Munya v Kithinji & 2 others (Application 5 of 2014)
[2014] KESC 30 (KLR) (2 April 2014) (Ruling)

Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR

Neutral citation: [2014] KESC 30 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 5 OF 2014

JB OJWANG & SC WANJALA, SCJJ

APRIL 2, 2014

BETWEEN

GATIRAU PETER MUNYA ..... APPLICANT

AND

DICKSON MWENDA KITHINJI ..... 1ST RESPONDENT

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

FREDRICK NJERU KAMUNDI COUNTY RETURNING OFFICER, MERU COUNTY ..... 3RD RESPONDENT

Supreme Court distinguishes between injunctions, orders of stay and conservatory orders.

Reported by Phoebe Ida Ayaya and Maryconcepter Nzakuva

Jurisdiction *- Jurisdiction of the Supreme Court to hear appeals from the Court of Appeal - Appeal involving interpretation or application of the Constitution - Whether the Appeal challenging the decision of the Court of appeal in the election dispute in issue was in compliance with the Supreme Court's jurisdictional mandate - Constitution ofKenya, 2010, article 163(4).*

Civil Practice and Procedure *- Interlocutory Reliefs - Conservatory orders -Application for stay of execution of a judgment arising from the Court of Appeal pending appeal in the Supreme Court - Principles to be considered before granting stay of execution - Whether this was a proper case where the interlocutory reliefs sought by the Applicant could be granted - Whether the Court could grant interlocutory stay orders on the scheduling of fresh gubernatorial elections pending the hearing and determination ofthe Appeal - Whether the Court could order a stay on the process of swearing - in a Speaker of a County Assembly as governor in acting capacity.*

Brief facts

The Applicant brought an application before the Supreme Court seeking for orders to stay the execution of the judgement of the Court of Appeal nullifying his election, an order to stop the Independent Electoral and

Boundaries Commission (IEBC) from declaring the Meru Gubernatorial office vacant, an order to stop the Speaker of the County Assembly of Meru from assuming the office of the governor and an order to stop the IEBC from announcing and/or conducting the gubernatorial elections for Meru County pending the hearing and determination of his appeal.

A Preliminary Objection was raised by the 1st Respondent on ground that the Supreme Court lacked jurisdiction to entertain both the Application and the substantive appeal.

The central issue that revolved around the Petition against the Applicant was whether the election was conducted in accordance with the provisions of articles 81(e) and 86 of the Constitution of Kenya, 2010 and in determining the integrity of the particular election, the Co Appeal applied the provisions of articles 81 and 86 of the constitution general principles for the electoral system and voting.

Issues

i. Whether the appeal challenging the decision of the Court of Appeal in the election dispute in issue was in compliance with the Supreme Court's jurisdictional mandate and merited being admitted to hearing.

ii. Whether the Supreme Court could grant interlocutory stay orders on the scheduling of fresh gubernatorial elections pending the hearing and determination of the appeal.

iii. Whether the Supreme Court could order a stay on the process of swearing-in a Speaker of County Assembly as the Governor in acting capacity.

Held

1. Not every election petition decision was appealable to the Supreme Court under article 163(4)(a) of the Constitution. What the Court had to decide, however, was whether the instant appeal had arisen from a decision of the appellate Court in which issues of the interpretation and application of the Constitution were at play.

2. The Elections Act, 2011 and the regulations thereunder were normative derivatives of the principles embodied in articles 81 and 86 of the Constitution of Kenya, 2010 and in interpreting them, a court of law could not disengage from the Constitution. Thus, the appeal fell within the ambit of articles 163(4)(a) of the Constitution.

3. The case rested on clear issues involving a wide range of constitutional provisions touching simultaneously on individual fundamental rights and upon collective political rights and interests of many, notably those that fell under articles 38, 81 and 182 of the Constitution of Kenya, 2010 on political rights, general principles for electoral system and vacancy in the office of a county governor.

4. Throughout its analysis and assessment of the evidence on record and its determining the integrity of the particular election, the Court of Appeal was applying provisions of articles 81 and 86 of the Constitution of Kenya, 2010 hence indeed the Appeal fell within the jurisdiction of the Supreme Court under article 163(4) of the Constitution of Kenya, 2010 because the case rested on clear issues of constitutional interpretation.

5. By virtue of the fact that the Supreme Court had jurisdiction to hear and determine the Appeal, the Applicant's appeal in and of itself passed the merit test for being heard and determined by the Supreme Court.

6. The domain of interlocutory orders was somewhat ruffled characterized by injunctions, orders of stay, conservatory orders and others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of stay orders is more general, and merely denote that no party or interested individual or entity is to take action until the court has given the green light.

7. Conservatory orders bare a more decided public-law connotation: for they are orders that facilitate orderly functioning within public agencies, as well as uphold the adjudicatory authority of the Court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues like "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay.

8. Conservatory orders ought to be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

9. The principles to be considered before a Court of law can grant orders of stay of execution are, that the Appellant, or intending appellant, has to satisfy the Court that:

i. the Appeal or intended appeal is arguable and not frivolous; and that

ii. unless the order of stay sought is granted, the Appeal or intended appeal, were it eventually to succeed, will have been rendered nugatory.

10. In addition to those conditions of granting an order of stay of execution, the courts ought to consider the condition whether it would be in public interest that the order of stay be granted. This was due to the dictates of the expanded scope of Bill of Rights and the Public spiritedness that ran through the Constitution of Kenya, 2010.

11. Election petitions are both disputes in *personam* and disputes in *rem*. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute hence the public interest.

12. There were two possible scenarios that could emerge if the orders sought by the applicant were not granted;

a. The election machinery would have been set on motion. In that case, the applicant would seek re-election by contesting while at the same time pursuing his appeal before the Supreme Court. If the Appeal succeeded and the applicant was re-elected, then it could be said that the appeal had been rendered nugatory.

b. The applicant could participate in the elections and fail to be re-elected, while the appeal eventually succeeds. Thus the appeal would rendered nugatory. However, the applicant could participate in the election and fail to be re-elected while the appeal also fails, eventually. In this third scenario, it could not be said that the appeal would have been rendered nugatory.

13. The first and second scenarios would have a devastating impact upon other contestants who would have participated in the fresh gubernatorial elections. The contestants would have participated in elections in vain; the electorate likewise would have suffered grave disturbance for having voted in an election that was for all intents and purposes meaningless while the 2nd Respondent (IEBC) would have applied public funds and other resources in organizing and election in vain. Therefore those possibilities were inordinately extravagant and were best avoided.

14. Bearing in mind the nature of the competing claims, against the background of the public cause it was in the public interest and the concept of good grievance that the courts had to have an interest in safeguarding public resources. Thus, those principles stood not in favour of allowing the conduct of fresh elections for Meru gubernatorial office during the pendency of an appeal

Application disallowed.

Orders

i. *1st Respondent's motion of preliminary objection on jurisdictional mandate of the Supreme Court disallowed.*

ii. *Execution of judgment and order of the Court of Appeal stayed pending the hearing and determination of the Appeal .*

iii. *Occupancy of the office of the Governor of Meru County was to be maintained.*

iv. *A conservatory order issued against the IEBC declaring the Meru County Governor's seat vacant pending hearing and determination of the Appeal .*

v. *A conservatory order issued against the Speaker of the County Assembly of Meru assuming the office of the governor pending the hearing and determination of the Appeal .*

vi. *A conservatory order issued against the IEBC setting in motion the process of gubernatorial election for Meru County pending the hearing and determination of the Appeal .*

vii. *Registrar directed to make due arrangements for hearing and disposal of the Appeal on the basis of priority and of greatest frequency.*

viii. *File was to be placed before the Hon. Chief Justice for purposes of constituting a full bench to conduct the proceedings of the Appeal .*

Citations

East Africa

1. *Abdalla, Timamy Issa v Swaleh Salim Swaleh Imu & 3 others* Civil Appeal No 36 of 2013 - (Explained)

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

3. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition No 5 of 2012

4. *Joho, Hassan Ali & another v Suleiman Said Shahbal & 2 others* Petition No 10 of 2013 - (Followed)

5. *Kithinji, Dickson Mwenda v Gatirau Peter Munya & 2 others* Civil Appeal No 38 of 2013 - (Mentioned)

6. *Macharia & another v Kenya Commercial Bank & 2 others*, [2012] 3 KLR 199 - (Followed)

7. *Nduttu, Lawrence & 6000 others v Kenya Breweries Ltd & another* Petition No 3 of 2012 - (Followed)

8. *Ngoge, Peter Oduor v Francis Ole Kaparo & 5 others* Petition No 2 of 2012 - (Explained)

United Kingdom

1. *Winnie Babihuga v Masiko Wimmie Komuhangi & others*, Petition Appeal No 9 of 2002 - (Explained)

USA

2. *Nken v Holder* 556 US 418 (2009) - (Explained)

Statutes

East Africa

3. Constitution of Kenya, 2010 articles 1,1(2); 3; 25; 25(c); 27(1); 38; 50(1); 81(e)(iv)(v); 86; 86(a)(d); 87(1); 88(4)(5); 94(1); 123(4) (a); 159(2)(a); 160(1); 163(4)(a), (b); 163(7); 182(4)(5); 201(d); 249; 252 - (Interpreted)

4. County Governments Act, 2012 (Act No 17 of 2012) - In general - (Interpreted)

5. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rule 5(2)(b) - (Interpreted)

6. Elections (Parliamentary and County Election) Petition Rules, 2013 (Act No 24 of 2011 Sub Leg) rule 33(4) - (Interpreted)

7. Elections Act, 2011 (Act No 24 of 2011) sections 85A, 87,96 - (Interpreted)

8. Supreme Court Act, 2011 (Act No 7 of 2011) sections 21(1)(b) (2) - (Interpreted)

9. Supreme Court Rules, 2012 (Act No 7 of 2011 Sub Leg) rule 23 - (Interpreted)

RULING

A. Introduction

1. This is an application by way of notice of motion under certificate of urgency seeking orders from this court to:

   (a) stay the execution of the judgment and order of the Court of Appeal at Nyeri in Civil Appeal No. 38 of 2013 pending the hearing and determination of an appeal against the said judgment;

   (b) stop the Independent Electoral and Boundaries Commission (IEBC) from declaring the Meru County gubernatorial office vacant pending the hearing and determination of the appeal;

   (c) stop the Speaker of the County Assembly of Meru from assuming the Office of Governor pending the hearing and determination of the appeal; and

(d) stop IEBC from announcing and/or conducting the gubernatorial elections for Meru County pending the 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.38 of 2013 at Nyeri dated 12th March, 2014.

3. On 20th March, 2014 Wanjala SCJ, having heard Senior Counsel, Mr. Omogeni for the applicant, certified the application as urgent. The Hon. Judge directed the applicant to serve all the respondents and ordered the parties to appear before a two-Judge Bench of the Court for an inter partes hearing on 21st of March, 2014. He declined to issue a one-day conservatory order, since the matter had already been certified as urgent.

4. Mr. Omogeni filed written submissions in support of the application on 21st March 2014, while Mr. Muthomi for the 1st respondent filed a preliminary objection to the application and intended appeal, on the same date. The 1st respondent contended that this Court lacked jurisdiction to entertain the application and the intended appeal. The gist of the preliminary objection was that the appeal, not being one concerning the interpretation or application of the Constitution, could not be brought under Article 163 (4) (a) of the Constitution; and neither could the appeal be brought under Article 163 (4) (b) of the Constitution, since the requisite certification had not be sought and obtained by the applicant from the Court of Appeal.

B. Background

5. The applicant was declared the duly elected Governor of Meru County after the Meru gubernatorial elections held on 4th March, 2013. He won the election by 3,436 votes, which translates to a margin of 0.819%. The 1st respondent, a registered voter in North Imenti Constituency in Meru County, filed a petition in the High Court at Meru on 26th March 2013 seeking a nullification of the election results. The petitioner alleged that the election was marred by voter bribery, violence, intimidation, harassment, electoral malpractices, undue influence, discrepancy in the results announced, and contraventions of the regulations governing elections.

6. The petitioner sought, inter alia (i) an immediate scrutiny and recount of the votes cast in Imenti South, Tigania East, Igembe South and Buuri Constituencies; (ii) a declaration that the applicant, Mr. Munya, was not validly elected as Governor of Meru County; and (iii) a declaration that the election for Governor of Meru County was a sham and was, therefore, void.

7. The respondents in that case argued that the elections were free and fair, and that any non-compliance with the law was insignificant, and did not materially affect the outcome of the election. They urged the court to dismiss the petition.

8. The Court identified three issues for determination: (i) whether Mr. Munya (the applicant in this case) committed electoral offences and malpractices; (ii) whether IEBC and the Meru County Returning Officer conducted the elections in contravention of the Constitution and the Electoral Laws; and (iii) if the elections were not conducted in accordance with the principles of the Constitution and written law, whether the said non-compliance materially affected the election results.

9. The Court (Makau J), heard the petitioner's allegations and on 23rd September, 2013 dismissed the petition, and confirmed the applicant as the duly-elected Governor of Meru County. Aggrieved by this decision, the 1st respondent appealed to the Court of Appeal (in Nyeri Civil Appeal No. 38 of 2013).

10. At the Court of Appeal the 1st respondent sought, inter alia, (i) the setting aside of the judgment and orders made by the High Court on 23rd September 2013; and (ii) a declaration that Mr. Munya had not been validly elected as Governor of Meru County.

