Obado v Oyugi & 2 others (Civil Application 7 of 2014)
[2014] KESC 25 (KLR) (23 April 2014) (Ruling)

Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR

Neutral citation: [2014] KESC 25 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

CIVIL APPLICATION 7 OF 2014

MK IBRAHIM & NS NDUNGU, SCJJ

APRIL 23, 2014

BETWEEN

ZACHARIA OKOTH OBADO .... APPLICANT

AND

EDWARD AKONG'O OYUGI .... 1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 2ND RESPONDENT

JAIRUS OBAGA/COUNTY RETUURNING OFFICER, MIGORI COUNTY .... 3RD RESPONDENT

(An application for stay of execution of the Judgment and order of the Court of Appeal of Kenya at Kisumu, in Civil Appeal No. 39 of 2013 (J.W. Onyango, W. Ouko & S. Ole Kantai, JJA) dated March 28, 2014)

Supreme Court stays judgment nullifying the election of a governor pending an appeal before it

Reported by Andrew Halonyere & Valarie Adhiambo

Civil Practice & Procedure *- appeals - notice of appeal - filing and service of notice of appeal - extraction of court of appeal orders - whether a notice of appeal that was not filed and served according to the Supreme Court Rules was fatal to the appeal - whether failure to extract an order of the Court of Appeal in accordance with rule 34(2) of the Court of Appeal Rules was fatal to the appeal - Supreme Court Rules, rule 31 and rule 33; Court of Appeal Rules rule 34(2).*

Election Laws *- gubernatorial elections - nullification of gubernatorial elections - assumption of the office of the Governor by the Speaker of the county assembly pending a by election - what was the legal position in granting stay where the Speaker had not taken oath of office as opposed to where he had been sworn in as acting Governor.*

Civil Practice & Procedure *- conservatory orders - powers of the Supreme Court to grant conservatory orders - stay of execution of a judgment of a lower court - conditions for stay of orders - whether the application satisfied all the required conditions for stay of execution of the judgment /orders pending an appeal in an election petition.*

Brief facts

The Applicant (Zacharia Okoth Obado) was declared the duly elected Governor of Migori County during the march 4, 2013. The 1st Respondent (Edward Akong'o Oyugi) filed a Petition to the High Court and the High Court dismissed the petition. There after the 1st Respondent appealed to the Court of Appeal. The Court of Appeal nullified the election of the Applicant and being aggrieved by that decision the applicant appealed to the Supreme Court. The Appeal to the Supreme Court gave rise to this application in which the Applicant sought stay of execution of the judgment of the Court of Appeal, and *inter-alia* conservatory orders against the 2nd respondent (The Independent Electoral and Boundaries Commission) from conducting gubernatorial elections for Migori County pending the hearing and determination of the Appeal.

The 1st Respondent on his part sought to have the Appeal struck out on the ground that the notice of appeal was not served in accordance with rule 31 of the Supreme Court Rules and that the records of appeal was not extracted in accordance with rule 34(2)

Issues

i. Whether the record of appeal was fatally defective to warrant the striking out of the Appeal on the basis that the order was not extracted in accordance with rule 34(2) of the Court of Appeal Rules,

ii. Whether the address of service was such a mandatory provision, that its exclusion falsified the entire record, or was it an anomaly that could be cured by article 159 of the Constitution.

iii. Whether the Appeal met the set threshold for grant of stay of execution orders;

iv. Could the Supreme Court, upon the delivery of the judgment of the Election Court or the Court of Appeal nullifying the election of a County Governor, issue an order for stay and halt the IEBC from proceeding with the preparations for the by-elections as prescribed by article 182(5) of the Constitution.

v. Whether an order of stay could be granted where a vacancy had been declared and the Speaker had already assumed office.

vi. What was the legal position where the Speaker had not taken the oath of office, as opposed to where he had already been sworn in as acting County Governor?

Supreme Court Rules, rule 33(3) and (4)

(3) The Record of Appeal from a court or tribunal exercising original jurisdiction shall contain—

(a) an index of the documents in the record with the numbering of the pages in which they appear;

(b) the notice of appeal;

(c) the certificate, if any, certifying that the matter is of general public importance;

(d) a statement showing the address for service of the appellant including telephone numbers and email address;

(e) the address for service furnished by the respondent and as regards any respondent who has not furnished an address or service, the address and proof of service on the respondent of the notice of appeal;

(f) the pleadings;

(g) the record of proceedings;

(h) the trial judge's notes of the hearing;

(i) the transcript of any shorthand notes taken at

the trial; the affidavits read and all documents of evidence at the hearing, or, if such documents are not in the English language, certified translations thereof;

(k) the judgment or order;

(l) the certified decree or order

(m) such other documents, if any, as may be necessary for the proper determination of the appeal, including any interlocutory proceedings which may be directly relevant

(4) For the purpose of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under sub rule (3) and shall further contain the following documents relating to the appeal in the first appellate court -

(a) the certificate, if any, certifying that the matter is of general public importance;

(b) the memorandum of appeal;

(c) the record of proceedings; and

(d) the certified decree or order.

Held

1. The notice of appeal as its title indicated was a signification of intent by the potential appellant, to challenge by way of appeal, the decision of a lower Court. The petition of appeal on the other hand was a statement of grievance, an appeal cause against the judgment of a lower Court. The record of appeal was the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not have been able to determine the appeal before it.
2. If an intending appellant were to present the Court with a notice and petition of appeal, but without the record of appeal, and expect the Court to determine "the appeal" on the basis of those two, such an appeal would be incomplete and hence incompetent. That was the gist of rule 33(1) of the Supreme Court Rules.
3. Service of a Notice of Appeal ought to be served as provided by law and all subsequent legal procedures followed.
4. The appellant had 7 days within which to serve the notice of appeal and had 30 days from the day of filing the notice, within which to file the appeal. Though no party had raised it, it was evident that the law provided that the two activities would start running concurrently: the act of serving the notice of appeal and the act of filing the intended appeal. Though both had different timelines, they all commenced on the same day, namely the day of filing the notice of appeal.
5. Rule 33 (3) (e) of the Supreme Court Rules required that the record of appeal contain 'the address of service' of the respondent(s). That provision did not envisage that a litigant had the leeway of filing an appeal even on the first day of lodging the notice of appeal, while still having 7 days to serve the respondent with the notice of appeal. That was a scenario that the drafters of the law clearly did not envisage. Therefore, a party was not to be held responsible for such a grey provision of the law.
6. The notice of appeal ought to have been filed before the appeal. However, while the rules required that it be served, to allow the respondent(s) to file an address of service, and the address of service then to be contained in the record of appeal, the lack of that address of service did not warrant striking out of the appeal.
7. The nature of the matter before court which was urgent and constitutionally time bound was one of those exceptional cases where the Supreme Court would apply article 159 of the Constitution, in order to render substantive justice. Article 163(4) (a) of the Constitution gave the appellant a right to come to Court when seeking a constitutional interpretation and/or application. Such a right was not to be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party could be deduced.
8. While parties had been coming to the Supreme Court from the Court of Appeal, citing rule 33(3), the correct rule should have been rule 33(4). Rule 33(3) dealt with the record of appeal from a court or tribunal exercising original jurisdiction. Although no party had cited Rule 33(4), it was the right provision under which parties should have moved to the Supreme Court when appealing from the

Court of Appeal. Consequently, the court would consider the present case on the basis of the requisite documents under Rule 33(4).

9. Under rule 33(4) of the Supreme Court Rules , the record of appeal was to contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under rule 33(3). That had to be the record of appeal from the High Court filed in the Court of Appeal. In addition thereof, the documents from the first appellate court (Court of Appeal) were: the certificate, where it was required; the memorandum of appeal; the record of proceedings; and the certified decree or order.
10. The matter having come through the High Court then to the Court of Appeal, rule 33(4) contemplated that the address of service of the respondent was contained in the record of appeal forming the first appeal to the Court of Appeal. Rule 33(3) applied where it was a first appeal direct to the Supreme Court as contemplated under article 163(3) (b) (ii) of the Constitution. Therefore while the record of appeal herein did not contain an address of service of the respondent, the same was not fatal to the appeal before the Supreme Court.
11. The essence of article 159(2) (d) was that a Court was not to allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties. In the instant issue the rationale behind the provisions of rule 34(2) was to ensure that an order drawn reflected the terms of the judgment itself. Consequently, the main consideration should not have been the approval of the order by the parties but whether the extracted order was consistent with the Court's judgment. That was because, in a scenario where the draft drawn was approved by both parties but did not reflect the judgment of the Court, the Deputy Registrar was not bound to sign and seal it.
12. Rule 34(2) of the Court of Appeal Rules was enacted a while back, when the Court of Appeal was the final Court. Consequently, it was contemplated that only the successful party, in whose favour the judgment was delivered, would extract the Order. However, with the establishment of the Supreme Court, it was necessary that the drafters considered an amendment to rule 34(2) so as to allow any party that desired to appeal to the Supreme Court, to be at liberty to draft the order, a practice akin to the High Court practice under the Civil Procedure Rules.
13. The record of appeal was not fatally defective, to warrant it being struck out of the appeal on the basis that the order was not extracted in accordance with the Court of Appeal Rules since there was no prejudice occasioned to the 1st respondent in this regard. Therefore the appeal and the application were properly before the Court.
14. The Principles for grant of stay in an interlocutory application were established. The appellant had to show that; a) the appeal or intended appeal was arguable and not frivolous b) Unless the order of stay sought was granted, the appeal, were it to eventually succeed would be rendered nugatory; and c) It was in the public interest that the order of stay be granted
15. The constitutional timelines for a by-election, which was a relatively short period, had already started running. It was apparent therefore, that the Supreme Court faced the risk of an election being held while the appeal was pending if a stay was not granted. That scenario would have presented an awkward situation for both the Court and all parties to the application. Therefore the appeal would be rendered nugatory, if a stay was not granted.
16. The swearing-in of the Speaker as acting Governor would affect the existence of a vacancy in the office of the Governor. The Speaker would only assume office after taking the mandatory oath as provided by law, after which the constitutionally mandated process would start running. Once the Speaker assumed office, only then would the Governor cease to hold office. In the matter before the court, the Speaker had not been sworn in, therefore the vacancy of the Governor's office had not yet been effected. However, where the Speaker had already assumed office the Supreme Court would adhere to the provisions of the Constitution, pursuant to article 2(1). In addition, article 3(1) of the Constitution imposed an obligation on every one, without exception, to respect, uphold and

defend the Constitution. That obligation was further emphasized with regard to the exercise of judicial authority, by article 159(2) (e) which required that in the exercise of judicial authority the Courts had to heed to the purpose and principles of the Constitution being protected and promoted.

17. All statutes flow from the Constitution, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Therefore it could not be said that the Supreme Court could not stop a constitutionally guided process. What the Supreme Court would not do was to extend time beyond that decreed by the Constitution. However, a process provided for by the Constitution and regulated by statute could be stayed, as long as it was finally done within the time frame constitutionally authorized.

18. The Supreme Court would not be interfering with a constitutionally mandated process, if the order for stay was granted. Since an order for stay would be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker. The Supreme Court had to, in the public interest; grant an order for stay in order to avoid a prospect of wastage of public funds through the commencement of the constitutionally prescribed process of by-election by the IEBC, a process that could be rendered unnecessary had the appeal succeeded.

19. Where a County should have an incumbent Governor, who had been removed from office but was temporarily in office pending determination of a suit in a Court of law; or conversely, a Speaker acting as temporary Governor pending the election of a new Governor, there was need to limit the exercise of such a person's powers, until a substantive holder of office was either affirmed or elected. However, such a prescription of limitation did not fall within the jurisdictional mandate of the Supreme Court, or the judicial arm of government as a whole. That power is within the legislative mandate of Parliament.

20. The Supreme Court in upholding its objective under section 3 of the Supreme Court Act, to protect the Constitution, would not act *ultra vires* the Constitution, by usurping a mandate not bestowed on it.

21. ***[Obiter]*** We would therefore recommend that Parliament do consider legislating to limit the exercise of the powers of the office of the Governor in temporary situations such as in the instant matter.

Application allowed.

Orders

i. Execution of the whole judgment and/or orders of the Court of Appeal stayed pending the hearing and determination of the appeal.

ii. A conservatory order issued against the Speaker of Migori County Assembly from assuming the office of Governor, pending the hearing and determination of the appeal.

iii. A conservatory order issued against the 2nd respondent from certifying the gubernatorial seat of Migori County vacant pending the hearing and determination of the appeal.

iv. A conservatory order issued against the 2nd respondent announcing and/or conducting gubernatorial elections for Migori County pending the hearing and determination of the appeal.

v. Costs of the application to abide the determination of the main cause on appeal.

Citations

East Africa

1. *Board of Governors, Moi High School Kabarak & another v Malcolm Bell* Supreme Court Petition Nos 6 & 7 of 2013 (Consolidated) - (Followed)

2. *In Re Speaker of the Senate* Advisory Opinion Reference No 2 of 2013 - (Mentioned)

3. *Law Society of Kenya v Centre for Human Rights and Democracy & 12 others* Petition No 14 of 2013 - (Followed)

4. *Munya, Peter v Dickson Mwenda Githinji & 2 others* Petition No 2 0f 2014 - (Followed)

5. *Odinga, Raila & 5 others v Independent Electoral and Boundaries Commission & 3 others* Court Petition No 5 of 2013

6. *Rai, Jasbir Singh & 3 others v Tarlochan Singh Rai Estate & 4 others* Petition No 4 of 2012 - (Explained)

7. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 6 others* - Civil Appeal (Application) No 228 of 2013 - (Followed)

Statutes

East Africa

1. . Civil Procedure Rules, 2010 (cap 21 Sub Leg) In general - (Interpreted)

2. Constitution of Kenya, 2010 articles 2(1); 3(1); 10; 25(c); 25(2); 27(4); 38; 50(1); 81(e); 86(a)(b)(c); 87(1); 88; 88(4)(5); 89(1); 94(1); 134; 159(2)(e)(d); 163(4)(a); 163(3)(b)(ii); 163(7); 182; 182(4)(5); 201; 201(d) - (Interpreted)

3. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rules 32(3)(d); 34(2) - (Interpreted)

4. Elections Act, 2011 (Act No 24 of 2011) sections 85A, 83,86(2) - (Interpreted)

5. Supreme Court Act, 2011 (Act No 7 of 2011) sections 3,24 - (Interpreted)

6. Supreme Court Rules, 2012 (Act No 7 of 2011) Sub Leg) rules 30,31(1); 32(3)(d); 33(3),(e); 33(4) - (Interpreted)

RULING

A. Introduction

1. This is an application by way of a Notice of Motion under certificate of urgency seeking orders for-:

    i. Stay of execution of the whole judgment/orders of the Court of Appeal at Kisumu in Civil Appeal No 39 of 2013 pending the hearing and determination of the Appeal against the said judgment;

    ii. Grant of conservatory orders against the 2ndRespondent herein, to certify the gubernatorial seat of Migori County vacant pending the hearing and determination of the Appeal;

    iii. Grant of conservatory orders against the Speaker of the County Assembly of Migori from assuming the office of the Governor pending hearing and determination of the Appeal; and

    iv. Grant of conservatory orders against the 2nd Respondent announcing and/or conducting gubernatorial elections for Migori County pending hearing and determination of the appeal.

2. The Applicant has filed an appeal seeking to set aside the whole judgment of the Court of Appeal in Civil Appeal No 39 of 2013 dated 28thMarch, 2014 at Kisumu.

B. Background

3. The genesis of the application is the declaration of the Applicant as the duly elected Governor of Migori County in the elections held on 4th March, 2013.

4. The 1st Respondent, Edward Akong'o Oyugi filed a petition in the High Court at Homa Bay, Election Petition No 3 of 2013 challenging the declaration of the Applicant as the duly elected Governor of Migori County. He sought orders to be declared as the duly elected Governor or, in the alternative, the election of the Applicant be set aside and a fresh election ordered.

5. The High Court (EN Maina J), upon hearing and considering the evidence presented, dismissed the Petition and ordered the 2nd Respondent (IEBC) to pay costs of Ksh 1 million to both the Applicant and the 1stRespondent, with the 3rdRespondent bearing his own costs. Aggrieved by the High Court decision, the 1st Respondent appealed to the Court of Appeal.

6. The prayers sought at the Court of Appeal include that:

   (i) the certificate issued by the High Court be quashed;

   (ii) the election and declaration of the applicant as Governor of Migori County be set aside and a fresh election ordered. The 2nd and 3rd Respondents on their part filed a cross-appeal, challenging the High Court's decision condemning the 2nd Respondent to pay costs and the 3rdRespondent to bear his own costs.

7. The Court of Appeal (Onyango Otieno, Ouko & Kantai, JJA) in its decision delivered on 28th March, 2014 allowed the Appeal. It set aside the judgment of the High Court stating that the election of Governor, Migori County was so poorly conducted that it failed to meet the constitutional and legal requirements of a free and fair election. It further ordered that IEBC be notified to proceed under section 86(2) of the *Elections Act* and conduct a fresh election.

8. Aggrieved by this decision, the Applicant filed a Notice of Motion dated 3rdApril, 2014 in this Court, under certificate of urgency, seeking the aforementioned orders.

9. On 3rd April, 2014 the Application was heard exparte by a single Judge (Ibrahim, SCJ), and certified urgent. Conservatory orders in terms of prayers No 2, 3, 4 and 5 in the Notice of Motion were granted until the inter partes hearing before a two Judge bench on 8th April, 2014. After hearing the submissions by the parties on all interlocutory matters, Ibrahim and Ndungu SCJJ, set the ruling for 23rd April, 2014. The stay orders previously granted were extended until delivery of this ruling.

C. Submissions

a. Applicant's Submission

10. Counsel for the Applicant, Senior Counsel Ahmednasir, submitted that the intended appeal had been filed as a matter of right pursuant to article 163(4) (a) of *the Constitution* and in tandem with the principles set out in the case of Peter Munya v Dickson Mwenda Githinji & 2 others, Petition No 2 0f 2014 (Munya case). He added that the contestations relate to the Court of Appeal's interpretation of articles 81(e), 86(a), (b) & (c) and article 10 of *the Constitution*. He argued that, of the five issues extracted by the Court of Appeal for determination, three of them were constitutional issues. He pointed out that the questions for determination were centered on the constitutional principles followed in conducting the elections, and that the Court of Appeal's judgment was premised on the finding that the election failed to meet the constitutional requirement of a free and fair election.

11. With respect to the application for stay, counsel sought to rely on the three grounds for stay set out in the Munya case, plus one additional ground. These are:

   1) the Appeal raises arguable issues, hence it is not frivolous;

   2) the appeal will be rendered nugatory if stay is not granted and the by-elections are held;

   3) that it would be in the public interest for the appeal to be heard; and

4) it is the Court's duty to have a watchful eye and interpretative vigilance in its patrol of Kenya's constitutional boundaries.

12. As to whether the appeal is arguable and not frivolous, counsel urged that the Court of Appeal failed to make a determination on whether the 1st Respondent discharged the burden of proof to the standard required by *the Constitution*. He urged that the Court of Appeal should not have proceeded to make a determination in view of the fact that the petitioner in the election court did not discharge the burden of proof. To reinforce this point, counsel stressed that the Court of Appeal lowered the standard of proof required to invalidate an election as was clearly set out by this Court in Raila Odinga & others v Independent Electoral and Boundaries Commission & others, Supreme Court Petition No 5 of 2013 (Raila Odinga case) and as a result misapplied article 163(7) of *the Constitution*.

13. It was urged that the Court of Appeal acted contrary to the principles set out in Section 83 of the *Elections Act*, 2011 in declaring that no matter how small the level of malpractices, it was enough to void an election. He argued that the Court practised judicial bias and, in effect, breached articles 25(2) and 50(1) of *the Constitution*,on the right to fair trial. It was his contention that the Court of Appeal erred by taking into account the margin of victory as a factor in determining the validity of the election, as it was a departure from the constitutional requirement that the candidate who receives the majority votes is declared elected. He averred that although the Court made a finding that after tallying, the Applicant's margin increased by 300%, it still proceeded to state that the election was not free and fair. This, he argued, was a misapplication of the constitutional requirement, as it was a determination on matters of fact by the Court contrary to article 89(1) and article 88 of *the Constitution*.

14. With regard to the appeal being rendered nugatory, counsel invoked the Munya case. He explicated two possible scenarios that would occur if stay was to be denied, as was expounded in the Munya case. One of them was that the election machinery will be set in motion and the Applicant will seek re-election, while at the same time pursuing his appeal before this Court. He added that if the Appeal succeeds and the Applicant is re-elected, then it could be said that the Appeal would have been rendered nugatory.

15. He submitted that it would be prudent in the public interest for conservatory orders to be issued, simply because if the matter proceeds to a full hearing without stay, the 2nd and 3rd Respondents will utilize public funds to conduct a by-election which, after determination of this Appeal, may turn out to have been unnecessary, and thus a waste of public funds.

16. On the fourth condition, Counsel urged that this Court in view of its constitutional position ought to have a watchful eye and interpretative vigilance in its patrol of Kenya's constitutional boundaries to protect *the Constitution* and ensure that it is not breached. This reasoning, he argued, was a paraphrase from the Supreme Court decisions in The Matter of Speaker of the Senate, Advisory Opinion Reference No 2 of 2013, and the Raila Odinga case. Finally, counsel urged the Court to consider the article by the learned Justice JB Ojwang in ''Elections Disputes and Judicial Process: Emerging Lessons'', concerning the issue of irregularity as an influence on free and fair election.

17. On the Preliminary Objection touching on jurisdiction under article 163(4) (a) of *the Constitution*, co-counsel for the Applicant, Senior Counsel Mr Omogeni submitted that from the 1st Respondent's Replying Affidavit it is quite clear that the 1st Respondent has acknowledged that the Court of Appeal correctly interpreted articles 81, 86 and 38 of *the Constitution*. He submitted that, guided by the ruling in the Munya case, the Court has jurisdiction on any constitutional issues determined in the Court of Appeal.

18. He further implored the Court to invoke article 159(2)(d) of *the Constitution* and consider substantive justice as opposed to procedural technicalities being relied on by the 1st Respondent. He was of the

view that rule 31(1) of the Supreme Court Rules, 2012 does not lay down the manner in which the notice of appeal should be served. He submitted that the notice of appeal in this matter was properly lodged within the prescribed time, and served as prescribed by the Rules - as it was served to Counsel for the 1st Respondent together with the record of appeal. He sought to distinguish the current case from the Law Society of Kenya v Centre for Human Rights and Democracy & Others, Supreme Court Petition 14 of 2013.

19. Counsel submitted that the Court has discretion to issue interlocutory orders as stipulated under section 24 of the *Supreme Court Act*, 2011 and as confirmed by this Court in Board of Governors, Moi High School Kabarak & Another vs Malcolm Bell, Supreme Court Petition Nos 6 & 7 of 2013, and in the Munya case.

20. He urged that this motion was in the public interest, as the people of Migori County had a right to know the outcome of the election for the position of Governor from the highest Court in the land. He added that if conservatory orders are not issued, time starts to run as per article 182 of *the Constitution*, and a by-election would be held within 60 days. In case a by-election is held and the Applicant's petition is heard and determined in his favour, the former would amount to a waste of public funds, in contravention of article 201 of *the Constitution*.

b. 1st Respondent's Submissions

21. Mr Steven Mwenesi, learned counsel for the 1st Respondent, opposed the Application. It was his contention that the Application must be supported by a competent originating process. He submitted that in the Applicant's case there was no competent originating motion for two reasons. First, the notice of appeal was not served in accordance with rule 31 of the Supreme Court Rules; and secondly, the order appearing in the record of appeal was not extracted in accordance with rule 34(2) of the Court of Appeal Rules.

22. He urged that the Notice of Appeal is initially filed in the Court of Appeal which then transmits it to the Supreme Court. In addition, the Court must be satisfied that all those affected by the intended appeal had been notified in accordance with the law. Counsel submitted that the order extracted was not in conformity with the Court of Appeal Rules as it was filed without the approval of the 1st Respondent.

23. It was his submission that a breach of rules 31 and 33(3) of the Supreme Court Rules and rule 34(2) of the Court of Appeal Rules was not an issue of procedural technicality, but "procedural" substance. He stated that invoking article 159(2)(d) in the current circumstances amounted to substantial injustice and was a violation of section 3 of the *Supreme Court Act* which obligates the Court to assert the supremacy of *the Constitution*.

24. Counsel further posed the question whether article 163(4) (a) of *the Constitution* overrides article 87(1) of *the Constitution*, on the basis of which Parliament enacted section 85A of the *Elections Act*, on timely determination of election disputes. He also questioned the time - limit for the Supreme Court to determine the Appeal, if admitted, and the wisdom of granting conservatory orders without limitations. He argued that by granting the orders, the Court would be creating a temporary executive of Migori County, thus it would also have to impose the same limitations imposed on a temporary executive of the Republic under article 134 of *the Constitution*. He opined that if the Court were to grant conservatory orders then the matter must be heard and determined within seven days.

25. On the issue of stay of the judgment of the Court of Appeal, it was counsel's submission that the Applicant never asked for stay at the Court of Appeal. Subsequently a certificate was issued and the Speaker automatically assumed office pending the administration of oath as Acting Governor, to

commence executing his functions in accordance with article 182(4) of *the Constitution*. It was his contention that there was no vacancy in the office of the Governor of Migori County, and there was nothing to stay in the judgment of the Court of Appeal as it had been implemented. Further, counsel submitted that there was neither an application before the Court for the filling of the vacancy created by *the Constitution*, nor one asking the Court to reinstate the ousted Governor, or allow him to act as a temporary Governor. Hence, counsel submitted that by granting the conservatory orders the Court will be giving undue advantage to the Applicant and causing prejudice to the 1st Respondent and the people of Migori, contrary to article 27(4) of *the Constitution*.

c. 2nd and 3rd Respondents' Submission

26. Counsel for the 2nd and 3rd Respondents, Mr Obondo, in support of the Application, invited the Court to settle certain issues arising from the Court of Appeal's judgment on electoral law. He submitted that one such issue was on the margin of victory. In this regard, counsel submitted that the Court of Appeal interpreted article 88(4) ofthe Constitution to the effect that a certain margin of victory was needed for one to be declared the winner in a gubernatorial election, but did not define that margin. Counsel was of the view that the Appellate Court misinterpreted the said provision of *the Constitution*, as there was no such margin.

27. The 2nd Respondent was also interested in the interpretation of articles 81 and 86 of *the Constitution* with respect to accuracy of election results in the conduct of elections. Counsel stated that the Appellate Court made findings that the words 'fatigue' and 'human error' were over - used and misused. In this context the Court departed from the reasoning of earlier Court of Appeal judgments, without any analysis.

28. In addition, Counsel urged the Court to consider the issue of public interest in that taxpayers' money was likely to be used in preparation of a by election in a situation where it ought not to be used. To support his argument, counsel cited Civil Appeal No 36 of 2013, Civil Appeal No 219 of2013 and Civil Appeal No 39 of 2013 as instances where the High Court had nullified the elections only for the Court of Appeal to uphold them after the 2nd Respondent had spent huge sums of money to prepare for the elections.

D. Issues for Determination.

29. The following issues fall for determination:

    a. Whether the Notice of Appeal was filed and served in accordance with the rules, and if not, whether that is fatal to the Appeal;

    b. Whether the order of the Court of Appeal was extracted in accordance with the rules, and if not, whether that is fatal to the Appeal;

    c. Whether the appeal meets the set threshold for grant of stay orders;

    d. Whether a stay can be granted where a vacancy has been declared and the Speaker has already assumed office;

    e. Whether the Court should grant the stay orders prayed for in the application.

D. Analysis

i. Was the Notice of Appeal served

30. The question whether the Notice of Appeal was served falls for determination first. Upon being served with the Application and the Petition of Appeal, the 1st Respondent filed a Notice of Appointment of Advocates Under Protest, on the basis that he was not served with the Notice of Appeal. In his submissions, he urged the dismissal of this Application on grounds inter alia:

> " 16(g) the Notice of Appeal to commence the Appeal on which the Application for stay is premised has not been served on me or my advocates in accordance with rule 30 of the Supreme Court Rules".

31. He argued that the Appeal is incompetent and cannot support the conservatory orders or engage the Supreme Court's appellate jurisdiction. He submitted that the process of appeal to this Court is initiated by a Notice of Appeal which must be filed and served, and an Affidavit of service filed prior to the filing of the appeal. Indeed, rule 32(3)(d) of the Court's Rules states that the record of appeal at the Supreme Court shall contain,

> " (d) a statement showing the address for service of the Appellant and the address for service furnished by the Respondent and as regards any Respondent who has not furnished an address for service, the address and proof of service on him of the Notice of Appeal".

32. Counsel submitted that the Notice of Appeal is a vital process for the institution of an appeal to this Court, and that its filing and service is integral to the validity of an appeal: in fact the law requires evidence of service. While article 159 of *the Constitution*, requires that Courts administer justice "without undue regard to technicalities of procedure", it was his submission that where a Notice of Appeal has not been dealt with, according to the law, the omission is not an issue of procedural technicality, but is" a matter of procedural substance," and a "procedural substantive requirement". Counsel cited the opinion of Ibrahim SCJ in Jasbir Singh Rai& 3 others v Tarlochan Singh Rai Estate & 4 others [2013] eKLR in support. He reiterated the central role of the Notice of Appeal, and averred that an appeal anchored on a defective Notice of Appeal is fatal and is for striking out.

33. The Applicant, through Counsel Mr Omogeni, denies that such is the case, submitting that the 1st Respondent has suffered no prejudice, urging that this matter gives the opportune moment for the Court to invoke article 159 of *the Constitution*, by focusing on substantive justice rather than mere undue technicalities.

34. Rule 31(1) provides:

> " A person who intends to appeal to the Court shall file a Notice of Appeal within fourteen days from the date of judgment or ruling... (sic) it is desired to appeal from."

Rule 32 provides for service as follows:

> " (1) An appellant shall, within seven days of lodging a notice of appeal, serve copies of the notice of appeal on all persons directly affected by the appeal.
>
> (2) A person upon whom a notice of appeal is served shall- (a) within fourteen days of receiving the notice of appeal file a notice of address for service which

> shall contain that person's contact details including telephone numbers and email address, in the registry and serve the intended appellant with copies of the notice "

An appeal is thus instituted as provided under rule 33(1), by filing a Petition of Appeal; a Record of Appeal; and payment of the prescribed fee. Rule 33(3) deals with the contents of the Record of Appeal in the following terms:

> " The record of Appeal from a court or tribunal exercising original jurisdiction shall contain .
> (e) The address for service furnished by the respondent and as regards any respondent who has not furnished an address or service, the address and proof of service on the respondent of the notice of appeal..."

35. This rule is the basis of the 1st Respondent's objection. He argued that failure to serve the Notice of Appeal is an omission that renders the record of appeal fatally defective. The judgment of the Court of Appeal, the subject of this Appeal, was delivered on 28th March, 2014. A perusal of the record of appeal (at pages 134-135) reveals that the Notice of Appeal was filed at the Court of Appeal on 31st March, 2014. There is no Affidavit of service annexed, nor is there an acknowledgement stamp of the 1st Respondent that shows service was done. The Appeal and Application to this Court were filed on 3rd April, 2014; the Application was heard ex parte and orders made, inter alia, that it is served on all parties by 7th April, 2014 for inter partes hearing on 8th April, 2014. Suffice it to say that the Respondents were subsequently served with the Appeal and this Application, between 4th and 7th April, 2014.

36. The importance of the Notice of Appeal has been stated in Law Society of Kenya v The Centre for Human Rights & Democracy & 12 Others, Petition No 14 of 2013,(Law Society case) in which this Court stated:

> " The Notice as its title indicates is a signification of intent by the potential Appellant, to challenge by way of appeal, the decision of a lower Court. The Petition of Appeal on the other hand is a statement of grievance, an appeal cause against the judgment of a lower Court. The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the Appeal before it"
>
> "If an intending appellant were to present the Court with a Notice and Petition of Appeal, but without the Record of Appeal, and expect the Court to determine "the appeal" on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed this is the gist of rule 33(1) of the Supreme Court Rules".

37. Service of a notice of appeal is crucial. Kiage, JA in Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others [2013] eKLR states:

> " ... I am not in the least persuaded that article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side,

> it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…”

38. We are persuaded by this dictum of the learned judge. The Notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.

39. The judgment of the Court of Appeal in this case was delivered on 28th March, 2014. The Notice of Appeal was filed on 31st March, 2014. This is within the requisite 14 days. Thereafter, the Appellant had 7 days within which to serve, and that would have been until 7th April, 2014. Additionally, the Appellant had 30 days from day of filing the Notice, within which to file the, appeal. Though no party has raised it, it is evident that the law provides that the two activities start running concurrently: the act of serving the Notice of Appeal and the act of filing the intended appeal. Though both have different timelines, they all commence on the same day, namely the day of filing the Notice of Appeal.

40. However, rule 33 (3)(e) requires that the Record of Appeal contain ‘the address of service’ of the Respondent(s). This provision did not envisage that a litigant has the leeway of filing an appeal even on the first day of lodging the Notice of Appeal, while still having 7 days to serve the Respondent with the Notice of Appeal. This is a scenario that the drafters of the law clearly did not envisage. Therefore, should a party be held responsible for such a grey provision of the law” We do not think so.

41. The central question here, however, is whether the 1st Respondent was served. The Notice of appeal was filed within time and the appeal filed on 3rd April 2014, before serving the Respondent. The Applicant has conceded to this, adding nonetheless that there has been no prejudice occasioned to the 1st Respondent. If we understand the Applicant, he seems to be saying that even though he had not served the Notice of Appeal before filing the Appeal, the Notice was finally served when the Record of Appeal was served upon the Respondents. The 1st Respondent dismisses this argument and avers that having not been served with the Notice of Appeal, the Record of Appeal served to him containing the said Notice is defective as it lacked a mandatory document: the Respondent’s address of service.

42. The sanctity of the Record of Appeal has been emphasized above in this ruling. The question then is whether the address of service is such a mandatory provision, that its exclusion falsifies the entire record, or is it an anomaly that can be cured by article 159 of *the Constitution*” In the Law Society case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of article 159 thus:

> “Indeed, this Court has had occasion to remind litigants that article 159(2)(d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that article 159 (2)(d) is applicable on a case- by-case basis Raila Odinga and 5 others v IEBC and 3 others; Petition No 5 of 2013,[2013] e KLR”.

43. Informed by the role that the Notice of Appeal plays, it is our considered opinion that such a document ought to be filed first before the Appeal. However, while the rules require that it be served, to allow the Respondent(s) to file an address of service, and the address of service then to be contained in the Record of Appeal, the lack of that address of service does not warrant striking out of the Appeal. We add that the nature of the instant matter, which is urgent and constitutionally time - bound, is one of those exceptional cases where this Court will apply article 159 of *the Constitution*, in order to render substantive justice. It is also our view that article 163(4) (a) of *the Constitution* gives the Appellant a ‘right’ to come to Court when seeking a constitutional interpretation and/or application. Such a right

should not be abruptly excluded blatantly for noncompliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced.

44. Parties in this case have heavily relied on rule 33(3) of this Court's Rules. This Court notes that, it is not only in this matter but it has occasionally been the practice in other matters, wherein parties have not been keen enough to explore the provisions of rule 33(4) of the Court's Rules.

45. Rule 33(4) provides thus:

> "(a) For the purpose of an appeal from a court or tribunal in its appellate jurisdiction, the record of appeal shall contain documents relating to the proceedings in the Court corresponding as nearly as possible to the requirements under rule (3) and shall further contain the following documents relating to the Appeal in the first appellate court-
>
> (b) the Certificate, if any, certifying that the matter is of general public importance;
>
> (c) the Memorandum of Appeal;
>
> (d) the record of proceedings; and
>
> (e) the certified decree or order."

46. While parties have been coming to this Court from the Court of Appeal, citing rule 33(3), the correct rule should be rule 33(4). Rule 33(3) deals with 'record of appeal from a court or tribunal exercising original jurisdiction'. Although no party has cited rule 33(4), it is the right provision under which parties should move to the Supreme Court when appealing from the Court of Appeal. Consequently, we proceed to consider the present case on the basis of the requisite documents under rule 33(4).

47. Under this rule, the record should contain documents relating to the proceedings in the trial court corresponding as nearly as possible to the requirements under rule 33(3). In our opinion, this must be the Record of Appeal from the High Court filed in the Court of Appeal. In addition thereof, the documents from the first appellate court (read Court of Appeal) emphasized are: the certificate, where it is required; the memorandum of appeal; the record of proceedings; and the certified decree or order.

48. The address of service is not mentioned. Suffice it to say that the matter having come through the High Court then to the Court of Appeal, rule 33(4) contemplates that the address of service of the Respondent is contained in the record of appeal forming the first appeal to the Court of Appeal. We hold that rule 33(3) applies where it is a first appeal direct to the Supreme Court as contemplated under article 163(3)(b)(ii) of *the Constitution*. We find therefore that while the Record of Appeal herein does not contain an address of service of the Respondent, the same is not fatal to the appeal before this Court.

ii. Extraction of Court of Appeal Orders

49. Counsel for the 1st Respondent, also submitted that there was no valid order against which a stay can be sought as the extraction of the Court of Appeal order was not done in accordance with rule 34 (2) of the Court of Appeal Rules. He stated that the order as the formal expression of the Court's decision was not a matter of procedural technicality.

50. On the contrary, Counsel for the Applicant submitted that there was need to differentiate between substantial justice and procedural technicalities arguing that the order in the Record of Appeal sealed by the deputy registrar was not materially different from the one drafted by the 1st Respondent who

was informed of its extraction and had not objected to its content. Further, Counsel contended that there was no prejudice to the 1st Respondent.

51. Rule 34(2) of the Court of Appeal Rules 2010 provide: "Where a decision of the Court was given in a civil application or appeal-

> " a. the party who has substantially been successful shall within 14 days from date of judgement prepare a draft of the order and submit it for approval of the other parties;
>
> b. the parties to whom the draft has been submitted shall approve the same within seven days from the date of delivery;
>
> c. if all parties approve the draft, the order shall, unless the presiding judge otherwise directs, be in accordance with it;
>
> d. if the parties do not agree on the form of the order, or if there is non-compliance with sub-rules 9(a) and (b) the form of the order shall be settled by the presiding judge or by such judge who sat at the hearing as the presiding judge shall direct after giving all the parties an opportunity of being heard;
>
> e. If the parties are unable to agree which party was substantially successful, the registrar on the Application of either party, which application may be made informally and after giving all parties an opportunity of being heard, shall direct by which party the draft is to be prepared and such direction shall be final."

52. It is evident from the Record of Appeal that the order signed and sealed by the deputy registrar was the one drawn up by the Applicant. Indeed, we agree with the 1st Respondent that as per rule 34(2) of the Court of Appeal Rules, a draft order must be prepared by the successful party, in this instance the 1st Respondent, and approved by all parties before it is issued by the registrar.

53. On this issue, Counsel for the Applicant sought refuge under article 159(2)(d) of *the Constitution* and urged the Court to make a distinction between substantial justice and procedural technicalities. Counsel for the 1st Respondent, on his part, contended that an assumption that article 159 allows litigants to do as they wish with the law is substantial injustice, and a violation of section 3 of the *Supreme Court Act*, which requires the Court to assert the supremacy of *the Constitution*.

54. We have discussed the application of article 159 already (See the Law Society case above). In Raila Odinga v IEBC & others (2013) eKLR, this Court observed further:

> " Article 159(2)(d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

55. Be that as it may, the essence of article 159(2)(d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties. In the instant issue, therefore, while we agree again that the rules must be complied with; it is our opinion that the rationale behind the provisions of rule 34(2) is to ensure that an order drawn reflects the terms of the judgment itself. Consequently, the main consideration should not be the approval of the order by the parties but whether the extracted order is consistent with the Court's judgment.

This is because, in a scenario where the draft drawn is approved by both parties but does not reflect the judgment of the Court, the deputy registrar will not be bound to sign and seal it.

56. Further, as to whether any prejudice has been occasioned to the 1st Respondent due to non-adherence to the provisions of rule 34(2), we answer in the negative, as it is worth noting that the order eventually signed and sealed by the deputy registrar is substantially similar to the draft drawn up by the 1st Respondent, and reflects the judgment of the Court of Appeal.

57. We take note that rule 34(2) of the Court of Appeal Rules was enacted a while back, when the Court of Appeal was the final Court. Consequently, it was contemplated that only the successful party, in whose favour the judgment is delivered, will extract the Order. However, as observed by counsel on record, with the establishment of the Supreme Court, it will be necessary that the drafters consider an amendment to this Rule so as to allow any party that desires to appeal to the Supreme Court, to be at liberty to draft the order: a practice akin to the High Court practice under the Civil Procedure Rules.

58. Consequently, as to whether the Record of Appeal is fatally defective, thus warranting the striking out of the Appeal on the basis that the order was not extracted in accordance to the Court of Appeal Rules, this Court holds in the negative. There was no prejudice occasioned to the 1st Respondent in this regard. Hence the jurisdiction-challenge in this matter is hereby dismissed, and the Court holds that the Appeal and the Application thereunder are properly before the Court.

iii. Does this appeal meet the threshold established for grant of stay

59. The principles for grant of stay in an interlocutory application of this nature are well established by this Court in the Munya Case. The Appellant must show that:

> “(i) the appeal or intended appeal is arguable and not frivolous;
>
> (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory; and ..
>
> (iii) it is in the public interest that the order of stay be granted”.

60. The question before us then, is whether the instant matter meets this test. We note that the Appellant seeks to invoke the jurisdiction of this Court under article 163(4) (a) of *the Constitution*. In contesting the findings of the Court of Appeal, the Applicant faults its interpretation of articles 81(e), 86(a), (b) & (c) and 10 of *the Constitution*. Indeed, the main ground for the Appeal rests on whether or not the election in dispute was conducted in line with the constitutional principles envisaged under article 38 of *the Constitution*.

61. Further, the question is raised as to whether, in line with article 88(4) of *the Constitution*, the 2nd and 3rd Respondents in declaring the winner of a gubernatorial election should consider the margin of victory. Another point of law raised is whether indeed, the Court of Appeal failed to make a determination as to the 1st Respondent’s burden of proof to the required standard. These issues, we find, cannot be deemed frivolous.

62. The 2nd and 3rd Respondents who have also supported the Application framed six issues which they consider valid and arguable, and on which they seek this Court’s determination. These include:

    i. Whether the learned judges of the Court of Appeal, in carrying out their judicial function, can derogate from the provision of article 25(c) as read together with article 50(1) of *the Constitution*, respecting the unalienable right to fair hearing; and

ii. Whether the learned judges of the Court of Appeal, in their interpretation and application of *the Constitution*, should ignore the provisions of the *Elections Act* (in particular sections 83 and 85A), a Statute enacted pursuant to the express provisions of *the Constitution*, to wit, articles 38, 81(a)(d) and (e), 86, 87(1), 88(5) and 94(1). We find these issues pertinent, and arguable, and that they are properly before this Court for appraisal and determination.

63. . The matter before us is similar to that in the Munya case, in that the constitutional timelines for a by-election, which is a relatively short period, have already started running. It is apparent, therefore, that this Court runs the risk of an election being held while the appeal is pending, if a stay is not granted. This scenario would present an awkward situation for both the Court and all parties to this Application; a situation best avoided. Therefore it is the opinion of this Court that this appeal would be rendered nugatory, if a stay is not granted.

64. As to whether grant of such stay would be in the public interest, we note that the Applicant cited the dictum in the Munya case in his submission that public funds are at risk of being expended for an election when there is an impending appeal that has a high probability of success. He asked that this Court safeguards this public interest. If this Court had any doubt as to this argument, our anxieties are allayed by the 2nd Respondent's submission. The 2nd Respondent, IEBC, is a constitutional body charged with conducting elections in this Republic. In so doing, it expends public funds. *The Constitution* decrees under article 201(d) ofthe Constitution that public money shall be used in a prudent and responsible manner.

65. The IEBC has cited cases where it had expended public funds to prepare for elections that finally never materialized, because of the outcome of Court decisions. There can be no better reason for grant of stay than in this case where the IEBC itself is calling out loud for grant of stay so as to safeguard public funds.

66. Learned Senior Counsel Ahmednasir urged us to adopt a fourth principle when determining the grant of stay in interlocutory applications: that given its status as the Supreme Court, the Court should have a watchful eye and interpretative vigilance in its patrol of Kenyas constitutional boundaries. While we acknowledge counsel's proposition, which he correctly points out is borrowed from the words of Chief Justice Willy Mutunga in his concurring advisory opinion in the Matter of Speaker of the Senate, we believe that the Court is aware of its objectives as provided in section 3 ofthe *Supreme Court Act*, which accommodates such concerns.

iv. Should a stay be granted where a vacancy has been declared and the Speaker has already assumed office

67. The Application before us seeks orders that the 2nd Respondent be stopped from certifying the gubernatorial seat of the Migori County vacant and from announcing and conducting gubernatorial elections for the County of Migori pending the hearing and determination ofthe Appeal. It also seeks orders, inter alia, that the Speaker of the County Assembly of Migori County be stopped from assuming the office of Governor of Migori County, pending the hearing and determination of the Appeal. An argument, however, has been made by Counsel for the 1st Respondent, Mr Mwenesi, that such stay should not be granted, since the orders of the Court of Appeal have already been executed and the vacancy has been declared, rendering the Applicants' prayers inconsequential.

68. Article 182 (4) & (5) ofthe Constitution states that:

> "(4) If a vacancy occurs in the office of County Governor and that of deputy County Governor, or if the deputy County Governor is unable to act, the Speaker of the County Assembly shall act as County Governor.
>
> (5) If a vacancy occurs in the circumstances contemplated by clause (4), an election to the office of County Governor shall be held within sixty days after the Speaker assumes the office of County Governor."

69. Further, section 86 of the *Elections Act*, 2011 provides that:

1. An election Court shall, at the conclusion of the hearing of an election petition, determine the validity of any question raised in the Petition, and shall certify its determination to the Commission which shall then notify the relevant Speaker.

2. Upon receipt of a certificate under this section, the relevant Speaker shall give the necessary directions for altering or confirming the return, and shall issue any notification which may be necessary.

70. The chronology of events following a declaration that the election of a County Governor is null and void, is as follows:

i. The Election Court issues a certificate to the IEBC informing it of its determination as required under section 86(1) of the *Elections Act*, 2011;

ii. The IEBC then informs the relevant Speaker of the nullification of the election results;

iii. The Speaker of the relevant County Assembly then takes up the position of County Governor in an acting capacity pursuant to article 182(4) of *the Constitution*, and informs the IEBC;

iv. The IEBC is then expected to conduct the by-election within sixty (60) days of the Speaker assuming office of County Governor.

71. The questions therefore that this Court must address itself to are as follows:

> "Can the Supreme Court, upon the delivery of the judgment of the Election Court or the Court of Appeal nullifying the election of a County Governor, issue an order for stay and halt the IEBC from proceeding with the preparations for the by-elections as prescribed by article 182(5) of *the Constitution*;" Can such Order issue after the Speaker assumes office under article 182(4) "What is the legal position where the Speaker has not taken the oath of office, as opposed to where he has already been sworn in as acting County Governor"

72. As regards the latter two questions, we are of the opinion that, the swearing-in of the Speaker as acting Governor will effect the existence of a vacancy in the office of Governor. The Speaker only assumes that office after taking the mandatory oath as provided by law, after which the constitutionally mandated process starts running. Once the Speaker assumes that office, only then will the Governor cease to hold office. In the matter before us the Speaker has not been sworn in, therefore the vacancy of the Governor's office has not yet been effected. However, where the Speaker has already assumed office we would adhere to the provisions of *the Constitution*, pursuant to article 2(1). In addition, article 3(1) of *the Constitution* imposes an obligation on every one, without exception, to respect, uphold and defend *the Constitution*. This obligation is further emphasized with regard to the exercise of judicial authority,

by article 159(2)(e) which requires that in the exercise of judicial authority the Courts must pay heed to the purpose and principles of *the Constitution* being protected and promoted.

73. However, all statutes flow from *the Constitution*, and all acts done have to be anchored in law and be constitutional, lest they be declared unconstitutional, hence null and void. Thus, it cannot be said that this Court cannot stop a constitutionally-guided process. What this Court would not do is to extend time beyond that decreed by *the Constitution*. However, a process provided for by *the Constitution* and regulated by statute can be stayed, as long as it is finally done within the time-frame constitutionally authorized.

74. For that reason, this Court would, by no means be interfering with a constitutionally-mandated process, if the order for stay is granted. This is because an order for stay will be sufficient to bring to a halt the preparation of the by-election by the IEBC as well as stop the swearing in of the Speaker.

75. Further, this Court in determining that it had jurisdiction to hear interlocutory applications and to grant orders for stay, in Board of Governors, Moi High School Kabarak & another v Malcolm Bell, Supreme Court Petition No 6 & 7 of 2013, held that interlocutory relief may be granted or denied if it was in the public interest to do so. It held that [paragraph 25]:

> "The Court has jurisdiction to hear and determine such interlocutory applications with special regard to the circumstances of each case. Where necessary, this Court may also exercise its discretion to decline to grant interlocutory relief, if the same may imperil the ultimate function of the Court - to render justice in accordance with *the Constitution* and the ordinary law." Blacks' Law Dictionary, (2009) Thomas Reuters, 9th edition defines "stay" as: "1. [t]he postponement or halting of a proceeding, judgment, or the like. 2. An order to suspend all or part of a judicial proceeding. - Also termed stay of execution; suspension of judgment."

76. We conclude by stating that this Court shall, in the public interest, grant an order for stay in order to avoid a prospect of wastage of public funds through the commencement of the constitutionally - prescribed process of by-election by the IEBC, a process that may be rendered unnecessary should the appeal succeed.

77. Before giving our Orders, we make reference to the submissions of learned counsel Mr Mwenesi. In urging the Court to consider the unique scenario that plays out once a Governor's election has been annulled, counsel had asked the Court to consider the nature of the conservatory orders that it may issue. He pointed out, correctly, that granting a stay will amount to creating a 'temporary Executive for Migori County'. In view of the vast financial and administrative powers of a Governor's office, he asked that should the Court grant a stay in this matter, then it should be sanctioned with limitations akin to those under article 134 of *the Constitution* for the exercise of Presidential powers during temporary incumbency. While we think this is an important issue, we must point out that there is no lacuna in law for punishing transgressions linked to abuse of office by a public officer. However, we find the concerns of counsel valid, that where a County should have an incumbent Governor, who has been removed from office but is temporarily in office pending determination of a suit in a Court of law; or conversely, a Speaker acting as temporary Governor pending the election of a new Governor, there is need to limit the exercise of such a person's powers, until a substantive holder of office is either affirmed or elected.

78. However, we are of the opinion that such a prescription of limitation does not fall within the jurisdictional mandate of this Court, or the judicial arm of government as a whole. This is a power that falls within the legislative mandate of Parliament. This Court in upholding its objective under section 3 of the *Supreme Court Act*, to protect *the Constitution*, will not act ultra vires *the Constitution*, by

usurping a mandate not bestowed on it. We would therefore recommend that Parliament do consider legislating to limit the exercise of the powers of the office of Governor in temporary situations such as in the instant matter.

F. Order

79. The foregoing analysis of the meritorious representations of counsel leads us to certain Orders set out hereunder:

i. The Applicant's Notice of Motion dated 3rd April, 2014 is allowed.

ii. Execution of the whole judgment and/or orders of the Court of Appeal dated 28th March 2014 is hereby stayed pending the hearing and determination of the Appeal.

iii. A conservatory order shall issue against the Speaker of Migori County Assembly from assuming the office of Governor, pending hearing and determination of the appeal.

iv. A conservatory order shall issue against the 2nd Respondent from certifying the gubernatorial seat of Migori County vacant pending hearing and determination of the appeal.

v. A conservatory order shall issue against the 2nd R espondent announcing and/or conducting gubernatorial elections for Migori County pending hearing and determination of the appeal.

vi. This matter is to be mentioned on 25th April, 2014 before the Deputy Registrar of the Supreme Court, to confirm compliance and to fix hearing dates.

vii. The Costs of this Application shall abide the determination of the main cause on appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2014

..

M.IBRAHIM

JUDGE SUPREME COURT OF KENYA

..

N. S. NDUNGU

JUDGE SUPREME COURT OF KENYA

I certify that this is a true Copy of the original

REGISTRAR

SUPREME COURT OF KENYA