



**Bichage v Tong'i & 2 others (Petition 17 of 2014)  
[2015] KESC 5 (KLR) (16 October 2015) (Ruling)**

*Chris Munga N Bichage v Richard Nyagaka Tong'i, Independent  
Electoral and Boundaries Commission & Robert K Ngeny [2015] eKLR*

Neutral citation: [2015] KESC 5 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA  
PETITION 17 OF 2014  
JB OJWANG & N NDUNGU, SCJJ  
OCTOBER 16, 2015**

**BETWEEN**

**CHRIS MUNGA N BICHAGE ..... APPLICANT**

**AND**

**RICHARD NYAGAKA TONG'I ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**ROBERT K NGENY ..... 3<sup>RD</sup> RESPONDENT**

*(Being an application for leave to file a document out of time under Article 159(2)  
(d) and (e) of the Constitution, Section 3(e) of the Supreme Court Act (Cap 9, Laws of  
Kenya) and Rules 3(2), (4) and (5), 8(1), 18(2) and 26(1) of the Supreme Court Rules 2012)*

**Supreme Court sitting on second appeal is restricted to matters of law only**

Reported by Njeri Githang'a

***Jurisdiction**- appellate jurisdiction of the Supreme Court- admission of evidence – where the Supreme Court, sitting on second appeal, was essentially restricted to matters of law only-whether there was a difference between the admission of evidence in the exercise of the Supreme Court's exclusive original jurisdiction, and in its appellate jurisdiction-whether in election petitions other than a Presidential election in respect of which the Supreme Court has original jurisdiction, evidence can be introduced at the second level of appeal - Constitution of Kenya 2010, article 87(1), 163(4)(a), 163(4)(a)- Supreme Court Rules, rule 8(1) and (2)*



## **Brief facts**

The application before the court was for leave to file a supplementary affidavit annexing the certificate of election results for Member of the National Assembly Election, 2013 for Nyaribari Chache constituency, in a second appeal to the Supreme Court.

## **Issues**

- i. Whether the Supreme Court could allow the admission of further affidavits in instances where such affidavits introduce important evidence, in election-petition matters on second appeal.
- ii. Application of Rule 8(1) and (2) of the Supreme Court Rules in relation to the filing of additional pleadings.
- iii. Whether there was a difference between the admission of evidence in the exercise of the Supreme Court's exclusive original jurisdiction, and in its appellate jurisdiction
- iv. Whether the Supreme Court sitting on second appeal was restricted to matters of law only.

## **Held**

1. Form 38 was important in determining whether an election petition had been filed in time at the High Court. In the instant matter, Form 38 was indeed part of the record in the trial Court proceedings, the applicant was in no way prejudiced; and an affidavit for the admission of such a document lacked a proper basis.
2. The Court had the jurisdiction to determine the issue of grant of leave. The petition of appeal was premised on article 163(4) (a) of the Constitution, and the applicant filed the application seeking relief in respect of the main appeal.
3. In election petitions, the Court could exercise its jurisdiction in two basic situations:
  - a. Exclusive original jurisdiction in Presidential election petitions, under article 163(3)(a) of the Constitution; and
  - b. An appeal qualifying as "matter of right", under article 163(4)(a) of the Constitution.
4. While exercising exclusive original jurisdiction in Presidential elections, the Court could exercise its discretion on whether to admit additional evidence, and it was essential that no prejudice was occasioned to a party if the evidence was admitted. However, in relation to admission of new evidence in election petitions on second appeal, and as of right, such would be a matter of first impression in the Supreme Court.
5. Article 87(1) of the Constitution was a reflection of the sensitive timelines, on account of which Parliament had the latitude to enact legislation providing for timely resolution of disputes and that causal link, itself, formed the nexus between article 87(1) of the Constitution and section 85A of the Elections Act, which limited the Court of Appeal's jurisdiction in election-petition appeals to matters of law only.
6. In the exercise of its exclusive original jurisdiction in Presidential-election petitions, the Court sat as a Court of first instance, and therefore, it could deal with matters of fact and of law. In appellate election-petition matters, section 85A of the Elections Act limited the Court of Appeal to matters of law only.
7. The implication of Rules 8(1) and 18(1) and (2) of the Supreme Court Rules, in relation to the Court's discretion as regards the admission of further affidavits or pleadings was that the Court observed in Wanjohi case that it could admit a supplementary record. However, that case was distinguishable from the instant one because all the parties had consented to the supplementary record of appeal being filed.
8. It was essential for the Court to exercise its discretion judiciously, in regard to the admission of a supplementary affidavit filed out of time. A view of the Constitution, legislation, and case law disclosed that in election-petition matters:
  - a. time is of the essence in finalizing electoral disputes;
  - b. the High Court acts as a trial Court, and has the jurisdiction to deal with matters of fact and evidence;
  - c. the Court of Appeal, when acting as an appellate Court in election petitions, is restricted to matters of law; and



d. the Supreme Court can act as a second appellate Court in election-petition disputes involving Parliamentary and Gubernatorial seats, where matters of the Constitution and the law were involved – where the “interpretation or application of this Constitution” was in issue.

9. The Court, in the exercise of its appellate jurisdiction under article 163(4)(a) of the Constitution, was restricted to matters of law. Although Rule 8(1) and (2) of the Supreme Court Rules provided for the admission of further affidavits, it was still a relevant question that the Court was dealing with an election petition on second appeal. Accordingly, while exercising its discretion, the Court is to:

- a. deal with points of law;
- b. consider any matter of prejudice to a party; and
- c. consider the time factor – which limits the admission of new evidence at the appellate level.

10. The Raila Odinga case was to be distinguished, because the Court was in that case, exercising its exclusive original jurisdiction, and so it was not limited to determining matters of law. Likewise, the Wanjohi case could be distinguished, as the Supreme Court Rules dealt only with the filing of “further pleadings and affidavits”, rather than with a supplementary record of appeal – and moreover, all the parties had consented to the filing of the supplementary record of appeal out of time, unlike in the case before the court where a new filing was vigorously contested.

*Application dismissed.*

### **Orders**

Application for leave to file the supplementary affidavit dismissed.

### **Citations**

#### Cases

##### *East Africa*

1. *Board of Governors, Moi High School, Kabarak & another v Malcolm Bell* Application Nos 12 & 13 of 2012 (Consolidated) – (Explained)
2. *Joho, Hassan Ali & another v Suleiman Said Shabbal & 2 others* Petition No 10 of 2013 – (Mentioned)
3. *Lisamula, Anami Silverse v Independent Electoral and Boundaries Commission & 2 others* Petition No 9 of 2014 – (Mentioned)
4. *Munene, Mary Wambui v Peter Gichuki Kingara & 2 others* Petition No 7 of 2014 – (Mentioned)
5. *Odinga, Raila & 5 others v Independent Electoral and Boundaries Commission & 3 others* Petition Nos 5,4,3 of 2013 (Consolidated) – (Distinguished)
6. *Salat, Nick Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* Application No 16 of 2014 – (Explained)
7. *Wanjohi, George Mike v Steven Kariuki & 2 others* Petition No 2A of 2014 – (Distinguished)
8. *Wetangula, Moses Masika v Musikari Nazi Kombo & 2 others* Petition No 12 of 2014– (Distinguished)

##### *India*

1. *Chennai Metropolitan Water Supply and Sewerage Board & others v TT Murali Babu*, Supreme Court Civil Appeal No 1941 of 2014 – (Mentioned)

#### Statutes

##### *East Africa*

1. Constitution of Kenya, 2010 articles 87,(1),163(4)(a),(7),(8) – (Interpreted)
2. Elections (Parliamentary and County Elections) Petition Rules, 2013 (Sub Leg Act No 24 of 2011) rule 21– (Interpreted)
3. Elections Act (Act No 24 of 2011) section 85A – (Interpreted)
4. Supreme Court Act, 2011 (Act No 7 of 2011) section 31 – (Interpreted)
5. Supreme Court Rules, 2012 (Sub Leg Act No 7 of 2011) rules 8(1)(2); 18(1)(2) – (Interpreted)



## Advocates

1. Mr Oduol of the Applicant
2. Mr Omogeni for the 1<sup>st</sup> Respondent
3. Mr Magare for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

## RULING

### A. Introduction

1. The application before this Court is by way of Notice of Motion under certificate of urgency, dated 18<sup>th</sup> May, 2015. The applicant seeks Orders that:
  - (i) leave be granted to the applicant to lodge a supplementary affidavit annexing the certificate of election results for Member of the National Assembly Election, 2013 for Nyaribari Chache constituency, dated 5<sup>th</sup> March 2013;
  - (ii) the applicant be at liberty to apply to this Court for further directions and Orders, for purposes of meeting the ends of justice; and
  - (iii) the costs of the application be provided for.
2. On 21<sup>st</sup> May 2015, this Court (Ojwang, SCJ), having heard counsel for the applicant, certified the application as urgent and directed that the Registrar of the Court should assign a suitable hearing date.
3. The 1<sup>st</sup> respondent filed a replying affidavit dated 25<sup>th</sup> May, 2015, and written submissions dated 24<sup>th</sup> June 2015, while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their combined written submissions dated 22<sup>nd</sup> June 2015.

### B. Background

4. The applicant had contested the seat of Member of the National Assembly for Nyaribari Chache Constituency, during the General Elections held on 4<sup>th</sup> March 2013. The 1<sup>st</sup> respondent contested the same seat, while the 2<sup>nd</sup> respondent had the conduct of the election, which was presided over by the 3<sup>rd</sup> respondent, as the Returning Officer.
5. On 5<sup>th</sup> March, 2013, the 3<sup>rd</sup> respondent declared the applicant as the winning contestant, with the 1<sup>st</sup> respondent taking second place in the vote tally. Dissatisfied with the election result, the 1<sup>st</sup> respondent filed an election petition, Richard Nyagaka Tong'i v. IEBC and 2 Others Election Petition No. 5 of 2013.
6. On 7<sup>th</sup> October 2013, Muriithi J. allowed the petition, and declared that the applicant had not been validly elected. Aggrieved by the decision of the High Court, the applicant lodged an appeal at the Court of Appeal in Kisumu, Chris Munga N. Bichage v. Richard Nyagaka Tong'i and 2 Others, Civil Appeal No. 48 of 2013.
7. On 11<sup>th</sup> December 2013, the Court of Appeal dismissed the appeal, reserving the reasons (to be delivered on 21<sup>st</sup> February 2014). The 2<sup>nd</sup> respondent conducted a by-election on 19<sup>th</sup> December, 2013 in which the 1<sup>st</sup> respondent was declared to be the elected member of the National Assembly for Nyaribari Chache.



8. On 4<sup>th</sup> April 2014, the Court of Appeal delivered its reasons for the decision. Thereupon, the applicant, being aggrieved by the Judgment of the Court of Appeal, filed a notice of appeal on 16<sup>th</sup> April, 2014, followed by a petition of appeal on 14<sup>th</sup> May, 2014.
9. On 6<sup>th</sup> June, 2014, the 1<sup>st</sup> respondent applied to have the appeal struck out; but this Court dismissed the application on 19<sup>th</sup> February, 2015. It was held that the question raised, on whether the appeal had been rendered nugatory, was one that ought to be determined on the basis of a hearing, rather than at the interlocutory stage.
10. Before a hearing date was set, the applicant filed the instant application, seeking leave to file a document out of time.
11. At the outset, learned counsel Mr. Omogeni urged that the Court should enter upon its task by considering whether it had jurisdiction. But learned counsel, Mr. Oduol for the applicant objected, on the basis that no preliminary objection had been filed; and that all that was sought was leave to file a document out of time.
12. On the second issue, as to whether the respondent's submissions amounted to a preliminary objection, the two-Judge Bench directed the parties to proceed with their submissions in relation to the application.

### **C. The Parties' Respective Cases**

#### **(i) Applicant**

13. Mr. Oduol submitted that all the applicant seeks is leave to file a supplementary affidavit out of time; and that the object was to introduce an evidentiary detail, attached as "CMNB-01" – a Form 38 document, a certificate of election results dated 5<sup>th</sup> March, 2013.
14. Counsel urged that this Court has the jurisdiction, in terms of Article 163(4)(a) of *the Constitution* of Kenya 2010, to determine the application. In support of this contention, he referred to Article 163(8) of *the Constitution* as read with Section 31 of the *Supreme Court Act*, 2011 (*Act No. 7 of 2011*), which authorises this Court to make rules regarding the exercise of its jurisdiction. He submitted that, by Rule 8(1) of the Supreme Court Rules, 2012 a party, with leave of the Court, or with consent of the other party, may lodge further pleadings, or affidavits; and that Rule 18(1) and (2) provides that the Court may in any proceedings, call for additional evidence, though a party seeking to adduce additional evidence must make a formal application before the Court.
15. On the question whether this Court is being improperly asked to engage in a factual analysis, counsel submitted that this question should be determined at the hearing of the appeal itself. It was further urged that the question whether the grounds raised by the applicant (including the one on the High Court's jurisdiction to entertain the 1<sup>st</sup> respondent's petition) have merit, is one that should be determined on appeal.
16. Counsel submitted that on 5<sup>th</sup> March 2013, the 3<sup>rd</sup> respondent had issued to the applicant a certificate of election results (Form 38), declaring him the duly-elected Member of the National Assembly for Nyaribari Chache; and that subsequently, on 15<sup>th</sup> March, 2013, the applicant presented the said Form 38 to the National Assembly, while retaining a photocopy thereof.
17. Learned counsel submitted that the applicant had duly filed the required documents, in terms of the directions set out in *Moses Masika Wetangula v. Musikari Nazi Kombo and 2 Others*, Sup. Ct. Petition No. 12 of 2014; [2015] eKLR. These are: (a) the document sought to be introduced is common to all



the parties, and is not prejudicial to one or other; (b) it was not in dispute that the 3<sup>rd</sup> respondent had issued the document; and (c) the document was the basis upon which the applicant had been declared the winner.

18. Learned counsel submitted that the Form 38 was not being introduced for the first time in Court; for the 2<sup>nd</sup> respondent had laid before the High Court the original Forms 36 and 38, in compliance with Rule 21 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.
19. It was submitted that this Court has the discretionary powers to admit additional evidence. He relied on *Nick Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission and 7 Others*, Sup. Ct. Application No. 16 of 2014; [2014] eKLR (at pages 24-25) where the following passage appears:

“The statutory anchorage of the discretion to extend time is Rule 53 of the Supreme Court Rules. ...Hence, this Court by virtue of Rule 53... has discretionary powers to extend time within which certain acts can be undertaken. This can be perceived [in] the use of the word ‘may’ in crafting of the Rule. This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realised.”
20. Counsel urged the importance of including Form 38 in the proceedings, wherein the applicant seeks to show that a petition had been filed out of time. Counsel invoked this Court’s decision in *Wetangula*, in which Rawal, DCJ in her concurring opinion, found (paragraph 154) that any allegation of delay ought to have been considered using Form 38 – in the absence of which the Court would have insufficient evidence as a basis for ascertaining jurisdiction.
21. In his reply to the 1<sup>st</sup> respondent’s submissions, learned counsel urged that judicial precedence is an imperative, by virtue of Article 163(7) of *the Constitution*; and also on the basis of *George Mike Wanjohi v Steven Kariuki & 2 Others* Sup. Ct. Petition No. 2A of 2014; [2014] eKLR, in which this Court held that it has jurisdiction to admit fresh evidence.
22. On the 1<sup>st</sup> respondent’s contention that the Form 38 should have been tendered as part of the evidence in the affidavit, counsel urged that documents brought to Court by the 2<sup>nd</sup> respondent in compliance with Rule 21 of the Elections Petition Rules, do not require the tendering of evidence through an affidavit.

#### **(ii) First Respondent**

23. Learned counsel, Mr Omogeni for the 1<sup>st</sup> respondent, contested the application on three grounds: (a) that the Court lacked jurisdiction and discretion to admit electoral-dispute evidence on second appeal; (b) that the applicant had not shown that he had exercised due diligence but failed to obtain the Form 38 which was required in the discharge his burden of proof; and (c) that he failed to show conduct such as should move the Court to admit the evidence in question.
24. Learned counsel submitted that the statutory law of elections, in the terms of the *Elections Act*, makes the High Court the only Court that can receive evidence in both Parliamentary and Gubernatorial election-petitions. As regards the Court of Appeal, counsel urged that Section 85A of the *Elections Act* limits jurisdiction to issues of law. It was the 1<sup>st</sup> respondent’s submission that, based upon Article 163(4(a) of *the Constitution*, this Court cannot be compelled to admit further evidence.
25. Counsel invited this Court to apply its mind to the question whether, in election petitions other than a Presidential election in respect of which the Court has original jurisdiction, evidence can be introduced



- at the second level of appeal. In counsel's perception, the applicant was seeking leave of the Court to introduce an evidentiary document which did not form part of the record of the High Court or the Court of Appeal.
26. Counsel invoked Article 87 of *the Constitution*, as mandating Parliament to deal with election disputes in a timely manner; and with the consequence that the Supreme Court has no jurisdiction to entertain the matter before it.
  27. Counsel invoked this Court's decision in *Munya 2*, in which it was held (paragraphs 81 and 90) that by Section 85A of the *Elections Act*, matters of law only include "the interpretation, or construction of a provision of *the Constitution*, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor".
  28. With regard to the second objection centred on burden of proof, counsel relied on *Munya 2*, in which this Court held (paragraph 182) that "the evidential burden is the obligation to show...if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue". He submitted that the applicant had failed to show that he had exercised reasonable diligence, and that the document in question could not have been obtained for use at the trial. Learned counsel submitted that the application should also fail, as the applicant would have failed to discharge his burden on a balance of probabilities.
  29. In respect of the third objection to this Court's exercise of discretion, counsel urged that in the exercise of its discretion, on whether to admit the applicant's evidence, the Court should take into account the conduct of the parties. It was counsel's contention that the applicant had tendered no evidence to show that he applied for Form 38, and neither had he shown due diligence in filing the Form 38. He relied on the Indian Supreme Court decision in *Chennai Metropolitan Water Supply and Sewerage Board and Others v T.T Murali Babu*, Supreme Court Civil Appeal No. 1941 of 2014, for the principle that where a litigant delays in taking due action, a position should not be taken in favour of such litigant.
  30. Mr. Omogeni contested the averment that Form 38 had been tendered before the Court. He invited the Court to draw distinctions between *Raila Odinga and 5 Others v. Independent Electoral and Boundaries Commission and 3 Others* [2013] eKLR, and the instant case. He submitted that in *Raila Odinga*, the Court dealt with the introduction of evidence as regards a Presidential Election Petition, which this Court has original jurisdiction to entertain, unlike the election petition in respect of a National Assembly seat, where this Court deals with second appeals – a situation governed by a different law.

### **(iii) Second and Third Respondents**

31. Learned counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, Mr Magare, submitted that the 3<sup>rd</sup> respondent had indeed filed Form 38 at the right time; and he referred to the High Court proceedings, in which Forms 36 and 38 had been placed before the Court, in terms of Rule 21 of the Election Petitions Rules.
32. Counsel urged that no prejudice would be occasioned by admitting the evidence, in particular as the 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not oppose the application.

### **D. Issue For Determination**

33. From the pleadings and the written and oral submissions, the main issue arising for determination is – whether this Court should grant leave to the applicant to file a document out of time.



33A. Analysis of the foregoing issue will in our view, entail three questions:

- (i) does the document in question form part of the record as alleged?
- (ii) if so, then why does the applicant seek to have it admitted one more time, at this stage? and
- (iii) would a repeat-admission of the document occasion prejudice to any party?

#### **E. Analysis**

34. The applicant submitted that this Court has the jurisdiction, and can exercise its discretion to admit a supplementary affidavit and the Form 38 out of time, because the 2<sup>nd</sup> respondent had already presented it before the High Court. In effect, it was urged, the Form 38 was already part of the record of appeal. The 1<sup>st</sup> respondent's main objection to the application is that Article 163(4)(a) of *the Constitution* does not clothe this Court with the jurisdiction to admit evidence on a second appeal, on an election petition.
35. A scrutiny of the proceedings in Volume 6 of the record of appeal (at page 1636) shows that the 2<sup>nd</sup> respondent had produced Form 36, in terms of Rule 21 of the Elections Petition Rules, as well as Form 38.
- 35A. It thus emerges that the document in question, a Form 38, was part of the record in the trial Court proceedings – a fact confirmed by an interested party (2<sup>nd</sup> and 3<sup>rd</sup> respondents in this matter).
- 35B. Why does the applicant seek to re-introduce a document that is already on the record? It appears from the submissions, that the applicant is moved by perceived hints from the Wetangula case, in which the Form 38 was a relevant question; but the facts of the two cases, and in relation to Form 38, differ significantly: in Wetangula there was hardly any evidence that Form 38 was ever filed in Court. Since in the instant matter Form 38 is indeed part of the record, the applicant is in no way prejudiced; and an affidavit for the admission of such a document lacks a proper basis.
36. The 1<sup>st</sup> respondent also urged that this Court lacks jurisdiction in terms of Article 163(4)(a) of *the Constitution*, to admit a supplementary affidavit that introduces new evidence. It is not in contest that by this application, the applicant seeks interlocutory relief within the main appeal. This Court's remarks in Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell, Sup. Ct. Application Nos. 12 and 13 of 2012; [2013] eKLR are relevant: it was held that within the Supreme Court's appellate jurisdiction, parties may seek interlocutory relief. The Court thus held (paragraph 33):
- “It is clear to us that if interlocutory applications are excluded as a necessary step to preserve the subject-matter of an appeal, the Supreme Court's capability to arrive at a just decision on the merits of an appeal, would be substantially diminished. Both *the Constitution* and the *Supreme Court Act* have granted the Court the appellate jurisdiction; and within that jurisdiction, the parties are at liberty to seek interlocutory reliefs, in a proper case.”
37. On the foregoing principle, this Court, indeed, has the jurisdiction to determine the issue of grant of leave. The petition of appeal is premised on Article 163(4)(a) of *the Constitution*, and the applicant filed the application seeking relief in respect of the main appeal.
38. Counsel for the applicant further sought admission of the supplementary affidavit together with the attached Form 38, on the basis that it is an important document in the prosecution of the appeal. Time and again, this Court has signalled the importance of Form 38, in determining whether an election



petition has been filed in time at the High Court (See Hassan Ali Joho and Another v. Suleiman Said Shahbal and 2 Others, Sup. Ct. Petition No. 10 of 2013; [2014] eKLR (paragraph 77); Mary Wambui Munene v. Peter Gichuki Kingara and 2 Others, Sup. Ct. Petition no. 7 of 2014; [2014] eKLR; Anami Silverse Lisamula v. The Independent Electoral and Boundaries Commission and 2 Others, Sup. Ct. Petition No. 9 of 2014; [2014] eKLR (paragraph 124); and Rawal DCJ's concurring opinion in Moses Masika Wetangula v. Musikari Nazi Kombo and 2 Others, Sup. Ct. Petition No. 12 of 2014; [2015] eKLR (paragraph 154)).

39. Should this Court allow the admission of further affidavits in instances where such affidavits introduce important evidence, in election-petition matters? In election petitions, this Court may exercise its jurisdiction in two basic situations: (a) exclusive original jurisdiction in Presidential election petitions, under Article 163(3)(a) of *the Constitution*; and (b) an appeal qualifying as “matter of right”, under Article 163(4)(a) of *the Constitution*.

40. With reference to the exclusive original jurisdiction in a Presidential election petition, this Court made the following remarks in the Raila Odinga case:

“The other issue the Court must consider when exercising its discretion to allow a further affidavit is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the evidence...is such as to make it difficult or impossible for the other party to respond effectively, the Court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence.”

41. In that case, we held that this Court may exercise its discretion on whether to admit additional evidence, and that it is essential that no prejudice is occasioned to a party if the evidence is admitted. However, in relation to admission of new evidence in election petitions on second appeal, and as of right, we are in agreement with the 1<sup>st</sup> respondent's submission, that such would be a matter of first impression in this Supreme Court.

42. Counsel for the applicant relied on Rules 8(1) and 18(1) and (2) of the Supreme Court Rules to support his submission that additional evidence can be introduced in election petitions on second appeal. The said provisions read as follows:

“ 8

(1) A party may, with leave of the Court or with consent of the other party, lodge further pleadings and affidavits.”

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(1) The Court may in any proceedings, call for additional evidence.

(2) A party seeking to adduce additional evidence under this rule shall make a formal application before the Court.”



43. In *George Mike Wanjohi v. Steven Kariuki and 2 Others*, Sup. Ct. Petition 2A of 2014; [2014] eKLR, this Court had the opportunity to address the application of Rule 8(1) and (2) in relation to the filing of additional pleadings; and we thus observed (paragraph 51):

“We note that the Supreme Court Rules, 2012 do not envisage a situation in which a respondent may lodge a supplementary record of appeal. However, Rule 8(1) and (2) makes provision for any party, with leave of Court or with the consent of the other party, filing further pleadings or affidavits. Such an application for leave may be made informally. Rule 11 also provides that a respondent may file grounds of objection, an affidavit, or both. We note that no prejudice was occasioned by the additional material placed before the Court.”

44. Counsel for the 1<sup>st</sup> respondent submitted that Article 87 of *the Constitution*, and the *Elections Act* and its Rules, are the governing legal framework for election petitions; and that by the *Elections Act*, only the High Court has the jurisdiction to admit evidence in election petition cases. He urged that Section 85A of the *Elections Act* allows the Court of Appeal to determine only questions of law, and that the Supreme Court, sitting on second appeal, may not determine questions of fact.

45. This Court restated the importance of the Elections statutes and Regulations in *Munya 2*, holding (paragraph 62) that Article 87(1) of *the Constitution* is a reflection of the sensitive timelines, on account of which Parliament has the latitude to enact legislation providing for timely resolution of disputes. And that causal link, itself, forms the nexus between Article 87(1) of *the Constitution* and Section 85A of the *Elections Act*, which limits the Court of Appeal’s jurisdiction in election-petition appeals to matters of law only. The Court thus held (paragraph 63):

“... Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.”

46. Is there a difference between the admission of evidence in the exercise of the Supreme Court’s exclusive original jurisdiction, and in its appellate jurisdiction? The answer is in the affirmative. In the exercise of its exclusive original jurisdiction in Presidential-election petitions, this Court sits as a Court of first instance, and therefore, it may deal with matters of fact and of law. Now as, in appellate election-petition matters, Section 85A of the *Elections Act* limits the Court of Appeal to matters of law only, the question arises: should the Supreme Court, sitting on second appeal, also restrict itself to matters of law only?

47. In *Munya 2*, this Court interpreted the expression, “matters of law only”, as applied in Article 87 of *the Constitution* and Section 85A of the *Elections Act*, as follows [paragraph 81]:

“...[I]t emerges that the phrase ‘matters of law only’, means a question or an issue involving:

- (a) the interpretation, or construction of a provision of *the Constitution*, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, in an election petition in the High Court, concerning membership of the National Assembly, the Senate, or the office of County Governor....
- (b) the application of a provision of *the Constitution*, an Act of Parliament, Subsidiary Legislation, or any legal doctrine, to a set of facts or evidence on record, by the trial Judge in an election petition in the High Court, concerning



membership of the National Assembly, the Senate, or the office of County Governor...”.

48. The emerging principle logically entails the position that the Supreme Court, sitting on second appeal, is essentially restricted to matters of law only. On that basis, what is the implication of Rules 8(1) and 18(1) and (2) of the Supreme Court Rules, in relation to the Court’s discretion as regards the admission of further affidavits or pleadings? In *Wanjohi* the Court observed that a reading of Rule 8(1) and (2) suggested that it could admit the supplementary record. However, that case is distinguishable from the instant one: because all the parties had consented to the supplementary record of appeal being filed.
49. The scope of this Court’s discretion is also a relevant question. The applicant submitted that the Supreme Court may exercise a discretion to admit the affidavit filed out of time. On a related point, the Court, in *Nicholas Kiptoo Korir Arap Salat v The Independent Electoral and Boundaries Commission and 8 Others*, Sup. Ct. Application No. 16 of 2014; [2014] eKLR, had thus pronounced itself (pp.24-25):
- “The statutory anchorage of the discretion to extend time is Rule 53 of the Supreme Court Rules. ...Hence, this Court by virtue of Rule 53 of the Supreme Court Rules has discretionary powers to extend time within which certain acts can be undertaken. This can be perceived by the use of the word ‘may’ in crafting of the rule. This discretion is a very powerful tool which in our view should be exercised with abundant caution, care and fairness; it should be used judiciously and not whimsically to ensure that the principles enshrined in our Constitution are realised.”
50. In this particular application, it is essential for the Court to exercise its discretion judiciously, in regard to the admission of a supplementary affidavit filed out of time. A view of *the Constitution*, legislation, and case law discloses that in election-petition matters: (i) time is of the essence in finalising electoral disputes; (ii) the High Court acts as a trial Court, and has the jurisdiction to deal with matters of fact and evidence; (iii) the Court of Appeal, when acting as an appellate Court in election petitions, is restricted to matters of law; and (iv) this Court can act as a second appellate Court in election-petition disputes involving Parliamentary and Gubernatorial seats, where matters of *the Constitution* and the law are involved – where the “interpretation or application of this Constitution” is in issue.
51. This Court, in the exercise of its appellate jurisdiction under Article 163(4)(a) of *the Constitution*, is restricted to matters of law. Although Rule 8(1) and (2) of the Supreme Court Rules provides for the admission of further affidavits, it is still a relevant question that the Court is here dealing with an election petition on second appeal. Accordingly, while exercising its discretion, this Court is to: deal with points of law; consider any matter of prejudice to a party; and consider the time factor – which limits the admission of new evidence at the appellate level.
52. The *Raila Odinga* case is to be distinguished, because the Court was in that case, exercising its exclusive original jurisdiction, and so it was not limited to determining matters of law. Likewise, the *Wanjohi* case can be distinguished, as the Supreme Court Rules dealt only with the filing of “further pleadings and affidavits”, rather than with a supplementary record of appeal – and moreover, all the parties had consented to the filing of the supplementary record of appeal out of time, unlike in this case where a new filing is vigorously contested.
53. This Court, sitting as a second appellate Court, and exercising its jurisdiction under Article 163(4)(a) of *the Constitution*, will not grant leave to file the supplementary affidavit.



**F. Orders**

54. The foregoing analysis and determination leads us to make specific Orders in the following terms:

- (a) The application dated 18<sup>th</sup> May, 2015, is disallowed.
- (b) A hearing date for the appeal in this matter shall be issued by the Registrar, on the basis of priority.
- (c) The costs of this application shall abide the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF OCTOBER 2015.**

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**J. B. OJWANG**

**JUSTICE OF THE SUPREME COURT**

.....

**N. S. NDUNGU**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR, SUPREME COURT**