11. The matter was heard before a three-Judge Bench: Visram, Mohammed and Odek JJA. The Court identified three issues as central to the appeal before it: (i) whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the election; (ii) whether the trial judge was right in ordering a scrutiny and recount of only 7 polling stations; and (iii) whether the trial judge independently evaluated the evidence on record.

12. The Court of Appeal held that the results of the Meru gubernatorial elections were not verifiable by the paper-trail left behind. The Court came to this conclusion after applying the "qualitative and quantitative test," as required by law, and relying on the case of Winnie Babihuga v. Masiko Wimmie Komuhangi & Others, HCT-00-CV-EP-0004-2001, which held that the quantitative test is most relevant where numbers and figures are in question; and the qualitative test is most suitable where the quality of the entire election process is questioned, and the Court has to determine whether or not the election was free and fair.

13. The Court further held that the trial Judge had erred in ordering a scrutiny and recount in only 7 polling stations, as opposed to the four constituencies cited by the petitioner. The Court also held that the trial Judge did not independently evaluate the evidence on record, and appeared to rely on the submissions of the respondent to the extent of including errors found in the respondent's written submissions.

14. The Court of Appeal held that: the declared results of the Meru gubernatorial elections were not accurate, verifiable and accountable; the tallying process was not efficient and accurate; the trial judge erred and misdirected himself in finding that a margin of 0.819% could be described as wide; quantitatively, the errors and irregularities disclosed materially affected the results of the elections, given the margin between the winner and the runner-up; the trial judge erred in denying the appellant the right to cross-examine one of the defence witnesses.

15. The Court of Appeal set aside the High Court's judgment, and declared that the Meru gubernatorial election did not meet the threshold of Article 81(e)(iv) and (v) and Article 86 of the Constitution. The appeal was allowed, and the election of Mr. Munya as Governor of Meru County declared null and void.

16. Aggrieved by the said judgment, the appellant, on 20th March, 2014, filed a Notice of Motion under certificate of urgency at the Supreme Court – hence these proceedings. After hearing the submissions by the applicant and respondents, on all interlocutory matters including the preliminary objection by the 1st respondent, Ojwang and Wanjala SCJJ set the Ruling for today, 2nd March, 2014. The Hon. Judges ordered the status quo to be maintained, and the swearing in of the Speaker of the County Assembly as acting Governor, to remain in abeyance until the Ruling.

C. The Parties' Respective Cases

(i) The Applicant

17. Senior Counsel, Prof. Tom Ojienda, for the applicant, commenced his submissions by laying the basis for the application for stay dated 20th March, 2014. Counsel submitted that the application was anchored upon Section 21 (1) (b) and (2) of the Supreme Court Act, 2011 (the Supreme Court Act) as read together with Rule 23 of the Supreme Court Rules, 2012 (the Supreme Court Rules) which

allow the Supreme Court to hear interlocutory applications. The application sought: an Order of stay against execution of the Orders of the Court of Appeal in Dickson Mwenda Kithinji v. Gatirau Peter Munya & 2 Others, Nyeri Civil Appeal No. 38 of 2013 issued on 12th March 2014; an Order stopping the IEBC from certifying the gubernatorial seat of Meru County vacant; an Order stopping the Speaker of the Meru County Assembly from assuming office as the Governor of Meru County; and an Order stopping the IEBC from announcing or conducting gubernatorial elections for Meru County.

18. Counsel submitted that the Court had the competence and jurisdiction to entertain the application for stay, provided it was properly demonstrated that: the appeal raised triable issues with a high chance of success; the balance of convenience tilted in favour of granting the orders sought; there was a possibility of the appeal being rendered nugatory if the Court failed to grant the Orders sought; and finally, a demonstration that there was need for the Court to carefully balance the interests of the parties at play.

19. Counsel urged the Court to apply the guiding principle regarding the grant of interlocutory orders which had been laid down in the case of Board of Governors, Moi High School Kabarak & Another v. Malcolm Bell, SC Petition No 6 & 7 of 2013 [2013] eKLR, as the guiding precedent on this limb. He urged that, for the Court to grant a stay, it would exercise the same power as that exercised by the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules. However, counsel submitted, the proper forum to lodge such an application would be the Supreme Court and not the Court of Appeal, where an appeal lies at the Supreme Court. In particular, he referred to the Court's holding that:

> "where the Supreme Court has appellate jurisdiction derived from the Constitution and the law, it is equally empowered not only to exercise its inherent jurisdiction, but also to make any essential or ancillary orders such as will enable it to sustain its constitutional mandate as the ultimate judicial forum. A typical instance of such exercise of ancillary power is that of safeguarding the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues."

20. To buttress his argument, Prof. Ojienda also cited as persuasive authority, the American case of Nken v. Holder 556 U.S. 418 (2009); before granting a stay, a Court had to consider: whether the stay-applicant has made a strong case showing that he is likely to succeed on the merits; whether the applicant will be irreparably injured, absent a stay; whether the issuance of a stay order will substantially injure the other parties interested in the proceedings; and where the public interest lies. Counsel sought to extrapolate these principles to the application by referring to the provisions of Article 182 of the Constitution and in particular, Article 182(4). He submitted that the swearing in of the Speaker of Meru County as Governor was set to take place on 24th March, 2014. Thereafter, the mechanics of time requiring IEBC to conduct elections within 60 days would begin. Therefore, it was urged, a grant of stay was critical, to shield the applicant from suffering "irreparable injury".

20A. Specifically, counsel made reference to Article 182 of the Constitution, which provide as follows:

> "....
>
> (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.

(6) A person who assumes the office of county governor under this Article shall, unless otherwise removed from office under this Constitution, hold office until the newly elected county governor assumes office following the next election held under Article 180 (1)".

21. In addition, counsel submitted that another apparent effect if stay is not granted, under the provisions of the County Governments Act, 2012 (Act No. 17 of 2012) (the County Governments Act), would be that the Governor of Meru County, the Executive Committee and all members of staff serving under the said officer would be out of office and, therefore, all transactions within the County would stall in substance until a Governor was elected.

22. Counsel also submitted that the Court of Appeal had considered issues of fact, as opposed to law, contrary to the provisions of Section 85A of the Elections Act, (Act No. 24 of 2011) (the Elections Act), during the hearing and determination of the appeal.

22A. The said Section (85A) provides as follows:

> "An appeal from the High Court in an election petition concerning membership of the National Assembly, Senate or the office of county governor shall lie to the Court of Appeal on matters of law only and shall be —
>
> (a) filed within thirty days of the decision of the High Court; and
>
> (b) heard and determined within six months of the filing of the appeal" [Emphasis supplied].

23. In this regard, counsel submitted that the Court of Appeal in reopening the evidence, had disregarded its own decision in the case of Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 Others Civil Appeal No. 36 of 2013; [2014] eKLR, where, in urging caution as to how the Court should approach issues law and fact, it stated as follows:

> "This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because the jurisdiction of this Court to draw its own conclusions can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts, and only interfere if two conditions are met. Firstly, that the conclusions are conclusions of law, and that secondly, the conclusions of law arrived at cannot reasonably be drawn from findings of the lower Court on the facts."

24. He further submitted that the Court of Appeal in its judgment had shifted the burden of proof by holding that the respondent (the applicant herein) had the onus of proving the allegations mounted by a petitioner (the 1st respondent herein). In the circumstances, counsel urged that the appeal before the Court raises substantive issues of non-compliance with the terms of the Constitution.

25. In his response to the issues raised in the preliminary objection, regarding the jurisdiction of the Court, counsel cited the case of Hassan Ali Joho & Another v. Suleiman Said Shahbal & 2 Others, Petition No. 10 of 2013, urging that the Supreme Court had jurisdiction to entertain the appeal before it. He argued that the Court in the Joho case had embraced a purposive interpretation of the Constitution, and held that where there were issues of law before the appellate Court, a direct appeal lay to the Supreme Court. He cited Article 163(4)(a) of the Constitution, arguing that so long as the Constitution had been applied or interpreted by the High Court or Court of Appeal, then an appeal lay directly to the Supreme Court. In this regard, counsel submitted that the Court of Appeal had interpreted Articles 81(e) and 86 of the Constitution.

25A. Article 163(4) of the Constitution thus provides:

> "Appeals shall lie from the Court of Appeal to the Supreme Court—
>
> (a) as of right in any case involving the interpretation or application of this Constitution; and
>
> (b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."

26. Counsel submitted that the Court of Appeal had also interpreted Section 85A of the Elections Act, and fell into error by purporting to legislate, giving Rule 33 (4) of the Elections (Parliamentary and County Election) Petition Rules, 2013 a new meaning, by substituting "polling stations" with "constituency"; and such action, it was urged, violated the provisions of Articles 94(1), 1(2), 3(a) and 87(1) of the Constitution. In this regard, counsel urged, the Court contravened the provisions of Article 87(1) of the Constitution and Section 96 of the Elections Act, which provisions formed a substantial part of the Court's judgement. Counsel submitted that, in the circumstances, the Court of Appeal had been engaged, on a substantial scale, in the interpretation of the Constitution.

27. In addition, counsel submitted that the Court of Appeal had disregarded the provisions of Articles 50(1) and 25 of the Constitution, by making a fact-related finding, that certain bits of evidence had been struck out of the record – while such was not the case. According to counsel, this had compromised the applicant's right to fair trial, and was compounded by the fact that the notion of exclusion of evidence influenced the decision of the Court of Appeal. As a result, counsel submitted, there was a prima facie case, and that the balance of convenience tilted in favour of granting stay orders.

28. Learned Senior Counsel, Mr. Omogeni appearing with learned Senior Counsel, Prof. Ojienda, questioned the findings by the Court of Appeal regarding the evidence of DW10. He submitted that DW10, contrary to the findings by the Court, had been cross-examined at length on the contents of his affidavit. He referred to page 173 of Volume 1 of the record to support his contention. He submitted that DW10 and not DW8 was the witness who had annexed to the depositions Forms 35 and 36 which were used in the trial Court. Counsel submitted that the finding by the Court of Appeal that DW10 was never cross-examined on the contents of Form 35 was a misinterpretation of the trial record. Further, counsel urged, the fact that the Court of Appeal held the alleged omission to be a critical aspect of the appeal, prejudiced the applicant and compromised his right to fair trial. Counsel referred to Volume 4 of the record (page 510) to show the Court that the affidavit of DW8 did not contain an annexation of Forms 35 and 36, and urged that the Court of Appeal, in the circumstances, misdirected itself by finding that this witness ought to have been cross-examined.

29. Counsel also submitted that the Court of Appeal at page 111 of its judgement, had misdirected itself by finding that the appellant's (the 1st respondent herein) annexures, DMK2, DMK3 and DMK4 had been expunged from the record at the High Court, whereas this was not the case.

29A. The impugned part of the judgement of the Court of Appeal (para.159) thus reads:

> ".....The trial Judge could not properly make a determination on the weight to be given to exhibits DMK2, DMK3 and DMK4 in relation to the alleged irregularities and malpractices after striking these exhibits from the record and denying himself the opportunity to test in judicial proceedings the veracity of the allegations made....."

30. As a consequence of the said misdirection by the Court, counsel submitted that the applicant had a sufficient basis for the contention that his right to fair trial had been violated, and that he was deprived of his seat as Governor of Meru County.

31. In arguing that the balance of convenience was in favour of granting the application, counsel referred to the public nature of the office in question. He submitted that the balance of convenience would tilt in favour of preserving the status quo, to avoid unnecessary expenditure of public funds, when the petition of appeal could be heard and determined expeditiously. He submitted that the respondent stood to suffer no prejudice if orders of stay were granted, pending the hearing of an appeal which raised serious and substantial issues of law; and that it was relevant, in this regard, that the respondent had not been a contestant in the last general elections.

32. Mr. Omogeni addressed the Court on the issue of violations of the Constitution, and the integral role of such violations in placing this matter within the scope of Article 163(4)(a). In this regard, counsel referred to the petition that had been instituted in the High Court. He referred to paragraph 5b of the Petition appearing at pages 13 and 14 of Volume 4. This paragraph challenged the conduct of the gubernatorial elections by the 2nd and 3rd respondents, as being inconsistent with the Constitution. Counsel further referred to paragraph 5c, and submitted that the petitioner's case before the High Court had been that the 2nd and 3rd respondents did not conduct the elections in accordance with Articles 1, 3, 38 and 81 of the Constitution. He referred to paragraph 220 of the finding of the Court of Appeal at page 160 of the Judgement, to argue that the sole basis for the nullification of the election by the Court of Appeal, was a finding on constitutionality.

The Court of Appeal thus held (para. 220):

> "Based on the findings and reasoning stated above, we hereby set aside the judgment of the High Court dated 23rd September 2013 and set aside all consequential orders and decree made pursuant thereto. We declare that the Meru gubernatorial elections conducted on 4th March, 2013 did not meet the Constitutional threshold in Article 81 (e) (iv) & (v) and Article 86 of the Constitution by not being administered in an efficient, accurate and accountable manner..."

33. Finally, counsel revisited the concept of public interest. He referred to the public profile of the Constitution of Kenya, and submitted that public funds ought to be saved, by halting any action occasioning substantial expense, pending final determination by the Court. He invoked Article 201(d) of the Constitution, to persuade the Court to halt any further activities occasioning the use of public money, pending the outcome of the substantive appeal.

(ii) The 1st Respondent

34. Counsel for the 1st respondent, Mr. Muthomi submitted that the central issue in the 1st respondent's preliminary objection was the jurisdiction of the Court to hear both the application and the substantive appeal. He submitted that not every Court of Appeal decision is amenable to challenge before the Supreme Court. Counsel submitted that the test for jurisdiction is not dependent on "how wrong or bungled the Court of Appeal decision is," or "how aggrieved the petitioner is by the Court of Appeal's decision"; rather, the true test is derived from the plain reading of Article 163(4)(a) and (b) of the Constitution, and the satisfaction of the two ingredients therein. Counsel urged that in this instance, only Article 163(4)(a) was applicable. He contended that the law-maker's policy was that the Supreme Court was not meant to hear just any appeal.

35. Counsel submitted that the Supreme Court had provided a guiding principle with regard to its appellate jurisdiction in the case of Peter Oduor Ngoge v. The Hon Francis Ole Kaparo & 5 Others, Petition No. 2 of 2012 where the Court held as follows:

> "In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs to resolve all matters turning on the technical complexity of the law, and only cardinal issues of law or of jurisprudential moment will deserve the further input of the Supreme Court" (Emphasis supplied).

36. Counsel urged that "matters deserving further input from the Supreme Court" are only cardinal issues of law, or of jurisprudential moment, and not just ordinary issues of law. Counsel argued that in this instance, the Supreme Court was being asked to accept each and every matter of a political nature, yet such cases are not instances of cardinal jurisprudential moment. Counsel urged that if the Court allowed the appeal, then it would run the risk of opening a floodgate of appeals divorced from cardinal issues of law. Counsel submitted that all statutes are made pursuant to the Constitution, and that there is no general right of recourse to the Supreme Court. Counsel cited the case of Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board SC Petition No. 5 of 2012; [2012] eKLR, where the Supreme Court also considered the relevant issues of jurisdiction.

37. Counsel submitted that given the broad outlook of the Constitution, the question posed was whether this appeal falls within the terms of Article 163(4)(a) of the Constitution. Counsel submitted that first, from the foregoing provision, it is anticipated that any grievance coming up before the Supreme Court is in the form of an appeal. Second, he urged, those constitutional provisions of relevance must have been canvassed and argued at the Court of Appeal; the lower Courts must have had the opportunity to pronounce themselves upon such constitutional issues.

38. Counsel submitted that the applicant's object in invoking the Supreme Court's jurisdiction is that, the following provisions of the Constitution were allegedly breached: Articles 25(c), 50(1), 87(1), 94(1), 123(4)(a), 159(2)(a), 27(1), 86(d), 88(5), 163(4) and 163(7). However, counsel contended, the dispute was not about the interpretation or application of the Constitution, because the applicant "did not complain, invoke, protest or otherwise raise any issue before the Court of Appeal", as to the several Articles now being relied upon. He submitted that the essence of the dispute at the High Court and the Court of Appeal was whether the election was fair or not.

39. Counsel respectfully disagreed with the appellant's allegation that the Court of Appeal had overlooked the precedents of the Supreme Court. Counsel directed the Court's attention to the Court of Appeal decision in Dickson Mwenda Kithinji v. Gatirau Peter Munya and 2 Others Civil Appeal No. 38 of 2013, which indicates that the Court cited and relied on decisions of the Supreme Court, especially as shown at paragraphs 6, 47, 95, 99,100,138, 208 and 214 of the decision.

40. Counsel took up the appellant's reference to Section 85A of the Elections Act, urging that the concern here was the interpretation of an ordinary statute, and did not qualify as an interpretation or application of the Constitution, so as to bring the appeal within the terms of Article 163 (4) (a). Mr. Muthomi urged that, by the same token, due to the limitations under Article 163 of the Constitution, the Supreme Court has no jurisdiction (except upon the grant of leave and certificate) to entertain an appeal arising from the interpretation of Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013.

41. Mr. Muthomi submitted that the constitutional provisions cited in the appeal, other than Articles 81 and 86, had not been canvassed before the Court of Appeal, and that this undermined the integrity of the appeal brought before the Supreme Court.

42. Regarding the appellant's application for stay of execution of the whole judgement or Orders of the Court of Appeal, counsel submitted that there are two main issues to be dealt with: first, whether there is an arguable appeal; and second, whether the appeal will be rendered nugatory. Counsel contended that the purpose of filing the application was to allow an elected person whose election had been declared null and void, to continue being a Governor while the appeal is pending. It was counsel's submission that even if a stay was granted as prayed, the Order would not in itself vacate the judgement.

43. Counsel contended that the grounds contained in the petition of appeal did not give rise to an arguable appeal. In his view, most of the grounds in the petition of appeal had little to do with the interpretation or application of the Constitution. At best, counsel submitted, the applicant had alleged violations of his rights to a fair trial, when "he did not protest the alleged violation during the proceedings at the Court of Appeal". Regarding allegations of violations of Articles 81(e), 86, 87 and 88 of the Constitution, Mr. Muthomi submitted that only Articles 81(e) and 86(a) deal with the requirement that elections need to be conducted in a free and fair manner.

44. Counsel supported the Court of Appeal's finding that DW8 was not cross-examined after the trial Judge disallowed the petitioner's (respondent herein) application to cross-examine him. He also maintained that, indeed, annexures "DMK2", "DMK3" and "DMK4" had been expunged from the pleadings by the trial Judge.

45. Counsel dispelled the applicant's claim that County operations would stall if a fresh election were to be immediately conducted. He submitted that there were constitutional provisions already in place dealing with County processes, and this would seal any probable lacunae. Mr. Muthomi contended that public policy would suffer if the Supreme Court were to expand its jurisdiction beyond the contemplation of the Constitution.

46. Counsel submitted that the dispute at hand was not a private matter, but a public law issue in rem. He cited the Hassan Ali Joho case, where the Supreme Court held that electoral disputes were disputes in rem. This meant, counsel argued, that the applicant's office was an elective office, and thus, a public-interest issue where the office remained, regardless of the different individuals who would occupy it. It was counsel's contention that the main issue in this case was whether the election was "free and fair". Counsel urged the Court to strike out both the application and intended appeal, on the basis that the Court lacked jurisdiction to entertain the same, and that, in any case, the petition had not disclosed an arguable appeal.

(iii) The 2nd and 3rd Respondents

47. Learned counsel for the 2nd and 3rd respondents, Mr. Martin Munyu, submitted that the election had been nullified by the Court of Appeal on grounds that it did not meet the threshold under Article 81 of the Constitution. Counsel drew the attention of the Court to the replying affidavit sworn by Ms. Ruth Mutuku, a legal officer with the 2nd respondent, which specified the several constitutional issues which arose before the Court of Appeal, and which were now before the Supreme Court for determination on appeal. The issues were:

    (a) whether the declaration of the election of the applicant as the duly- elected Governor of Meru County was in contravention of Article 81 of the Constitution, 2010;

(b) whether the declaration of the election of the applicant as the duly-elected Governor of Meru County was in contravention of Article 38 of the Constitution, 2010;

(c) whether the Court of Appeal upheld the provisions of Article 50 of the Constitution of Kenya; and whether the 2nd respondent discharged its constitutional obligations as set out in Articles 81, 86, 88 (4), 249 and 252 of the Constitution;

(d) whether Section 83 of the Elections Act, 2011 is in contravention of Articles 81 and 86 of the Constitution of Kenya; and

(e) whether the Court of Appeal contravened the provisions of Article 164(1)(b) of the Constitution by disregarding the provisions of Section 85A of the Elections Act.

48. Mr. Munyu submitted that the issues for determination concerned the interpretation and application of the Constitution, and therefore, this Court was seized of jurisdiction to entertain the appeal.

49. On the application for stay, learned counsel argued that there was a need to stay the swearing-in of the Speaker of the County Assembly as Governor, pending a determination of the appeal before the Supreme Court. The Order for stay would prevent, and for good cause, the setting in motion of the election machinery under Article 182(4) and (5) of the Constitution.

50. Counsel also contended that interim stay would not prejudice the parties if they were to wait for the ruling of the Court, and it would save public resources, in the event that the appeal succeeded. He submitted that the balance of convenience, therefore, was on the side of issuing an interim order stopping the election of a new Governor. Mr. Munyu disagreed with the 1st respondent's argument that allowing the appeal would open "floodgates for other election petitions" coming to the Supreme Court's docket. He submitted that, not every election petition would come up before the Supreme Court on appeal. Counsel contended that under Article 163 (7) of the Constitution, the Supreme Court would have the opportunity to guide other Courts on the interpretation of the principles under Articles 81 and 86 of the Constitution, and the Elections Act, Rules and Regulations.

(iv) The Applicant, again

51. Senior Counsel, Prof. Ojienda in response to the submissions by the 1st respondent, asserted that the Petition of Appeal had set out in concise format the various Articles of the Constitution considered at the High Court and the Court of Appeal. He argued that the right to hold office under Article 38(3)(c) of the Constitution was a constitutional right and, where an individual had been denied this right, he is entitled to lodge an appeal at this Court, for appropriate orders.

52. Counsel urged that this Court ought to deal with the interpretation of the Constitution and the statutes which the Court of Appeal considered, in arriving at its decision. He submitted that any decision rendered by the Supreme Court held a special constitutional status, in the terms of Article 163(7) which stipulates:

> "All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court."

53. Arguing that counsel for the respondent had misunderstood the import of the principle of stare decisis, Prof. Ojienda urged that the application before the Court was challenging the lowering of the threshold of the burden of proof, that had previously been set by this Court, and which the Court of Appeal had not accommodated while interpreting Article 81(e) of the Constitution.

54. Prof. Ojienda distinguished the cases of Peter Oduor Ngoge v. The Hon Francis Ole Kaparo & 5 Others, SC Petition No. 2 of 2012 and Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board, SC Petition No. 5 of 2012, from the matter before the Court. He submitted that there had been no substantial issue touching on the application or interpretation of the Constitution before the Court in the Peter Oduor Ngoge case, and therefore the Court was right to hold that it had no jurisdiction to entertain the same under the provisions of Article 163(4)(a) of the Constitution.

55. On the other hand, in Erad Suppliers & General Contractors Limited v. National Cereals & Produce Board, SC Petition No. 5 of 2012, counsel submitted that the only matter before the Court and which arose as a matter of inference, was the interpretation of Article 160 (1) of the Constitution, and not the direct interpretation of Articles of the Constitution, in the manner applicable to the petition herein.

56. Counsel submitted that if the Court were to decline jurisdiction, it would leave the law unsettled and uncertain. Counsel urged that contrary to the submissions of counsel for the 1st respondent, the risk of opening floodgates of electoral matters coming up before the Court subsequently, was negligible.

57. Learned Senior Counsel, Mr. Omogeni revisited the issue of annexures DMK 2, DMK3 and DMK4. He drew the Court's attention to page 763 of volume 5 of the Petition bundles, to illustrate that the application seeking to strike out these annexures had in fact, been denied by the High Court. The judges of the Court of Appeal were, therefore, not properly guided in reaching a different finding. It was submitted that this oversight curtailed the right of the applicant to fair trial.

58. Regarding the question as to whether constitutional issues were canvassed at the Court of Appeal, thereby entitling the appellant to file an appeal pursuant to Article 163 (4) (a) of the Constitution, counsel referred to pages W1247, W1251 of Volume 3 of the record, to demonstrate that the issue canvassed at the Court of Appeal revolved around the interpretation and application of Articles 81 and 86 of the Constitution. Counsel submitted that the Court of Appeal's misdirection as far as the said Articles were concerned, gave a basis for an appeal before this Court. Therefore, one of the issues before this Court revolved around the exercise of jurisdiction by the Court of Appeal, pursuant to Article 164 (3) (b) of the Constitution; and thus, if that Court did not exercise this jurisdiction as directed by the Constitution, or an Act of Parliament, it became a question of violation of Article 164, and hence, a constitutional issue.

59. In response to Mr. Muthomi's assertion that no issue touching upon the violation of the rights of the applicant had been canvassed at the Court of Appeal, counsel submitted that he could not have anticipated that the Judgment of the Court of Appeal would violate the applicant's rights to the extent detailed in the submissions, and on principle, issues of violation of the Constitution needed not be argued before they became issues meriting protection by the machinery of the Supreme Court.

D. Issues for Determination

60. The square issues for resolution at this interlocutory stage in relation to the appeal, are plainly stated, namely:

    (i) whether the appeal lodged is in compliance with the Supreme Court's jurisdictional mandate;

    (ii) whether, if (i) above is fulfilled, this particular appeal merits being admitted to hearing;

    (iii) whether, in the event both (i) and (ii) above are fulfilled, this Court should grant interlocutory stay orders on the scheduling of fresh gubernatorial elections, pending the hearing and determination of the appeal;

(iv) whether, in the event both (i) and (ii) above are fulfilled, this Court should order a stay on the process of swearing-in the Speaker of Meru County Assembly as Governor, in an acting capacity.

E. Analysis

(i) Jurisdiction of the Court

61. Counsel have correctly perceived the extent of the Supreme Court's appellate jurisdiction as prescribed in Article 163(4) of the Constitution: such appeal may lie –

a) as of right in any case involving the interpretation or application of this Constitution; and

b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to sub-Article 5.

Such is the framework of constitutional principle that guides us in this Court, in determining the interlocutory matter herein.

62. It is Mr. Muthomi's submission that this Court lacks jurisdiction to entertain the appeal under Article 163 (4) (a), since the appeal does not involve the interpretation or application of the Constitution; and the appeal does not, therefore, lie before this Court as of right. In other words, there is no automatic right of appeal available to the applicant. Counsel's submissions to this effect have been elaborately set out in the foregoing paragraphs of this Ruling.

63. If the appeal does not lie from the Court of Appeal to this Court as of right, then it follows that it could be brought under the second limb of Article 163 (4) of the Constitution. But even this window, according to Mr. Muthomi, is not open to the applicant since he did not seek and obtain certification from either the Court of Appeal or this Court, before filing the appeal.

64. Learned Senior Counsel, Messrs Ojienda and Omogeni, on the other hand, submit that, indeed, this appeal falls squarely within the ambit of Article 163 (4) (a) of the Constitution. Their submissions to this effect are set out in detail elsewhere in this Ruling.

65. This Court has, since the commencement of its operations, pronounced itself on the various dimensions of its jurisdiction as decreed by the Constitution. Towards this end, there is now a steady stream of decisions by the Court in which it has clarified, and delimited the nature and scope of its jurisdiction. When can a case be said to involve the interpretation or application of the Constitution, so as to bring it within the ambit of Article 163(4) (a) of the Constitution? This question fell for consideration before a two-Judge Bench of this Court in the case of Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another (Tunoi and Wanjala SCJJ) SC Petition No. 3 of 2012; (2012) eKLR. At paragraph 27, the Court was categorical that:

> "Article 163 (4) (a) must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court.....Towards this end, it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application."

66. The Court expounded upon this principle at paragraph 28 where it thus pronounced itself:

> "the appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant

must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a)" [emphasis supplied].

67. This principle was affirmed by the Court in Samuel K. Macharia and Another v. Kenya Commercial Bank and Others, Supreme Court Application No. 2 of 2011.

68. In the case of Peter Oduor Ngoge v. Hon. Ole Kaparo & Others, S.C. Petition No. 2 of 2012, while declining to admit the Petitioner's case under Article 163 (4) (a), the Court stated as follows:

> "In the Petitioner's whole argument, we think he has not rationalized the transmutation of the issue from an ordinary subject of leave-to appeal, to a meritorious theme involving the interpretation or application of the Constitution such that it becomes, as of right, a matter falling within the appeallate jurisdiction of the Supreme Court."

69. The import of the Court's statement in the Ngoge case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

70. These two cases, in our view, adequately clarify the frontiers of the appellate regime of the Supreme Court embodied in Article 163 (4) (a) of the Constitution. They provide a basis upon which the jurisdictional question before us may be decided.

71. Turning to the matter herein, therefore, we must advert to the nature of the issues from which this appeal has arisen. The Record of Appeal reveals that in the course of the proceedings at the High Court, the trial Judge identified inter alia, the following issues:

    (i) whether the Independent Electoral and Boundaries Commission and the Meru County Returning Officer conducted the elections in contravention of the Constitution and Electoral Laws; and

    (ii) If the elections were not conducted in accordance with the principles of the Constitution and written law, whether the said non-compliance with the principles of the Constitution and written law, materially affected the outcome of the election.

72. The record also shows that on appeal, the appellate Court identified three issues as being central in the appeal:

    (i) whether the errors and irregularities disclosed by the evidence on record materially affected the quantitative margin and the qualitative aspects of the election;

    (ii) whether the trial judge was correct in ordering the scrutiny and recount of only 7 polling stations; and

    (iii) whether the trial Judge independently evaluated the evidence on record.

73. While the High Court found that the respondent (applicant herein) had been duly elected, and dismissed the petition, the Court of Appeal found to the contrary, and allowed the appeal. In setting aside the judgment of the High Court, the appellate Court stated (at paragraph 220) as follows:

> "We declare that the Meru gubernatorial elections conducted on 4th March 2013 did not meet the Constitutional threshold in Article 81 (e) (iv) & (v) and Article 86 of the Constitution by not being administered in an efficient, accurate and accountable manner."

74. Counsel for the 1st respondent urged the Court to strike out the appeal on grounds that none of them raised issues of constitutional application; and that, other than Articles 81 and 86 of the Constitution, there were "no constitutional issues that were canvassed at the Court of Appeal." We agree with Mr. Muthomi that not every election petition decision is appealable to the Supreme Court under Article 163 (4) (a) of the Constitution. What we must decide, however, is whether this appeal has arisen from a decision of the appellate Court in which issues of the interpretation and application of the Constitution were at play. Is the applicant faulting the interpretation or application of the Constitution by the Court of Appeal in reaching the decision to set aside the judgment of the High Court, that had declared him to be validly elected?

75. Mr. Muthomi contends that the applicant is, basically, impugning the Court's interpretation of Section 87 of the Elections Act. This, he argues, has nothing to do with the interpretation or application of the Constitution, it being an ordinary statute. It is the same shortfall, urges counsel, as regards the Court's contested interpretation of Rule 33 (4) of the Elections (Parliamentary and County Election) Petition Rules 2013. Both Prof. Ojienda and Mr. Omogeni, however, submit that the Court of Appeal must be taken to have interpreted among others, the provisions of Articles 81 and 86 of the Constitution. Mr Munyu, representing the 2nd and 3rd respondents, was even more specific as to the constitutional nature of the controversy.

76. We note that, right from the High Court, the central issue revolving around the petition against the applicant's election was: whether this election was conducted in accordance with the principles of the Constitution. The operative principles in question, in our view, were the provisions of Articles 81 (e) and 86 of the Constitution. Although the issues, as later formulated by the Court of Appeal, narrowed down to the specifics of irregularity, scrutiny and recount of the vote, the central theme of the application of Articles 81 and 86 to the dispute, was never lost. Throughout its analysis and assessment of the evidence on record, in determining the integrity of this particular election, the Court of Appeal was applying the provisions of Articles 81 and 86 of the Constitution. This is illustrated by the Court's own conclusion at paragraph 220 (quoted above) of its judgment.

77. While we agree with Mr. Muthomi, regarding his contention that Section 87 of the Elections Act cannot be equated to a constitutional provision, we must hasten to add that the Elections Act, and the Regulations thereunder, are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution, and that in interpreting them, a Court of law cannot disengage from the Constitution.

78. Applying these principles to the matter at hand, we hold that this appeal, indeed, falls within the ambit of Article 163(4) (a) of the Constitution.

79. Although learned counsel for the 1st respondent has urged that the applicant can only move this Court on the basis that his case entails a matter of general public importance, we are more in agreement with counsel for the applicant, that the case rests on clear issues of constitutional interpretation – and that, therefore, the matter properly falls to the jurisdiction of this Court, even without any certification emanating from the Court of Appeal. The reasoning in this regard is well articulated in

the submissions by counsel for the applicant, and for the second respondent. The Court of Appeal's decision and the appeal therefrom, have raised issues of first impression as to the interplays in a wide range of constitutional provisions, touching simultaneously on individual fundamental rights, and upon collective political rights and interests of many, notably those falling under Articles 38, 81 and 182 of the Constitution. This Court, by the terms of the Constitution, and specifically under the Supreme Court Act, 2011 (Act No. 7 of 2011) which reposes the mandate to "assert the supremacy of the Constitution" [Section 3(a)] and to "provide authoritative and impartial interpretation of the Constitution" [Section 3(b)], has the responsibility to hear the parties and to interpret the Constitution as appropriate.

80. It follows that we disallow the preliminary objection, insofar as it contests this Court's jurisdiction to entertain the applicant's appeal.

81. It also follows that, apart from our holding on the question of jurisdiction, we rule that the applicant's appeal, in and of itself, passes the merit test for being heard and determined.

82. We are fortified by the decision of this Court in Hassan Ali Joho and Another v. Suleiman Said Shahbal and 2 Others, Petition No. 10 of 2013; wherein the Court observed thus:

> "Applying a principled reading of the Constitution, this Court responds to the demands of justice by adjudicating upon issues that tend to bring the interpretation or application of the Constitution into question. However, it is to be affirmed that any appeal admissible within the terms of Article 163 (4) (a) is one founded upon cogent issues of constitutional controversy. The determination that a particular matter bears an issue or issues of constitutional controversy properly falls to the discretion of this Court...."

(ii) Should Orders of Stay of Execution be granted?

83. The question as to whether this Court has jurisdiction to grant inter-locutory orders in the nature of a stay of execution was long settled in Board of Governors, Moi High School, Kabarak & Another v. Malcolm Bell, SC Applications Nos. 12 and 13 of 2012, wherein the Court stated as follows (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."

84. That leaves pending the main interlocutory matters: whether we should stay the hand of the Independent Electoral and Boundaries Commission, and the Speaker of Meru County Assembly, so they do not move to alter the state of affairs at the Meru County gubernatorial office, pending the hearing and determination of the applicant's appeal.

85. These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of "stay orders" is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.

86. "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

87. The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

    (i) the appeal or intended appeal is arguable and not frivolous; and that

    (ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

88. These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:

(iii) that it is in the public interest that the order of stay be granted.

89. This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through the Constitution. This Court has already ruled that election petitions are both disputes in personam and disputes in rem. While an election petition manifestly involves the contestants at the poll, the voters always have a stake in the ultimate determination of the dispute, hence the public interest.

(iii) Is there an arguable appeal?

90. After perusing the grounds in support of the application, and hearing the submissions of counsel, it is clear that the applicant is impugning the judgment of the Court of Appeal on several grounds, the primary ones being:

    (i) that the Court arrived at conclusions based on misinterpretations of the content of the findings of the trial judge;

    (ii) that the Court exceeded its jurisdiction, by delving into issues of fact as opposed to issues of law contrary to the provisions of Section 85A of the Elections Act, and in departure from its own earlier decisions;

    (iii) that the Court disregarded the doctrine of stare decisis; and

    (iv) that the Court applied the wrong principle regarding burden of proof.

91. In sum, the gist of the appeal is that, had the appellate Court not committed the alleged breaches, it would not have declared the election of the applicant as not having met the threshold in Articles 81 and 86 of the Constitution. In view of these allegations, we do not think that this appeal can be anything but arguable. Nor can it be characterized as frivolous.

(iv) Would the Appeal be rendered nugatory if the orders of stay are not granted?

92. There are two possible scenarios that could emerge, if the orders sought by the applicant are not granted. The first is that the election machinery will be set in motion. The applicant will seek re-election by contesting, while at the same time pursuing his appeal before this Court. If, for purposes of argument, the appeal succeeds and the applicant is re-elected, then it could be said that the appeal would have been rendered nugatory. The main objective of the applicant is to forestall a situation where he is forced to go through the rigours of an election, when there is a possibility that his earlier election could be upheld by this Court.

93. Secondly, the applicant could participate in the elections and fail to be re-elected, while the appeal eventually succeeds. The effect would be the same from the applicant's point of view. Thirdly, the applicant could participate in the election and fail to be re-elected while the appeal also fails, eventually. In this third scenario, it cannot be said that the appeal would have been rendered nugatory.

(v) Is it in the Public Interest that the Orders of Stay should be granted?

94. The first and second scenarios would have a devastating impact upon the other contestants who would have participated in the fresh gubernatorial elections. Not only would they have participated in the elections in vain, they would also have expended considerable amounts of money in the campaigns. The electorate, likewise, would suffer grave disturbance, for having voted in an election that, for all intents and purposes, was meaningless. The 2nd respondent would have applied public funds and other resources in organizing an election in vain. In our view, these possibilities are inordinately extravagant, and are best avoided.

95. The applicant's prayer in this case is, in its essence, a conservatory order: to the effect that during the pendency of the appeal, the current occupancy of the Governor's office be maintained; and the motion towards new elections be held in abeyance.

96. Although learned counsel have urged their case partly on the basis that the applicant, by virtue of Article 38 of the Constitution, has the "right to hold office", we do not perceive this case as a "private-interest matter"; for the public interest in fairly-conducted elections, and in legitimate office-holding, looms larger still.

97. Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources.

98. These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that.

F. Orders

99. Upon considering the application and the preliminary objection, and after hearing the meritorious representations of counsel, we have come to conclusions now crystallized in specific Orders as follows:

    (i) The applicant's Notice of Motion of 20th March, 2014 is allowed.

(ii) The first respondent's Notice of Preliminary Objection of 21st March, 2014 is disallowed.

(iii) Execution of the Judgment and Order of the Court of Appeal of 12th March, 2014 shall rest in abeyance pending the hearing and determination of the appeal.

(iv) A conservatory order shall issue forth against the Independent Electoral and Boundaries Commission declaring the Meru County Governor's seat vacant, pending the hearing and determination of the applicant's appeal.

(v) A conservatory order shall issue forth against the Speaker of the Meru County Assembly assuming the office of Governor, pending the hearing and determination of the applicant's appeal.

(vi) A conservatory order shall issue forth against the Independent Electoral and Boundaries Commission setting in motion the process of gubernatorial election for Meru County, pending the hearing and determination of the applicant's appeal.

(vii) The costs of this application shall abide the Court's decision in the appeal.

(viii) The Registrar shall make due arrangements for the hearing and disposal of the appeal, on the basis of priority and of the greatest frequency.

(ix) The file on this matter shall be forthwith placed before the Hon. The Chief Justice and President of the Court, to the intent that a full Bench be empanelled to conduct the proceedings of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF APRIL, 2014.

.....

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA