article 163(4)(a) of the Constitution.

31. The 3rd and 4th respondents contests this court's jurisdiction on two fronts: Firstly, they urge that the Petition is not predicated on any constitutional provision. Secondly, that the appeal does not raise any question of constitutional interpretation or application. With regard to the first contention, they urge that the failure to identify the constitutional provision which invokes this court's jurisdiction is grave and cannot be cured by article 159 of the *Constitution*. In urging so, they rely on our previous decisions in which we have emphasised on the need to quote the exact provision of the Constitution which invokes our jurisdiction.

32. In that regard, in *Nasra Ibrahim Ibren v IEBC & others* SC Petition No 19 of 2018; [2018] eKLR we reiterated that the need to specify the constitutional provision through which one moves the court flows from the fact that not every appeal from the Court of Appeal is appealable to this court. Appeals are limited by article 163(4) of the *Constitution*, which categorises them either as of right or upon certification that a matter of general public importance is involved. Our jurisdiction therefore must be invoked within the confines of that constitutional provision. In approaching the court as of right, a party must demonstrate that questions of constitutional application or interpretation are in controversy. With regard to the second limb, one must have been granted certification to appeal to this court. Such requirements therefore dispel any notion of an automatic locus before this court. It has thus been our consistent position that the jurisdiction upon which an appeal rests should not be left for speculation. It must be outrightly stated.

33. In that regard, in *Suleiman Mwamlole Warrakah & 2 others v Mwamlole Tchappu Mbwana & 4 others* SC Petition No 12 of 2018; [2018] eKLR the jurisdiction of this court was contested because the Petitioners had not indicated under what provision of article 163(4) of the *Constitution* they were moving the court. In that case, Counsel contended that the absence of certification should be taken to mean that the appeal was premised under article 163(4)(a) of the *Constitution*. In declining that argument, we held that [paragraph 53]:

> "In this appeal, what counselfor the petitioners is asking us to do is to assume jurisdiction by way of elimination. This court is being called upon to hold that, because certification was not sought by the intending appellant, then it must follow that the said appellant is invoking the court's jurisdiction as of right under article 163(4)(a) of the *Constitution*, even without demonstrating that, such right obtains in the first place. This we cannot do, as it would make a mockery of our past pronouncements on the matter."

34. In the present case, the petitioner's appeal is filed pursuant to rules 9 and 33 of the *Supreme Court Rules, 2012*. Rule 9 specifies the contents of a petition while rule 33 provides the timeframe for filing an appeal as well as the documents that forms the record of appeal. The importance of the rules of the court was recognised in the case of *Daniel Kimani Njihia v Francis Mwangi Kimani & another* SC Application No 3 of 2014; [2015] eKLR, where we held that [paragraphs 14 & 15]:

> "This court's jurisdiction is exercisable only on the basis of express provisions of the Constitution and the law. The operational rules for this court (*Supreme Court Rules, 2012*) are made pursuant to the Constitution, article 163(8) ...Consequently, the only applicable

sources of law when moving the Supreme Court are the *Constitution*, the *Supreme Court Act*, and the *Supreme Court Rules*, 2012.

35. Undoubtedly, the Rules of the court thus remain an important tool in aiding the dispensation of justice. In this case however, rules 9 and 33 do not make reference to any particular jurisdiction of this court. Be that as it may be, we acknowledge that the appeal before us, in its body, is crafted in a manner that demonstrates that the petitioner invokes this court's jurisdiction under article 163(4)(a) of the *Constitution* and specific provisions of the *Constitution* are cited as having been violated. We have already cited articles 27, 50, 81, 86 and 87 in that regard. The *Warrakah* case in that context is clearly distinguishable. Inelegance in drafting is not encouraged nonetheless.

36. This brings us to the second aspect of the contestation of jurisdiction flowing from and as a corollary to the above. The 3rd and 4th respondents submit that the appeal does not raise any question of constitutional interpretations or application but rather the petitioner only makes mere reference to certain constitutional provisions. In response, the Petitioner urges that her appeal raises questions of constitutional interpretation and application.

37. Further to our finding above, in our past decisions, we have cautioned parties against making fleeting statements alleging constitutional controversies where such questions were not pivotal for the determination of the dispute before the Court of Appeal. In this case, we note that the grounds raised in the Petition fall for this court to determine the interpretation of *inter alia* articles 81 and 86 of the *Constitution* in the context of the electoral process. Further, the petitioner alleges infringement of her right to fair hearing and fair, which proposition calls for interpretation of article 50. Above all, this appeal raises an important issue of timelines for settling electoral disputes. Such a question is deeply rooted in the Constitution and the determination of it will require an interpretation of articles 87(1) and 105 of the *Constitution*. To that extent therefore, it is our finding that this court has jurisdiction to determine the petitioner's appeal under article 163(4)(a) of the *Constitution*.

(b) Whether the proceedings before the High Court were a nullity, and if so, what are the consequences thereof?

38. It is the respondents' case that the High Court had no jurisdiction to determine an election petition after the lapse of 6 months from the date of its filing. On her part, the petitioner urges that article 87 was not intended to deny a litigant the right of access to justice and especially where the 6 months' period lapse was on account of an appellate process which the Petitioner had no control over. In order to contextualise the parties' arguments, we will briefly narrate the background to this issue.

39. The petitioner filed an election Petition at the High Court in Kirinyaga on September 5, 2017. On October 17, 2017, the 3rd and 4th respondents filed an application seeking to strike out the Petition and the supporting affidavits thereto for non-compliance with rule 8(1) of the *Elections (Parliamentary and County) Petition Rules* 2017. By a Ruling delivered on November 15, 2017, the High Court held that the petitioner's failure to include the results of the elections and the date of declaration of results in the Petition was a serious non-compliance with rules 8(1)(c) and (d) aforesaid which rendered it incurably defective. On that basis, the Petition was struck out.

40. That decision was overturned by the Court of Appeal on March 2, 2018. In doing so, the appellate court remitted the matter back to the High Court for its substantive determination. We note that by the time the Court of Appeal made its decision reinstating the Petition, the life span of 6 months from the date of filing of the petition was almost coming to an end. And as expected, by the time the High Court eventually determined the petition on June 11, 2018, 9 months had lapsed from the date of filing the petition. Hence the difficult question now facing the court.

41. That question first arose in the High Court and that court took the view that once an appeal arising from any matter in an election petition is filed at the Court of Appeal, it operates as stay of proceedings at the High Court pending the outcome of the appeal. The Court of Appeal however was of a different view. It held that the 6 months' time period limited by section 75 of the *Elections Act* as read with article 87 of the *Constitution* could not be extended. It thus held that the High Court had no jurisdiction to hear and dispose of the election petition upon expiry of 6 months after the election petition was lodged. Consequently, the proceedings at the High Court were declared a nullity.

42. On our part, we are aware that there have been conflicting decisions emanating from the superior courts with regard to consequences of determining an election petition after the specified timeframes. This being the first time this issue is before us, we must settle the law in this Judgment. In that context, we note that timelines in resolving electoral disputes were first introduced by the 2010 Constitution. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others* SC Petition No 2B of 2014; [2014] eKLR while considering the rationale of article 87(1) which requires Parliament to create a mechanism for timely resolution of electoral disputes, we held that [paragraph 62]:

> "Article 87 (1) grants Parliament the latitude to enact legislation to provide for "timely resolution of electoral disputes." This provision must be viewed against the country's electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people's franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about "timelines and timeliness", was intended to redress this aberration in the democratic process. The country's electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people's will, in the name of which elections are decreed and conducted, should not be held captive to endless litigation."

43. We expressed similar sentiments in the case of *Lemanken Aramat v Harun Meitamei Lempaka & 2 others* SC Petition No 5 of 2014; [2014] eKLR (Aramat) where we held that:

> [70] "There are instances when the Constitution links certain vital conditions to the power of the court to adjudicate a matter. This is particularly true in the context of Kenya's special electoral dispute-resolution mechanism. By linking the settlement of electoral disputes to time, the Constitution emphasises the principles of efficiency and diligence, in the construction of vital governance agencies. This consideration addresses the historical problem of delayed electoral justice, that has plagued this country in the past...
>
> [76] The ultimate principle is: while citizens are at liberty to contest electoral outcomes, they will proceed within prescribed timelines, and in this way help to sustain the due functioning of other constitutional processes."

44. We further note that the Constitution of Kenya Review Commission (2005) had proposed in its draft Constitution that election petitions should be heard within one year from the date of elections. That proposal was made against the backdrop of the long judicial process which undoubtedly led to denial of justice to certain parties while also giving courts the opportunity to conclusively, and on merit, determine all electoral disputes placed before them for adjudication. By 2010, when the new Constitution was being promulgated, that period had been reduced to 6 months as reflected in article 105(2) of the *Constitution*. In applying that article in the *Aramat case*, the Court of Appeal had remitted the matter to the High Court for a recount of votes after the lapse of 6 months. In finding that

the jurisdiction of the High Court was already extinguished, in the subsequent appeal to this Court, we held that:

> [139] "The *Constitution* and the *Elections Act*, which are the foundation of a special electoral-dispute regime, confer upon the High Court the power to determine electoral disputes within six months; and the appellate court cannot confer upon itself powers to resurrect the jurisdiction of election courts, after such jurisdiction is exhausted under the law."

45. The need to adhere to the constitutional timeframes was also emphasised in the cases of *Hassan Ali Joho & another v Suleiman Said Shahbal and others*, SC Petition No 10 of 2013; [2013] eKLR and *Evans Odhiambo Kidero & 4 others v Ferdinard Ndungu Waititu & 4 others*, SC Pet No 20 of 2014; [2014] eKLR. In that regard, we still hold the position that the period provided for the settlement of electoral disputes cannot be extended by any court and we see no reason to depart from that position in this or any other case. It is indeed unfortunate that in remitting the matter back to the High Court after the determination of the prior appeal, the Court of Appeal appeared to have disregarded this court's decision in *Lemanken Aramat v Harun Maitamei Lempaka & 2 others*. Had the appellate court applied the precedent in that case, it would not have made an open ended order of remission as it did. The court should have made a limited order with the requirement that the High Court determines the petition strictly within the timeline of six months. In the alternative, the appellate court should have decided to end the matter at that stage, well aware that any substantive determination of the petition by the High Court, would be an exercise in futility, in view of the precedent in Lemanken. The reverse happened and after remitting the matter, the same court differently constituted in the present appeal correctly held but too late in the day, that the timelines had been breached and jurisdiction could not be properly exercised by the High Court.

46. In addition to the above holdings and with regard to elections of a Governor, the relevant provision is section 75 of the *Elections Act* as read with article 87(1) of the *Constitution*. Article 87(1) provides that:

> " Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes."

47. In view of that provision, Parliament enacted the *Elections Act* which provides at section 75 that:

(1) A question as to validity of an election of a county Governor shall be determined by High Court within the county or nearest to the county.

(1A) ...

(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.

48. Section 75 undoubtedly derives its authority from article 87 of the Constitution which requires timely resolution of electoral disputes. We have already explained why there was a need to provide for defined timelines for settling electoral disputes. As such, we hold and maintain our position that once an election petition is filed at the High Court sitting as the Election Court, it must be determined within a period of 6 months. In that regard, our position resonates with the Judgment in *Gerald Iha Thoya v Chiriba Daniel Chai & another* Election Appeal No 1 of 2018; [2018] eKLR (Gerald Thoya), in which Korir J, pronounced himself as follows:

> " The reference point is the date the petition is lodged. The calendar is not shifted by the conduct of the parties and neither can it be breached by the actions of the election court.

> The period is cast in stone and once the six months lapse the election court no longer has any powers to hear and determine the election petition. It must down its tools without prompting."

49. Our holding above brings us to a more difficult question which is what happens, as in this case, where the 6 months' period lapses as a result of an appellate process which was necessary for the enforcement of a litigant's right of access to court. Is there any exception to the position we have already taken?

50. Courts have suggested opposing views on how such cases should be dealt with. One school of thought is as propounded in the case of *Charles Kamuren v Grace Jelagat Kipchoim & 2 others* Civil Appeal No 159 of 2013; [2013]eKLR, where the Court of Appeal (Nambuye, Musinga & M'inoti JJA) held:

> [38] "Turning to article 105 of the *Constitution* which requires the High Court to hear and determine an election petition as to whether a person has been validly elected as a member of parliament or whether a seat of such a member has become vacant, within a period of six months of the date of lodging the petition, we are of the considered view that where such a petition had been struck out and an appeal against such an order this court finds that the petition ought not to have been struck out, the court has power to direct the High Court to hear and determine the petition, even if the six months period stipulated under article 105 has lapsed. In such an instance, it cannot be argued that the constitutional period for hearing and determining the petition has already lapsed. The period of six months shall begin to run from the date of delivery of the judgment by the Appellate Court. It would occasion great injustice if a successful appellant, (that is, one whose election petition is found to have been wrongfully struck out), were to be denied the right to be heard simply because the appeal is determined after six months from the date the petition was lodged."

51. That position is different from the one taken by the Court of Appeal in the instance case. In Gerald Thoya Korir J also proposed that all applications ought to be heard together with the substantive matter and even if a court were to strike out the petition, it should still determine other issues since the actions are subject to appeal. In such a case, all applications would then be considered as a response to the petition including an application for striking out thus saving time and meeting the 6 months' deadline.

52. In addition to the above, in *Samwel Kazungu Kambi v Nelly Ilongo & 2 others* Election Petition No 4 of 2017; [2017] eKLR (Ruling No7) Korir J made a further proposal and held that [paragraph 38]:

> " [T]he doctrine of deferred and sequential appellate jurisdiction in regard to interlocutory decisions in electoral disputes should be revisited and tinkered with so that the Court of Appeal acting upon its wisdom and discretion can promptly review some decisions. How this can be achieved without staying the proceedings of the election court is a matter that can be addressed by the Court of Appeal or by an amendment to the *Court of Appeal (Election Petition) Rules*, 2017. The right of appeal provided by article 164(3) of the *Constitution* should not be rendered sterile simply because the appeal is arising from an interlocutory decision in an election dispute. It is alright to defer an appeal where such deferment will not prejudice the parties. However, if postponing an appeal will result in injustice, then such an appeal should be heard without undue delay."

53. The above decision recognises that depending on the circumstances of a case, some interlocutory decisions may require immediate intervention by an appellate court. However, we cannot lose sight of the danger of unnecessarily opening the appellate door for interlocutory applications. The Court

of Appeal noted the risks posed by such an action in the case of *Cornel Rasanga Amoth v William Odhiambo Oduol & 2 others* Civil Application No 26 of 2013; [2013]eKLR where it pronounced that:

> "In our view, appeals from interlocutory rulings, orders or directions during the electoral disputes would clog our justice system with the result that there would be no end to resolution of electoral disputes, the very mischief the *Constitution* 2010 sought to redress. We must guard, and protect the ideals and aspirations of Kenyans.

54. With regard to applications for striking out a petition, the Court of Appeal was categorical that such appeals were inevitably justiciable since striking out amounts to disposing of the petition. The decision in the case of *Benjamin Ogunyo Andama v Benjamin Andola Andanyi & 2 others* Civil Application No 24 of 2013; [2013] eKLR succinctly captures that position as follows:

> " "However, in our view, if an appeal is against a decision of the High Court allowing an interlocutory application seeking striking out of a Petition, then this court would have jurisdiction to hear it for an order striking out a petition is a final decision on the petition and an appeal from it is no longer an interlocutory appeal but is an appeal on final decision on the Election Petition. This, in our view is only where application for striking out the petition is allowed and the petition is ordered struck out."

55. We take the view that all the suggested propositions must be considered within the context of the strict timelines provided for the settlement of electoral disputes. We understand that these proposals seek to remedy the likelihood of denial of substantive justice due to impeding court processes or where a wrong cannot be corrected at the appellate stage due to lapse of time. Hence, a proper consideration of this issue requires a balancing of rights such as the right of appeal, access to court, the right to have a matter adjudicated within the specified timeframes and the right to substantive justice. Consequently, learning from the experience of the emerging jurisprudence in our courts, we propose the following:

(a) All Applications by a respondent in an election petition, save in exceptional circumstances, should form part of the response to the Petition. Similarly, a Petitioner should as much as possible file any application arising from his Petition eg for scrutiny or recount at the same time as the Petition.

(b) Unless for want of jurisdiction or in any other deserving circumstance, a trial court should exercise restraint in striking out a Petition or a response, where such an action is likely to summarily dispose of the matter.

(c) All applications for striking out an election petition for want of jurisdiction, or for any other reason, must be made and determined within the constitutional and statutory timelines for the resolution of electoral disputes. In this regard, it is for the trial Court, to make and enforce such case management orders, so as to meet this objective.

(d) Appeals on interlocutory applications, other than for striking out in circumstances explained in (b) and (c) above, should await the final determination of the whole petition before the trial court.

(e) In exceptional circumstances, an appellate court may dispose of an appeal arising from an interlocutory application filed and determined by the trial court while the substantive matter is still ongoing at the trial court. In doing so, the timeframe question as explained above must always be borne in mind.

56. The above proposals as premised in (e) above do not in any way provide an exception to the requirement of settling disputes within the specified timeframe. As already stated, all election petitions must be resolved within the provided timeframes without qualification. In this case, we have noted that the High Court determined the petition before it after the lapse of 6 months from the date of filing. That was an affront to the Constitution and the enabling electoral laws. As such, we agree with the Court of Appeal that the said High Court proceedings were a nullity.

57. Having found that the proceedings before the High Court were a nullity, we would have no jurisdiction to determine the remaining issues. On the issue of the appropriate remedy, we restate that, upon lapse of time, the High Court had no jurisdiction to determine the petition. As such, no decision, strictly speaking emanated from the High Court and no remedy was/is available to any party.

(c) Who should bear the costs of these proceedings?

58. We sympathise with the petitioner who, without any fault of her own, has been locked out of the seat of justice. We also take note of the long time and the judicial processes that the parties have engaged themselves in. Equally, it is expected that huge financial resources have been spent in prosecuting and defending this matter. Yet, while the general rule is that the successful party ought to be paid costs by the unsuccessful one, where proceedings are declared to be a nullity, no party can claim success – see *Paul Chen-Young v Ajax Investments Ltd & others*, Jamaica Supreme Court Civil Appeal No 39 of 2006, paras 205 and 206. Each party should therefore bear their costs in the proceedings before all the courts.

F. Orders

59. Flowing from the above determination, we make the following orders:

    (a) The Petition of Appeal dated January 25, 2019 is hereby dismissed.

    (b) All the costs in the proceedings before the High Court, the Court of Appeal and this court shall be borne by each party.

60. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF AUGUST, 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

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA